No. 21-908

In the Supreme Court of the United States

KATE MARIE BARTENWERFER,
PETITIONER,

v.

KIERAN BUCKLEY,
RESPONDENT.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

IAIN ANGUS MACDONALD
MACDONALD FERNANDEZ LLP
221 Sansome St., 3rd Fl.
San Francisco, CA 94104
(415) 362-0449

RENO FERNANDEZ
ANNA-ROSE MATHIESON
COMPLEX APPELLATE LITIGATION GROUP LLP
96 Jessie Street
San Francisco, CA 94105
(415) 649-6700

LISA S. BLATT
Counsel of Record
SARAH M. HARRIS
ANDREW L. HOFFMANN
AARON Z. ROPER
MARY E. GOETZ
WILLIAMS & CONNOLLY LLP
680 Maine Avenue SW
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

QUESTION PRESENTED

May an individual be subject to liability for the fraud of another that is barred from discharge in bankruptcy under 11 U.S.C. § 523(a)(2)(A), by imputation, without any act, omission, intent or knowledge of her own?

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OPINIONS BELOW

The opinion of the court of appeals (Pet.App.1a-6a) is unreported but available at 860 F. App'x 544. The order of the court of appeals denying rehearing en banc (Pet.App.60a-61a) is unreported. The initial (J.A.22-59) and post-remand (Pet.App.7a-30a) opinions of the bankruptcy appellate panel are unreported but available at 2017 WL 6553392 and 2020 WL 1970506, respectively. The initial (J.A.1-18) and post-remand (Pet.App.35a-59a) opinions of the bankruptcy court are reported at 549 B.R. 222 and 596 B.R. 675, respectively.

JURISDICTION

The court of appeals denied rehearing en banc on September 24, 2021. Pet.App.60a-61a. The petition for

certiorari was filed on December 17, 2021 and granted on May 2, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

11 U.S.C. § 523(a)(2)(A) provides:

(a) A discharge under section 727, 1141, 1192[,] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt— …

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition … .

Section 523 is reprinted in full, *infra*, App.1a-9a.

STATEMENT

Bankruptcy once meant consigning families to Dickensian debtors' prisons until the paterfamilias repaid every farthing. Congress has long since broken from that past. The 1978 Bankruptcy Code enshrined today's modern federal bankruptcy scheme, whose overarching mission is to extend a "fresh start in life" to the "honest but unfortunate debtor." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1758 (2018) (citations omitted). Debtors who honestly incur debts can wipe the slate clean and obtain discharge. But debtors who incur debts through dishonesty cannot avoid these obligations.

Thus, the statutory text at every turn centers on the "individual debtor," her debts, her conduct, and her intent, as distinct from her spouse, dependents, partners, agents, or affiliates. The individual debtor lists her own debts and assets. And the bankruptcy court adjudicates

each debtor's right to discharge individually and separately. Under the modern Code, forcing a debtor to retain a debt for life is grave business. Section 523 strictly limits the list of nondischargeable debts, and this Court has repeatedly held that those exceptions are narrow. If the text of the relevant exception does not clearly bar discharge, the debtor gets the benefit of the doubt.

This case involves section 523(a)(2)(A), which bars "an individual debtor" from "discharg[ing] … any debt … for money, property, services, or … credit, to the extent obtained by … false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). All agree—and this Court has long held—that these fraud-based torts require an intent to defraud, among other elements. The question here is whose fraud counts. Must the individual debtor commit the fraud and possess the requisite intent? Or does the Code forever saddle innocent and unwitting debtors with debts arising from someone else's fraud?

Text and context supply the natural answer: only the individual debtor's fraud counts. For starters, section 523(a)(2)(A)'s text does not expressly state that others' fraud bars discharge. Because discharge exceptions require a clear statement, that principle should end the matter. Many other textual clues confirm this result. The "individual debtor" is the subject of every discharge provision, and it defies credulity that Congress brought other, unstated actors to the fore mid-sentence just by using the passive voice ("obtained by … fraud").

Congress did not need to sprinkle "the individual debtor" throughout section 523 to focus the bankruptcy court on the individual debtor's own conduct and mental state. In section 523(a)(2)(A) as elsewhere, the "individual debtor" is the only logical person who could perform the relevant acts. Throughout the Code, Congress used the passive voice and omitted references to "the debtor" in

situations where Congress is plainly referring to "the debtor." And in the limited circumstances where Congress wanted to hold an individual debtor responsible for someone else's conduct, Congress used different language. Those textual and contextual directives track the Code's overarching aim: a fresh start. Only for exceptionally good reasons, like personal culpability, does Congress consign debtors to lifetime debts.

Buckley instead contends that section 523(a)(2)(A) bars even honest debtors from discharging debts arising from *anyone's* fraud. He theorizes that Congress imposed that draconian result by using the passive voice to describe the relevant debts ("obtained by" fraud) and by omitting an express, debtor-specific mens rea requirement. Br. in Opp. 9-11. This Court refuses to read such rules into the Code by "negative inference." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1659 (2019). Further, across contexts, this Court has repeatedly refused to overread the passive voice that way. Placing dispositive weight on Congress' references to "the debtor" is particularly nonsensical given that the Code alternates between referring to the debtor herself and employing the passive voice without rhyme or reason. And Buckley's theory that the Code penalizes even innocent debtors for others' fraud would defy the modern Code's emphasis on giving innocent debtors a fresh start.

Buckley also argues that *Strang v. Bradner*, 114 U.S. 555 (1885), a case that arose under the 1867 Bankruptcy Act, still applies to today's Code and forces innocent debtors to remain responsible for debts arising from their partners' fraud. Br. in Opp. 11. But *Strang*'s imputation reasoning rests on federal common-lawmaking that did not survive *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *Strang* did not purport to interpret the then-operative text of the 1867 Bankruptcy Act. Even had *Strang*

parsed that text, Congress repealed the 1867 Act, replaced it with statutes that used different language to describe the relevant actors and actions, and eventually overhauled the entire bankruptcy scheme in the 1978 Code. If *Strang* still lurks within the modern Code, *Strang*'s reasoning—that innocent debtors remain liable for their partners' wrongdoing under common-law agency principles—would wreak havoc throughout the Code.

A. Factual Background

1. In 2005, then-34-year-old Kate Pfenninger (now Bartenwerfer) worked at a medical-supply company, assisting company lawyers with filling out regulatory paperwork. C.A. Excerpts of Record (E.R.) 894-96. She lived with her boyfriend (now husband) David Bartenwerfer in a one-bedroom condo in downtown San Francisco that Kate owned. E.R.960. But Kate hoped for a family, and the apartment was too small for a child. E.R.960.

So, in February 2005, David and Kate bought a two-bedroom house in Noe Valley, a popular San Francisco neighborhood. E.R.921, 1008; C.A. Buckley Further Excerpts of Record (F.E.R.) 309. The $880,000 house was a fixer-upper: the foundation had a gaping crack and the interior was straight out of the 1950s. E.R.192, 758, 958. David and Kate made a 20% down payment and financed the rest with an adjustable-rate mortgage. E.R.1012. They moved in and began updating the kitchen and floors. E.R.921.

Then, in January 2006, David was laid off from his financial-services job at Charles Schwab. E.R.959. David decided to renovate the house, proposing "this grand idea to have this great big house." E.R.959. Kate demurred: "[W]ho's going to clean that"? E.R.961. "If I want a big house, I'll move to Texas." E.R.959.

David persisted, promising to handle the whole renovation. E.R.961. Kate eventually relented to "support[] him." E.R.959. But she was adamant that she did not like "the transient idea of let's build a house and like flip it and move … that's not who I am." E.R.961.

David forged ahead, hiring a designer, a structural engineer, and an architect to draw up plans. E.R.758-60. He negotiated with neighbors and the City to obtain permits. E.R.760-62. And he hired a general contractor to oversee the project, who employed six to eight workers (including two of the contractor's brothers). E.R.764, 766. David's brother Dale served as "on-site manager" and did some carpentry. E.R.766-67. As David's unemployment continued, David also helped a few friends with renovations at nearby properties. *E.g.*, E.R.251, 335.

In April 2007, construction began in earnest. E.R.768. Kate bought a small home nearby and the couple moved out. E.R.768, 923. As far as Kate was concerned, the renovation "was [David's] job, and I had my job." E.R.962. She occasionally helped pick fixtures, discussed floor plans, or scanned documents for David. E.R.246, 608. But she did not handle contractors, sign checks, review invoices, or track the budget. E.R.946, 962-64. Between April and November 2007, Kate never set foot on the property. E.R.924, 964.

That summer, David's contractor was moving the project along. E.R.770. But, around September, the contractor's mother died. E.R.770. The contractor bought a one-way ticket home to El Salvador; his two brothers who worked on the renovation also left. E.R.770-71. David was "desperate." E.R.772. No other contractors would step in. E.R.771-72. The City would not sign off on some permits without the contractor present. E.R.790. David

and Kate were marrying in November. E.R.772. And David learned that his mother's breast cancer had returned. E.R.772, 817-18.

David and Kate realized they would need to sell the house after all. David urged Kate to get her real-estate license to help. E.R.973. But Kate, studying in rare off hours from her medical-supply job, failed the test on her first try. E.R.976. David hired a professional realtor instead. E.R.975. Kate obtained her license in January 2008—after the disclosure statement at issue—but never used it. E.R.643, 977-78.

Nonetheless, by November 2007, David was working to wrap up everything as the house went on the market. E.R.786-87. On November 11, David and Kate met with their real-estate agent to fill out the Transfer Disclosure Statement, a check-the-box form used for California real-estate sales. E.R.234-40. Kate understood the form to seek the couple's "collective knowledge." E.R.966. Some questions—"is there a refrigerator"?—Kate could answer for herself by looking around. E.R.966. For others, like whether the renovation had proper permits, Kate trusted David. E.R.966. As Kate explained at trial, "How would I know that? It wasn't my job; I wasn't there. I had my own job." E.R.968-69. "I had no reason not to believe [David], not to trust him." E.R.966.

2. In January 2008, David and Kate—now newlyweds—agreed to sell the house to respondent Kieran Buckley and his girlfriend for $2.1 million. J.A.3, E.R.192. Buckley is a self-proclaimed "big time developer," real-estate "mogul," and "general contractor" with "extensive experience in real estate development." F.E.R.276-77.

