

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

KATE MARIE BARTENWERFER,)
)
 Petitioner,)
)
 v.) No. 21-908
)
 KIERAN BUCKLEY,)
)
 Respondent.)

Pages: 1 through 83
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Date: December 6, 2022

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4 Petitioner,)

5 v.) No. 21-908

6 KIERAN BUCKLEY,)

7 Respondent.)

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9 Washington, D.C.

10 Tuesday, December 6, 2022

11

12 The above-entitled matter came on for
13 oral argument before the Supreme Court of the
14 United States at 11:26 a.m.

15

16 APPEARANCES:

17

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19 of the Petitioner.

20 ZACHARY D. TRIPP, ESQUIRE, Washington, D.C.; on behalf
21 of the Respondent.

22 ERICA L. ROSS, Assistant to the Solicitor General,
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24 United States, as amicus curiae, supporting the
25 Respondent.

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P R O C E E D I N G S

(11:26 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 21-908, Bartenwerfer versus Buckley.

Ms. Harris.

ORAL ARGUMENT OF SARAH M. HARRIS

ON BEHALF OF THE PETITIONER

MS. HARRIS: Mr. Chief Justice, and may it please the Court:

Bankruptcy law gives honest but unfortunate debtors a fresh start by extinguishing all their debts. Exceptions are narrow, must be clearly expressed, and reflect debtors' intentional wrongs, not someone else's. 523(a)(2)(A) thus bars dishonest debtors from discharging liabilities incurred on account of their fraud. The code does not bar unwitting debtors like Petitioner from discharging debts for others' fraud.

That conclusion follows from the text. Section 523 specifies when the individual debtor, as distinct from others, cannot discharge debts. (a)(2)(A)'s reference to actual fraud targets the debtor's misconduct by

1 requiring fraudulent intent, just as other
2 tort-based exceptions target the debtor's fault.

3 Since Neal versus Clark, even debtors
4 who themselves commit constructive fraud can
5 discharge those debts because they lack
6 fraudulent intent. Congress did not
7 irrationally bar debtors who committed no fraud
8 themselves from discharging debts for others'
9 fraud.

10 Respondent and the government argue
11 that anyone's fraud counts so long as the debtor
12 winds up with a fraud-related debt. But
13 (a)(2)(A)'s use of the passive voice does not
14 reflect indifference to who committed fraud with
15 culpable intent. Nor does Strang, which arose
16 under the repealed 1867 act, control today's
17 code.

18 And while state laws impose vicarious
19 liability for partners' acts, bankruptcy
20 discharge applies different federal law rules to
21 individual debtors because the point of
22 bankruptcy is to eliminate liability.
23 Bankruptcy is the last place to read in
24 vicarious liability. Yet, Respondent's sweeping
25 theory could apply throughout the code to deny

1 discharge based on others' wrongdoing.

2 That financial death sentence would
3 fall mostly on unsophisticated spouses who do
4 not realize routine transactions in marriage,
5 like selling homes, create business partnerships
6 in the eyes of the law.

7 Dishonest debtors cannot escape their
8 creditors, but the Court does not consign
9 unwitting debtors to the same fate.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Ms. Harris, the
12 523(a)(2)(A) does not focus on the debtor at
13 least textually. It focus -- focuses on the
14 debt. And it is in the passive voice, but it's
15 talking about money or debt that's obtained by
16 fraud. How do you convert that into a statute
17 that is focusing on the debtor?

18 MS. HARRIS: A few textual
19 indications. First of all, the "individual
20 debtor" runs throughout 523. It is the only
21 identified actor who is the subject of the whole
22 series of exceptions. And the individual debtor
23 is the relevant actor, only relevant actor, in a
24 lot of the other provisions.

25 And, second, we know that fraud, the

1 term "actual fraud," it's not just Congress
2 using the passive voice. Congress is requiring
3 fraudulent intent. And this Court has
4 recognized in cases like Dean and Wilson, when
5 Congress is using the passive voice without
6 intent requirements, that's when you're more
7 likely to think Congress is indifferent to who's
8 doing something.

9 But, when Congress requires
10 culpability, that is very good evidence that
11 Congress actually cares quite a bit about who is
12 performing the misconduct. And Bullock confirms
13 that because, in that case, the Court was
14 confronting whether defalcation requires intent,
15 and the Court said that the (a)(4) exception for
16 defalcation, along with the (a)(2)(A) exception
17 for fraud, the (a)(6) exception for willful and
18 malicious injury to property, I could go on,
19 there's a couple of other tort-related things --

20 JUSTICE THOMAS: But doesn't -- I
21 understand that, but doesn't it work against you
22 that some of these provisions that you're
23 referring to actually speak in terms of the
24 debtor and refer specifically to the debtor?
25 And if it does refer to the debtor in those

1 provisions, doesn't that argue against including
2 -- or treating this provision the exact same way
3 that does not refer to the debtor?

4 MS. HARRIS: Not given the nature of
5 the Bankruptcy Code. And if you look at the way
6 that Congress is using the word "the debtor" or
7 not using "the debtor," it's very similar to
8 what happened in Hartford Underwriters with
9 respect to using the word "trustee," "only
10 trustee," or "not trustee" at all.

11 The individual debtor is the star
12 throughout. And just to give a couple of
13 examples of exactly how arbitrary Congress was
14 in using "the debtor" or not "the debtor," take
15 the contrast between 507(a)(10) and 523(a)(9).
16 Those are two provisions that deal with the
17 exact same type of debt. The debt is for
18 someone who's engaged in drunk driving, kills
19 someone; the debtor is operating the motor
20 vehicle. The first one does not mention the
21 debtor. The second one mentions the debtor.
22 And too the idea that Congress attached
23 talismanic significance to mention the debtor
24 just doesn't seem to withstand scrutiny.

25 Now another example is just the

1 history of how the Bankruptcy Code has been
2 amended. So, if you look at (a)(4), for 70
3 years, it referred to "his" defalcation, meaning
4 unambiguously the debtor's. But then, in 1978,
5 "his" disappeared. So, if you think that there
6 is a huge significance for whether the debtor is
7 referred to or not, that would have been a sea
8 change, but no one noticed it.

9 Or, if you take (a)(6), converse
10 problem, you have a provision that did not
11 mention "the debtor" until 1978, added the words
12 "the debtor," and, again, no one seemed to
13 notice that there was apparently a massive
14 change in meaning. And that underscores --

15 JUSTICE KAGAN: Well, you seem to be
16 saying, Ms. Harris, that Congress is just
17 careless when it writes this statute. And that
18 may be true. There are some statutes where
19 Congress is careless. But here we are. We have
20 a text. The text, it seems to me, cuts against
21 you in terms of, you know, the -- it's the
22 individual debtor that has the debt, but, after
23 that, it's for money obtained by false pretenses
24 and fraud, anyone's false pretenses and fraud.

25 You know, unless you have something

1 very significant that goes against that
2 language, that says, look, realize that Congress
3 was careless in the language that it chose, put
4 the -- so put that -- that -- that -- that text
5 aside because I have something big that suggests
6 what Congress's real choice was, like, what is
7 that big thing that you have?

8 MS. HARRIS: So I think two big
9 things, one of which is the requirement of
10 culpability makes it significantly less likely
11 that Congress is just going to yoke in anyone's
12 debt, especially in a statute that is about
13 discharging liabilities.

14 And second of all is that Congress,
15 when it was indifferent to how the debtor was
16 haled -- was saddled with a particular debt and
17 wanted to say we're just going to have the
18 bankruptcy court defer to a state or federal
19 judgment for a particular type of thing,
20 Congress did so in other provisions by using the
21 word "judgment," which does have significance.
22 It says, I don't care, you know, whether you
23 committed misconduct. The bankruptcy court
24 doesn't have to get into whether you possessed
25 fraudulent intent. We are instead going to look

1 in provisions like (a)(13) for restitution.
2 Just do you have an order of restitution and a
3 debt arising from that?

4 CHIEF JUSTICE ROBERTS: It's --

5 JUSTICE JACKSON: So, Ms. Harris, even
6 assuming that we agree about your reading that
7 it has to be the debtor's fraud, I -- I don't
8 understand how you get away from principles of
9 vicarious liability. And I'm not just relying
10 on Strang. I'm relying on Field versus Mans,
11 which suggested and, in fact, I think held that
12 fraud in the Bankruptcy Code is defined by
13 common law principles. And we do have in the
14 common law this notion that people are held
15 responsible for the fraud of agents.

16 So are -- are you saying that
17 principle doesn't apply here or that your
18 client's husband was not an agent, or how -- how
19 do we get out of vicarious liability?

20 MS. HARRIS: Well, a few responses,
21 and the first of which is, if you look at Meyer
22 versus Holley, which is the main case that
23 Respondent is relying on, the notion that you
24 port in vicarious liability as a matter of
25 common law is not a rule that applies

1 willy-nilly to every federal statute. It is
2 confined to when Congress is creating torts.
3 And it's honestly honored more in the breach
4 sometimes if you look at cases like Gebser --

5 JUSTICE JACKSON: But Field versus
6 Mans was a bankruptcy case, and we said look at
7 fraud based on common law principles.

8 MS. HARRIS: Correct, and what Field
9 versus Mans said was for the substantive
10 elements of what is in the statutory text, the
11 word "fraud," that the substantive elements are
12 defined with respect to the common law.

13 If it were the case that whenever you
14 mention the word "fraud" you would have
15 vicarious liability in any statute, Gebser or
16 other cases mentioning common law torts would
17 have come out the other way.

18 The reason why Congress is not saying
19 that every single statute always that mentions
20 sort of a common law term torts in vicarious
21 liability, especially in bankruptcy, is
22 bankruptcy is the last place you'd expect to
23 have that. You are extinguishing liabilities.
24 You're not reading new ones in.

25 JUSTICE JACKSON: So you're saying --

1 CHIEF JUSTICE ROBERTS: Well --

2 JUSTICE JACKSON: -- the whole
3 principle of Strang is gone, the idea that
4 vicarious liability does apply per the common
5 law in this -- this situation?

6 MS. HARRIS: In this situation, yes,
7 but I -- I would say that Strang in the first
8 instance is much more limited to the 18 -- the
9 context of the 1867 act, which I think even the
10 government is acknowledging.

