No. 21-908

In the Supreme Court of the United States

KATE MARIE BARTENWERFER, PETITIONER

v.

KIERAN BUCKLEY

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Petitioner and her business partner jointly sold respondent a home at a fraudulently inflated price, as her partner fraudulently misrepresented its condition. Petitioner is liable to the victim, respondent, under state law without regard to her knowledge of her partner's fraud, because her partner is her agent and he defrauded respondent while acting within the scope of the agency relationship. The question presented is whether the debt petitioner owes respondent for the money obtained by that actual fraud is a "debt … for money … obtained by … actual fraud," 11 U.S.C. 523(a)(2)(A), and therefore non-dischargeable in bankruptcy.

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BRIEF FOR RESPONDENT

INTRODUCTION

This Court should reject petitioner's effort to rewrite the statutory text. The Bankruptcy Code provides that a debtor cannot discharge "*any* debt ... for money ... obtained by ... actual fraud." 11 U.S.C. 523(a)(2)(A) (emphasis added). Petitioner nonetheless asserts that only *some* debts for money obtained by actual fraud are non-dischargeable. In the lower courts, petitioner argued that a debtor can discharge a debt for money obtained by an actual fraud perpetrated by her business partner, acting within the scope of the partnership, unless the debtor also "knew or should have known" of her partner's misrepresentations. Pet. App. 6a, 16a, 47a-48a. Petitioner has now abandoned that position. Petitioner now asserts that a debtor can discharge her debt to the victim even if she knew that her partner was defrauding him to enrich the partnership. Petitioner instead argues that the

debtor can discharge the debt unless the debtor "commit[s] the fraud and possess[es] the requisite intent," apparently all by herself, without an agent acting on her behalf. Pet. Br. 3. According to petitioner, the debtor is otherwise "innocent" and refusing a discharge would conflict with the "overarching aim" of providing a "fresh start." *Id.* at 3-4.

But this is a court, not a legislature, and this Court's inquiry should begin and end with the statutory text. "Any" debt for money obtained by fraud means "any" such debt of whatever kind, not just petitioner's gerrymandered subspecies of debts. "Once it is established that specific money or property has been obtained by fraud," then "'any debt' arising therefrom is excepted from discharge." *Cohen* v. *de la Cruz*, 523 U.S. 213, 218 (1998). The inquiry stops there, and it is undisputed those elements are satisfied. Petitioner and her partner jointly sold respondent a home at a fraudulently inflated price. And petitioner is liable to the victim (respondent) under state law without regard to her knowledge of the fraud, because her partner is her agent and he defrauded respondent while acting within the scope of the agency relationship. That is enough to prevent petitioner from discharging her obligation to compensate the victim.

This Court's decision in *Strang* v. *Bradner*, 114 U.S. 555 (1885), held a debt non-dischargeable on materially identical facts: The debtors owed a debt to victims of a fraud perpetrated by the debtors' partner on behalf of the partnership, but the debtors claimed they did not direct or know of the misrepresentations. *Id.* at 560-61. At the time, the statute required actual fraud "of the bankrupt" for a debt to be non-dischargeable, and the Court held that the debt *was* "created by their fraud" because one partner's fraud is "imputed ... to all the members of his

firm." *Ibid.* Business partners—then as now—are jointly and severally responsible for liabilities incurred by the partnership, including liabilities for fraud. So long as one partner defrauds a third party within the partnership's scope, "his partners cannot escape pecuniary responsibility therefor upon the ground that such misrepresentations were made without their knowledge." *Id.* at 561.

Congress has not provided the "clear indication" needed to depart from *Strang*. *Cohen*, 523 U.S. at 221 (citation omitted). To the contrary, Congress is fairly understood to have ratified *Strang* by deleting the requirement of fraud "of the bankrupt," and thus eliminating even an arguable textual hook for petitioner's theory. As amended, the statute depends on whether a person is liable for obtaining money by means of fraud, and petitioner is liable for just that.

Petitioner's claim that she is "innocent" is also fundamentally misplaced. Rather than invoking a free-floating inquiry into whether a debtor is "innocent," Congress deferred to state-law determinations about who should be held liable when money is obtained by fraud. And in the eyes of state law, petitioner is not "innocent." Under the same longstanding rules of agency law and vicarious liability that applied in *Strang*, petitioner is equally responsible for committing the fraud here: Her agent was acting on her behalf when he defrauded respondent to obtain more money for their partnership. The innocent person here is the victim, respondent.

For more than 150 years, the Code has protected victims of fraud rather than the debtors who are liable for defrauding them. The text is unambiguous. *Strang* is on point. That policy is beyond sensible. And petitioner's new theory is atextual, waived, and forfeited. This Court should affirm.

STATEMENT

1. In March 2008, respondent Kieran Buckley purchased a home in San Francisco's Noe Valley from two business partners: petitioner and David Bartenwerfer. J.A. 3, 4-5 n.3.[1] Kate was a licensed real estate broker and David was an unlicensed contractor. J.A. 2-3. Both were on the title to the house and they had done extensive renovation to the home since purchasing it. J.A. 5 n.3; Pet. App. 37a.

"[T]here is no dispute that [p]etitioner and [David] are deemed to have been partners." Pet. 30; see J.A. 4-5 n.3. Under California law, their business partnership meant that they would "shar[e] in the profits and losses" of their joint endeavor. *Chambers* v. *Kay*, 29 Cal. 4th 142, 151 (2002); see Cal. Corp. Code § 16306(a) ("all partners are liable jointly and severally for all obligations of the partnership"). Each became the agent of the other within the scope of their business, sharing assets *and* liabilities, including liabilities for torts like "the fraud of a copartner acting within the scope of his or her authority." *Miske* v. *Coxeter*, 204 Cal. App. 4th 1249, 1256 (2012). So long as one co-partner acted with the requisite scienter within the partnership's scope—and a third party relied on that co-partner's misrepresentations to their detriment—all partners are identically liable for fraud, without further inquiry into each partner's knowledge or intent. See *Siebold* v. *Berdine*, 61 Cal. App. 158, 161-62 (1923).

That rule is longstanding. See Revised Unif. P'ship Act §§ 305, 306(a) (1997) (same rule); Unif. P'ship Act of

[1] Kate and David were unwed at the time they signed the disclosure statement containing fraudulent representations and omissions, see C.A. E.R. 77 n.2, and nothing in this case hinges on their marriage. Their business partnership, not their marriage, was the basis for petitioner's liability.

1914 § 15 (same); Joseph Story, *Commentaries on the Law of Partnership* §§ 108, 166 (5th ed. 1859) (same). More generally, when a fraud or other tort is committed by an agent within the scope of an agency relationship, the principal is equally responsible, without inquiry into the principal's direction or knowledge. Restatement (Second) of Agency §§ 219(1), 257 (1958); *Meyer* v. *Holley*, 537 U.S. 280, 285-86 (2003) ("The principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts complained of." (quoting *New Orleans, M., & C.R. Co.* v. *Hanning*, 82 U.S. 649, 657 (1872)).[2]

In agreeing to purchase the house from Kate and David, Buckley reasonably relied (a jury later found) on sworn representations and omissions that Kate and David jointly made regarding the condition of the home. J.A. 8-9, 29 n.4. Specifically, in a state-mandated Transfer Disclosure Statement, they jointly attested that the house lacked "past or present leaks or water intrusion," that they were not "aware of 'any significant defects/malfunctions'" in the roofs or windows, and that they were unaware of any "alterations or repairs [that] were made to the Property without necessary permits" or "not done in compliance with building codes." J.A. 10-18, 24, 27; see Cal. Civil Code § 1102.3 *et seq*. They both further attested in the sales contract that they had "no knowledge or notice that the Property has any material defects other than as disclosed." J.A. 25.

[2] Kate and David could have availed themselves of a different liability rule by using a corporation or limited-liability company like "RJUOP I, LLC," which they jointly operated. J.A. 3; see, *e.g.*, Cal. Corp. Code § 17701.01 *et seq.* (Limited Liability Company); Cal. Corp. Code § 200 *et seq.* (Corporation).

After buying the house, Buckley learned that Kate and David's statements were false. The Bartenwerfers had repaired a leak in the roof not long before making their sworn disclosures. J.A. 10, 45. Soon after closing, Buckley discovered multiple leaks. J.A. 10-11, 45. The windows had significant defects, as they were installed "out of square" and would not close properly. J.A. 14-15. Also, the house lacked a required fire escape, electrical and plumbing work lacked necessary government approvals, and there were other outstanding permit issues. J.A. 11-14, 16-17. Together, these defects sharply reduced the value of the house. See J.A. 4.

