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 of *Amici Curiae* Professors Lawrence Ponoroff and Rafael I. Pardo in Support of Respondent

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INTEREST OF *AMICI CURIAE*[1]

Amici are leading scholars of bankruptcy and commercial law who have been teaching, researching, and writing about bankruptcy law for decades. *Amici* have an interest in ensuring that the Bankruptcy Code is interpreted consistent with its text and structure, thereby providing predictability in the Code's administration. *Amici* also have authored works of scholarship relating to or directly addressing the question presented in this case: the proper scope of the Code provision concerning dischargeability of debts obtained by fraud.

Amici are the following scholars:

Lawrence Ponoroff is a former dean of three U.S. law schools and is currently Professor Emeritus at Tulane University Law School. He is the co-author of a bankruptcy law casebook and treatise as well as dozens of law review articles addressing various bankruptcy issues. He authored *Vicarious Thrills: The Case for Application of Agency Rules in Bankruptcy Dischargeability Litigation*, 70 Tul. L. Rev. 2515 (1996), which addresses dischargeability of debts obtained by fraud. He is an elected member of the American Law Institute and a Fellow of the American College of Bankruptcy. He previously served multi-year terms on the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States

[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certify that no counsel for any party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties have filed blanket consents to the filing of amicus briefs.

and on the Federal Judicial Center Committee on Bankruptcy Judge Education.

Rafael I. Pardo is the Walter D. Coles Professor of Law at Washington University in St. Louis School of Law. Much of his scholarship has focused on topics relating to the discharge of debt through bankruptcy. For example, he co-authored *Does Ideology Matter in Bankruptcy? Voting Behavior on the Courts of Appeals*, 53 Wm. & Mary L. Rev. 919 (2012), which discusses the historical development of discharge and dischargeability. He has dedicated a significant amount of time to providing *pro bono* advice and representation to individuals who have sought debt relief through the bankruptcy system. He also has testified as a bankruptcy expert before both houses of Congress, is an elected member of the American Law Institute, and is an elected fellow of the American Bar Foundation.

The positions taken in this brief are those of the *amici* alone and should not be attributed to any institution with which the amici are or have been affiliated.

INTRODUCTION

Statutory text is often put together over time, accounting along the way for a variety of competing interests. *Cf. New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 543 (2019) (noting that legislation may be the product of "hard-fought compromise") (citation omitted). Thus, even when a statute might be thought to "serve one general objective," that statute will often contain "subsidiary provisions that seek to achieve other desirable (perhaps even contrary) ends as well." *Fitzgerald* v. *Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 108 (2003).

There is no better example of legislative compromise than the Bankruptcy Code. Over many years, Congress has fine-tuned bankruptcy law to account for various competing interests, thereby striking a "careful balance between the interests of creditors and debtors." *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1804 (2019).

Petitioner takes a more simplistic view, attempting to distill the purposes of the Code down to a single, overarching goal: giving a "fresh start" to the "honest but unfortunate debtor." *E.g.*, Pet. Br. 2. Certainly, providing a fresh start is one important purpose underlying the Bankruptcy Code. See *Marrama* v. *Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007). But it is not the whole story. By definition, the exceptions to discharge listed in 11 U.S.C. 523(a) *carve out* certain debts from a debtor's fresh start.

Such exceptions to discharge have existed in federal bankruptcy law from the earliest U.S. bankruptcy legislation. As discharge has expanded to provide greater relief to debtors, exceptions to discharge likewise have expanded—protecting creditors along the way. In its present form, Section 523(a) contains a long list of exceptions, many of which have nothing to do with a debtors' honesty.

In particular, Section 523(a)(2)(A) does not implicate the "honest but unfortunate debtor" principle. The text of that provision focuses not on the debtor's acts but on the nature of the debt, excepting from discharge "any debt * * * to the extent obtained by * * * actual fraud." 11 U.S.C. 523(a)(2)(A). That exception applies even when the debt was incurred by the fraud of someone other than the debtor, with the fraud imputed to the debtor through state-law agency principles. See *Strang* v. *Bradner*, 114 U.S. 555, 561 (1885). Thus, Congress chose to protect a defrauded creditor over an "honest but unfortunate" debtor who is responsible for fraud as a matter of agency law, even if that debtor did not carry out the fraud herself and even if that debtor did not know about the fraud at the time it was taking place.