11 So Strang is a case that arose under
12 the 1867 act. The best-case scenario is that it
13 has to do with the text, "fraud [...] of the
14 bankrupt," which Congress repealed, got rid of,
15 didn't mention the word "fraud" again until
16 1978, did not use the terms "of the bankrupt."

17 Instead, in the 1978 code, starts
18 talking about the individual debtor as someone
19 distinct from partners, and there's also a sea
20 change in the background principles of
21 bankruptcy by that point, which is going from
22 the 1867 act, a world where you have to
23 discharge 50 percent of your debts at all to get
24 to discharge, to the 1978 code, where Congress
25 has constantly been enacting the code and other

1 bankruptcy acts against the backdrop principle
2 that exceptions to discharge are narrowly --
3 narrowly confined to what is very clearly
4 expressed.

5 CHIEF JUSTICE ROBERTS: Your --

6 MS. HARRIS: And so this Court --

7 CHIEF JUSTICE ROBERTS: -- under your
8 theory, a partner or -- or an individual debtor
9 whose partner is guilty of fraud, the debtor may
10 even -- the individual debtor may well benefit
11 from it since it's the -- the money may well go
12 to something, assets for the partnership.

13 She knew about the fraud, didn't do
14 anything about it, and yet you would say
15 she's -- her debt can be discharged. She isn't
16 liable at all for the results of the fraud.

17 MS. HARRIS: I would say it depends on
18 the circumstances of whether there is a
19 sufficient level of knowledge and --

20 CHIEF JUSTICE ROBERTS: Well, she --

21 MS. HARRIS: -- acquiescence to --

22 CHIEF JUSTICE ROBERTS: -- knew about
23 it. She knew about it.

24 MS. HARRIS: Right, but the question
25 -- would be the circumstances of, in addition to

1 knowledge, was there some sort of acquiescence,
2 was there a duty of disclosing --

3 CHIEF JUSTICE ROBERTS: She knew --
4 knew about it and didn't do anything.

5 MS. HARRIS: Right. And so I think
6 that still begs factual questions with respect
7 to whether there is a duty of that person to
8 disclose some representations to the person who
9 is defrauded or whether there is a reckless
10 indifference in ability to control the fraud,
11 all of which would come under direct liability.

12 And so the case is not -- it's not the
13 case that you can just sort of sit idly by and
14 say, I know about the fraud. You know, I have
15 the ability to control the fraudulent --

16 CHIEF JUSTICE ROBERTS: It's -- it's
17 not the case what? It's not the case that?

18 MS. HARRIS: It's not the case that
19 person would get off the hook because that is
20 direct liability. The thing that you don't get
21 is vicarious liability. So, in the case, it is
22 not sufficient just to have knowledge, but if
23 there is --

24 CHIEF JUSTICE ROBERTS: It's, I'm
25 sorry, direct liability what? Under applicable

1 state law?

2 MS. HARRIS: No, the direct liability
3 would be the line I think the Court drew in
4 Gebser and is the traditional -- I think the
5 traditional concept in the Restatement, Second,
6 of Torts, which is, when you say the debtor or
7 another actor in a statute, who do you mean for
8 purposes of direct liability if the statute does
9 not include vicarious liability?

10 And Gebser is probably the -- the best
11 case answering that question by saying the
12 minimum for direct liability there for a school
13 district is that the school direct needs to be
14 on notice of potential harassment, needs to be,
15 you know, willfully blind even to that and have
16 the ability to control that from happening.

17 And so that I think is the probably
18 minimal level for what you would have for direct
19 liability for a fraud. So it is just not the
20 case that people are getting off scot-free
21 for essentially acquiescing or encouraging
22 fraud.

23 And just to take a step back for a
24 second, in terms of how this rule also cashes
25 out, most people who are sophisticated enough to

1 know that they are actually forming a
2 partnership also know that they should form an
3 LLC in order to avoid liability.

4 So the people on whom this rule
5 actually falls today are people who don't know
6 they're forming partnerships under a state law
7 where the bar is pretty low.

8 JUSTICE KAVANAUGH: Is -- isn't that a
9 good argument, though, for then state law to
10 change -- you're not disputing, I think, that
11 your client was liable under state law -- or for
12 the Bankruptcy Code to change to create an
13 exception for a situation like this?

14 MS. HARRIS: I don't think that's
15 particularly helpful because we're not asking
16 for state law liability rules to change. It is
17 a fair rule to say that people are liable, just
18 as in a normal imputation sense. The problem is
19 bankruptcy is a different set of federal rules.
20 So, when you have --

21 JUSTICE KAVANAUGH: But the code --
22 sorry to interrupt. The code bar -- I mean
23 leaves in place I guess would be a better word
24 for the state law fraudulent determination in --
25 in this situation, doesn't displace it at least.

1 MS. HARRIS: No, I respectfully
2 disagree with that. So bankruptcy law is quite
3 clear. State law defines the debt because state
4 law defines property interests. But, under
5 cases like Brown versus Felsen, state law does
6 not define the scope of the federal discharge
7 exceptions.

8 And that's evident from cases like
9 Bullock, where defalcation had a very different
10 meaning under state law, it had no intent
11 requirement, and the Court said, no, bankruptcy
12 discharge is a federal law. The exceptions are
13 construed pursuant to federal law. Field versus
14 Mans also stands for that proposition. You're
15 asking, what are the elements of the federal
16 discharge exception?

17 And, here, the question is, can you
18 read in vicarious liability? You certainly
19 can't read it in from state law. There's not
20 even a state court judgment here that reflects
21 vicarious liability --

22 JUSTICE GORSUCH: Ms. -- Ms. Harris,
23 I'm sorry to interrupt you, but -- but I just
24 want to follow up on Justice Kavanaugh's
25 question and take us back just a -- us back just

1 a minute. I -- I think what my colleague was
2 getting at and -- and where I guess I'm at, so
3 tip my hand here, is we do take debts as given
4 under state law, right? That part of it is --
5 is -- we -- we take from state law.

6 MS. HARRIS: Yes.

7 JUSTICE GORSUCH: Okay. And there's
8 no question here that your client had a debt
9 under state law for money.

10 MS. HARRIS: Correct, there's a debt
11 for money.

12 JUSTICE GORSUCH: Okay. And then the
13 question is, obtained by fraud is the -- that's
14 the -- that's -- the first half of the statute
15 we're all in agreement on. It's the back half
16 of the statute that we disagree about, right?

17 MS. HARRIS: Yes. And to --

18 JUSTICE GORSUCH: And the question
19 there is "obtained by fraud," does that
20 necessarily mean her fraud, or can it mean
21 another's fraud? And -- and that's a question
22 of federal law.

23 MS. HARRIS: Well, I would just take a
24 step back, because the state court judgment that
25 we have here was also not for fraud, and that's

1 why there is a mini-trial in the bankruptcy
2 court for whether --

3 JUSTICE GORSUCH: I -- I understand
4 that, but that's -- that -- that goes to the
5 back half of the -- the statute --

6 MS. HARRIS: Yes.

7 JUSTICE GORSUCH: -- not the front
8 half of the statute --

9 MS. HARRIS: Correct.

10 JUSTICE GORSUCH: -- and it goes to
11 the federal law question of what's fraud.

12 MS. HARRIS: Yes, the federal law
13 question of is the money obtained by fraud.

14 JUSTICE GORSUCH: By fraud, yeah.

15 MS. HARRIS: By fraudulent means.

16 JUSTICE GORSUCH: That second half.

17 MS. HARRIS: Yes.

18 JUSTICE GORSUCH: Okay. All right.

19 Thanks for clarifying that for me.

20 MS. HARRIS: Yes. And that's the
21 clarification --

22 JUSTICE SOTOMAYOR: So, under common
23 law, aren't you liable for the fraud of an agent
24 or partner?

25 MS. HARRIS: Yes, that is absolutely

1 the liability rule, but it is not the rule that
2 necessarily gets ported into federal statutes
3 all the time.

4 Vicarious liability is not a universal
5 principle that just because you see a common law
6 term or just because even Congress creates a
7 tort, which again it's not doing here, you don't
8 just read in vicarious liability across the
9 code.

10 JUSTICE SOTOMAYOR: All right. So
11 let's look at our decision in Husky. The
12 debtor -- you're saying it has to be the
13 debtor's fraud that counts only. But, in Husky,
14 that case involved fraud by a third party, a
15 shareholder, who fraudulently conveyed assets of
16 the debtor company.

17 We held that the debt was not
18 dischargeable even though the debtor made no
19 misrepresentations to the creditor. The company
20 didn't. The shareholder, an individual, did.
21 But we viewed the company as bound by its
22 agents.

23 So isn't that a federal rule that we
24 announced there on dischargeability --

25 MS. HARRIS: No. And I think --

1 JUSTICE SOTOMAYOR: -- and what fraud
2 means?

3 MS. HARRIS: I -- Husky announced what
4 fraud meant as a matter of common law and said
5 fraudulent conveyance is a form of fraud. Husky
6 did not say just because you have a corporation
7 and an agent and the agent's actions --

8 JUSTICE SOTOMAYOR: Well, it did,
9 because it made that debt not dischargeable.
10 And the debtor wasn't the one who did the fraud,
11 it was a shareholder.

12 MS. HARRIS: Right. But, for
13 corporations, I don't think just because a
14 corporation can only act through their agents,
15 it means that you read vicarious --

16 JUSTICE SOTOMAYOR: Well, usually a
17 shareholder is not considered an agent of the
18 corporation. Its officers and employees are.
19 So we -- we took that principle even a step
20 further then.

21 MS. HARRIS: Respectfully, Husky does
22 not expressly say anything with respect to
23 imputation. And the things that it does say
24 with respect to contrasting (a)(2)(A) and other
25 provisions of the code make it very curious that

1 there was -- if there was an imputation holding,
2 it was not discussed.