Buckley sued Kate and David in California state court, seeking compensation for having overpaid for the house due to those misrepresentations. On September 27, 2012, following a 19-day trial, a jury returned a special verdict in Buckley's favor for non-disclosure of material facts, negligence, and breach of contract. J.A. 3; Pet. App. 3a. It found that Kate and David failed to disclose material information in the sale of the property, and awarded Buckley damages, measured as repair costs and the diminished value of the house (plus Buckley's costs of suit and attorney's fees). J.A. 4, 25-27.

2. Rather than pay the judgment, Kate and David jointly filed for bankruptcy under Chapter 7 of the Bankruptcy Code. J.A. 27. For individuals, Chapter 7 provides a framework for liquidating a debtor's assets, distributing the proceeds to creditors, and discharging the debtor's debts if the debtor can satisfy the requisite criteria. See 11 U.S.C. 727.

Congress has also crafted exceptions to discharge, which prevent a discharge from extinguishing certain categories of debts. See 11 U.S.C. 523. This case involves

11 U.S.C. 523(a)(2)(A). It provides that "[a] discharge … 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, other than a statement respecting the debtor's or an insider's financial condition.

Buckley filed an adversary proceeding—a lawsuit within a bankruptcy proceeding, see Fed. R. Bankr. P. 7001—to have the debts Kate and David owed him excepted from discharge under Section 523(a)(2)(A). Pet. App. 3a. He contended they each owed him a debt for obtaining his money via actual fraud. *Ibid*.

After a trial, the bankruptcy court determined that the debts were non-dischargeable. *Ibid*. First, the court determined that David had committed actual fraud. Based on detailed findings, it found that David "had the requisite knowledge and intent to deceive Mr. Buckley." J.A. 10-18. The court also held that the remaining elements of common-law fraud (including materiality, reliance, and resulting loss) were satisfied. See J.A. 6-7. David's debt to Buckley was therefore found non-dischargeable, and that determination is no longer disputed.

Second, the court determined that Kate's debt was non-dischargeable as well. It reasoned that "an agency relationship existed between Mr. and Mrs. Bartenwerfer based on their partnership with respect to the remodel project," under which she "would financially benefit from the successful completion of the project and sale of the Property." J.A. 5 n.3. Under applicable state-law principles of agency law and vicarious liability, the fraud of one partner within the scope of the partnership is imputed to

all partners. See p. 4, *supra*. The Court therefore concluded that "the Bartenwerfers'[] debt to Mr. Buckley ... is nondischargeable under section 523(a)(2)(A)." J.A. 18.

3. The Bankruptcy Appellate Panel (BAP) affirmed as to David's debt but vacated and remanded as to Kate's. J.A. 22-59. The BAP held that Kate's debt was dischargeable unless Kate "'knew or had reason to know' of [David]'s fraudulent omissions." J.A. 43-44 (quoting *Sachan* v. *Huh* (*In re Huh*), 506 B.R. 257, 271-72 (B.A.P. 9th Cir. 2014) (en banc)).

On remand, the bankruptcy court held a trial solely on that issue, found that standard unmet, and held that Kate's debt to Buckley was dischargeable. Pet. App. 35a-59a; see C.A. E.R. 891 ("This is our evidentiary hearing on ... whether or not Mrs. Bartenwerfer knew or should have known"). The BAP affirmed. Pet. App. 7a-30a.

4. Relying on *Strang*, the Ninth Circuit reversed. Pet. App. 1a-6a. The court of appeals recognized that, under "basic partnership principles, [']if, in the conduct of partnership business, ... one partner makes false or fraudulent misrepresentations ... his partners cannot escape pecuniary responsibility therefor upon the ground that such misrepresentations were made without their knowledge.[']" *Id.* at 5a (quoting *Strang*, 114 U.S. at 561). The court accordingly determined that "the bankruptcy court applied the incorrect legal standard," and found petitioner's debt "nondischargeable regardless of her knowledge of the fraud." *Id.* at 6a.[3]

[3] The Ninth Circuit did not address respondent's additional arguments for reversal, including that petitioner either knew or should have known of her co-partner's fraud or was directly liable for fraud herself given her own involvement in the sale of the house. Resp. C.A. Br. 39-55. If this Court were to reverse, those arguments would remain available to the court of appeals.

Petitioner sought certiorari, invoking a circuit conflict over the "knew or should have known" rule. Pet. 8. This Court granted the petition.

SUMMARY OF ARGUMENT

Section 523(a)(2)(A) of the Bankruptcy Code bars a debtor from discharging "any debt ... for money ... obtained by ... actual fraud." The question presented is whether that provision includes an unstated exception that allows discharge of some debts for money obtained by actual fraud, namely, where the fraud was perpetrated by the debtor's partner or agent without the debtor's knowledge but the debtor is liable under state law because the partner or agent was acting within the scope of the agency relationship. Text, precedent, history, and context all compel the same result: "All" such debts are non-dischargeable, not just some.

I. The text unambiguously answers the question presented. When a debtor owes a debt for money obtained by means of the actual fraud of her business partner, that debt is one "for money … obtained by … actual fraud." Section 523(a)(2)(A) covers "any" and all such debts. The statute asks only (1) whether money or property was obtained by actual fraud and (2) whether the debtor's liability arises therefrom. See *Cohen*, 523 U.S. at 218. The text requires nothing more, and this Court has "no authority to add a limitation the statute plainly does not contain." *Whitfield* v. *United States*, 574 U.S. 265, 268-69 (2015).

This Court's decision in *Strang* confirms that result. *Strang* squarely rejected the argument that a lack of direction, knowledge, or intent by one partner is a basis to discharge a debt owed for the actual fraud of a co-partner. The then-operative statute required actual fraud "of the bankrupt" and *Strang* determined that a debtor's vicarious liability for their partner's fraud within the scope of

their partnership *is* the actual fraud of the debtor for purposes of denying a discharge. See 114 U.S. at 560-61.

Nothing Congress has done since indicates a clear intent to depart from that result. Rather, Congress's revisions to the statute reinforce *Strang*, as Congress deleted the "of the bankrupt" language that provided even a potential textual hook for petitioner's position. Nor has Congress provided the requisite clear statement necessary to depart from ordinary background rules of vicarious liability. See *Meyer*, 537 U.S. at 285-86.

Statutory context further supports respondent. Like some other exceptions to discharge (but unlike others), Section 523(a)(2)(A) lacks even that arguable textual basis to indicate that Congress might have wanted to require personal involvement or intent from the debtor beyond whatever is necessary for liability to arise under state law from money obtained by fraud. Rather, so long as the debtor owes such a liability, the debt is excepted from discharge. Several other provisions of Section 523(a) are drafted in a similar way, and petitioner herself recognizes that they do not require proof of the debtor's intent or the like. "What matters is … whether through direct or vicarious liability, the debtor ended up on the hook." Pet. Br. 26. So too here.

Respondent's rule also reflects sound policy. The discharge exceptions each embody a policy that protecting certain categories of creditors is more important than providing debtors a complete "fresh start." Section 523(a)(2)(A) embodies Congress's determination that protecting victims of fraud is more important than protecting debtors who are liable for defrauding them. That rule also advances federalism interests, as it defers to state policy judgments about the circumstances in which one person should be held liable for a fraud perpetrated

by another, including an agent who defrauds a third party while acting on a debtor's behalf.

The underlying rule of vicarious liability itself advances sound policies. Liability springs from the formation of a partnership to share income *and* liabilities. The bitter comes with the sweet.

II. Petitioner's contrary arguments provide no basis to reverse the court of appeals' judgment.

At the outset, petitioner has abandoned the "knew or should have known" rule that she urged below, that was the basis of the trial, that the court of appeals rejected, and that was the basis of the circuit conflict petitioner invoked to obtain this Court's review. Petitioner now contends that knowledge is insufficient and that intent is required. Pet. Br. 13. This Court should not countenance petitioner's change of position, as petitioner waived and forfeited her current argument below.

Petitioner's abandonment of the "knew or should have known" rule confirms that the court of appeals was correct to reject it. No court has ever squared that rule with the statutory text and *Strang*, and petitioner's change in position confirms that the rule lacks any legal basis. This Court accordingly can affirm without even addressing petitioner's new argument.

In any event, petitioner's new rule is meritless. Petitioner tries to avoid the text by offering a historical narrative of the Bankruptcy Code showing, supposedly, Congress's unbroken plan of always favoring debtors over creditors, and by proposing a novel substantive canon of discharge-exception interpretation to require unambiguous text before barring the discharge of a debt arising from money obtained by an agent's fraud. But the text *is* unambiguous: "Any" liability for money obtained via fraud is non-dischargeable, not just some such debts.

Moreover, petitioner's historical argument overlooks that, for 150 years, Congress has consistently protected innocent victims of fraud, not debtors who are liable for defrauding them.