Unbeknownst to David and Kate, Buckley also had a long history of suing real-estate counterparties.[1]

Buckley presented David with an 83-point list of items to fix before closing, E.R.597, from cleaning the gutters to replacing a kitchen lightbulb. E.R.225-26. David dug in, winnowing the list to 14 by March 2008. E.R.601, 795-96. Buckley's real-estate agent praised David for "doing a very good job and working hard" on the outstanding issues. E.R.602; *see* E.R.798. The sale closed in March 2008. J.A.3.

In hindsight, early 2008 was an inauspicious time to buy a house. In September 2008, after Lehman Brothers went under, the San Francisco residential real-estate market collapsed. Tom Abate, *Pain Felt More Here Because California Home Prices Played Major Role*, S.F. Chron., Sept. 15, 2009, at A1. During the Great Recession, Bay Area home values plummeted 46%. Compass, *San Francisco Bay Area Real Estate Market Cycles Since 1990*, Bay Area Market Reports (July 2022), https://bit.ly/39LI61o.

Californians suffered buyer's remorse in droves, and turned to the courts to try to unwind sales. *E.g.*, David Streitfeld, *Feeling Misled on Home Price, Buyers Sue Agent*, N.Y. Times (Jan. 22, 2008), https://nyti.ms/3sQSpZ1. Buckley was not immune. In September 2008, one buyer sued him to rescind an $855,000 condo sale, claiming Buckley had made inadequate disclosures. *Chin v. Diamond LLC*, No. CGC-08-479690 (Cal. Super. Ct. S.F. Cnty. filed Sept. 11, 2008).

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[1] *E.g.*, *Buckley v. Bart-Bek Plus*, No. CGC-07-459803 (Cal. Super. Ct. S.F. Cnty. filed Jan. 22, 2007); *Buckley v. Zedd*, No. CUD-04-611143 (Cal. Super. Ct. S.F. Cnty. filed July 22, 2004); *Buckley v. Timken*, No. CGC-04-430605 (Cal. Super. Ct. S.F. Cnty. filed Apr. 15, 2004).

Soon thereafter, Buckley began compiling new issues with David's renovations. In October 2008, Buckley's housing inspector for the first time noted the absence of a fire escape. E.R.662. In February 2009, Buckley noticed leaks that had not appeared the previous rainy season. E.R.781; F.E.R.260. He claimed that the windows were askew and sticking, despite removing that issue from his initial, 83-item list after David applied some wax. E.R.602, 815-16. And he complained that David had not disclosed open permits at the time of the sale, even though the City had since signed off on everything. E.R.798, 800.

3. In June 2009, Buckley sued David and Kate in California state court on multiple contract and tort theories seeking damages and to rescind the sale. Compl. 4-14, *Buckley v. Bartenwerfer*, No. CGC-09-489793 (Cal. Super. Ct. S.F. Cnty. filed June 24, 2009). As relevant here, Buckley brought California tort claims for negligent misrepresentation, intentional misrepresentation, and nondisclosure of material facts. *Id.* at 10-11; *see* E.R.174-79. After a 19-day trial, a jury rejected Buckley's claims for negligent and intentional misrepresentation. J.A.3, E.R.174-77. The jury sided with Buckley on his nondisclosure claim, concluding that David or Kate failed to disclose issues relating to leaks, windows, permits, and the fire escape. E.R.178. But the jury refused to award punitive damages because neither Bartenwerfer acted "with malice, oppression, or fraud." E.R.182.

The state court entered judgment against David and Kate in October 2012. J.A.27. After remittitur, attorneys' fees, and costs, the nondisclosure award totaled $532,436. J.A.20-21, 26-27. That judgment—along with the costs of many years of litigation—devasted the Bartenwerfers' finances.

Six months later, in April 2013, Buckley sold the house for a $259,000 profit after the market rebounded.

See 549 28th St, San Francisco, CA 94131, Zillow, https://bit.ly/38aPeUJ. Today, the house is worth $4.2 million. *Id.*

B. Proceedings Below

1. **Bankruptcy proceedings.** In April 2013, David and Kate filed for bankruptcy under chapter 7. *In re Bartenwerfer*, No. 13-30827 (Bankr. N.D. Cal. filed Apr. 8, 2013). Chapter 7 allows individual debtors of limited means to liquidate their assets and to discharge their debts. *See* 11 U.S.C. § 727(a). A chapter 7 discharge eliminates "all" pre-bankruptcy debts "[e]xcept as provided in section 523." *Id.* § 727(b).

David and Kate filed jointly as spouses pursuant to 11 U.S.C. § 302(a), a procedural device that permits the court to jointly administer a couple's bankruptcy case for administrative convenience. *See* Fed. R. Bankr. P. 1015(b). But they each remained "individual debtors," in the parlance of the Code, for purposes of determining their respective entitlements to discharge. *See* 11 U.S.C. §§ 302(a), 727(a)(1). Thus, David and Kate's bankruptcy forms meticulously document who owns each asset and who bears each liability (David, Kate, both jointly, or the community). *E.g.*, Summary of Schedules, *In re Bartenwerfer*, No. 13-30827 (May 7, 2013), Dkt. No. 14.

Buckley responded with an adversary complaint, alleging that neither David nor Kate could discharge the California judgment under 11 U.S.C. § 523(a)(2). E.R.191-92. That provision prevents "an individual debtor from [discharging] any debt … for money … to the extent obtained by … false pretenses, a false representation, or actual fraud."

After a bench trial, the bankruptcy court held that neither David nor Kate could discharge the state-court

judgment. J.A.18. Because the jury had rejected Buckley's misrepresentation claims, Buckley argued that his nondisclosure claim amounted to fraud under section 523(a)(2)(A). J.A.4. The court determined that California's nondisclosure tort satisfied some elements of fraud, but not fraudulent intent. J.A.7. Therefore, because the Bankruptcy Code treats each Bartenwerfer as a separate "individual debtor," the court examined whether each Bartenwerfer acted with fraudulent intent so as to have "obtained" debts by "fraud" under section 523(a)(2)(A). *See* J.A.4. As to David, the court found that he acted with fraudulent intent based on his knowledge of outstanding issues with the roof, permits, windows, and fire escape when he signed the disclosure form in November 2007. J.A.10-18.

The court did not separately analyze Kate's intent. Instead, the court imputed David's intent to Kate. Although the pair never signed any formal business agreement, the court reasoned that "an agency relationship existed between Mr. and Mrs. Bartenwerfer based on their partnership with respect to the remodel project: she was on title to the Property, signed the disclosure statements … , and would financially benefit" from the sale. J.A.4-5 n.3.

The Ninth Circuit's Bankruptcy Appellate Panel affirmed the finding as to David's fraudulent intent. J.A.44. But the panel vacated and remanded as to Kate. The panel agreed that David and Kate had a "partnership/agency relationship." J.A.43. Under a previous bankruptcy panel ruling, though, an innocent partner only incurs a debt for money "obtained by … actual fraud" when she personally "knew or had reason to know" of the fraud. *See* J.A.43 (quoting *Sachan v. Huh*, 506 B.R. 257, 272 (B.A.P. 9th Cir. 2014) (en banc)). The panel remanded for fact-finding on Kate's specific knowledge. J.A.44.

On remand, the bankruptcy court heard more testimony and found that Kate did not know or have reason to know of David's purported fraud. Pet.App.56a-58a. The court found that Kate "consistently, clearly, and credibly maintained" that she relied on David in filling out the disclosure form. Pet.App.46a.

Buckley did not "seriously dispute" that Kate lacked "actual knowledge." Pet.App.47a. Instead, Buckley argued that Kate should have known about the deficient disclosures. Pet.App.47a. The bankruptcy court disagreed, emphasizing that Kate's conduct was "reasonable." Pet.App.57a. She "logically assumed that [David's] first-hand knowledge" was the best source of information. Pet.App.57a. He had "devoted himself full-time to the Property"; she had not set foot there for months. Pet.App.57a. In short, Buckley offered "no evidence whatsoever" that Kate had "any hint of defects" that might warrant further investigation. Pet.App.57a-58a.

The bankruptcy appellate panel affirmed, holding that the record supported the conclusion that Kate's "actions and attitude toward the truth were … reasonable." Pet.App.20a, 24a.

2. **Ninth Circuit.** The Ninth Circuit reversed in relevant part. Pet.App.6a. The court read Supreme Court and Ninth Circuit precedent to render an innocent partner's debt "nondischargeable regardless of her knowledge of the fraud." Pet.App.5a-6a. The court therefore "imputed" David's knowledge to Kate and held her debt nondischargeable. Pet.App.6a.

That debt has surpassed $1.3 million today with California's 10% statutory interest rate and attorneys' fees. *See* J.A.21, 26-27. Meanwhile, the Bartenwerfers already struggle to make ends meet. Kate, the sole breadwinner, still does administrative work at a medical company.

E.R.75. David has suffered serious health problems that preclude long-term employment. He was diagnosed with invasive skin cancer in 2011, which is now at Stage 3. With a child in school and San Francisco living expenses, the family's net income has been negative eight months over the last year. Joint Decls., *Bartenwerfer v. Buckley*, No. 13-03185 (Bankr. N.D. Cal.), Dkt. Nos. 291, 309, 311, 313.

SUMMARY OF ARGUMENT

I. Section 523(a)(2)(A) only bars individual debtors from discharging debts obtained by their own fraud. When the individual debtor lacks any fraudulent intent herself, her debt is dischargeable.

A. A clear-statement rule resolves this case. Because bankruptcy offers a fresh start to honest debtors, this Court confines discharge exceptions to those "plainly expressed." *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 275 (2013) (citation omitted). Section 523(a)(2)(A) does not "plainly" hold individual debtors responsible for their partners' fraud.

B. To the contrary, section 523(a)(2)(A)'s text focuses on the "individual debtor"—the person at the center of every bankruptcy case. The "individual debtor" is the only plausible actor in the text who could have "obtained" assets "by" fraud. "[O]btained by" also requires individual effort and "fraud" requires individual malintent, underscoring that section 523(a)(2)(A) targets the conduct of one individual—the debtor.