3 For instance, when the Court is
4 discussing the relative breadth or narrowness of
5 (a)(2)(A) for fraud, (a)(4) for defalcation,
6 (a)(6) for willful and malicious injury --
7 injury to property, there's -- and the 727 total
8 bars to discharge, it wouldn't --

9 JUSTICE SOTOMAYOR: All right. May I
10 just finish a thought that -- in answering
11 questions earlier. Have you abandoned the
12 argument that a debtor is responsible for fraud
13 he or she knew or should have known?

14 MS. HARRIS: That is part of the
15 argument, but it's -- it's necessary but not
16 sufficient to our argument. So we are saying
17 the debtor must actually have committed the
18 fraud him or herself. That is consistent with
19 the question --

20 JUSTICE SOTOMAYOR: But how about if
21 the debtor -- if she knew that her husband was
22 lying?

23 MS. HARRIS: Yes. And if you knew --
24 sorry, if you knew that the husband was
25 committing fraud?

1 JUSTICE SOTOMAYOR: Yes, if she knew
2 that the husband was lying.

3 MS. HARRIS: Yes, and that just gets
4 back to the colloquy with respect to do you have
5 other indications that would suffice to be
6 direct liability. So --

7 JUSTICE SOTOMAYOR: Why do you need
8 more? Meaning --

9 MS. HARRIS: What more --

10 JUSTICE SOTOMAYOR: -- if -- if they
11 were partners and the form she signed said, I
12 didn't commit any fraud, she -- she signed a
13 statement to the bank that said, I'm making all
14 true statements, not saying my husband is, but
15 I'm making all true statements, she is not
16 liable then?

17 MS. HARRIS: No, in that situation,
18 you would have given me a situation where, if
19 she is -- she knows that they're not true, she's
20 making affirmative acts, that's clearly direct
21 fraud. She is directly liable.

22 JUSTICE SOTOMAYOR: All right.

23 MS. HARRIS: And, in addition to that,
24 under principles of direct liability, the debtor
25 would also be liable for encouraging fraud, for

1 inducing fraud. If you have fraudulent intent,
2 the next question is, what is the minimum amount
3 of direct involvement to complete the elements
4 of fraud? And, again --

5 JUSTICE SOTOMAYOR: Okay. Thank you,
6 counsel.

7 JUSTICE KAGAN: I -- I guess going
8 back to the conversation we were having before,
9 when I said, well, why is it that we should
10 essentially insert the words "the debtor's own
11 fraud," as opposed to obtained by fraud that was
12 committed by anyone at all, and you said to me
13 the bankruptcy law would have a higher
14 culpability standard, and I guess I just don't
15 understand why that's necessarily so.

16 You have, as some of these questions
17 have made clear, a limiting principle with, you
18 know, the limit that you -- you -- the state has
19 imposed liability. You have enough involvement
20 for the state to impose liability because you
21 have been a member of a partnership and the
22 other -- one of the other partners has committed
23 fraud, and you've gotten the benefits of that,
24 and you need to be stuck with the burdens as
25 well.

1 And why are you so sure that
2 bankruptcy has a higher standard? And, you
3 know -- you know, I -- I do think that this
4 would be reading into the text, so we need a
5 justification for that.

6 MS. HARRIS: So I think the -- the
7 justification why we're not reading something
8 into the text is, under that line of logic, this
9 Court's decision in Bullock probably should have
10 come out the other way, because you start from
11 the premise in bankruptcy, of course, there's a
12 state law liability. That's the whole point.
13 You're there because you have debts. State law,
14 for whatever reasons, has chosen to put you on
15 the hook.

16 And in Bullock, you know, there was a
17 defalcation judgment. The -- the person had not
18 commit -- had not done it with any sort of
19 culpable intent but was still liable for a state
20 law debt for defalcation. And this Court said,
21 for purposes of the federal bankruptcy
22 exception, a different rule governs.

23 And it's not reading something into
24 the statute to say culpability is required.
25 You're just interpreting the substance of the

1 elements. And the Court said defalcation,
2 really similar to fraud under (a)(2)(A), and the
3 thread running underneath the code is that
4 culpability is what justifies the exception from
5 the rule that discharge exceptions -- normally,
6 you get discharge. Normally, you always get
7 discharge. And for Congress to depart from that
8 principle, you need a pretty good justification.
9 And the Court said fault is that justification
10 for these exceptions.

11 So it would be extremely curious for
12 the Court to say doesn't matter -- you know, if
13 you committed constructive fraud, don't have
14 fraudulent intent yourself, you're fine, you get
15 discharge, but someone who has no fraudulent
16 intent whatsoever is still on the hook based on
17 thinking that you're reading in vicarious
18 liability or other principles into the statute.

19 And that is what I think is contrary
20 to the tenor of Bankruptcy Code and the
21 reasoning in cases like Bullock, and there's
22 also no stopping point, apparently, to that
23 position, because it's not --

24 JUSTICE JACKSON: But it's not -- it's
25 not contrary to what we actually said in Field,

1 and so I'm still really confused about the
2 suggestion that common law principles apply or
3 that we've said common law principles apply but
4 only when we're talking about the substantive
5 elements. I mean, if you read Field, it's very
6 clear -- it's a Justice Souter opinion from
7 1995 -- that we -- we're saying that there was
8 no reason to doubt Congress's intent to adopt a
9 common law understanding of the terms that it
10 used in this very statute.

11 MS. HARRIS: Yes, that is correct, and
12 we're looking at the terms in the statute. The
13 terms in the statute are the word "fraud." And
14 so the Court says the substantive elements are
15 fraud.

16 Maybe another way of showing this is
17 by talking about Grogan versus Garner, which is
18 a case where the -- the Court is not dealing
19 with the elements of fraud but what is the
20 standard of proof for fraud. That's not covered
21 in the text of 523(a)(2)(A). And the consensus
22 of the states was you need, you know, a clear
23 and convincing evidence standard to show fraud.
24 And the Court said, no, we're not going to go
25 with that. We're not going to just port in the

1 state law standard. We're going to ask, what is
2 the federal standard that should govern that
3 exception?

4 And the way the Court got to the
5 conclusion that the preponderance standard was
6 the right one was by looking at other parts of
7 523(a) and trying to read them as a harmonious
8 whole.

9 JUSTICE JACKSON: So is your point
10 that -- that it's not construing the terms of
11 the statute to determine to whom it applies,
12 that when it says "obtained by fraud," to the
13 extent that the Court is trying to assess
14 whether it's an -- the individual debtor or, you
15 know, their agent or anyone in the world, the
16 Court is not construing the terms of the
17 statute? Because we -- we say in Field that
18 when we are construing the terms of the statute,
19 we look to the common law in this context.

20 MS. HARRIS: Right. So the position
21 on vicarious liability, at -- at least as I
22 understand it to be by the other side, is it
23 wouldn't matter if you said the debtor or not.
24 So the question in the first instance of who's
25 obtaining the fraud is passive voice.

1 The question is, does it mean the
2 debtor, does it mean anyone, does it mean
3 someone else? And you look at the context of
4 the code and the other actors to figure it out.

5 With respect to whether there is
6 vicarious liability, again, I take it, even if
7 you mention the debtor, their -- the
8 argument that's being made --

9 JUSTICE JACKSON: The statute mentions
10 the debtor, as you say. The statute says
11 "individual debtor," right, at the beginning of
12 it? And so, when we're trying to figure out --
13 it says it -- it does not discharge an
14 individual debtor from any debt for money, et
15 cetera, obtained by fraud.

16 So, when I'm trying to determine what
17 "individual debtor" means, why can't I look at
18 Field and say, okay, does "individual debtor"
19 mean only that person, or does it mean that
20 person and their agents, as Field seems to
21 suggest that I'm supposed to do?

22 MS. HARRIS: Well, I think Field would
23 be contrary to the definitions and the usage
24 throughout the Bankruptcy Code had it actually
25 held that because the individual debtor is

1 defined as distinct from and juxtaposed against
2 partners, spouses, dependents, et cetera,
3 throughout the code in at least 21 places.

4 And so it is in direct contrast to
5 statutes like Title VII, where the Court said,
6 hey, there's a definition of "employer" that
7 includes agents. That's actually when the Court
8 would think that a tort-creating statute would
9 create vicarious liability. So --

10 JUSTICE ALITO: May I take you back to
11 -- did you finish that --

12 MS. HARRIS: Yes.

13 JUSTICE ALITO: -- answering Justice
14 Jackson? Could -- could I take you back to
15 Strang and inquire about your grounds for
16 distinguishing it? You mentioned very briefly
17 that we shouldn't be concerned about it because
18 it was interpreting the bankruptcy law in effect
19 in 1885. But the statute in effect there was
20 more hostile to your position than the statute
21 in effect here because it said "by the fraud or
22 embezzlement of the bankrupt."

23 And then you have another argument in
24 your brief, which is that Strang was federal
25 common law. I don't know whether that's true

1 because whether a debt is dischargeable or not
2 is a question of federal bankruptcy law. But,
3 if it was a question of federal common law under
4 the pre-Erie regime whether the liability -- the
5 dischargeability of a debt by one partner is
6 discharge -- dischargeable against the other
7 partner, would we not look to what has taken the
8 place of federal common law under Erie, which
9 would be state law, so we would look to state
10 liability law?

11 MS. HARRIS: So responses on Strang
12 first and then responses on state law.

13 On Strang, it is a very strange canon
14 that you think that Congress would be ratifying
15 the meaning of a statute by jettisoning all the
16 prose in that statute and, you know, taking
17 another tack. And the other important
18 distinction is "of the bankrupt" gets replaced
19 by "individual debtor," who is then juxtaposed
20 against lots of other actors who are partners.

21 Now, with respect to whether state law
22 would then -- sorry. One more point on Strang,
23 which is it's hard to read Strang as some sort
24 of, like, lurking rule that governs the rest of
25 the code forever more when circuit courts about

1 20 years after Strang and onwards were saying
2 when they were interpreting pretty similar
3 language with respect to the total bar on fraud
4 discharge that they were not going to imply
5 imputation in -- in that setting. So it's hard
6 to say that Strang is sort of controlling
7 onwards.