There is nothing strange about the fact that those state-law principles apply in a bankruptcy context. To the contrary, the Code heavily relies on state law, including agency law, and that law continues to have force in a bankruptcy case unless some federal law displaces it. And, of course, state law is not static. If it were ever to be the case that some policy problem arose from the scope of imputed liability under state law—in the context of spousal relationships, for example—States are well equipped to revise their law to account for that problem, and, as a general rule, the result in bankruptcy would follow suit.

ARGUMENT

I. The "Honest But Unfortunate Debtor" Principle Does Not Animate Section 523(a)(2)(A), Which Protects Creditors' Interests

Petitioner insists that the exception to discharge in Section 523(a)(2)(A) should be interpreted so as to protect any honest but unfortunate debtor—*i.e.*, any debtor that did not herself commit the fraud that has given rise to the debt in question. That contention badly misunderstands the role that the exceptions to discharge—as opposed to the total bar to discharge found in 11 U.S.C. 727(a)—plays in the Bankruptcy Code.

A. The Bankruptcy Code is a bundle of compromises. Debtors' interests are balanced against creditors' interests. See, *e.g.*, *Taggert* v. *Lorenzen*, 139 S. Ct. 1795, 1804 (2019). Creditors' interests are balanced against other creditors' interests. See, *e.g.*, *City of Chicago, Illinois* v. *Fulton*, 141 S. Ct. 585, 589 (2021) (explaining that "[t]he automatic stay" imposed under 11 U.S.C. 362 "prevent[s] individual creditors from pursuing their own interests to the detriment of the others"). And state-law principles are balanced against federal imperatives. See, *e.g.*, *Butner* v. *United States*, 440 U.S. 48, 55 (1979) (state property law applies in bankruptcy absent a conflicting federal interest).

In fact, the history of federal bankruptcy law can be understood as Congress's long-running effort to mediate among creditors and debtors. In the beginning, bankruptcy was "purely a creditors' remedy," Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 14 (1995) ("*Bankruptcy Laws*") (discussing the original bankruptcy act), and the availability of discharge of debts was narrow. Now, bankruptcy law is much friendlier to debtors than it once was, and a general discharge from debts is available in most bankruptcy cases involving individual debtors. See, *e.g.*, 11 U.S.C. 727. There is no doubt that one policy reflected in the Code is granting a "fresh start" through discharge to the "honest but unfortunate debtor." *Marrama*, 549 U.S. at 367.

That does not mean, however, that *every aspect* of bankruptcy law was designed to protect the honest but unfortunate debtor (a phrase that appears nowhere in the bankruptcy statute), let alone to do so at all costs. For example, the Code's exceptions to discharge—codified in 11 U.S.C. 523(a)—show congressional action to carry out the *exact opposite* policy. See Jonathan R. Nash & Rafael I. Pardo, *Does Ideology Matter in Bankruptcy? Voting Behavior on the Courts of Appeals*, 53 Wm. & Mary L. Rev. 919, 937 (2012) (noting that "[a] review of the historical record reveals Congress's ongoing tendency to carve out more and more exceptions to the discharge in bankruptcy"). Since 1800, the bankruptcy laws have included exceptions to discharge, and the current statute lists twenty-one such exceptions, twelve of which Congress added subsequent to the Bankruptcy Code's enactment in 1978. See Act of April 4, 1800, ch. 19, § 62, 2 Stat. 19, 36; 11 U.S.C. 523(a); Tabb, *Bankruptcy Laws*, *supra*, at 24; Nash & Pardo, *supra*, at 938.

Congress has used those exceptions to counterbalance debtor-friendly aspects of bankruptcy law, by affording protections to creditors who hold certain specific types of debt. See Nash & Pardo, *supra*, at 940. As this Court has explained, "[t]he various exceptions to discharge in [Section] 523(a) reflect 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* v. *de la Cruz*, 523 U.S. 213, 222 (1998) (quoting *Grogan* v. *Garner*, 498 U.S. 279, 287 (1991)).

Section 523(a)(2)(A) represents just such a protection for creditors. The creditors in question were *deceived* into extending monies or providing services to the debtor or the debtor's confederate. Section 523(a)(2)(A) therefore broadly guarantees that those creditors are able to recover on legitimate claims regardless of whether the debtor who invokes the protections of bankruptcy law is the actor who personally engaged in bad acts or had knowledge thereof. See, *e.g.*, *In re M.M. Winkler & Assocs.*, 239 F.3d 746, 751-752 (5th Cir. 2001).