When petitioner addresses the text, she reasons from stray textual "clues," namely, Section 523(a)(2)(A)'s mention of the "individual debtor" and the use of the passive voice in "money … obtained by." Pet. Br. 3, 18-21. But those terms provide no basis to adopt petitioner's atextual rule. An "individual" debtor refers to a debtor who is a natural person, not an entity like a corporation. See, *e.g.*, 1 U.S.C. 1. And the passive "obtained" does not remotely suggest that the debtor must commit and intend the underlying fraud, by herself, without the involvement of an agent.

Petitioner likewise cannot distinguish *Strang*. Petitioner contends that *Strang* did not interpret a federal statute and instead is a pre-*Erie* case about federal common law. But the decision, posture, and briefing in *Strang* confirm that the Court decided a question about the statutory requirement of debt for the actual fraud "of the bankrupt" under Section 523(a)(2)(A)'s predecessor. *Strang* held that the actual fraud of a co-partner, acting within the partnership's scope, qualified as the actual fraud of all of the partners for purposes of that statutory standard. And this case follows *a fortiori* from *Strang*, because the statute no longer even requires an actual fraud "of the bankrupt."

Section 523(a)(2)(A)'s context is no more helpful to petitioner, as different language in different provisions does not support adding an additional unwritten exception to Section 523(a)(2)(A). Moreover, even if there were a requirement that the debtor commit the fraud, *Strang* would establish that petitioner did just that: Her agent

defrauded respondent while acting within the scope of the agency relationship, making petitioner equally responsible for committing that fraud under state law.

Petitioner argues primarily from policy, urging that she is an "innocent" debtor who deserves a "fresh start." But even when a debtor obtains a discharge of all of their other debts, the Code expressly denies a discharge of any liability for money obtained by actual fraud. Petitioner also overlooks that, under applicable state law, she is not innocent but rather equally responsible for the fraud her agent committed on her behalf. The innocent person is the victim, respondent. And the Code and *Strang* confirm that petitioner cannot use bankruptcy to "escape pecuniary responsibility" for compensating the victim "upon the ground that such misrepresentations were made without [her] knowledge." *Strang*, 114 U.S. at 561. This Court should affirm.

ARGUMENT

I. Section 523(a)(2)(A) Bars Discharge Of Any Debt For Money Obtained By Actual Fraud, Including Actual Fraud Of An Agent For Which The Debtor Is Vicariously Liable

A. The Text Makes Dischargeability Depend On Whether The Debtor Is Liable For Money Obtained Via Actual Fraud

1. The text of Section 523(a)(2)(A) resolves this case. The Court must "start[] with the text." *Tapia* v. *United States*, 564 U.S. 319, 326 (2011). When the text is unambiguous, the inquiry "ends there as well." *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (citation omitted).

Section 523 creates exceptions to the general "fresh start" that an individual Chapter 7 debtor can obtain

with a discharge. See *Cohen*, 523 U.S. at 222. The exception at issue provides that a discharge "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.

11 U.S.C. 523(a)(2)(A). This exception applies when the debtor is an "individual debtor," *ibid.*, that is, a natural person rather than a corporation or other artificial entity. Cf. 11 U.S.C. 1141(d)(6)(A) (listing exceptions to discharge for "a debtor that is a corporation").

The statutory test is unambiguous: "Once it is established that specific money or property has been obtained by fraud," then "'any debt' arising therefrom is excepted from discharge." *Cohen*, 523 U.S. at 218. What matters is that (1) money is "obtained" via fraud; and (2) there is liability "arising therefrom." *Ibid.* This case does not involve a "statement respecting the debtor's or an insider's financial condition," see 11 U.S.C. 523(a)(2)(A), so the provision's sole exception to that rule does not apply.

First, money or property must be acquired by means of actual fraud. The provision addresses any debt for "money, property, services," and so on, "to the extent obtained by … actual fraud." 11 U.S.C. 523(a)(2)(A). "[O]btained by," this Court has explained, "modifies 'money, property, services, or ... credit[,]' … mak[ing] clear that the share of money, property, etc., that is obtained by fraud gives rise to a nondischargeable debt." *Cohen*, 523 U.S. at 218. "Obtained" means to "to acquire, in any way." *Webster's New International Dictionary* 1682 (2d ed. 1950). "By" means "through the means of; in

consequence of." *Id.* at 367. And "actual fraud" means "positive fraud, or fraud in fact, involving moral turpitude or intentional wrong." *Neal* v. *Clark*, 95 U.S. 704, 707-09 (1877). "[A]nything that counts as 'fraud' and is done with wrongful intent is 'actual fraud.'" *Husky Int'l Elecs., Inc.* v. *Ritz*, 578 U.S. 356, 360 (2016).

Second, the debtor must owe a "debt" that is "for" money obtained by fraud. "A 'debt' is defined in the Code as 'liability on a claim,' § 101(12), a 'claim' is defined in turn as a 'right to payment,' § 101(5)(A), and a 'right to payment,' ... 'is nothing more nor less than an enforceable obligation.'" *Cohen*, 523 U.S. at 218 (quoting *Pa. Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 559 (1990)).

A debt "for" money obtained via fraud, this Court has held, covers "'any debt' arising therefrom." *Cohen*, 523 U.S. at 218; see *id.* at 219-21 ("arising from," "on account of," or "traceable to" fraud); *Webster's New International Dictionary* 984 ("for" means "because of; on account of; in consequence of"). In *Cohen*, this Court held that debts arising from money obtained by fraud are not limited to the value of that money and instead extend to the "full liability traceable to that sum," including treble damages and attorney's fees and costs. 523 U.S. at 219; see also Pet. C.A. Br. 16, 33 ("debts 'resulting from' or 'traceable to fraud'"). Section 523(a)(2)(A)'s exception thus covers the full scope of liability arising from money acquired by means of actual fraud.

2. Vicarious liability for money acquired by means of actual fraud satisfies this statutory test. First, petitioner and her partner obtained an inflated purchase price for the house they jointly sold respondent. See J.A. 3-4. That is "money." The means through which they acquired that

money was actual fraud, namely, David's undisputed actual fraud in intentionally duping respondent into overpaying them for the house. See J.A. 3-4; 10-18; 44-50.

Second, vicarious liability for obtaining money via fraud is a "debt for" money obtained by fraud, because it is a liability arising therefrom: Petitioner is liable to respondent on account of the money obtained via David's actual fraud, because petitioner is liable for that fraud under applicable state law. "[T]here is no dispute that the [p]etitioner and [David Bartenwerfer] are deemed to have been partners." Pet. 30. And there is no dispute that petitioner is liable for David's fraud under applicable state law, because David defrauded respondent within the scope of their partnership. Responsibility for that fraud is imputed to petitioner under state law, without regard to further proof of her intent, direction, or knowledge. See p. 4, *supra*.

Petitioner is thus liable for money obtained from respondent by actual fraud but has not yet compensated respondent. Under the plain text of the Code, that unpaid liability to the victim is a "debt … for money … obtained by … actual fraud," 11 U.S.C. 523(a)(2)(A), and therefore non-dischargeable.

B. The Text Unambiguously Covers "Any" Such Debt, Without An Exception Based On Whether The Debt Is Grounded In Vicarious Liability

The Code covers "any" liability arising from money obtained via fraud, without differentiating between direct and vicarious liability or requiring additional evidence beyond whatever is needed to prove that money was obtained by actual fraud and that the debtor is liable under state law on a debt arising therefrom. Time and again, this Court has confirmed that "any" means "any." See *United States* v. *Gonzales,* 520 U.S. 1, 5 (1997) ("Read

naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (quoting *Webster's Third New International Dictionary* 97 (1976))); see, *e.g.*, *Gallardo* v. *Marstiller*, 142 S. Ct. 1751, 1758 (2022) ("'[*A*]*ny* rights ... to payment for medical care' most naturally covers not only rights to payment for past medical expenses, but also rights to payment for future medical expenses."); *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 220 (2008) (similar). Here, "any" liability of whatever kind will do, including one grounded in vicarious liability.

Section 523(a)(2)(A)'s sole exception confirms the point. The statute covers "any" debt for money obtained by actual fraud, "other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. 523(a)(2)(A).[4] That exception makes clear that no exceptions "other than" the express one exist. *Ibid.* "[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Hillman* v. *Maretta*, 569 U.S. 483, 496 (2013) (quoting *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)). The text thus forecloses creation of an additional, unstated exception. This Court has "no authority to add a limitation the statute plainly does not contain." *Whitfield*, 574 U.S. at 268-69.