8 Now, whether state law would take the
9 place of Strang, I think the answer is
10 conclusively no for reasons we've discussed,
11 which is that the scope of the discharge
12 exception is a question of federal law, and it
13 would be particularly odd to think that state
14 law -- that you sort of need, like, a state law
15 judgment for imputation or something or that you
16 want to apply state law rules in bankruptcy
17 when, here, you don't even, again, have that
18 judgment for imputation. All you have here is a
19 judgment that Kate was directly liable for a
20 nondisclosure tort.

21 So, no, I don't think the federal
22 Bankruptcy Code shifted to a world in which you
23 look at the statutory terms just governed by
24 sort of California law. That would create --
25 create a very non-uniform scheme. What you do

1 have is a statute that is not mentioning any
2 kind of vicarious liability, that is not
3 creating torts, that is very similar --
4 dissimilar for the language that Congress has
5 used when it does import vicarious liability,
6 and the point of it is to discharge the honest
7 but unfortunate debtor by tracking concepts of
8 culpability if you're going to deny someone and
9 sort of saddle them with -- with -- for life
10 with the harsh penalty of a lifelong debt.

11 JUSTICE KAGAN: Could I -- could --
12 could -- I'm not quite sure I understand your --
13 your theory of Strang and what happened
14 afterward, because I would have thought that
15 whatever the differences in the Strang statute,
16 as Justice Alito said, that was a more hostile
17 statute to your position. And afterwards, what
18 Congress does is it amends the statute so that
19 the text of the statute actually reflects better
20 the Strang holding.

21 So shouldn't we take from that that,
22 you know, Congress looked at the Strang holding
23 and basically said let's fix the statute so that
24 we can reflect that holding quite clearly?

25 MS. HARRIS: No, for a couple of

1 reasons.

2 First of all, there's a lot of slicing
3 and dicing between the 1867 act and the 1978 act
4 in which they're -- you know, the act -- the
5 1867 act is repealed. Congress doesn't use the
6 word "fraud" for the next, like, 70-some years
7 in -- in this particular part of the discharge
8 exception. Congress is slicing and dicing,
9 like, the different parts of the -- like the
10 substantive elements of non-dischargeability
11 into different parts of the code.

12 It's a -- it's a very strange canon of
13 ratification, the opposite of what the Court
14 normally considers to be ratification, if you
15 say the statute got thrown out the window, the
16 language is not the same, there's been a ton of
17 amendments since then, the language is now
18 different, but yet the point that Congress had
19 sub silentio was somehow to ratify the holding
20 of Strang.

21 And on top of that, that still doesn't
22 explain why there were so many circuit court
23 cases shortly after Strang that said we're not
24 thinking that Strang, you know, is interpreting
25 -- like, even when there is similar language,

1 they're not saying, oh, you know, it must be
2 clear from Strang that if you see words
3 like "fraud of the bankrupt" you have to make
4 sure that an innocent person is on the hook for
5 the fraud of the debtor. They said that -- you
6 know, that rule doesn't port to these very
7 similar statute -- statutory language because
8 fraudulent intent normally means culpability.

9 There's all the more reason to think
10 that the 18 -- the 1978 code reflects that
11 principle because the stronger canon against
12 which it was enacted and that this Court
13 repeated time and again and Congress ratified,
14 you know, enacted amendments to the code against
15 was that exceptions to discharge must be clearly
16 expressed, and if there is any ambiguity, the
17 tie goes to the debtor.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice -- Justice Thomas, anything
21 further?

22 MS. HARRIS: Sorry.

23 JUSTICE SOTOMAYOR: I have one -- I
24 have one question. I thought your Petitioner
25 and her husband had an LLC. I thought that was

1 on -- in the Joint Appendix 3.

2 MS. HARRIS: That's incorrect, and a
3 footnote in our reply brief makes clear that the
4 testimony in bankruptcy court which the court
5 found -- found credible was she'd never heard of
6 the LLC. The LLC also appears to have been
7 created after the transaction in this case.

8 JUSTICE SOTOMAYOR: Got it. I -- then
9 I missed -- I'm glad I clarified that fact.
10 Thank you.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?
12 Justice Kavanaugh?

13 JUSTICE KAVANAUGH: Just quickly so I
14 understand, they have two basic arguments, a
15 Strang argument and a state law argument.
16 You're saying Strang doesn't apply because the
17 statute's changed. The state law doesn't govern
18 because this is a federal law question. On
19 federal law, it's -- "individual debtor" is the
20 key phrase. Is that the basics?

21 MS. HARRIS: That's the basics. I
22 think also reading in vicarious liability as a
23 matter of federal law wouldn't work either.

24 JUSTICE KAVANAUGH: Right, because we
25 usually see statutes that specifically speak to

1 that. So --

2 MS. HARRIS: Well, because -- because
3 the Bankruptcy Code is not creating a tort, and
4 that rule is specific to creating torts under
5 Meyer versus Holley.

6 JUSTICE KAVANAUGH: Got it. Thank
7 you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

10 I -- I do have one last question, your
11 reliance on "individual debtor." What do you do
12 with your friend's argument that that means
13 individual as opposed to corporation?

14 MS. HARRIS: I think that defies the
15 text of it because it's not just distinguishing
16 between individuals and corporations. And even
17 the provision, you know, even in 523(a)(2)
18 itself, there's references to the individual
19 debtor versus spouses, dependents, other people
20 who are definitely flesh-and-blood humans.

21 CHIEF JUSTICE ROBERTS: Okay. Thank
22 you, counsel.

23 Mr. Tripp.

24

25

1 ORAL ARGUMENT OF ZACHARY D. TRIPP

2 ON BEHALF OF THE RESPONDENT

3 MR. TRIPP: Mr. Chief Justice, and may
4 it please the Court:

5 The question in this case is whether
6 the fraud exception to discharge includes an
7 additional unwritten requirement that the debtor
8 personally intend or know the -- of the fraud
9 above and beyond whatever it takes to hold her
10 liable for the fraud in the first place. And
11 the answer is no. The words just aren't there.

12 And I'll start with the text. It says
13 that the -- the bankruptcy discharge "does not
14 discharge an individual debtor from any debt
15 [...] for money [...] to the extent obtained
16 [...] by actual fraud." So, as this Court put
17 it in Cohen versus de la Cruz, once it is
18 established that specific money is obtained by
19 fraud, then "any debt arising therefrom is not"
20 discharged. Full stop. The text stops there.
21 There are no more words.

22 And it's -- I think it's undisputed
23 that Petitioner is -- that this case fits the --
24 the bill. Petitioner obtained my client's money
25 by means of an actual fraud, and she's

1 fully liable for the fraud. It is her fraud
2 under bedrock principles of partnership law.

3 Second, Strang, back at a time when
4 the statute actually said that it needed to be
5 the fraud "of the bankrupt," this Court held
6 that it was the fraud of the bankrupt by relying
7 on the same principles of partnership law that
8 still apply today. So even if those words were
9 added back to the statute, I think we would
10 still win, but without them, this case should be
11 easy.

12 Third, novelty. Petitioner contends
13 that the -- that the debtor must actually intend
14 the fraud without reliance on agency law,
15 vicarious liability, or imputation, and on that
16 rule, the debtor could know, she could know that
17 her -- her -- her partner is a fraudster, profit
18 off the fraud and then turn around and discharge
19 the debt to the victim.

20 No court has ever read the statute
21 that way. Petitioner herself didn't read it
22 that way until after cert was granted, and this
23 Court should not be the first. It should just
24 read the text to mean what it says, restate what
25 it already said in Cohen and affirm.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Just to satisfy my
3 curiosity, would you include in that if -- if
4 they -- Petitioner and her husband had included
5 their infant child in the partnership or an
6 adolescent child in the partnership, would it
7 also be non-dischargeable as to that partner?

8 MR. TRIPP: I -- I -- I -- I think --

9 JUSTICE THOMAS: I'm just trying to
10 see how far you would go with your theory.

11 MR. TRIPP: Yeah. So I -- I think
12 there are basically three pieces to the -- to
13 the statutory test that this Court stated in
14 Cohen. There is the liability piece, right, you
15 need to owe a debt, which is defined to mean a
16 liability that's usually going to come from
17 state law. The second is the fraudulent
18 obtaining requirement, money needs to be
19 obtained by means of fraud. And then the third
20 is you need to have a causal link, right, it
21 needs to be a liability for -- for the fraud.

22 And I think, candidly, I -- I'd be
23 surprised if state law would find a -- you know,
24 a partnership in that circumstance that you're
25 describing, but I take the point, right, I'll

1 take the hypothetical that, yes, if they're
2 going to hold the child liable for the fraud,
3 like actually liable for the fraud outside of
4 bankruptcy, then, yes, it would be
5 non-dischargeable in the -- in the -- in
6 the child's bank -- I guess I don't know how a
7 child would be in bankruptcy.

8 JUSTICE THOMAS: Well, it would be the
9 partnership, wouldn't it?

10 MR. TRIPP: It -- it -- it would be if
11 -- if -- for purposes of the hypothetical, I'll
12 assume that you're extending -- like imputing
13 liability to all the members of the partnership.
14 Then -- then -- then yes, it would be not
15 dischargeable.

16 And I think, really, the right way to
17 think about the statute actually to pick up on
18 one of your questions, Justice Kavanaugh, was --
19 is to say to -- to -- once -- once there's been
20 a finding that -- that -- that -- that somebody
21 is liable for fraud, then -- then, basically,
22 just the statute gets out of the way of whatever
23 the state remedies are available to the victim
24 in that circumstance and it allows the victim to
25 obtain -- to get compensation, basically, to get

1 restored to the position that they would have
2 been in but for the fraud.

3 JUSTICE BARRETT: We --

4 JUSTICE SOTOMAYOR: You keep bouncing
5 back and forth on this, and I -- I want to
6 understand your position clearly. Is it your
7 position that any debt obtained by fraud is
8 non-dischargeable, or is it your view that any
9 debt obtained by fraud in connection with a
10 partnership or agency relationship of the debtor
11 is what is non-dischargeable?

12 MR. TRIPP: I'm not adding those --
13 those -- those additional points.

14 JUSTICE SOTOMAYOR: So then let me
15 give you the hypothetical different than Justice
16 Thomas's. I obtain a loan fraudulently. Later,
17 I sell that debt to my friend, Justice Thomas,
18 who has no idea about the fraud. Justice Thomas
19 then struggles to pay the debt and he files for
20 bankruptcy. He wants to discharge the debt.
21 Can he?