Like the other exceptions to discharge, Section 523(a)(2)(A) is not aimed at punishing the debtor, and it does not *negate* a debtor's fresh start. The debtor can still discharge any of her debts not covered by that provision (or by any other nondischargeability provision). Rather, Section 523(a)(2)(A) simply ensures that the debtor's personal liability for one particular kind of debt survives bankruptcy, in recognition of the overriding importance of ensuring that victims of fraud are able to recover from a debtor that is responsible for that fraud as a matter of state law.

There is a separate bar to discharge that, broadly speaking, *does* seek to punish a dishonest debtor and *does* entirely wipe out the debtor's ability to obtain a fresh start: Section 727(a), which sets forth the circumstances in which a debtor cannot obtain *any discharge at all for any of her debts.* See 11 U.S.C.

727(a).[2] In that provision, the focus is on the debtor's entitlement to a favored status conferred by the Bankruptcy Code. For instance, a debtor who deliberately makes a false oath or who fails to obey a lawful order of the court may not discharge a single one of her prepetition debts and continues to be subject to personal liability for each of them. See, *e.g.*, 11 U.S.C. 727(a)(4), (6).

The exceptions to discharge for particular debts have a very different purpose. See, *e.g.*, *Friend* v. *Talcott*, 228 U.S. 27, 40-41 (1913) (describing the "difference" between decision about whether "the bankrupt * * * is entitled to" any discharge at all and decision, "as between a particular creditor and the bankrupt, whether the claim of that creditor is of such a character as to be exempt from the operation of a discharge"); *Brown* v. *Felsen*, 442 U.S. 127, 128-129 (1979). Those exceptions single out particular debts, owed for particular reasons to particular kinds of creditors, and decree that those debts should survive bankruptcy. And they do so based not on how honest or how unfortunate the debtor is, but based on the nature of the debt itself and on the creditor's strong entitlement to recovery. In short, the fact that a debt is excepted from discharge—which does not in any way affect the separate question of the debtor's entitlement to a general discharge—merely sets a defined limit on the debtor's fresh start, without taking it away entirely.

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[2] A complaint objecting to discharge under Section 727(a) effectively sets the debtor against all of his or her creditors, not simply the one that may register the objection. And if discharge is denied under that provision, questions regarding exceptions to discharge for particular debts under Section 523(a) become moot.

B. Those conclusions are borne out by an examination of the history of bankruptcy law, which demonstrates that the exceptions to discharge of particular debts do not exist to ensure that only dishonest debtors are subject to that limited bar on discharge. Rather, the exceptions cover various *types* of debts as a way of ensuring that certain deserving creditors are not stripped of their claims.

1. *1800-1898*. Congress's earliest bankruptcy statute, enacted in 1800, gave creditors significant control over bankruptcy proceedings, obviating any need for exceptions to a debtor's discharge. See Act of Apr. 4, 1800, ch. 9, § 36, 2 Stat. 19, 31 (repealed 1803) (discharge contingent on the consent of two-thirds of the creditors, measured by the number and value of the creditors' claims). In the Act of 1841, however, Congress allowed debtors to voluntarily seek discharge of debts through bankruptcy—and allowed creditors to block that discharge only under certain circumstances and only if a majority of them (in number and value of proved debts) agreed. See Act of Aug. 19, 1841, ch. 9, § 4, 5 Stat. 440, 443 (repealed 1843); John C. McCoid, II, *The Origins of Voluntary Bankruptcy*, 5 Bankr. Dev. J. 361, 361-362 (1988); Rafael I. Pardo, *Bankrupted Slaves*, 71 Vand. L. Rev. 1071, 1086 n.75 (2018).

The 1841 Act placed two different kinds of limits on discharge. First, the Act listed four complete bars to discharge of any of a debtor's debts. Each of those bars related to some type of dishonesty on the part of the debtor. See Act of Aug. 19, 1841, ch. 9, § 4, 5 Stat. at 443-444 (barring discharge for debtors who (*inter alia*) fraudulently or willfully concealed property). Second, the Act contained an exception to discharge for particular debts "created in consequence of defalcation" when acting in some fiduciary capacity. *Chapman* v. *Forsyth*, 43 U.S. (2 How.) 202, 207-208 (1844); see *ibid.*

("The debts here specified are excepted from the operation of the act. This exception applies to the debts and not to the person, if he owe other debts.").[3]

Congress passed a new bankruptcy act in 1867 that weakened the creditor consent requirement for discharge even further but expanded the list of reasons why discharge would be unavailable to a debtor as a statutory matter. See Act of Mar. 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878); see also Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 356-357 (1991) ("*Discharge*"). Focusing again on whether a debtor had acted dishonestly, Congress provided that a debtor should be denied discharge for *all* of his debts if (for instance) he concealed property or incurred debt through gaming, then regarded as morally questionable. Act of Mar. 2, 1867, ch. 176, § 29, 14 Stat. at 531-532.