C. The rest of section 523 confirms that interpretation. Section 523(a)(2)(B) and (C) indisputably focus on the individual debtor's intent. Reading 523(a)(2)(A) alone to sweep in others' conduct would produce bizarre anomalies. Further, seven other exceptions to discharge in section 523 use passive-voice formulations similar to "obtained by … fraud" yet plainly target only the individual

debtor's actions. Congress also knew how to hold individual debtors responsible for others' conduct in section 523—and did so in other exceptions to discharge by expressly refusing to discharge a "judgment," "order," or the like. That language preserves whatever imputation rules underlie court or administrative orders.

E. Granting discharge to innocent partners also aligns with the Code's core aim of relieving honest but unfortunate debtors. An innocent partner is by definition not culpable. And focusing on the individual debtor's own conduct and state of mind avoids messy evidentiary sideshows about others' fraud.

II. Buckley's contrary approaches lack merit.

A. Buckley argues that section 523(a)(2)(A)'s passive-voice formulation targets the debt, not the debtor, so anyone's fraud bars discharge. But Congress' use of the passive voice does not render the actor irrelevant. The Court looks to other textual and contextual evidence. Here, text and context dictate that only individual debtors can commit fraud. Congress did not need to mention "the individual debtor" in every subsection to focus bankruptcy courts on the individual debtor and her intent.

Buckley's theory would also mean that the Bankruptcy Code has inexplicably grown more punitive over the years. Predecessor versions of many discharge exceptions contain the kind of express references to the debtor's mental state that would bar imputation on Buckley's view. Modern versions do not. Congress does not ordinarily inflict such life-changing consequences just by switching to the passive voice.

Looking to whether the debt reflects anyone's fraud would also bar discharge not just for innocent partners, but also for innocent spouses, agents, assignees, and purchasers. There is no reason to think the debtor-friendly

modern Code perversely imposed sweeping collective responsibility.

B. *Strang*, 114 U.S. 555, does not dictate a contrary result. There, the Court refused to allow innocent business partners to discharge debts arising from another partner's fraud. But if that holding applied to all ensuing bankruptcy acts, *Strang* would foreclose Buckley's primary textual argument that Congress bars imputation in other discharge exceptions by expressly mentioning the debtor. Indeed, the 1867 Bankruptcy Act in *Strang* expressly referred to "fraud … of the bankrupt"—which, under Buckley's textual read, should have foreclosed imputing one partner's fraud to the others.

Strang also crafted a partnership liability rule as a matter of federal common law, not statutory text. *Erie* abrogated that act of judicial law-making. Even had *Strang* rested on text, Congress repealed the 1867 Act and repeatedly rewrote the fraud discharge provision. Congress does not ratify statutory-interpretation decisions through frequent redlining. Finally, if *Strang*'s reasoning lives on, then much of the modern Bankruptcy Code imputes responsibility. Fresh start would become the exception, not the rule.

ARGUMENT

I. Section 523(a)(2)(A) Permits Bankruptcy Discharges for Innocent Partners

The Bankruptcy Code offers individual debtors the lifeline of a "fresh start," discharging all debts except in narrow circumstances. The exception at issue here—section 523(a)(2)(A)—states: "A discharge under section 727 … does not discharge an individual debtor from any debt … for money, property, services, or … credit, to the

extent obtained by … false pretenses, a false representation, or actual fraud." That provision does not apply to innocent debtors.

A. The Bankruptcy Code's Default Rule Is Discharge Absent Unambiguous Text Otherwise

Bankruptcy law was once "harsh," "as much concerned with ensuring full satisfaction of creditors … as with securing new beginnings for debtors." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 365 (2006). Well into the 18th century, debtors faced "perpetual bondage to their creditors," surviving on "a miserable pittance [and] dependent upon the bounty or forbearance of [their] creditors." 3 Joseph Story, *Commentaries on the Constitution* § 1101, at 5 (1833); *see Katz*, 546 U.S. at 365. That system also harmed creditors, since debtors had little incentive to cooperate or repay. Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy*, 21 U. Rich. L. Rev. 49, 54-55 (1986).

Gradually, bankruptcy law adopted a more "liberal spirit." *Neal v. Clark*, 95 U.S. 704, 709 (1878). The short-lived 1867 Bankruptcy Act permitted debtors who could pay half their debts to discharge the rest. Act of Mar. 2, 1867, ch. 176, § 33, 14 Stat. 517, 533 (1867 Act). In 1898, Congress expanded the universe of dischargeable debts. Act of July 1, 1898, ch. 541, § 14, 30 Stat. 544, 550 (1898 Act); *see* Hallinan, *supra*, at 60-62.

In 1978, the modern Code broke with past statutes by wholeheartedly embracing absolution for innocent debtors. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 240 (1989). "The principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor." *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (internal quotation marks omitted). The Code thus offers "broad provisions for the discharge of debts, subject to exceptions." *Lamar*, 138 S. Ct. at

1758. Those exceptions reflect "strong, special policy considerations, such as the presence of fault," that justify enduring indebtedness. *Bullock*, 569 U.S. at 276. Because nondischargeability can be "a financial death sentence" and reflects an "extreme penalty for wrongdoing," discharge is the norm. 3 Bankr. Litig. § 14:1 (Sept. 2021 update) (citations omitted).

This Court thus deploys a "long-standing" interpretive rule: "[E]xceptions to discharge 'should be confined to those plainly expressed.'" *Bullock*, 569 U.S. at 275 (quoting *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998)); *accord Schwab v. Reilly*, 560 U.S. 770, 790 n.17 (2010). That "'well-known' guide" fulfills modern bankruptcy's role in "aid[ing] the unfortunate debtor by giving him a fresh start in life." *See Kawaauhau*, 523 U.S. at 62; *Lamar*, 138 S. Ct. at 1758 (citation omitted). Lifelong debt "destroys all encouragement to industry and enterprize on the part of the unfortunate debtor, by taking from him all the just rewards of his labour." Story, *supra*, § 1101, at 5. Congress must speak exceptionally clearly before courts will subject debtors to that fate.

Section 523(a)(2)(A) does not "plainly express[]" a rule that the individual debtor must permanently bear debts attributable to others' fraud. *Bullock*, 569 U.S. at 275 (citation omitted). Instead, the provision "does not discharge an individual debtor from any debt … for money, property, services, or … credit, to the extent obtained by … actual fraud." The lack of a clear statement rendering an innocent debtor liable for *someone else's* fraud is dispositive. Bankruptcy's default result—discharge—governs. It would turn the Code on its head to read the phrase "to the extent obtained by … actual fraud" as referring to fraud by anyone other than the individual debtor.

B. Section 523(a)(2)(A)'s Text Bars Discharge Only When Individual Debtors Commit Fraud

Multiple textual cues confirm that the "most straightforward reading of § 523(a)(2)(A) is that it prevents the discharge of 'any debt' respecting 'money, property, services, or … credit' that *the debtor* has fraudulently obtained." *Cohen v. de la Cruz*, 523 U.S. 213, 218 (1998) (emphasis added). Section 523 focuses on the "individual debtor" and judges each debtor individually, not by what their spouses, partners, or affiliates have done. So if, as here, the individual debtor lacks fraudulent intent, courts cannot impute someone else's fraudulent intent to her.

"Individual debtor." Section 523(a)(2)(A) puts the "individual debtor" front and center by declining to "discharge *an individual debtor* from any debt" for assets "obtained by" fraud. An "individual" is "[a] particular being as distinguished from a class, species, or collection." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1741 (2020) (quoting *Webster's New International Dictionary* 1267 (2d ed. 1954)); *see also Mohamad v. Palestinian Auth.*, 566 U.S. 449, 454 (2012). The Code defines a "debtor," in relevant part, as a "person … concerning which a case … has been commenced." 11 U.S.C. § 101(13). And the Code defines "person" to separate out "individual[s], partnership[s], and corporation[s]." *Id.* § 101(41). Thus, the particular person seeking discharge is the "individual debtor"—not spouses, partners, agents, or dependents.

Indeed, Congress foreclosed grouping the debtor with anyone else. Section 523(a)(2) twice distinguishes "the debtor" from "an insider"—a term that includes a "relative" of an individual debtor or of her "general partner," a "general partner of the debtor," "a partnership in which the debtor is a general partner," or a "corporation" where the "debtor is a director, officer, or person in control." *Id.* § 101(31) (defining "insider"); *id.* § 523(a)(2)(A),

(B) (addressing statements "respecting the debtor's or an insider's financial condition"). Section 523(a)(2)(C)(ii) likewise differentiates between the "debtor" and "a dependent of the debtor," even though common-law principles might otherwise make debtors vicariously liable for dependents' actions.

These distinctions between the "debtor" and related actors recur throughout chapter 5, which articulates substantive rules applicable in all bankruptcy cases. Most prominently, section 524(e) provides: "[D]ischarge of a debt of the debtor does not affect the liability of any other entity on … such debt." In other words, discharging one partner's debt does not let others off the hook, even if common-law rules treat all partners as equally responsible. Or take section 522(b)(1), which delineates what property is exempt from the bankruptcy estate for "debtors who are husband and wife" when "one debtor" wants certain exemptions and "the other debtor" disagrees. Even though state law might let one spouse bind the couple, the Code treats each spouse separately. *Accord id.* § 522(m). And section 524(b) allows creditors to recover from community property if one spouse is denied discharge. But the innocent party's separate property remains protected. *Collier on Bankruptcy* ¶ 524.02[3] (16th ed. 2022).[2]

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[2] *Accord, e.g.*, 11 U.S.C. § 508 (providing rules for payments that "a general partner that is not a [chapter 7] debtor" pays to "a creditor of a partnership debtor"); *id.* § 510(b) (subordinating claims when "the debtor or … an affiliate of the debtor" rescinds securities transaction); *id.* § 522(a)(1) (defining "spouse" as a "dependent," separate from debtor); *id.* § 522(d) (distinguishing "debtor" and "dependent of the debtor"); *id.* § 522(f), (*l*), (o) (same); *id.* § 525 (prohibiting discrimination against a "debtor … or another person with whom such … debtor has been associated").