22 MR. TRIPP: Yes. So I'll -- I'll walk
23 through, and I want to be clear that the test
24 we're advocating --

25 JUSTICE SOTOMAYOR: Yes, he can be

1 liable?

2 MR. TRIPP: Can -- can I just walk
3 through it?

4 JUSTICE SOTOMAYOR: Go ahead.

5 MR. TRIPP: I think it helps. So he
6 would clearly -- there would not be an agency
7 relationship, so he would not be liable on the
8 fraud itself.

9 JUSTICE SOTOMAYOR: He's not a
10 partner, he's not an agent.

11 MR. TRIPP: Right. He would be liable
12 -- I take the purpose of your hypothetical that
13 he would be liable under state law basically on
14 -- on the contract, right, because it's been
15 transferred to him.

16 JUSTICE SOTOMAYOR: Exactly.

17 MR. TRIPP: Right. And then the
18 question would be, does state -- does state law
19 actually impose -- there would be two remaining
20 questions. So --

21 JUSTICE SOTOMAYOR: Right.

22 MR. TRIPP: -- one is, does state law
23 actually impose liability on -- on the person in
24 that circumstance? I think the answer would be
25 yes as you're describing it.

1 And then the last question would be
2 the causal link, is, is this a liability that is
3 really for the fraudulent obtaining of money,
4 and I think that that becomes a question under
5 -- under this Court's cases about the causal
6 standard in -- in this statute, and we're not --
7 we're not asking to break any -- any new ground
8 here. This is -- so this is the easiest case.
9 There is -- there is not a word --

10 JUSTICE SOTOMAYOR: I -- I understand.
11 I gave you a hard case for a purpose.

12 MR. TRIPP: Yeah.

13 JUSTICE BARRETT: Well, what --

14 JUSTICE SOTOMAYOR: What do we do?

15 JUSTICE BARRETT: Well, what --

16 MR. TRIPP: And -- and -- and I'll
17 take -- and I -- I want to be clear. I will
18 take this and I think, as you're describing it,
19 probably the way -- just the way this Court has
20 articulated the causal standard in its own
21 cases, right, there's two pieces to causation.
22 It has said arising from, resulting from,
23 traceable to, and on account of. It's used a
24 couple different formulations. I think that
25 debt would satisfy that.

1 And then the question would be, is
2 there some kind of proximate cause check on
3 that? And that's something this Court really
4 hasn't explored. It has some cases. Like
5 Archer versus Warner start to get into this, but
6 this case is not one of them. There's not any
7 -- any briefing about proximate cause. I think
8 it's not the place to get into that.

9 But I will also say that if, at the
10 end of the road, the answer is the person is
11 liable, I think that's really just the -- the
12 consequence of the plain language that Congress
13 has enacted. It -- it says --

14 JUSTICE BARRETT: Well, counsel --

15 JUSTICE JACKSON: Can I just --

16 JUSTICE BARRETT: -- you have a good
17 argument on the text, but there is kind of an
18 anomaly here. You know, (2)(A) doesn't focus on
19 the debtor; it focuses on the debt. But then
20 (B), which is about use of a statement in
21 writing that's material -- materially false,
22 focuses on the individual debtor, as does (C),
23 which is the luxury items, you know, within 90
24 days. Do you want to address the anomaly?

25 MR. TRIPP: Yeah. Sure. So, of

1 course, (B) is an exception to (A), and so we
2 would usually think that it would operate
3 differently, and the ordinary inference that we
4 draw from the presence of references, these
5 specific references to the role of the debtor in
6 (B) and (C), is that Congress cared in (B) and
7 (C) how exactly the debtor was involved,
8 whereas, in (A), the -- the absence of that
9 language --

10 JUSTICE BARRETT: But why would
11 Congress have cared? I mean, I agree with you.
12 Look, I think the language cuts in your favor.
13 I'm just asking you, as a policy matter, why do
14 you think Congress would have had such a harsh
15 result on (A) whereas, in (B), when there's
16 actually a use of writing --

17 MR. TRIPP: So --

18 JUSTICE BARRETT: -- oh, just, you
19 know, you're not -- you're not liable just on
20 the debt. You -- it has to be -- work --

21 MR. TRIPP: Yeah. So, actually,
22 there's a good history of this in Field versus
23 Mans. (B) -- (B) is a -- a very different
24 provision. It has a very different history and
25 background. It used to be a complete barrier to

1 discharge, not -- not just an exception. You
2 get no discharge at all. And what was happening
3 was that banks were duping debtors into taking
4 on credit.

5 JUSTICE BARRETT: But I thought that
6 history explained the materiality requirement.
7 I didn't think that it necessarily would explain
8 the writing requirement.

9 MR. TRIPP: I -- I -- I think it -- it
10 is essentially a debtor-specific problem where
11 specific debtors were being duped into making
12 false statements. And so I think it's at least
13 plausible that Congress could have wanted to
14 adapt -- have a debtor-specific rule there, but
15 I also want to be clear, I think as we mentioned
16 in the briefs, I -- I think you probably would
17 impute there too -- that's what the Fifth
18 Circuit has held in the Osborne case that we
19 cite in our briefs -- so that when you, you
20 know, make a false statement in writing to get a
21 loan through your agent, you know, you get your
22 lawyer to make the loan for you instead of doing
23 it yourself, I think that probably would be --
24 would be non-dischargeable.

25 But I think maybe a critical point is

1 you don't need to decide the meaning of any of
2 the other exceptions to rule in our favor here.
3 Ours is laser-focused on the text of this one
4 for --

5 JUSTICE JACKSON: But, counsel, with
6 respect to the text of this one, I guess I'm
7 trying to figure out why the way in which you're
8 interpreting it is the -- is the most narrow
9 way. You're encouraging us not to do more than
10 we have to, and I understand that, but why
11 wouldn't the text just lend itself to the kind
12 of Strang analysis of vicarious liability where
13 we look at 523(a) and it talks about, you know,
14 discharge of an individual debtor, and we may
15 even accept the Petitioner's view that it has to
16 be an individual debtor who commits the fraud
17 for the purpose of this case, and we say just
18 that the -- that the individual debtor's
19 liability can arise through vicarious liability,
20 see Strang. I mean, I don't -- I don't
21 understand the -- why we would have to go
22 further and say it could be anyone's fraud for
23 the purpose of this case.

24 MR. TRIPP: I mean, I -- I think we
25 would be perfectly happy with that. I think, as

1 long as your opinion says affirmed or
2 dismissed --

3 (Laughter.)

4 MR. TRIPP: -- as improvidently
5 granted as the bottom, we're -- we're -- we're
6 -- we're good. And --

7 JUSTICE JACKSON: Am I right that
8 that's a narrow -- it sort of seemed like you
9 were asking in your first statement here to do
10 the -- what I would consider to be the
11 maximalist thing, saying it has to be anybody --
12 it can be anybody's fraud. And then you said,
13 but there's also Strang, which seemed to me to
14 be a narrower way to do this, but maybe I'm
15 looking at it wrong.

16 MR. TRIPP: Yeah, I mean, I think,
17 candidly, we're happy with either. I think,
18 really, the -- the better reading of the text as
19 a whole is simply actually what the Court
20 already said when it was paraphrasing the
21 language of the -- of the test in Cohen versus
22 de la Cruz.

23 But I guess maybe a key sort of
24 textual point on this is, of course, it doesn't
25 say it needs to be the fraud of -- of the

1 debtor, right? That language is missing. And
2 then, as -- as per Field versus Mans and Strang,
3 I mean, really, even if it did, this -- this is
4 the fraud of the debtor, right? It all just --
5 it all just circles -- it all just circles back
6 around. And so I think there are multiple
7 layers that sort of reinforce just the -- the --
8 the plain meaning of the argument the deeper you
9 dig into it.

10 JUSTICE SOTOMAYOR: Except that it's
11 not Justice Thomas's fraud. He wasn't a partner
12 with me who committed the fraud. He didn't even
13 know about the transaction that it was
14 fraudulent. So why should he be held liable?

15 MR. TRIPP: So --

16 JUSTICE SOTOMAYOR: That's the --

17 MR. TRIPP: Yeah.

18 JUSTICE SOTOMAYOR: -- the advantage
19 of Justice Jackson's approach, isn't it?

20 MR. TRIPP: Yeah, and -- and which, of
21 course, we're -- we're comfortable with.

22 JUSTICE SOTOMAYOR: And somebody will
23 have to explain to me, and I'm assuming the
24 government will, why we can add that vicarious
25 liability or did under Strang, under whose

1 common law, state or federal. But we'll figure
2 that out.

3 CHIEF JUSTICE ROBERTS: Well, just
4 trying to find something you're not comfortable
5 with --

6 MR. TRIPP: Okay.

7 CHIEF JUSTICE ROBERTS: -- it's not
8 clear to me that Ms. Bartenwerfer's obtained
9 access to the funds involved through fraud, even
10 if it's vicarious liability. She obtained
11 access through vicarious liability, and the
12 statute requires fraud. And I'm not sure why
13 you jump right away to fraud rather than the
14 actual way in which she obtained access and
15 incurred the debt was not by fraud. It was by
16 vicarious liability because of the fraud of
17 someone else.

18 MR. TRIPP: So can I -- can I take you
19 back to the text on this? Because what it --
20 what --

21 CHIEF JUSTICE ROBERTS: Sure.

22 MR. TRIPP: -- what it says is that
23 what needs to happen is it needs to be for money
24 obtained by actual fraud. It is undisputed that
25 she obtained the purchase price for -- for the

1 -- she obtained the money. That's never been
2 disputed.

3 CHIEF JUSTICE ROBERTS: But she
4 incurred -- incurred the debt --

5 MR. TRIPP: She incurred --

6 CHIEF JUSTICE ROBERTS: -- by
7 vicarious liability, and it's the debt that
8 she's trying to discharge under the statute.

9 MR. TRIPP: Yeah, but the -- what the
10 statutory test is focusing on is, what was the
11 means for obtaining the money? The answer to
12 that is fraud. That's been undisputed. And
13 then the question is, is she liable for the
14 fraud? And the answer to that is actually yes
15 on both the front end and the back end.