The Code thus depends on state law to determine the extent of non-dischargeable liability arising from money obtained via actual fraud. So long as money was obtained by actual fraud, any state-law liability arising therefrom

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[4] Such statements are subject to different requirements in order for a debt arising therefrom to be excepted from discharge. See 11 U.S.C. 523(a)(2)(B).

is non-dischargeable. The provision "focuses on the character of the debt, not the culpability of the debtor." *Deodati* v. *M.M. Winkler & Assocs.* (*In re M.M. Winkler & Assocs.*), 239 F.3d 746, 749 (5th Cir. 2001).

C. *Strang* Confirms That Lack Of Intent Or Knowledge Is No Defense When One Partner Is Vicariously Liable For Obtaining Money Via Another Partner's Actual Fraud

1. In *Strang*, this Court held a debt non-dischargeable on materially identical facts. There, Peter Strang secured money for his partnership, Strang & Holland Brothers, through fraudulent misrepresentations that he made without the "direction," "knowledge," or "active participation" of his partners John and Joseph Holland. *Strang*, 114 U.S. at 558, 561. The Holland brothers filed for bankruptcy and obtained discharges. *Id.* at 556. The Bankruptcy Act of 1867 provided, however, that a discharge did not apply to "any 'debt created by the fraud or embezzlement of the bankrupt.'" *Ibid.* (quoting Act of Mar. 2, 1867, ch. 176, § 33, 14 Stat. 533). The victims sued in New York state court, contending that the Holland brothers were liable and that the brothers' debts to them had not been discharged. *Id.* at 556-57. The state courts found in favor of the victims and the Holland brothers brought the case to this Court on writ of error. *Id.* at 557.

This Court affirmed. First, this Court determined that Strang had committed actual fraud, as required by *Neal* v. *Clark*, 95 U.S. 704 (1877). "[I]t is impossible to avoid the conclusion that the debt in question was created by positive fraud upon the part of Strang, representing his firm." *Strang*, 114 U.S. at 559-60.

Second, this Court determined that the Holland brothers' liability to the victims had not been discharged.

The Court stated that "the statute expressly declares that … no *debt created by the fraud* of the bankrupt shall be discharged," and it determined that the brothers' discharges "do not constitute a defense" so long as the debt was one "created by their fraud." *Id.* at 560-61.

The Court then held that the Holland brothers' debt to the victims was such a debt because Strang's "fraud [wa]s to be imputed, for the purposes of the action, to all the members of his firm." *Id.* at 561. The Court relied on the longstanding and familiar rule of vicarious liability that still applies today—and that is the basis of petitioner's liability to respondent: "Each partner was the agent … of the firm with reference to all business within the scope of the partnership." *Ibid.* Accordingly, "if, in the conduct of partnership business, … one partner makes false or fraudulent misrepresentations … to the injury of innocent persons who deal with him as representing the firm, … his partners cannot escape pecuniary responsibility therefor upon the ground that such misrepresentations were made without their knowledge." *Ibid.* And that is "especially so" where, as here, "the partners … received and appropriated the fruits of the fraudulent conduct of their associate in business." *Ibid.*

2. This case follows *a fortiori* from *Strang*. The facts are materially identical, as both cases involve debtors who are liable for the fraud of a co-partner committed within the scope of the partnership, without regard to their direction or knowledge of the fraud. Under *Strang*, such a debt is non-dischargeable and indeed qualifies as the debtor's own fraud. Today, moreover, there is no need even to determine whether the underlying fraud qualifies as the debtor's own fraud, because the statute no longer requires a fraud "of the bankrupt." It simply requires money to be obtained by means of fraud and for

liability to arise therefrom. *Cohen*, 523 U.S. at 218. And that standard is readily satisfied.

More recent decisions confirm *Strang*'s vitality. For example, this Court later adopted an identical approach to vicarious liability in interpreting the discharge exception for debts arising from willful and malicious injury. See *McIntyre* v. *Kavanaugh*, 242 U.S. 138, 139 (1916) ("If ... the firm inflicted a wilful and malicious injury to property, of course, [a partner in the firm] incurred liability for that character of wrong" "whether they personally participate therein or not"). And this Court relied on *Strang* in *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229 (2010), for the proposition that that there would be nothing odd about Congress incorporating into a different provision of the Bankruptcy Code "the joint responsibilities that typically flow from [a] partnership." *Id.* at 238 (citing *Strang*, 114 U.S. at 561).

D. Congress Has Ratified *Strang*, Not Abrogated It

Far from providing the clear intent needed to abrogate this Court's statutory interpretation, Congress's minor changes to the fraud exception since *Strang*—notably, the deletion of "of the bankrupt"—are fairly understood to ratify *Strang*. Today's Bankruptcy Code confirms that it is irrelevant whether the debtor personally knew of or intended the fraud and instead it is sufficient that the debtor is *liable* for money obtained by fraud.

1. "When Congress used the materially same language in § 523(a)(2)" from prior versions of the statute, "it presumptively was aware of the longstanding judicial interpretation ... and intended for it to retain its established meaning." *Lamar, Archer & Cofrin, LLP* v. *Appling*, 138 S. Ct. 1752, 1762 (2018). This Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended

such a departure." *Cohen*, 523 U.S. at 221 (quoting *Pa. Dep't of Pub. Welfare*, 495 U.S. at 563).

This Court has further recognized that Congress "legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Meyer*, 537 U.S. at 285. Congress "must 'speak directly'" before this Court will understand a statute to depart from such principles. See *ibid.* (quoting *United States* v. *Texas*, 507 U.S. 529, 534 (1993)). Congress drafted the Code against a backdrop of state law, which Congress generally left undisturbed. See *Butner* v. *United States,* 440 U.S. 48, 55 (1979); see also *BFP* v. *Resol. Tr. Corp.*, 511 U.S. 531, 544-45 (1994) (requiring a "clear and manifest" intent to "displace traditional state regulation") (citation omitted).

2. Those principles powerfully support the court of appeals' rule, as there is no clear indication or direct statement that Congress abrogated *Strang*. Rather, in 1898, only 13 years after *Strang*, Congress amended the statute and retained the key language barring the discharge of debts for fraud—but *deleted* the "of the bankrupt" clause that might have provided a plausible textual hook for excluding vicarious liability. Congress instead adopted broader language that reflected *Strang*'s focus on the existence of liability for money obtained via fraud, without regard to who personally perpetrated it: The Act barred discharge of "judgments in actions for frauds, or obtaining property by false pretenses or false representations." Act of July 1, 1898, ch. 541, § 17, 30 Stat. 550. And a judgment awarding damages for fraud on a theory of vicarious liability, no different from "an award of punitive damages for fraud[,] plainly fits in the category of 'judgments in actions for fraud.'" *Cohen*, 523 U.S. at 221.

That language has remained largely unchanged since. In 1903, Congress simplified the provision to reach "all 'liabilities for obtaining property by false pretenses or false representations,'" and no longer requiring that a fraud liability be reduced to a judgment for it to be nondischargeable. *Ibid.* (quoting Act of Feb. 5, 1903, ch. 487, § 5, 32 Stat. 798).[5] The Bankruptcy Act of 1978 then adopted a "'substantially similar' provision," *Ibid.* (quoting *Brown* v. *Felsen*, 442 U.S. 127, 129 n.1 (1979)), adding back the term "fraud" and keeping the focus on the character of the debt, not the debtor's mental state, by reaching "any debt" for "obtaining money" via "false pretenses, a false representation, or actual fraud." Act of Nov. 6, 1978, Pub. L. No. 95-598, § 523, 92 Stat. 2590.[6] Amendments since then have been "slight." *Cohen*, 523 U.S. at 221. The focus remains on whether the debtor is liable for a debt arising from money obtained by fraud, without differentiating between different theories of liability.

The leading bankruptcy treatise—which has faithfully reported *Strang*'s rule from its first edition in 1898 to the present—is in accord, finding "nothing … to suggest that Congress wished to alter th[e] [previous] construction of the nondischargeability provision" that "debts created by the fraud of the agent of a principal-debtor [a]re nondischargeable." 4 Collier on Bankruptcy ¶ 523.08 (16th ed. 2022); *see* Collier on Bankruptcy 173 (1st ed. 1898) (reporting *Strang*'s rule).

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[5] This iteration of the statute dropped the term "fraud," but "cases construing section 17a(2) of the [Bankruptcy] Act uniformly held that debts created by the fraud of the agent of a principal-debtor were nondischargeable[.]" 4 Collier on Bankruptcy ¶ 523.08 (16th ed.).

[6] The 1978 Act used the phrase "actual fraud," adopting the standard from *Neal*, *supra*, that *Strang* applied. See 114 U.S. at 559-61.