The rest of the Code also separates debtors from related individuals. Case in point: Section 727(a)(7) bars "the debtor" from discharging *any* debts if he "committed" misconduct (like concealing records) "in connection with another case … concerning an insider," *e.g.*, the debtor's partner. Not only are debtors and their partners distinct; Congress clearly knows how to hold debtors responsible for conduct implicating their partners' bankruptcy cases when Congress wants to do so.[3]

"Obtained by." Section 523(a)(2) then directs the bankruptcy court to determine whether the assets were "obtained by" fraud. *See Cohen*, 523 U.S. at 218 ("to the extent obtained by" modifies "money, property, services, or … credit"). To "obtain" means to "get hold of by effort." *Webster's New International Dictionary* 1682 (2d ed. 1949). That verb choice focuses on an individual actor. Individuals get hold of things by effort.

But who? Grammatically, the passive voice of "obtained by" "does not itself answer this question." *Cf. E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 128 (1977). But context makes the answer obvious. The sentence "Jane's clerkship was obtained through hard work" does not say *whose* hard work led to the clerkship. But the natural answer is Jane, not her parents, classmates, or recommenders. Likewise, if a State's pardon scheme provides: "A pardon does not relieve the recipient from

[3] *Accord, e.g.*, 11 U.S.C. § 101(10A) (distinguishing "the debtor," "the debtor's spouse," and "the debtor's dependents"); *id.* § 363(j) (permitting "the debtor's spouse" or "co-owners" to recover from property sales); *id.* § 707(b)(2)(A)(ii) (distinguishing "the debtor," "the spouse of the debtor," "the dependents of the debtor," "the family of the debtor," and other relatives "of the debtor"); *id.* § 1129(a)(5)(A)(i) (requiring disclosure of any "affiliate of the debtor participating in a joint plan with the debtor"); *id.* § 1301(a) (barring collection of consumer debt "from any individual that is liable on such debt with the debtor").

professional disbarment imposed for moral turpitude," the meaning is clear. The pardon recipient was disbarred. If the pardon recipient was disbarred based on her own moral turpitude, the pardon does not provide relief. If she was disbarred for participating in a scheme involving moral turpitude only by someone else, the pardon gives a second chance. Because these sentences begin by identifying the person who receives a benefit, the natural inference is that the rest of the sentence refers to the same person.

So too here, when parsing the sentence, "A discharge … does not discharge an individual debtor from any debt … for money … to the extent obtained by … fraud," the only plausible person who commits that fraud is the "individual debtor." The only other actor in section 523(a)(2)(A) is "an insider," who appears only as a possessive noun: Section 523(a)(2)(A) excepts fraud involving "statement[s] respecting the debtor's or *an insider*'s financial condition." That leaves the "individual debtor" as the only listed actor who could "obtain" assets by fraud. The "individual debtor" is already the person who bears the debt. Congress' use of "obtained by"—a verb requiring individual effort—reinforces that section 523(a)(2)(A) focuses on the individual debtor's conduct, too.

"False pretenses, a false representation, or actual fraud." Finally, section 523(a)(2)(A) pinpoints specific, wrongful acts that bar discharge—"false pretenses, a false representation, or actual fraud." Buckley agrees that these common-law torts require wrongful intent; he merely disputes *whose* intent qualifies. Br. in Opp. 15. Again, context supplies the answer: the individual debtor. Fraud naturally implies the perpetrator's malintent, not innocent bystanders'.

False pretenses, false representations, and actual fraud incorporate the "elements that the common law has

defined them to include." *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 356, 360 (2016) (citation omitted). Critically, those torts all require scienter, *i.e.*, "intentional wrong." *Id.* "False pretenses" and "false representation" require "intent to defraud." *Black's Law Dictionary* 541-42 (5th ed. 1979). "Actual fraud" requires "wrongful intent," *i.e.*, intentional "deception or trickery." *Husky*, 578 U.S. at 360; *accord Restatement (Second) of Torts* § 526 (1977). An actor typically commits fraud by making "[a] *knowing* misrepresentation … of a material fact." *Unicolors, Inc. v. H&M Hennes & Maurtiz, L.P.*, 142 S. Ct. 941, 949 (2022) (quoting *Black's Law Dictionary* 802 (11th ed. 2019)). By including common-law torts with individualized scienter requirements, Congress underscored the focus on a single actor—the "individual debtor."

C. The Rest of Section 523 Confirms This Reading

The rest of section 523 centers on the individual debtor every step of the way.

1. Section 523(a)(2) operates as a whole, and both other subparagraphs—523(a)(2)(B) and (C)—clearly focus on the individual debtor and her state of mind.

Section 523(a)(2)(B) works in tandem with 523(a)(2)(A). Section 523(a)(2)(A) bars discharge for fraud but carves out fraudulent "statement[s] respecting the debtor's or an insider's financial condition." Section 523(a)(2)(B) bars debtors from discharging debts relating to such statements, but only when other conditions are met. Besides being false, those statements must be "in writing" and induce reasonable reliance. And, of particular relevance here, the statements must be ones "that the debtor caused to be made or published with intent to deceive." 11 U.S.C. § 523(a)(2)(B).

Buckley agrees that section 523(a)(2)(B) looks to only the individual debtor's conduct, and thus bars imputing

others' conduct to the debtor. Br. in Opp. 10. But section 523(a)(2)(B) reinforces that the relevant actor in section 523(a)(2)(A) is likewise the individual debtor. Otherwise, under Buckley's reading, Congress implausibly would have barred innocent debtors from discharging debts relating to anyone's fraud. Yet Congress would simultaneously allow innocent debtors to discharge fraud-related debts involving the kind of financial statements that fraudsters commonly make to wrongly obtain significant loans. It defies credulity that Congress would use such obscure language to impute mine-run fraud to innocent debtors, yet grant special reprieves if fraudulent financial statements are involved.

Section 523(a)(2)(C) creates a special presumption "for purposes of subparagraph (A)" that debts for cash advances "obtained by an individual debtor" are nondischargeable. 11 U.S.C. § 523(a)(2)(C)(i)(II). That usage reinforces that the "individual debtor" is the actor "obtain[ing]" assets throughout.

Section 523(a)(2)(C) puts a thumb on the scales against discharging consumer-credit debts that the individual debtor incurred for cash advances shortly before the bankruptcy filing. Congress considers those debts presumptively fraudulent. If 523(a)(2)(A) treated the debtor's and her partner's fraud interchangeably, 523(a)(2)(C)'s limitation to the individual debtor would make no sense. Congress would have barred a debtor from discharging debts arising from her partner's fraudulent misstatements on a mortgage application under 523(a)(2)(A). Yet Congress would allow that debtor to discharge debts arising from her partner's $400,000 cash advance weeks before filing for bankruptcy under 523(a)(2)(C). Such disparate treatment would be "inexplicably bizarre." *Cf. Lamar*, 138 S. Ct. at 1761.

2. Petitioner's reading is "reinforced by the structure of § 523(a)," the Code's list of discharge exceptions. *See Grogan v. Garner*, 498 U.S. 279, 287 (1991). Elsewhere, Congress used similar passive-voice formulations to refer to conduct that only the individual debtor could logically perform.

Take section 523(a)(1), which "does not discharge an individual debtor from any debt … for a tax or customs duty." Specifically, those debts are nondischargeable if a required "return" "was not filed or given," or "was filed or given" late. 11 U.S.C. § 523(a)(1)(B)(i)-(ii). That provision naturally refers to the individual debtor, the only identified subject in the rest of the sentence—and the person who personally owed taxes or duties. *See* S. Rep. No. 95-989, at 78 (1978) (section 523(a)(1) "nondischargeable debts" include "taxes for which *the debtor* had not filed a required return" or filed late) (emphasis added).

That conclusion holds true even though section 523(a)(1)(C) specifically refers to the debtor by excepting debts "with respect to which *the debtor* made a fraudulent return or willfully attempted … to evade or defeat such tax." 11 U.S.C. § 523(a)(1)(C) (emphasis added). By referring to "the debtor" there, Congress did not make the debtor irrelevant elsewhere. Otherwise, section 523(a)(1) would perversely punish debtors whose spouses, partners, or agents innocently failed to file returns or reports, yet exculpate debts where spouses, partners, or agents actually "made a fraudulent return." Rather, Congress omitted "the debtor" because the referent was self-apparent. *Cf. United States v. Briggs*, 141 S. Ct. 467, 470 (2020) (unstated but "natural referent" in military statute of limitations was military code).

Another example: Section 523(a)(3) "does not discharge an individual debtor from any debt … neither

listed nor scheduled under section 521(a)(1)." Again, section 523(a)(3) plainly means the *debtor* did not list or schedule the debt in question. Section 521's title, "Debtor's duties," is apt. The debtor is obviously the person who produces lists and schedules of debts and assets in bankruptcy.

Or consider section 523(a)(4), which "does not discharge an individual debtor from any debt … for fraud or defalcation while acting in a fiduciary capacity." Congress presumably meant that the individual debtor must have committed that misconduct while acting in a fiduciary capacity. *See* S. Rep. No. 95-989, at 79 (section 523(a)(4) "excepts debts for fraud *incurred by the debtor* while acting in a fiduciary capacity") (emphasis added); *Collier*, *supra*, ¶ 523.10[1][d] (section 523(a)(4) requires "that *the debtor* be acting in a fiduciary capacity") (emphasis added). Congress did not use the phrase "while acting" to change subjects midstream and loop in someone else's fraud or defalcation as a fiduciary.

Section 523(a)(12) similarly "does not discharge an individual debtor from any debt … for malicious or reckless failure to fulfill any commitment by the debtor" to federal agencies "to maintain the capital of an insured depository institution." That text specifies that the debtor is the person who committed to maintain capital—but does not expressly say who "malicious[ly]" or "reckless[ly] fail[ed]" to honor that commitment. Context makes the answer self-evident: the debtor—not someone else—must have intentionally violated her previous commitment. Buckley seemingly agrees. *See* Br. in Opp. 10.

Then there are sections 523(a)(14) and (14A), which "do[] not discharge an individual debtor from" debts "incurred to pay a tax." Once more, the natural inference is that the individual debtor incurred these debts, especially since the individual debtor's debts are the centerpiece of

bankruptcy. Section 523(a)(18) likewise "does not discharge an individual debtor from" debts "owed to a pension" or retirement plans. The debtor is undoubtedly the person who owes this money. *See* H.R. Rep. No. 109-31, pt. 1, at 64 (2005) (section 523(a)(18) exempts "any amount owed by *the debtor* to a pension," etc.) (emphasis added). Congress' fondness for the passive voice did not override the Code's laser focus on the individual debtor.