16 First, it covers any debt, and debt is
17 defined to mean liability, so I think that it
18 naturally --

19 CHIEF JUSTICE ROBERTS: Well, if I
20 could just pause before I lose the --

21 MR. TRIPP: Okay.

22 CHIEF JUSTICE ROBERTS: -- the train
23 of thought. "Obtained from the debtor," right?
24 That's the "obtained" you're talking about with
25 the debt?

1 MR. TRIPP: Right.

2 CHIEF JUSTICE ROBERTS: Well, that
3 wasn't her. That was her business partner.
4 He's the one who obtained the money. The reason
5 she's liable is because of vicarious liability.

6 MR. TRIPP: No. I want to -- well, on
7 the obtaining, I think one of the reasons
8 there's no argument in this case about the
9 obtaining element, it's never been disputed in
10 the case, is that we bought the house from both
11 of them. They were both on the title to the
12 house, so they both obtained the money. The
13 partnership obtained the money. She also
14 obtained the money through --

15 CHIEF JUSTICE ROBERTS: Well, just --

16 MR. TRIPP: -- the eyes of partnership
17 laws.

18 CHIEF JUSTICE ROBERTS: -- I mean,
19 just because it's the first time doesn't mean
20 there's still not an -- an argument. And the
21 argument is, yes, I understand the notion of a
22 business partnership, but, to the extent we're
23 talking about why this individual is liable,
24 it's because of the business partnership. It's
25 not because she did anything. Her eventual --

1 or her husband did do something. And I
2 understand the idea that under state law, she's
3 on the -- the -- the hook for the debt because
4 of -- but because of vicarious liability, not
5 because of any fraud that she's responsible for.

6 MR. TRIPP: So --

7 CHIEF JUSTICE ROBERTS: Yeah, they got
8 the money, but I'm saying --

9 MR. TRIPP: Yeah. No, so I -- I take
10 the point about vicarious liability. I think,
11 again, my -- my main reaction just -- first
12 response is the text, it doesn't differentiate
13 between vicarious and direct liability. It says
14 "any liability."

15 CHIEF JUSTICE ROBERTS: It says
16 "obtained."

17 MR. TRIPP: It's any -- any liability,
18 any debt for money to the extent obtained by
19 actual fraud. And so I think the text gets you
20 a long way there. I -- I mean, I think it
21 actually gets you all the way there.

22 I think another important response, I
23 think, under -- underlying some of these
24 concerns is about the -- it's getting at the
25 sense of the fresh start policy. And, you know,

1 Petitioner starts the argument with the fresh
2 start policy, but the code, as this Court has
3 recognized on numerous occasions, balances
4 multiple competing interests, and this entire
5 statute, the whole thing, all of the exceptions
6 in 523(a) are exceptions to the fresh start
7 policy, where specific creditors, a specific
8 category of debt is protected. And I think the
9 only way to understand what is it that is really
10 covered is to just focus on the statutory text.

11 And the way this Court paraphrased it
12 in Cohen is the same way I think, frankly, that
13 it reads on its own, and it also gets you to the
14 same place you already got in -- in -- in
15 Strang. And so I think there -- there's a lot
16 here to support that just ordinary, plain --
17 plain meaning of the term.

18 JUSTICE ALITO: If I say John's
19 property -- John's house was obtained by fraud,
20 what do you understand that to mean?

21 MR. TRIPP: That fraud was the means
22 through which the house was obtained.

23 JUSTICE ALITO: By whom?

24 MR. TRIPP: Well, I think, in that
25 sentence, it doesn't -- it doesn't indicate. It

1 doesn't matter.

2 JUSTICE ALITO: Well, if I just say
3 that, aren't you going to understand me to be
4 saying that it was John who obtained the house
5 by fraud? Not that somebody who obtained the
6 house in 1885, when Strang was decided, obtained
7 it by fraud, and after that time, it's had a
8 whole chain of owners, and John is only the
9 latest one?

10 MR. TRIPP: You might think that John
11 obtained the house, but it doesn't require that
12 through -- through the fraud, but it doesn't
13 skip over past obtained to -- to the fraud
14 element, which is what Petitioner really needs
15 it to do.

16 JUSTICE ALITO: Well, what -- what I'm
17 getting at is that you -- you are relying on a
18 semantic reading of this language, and, you
19 know, I think you're right, but, in context, it
20 mean -- could mean something very different, and
21 I don't know how much we can get from context
22 because, when I look at all the provisions that
23 have been cited, some talk about the debtor,
24 some don't talk about the debtor, it looks more
25 haphazard than a -- a -- a pattern from which we

1 can infer very much. No?

2 MR. TRIPP: I agree that it is
3 haphazard, and I think the right way to move
4 forward with the haphazard is to stick to the
5 text. Maybe point to sort of two other things.
6 One is (a)(19) for securities fraud. It picks
7 up common law securities fraud. And -- and
8 Petitioner admits that that picks up vicarious
9 liability. It's not clear why you would want to
10 treat those differently.

11 And then, again, as per Field versus
12 Mans -- I think this is actually a really
13 important point -- this is a provision that is
14 targeted at a common law tort fraud. This Court
15 has recognized that actual fraud picks up the
16 soil of the common law with it when Congress is
17 speaking that way, and agency law and vicarious
18 liability is an age-old bedrock way of proving
19 up fraud that is recognized in all 50 states.

20 JUSTICE ALITO: So we have to look at
21 something else to find as a basis for the
22 vicarious liability? But we would -- if the
23 statutory language is not dispositive, we would
24 have to look someplace else, in which case you
25 don't care about whether anybody would be liable

1 -- vicariously liable under any other body of
2 law? We have to look to some other body of law,
3 right?

4 MR. TRIPP: I -- I think, yeah, you
5 would normally look to state law vicarious
6 liability, although in -- as for these -- these
7 -- I think it's undisputed that on these
8 partnership agency principles, the vicarious
9 liability is -- is uniform.

10 JUSTICE ALITO: Well, what if the
11 particular state has some very far-reaching and
12 esoteric and sui generis under -- principle of
13 vicarious liability? Then what?

14 MR. TRIPP: I -- I think then that
15 comes back to the answers to the hypothetical,
16 and the right way -- the hypotheticals earlier
17 and -- and the right way to understand what the
18 statute is getting at. The -- the weighty
19 decision when a -- when a state is going to
20 attach an idiosyncratic vicarious liability rule
21 is the imposition of liability in the first
22 place.

23 That is -- that is much bigger and
24 most of the time is entered into without a
25 bankruptcy on the horizon, right? Nine times

1 out of 10 there's not going to be a bankruptcy
2 on the horizon, maybe more. And I think,
3 really, the right way to understand the statute
4 is to get out of the way of the -- whatever the
5 state law remedies are available to victims of
6 fraud.

7 Whereas what Petitioner would do --
8 and this, I think, is very important -- is would
9 cut off a -- a practical remedy that is critical
10 for victims of fraud in many cases. Anytime you
11 have a fraudster who has disappeared, dissipated
12 the assets, transferred them to somebody else,
13 like in Husky, then what the Petitioner -- what
14 the -- what the victim needs to do to get
15 compensated is basically to follow the money and
16 follow the liability to the people around the
17 fraudster who are liable for the fraud to the
18 victim.

19 And Petitioner would interpose through
20 that with a -- a novel and I think maybe
21 shocking rule of vicarious liability that --
22 that even if you know the -- the -- the
23 liability chain gets cut off, and I think
24 there's a good reason why the states have
25 uniformly rejected that for -- for --

1 JUSTICE KAGAN: But -- but your rule
2 is even if you don't know. And, you know, this
3 idea of once there's liability the statute gets
4 out of the way, well, there's always going to be
5 liability because there wouldn't be a debt
6 unless there had been liability. So there
7 really isn't a limit. I mean, if there's a
8 debt, there's liability.

9 And I think what Ms. Harris was
10 suggesting was that even though a literal
11 reading of the statute would not give you the
12 fact that this has to be something that the
13 debtor herself was responsible for, the -- the
14 -- the underlying notions of culpability that we
15 typically think of when we think of the
16 Bankruptcy Code would suggest that result.

17 MR. TRIPP: And maybe two responses to
18 that. So one is I think she is culpable under
19 this very basic sense that it is actually her
20 fraud. She stood to benefit from it. In
21 partnership law forever, it has been that the
22 bitter comes with the sweet, not heads I win,
23 tails you lose. So I think that's a -- a basic
24 response to -- to the concerns about
25 culpability.

1 And I guess also, as I was saying
2 earlier, it's not -- there is also the second
3 check that it needs to be the liability for the
4 fraudulent obtaining of money, right? There is
5 a causal link that is required in the statute.
6 And, here, it's easy because this is liability
7 for fraud itself. We proved up all the elements
8 of fraud. And maybe that's something you could
9 explore in a future case, but it's -- it's not
10 -- it's not here today.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel. I have just one question that really
13 is out of curiosity. Why did the trial in this
14 case take 19 days?

15 MR. TRIPP: I'm -- I'm not sure I have
16 a great way to answer that other -- other than
17 to say that it -- it was quite difficult. There
18 were a number of different problems with the
19 house. There was conflicting testimony from --
20 from Petitioner, Petitioner's business partner.
21 And so I guess I -- I don't have a fulsome
22 answer to that question.

23 CHIEF JUSTICE ROBERTS: Well, I'm sure
24 it's -- I'm sure it's not your fault, but that's
25 an awfully high expenditure of the funds of the

1 federal judiciary for this.

2 Justice Thomas, anything further?

3 JUSTICE ALITO: Just out of curiosity,
4 in -- in what sense is she a partner?

5 MR. TRIPP: So we had findings from
6 the court on California partnership law proving
7 up the partnership, so you need to have --
8 they're in the JA at 42. You need to have the
9 co-owners of the business sharing in profits,
10 losses, management, and control, and so we -- we
11 had findings on that.

12 And as the case comes to the court,
13 they -- they affirmatively waived in the cert
14 petition any challenge to any piece of that.