As for whether discharge of *specific* debts was permissible, Congress provided that "no 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 under this act; but the debt may be proved." Act of Mar. 2, 1867, ch. 176, § 33, 14 Stat. at 533. This Court held in *Strang* v. *Bradner*, 114 U.S. 555 (1885), that the provision barred debtors from discharging liability for their business partner's fraud—regardless of whether the debtors had personal knowledge of that fraud or participated in the fraud in any way—because the debtors were responsible for the actions of their partner as a

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[3] Courts also were "split on the issue of whether a discharge under the Act applied to debts owed to government creditors." Rafael I. Pardo, *Bankrupted Slaves*, 71 Vand. L. Rev. 1071, 1087 (2018).

matter of agency law. See *id.* at 561. In effect, this Court concluded that the provision was intended to protect defrauded creditors' rights rather than to punish dishonest debtors. See *ibid.* Thus, the debtor's lack of personal involvement in the commission of the fraud was irrelevant.

2. *1898-1978*. Beginning with the 1898 bankruptcy act, Congress created a number of additional protections for debtors. See Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978); Walter D. Coles, *The Bankrupt Law of 1898—Its Merits and Defects*, 7 Am. Lawyer 283, 284 (1899); *Discharge*, *supra*, at 364. Yet Congress continued to pay close attention to the circumstances in which discharge could be denied either entirely or as to specific debts—and, as to the latter, to focus on the nature of the debt rather than on the debtor's personal honesty or dishonesty.

For instance, in 1903 amendments to the 1898 Act, Congress slightly altered the statutory language excepting fraud-related debts from discharge, without altering the meaning of that exception with respect to imputed liability. Compare Act of February 5, 1903, ch. 487, § 5, 32 Stat. 797, 798 ("A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * are liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another."), with Act of 1898, ch. 541, § 17, 30 Stat. at 550 (excepting from discharge "judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another"); see *McIntyre* v. *Kavanaugh*, 242 U.S. 138, 139 (1916). And Congress expanded one category of particular debts excepted from discharge: debts involving alimony, child support, and similar support-related obligations. *Id.* at 139-140 (covering debts "for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female"). By adding exceptions to discharge for alimony and other support debts, Congress protected a certain class of creditors—primarily, wives and children. And it did so without regard to whether the debtor who owed such a debt was honest, unfortunate, or both. *Cf. Dunbar* v. *Dunbar*, 190 U.S. 340, 352 (1903) (explaining that rationale for exempting family-support debts from discharge was that the "welfare of the state * * * demand[s] that, so long as [the debtor] has any substance at all, he shall apply it to the maintenance of his children").

In 1922 amendments, Congress expanded the exceptions to discharge for particular types of debts by protecting employees whose employers sought discharge in bankruptcy. Congress provided that a discharge in bankruptcy would not release a debt that an employer owed "for wages due to workmen, clerks, traveling or city salesman, or servants, which have been earned within three months before the date of commencement of the proceedings in bankruptcy." Act of January 7, 1922, ch. 22, § 17, 42 Stat. 354, codified at 11 U.S.C. 35 (1925-1926). Congress also provided that an employer's debt "for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment" was not subject to discharge. *Ibid.* Again, nothing in the language of those exceptions implicates a debtor's honesty. Those debts were simply not the *type* of debts as to which Congress thought a debtor's personal liability should be discharged.

3. *1978-present*. In 1978, Congress codified the Bankruptcy Code in title 11 of the United States Code. In doing so, Congress modified the discharge and exception-to-discharge provisions slightly. Compare, *e.g.*, Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523(a), 92 Stat. 2549, 2590, with 11 U.S.C. 35 (1976). For the most part, however, Congress simply codified the same provisions it had crafted beginning in 1898.

Since 1978, Congress has shifted the Code in a more creditor-friendly direction, see Nash & Pardo, *supra*, at 938-939—and, in the course of doing so, has continued to expand the list of exceptions to discharge for particular debts. Each of those exceptions can be understood as preventing certain *types* of claims from being discharged in bankruptcy, for the protection of the creditors who hold the claims, without regard to the honesty or dishonesty of the debtor. For instance, in 1984, Congress created a new exception under which debtors could not discharge debts arising from driving under the influence of drugs or alcohol. Act of July 10, 1984, § 371, Pub. L. No. 98-353, 98 Stat. 333. A Senate Committee Report explained that the policy of compensating drunk-driving victims far outweighed any policy in favor of "giv[ing] the honest and financially distressed debtor a fresh start." S. Rep. No. 101-434, at 4 (1990), as reprinted in 1990 U.S.C.C.A.N. 4065, 4069. And in 1994, Congress added an exception preventing discharge of debts for certain condominium and cooperative housing fees. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 309, 108 Stat. 4106. That provision protects a certain class of creditors—condominium and cooperative housing owners—regardless of how honestly the debtor has behaved.