2. By contrast, in the limited circumstances when Congress wanted to bar discharge regardless of the individual debtor's culpability or intent, Congress used different language.

Section 523(a)(13) "does not discharge an individual debtor from any debt … for any payment of an order of restitution issued under title 18." That provision focuses on honoring a court order, not having the bankruptcy court weigh the debtor's conduct. The debtor could owe restitution because he committed a crime. Or he might owe restitution for aiding and abetting someone else's crime, or otherwise faces imputed responsibility. Section 523(a)(13) is indifferent to those details. What matters is that, whether through direct or vicarious liability, the debtor ended up on the hook for restitution. *Collier*, *supra*, ¶ 523.19.

Likewise, section 523(a)(14B) "does not discharge an individual debtor from any debt … incurred to pay fines or penalties imposed under Federal election law." Clearly, the individual debtor incurred that debt. But by tying the debt to fines or penalties, this provision honors the fines or penalties without reexamining the debtor's role in directly perpetrating underlying election-law violations.

Or take section 523(a)(19)(B), which "does not discharge an individual debtor from any debt … that …

results … from" a federal or state "judgment, order, consent order, or decree," or "settlement agreement" involving securities-law violations. So, if a state-court judgment holds an unwitting debtor liable for his partner's or employee's securities fraud, the debtor may not escape those debts.

These examples show that Congress knew how to hold debtors liable for others' misdeeds when Congress wanted to do so. *Cf. Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 384 (2013). For discrete, disfavored debts involving things like criminal restitution, election fines, and securities fraud, Congress favored full repayment and administrative simplicity by honoring whatever imputation rules underlie judgments.

But Congress chose differently in section 523(a)(2)(A). By declining to "discharge an individual debtor" from debts "obtained by … actual fraud," section 523(a)(2)(A) directs the bankruptcy court to determine in the first instance whether the debt reflects fraud. Bankruptcy courts thus ask whether the *individual debtor* committed fraud, including possessing the requisite intent. That inquiry materially differs from whether the individual debtor has a judgment against him for fraud, which might reflect all kinds of vicarious-liability theories that section 523 does not incorporate.

D. Allowing Innocent Partners to Discharge Debts Furthers Bankruptcy Policy

1. Granting discharge to innocent partners furthers bankruptcy's goals. Section 523(a)(2)(A) reflects the Code's "basic policy … of affording relief only to an 'honest but unfortunate debtor.'" *Lamar*, 138 S. Ct. at 1758 (citation omitted). Denying discharge metes out "retribution" to the dishonest debtor. Theresa J. Pulley Radwan, *Determining Congressional Intent Regarding Dischargeability of Imputed Fraud Debts in Bankruptcy*, 54

Mercer L. Rev. 987, 1029 (2003). Section 523(a)(2)(A) thus "continues the tradition" of "prohibit[ing] debtors from discharging liabilities incurred on account of *their* fraud, embodying a basic policy animating the Code of affording relief only to an 'honest but unfortunate debtor.'" *Cohen*, 523 U.S. at 217 (emphasis added) (citation omitted).

But such "retribution is at odds with the notion of an innocent debtor." Radwan, *supra*, at 1029. Denying discharge forces the innocent partner to forever bear responsibility for someone else's act despite any "bad faith or immorality" on her part. *See Husky*, 578 U.S. at 360 (citation omitted).

Take this case. As the bankruptcy court found, Kate acted "reasonab[y]" in not discovering David's purported fraud. Pet.App.57a. Living elsewhere and working full time, Kate had no reason to notice defects that slipped the attention of an experienced developer and real-estate "mogul" like Buckley. *See* F.E.R.276-77. Denying discharge would leave Kate trying to pay off a debt that grows by 10% annually. By the time Kate reaches 85, she will owe Buckley $35 million.

All sorts of relationships could equally trigger lifelong liability. The widow who trusts her son-in-law to run the family store, not knowing that he swindles customers. The doctor whose nurse forges her signature on Medicare reimbursements. The college student who partners with his roommate by investing $100 in the roommate's startup—which turns out to be a Ponzi scheme. And virtually any marriage where one spouse engages in financial misconduct could be recast as a partnership. The bar for finding a partnership is low: jointly participating in a one-off profit-making endeavor would do the trick, regardless of the spouses' intent or whether they sign a partnership agreement. *See* J.A.4-5 n.3, 43; Unif. P'ship Act § 202(a), (c)(3) & cmt. (1997).

Buckley urges that Congress should favor creditors over innocent partners. Br. in Opp. 13-14. But if "merely protecting creditors from harm justified the denial of discharge, no discharge would exist." Radwan, *supra*, at 1028. The Code embraces a different calculus, permitting discharge absent "fault" or other "strong policy reasons." *Bullock*, 569 U.S. at 276. Creditors' universal interest in repayment is not a "strong policy reason[]" to justify saddling blameless debtors with lifelong debt. *See id.*

Nor does protecting innocent partners leave creditors in the lurch. *Contra* Br. in Opp. 13-14, 16. Creditors can, of course, seek recovery from the partner who committed fraud, as Buckley did. And for married partners, creditors may be able to garnish joint or community property (like Kate's wages) even if the innocent partner obtains discharge. *See* 11 U.S.C. § 524(b).

2. Section 523(a)(2)(A)'s focus on the debtor's own conduct and intent also avoids practical problems. The bankruptcy court always has the individual debtor before it. 11 U.S.C. §§ 301-303. Determining whether that debtor committed fraud is usually straightforward. Here, for example, the court put Kate on the stand and found that she "consistently, clearly, and credibly maintained" that she lacked knowledge of any fraud. Pet.App.46a.

Imputation, by contrast, risks complicated forays into whether some third party committed fraud. Say the business partner had died before the innocent partner filed for bankruptcy. The bankruptcy court would have to take evidence on whether the dead man acted with fraudulent intent. Section 523(a)(2)(A)'s text offers no reason to think Congress wanted such a bizarre regime.

II. Contrary Interpretations Are Untenable

Buckley contends that section 523(a)(2)(A) bars discharge for honest debtors whose partners committed

fraud. His first theory is that, by using the passive voice to describe the relevant debts ("obtained by" fraud) and omitting an express, debtor-specific mens rea requirement, section 523(a)(2)(A) bars the debtor from discharging debts attributable to *anyone's* fraud. Br. in Opp. 9-11. Buckley's second theory is that *Strang*, 114 U.S. 555, already resolved that debtors are liable in bankruptcy for debts arising from their partners' fraud. Br. in Opp. 11. Neither theory withstands scrutiny.

A. The Anyone's-Fraud-Counts Reading Is Wrong

1. Buckley contends that section 523(a)(2)(A) covers "all debts for money that was 'obtained by' actual fraud, without regard to the debtor's involvement in, or state of mind as to, the underlying fraud." Br. in Opp. 9. Under Buckley's view, because section 523(a)(2)(A) employs the passive voice, the debtor is on the hook so long as the assets were "obtained by" *someone's* fraud.

The Court's cases repudiate the notion that Congress takes all comers just by using the passive voice. Consider Congress' passive-voice directive that "[a] defendant shall be given credit" for time served. 18 U.S.C. § 3585(b) (1984). An earlier iteration mandated that "[t]he Attorney General shall give any such person credit" for time served. 18 U.S.C. § 3568 (1982). Under Buckley's approach, jettisoning the mention of the Attorney General should be smoking-gun proof that Congress broadened the cast of characters to include anyone who can award time served (such as district courts). But this Court called that "a rather slim ground for presuming an intention to change … well-established procedures" and held based on other contextual clues that the Attorney General remained the sole actor who could award good-time credit. *United States v. Wilson*, 503 U.S. 329, 335-36 (1992).

Or consider the Federal Unemployment Tax Act, which mandates that "no person shall be denied compensation" on the basis of pregnancy. 26 U.S.C. § 3304(a)(12). That passive-voice formulation does not say *who* denies compensation based on pregnancy. Under Buckley's approach, that formulation should cover state and private actors alike. Yet the Court reasoned from context that this provision addresses States, and focuses on "the basis for the State's decision." *Wimberly v. Lab. & Indus. Rels. Comm'n*, 479 U.S. 511, 516 (1987).

In short, "[w]hen Congress writes a statute in the passive voice, it often fails to indicate who must take a required action," and "[t]his silence can make the meaning of a statute somewhat difficult to ascertain." *Wilson*, 503 U.S. at 334-35. But rather than turning Congress' silence into a fill-in-the-blank exercise with anyone who might perform the action, this Court solves the whodunnit with other textual and contextual clues. *E.g.*, *E.I. du Pont*, 430 U.S. at 128 (resting on "other parts of the statute" because the at-issue provision, by "speak[ing] only in the passive voice," does not "answer" the "question"). Here, text and context overwhelmingly point to the "individual debtor" as the only actor Congress had in mind. *Supra* pp. 18-27.

Buckley portrays Code provisions where Congress expressly mentioned "the debtor's state of mind" as proof that "[w]here the debtor's intent matters, the Code says so—and where it does not, it does not." Br. in Opp. 10. Buckley's no-imputation-allowed list thus features sections 523(a)(2)(B), which refers to false statements "the debtor caused to be made or published with intent to deceive"; 523(a)(6), which excepts debts "for willful and malicious injury by the debtor to another"; and 523(a)(12), which excepts debts "for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency." Br. in Opp. 10; *see*

also Br. in Opp. 11 (citing 11 U.S.C. §§ 548(a)(1)(A), 727(a)(2), (4)(A), 1305).[4]

But, as noted, Buckley agrees that section 523(a)(2)(A) also contains a mens rea requirement. Br. in Opp. 15-16. "[A]ctual fraud," "false pretenses," and "false representation[s]" are common-law torts; the grounds in the other provisions are not. That "historically persistent textual difference" belies Buckley's "attempt to draw an inference" from the explicit mens rea requirements in other provisions. *Cf. Field v. Mans*, 516 U.S. 59, 68-69 (1995). In section 523(a)(2)(A), Congress incorporated common-law elements—including wrongful intent—just by mentioning common-law torts. *Id.* at 68-70. Buckley would thus apparently concede defeat if section 523(a)(2)(A) provided that the fraud "be[] committed by 'the debtor'"—even without an express mens rea requirement. *See* Br. in Opp. 9. So the only difference between section 523(a)(2)(A)'s wrongful-intent requirement and Buckley's no-imputation examples is that section 523(a)(2)(A) does not connect fraudulent intent to any particular person, whereas Buckley's examples all refer to "the debtor."