Notably, Congress has considered—but not adopted—a proposal to abrogate *Strang*. In 1994, Congress chartered the National Bankruptcy Review Commission to investigate and study the Bankruptcy Code. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, §§ 601-610, 108 Stat. 4147-50. The Commission recommended, among other things, that Congress override *Strang*'s rule. See Nat'l Bankr. Rev. Comm'n, *Bankruptcy: The Next Twenty Years* § 1.4.7 (1997). The Commission cited *Strang* and proposed adding a new subsection to Section 523 to provide "that intentional action by a wrongdoer who is not the debtor cannot be imputed to the debtor." *Ibid.*[7]

Congress did not enact that proposal, however, and has not otherwise altered the text of Section 523(a)(2)(A). And this Court should not "rewrite the statute that Congress has enacted" to one it declined to enact. *Puerto Rico* v. *Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 130 (2016) (quoting *Dodd* v. *United States*, 545 U.S. 353, 359 (2005)).

E. Context Confirms The Text Means What It Says

As this Court has recognized, Section 523(a)(2)(A)'s immediate statutory context sheds limited light on its meaning because Congress adopted the various exceptions to discharge at different times for different reasons. See *Field* v. *Mans*, 516 U.S. 59, 66-69, 75 (1995) (declining to draw a negative inference about subsection (a)(2)(A) from text in subsection (a)(2)(B)). Section 523(a) is something of a "mash-up of legislative interventions" rather than a "neat, reticulated scheme of 'narrowly tailored exception[s]'" conceived as a unified whole. *Mission Prod. Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct.

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[7] One of petitioner's amici supported this proposal. See Nat'l Bankr. Rev. Comm'n, *Bankruptcy: The Next Twenty Years* App. G-1.c at 27 (report of Hon. Eugene R. Wedoff et al.).

1652, 1664 (2019) (describing 11 U.S.C. 365) (alteration in original).[8] And context will not override unambiguous text. *E.g.*, *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 631 (quoting *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004)). Still, the context indicates that a debtor who is liable for money obtained via actual fraud cannot discharge that debt; there is no need for further inquiry into why the debtor is liable.

As a general matter, Congress could have—but did not—adopt language expressly carving out vicarious liability from Section 523(a)(2)(A)'s scope or otherwise barring reliance on principles of agency law. For example, Congress elsewhere adopted the Graves Amendment, 49 U.S.C. 30106, which "shield[s] rental car companies from certain vicarious liability suits" otherwise available under state agency law. *Garcia* v. *Vanguard Car Rental USA, Inc.*, 540 F.3d 1242, 1244 (11th Cir. 2008); see 49 U.S.C. 30106(a) (such companies "shall not be liable ... by reason of being the owner ... for harm ... that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if— … there is no negligence or criminal wrongdoing on the part of the owner"). No similar language exists here.

Section 523(a)(2)(A)'s immediate context, moreover, shows that Congress could have—but did not—use language that would at least generate ambiguity about whether the debtor herself (and not her agent) must possess a particular mental state or take a particular action. For example, Congress has rendered non-dischargeable a "debt … for willful and malicious injury by the debtor,"

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[8] Section 523(a) had for a time two subsections numbered 9. See Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, § 283(j)(1)(B), 100 Stat. 3117 ("redesignating the second paragraph (9) as paragraph (10)").

11 U.S.C. 523(a)(6), as well as one for money obtained via certain false written statements that "the debtor caused to be made or published with intent to deceive," 11 U.S.C. 523(a)(2)(B)(iv).

Such references to "the debtor" provide a potential textual hook for concluding that only the debtor herself, and not her agent, must act with the requisite intent. These references are ambiguous, however, because they could include the conduct or intent of an agent acting on the debtor's behalf that is imputed to the debtor. Congress usually "intends its legislation to incorporate" background "tort-related vicarious liability rules." *Meyer*, 537 U.S. at 285. And this Court in *Strang* and *McIntyre* interpreted Section 523(a)'s predecessor provisions to incorporate such principles. To resolve the ambiguity, a court would need to assess the text, history, and context of the particular provision at issue to determine whether Congress has spoken "directly" to the issue. *Meyer*, 537 U.S. at 285. See, *e.g., Veritex Cmty. Bank* v. *Osborne* (*In re Osborne*), 951 F.3d 691, 704 (5th Cir. 2020) ("We … hold that a fraudulent statement by a debtor's partner or agent may be imputed to the debtor under § 523(a)(2)(B)."). But Section 523(a)(2)(A) lacks any such reference to "the debtor." It thus lacks any textual basis for even arguing that it must be the debtor herself, and not her agent, who perpetrated the fraud.

Notably, petitioner recognizes that other exceptions to discharge with similar language to Section 523(a)(2)(A) prohibit discharge of vicarious liabilities because they speak of the character of the debt without saying who must act to create it. For example, Congress has barred discharge of "any debt … for any payment of an order of restitution" under the federal criminal code. 11 U.S.C.

523(a)(13). As petitioner correctly puts it, "[t]hat provision focuses on honoring a court order, not having the bankruptcy court weigh the debtor's conduct." Pet. Br. 26. "What matters is that, whether through direct or vicarious liability, the debtor ended up on the hook for restitution." *Ibid*. Petitioner reaches the same conclusion (Pet. Br. 26-27) with respect to the exceptions for "any debt … incurred to pay fines or penalties imposed under Federal election law," 11 U.S.C. 523(a)(14B), and "any debt" arising from a "judgment," "order," or "settlement" involving a securities-law violation, 11 U.S.C. 523(a)(19)(B).

Congress used the same structure in Section 523(a)(2)(A), reaching "any debt" and using the passive voice to specify what must give rise to the debt (money must be obtained by fraud), without specifying who must obtain the money or commit the underlying fraud. Under that structure, "[w]hat matters is … whether through direct or vicarious liability, the debtor ended up on the hook" for obtaining money in that way. Pet. Br. 26. And petitioner is "on the hook" for exactly that.

F. The Text Embodies Sound Policy

Policy provides no basis to depart from unambiguous text, but the text nonetheless advances sound policy. Each of Section 523's exceptions to discharge "reflect[s] a conclusion on the part of Congress 'that the creditors' interest in recovering full payment of debts in these categories outweigh[s] the debtors' interest in a complete fresh start.'" *Cohen*, 523 U.S. at 222 (quoting *Grogan* v. *Garner*, 498 U.S. 279, 287 (1991)); see Lawrence Ponoroff, *Vicarious Thrills: The Case for Application of Agency Rules in Bankruptcy Dischargeability Litigation*, 70 Tul. L. Rev. 2515, 2563 (1996) ("[T]he discharge exceptions are not exclusively about fresh start. … [I]n the case of

debts incurred by fraudulent conduct, they are about fairness to certain types of creditors."). Congress's policy choice here is obvious: Congress is protecting victims of fraud, rather than people who are liable for obtaining the victim's money via fraud.

This rule helps ensure victims obtain a "full recovery," *Cohen*, 523 U.S. at 222, which is the purpose of imposing liability for fraud in the first place. "Imposing [vicarious] liability without independent fault," and preserving that liability in bankruptcy, also "deters fraud more than a less stringent rule." *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 14 (1991). And it advances federalism interests by deferring to state-law determinations about the circumstances in which one person should be held liable for fraud committed by another. Cf. *Butner*, 440 U.S. at 55 ("Unless some federal interest requires a different result, there is no reason why [state-law] interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.").

The underlying state-law rule of vicarious liability itself advances strong policies. "[F]ew doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own." *Gleason* v. *Seaboard Air Line Ry. Co.*, 278 U.S. 349, 356 (1929). The essence of a partnership is the sharing of the profits earned in partnership business; the flip side is the obligation to share in liabilities incurred in partnership business, including liabilities for fraud. See *Miske,* 204 Cal. App. 4th at 1256. Accordingly, when one partner defrauds a third party within the partnership's scope, all general partners are equally liable and none are "innocent" in the eyes of the law.

Vicarious liability incentivizes third parties to transact with partnerships as it "give[s] greater assurance of compensation for the victim." *Mary M.* v. *City of Los Angeles*, 54 Cal. 3d 202, 209 (1991). Partnerships, in turn, benefit from this increased business and can "internalize" their costs, leading to "a socially efficient level of loss-avoidance investment by the agent and a privately (and socially) efficient level of risk sharing between the principal and the agent." Alan O. Sykes, *The Economics of Vicarious Liability*, 93 Yale L.J. 1231, 1246 (1984).

The Bankruptcy Code and nonbankruptcy law also include ample protection against unfairness. First, money must be obtained by actual fraud and the debtor must be liable for that wrong under state law. A person can avoid such liability by not committing fraud themselves or not going into business with a fraudster. Ex ante, a partner concerned with potential liability can opt for a limited-liability business form, see note 2, *supra*, exercise care in selecting their partners and divvying up responsibilities, supervise their partners, or terminate the partnership. See Unif. P'ship Act § 105 (2013). Ex post, if one partner believes her share of liability is too large, she can seek indemnification or contribution from the partnership and her partners. See Bromberg and Ribstein on Partnership §§ 4.07, 5.11, 6.02 (3d ed. 2022 Supp. 2019).