15 JUSTICE ALITO: Was this a business,
16 or were they just joint tenants, or --

17 MR. TRIPP: No -- no, the -- the --
18 the finding in the -- in -- in the lower courts
19 was that this was a business and it was operated
20 as a business to share profits as a business.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?

23 Justice Kagan?

24 Justice Kavanaugh?

25 Justice Barrett?

1 Justice Jackson?

2 Okay. Thank you, counsel.

3 Ms. Ross.

4 ORAL ARGUMENT OF ERICA L. ROSS

5 FOR THE UNITED STATES AS AMICUS CURIAE,

6 SUPPORTING THE RESPONDENT

7 MS. ROSS: Thank you, Mr. Chief

8 Justice, and may it please the Court:

9 The plain text of Section 523(a)(2)(A)
10 bars discharge of Petitioner's debt to
11 Respondent. That debt is, in the words of the
12 statute, "a debt for money obtained by actual
13 fraud." As relevant here, a debt in bankruptcy
14 is simply an enforceable obligation under state
15 law. And under longstanding state principles of
16 agency law, Petitioner is liable, that is, she
17 owes a debt, for money obtained by the actual
18 fraud that her business partner committed in the
19 scope of their partnership.

20 Now Congress could have displaced that
21 rule in bankruptcy and required, as Petitioner
22 urges, that the debtor herself personally commit
23 the fraud. But nothing in the text suggests
24 that result. And following this Court's
25 decision in *Strang* that partners could not

1 discharge a debt created by the fraud of their
2 partner, Congress eliminated the only language
3 in the statute that might have suggested
4 Petitioner's rule.

5 Finally, Petitioner's reliance on a
6 grab bag of other provisions added at different
7 times and addressing different debts cannot
8 reverse-engineer a personal commission
9 requirement into this one.

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Ms. Ross, could you
12 just comment? You heard the various
13 hypotheticals about trying to find a limit to
14 your -- to Respondent's theory that you
15 apparently share. Would you spend a few minutes
16 on that, what the limit is?

17 MS. ROSS: Certainly, Justice Thomas.
18 So I think the hypothetical --

19 JUSTICE SOTOMAYOR: Is Justice Thomas
20 liable --

21 MS. ROSS: So I think Justice --

22 JUSTICE SOTOMAYOR: -- for my fraud?

23 MS. ROSS: -- Thomas probably isn't
24 liable, and I think the reason is -- I was going
25 to give sort of -- I -- I think there are two

1 buckets of hypotheticals. There are sort of the
2 bucket of hypotheticals where you have two
3 transactions and we're talking about the second
4 transaction. There's fraud in the first
5 transaction. And then, just like in the Justice
6 Thomas hypothetical, we're now in the second
7 transaction that didn't involve any fraud and
8 we're trying to figure it out.

9 I think, as my friend mentioned, you
10 know, some of this Court's language, the arising
11 from, doesn't give a ton of content to what the
12 actual causal requirement is, but I think we
13 would be perfectly comfortable sort of in a
14 future case that actually raised that type of --
15 type of hypothetical asking, you know, is this
16 really the causation that Congress meant when it
17 talked about "obtain." I think the answer might
18 well be no, but, again, that's not in this case.

19 The second bucket of hypotheticals I
20 think is when you have sort of the victim of
21 fraud, and I think, in a lot of those
22 hypotheticals, state law is going to deal with
23 that on the front end because state law isn't
24 going to hold that person liable.

25 So I'm thinking, for example, of, you

1 know, somebody who's defrauded and then, because
2 of the fraud, they themselves owe the debt.
3 They're not -- they're going to be able to
4 rescind that debt I believe most times. Under
5 state law, they may have a contribution action.
6 State law is going to deal with it on the front
7 end.

8 CHIEF JUSTICE ROBERTS: I'm sorry, you
9 said somebody who's -- could you say that again?

10 MS. ROSS: Sure. So -- so maybe I'm
11 sort of sticking my toe someplace I don't want
12 to be here, but, you know, there are sort of --
13 you can imagine really situations in which there
14 is fraud, you know, in -- in a different sense
15 in that the victim of the fraud is the one who
16 now owes the debt because, you know, it's credit
17 card fraud or something, and I think --

18 CHIEF JUSTICE ROBERTS: Well, I
19 describe her as a victim of the fraud right now.

20 MS. ROSS: So -- so I don't think that
21 that's how either state partnership law or
22 Congress has chosen to think about this, and I
23 think that makes sense.

24 Again, you know, I think Petitioner's
25 rule would permit or at least her rule as I

1 currently understand it would permit someone to
2 go into business with a known fraudster, know
3 about the fraud, pocket the money, spend the
4 money, dissipate all of her assets, go into
5 bankruptcy and then turn around and say to the
6 entirely innocent creditor, sorry, I'm in
7 bankruptcy now, you're out of luck.

8 CHIEF JUSTICE ROBERTS: I -- I thought
9 I understood your friend on the other side to
10 not go that far.

11 MS. ROSS: So I -- I think she's
12 attempting not to go that far. I think the
13 problem is that there are basically two possible
14 rules here. One is the "knew or should have
15 known" standard that she had in the petition and
16 that she abandoned when she got to the merits
17 stage. And, you know, I don't want to speak for
18 her. I have to assume that's because there's
19 nothing in the text of the statute that actually
20 says "knew or should have known."

21 So now we have her new rule, and her
22 new rule on page 3 of her reply brief I think is
23 very clear that the question is whether the
24 debtor committed the fraud. And just knowing
25 about fraud under basic concepts of liability is

1 not committing the fraud.

2 So she needs something more. So she,
3 I think, is trying to get sort of an aiding and
4 abetting concept where somebody would be
5 directly liable for the fraud. But, you know,
6 that's going to leave on the table a number of
7 cases where you know about the fraud. You just
8 sort of haven't done anything yourself to push
9 it forward.

10 JUSTICE JACKSON: And in that
11 situation, I -- I'm just wondering, so the
12 government's position is vicarious liability, or
13 we don't even need that, we're just interpreting
14 this to say she's wrong about it having to be
15 the debtor's fraud.

16 As I explored with -- with
17 Respondent's counsel, my thought is, isn't it
18 narrower to say even assuming she's right about
19 it needing to be the debtor's fraud, that at
20 least carries with it vicarious liability
21 through Strang and Field and whatever else, and
22 so that's all we're saying here. We're not
23 reaching, you know, Justice Thomas or Justice
24 Sotomayor's concerns about saying it's anyone's
25 fraud.

1 MS. ROSS: Certainly, Justice Jackson.
2 So, you know, I think the way that we would
3 think about this is, if you take the -- the
4 Strang view, which is what I take you to have
5 just articulated, and you limit it to this
6 provision, because, of course, it's pellucidly
7 clear everybody agrees that Strang was about the
8 predecessor to this provision, then I think that
9 is narrow.

10 I guess what I would say is that you
11 don't even need to get there because, if you
12 just look at the plain text of the statute,
13 there is just -- Congress has just made a
14 choice, we think an entirely reasonable one, to
15 pick up on state law determinations about who is
16 liable for fraud and not to then ask, you know,
17 to what extent, why were they liable, et cetera.

18 JUSTICE GORSUCH: Ms. -- Ms. Ross, I
19 want to throw you back where your -- your toe
20 was stuck earlier, and I just want to make sure
21 I understand it. I -- I -- I -- I've got your
22 answer to the first bucket of hypotheticals as
23 you call it. Tell me more about the second.

24 MS. ROSS: Already regretting it, but
25 sure, here I go. So I -- I think that in the

1 second bucket of hypotheticals, you could sort
2 of construct a situation in which I'm defrauded
3 and -- and the result of my being defrauded is
4 that I owe a debt, and that debt was obtained by
5 -- is for money that was obtained by fraud in
6 some sense.

7 But I think state law is not going to
8 actually hold me liable for that debt because I
9 was defrauded in the first place and so I'm
10 going to be able to rescind that transaction.

11 JUSTICE GORSUCH: I got it. Thank
12 you.

13 MS. ROSS: Yep.

14 JUSTICE GORSUCH: Okay. My other set
15 of questions concerned the question Justice
16 Barrett posed to your friend a moment ago about
17 (b) and (c) --

18 MS. ROSS: Sure.

19 JUSTICE GORSUCH: -- which say that,
20 you know, loosely, (b) says that it's
21 non-dischargeable if an individual debtor
22 misrepresents his or her financial circumstances
23 in a writing. And the second one says luxury
24 goods, the individual debtor goes on a shopping
25 spree 90 days before bankruptcy, can't discharge

1 those either.

2 In what world does it make sense or
3 how does the government rationalize those --
4 those provisions which focus on the individual
5 debtor with this one, which the government says
6 does not?

7 MS. ROSS: Certainly, Justice Gorsuch.

8 So if I could just take them each in
9 turn. (b), as my friend mentioned, is a
10 carve-out from (a), so we're necessarily in a
11 world where Congress wanted to make it easier to
12 discharge those debts, so there are more things
13 that you have to prove, so, in (b), for example,
14 as Justice Barrett pointing at -- pointed out,
15 you need to have a writing.

16 Nobody thinks that because there's a
17 writing requirement in (b) there's a require --
18 writing requirement in (a). That's just not
19 what Congress wrote.

20 JUSTICE GORSUCH: Let me just push
21 back there, and if Congress was concerned with
22 if the policy judgment were proceeds in fraud
23 regardless who committed them, should be --
24 should -- should be non-dischargeable, and those
25 debts, right?

1 That's a good -- I can -- I can see
2 that policy argument. That's rational. I can
3 also see a rational argument that -- that it's
4 got to be the individual debtors. And so, when
5 I'm talk between two rational policy arguments
6 as a judge, you know, it doesn't do much for me,
7 right? I mean, that's -- that's across the
8 street.

9 But -- but, here, you -- you -- you do
10 have a suggestion that a misrepresentation in
11 writing about your financial condition by your
12 partner would not be a problem and could be
13 dischargeable or, if I bought luxury goods for
14 my friends or my partners, those debts would be
15 dischargeable.

16 So I -- I -- it's -- it's -- the two
17 policy judgments seem to me to be tugging at
18 each other here. I could understand one or the
19 other, but it's very hard for me to understand a
20 little bit of this and a little bit of that.