In other cases interpreting the Code, this Court has repeatedly rejected the theory "that the expression of one thing indicates the inclusion of others unless the exclusion is made explicit." *Hartford Underwriters Ins. v. Union Planters Bank, N.A.*, 530 U.S. 1, 8 (2000) (refusing to attach significance to Congress' use of "only" elsewhere but

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[4] Buckley cites Collier as supporting this argument as to section 523(a)(2)(B). Br. in Opp. 10-11. But Collier just says that "the plain language" of section 523(a)(2)(B) requires the debtor's intent—as it obviously does. *Collier*, *supra*, ¶ 523.08[3]; *see* 11 U.S.C. § 523(a)(2)(B)(iv). Collier nowhere says that section 523(a)(2)(B)'s explicit intent requirement means that section 523(a)(2)(A) does not require *the debtor's* intent.

not in provision at issue); *accord Mission Prod.*, 139 S. Ct. at 1663-64 (same for "notwithstanding rejection"). And it would be particularly anomalous to treat Congress' omission of "the debtor" as dispositive. Across contexts, this Court has refused to attach talismanic significance to Congress' designation of an actor in one provision versus Congress' obfuscatory use of the passive voice elsewhere.

Take the Fair Housing Act. Section 810 authorized any "person aggrieved" by various practices to seek relief, but required administrative exhaustion first. 42 U.S.C. § 3610(a) (1976). By contrast, section 812 employed the passive voice: "The rights granted by section[] [804] … may be enforced by civil actions" in federal court. *Id.* § 3612(a). Under Buckley's approach, that difference should mean that someone besides "person[s] aggrieved" brought civil actions under section 812. But this Court considered the passive-voice usage irrelevant, holding that both provisions referred to "person[s] aggrieved" based on statutory context. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 103-05 (1979).

Another problem for Buckley is that, far from painstakingly considering when to mention "the debtor," Congress arbitrarily included and excluded the phrase across chapter 5. For instance:

- Chapter 5 twice refers to the exact same type of debt—for "death or personal injury" caused by the debtor driving while intoxicated. One provision expressly identifies the debtor as the culprit; the other does not. Section 507(a)(10) prioritizes claims against the debtor "for death or personal injury resulting from the operation of a motor vehicle … if such operation was unlawful because the debtor was intoxicated." That provision does not say who operated the vehicle, only that the debtor's inebriation made someone's operation of a vehicle unlawful. By contrast, section

523(a)(9) makes nondischargeable debts "for death or personal injury caused *by the debtor's operation* of a motor vehicle … if such operation was unlawful because the debtor was intoxicated." 11 U.S.C. § 523(a)(9) (emphasis added). Congress' variation between "resulting from the operation of a motor vehicle" and "caused by *the debtor*'s operation of a motor vehicle" did not create an inexplicable schism between two parallel provisions.

- Congress superfluously included references to "the debtor" throughout chapter 5. Section 503(c)(1) bars transfers "made to … an insider *of the debtor*," even though the Code already defines an "insider" in relation to "the debtor." *Id.* §§ 101(31), 503(c)(1) (emphasis added); *cf. id.* § 503(c)(2). Likewise, section 510(b) addresses claims involving the securities "of an affiliate *of the debtor*," even though the Code already defines "affiliate" in relation to "the debtor." *Id.* §§ 101(2), 510(b) (emphasis added). And section 521(e)(3) allows a chapter 13 creditor to request "a copy of the plan filed *by the debtor*," *id.* § 521(e)(3) (emphasis added), even though in chapter 13, only the debtor can file a plan, *id.* § 1321.[5]

- Conversely, Congress omitted "the debtor" from many passive-voice provisions that can only refer to

[5] *Accord, e.g.*, 11 U.S.C. § 521(a)(1)(iii)(I) (certification that an "attorney or the bankruptcy petition preparer delivered *to the debtor* the notice required by section 342(b)," even though section 342(b) only covers notice to the debtor); *id.* § 521(g)(1)(A) (requiring statement under section 521(f)(4) to describe "the amount and sources of the income *of the debtor*" even though section 521(f)(4) statements only include the debtor's financial information); *id.* § 524(m)(1) (presumption of hardship "may be rebutted in writing *by the debtor*" via written statement that the debtor must "sign and date," *see id.* § 524(k)(6)(A)).

the debtor. Section 523 examples are plentiful. *Supra* pp. 24-26. Beyond those, "domestic support obligations … owed to or recoverable by a spouse" or others mean obligations *the debtor* owes. 11 U.S.C § 507(a)(1)(A); *cf. id.* § 507(a)(1)(B). Section 522(e)'s reference to "[a] waiver of an exemption executed in favor of a creditor" refers to a waiver executed by *the debtor*, who files for property exemptions under the Code. And section 541's exclusions from the estate of "funds placed in" educational accounts for the debtor's children or grandchildren plainly refer to funds placed there by *the debtor*. *Id.* § 541(b)(5), (10).[6]

This Court's decision in *Husky* reinforces the unlikelihood that Congress gave the phrase "the debtor" magic-word status to differentiate situations where anyone's conduct counts. There, the Court assessed whether "interpreting 'actual fraud' in § 523(a)(2)(A) to encompass fraudulent conveyances would render duplicative" two other exemptions, including section 523(a)(6). 578 U.S. at 363. After analyzing the scope of those provisions, the Court found "clear differences between these provisions" in the types of conduct they covered, as well as "narrow redundancies." *Id.* at 364. But under Buckley's theory, *Husky*'s deep dive into section 523(a)(6) was unnecessary because 523(a)(6) only covers "willful and malicious injury *by the debtor*." 11 U.S.C. § 523(a)(6) (emphasis added). Were Buckley's theory correct, *Husky* should have just said that sections 523(a)(2)(A) and (a)(6) have completely different scopes because the former sweeps in all sorts of actors' fraud, while the latter only counts the debtor's.

[6] *Accord, e.g.*, 11 U.S.C. § 507(a)(8)(B) ("a property tax *incurred* before the commencement of the case," *i.e.*, a tax incurred by the debtor); *id.* § 521(f) (statement of the debtor's income and expenses "during the tax year of the debtor most recently concluded before such statement *is filed*," *i.e.*, filed by the debtor).

The same goes for *Husky*'s comparison of section 523(a)(2)(A) with 727(a)(2), which bars discharge altogether if the debtor "transferred, removed, destroyed, mutilated, or concealed" property "with intent to hinder, delay, or defraud a creditor" or others. *Husky* discussed ways in which section 727(a)(2) "is broader" and also "narrower" than section 523(a)(2)(A). 578 U.S. at 364. Not mentioned: Buckley's hypothesis that Congress limited section 727(a)(2) to debtors, but opened the floodgates to other actors in 523(a)(2)(A).

2. Buckley's approach would also create an implausible counterhistory of the Bankruptcy Code. Under Buckley's approach, far from evolving to embrace the "fresh start," successive bankruptcy statutes stuck debtors with ever greater responsibility for others' misconduct.

Tax-related debts. Since 1978, section 523(a)(1) has excluded from discharge "any debt … for a tax or a customs duty" where a return "was not filed" or "was filed" late. Act of Nov. 6, 1978, Pub. L. No. 95-598, § 523(a)(1)(B)(i)-(ii), 92 Stat. 2549, 2590 (1978 Act). Tax-related exclusions date to 1898. 1898 Act § 17(1), 30 Stat. at 550. The original version excluded debts of the bankrupt "due as a tax levied by the United States" or "the State, county, district, or municipality in which *he* resides," which clearly identified the debtor as the delinquent taxpayer. *Id.* (emphasis added); *accord* Act of Feb. 5, 1903, Pub. L. No. 57-62, § 5, 32 Stat. 797, 798 (1903 Amendments). Then, 1938 amendments covered taxes levied by "any State, county, district, or municipality," reaching tax debts outside the debtor's place of residence (*e.g.*, property taxes on a vacation home). Act of June 22, 1938, Pub. L. No. 75-696, § 17(1), 52 Stat. 840, 851 (1938 Amendments). Under Buckley's theory, Congress in 1938

would have implausibly made debtors responsible for *others'* tax delinquencies just by employing the passive voice and deleting a pronoun.

Embezzlement. Since 1978, section 523(a)(4) has excluded from discharge "debt[s] … for … embezzlement." 1978 Act § 523(a)(4), 92 Stat. at 2590-91. But earlier versions since at least 1867 barred discharge of "debt created by the … embezzlement of the bankrupt." 1867 Act § 33, 14 Stat. at 533. The 1898 Bankruptcy Act consistently barred "a bankrupt" from discharging debts "created by *his* … embezzlement." 1898 Act § 17(4), 30 Stat. at 550-51 (emphasis added); *accord* 1903 Amendments § 5, 32 Stat. at 798; 1938 Amendments § 17(4), 52 Stat. at 851. Under Buckley's approach, the 1978 Code for the first time punished innocent debtors for others' embezzlement by keeping the passive voice and deleting a pronoun, yet no one noticed this sea change.

Fiduciary misconduct. Since 1978, section 523(a)(4) has excluded from discharge "debt[s] … for fraud or defalcation while acting in a fiduciary capacity." 1978 Act § 523(a)(4), 92 Stat. at 2590-91. Previous versions barred the "bankrupt" from discharge of "debt created … by *his* defalcation as a public officer, or while acting in any fiduciary character," 1867 Act § 33, 14 Stat. at 533 (emphasis added), or for debt "created by *his* … defalcation while acting as an officer or in any fiduciary capacity," 1898 Act § 17(4), 30 Stat. at 550-51 (emphasis added); *accord* 1903 Amendments § 5, 32 Stat. at 798; 1938 Amendments § 17(4), 52 Stat. at 851. The Court interpreted those versions to target *the debtor*'s misconduct. *E.g.*, *Crawford v. Burke*, 195 U.S. 176, 188-89 (1904). Again, Buckley's approach yields the head-scratching result that the 1978 Code—the champion of the "fresh start"—left innocent debtors liable for more nondischargeable debts by using a passive-voice formulation and omitting a pronoun.