Moreover, partners are not on the hook for *all* liabilities incurred by co-partners. For example, if one partner committed fraud *outside* the partnership's scope, the other partners ordinarily would not be liable. Restatement (Second) of Agency § 219(2).[9] And state law has long ensured that a spousal relationship is not sufficient

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[9] Criminal liability also ordinarily does not attach without proof of the defendant's own mens rea. Bromberg and Ribstein on Partnership § 4.07.

for vicarious liability. So if a fraud is committed by a spouse who was not a business partner, the debtor would not be liable absent "some other basis for vicarious liability." 4 Modern Tort Law: Liability and Litigation § 28:24 (2d ed. May 2022 update).

II. Petitioner's Counterarguments Lack Merit And Confirm The Court Of Appeals Was Correct

A. Petitioner Has Abandoned The "Knew Or Should Have Known" Rule She Pressed Below And Waived And Forfeited The Rule She Now Advocates

1. Below and in her petition for certiorari, petitioner argued that Section 523(a)(2)(A) bars discharge only when the debtor "knew or should have known" of her partner's fraud. Pet. 12. Petitioner won an intermediate appeal on that issue, and the trial on remand was "limited to whether Mrs. Bartenwerfer knew or should have known" of David's fraud. Pet. App. 49a. Petitioner then invoked a circuit conflict over the "knew or should have known" standard to obtain this Court's review. See Pet. 24 (citing *Sullivan* v. *Glenn*, 782 F.3d 378 (7th Cir. 2015), cert. denied, 577 U.S. 1029 (2015); *Walker* v. *Citizens State Bank* (*In re Walker*), 726 F.2d 452 (8th Cir. 1984)). Petitioner emphasized that the trial on her knowledge made this "an ideal vehicle." *E.g.*, Pet. 4. Petitioner now argues, however, that knowledge is irrelevant and that Section 523(a)(2)(A) does not apply if "the individual debtor lacks any fraudulent intent herself" or does not "commit the fraud" herself. Pet. Br. 3, 13.

It is much too late for petitioner to raise an argument that she never raised at any point below, including at trial, during multiple appeals, or in the certiorari petition. *E.g.*, *United States* v. *Jones*, 565 U.S. 400, 413 (2012) (finding "forfeited" ground for reversal not passed upon

or presented below). Indeed, no court of appeals has *ever* adopted petitioner's theory. This "is a court of final review and not first view" and the Court should disregard petitioner's new argument on that basis alone. *Bethune-Hill* v. *Va. State Bd. of Elections*, 137 S. Ct. 788, 800 (2017) (citation omitted); cf. *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 37-38 (2015). Petitioner also affirmatively waived her new theory, which hinges on the debtor's intent, Pet. Br. 13, by pressing—and winning at trial on, see Pet. App. 49a, 59a—the "knew or should have known" rule, under which intent is unnecessary and knowledge is sufficient. Cf. *Morgan* v. *Sundance*, 142 S. Ct. 1708, 1713 (2022).

2. Petitioner's abandonment of the "knew or should have known" rule leaves it undefended, confirming that the court of appeals correctly rejected it. See Pet. App. 5a-6a. For the reasons set forth above, the "knew or should have known" rule lacks any semblance of a textual basis and conflicts with *Strang*, context, and sound policy. See pp. 13-29, *supra*. Congress also used the "knew or should have known" standard elsewhere in the Bankruptcy Code, 11 U.S.C. 1305(c), but not in Section 523(a)(2)(A). That omission is particularly notable in light of *Strang*. Remarkably, the circuits adopting the "knew or should have known" rule never squared it with the statutory text or with *Strang*. The Seventh Circuit admitted that barring discharge without regard to the debtor's knowledge of her partner's misrepresentations is "consistent with the language of the fraud exception," but rejected that conclusion on the ground that it "illustrates the limitations of literal interpretation of statutory language." *Sullivan*, 782 F.3d at 380 (Posner, J.).

The Eighth Circuit in *Walker* similarly did not address the text. Instead, it followed without discussion the

Second Circuit's decision in *In re Lovich*, 117 F.2d 612, 615 (1941), which had adopted a knew or should have known rule "[o]n principle." See *Walker*, 726 F.2d at 454 (relying on *Lovich*).[10] And *Sullivan*, *Walker*, and *Lovich* all fail to cite *Strang*, much less distinguish it. This Court accordingly should affirm the court of appeals' decision rejecting the "knew or should have known" rule.

3. This Court could also dismiss the writ of certiorari as improvidently granted. Petitioner invoked a conflict over the "knew or should have known" rule to obtain review, but then abandoned that position after certiorari was granted to advance a new rule over which no circuit conflict exists. Petitioner's "'cho[ice] to rely on a different argument' in [her] merits briefing" from the one pressed when convincing this Court to hear this case justifies dismissal. *Visa Inc.* v. *Osborn*, 137 S. Ct. 289, 289 (2016) (quoting *City & County of San Francisco* v. *Sheehan*, 575 U.S. 600, 608 (2015)); see *Unicolors, Inc.* v. *H&M Hennes & Mauritz, L.P.*, 142 S. Ct. 941, 949-50 (2022) (Thomas, J., dissenting).

B. Petitioner's New Rule Fails On The Merits

1. Petitioner's clear-statement rule is irrelevant and backwards

This Court has said, again and again, that its analysis starts with the text. See, *e.g.*, *Van Buren* v. *United States*,

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[10] *Walker*'s reliance on *Lovich* is also mistaken, as *Lovich* did not interpret Section 523(a)(2)(A) or its predecessors. *Lovich* interpreted a provision that barred *any discharge at all* for a debtor who used a false written statement to, among other things, obtain credit. See 117 F.2d at 614 (quoting Act of June 22, 1938, ch. 575, § 14(c)(3), 52 Stat. 850). Such a statement no longer totally bars discharge; it is now an exception to discharge of an individual debt addressed by a provision not at issue here. See 11 U.S.C. 523(a)(2)(B).

141 S. Ct. 1648, 1654 (2021) ("[W]e start where we always do: with the text of the statute."); *Mission Prods.*, 139 S. Ct. at 1661 ("We start with the text of the Code's principal provisions"). Petitioner instead starts with a history of the Bankruptcy Code and a policy argument about the importance of the "fresh start," in an effort to support a new rule requiring "a clear statement [to] render[] an innocent debtor liable for *someone else's* fraud." Pet. Br. 16-17.

a. At the outset, the text provides whatever clear statement could be needed. Congress provided that a discharge "does not discharge … any debt" for money obtained via actual fraud, without differentiating among reasons why the debtor is liable. 11 U.S.C. 523(a)(2)(A). "Any" means "any." See pp. 16-17, *supra.*

Petitioner's clear-statement rule is also backwards. This Court has required a clear statement from Congress before abrogating this Court's interpretation of a statute—as well as before departing from background principles of vicarious liability. See pp. 20-21, *supra.* Yet instead of directly speaking to the issue, Congress has, if anything, amended the statute to ratify *Strang* and the bedrock principles it reflects. See pp. 20-23, *supra.*

Petitioner also misconstrues the principle that "exceptions to discharge 'should be confined to those plainly expressed.'" *Kawaauhau* v. *Geiger*, 523 U.S. 57, 62 (1998) (quoting *Gleason* v. *Thaw*, 236 U.S. 558, 562 (1915)). This Court has invoked that principle only as one of several considerations to support a reading of a statutory term that the text and context already demanded. See *Bullock* v. *BankChampaign, N.A.*, 569 U.S. 267, 273-75 (2013) (the principle is "consistent with" the reading of "defalcation" to require culpability that precedent and context already "strongly favored"); *Geiger*, 523 U.S. at 61-62 (a

"guide" supporting a reading of "willful and malicious injury" to exclude negligence, which the text "strongly support[ed]" and which would avoid superfluity); *Gleason*, 236 U.S. at 560-62 (confirming that "property" does not include "services," when "the language of the act does not go so far" and the contrary reading relied on "philosophic disquisition").

That principle thus accords with the broader rule that this Court has "no license to give [statutory] exemption[s] anything but a fair reading.'" *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019) (quoting *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1142 (2018)) (alterations in original). "[J]ust as [this Court] cannot properly *expand* [a statutory exception] beyond what its terms permit, [the Court] cannot arbitrarily *constrict* it either by adding limitations found nowhere in its terms." *Ibid.* Here, the Code plainly expresses that any debt for obtaining money by fraud is non-dischargeable, so this Court cannot "arbitrarily constrict" that provision by "adding limitations nowhere found in its terms."

b. Petitioner's history of the Bankruptcy Code—which, she claims, shows Congress's increasing preference for a broader "fresh start" (Pet. Br. at 16-17)—also misses the mark. The history shows a straight line in favor of protecting victims of fraud: Since 1867, the statute has always included an exception barring the discharge of debts for actual fraud. See pp. 18, 21-22, *supra*.