21 MS. ROSS: Certainly, Justice Gorsuch.
22 So, of course, the first thing I would say is
23 that normally we look at the text, not trying to
24 figure out what Congress --

25 JUSTICE GORSUCH: Yes, yes.

1 MS. ROSS: -- was thinking about, and
2 I think the inference runs exactly in our favor
3 and exactly counter to my friend's point that,
4 you know, because it's in (b) and (c) you have
5 to sort of read it into (a) is not how
6 we normally view it.

7 JUSTICE GORSUCH: But give me a
8 rational explanation.

9 MS. ROSS: Sure. So the rational
10 explanation on (b) is that the particular
11 practice actually was written statements where
12 financial services companies would have a
13 consumer say, you know, it would say, please
14 list all your debts, but then they'd say, no,
15 no, just list one, that's okay.

16 And so they were sort of duping people
17 into making that kind of a misrepresentation.
18 That's why we have the writing requirement, I
19 think. And I think it's rational for Congress
20 to say, we think this is a really bad thing that
21 consumer -- that -- that these companies are
22 doing and so we're going to limit sort of the
23 ripple effects. If -- if they kind of get away
24 with it somehow, we're just going to limit it,
25 we're just not going to go any further.

1 On (c), I think similarly, Congress
2 there was creating a presumption of fraud, so
3 things that fall within (c), the shopping spree,
4 are presumptively fraudulent for purposes of
5 (a).

6 You know, I think you could read that
7 either way, allowing imputation or not. But
8 even if you think it doesn't, I think it's
9 entirely rational for Congress to have focused a
10 presumption on people who know themselves that
11 they're about to go into bankruptcy.

12 JUSTICE GORSUCH: Very helpful. Thank
13 you.

14 JUSTICE SOTOMAYOR: And I guess the
15 best way to deal with Justice Barrett and
16 Justice Gorsuch's views that it means that --
17 that -- that those provisions mean the debtor is
18 to say something like the debtor's fraud is
19 what's at issue, but it includes the alter ego
20 of the debtor, such as partners and agents of
21 the debtor.

22 MS. ROSS: I think that's certainly
23 one way that you could deal with it.

24 JUSTICE SOTOMAYOR: Because that's
25 what Strang and Field did, isn't it?

1 MS. ROSS: I think that's right. I
2 mean, I think what -- what I would say about
3 Strang in particular is that, you know, I can
4 understand my friend's reticence to sort of
5 read of the debtor in all over the code or to
6 say that wherever that's in the code, that that
7 would necessarily require imputation.

8 I don't think the Court needs to cross
9 that bridge here. I think it's very clear that
10 when Congress was responding to Strang, you
11 know, that was in the 1867 statute, the "fraud
12 of the bankrupt" language. It had already been
13 repealed by the time Strang came to this Court.

14 The next bankruptcy statute was in
15 1898, and what Congress did was it kept "fraud,"
16 but it took out "of the bankrupt." And so I
17 think at least when we're thinking about this
18 provision, it's very clear that Congress, of
19 course, has never sort of reinserted "of the
20 bankrupt."

21 My friend notes that, you know, it's
22 changed from "bankrupt" to "individual debtor."
23 I'm not sure where that gets her because it also
24 hasn't said "of the individual debtor."

25 So, yes, I mean, that -- that's --

1 that's a long way -- winded way of saying yes, I
2 think that you could certainly limit it to that,
3 to that understanding.

4 JUSTICE KAGAN: Do you think Ms.
5 Harris is right that this was all kind of like
6 an accident, you -- you know, that you take the
7 Bankruptcy Code as a whole and you say whether
8 it says "of the debtor," whether it doesn't say
9 "of the debtor," Congress was careless, Congress
10 wasn't thinking about it, it means nothing.

11 Now, even if she's right about that,
12 she might still lose because the text is the
13 text. But I'm just wondering whether you think
14 that that's right, that this is basically
15 carelessness.

16 MS. ROSS: So I guess I'd make a
17 couple of questions -- or, excuse me, a couple
18 of points, Justice Kagan.

19 The first is that I don't think it's
20 carelessly -- carelessness writ large. I think
21 there may be individual instances where maybe,
22 you know, in her two drunk driver ones, like,
23 you can't make sense of it.

24 I don't think you should say that
25 because there are a couple of those that the

1 whole statute makes no sense. And that's
2 particularly true in a -- a statute like this
3 one where we know that Congress has added -- I
4 mean, there are 19 exceptions in 523(a).
5 They've been added over the course of a hundred
6 years, often in statutes that have nothing to do
7 with bankruptcy itself.

8 So I -- I don't think you can say
9 that, you know, the whole thing you've got to
10 sort of throw out this idea of trying to make
11 sense of it because of a couple of anomalies.

12 And I think least of any place where
13 you would say that is (a)(2)(A) because we have
14 this history of Strang where it looks very clear
15 what Congress is doing.

16 We also have this background rule that
17 is -- you know, runs throughout partnership in
18 all 50 states, through the common law, through
19 both Neal and -- or, excuse me, Strang and its
20 discussion of Neal that partners are liable for
21 the frauds of their partners. And so, you know,
22 to the extent that Congress may have been
23 unclear elsewhere, I just don't think that that
24 can get you away from the clear meaning and the
25 clear history of this provision.

1 I guess, if I can make one more point
2 about something you made -- you said earlier,
3 Justice Kagan, about sort of the innocent debtor
4 and how we think about the purpose of this
5 statute as a whole.

6 One, you know, I think it's difficult
7 given this colloquy that we've just been having
8 about how much change and how these provisions
9 have been added at different times.

10 But, two, you know, I don't think it's
11 true that because there is sort of a sense of
12 giving a debtor a fresh start as a general
13 policy matter, that's necessarily come through
14 each and every provision. Obviously, these are
15 all exceptions to discharge.

16 But, even beyond that, you know, there
17 are a number of them that just sort of say
18 nothing about innocence or fault to begin with.
19 And I think Congress could very rationally here
20 have decided, as this Court explained in Cohen,
21 that what we want here is full compensation from
22 the creditor and given the background rules of
23 -- of partnership, that this gets you closer to
24 that end.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 Justice Alito, anything further?

4 Anything? Good?

5 Thank you.

6 Rebuttal, Ms. Harris.

7 REBUTTAL ARGUMENT OF SARAH M. HARRIS

8 ON BEHALF OF THE PETITIONER

9 MS. HARRIS: Thank you, Mr. Chief
10 Justice. Three quick points.

11 First of all is with respect to the
12 text, one unexplained aspect of the other side's
13 textual reading is what on earth Congress was
14 doing when it used specific language throughout
15 the exceptions in 523 to refer to debts for
16 various judgments and why Congress was not there
17 deliberately trying to say, in those instances
18 alone, we are indifferent to whether the debt
19 reflects vicarious liability or not.

20 We're just saying you have a judgment
21 against you. It's for fraud against a fiduciary
22 that meets certain specifications. That has to
23 mean something. And that is how Congress post
24 in the world after 1867 and certainly in 1978
25 was -- appears to have been dealing with that

1 problem. So, if you want to live by the text, I
2 think they have to die by the text in that
3 respect because I haven't heard a response to
4 why Congress had chosen that careful language.

5 And a number of the Court's cases do
6 say that the judgment language matters. It
7 says, bankruptcy courts, hands off, you defer to
8 that judgment.

9 Second point is with respect to the
10 other side's theories. I don't see a stopping
11 point with respect to the vicarious liability
12 theory -- theory if you -- even if you take
13 seriously the idea that vicarious liability
14 could only get read in whenever Congress used
15 the word "fraud," it still doesn't appear to
16 matter if Congress uses the word "debtor."

17 And the 727 total bars to discharge,
18 the ones that don't let you discharge any of
19 your debts, even if they're unrelated, a lot of
20 those are also about fraud. So the vicarious
21 liability theory seems to get you to a pretty
22 uncomfortable place because no one has ever
23 before thought that the Bankruptcy Code is a
24 minefield of vicarious liability just whenever
25 it mentions a common law term.

1 As for the state law theory, I -- I
2 think I heard the other side suggest that you
3 take whatever state law is to the point where
4 Neal versus Clark might be wrongly decided
5 because you can be liable for fraud without
6 culpable intent under a lot of state laws. You
7 certainly cannot be barred from discharging
8 fraud unless you have fraudulent intent. That's
9 been the law for -- for over a century.

10 And the idea that you're just sort of
11 having state law components that you defer to in
12 bankruptcy is contrary to the idea that, no, you
13 start off in bankruptcy with a debt, they exist
14 under state law, and the point of bankruptcy is
15 to get rid of that debt as a matter of federal
16 law. And that's why cases from Brown versus
17 Felsen onwards have said these discharge
18 exceptions are questions of federal law. You
19 look to federal law rules. You are not trying
20 to say whatever state's law -- whatever a state
21 law is governs, including fanciful state laws.

22 And then just a final point with
23 respect to the equities here. The fraudster to
24 be very clear is always on the hook. That
25 person can never discharge the debt in

1 bankruptcy. All we are talking about here is
2 whether the person who did not know of the
3 fraud, wasn't participating in it, can also be
4 on the hook forever for a lifelong debt.

5 And so, when we talk about cases like
6 Cohen or cases like Bullock, the thread that
7 runs underneath them is the idea that their
8 whole reason you get the strong medicine of not
9 getting a discharge under the federal bankruptcy
10 rules, where the norm is discharge, is that you
11 yourself are culpable.

12 That's what Bullock is talking about
13 when it talks about the exceptions all linked by
14 fault, and that's also what Cohen is talking
15 about when it's saying the reason why you can be
16 liable for debts for anything arising from that
17 fraud, including treble damages, including all
18 kinds of stuff, is because you set the fraud in
19 motion. It -- it's reasonable to -- to hold you
20 accountable for the consequences of that fraud
21 on that basis because they're the foreseeable
22 results of your culpable behavior.

23 That really does not carry over to the
24 individual debtor in this case, who again
25 committed no fraud herself. And we ask the

1 Court to reverse.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel. The case is submitted.

4 (Whereupon, at 12:39 p.m., the case
5 was submitted.)

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