Willful and malicious injuries. Conversely, since 1978, section 523(a)(6) has excluded from discharge "debt[s] … for willful and malicious injury *by the debtor* to another entity" or property. 1978 Act § 523(a)(6), 92 Stat. at 2590-91 (emphasis added). Buckley claims that Congress foreclosed imputation there by combining "the debtor" with a mens rea requirement. Br. in Opp. 10. Yet, from 1898 until 1978, the Bankruptcy Act merely barred discharge of debts "for willful and malicious injuries to the person or property of another." 1898 Act § 17(2), 30 Stat. at 550 (emphasis added); *accord* 1903 Amendments § 5, 32 Stat. at 798; 1938 Amendments § 17(2), 52 Stat. at 851. Under Buckley's theory, Congress' 1978 insertion of "by the debtor" massively constricted the scope of this provision. Yet contemporaneous commentators, without apparent disagreement, described the amendment as not "departing from current law." J. Ronald Trost et al., *Discharge of Debts Under the New Bankruptcy Code*, Prac. Law., June 1, 1979, at 51, 54.

3. The anyone's-fraud-will-do argument also proves too much. If the "character of the debt" is dispositive, Br. in Opp. 9 (citation omitted), then assets procured by anyone's fraud should be nondischargeable, no matter the relationship between the fraudster and the debtor. Innocent spouses, dependents, agents, assignees, or purchasers could all find themselves saddled with nondischargeable debts if it turned out someone else procured the underlying assets by fraud.

Take this case. The Ninth Circuit imputed David's intent to Kate because of their business partnership. Pet.App.5a-6a. But under Buckley's reading, the partnership is irrelevant. No matter what, as David's wife, Kate still would have received money from the sale tainted by David's purported fraud. Under Buckley's view of section

523(a)(2)(A), she would have "obtained" assets "by … actual fraud"—David's—despite being unaware.

Or say one spouse fraudulently racks up massive debt on a joint credit card, unbeknownst to the other. If the fraud-related character of the debt is all that matters, the innocent spouse could discover the fraud, divorce the fraudster, yet still carry the debts for life. *See* Steven H. Resnicoff, *Is It Morally Wrong to Depend on the Honesty of Your Partner or Spouse?*, 42 Case W. Res. L. Rev. 147, 178-80 (1992).

Spouses and partners are not the only ones at risk. Say a man falsely claims to be a nonsmoker on his life-insurance application. He dies; his daughter collects on the policy; and the insurance company sues to recoup the money after discovering the man smoked. If the daughter cannot repay the funds, is her debt to the insurance company nondischargeable due to her father's falsehood? Or suppose a girlfriend assumes her down-on-his-luck boyfriend's student-loan debt after they move in together. If it turns out the boyfriend fraudulently misrepresented his income on the loan application, did the girlfriend's generosity saddle her with a nondischargeable debt? Buckley's anyone's-fraud-counts theory would inject the risk of inescapable debt into everyday transactions, turning bankruptcy's fresh start into an empty promise.

B. *Strang* Does Not Require Barring Innocent Partners from Discharge

Buckley also argues that *Strang*, 114 U.S. 555, "interpreted Section 523(a)(2)(A)'s predecessor" to hold innocent debtors liable for their partners' fraud. Br. in Opp. 11. *Strang* involved section 33 of the Bankruptcy Act of 1867, which barred discharge of "debt[s] created by the fraud or embezzlement of the bankrupt." 14 Stat. at 533. Buckley interprets *Strang* to hold that unwitting partners

are responsible for their partners' fraud and cannot discharge the ensuing debts, and sees "no indication that Congress abrogated [*Strang*] in the interim." Br. in Opp. 11. But signs abound that *Strang*'s 137-year-old view of partnership imputation does not control the meaning of today's differently worded Code.

1. If *Strang*'s imputation theory lives on, *Strang* would foreclose Buckley's primary contention that dischargeability exceptions foreclose imputation by expressly mentioning the debtor's intent. Br. in Opp. 10-11. Buckley agrees that fraud inherently requires fraudulent intent and that "stating that the fraud needs to have been committed 'by the debtor'" would limit the inquiry to the debtor herself, without imputation. Br. in Opp. 9, 15.

Under Buckley's interpretation, the provision in *Strang*—section 33 of the 1867 Bankruptcy Act—would bar imputation. Section 33 states: "[N]o debt created by the fraud or embezzlement *of the bankrupt*, or by *his* defalcation as a public officer, or while acting in any fiduciary character, shall be discharged." 14 Stat. at 533 (emphasis added).

Under Buckley's primary theory, "fraud … of the bankrupt" means that the bankrupt himself—not someone else—must satisfy each element of fraud, including possessing fraudulent intent. Yet, Buckley simultaneously contends, *Strang* requires "that one partner cannot discharge a debt for money obtained through another partner's actual fraud." Br. in Opp. 7.

2. *Strang*'s conclusion that innocent partners were liable for their partners' fraud also rested on federal common law that did not survive *Erie*, 304 U.S. 64.

In *Strang*, the defendants—partners in a defunct business—had obtained bankruptcy discharges for their

debts. The plaintiffs—owners of a business that had extended credit to defendants' business—sued in New York state court to recoup their losses, claiming that Strang, one of the defendant partners, had obtained that credit by fraud. 114 U.S. at 559. The question before the Court was whether plaintiffs' "claim for damages [was] of the class from which the bankrupts were relieved by their respective discharges." *Id.* The Court answered no: Strang had committed actual fraud, and thus section 33 of the 1867 Act barred discharging that debt. *Id.* at 560.

Strang's final paragraph briefly addressed a separate question: whether the other partners could "be held liable for the false and fraudulent representations of their partner." *Id.* at 561. This portion of *Strang* did not purport to interpret any statutory text. *Strang* did not, for instance, define "the bankrupt" under section 33 to include any partner or agent of the bankrupt or interpret "fraud" to include partnership liability.

Instead, *Strang* reasoned as a matter of federal common law that innocent partners should be liable for debts created by another's fraud. *Strang* thus cited state cases and partnership treatises to conclude that innocent partners should not "escape pecuniary responsibility" for debts arising from their partner's fraud. *Id.* at 561-62. And *Strang* added policy-driven limits, allowing imputation of one partner's fraud to innocent partners only if the culpable partner made a fraudulent representation "for the benefit of [the] firm," with "reference thereto," and "without notice of any limitations upon [the partner's] general authority." *Id.* at 561. All of this reasoning exemplified federal common-lawmaking, where federal courts supplemented the statutory text with atextual liability rules derived from common-law concepts. *E.g., Briggs v. Spaulding*, 141 U.S. 132 (1891) (supplementing federal

banking act with federal-common-law corporate-governance standard). Unsurprisingly, the Court later summarized this portion of *Strang* as follows: "*At common law* every member of a partnership is subject to … liability" for one partner's wrong. *James-Dickinson Farm Mortg. Co. v. Harry*, 273 U.S. 119, 123 (1927) (emphasis added).

Other pre-*Erie* cases reinforce that *Strang* rested on federal common law. For instance, section 14 of the 1903 Amendments barred discharging *all* debts if the bankruptcy "applicant … obtained property on credit from any person upon a materially false statement in writing." 1903 Amendments § 4, 32 Stat. at 797 (amending 1898 Act § 14, 30 Stat. at 550); *see* Act of June 25, 1910, Pub. L. No. 61-294, § 6, 36 Stat. 838, 839 (similar). Like the provision in *Strang*, section 14 targeted fraud and identified the bankrupt as the relevant actor. Yet many courts barred imputation of fraud to innocent partners under section 14, reasoning that an "intent to deceive can never be imputed to one who not only takes no part in making the written statement, but … knows nothing of it."[7] Had *Strang* interpreted "the bankrupt" or "fraud" to include acts of culpable partners imputable under common-law rules, *Strang* would have compelled courts to interpret section 14 similarly. But that is not how many courts interpreted *Strang.*

Erie then repudiated *Strang*'s federal-common-law rule of imputed liability. *Erie* rejected the existence of

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[7] *Frank v. Mich. Paper Co.*, 179 F. 776, 779-81 (4th Cir. 1910); *accord Doyle v. First Nat'l Bank of Balt.*, 231 F. 649, 652-53 (4th Cir. 1916); *Ragan, Malone & Co. v. Cotton*, 200 F. 546, 550 (5th Cir. 1912); *W.S. Peck Co. v. Lowenbein*, 178 F. 178, 180-81 (4th Cir. 1910); *Gilpin v. Merchants' Bank*, 165 F. 607, 611 (3d Cir. 1908); *Hardie v. Swafford Bros. Dry Goods Co.*, 165 F. 588, 590-92 (5th Cir. 1908); *see also In re Hyman*, 97 F. 195, 196-97 (S.D.N.Y. 1899) (1898 Act).

federal-court authority to create "substantive federal law." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001); *see Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020). Thus, this Court has recognized that *Erie* superseded pre-*Erie* federal common law, even if courts of appeals failed to realize it. For example, this Court in 1997 held that *Erie* abrogated *Briggs*, 141 U.S. 132, which fashioned "federal common-law corporate governance standards" under federal banking acts—even though courts of appeals had incorrectly considered *Briggs* a binding interpretation of successive banking statutes for generations. *Atherton v. FDIC*, 519 U.S. 213, 217-18 (1997). Likewise, importing common-law vicarious-liability concepts when the federal statutory text is silent constitutes impermissible common-lawmaking post-*Erie*. *E.g.*, *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182-83 (1994) (no reading common-law aiding-and-abetting liability into Securities Exchange Act); *cf. Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646-47 (1981) (no common-law contribution right in antitrust law).

3. Even had *Strang* interpreted the text of the 1867 Act, as opposed to creating federal common law, *Strang* would not govern today. Back then, many believed that "the protection and payment of creditors was the only legitimate point of permitting legal relief through bankruptcy." Hallinan, *supra*, at 54. But the life of the 1867 Act was "nasty, brutish, and short," and Congress repealed it in toto in 1878. David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 Bankr. Devs. J. 321, 321-22 & n.5 (1998) (citation omitted). Only in 1898 did Congress reenter the arena with a new, more debtor-friendly regime. *Id.* at 322. That evolution culminated in the 1978 Code, which overhauled previous bankruptcy practice to extend debtors a "fresh start." *See Marrama*, 549 U.S. at 367 (citation omitted).