Indeed, at the same time Congress has made discharges more readily available, it has *expanded* the varieties of debts excepted from discharge. The 1867 statute had a short list of exceptions: In addition to debts for "fraud … of the bankrupt," Congress also excepted debts for "embezzlement" and the debtor's "defalcation as a public officer, or while acting in any fiduciary character."

Ch. 176, § 33, 14 Stat. 533. By 1978, that list had grown to nine exceptions. See Pub. L. No. 95-598, § 523, 92 Stat. 2590-91. Since then, Congress has expanded the list, which now comprises 19 subsections. When Congress amended the Code in 2005, for example, "[o]ther than [one] technical amendment[,] … every other … amendment to section 523(a) was designed to expand the scope of the subject discharge exception." 4 Collier on Bankruptcy ¶ 523.LH (16th ed.).

2. Section 523(a)(2)(A)'s text confounds petitioner

More fundamentally, "the text of a law controls over purported legislative intentions unmoored from any statutory text." *Oklahoma* v. *Castro-Huerta*, 142 S. Ct. 2486, 2496 (2022). And petitioner has no answer to the text. Petitioner treats its meaning as a "whodunnit" to be solved with a variety of "textual and contextual clues." Pet. Br. 31. Petitioner contends that, by using the words "individual debtor," the passive voice in "obtained by," and the common-law concept of "fraud," Congress implicitly enacted a previously unheard-of rule derogating from this Court's decision in *Strang* and familiar principles of vicarious liability. *Id.* at 18-22. But the clues petitioner invokes are, at best, red herrings; more often, they support the court of appeals' interpretation.

a. Section 523(a)'s reference to an "individual debtor" to describe to whom the discharge exceptions apply is irrelevant. That phrase describes which debtors ("individual[s]") can invoke the exceptions; it does not modify any element of the discharge exceptions that follow. And consistent with "common usage," Congress usually uses the term "'individual' to denote a natural person, and in particular to distinguish between a natural person and a corporation.'" *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449,

454 (2012). The definitions in the Code (and the Dictionary Act) confirm that reading. See 11 U.S.C. 101(41) ("The term 'person' includes individual, partnership, and corporation"); 1 U.S.C. 1 (distinguishing "individuals" from "corporations, companies, associations, firms, [and] partnerships"); see also 11 U.S.C. 101(31) (defining "insider" differently based on "if the debtor is an individual" or "if the debtor is a corporation").

Notably, a different Code provision specifies which discharge exceptions apply to corporate debtors—including liabilities covered by Section 523(a)(2)(A). See 11 U.S.C. 1141(d)(6)(A) ("[T]he confirmation of a plan does not discharge *a debtor that is a corporation* from any debt ... of a kind specified in paragraph (2)(A) ... of section 523(a) that is owed to a domestic governmental unit" (emphasis added)).

That cross-reference sharply undercuts petitioner's theory. Corporations can possess the requisite intent to commit fraud *only* when it is imputed to them via the acts of their agents. 10 Fletcher Cyc. Corp. §§ 4877, 4886 (Sept. 2022 update). Section 523(a)(2)(A) therefore cannot be understood to prohibit any reliance on imputation when the debtor is an individual, yet for the very same language in the same provision to allow imputation when the debtor is a corporation. That would render Section 523(a)(2)(A) "a chameleon." *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005).

This Court has also rejected petitioner's premise by holding that Congress's use of the word "person" or "individual" does not abrogate background rules of vicarious liability. In *Meyer*, this Court addressed the Fair Housing Act, which bars certain conduct only by "person[s]," defined as "individuals, corporations, partnerships, associations, labor unions, and other organizations." 537 U.S.

at 285 (citation omitted). Although the statute "says nothing about vicarious liability," this Court interpreted that statute as having been adopted "against a legal background of ordinary tort-related vicarious liability rules." *Ibid.* And because it did not speak directly to the question of whether to depart from those principles, this Court understood that legislation "to incorporate those rules." *Ibid.* So too here.

b. Congress's use of the passive voice "obtained," without specifying who must obtain the money or property, supports the court of appeals' rule. The passive voice is appropriately used to "focus[] on an event that occurs without respect to a specific actor, and therefore without respect to any actor's intent or culpability." *Dean* v. *United States*, 556 U.S. 568, 572 (2009); see *ibid.* ("It is whether something happened—not how or why it happened—that matters"); *Watson* v. *United States*, 552 U.S. 74, 80-81 (2007) ("to be used" in 18 U.S.C. § 924(d)(1) reflects "agnosticism ... about who does the using"); see also Bryan A. Garner, *Garner's Dictionary of Legal Usage* 659 (3d ed. 2011) (the passive voice is "legitimate[ly] use[d] ... when the actor is either unimportant or unknown"). Congress's use of the passive "obtained" thus naturally indicates that it only matters that the debtor is *liable* because money was obtained via fraud, without regard to who obtained the money from the victim.

Moreover, even if Congress implicitly required the debtor to obtain the money or property, that would support *respondent*, not petitioner. Petitioner has never argued that the statutory "obtaining" requirement is unmet: Respondent bought the house from *both* petitioner and her partner, paying them both the fraudulently inflated purchase price. See pp. 4, 6, *supra*; see also J.A. 5 n.3 (bankruptcy court finding it clear that petitioner

"would financially benefit from the successful completion of the project"). More broadly, partners ordinarily "obtain[]" the proceeds of a co-partner's fraud within the scope of the partnership, because "carry[ing] on as co-owners a business for profit" is the essence of a partnership. Unif. P'ship Act § 202(a). And this Court has held that, once money is obtained by fraud, any debt arising therefrom is non-dischargeable, including amounts that exceed the debtor's gain. See *Cohen*, 523 U.S. at 218, 223.

Petitioner wants the passive voice in "money obtained" to require not that the money be *obtained* by the debtor, but that the money be obtained by the *fraud* of the debtor. But the use of the passive "obtained" does nothing to support petitioner's grammatical leap-frog, to add "of the debtor" to the end of "obtained by … actual fraud," in order to narrow the means by which the actual fraud can be committed. It is not this Court's function to rewrite the statutory text, particularly when Congress deleted the "of the bankrupt" qualifier that appeared in the statute at the time of *Strang*. See *Murphy* v. *Smith*, 138 S. Ct. 784, 787-88 (2018) ("[R]espect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of [the Court's] own."). And regardless, *Strang* holds that the actual fraud of a co-partner within the scope of a partnership *is* the actual fraud "of the bankrupt." See pp. 18-19, *supra*. So even if this Court could restore the language Congress deleted, *Strang* would still bar discharge.

Petitioner's clerkship hypothetical (Pet. Br. 20) illustrates the problem with her theory. It would be perfectly natural to say that Jane has a "clerkship obtained by fraud" if Jane's agent doctored Jane's transcript on her behalf and the ploy succeeded in misleading a judge into

giving Jane the job. Whether Jane herself intended the fraud or not, fraud was the means through which Jane obtained the clerkship.

3. Petitioner cannot distinguish *Strang*

Petitioner cannot avoid *Strang*, which resolved the question presented in respondent's favor on materially identical facts when the statute required fraud "of the bankrupt." Petitioner contends that "*Strang* did not purport to interpret any statutory text," but instead involved "federal common law that did not survive *Erie*." Pet. Br. 40-43. That is incorrect. This Court quoted the statutory requirement of a "debt created by the fraud … of the bankrupt," emphasized that a "debt *created by the fraud* of the bankrupt" was non-dischargeable, determined that the Holland brothers' discharges "do not constitute a defense" as to any "debt created by their fraud," and held that their debt qualified because one partner's "fraud is to be imputed, for the purposes of the action, to all the members of his firm." 114 U.S. at 556, 560-61. That is a statutory holding.