Thus, "[t]he starting point" in interpreting the Code "is the existing statutory text, and not predecessor statutes." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (citation omitted); *accord Hartford Underwriters*, 530 U.S. at 10. Today's Code "often reflects substantial departures from various pre-Code practices," so it "makes little sense to graft onto the Code concepts that were developed during a quite different era." *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461-62 (1999) (Thomas, J., concurring in the judgment). And, across contexts, this Court does not assume that Congress ratified judicial interpretations of earlier statutes unless Congress reenacts the relevant language "without change" against a "broad and unquestioned" judicial consensus. *Jama v. ICE*, 543 U.S. 335, 349 (2005).

Here, Congress repealed the whole 1867 Act, then rewrote the fraud-discharge provision in ways incompatible with preserving imputation. Start with obvious textual differences. Section 33 of the 1867 Act speaks of "the bankrupt." But the modern Code is replete with descriptions of the "individual debtor"—a term introduced in 1978—and repeatedly distinguishes between the "individual debtor" and her spouse, partners, dependents, and other affiliates. Those provisions make pellucid that Congress refused to equate the "individual debtor" with anyone whose conduct might be attributable to her under common-law principles. *Supra* pp. 18-20.

Section 33 also targeted "debt created by the fraud or embezzlement of the bankrupt." 14 Stat. at 533. Today, the Code spreads discharge rules for fraud and embezzlement across multiple provisions. Section 523(a)(2)(A) covers "false pretenses, a false representation, or actual fraud," and uses different language ("obtained by" instead of "created by") to describe how the debtor procured the assets. Section 523(a)(2)(B) covers a subset

of fraud: written misstatements about "the debtor's or an insider's financial condition." And section 523(a)(4) groups "embezzlement" with "larceny" and "fraud or defalcation while acting in a fiduciary capacity." While the *concepts* of fraud and embezzlement have endured, the surrounding language about who performs those acts has changed, undercutting any notion that Congress ratified *Strang*'s imputation holding.

Further, Buckley agrees that section 523(a)(2)(B) bars courts from imputing a culpable partner's fraud to an unwitting partner. Br. in Opp. 10. Thus, even under Buckley's view, Congress abrogated *Strang* as to written false statements respecting financial condition. That abrogation makes it especially unlikely that Congress incorporated *Strang*'s imputation reasoning for other types of fraud.

Buckley responds that lower courts viewed *Strang* as barring innocent partners from discharging debts attributable to their partners' fraud even under post-1867 statutes. Br. in Opp. 12. Buckley's lone authority is Collier, who claims that "cases construing section 17a(2) of the [1898] Act uniformly" endorsed imputation, yet cites no such cases. *Collier*, *supra*, ¶ 523.08[3]. More significantly, this Court interpreted the 1898 Act thusly: "[W]hether the discharge of the defendants in bankruptcy shall operate as a discharge of plaintiff's debt, it not having been reduced to judgment, depends upon … whether it was or was not created by *defendant*'s fraud," etc. *Crawford*, 195 U.S. at 186 (emphasis added). Thus, the Court did not think words like "his," "the bankrupt," or "fraud" inexorably invited imputation.

4. If *Strang*'s imputation reasoning lives on, nothing would limit bankruptcy courts from putting innocent debtors on the hook for others' guilty acts throughout the

Code. Again, the 1867 Act covered "the fraud or embezzlement *of the bankrupt*." 1867 Act § 33, 14 Stat. at 533 (emphasis added). If the phrase "of the bankrupt" permits imputation, why would the Code's many references to the "individual debtor" exclude partners or agents? If *Strang* bakes into the Code the notion that innocent partners are always liable for their partners' wrongdoing, then imputation would reign everywhere.

Start with the other discharge exceptions in section 523. What if the debtor unwittingly owes tax penalties because his partner filed a late return? *See* 11 U.S.C. § 523(a)(1)(B)(ii). Or the debtor's partner, unbeknownst to the debtor, assaulted a customer? *See id.* § 523(a)(6). Or the partner hit a pedestrian while intoxicated? *See id.* § 523(a)(9). If *Strang* means that in bankruptcy, innocent partners are always responsible for their partner's bad acts, then all sorts of debts—even ones that refer to the debtor's own mental state—would follow the innocent partner forever.

Or take the total bars from discharge under section 727 (and the parallel provisions in other chapters, *see id.* §§ 1141, 1228, 1328). Most of those total bars rest on fraud or other particularly egregious acts that distort the bankruptcy process. If innocent debtors are always responsible for their partner's misconduct—even if the statute refers to an "individual debtor"—then innocent debtors would no longer be able to discharge *any* debts in bankruptcy. Section 727(a)(2)(A) and (3), for example, would deny any discharge to an innocent debtor whose partner "concealed" property or records with intent to hinder a creditor—say by taking home office furniture on the last day. Section 727(a)(6)(B) and (C) would bar discharge if a debtor's partner "refused … to respond to a material question" by the bankruptcy court.

Nor is it obvious that *Strang* would stop with partners. *Strang* rested on common-law agency principles, 114 U.S. at 561-62, which impute vicarious liability under myriad circumstances. An employer is generally liable for the torts of her employee acting within the scope of his employment. *Restatement (Third) of Agency* § 2.04 (2005). An employer unwitting of her employee's fraud, embezzlement, or larceny (to name a few) would nonetheless be unable to discharge debt arising from that tort. *See* 11 U.S.C. § 523(a)(2), (4).

Likewise, employers may be strictly liable for the torts of their independent contractors under certain circumstances. *See Restatement (Third) of Agency* § 7.06. A store owner on vacation could thus be permanently liable for debts arising from injuries her independent contractor maliciously inflicts on customers. *See* 11 U.S.C. § 523(a)(6). Or if the truck driver the store owner hires to transport merchandise drinks on the job, crashes, and creates a multi-fatality pileup. *See id.* § 523(a)(9).

In short, resurrecting *Strang*'s imputation rule would explode debtor liability. Discharge exceptions, no longer "confined to those plainly expressed," would swallow the Code. *See Bullock*, 569 U.S. at 275 (citation omitted). Far from offering a "fresh start" for the "honest but unfortunate debtor," *Lamar*, 138 S. Ct. at 1758 (citation omitted), bankruptcy would become a minefield of guilt-by-association.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

LISA S. BLATT
Counsel of Record
SARAH M. HARRIS
ANDREW L. HOFFMANN
AARON Z. ROPER
MARY E. GOETZ
WILLIAMS & CONNOLLY LLP
680 Maine Avenue SW
Washington, DC 20024
(202) 434-5000
lblatt@wc.com

IAIN ANGUS MACDONALD
MACDONALD FERNANDEZ LLP
221 Sansome St., 3rd Fl.
San Francisco, CA 94104
(415) 362-0449

RENO FERNANDEZ
ANNA-ROSE MATHIESON
COMPLEX APPELLATE LITIGATION GROUP LLP
96 Jessie Street
San Francisco, CA 94105
(415) 649-6700

JULY 19, 2022

STATUTORY APPENDIX

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11 U.S.C. § 523 ....1a

11 U.S.C. § 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1192[1] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, or equivalent report or notice, if required—

(i) was not filed or given; or

(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

(B) use of a statement in writing—

(i) that is materially false;

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[1] So in original. Probably should be followed by a comma.

(ii) respecting the debtor's or an insider's financial condition;

(iii) on which the creditor to whom the debtor is liable for such money, property, services, or credit reasonably relied; and

(iv) that the debtor caused to be made or published with intent to deceive; or

(C)(i) for purposes of subparagraph (A) —

(I) consumer debts owed to a single creditor and aggregating more than $500[2] for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than $750[2] that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii) for purposes of this subparagraph—

(I) the terms "consumer", "credit", and "open end credit plan" have the same meanings as in section 103 of the Truth in Lending Act; and

(II) the term "luxury goods or services" does not include goods or services reasonably necessary for the support or maintenance of the debtor or a dependent of the debtor;

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[2] Footnote omitted.

(3) neither listed nor scheduled under section 521(a)(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit—

(A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or

(B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request;

(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

(5) for a domestic support obligation;

(6) for willful and malicious injury by the debtor to another entity or to the property of another entity;

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—

(A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or

(B) imposed with respect to a transaction or event that occurred before three years before the date of the filing of the petition;

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or

(ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

(9) for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance;

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting

in a fiduciary capacity committed with respect to any depository institution or insured credit union;

(12) for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency to maintain the capital of an insured depository institution, except that this paragraph shall not extend any such commitment which would otherwise be terminated due to any act of such agency;

(13) for any payment of an order of restitution issued under title 18, United States Code;

(14) incurred to pay a tax to the United States that would be nondischargeable pursuant to paragraph (1);

(14A) incurred to pay a tax to a governmental unit, other than the United States, that would be nondischargeable under paragraph (1);

(14B) incurred to pay fines or penalties imposed under Federal election law;

(15) to a spouse, former spouse, or child of the debtor and not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit;

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a

legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

(17) for a fee imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under subsection (b) or (f)(2) of section 1915 of title 28 (or a similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915(h) of title 28 (or a similar non-Federal law);

(18) owed to a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, under—

(A) a loan permitted under section 408(b)(1) of the Employee Retirement Income Security Act of 1974, or subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title; or

(19) that—

(A) is for—

(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or

(ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and

(B) results, before, on, or after the date on which the petition was filed, from—

(i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding;

(ii) any settlement agreement entered into by the debtor; or

(iii) any court or administrative order for any damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return

made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar State or local law.

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A[3] of the Higher Education Act of 1965, or under section 733(g)[3] of the Public Health Service Act in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt of a kind specified in paragraph (2), (4), or (6) of subsection (a) of this section, unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge under paragraph (2), (4), or (6), as the case may be, of subsection (a) of this section.

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or

[3] Footnote omitted.

liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

(d) If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

(e) Any institution-affiliated party of an insured depository institution shall be considered to be acting in a fiduciary capacity with respect to the purposes of subsection (a)(4) or (11).