Strang's posture and briefing confirm the point. In invoking this Court's jurisdiction to review the judgment of the New York Court of Appeals, the Holland brothers described the predicate federal question as involving "the construction of a statute of the United States, to wit, the Revised Statutes, title Bankruptcy." Pet. Br. at 11, *Strang* v. *Bradner*, 114 U.S. 555 (1885) (No. 246); Tr. of R. at 77, *Strang* v. *Bradner*, 114 U.S. 555 (1885) (No. 246). Specifically, the assignments of error included an assertion that the statutory exception was for "the fraud of a bankrupt," not "a debt [] created by the fraud of his partner." Pet. Br. at 10, *Strang*, *supra*; Tr. of R. at 77, *Strang*, *supra*. The brothers then pressed that same argument in their briefing: "So far as either of the Hollands

are concerned it is not a debt created by the fraud of the bankrupt." Pet. Br. at 18, *Strang*, *supra*. "Fraud of the bankrupt's partner," they said, "is not the exception of the Bankruptcy Act," and they argued imputed fraud is not a form of "actual fraud" under the Act, as *Neal* required. *Id.* at 12-14. Those are statutory arguments, and this Court rejected them.

To the extent this Court also relied in *Strang* on the common law of agency for the underlying point that the actual fraud of one partner within the scope of the partnership constitutes the actual fraud of each of the copartners, *Erie* is immaterial. First, the statute no longer requires actual fraud "of the bankrupt," so it is now irrelevant whether the fraud qualifies as petitioner's own. It is sufficient that she is liable for obtaining money by means of fraud. Second, even if it were relevant whether the actual fraud here qualifies as petitioner's own, it still would qualify because the scope of "actual fraud" remains a federal-common-law term today, *Field*, 516 U.S. at 69-70, 70 n.9, and the underlying rule of agency law that applies today is the same one that applied in *Strang*: the fraud of petitioner's co-partner is imputed to her, under state law, because her co-partner committed the fraud within the scope of the partnership. See *Miske*, 204 Cal. App. 4th at 1256. *Erie* thus provides no basis for disregarding *Strang*.

4. Petitioner's arguments about context are misplaced

Petitioner asserts (Pet. Br. 23) it would "def[y] credulity" and be "inexplicably bizarre" for paragraph (A) of Section 523(a)(2) to be indifferent as to who perpetrated the fraud, when paragraphs (B) and (C) state that "the debtor" is the "relevant actor" for those paragraphs. So petitioner asks this Court to definitively interpret the

text of paragraphs (B) and (C) in her favor and then import that interpretation to paragraph (A), where the language she relies on in paragraphs (B) and (C) is lacking. Petitioner's approach, however, would violate the cardinal rule that, "'[w]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act,' we generally take the choice to be deliberate." *Badgerow* v. *Walters*, 142 S. Ct. 1310, 1318 (2022) (citation omitted).

Nor must paragraphs (B) and (C) necessarily be interpreted the way petitioner asserts. Congress's use of "the debtor" in those later-added provisions at most generates ambiguity about the role of background principles of vicarious liability in those provisions, and whether they reach the conduct of the debtor's agent. But ambiguity in those other provisions cannot justify rewriting the unambiguous text of paragraph (A).

In paragraphs (B) and (C), Congress specified that "the debtor" must cause a false written statement about a debtor's or an insider's financial condition to be made with intent to deceive, 11 U.S.C. 523(a)(2)(B), and that an "individual debtor" must incur consumer debts or obtain luxury goods in the run-up to bankruptcy, 11 U.S.C. 523(a)(2)(C). By contrast, in subsection (A), Congress used the passive "money … obtained," without specifying who must obtain the money, and an adverbial clause ("by … actual fraud") to specify how the money must be obtained.

It is reasonable to read those differences to indicate that Congress was indifferent about who obtained the money and how the fraud was perpetrated in the catch-all provision in paragraph (A), but intended to be more specific in the more targeted provisions in paragraphs (B) and (C). At the same time, as set forth above, see pp. 20-

21, *supra*, the ordinary rule is that background principles of vicarious liability apply throughout federal civil law, including exceptions to discharge, unless Congress has spoken directly to the issue. And each of the provisions petitioner relies upon could at least arguably be read to reach the conduct of an agent acting on the debtor's behalf. For example, paragraph (B) could be read in light of its context, *Strang* and *Meyer*, and background principles of vicarious liability to reach intentionally misleading statements made by the debtor's agent acting on the debtor's behalf. See, *e.g.*, *Osborne*, 951 F.3d at 704.

Petitioner also points to subsections 523(a)(1), (14) and (14A), which render certain tax-related debts nondischargeable. See Pet. Br. 24-25. But each of those provisions could be read to encompass a tax filing made by a paid preparer on the debtor's behalf. Ordinarily, "[t]he failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent." *United States* v. *Boyle,* 469 U.S. 241, 252 (1985). Similarly, petitioner points to Section 523(a)(3), which excepts from discharge debts "neither listed nor scheduled under section 521(a)(1)." 11 U.S.C. 523(a)(3). Of course, the debtor can produce the lists and schedules herself. Pet. Br. 25. But the text could also encompass a list or schedule that a debtor's lawyer or bankruptcy petition preparer files, or fails to file, on the debtor's behalf. Cf. 11 U.S.C. 110 (regulating "bankruptcy petition preparer[s]").

Petitioner contends (Pet. Br. 45) that respondent "agrees that section 523(a)(2)(B) bars courts from imputing a culpable partner's fraud to an unwitting partner." That is incorrect. To the extent anything in the brief in opposition suggests otherwise, the discussion above clarifies that the meaning of Section 523(a)(2)(B) is an open question not presented here and that this Court need not

resolve. But petitioner cannot assume that an ambiguous reference to "the debtor" in a different paragraph of the statute necessarily excludes the debtor's agent, and then use that unexamined assumption to rewrite the unambiguous text of Section 523(a)(2)(A) and to disregard *Strang*.

5. Petitioner's policy arguments are unsound and could not justify ignoring the text and *Strang*

Many of petitioner's arguments "sound not in text but in policy." *Badgerow*, 142 S. Ct. at 1320. Petitioner and her amici express concern about so-called "innocent" debtors who find themselves liable under nonbankruptcy law for money obtained by another's fraud. See Pet. Br. at 27-29; Hon. Judith Fitzgerald et al. Amicus Br. 32-34; Nat'l Consumer Bankr. Rights Ctr. Amicus Br. 6-15; Law Professors Amicus Br. 27-30. But it is the victim who is innocent. The applicable state law establishes that debtors in petitioner's shoes are not innocent, but instead equally responsible for the fraud as their agents who acted with fraudulent intent on their behalf.

Petitioner's position is extreme: Under petitioner's new rule, a partner who is *aware* of their co-partner's fraud nonetheless can pocket the illicit proceeds and discharge their resulting debt to the victim. At times, petitioner goes farther yet, suggesting that the debtor needs to "commit the fraud" herself, Pet. Br. 3, apparently meaning that when a debtor possesses fraudulent intent but deputizes an agent to make a false statement on her behalf, the resulting debt would be excepted from discharge. Even the courts of appeals that chose a rule solely on policy grounds to protect the debtor's fresh start did not go so far as petitioner would, instead opting for the "knew or should have known" rule petitioner has abandoned. See pp. 29-31, *supra*. Petitioner's new rule lacks

any textual basis *and* would produce anomalous outcomes that no court has ever viewed as sound policy.

Petitioner and her amici are also incorrect to assert that the fraud occurred "without any act, omission, intent or knowledge" by the debtor. Pet. Br. I. Petitioner formed a business partnership, signed the fraudulent disclosures, and sold the house with her partner. See pp. 4-6, *supra*. More importantly, in entering a partnership, petitioner joined a business venture to benefit from her partner's efforts, which comes with the responsibility to accept liabilities arising from his actions—including his frauds—on behalf of their partnership. Petitioner had many opportunities to avoid her liability before the fraud, and she could seek indemnification or contribution from the partnership or her partner after the fact. See p. 28, *supra*. But Congress has made clear that she may not use bankruptcy to perpetuate the harm to the victim by extinguishing her obligation to compensate him that arises because her agent defrauded respondent while acting on petitioner's behalf. The policy enshrined in the Code and undergirding petitioner's liability under state law are fundamentally fair and efficient, advancing the basic principle of providing "full recovery" to victims of fraud and forcing partnerships to internalize the costs of their profit-making ventures. *Cohen*, 523 U.S. at 222.

In any event, "'even the most formidable' policy arguments cannot 'overcome' a clear statutory directive." *BP P.L.C.* v. *Mayor & City Council of Balt.*, 141 S. Ct. 1532, 1542 (2021) (quoting *Kloeckner* v. *Solis*, 568 U.S. 41, 56 n.4 (2012)). "[N]othing in the generalized statutory purpose of protecting [certain parties] can overcome the specific manner of that protection which the text … contains," as "the pros and cons of [any particular rule] are for the consideration of Congress, not the courts."

RadLAX Gateway Hotel, LLC v. *Amalgamated Bank*, 566 U.S. 639, 649 (2012). "The Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is [the Court's] obligation to interpret the Code clearly and predictably using well established principles of statutory construction." *Ibid.* "Under that approach, this is an easy case." *Ibid.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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