It continues to be the case that debtors are barred from obtaining *any* discharge of *any* of their debts when they have acted dishonestly. See 11 U.S.C. 727(a). But, as the history set forth above demonstrates, the Section 523(a) exceptions to discharge for particular debts have a different focus: they are aimed at preventing certain *types* of claims from being discharged in bankruptcy. Merely invoking the principle that an honest but unfortunate debtor is entitled to some of the protections of bankruptcy law therefore does not advance the ball in interpreting Section 523(a) in general or Section 523(a)(2)(A) in particular. Rather, each exception must be given a "fair reading," *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1142 (2018), on its own terms.

II. Whether A Debtor Owes A Creditor Money "Obtained By Fraud" Within The Meaning Of Section 523(a)(2)(A) Is A State-Law Question

Section 523(a)(2)(A) does not ask *why* a debtor owes a creditor money "obtained by * * * false pretenses, a false representation, or actual fraud." 11 U.S.C. 523(a)(2)(A). Rather, as is typical throughout federal bankruptcy law, Section 523(a)(2)(A) leaves that question to the States, recognizing that whatever form of legal responsibility for the debt applies under state law also applies in bankruptcy.

A. As an initial matter, there is no question that under state law petitioner is subject to imputed liability for the bad acts of her partner in a partnership arrangement, including a person who, it so happens, later became her spouse.

Under applicable state law, general partnership is a type of mutual agency. See, *e.g.*, Rev. Unif. P'ship Act § 301(1) (2021); Cal. Corp. Code § 16301(1). "Each partner" is considered "an agent of the partnership," *id.*, and can be held liable "for all obligations of the partnership," Rev. Unif. P'ship Act § 306(a) (2021); see Cal. Corp. Code § 16306(a); see also Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 Bus. Law. 1, 30-31 (1993).

Agency law allows a principal to extend his person out into the world through the vessel of his agent. See Deborah A. Demott, *The Contours and Composition of Agency Doctrine: Perspectives from History and Theory on Inherent Agency Power*, 2014 U. Ill. L. Rev. 1813, 1816-1817 (2014). By virtue of that extension, the agent becomes an "alter ego" of the principal. See Floyd R. Mechem, *The Nature and Extent of an Agent's Authority*, 4 Mich. L. Rev. 433, 436-437 (1905). And the two persons—agent and principal—become inseparable. See Walter Wheeler Cook, *Agency by Estoppel*, 5 Colum. L. Rev. 36, 39 (1905) (noting that agency liability was founded on "the fiction of the identity of principal and agent"). That is, a principal "who acts through another acts himself." Lawrence Ponoroff, *Vicarious Thrills: The Case for Application of Agency Rules in Bankruptcy Dischargeability Litigation*, 70 Tul. L. Rev. 2515, 2561 n.178 (1996); see O.W. Holmes, Jr., *Agency*, 4 Harv. L. Rev. 345, 347-351 (1891) ("*Agency Vol. I*"); Oliver Wendell Holmes, Jr., *Agency*, 5 Harv. L. Rev. 1 (1891) ("*Agency Vol. II*").[4]

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[4] Traditionally, it was that relationship of identity between a principal and his agents that justified vicarious liability. "If the act of the servant is the act of the master, or master and servant are considered as one person, then the master must pay for the act if it is wrongful, and has the advantage of it if it is right." Holmes, *Agency Vol. I*, 4 Harv. L. Rev. at 351 (internal quotation marks omitted); *accord* Holmes, *Agency Vol. II*, 5 Harv. L. Rev. at 18-19; 1 William Blackstone, *Commentaries on the Laws of England*, *431-432 (J.B. Lippincott 1893) (stating that a master "may

In addition, there are numerous pragmatic justifications for imputed liability in an agency context. Principals exert control over their agents, are in the best position to monitor their agents, and benefit from their agents' actions. See, *e.g.*, Steven H. Resnicoff, *Is It Morally Wrong to Depend on the Honesty of Your Partner or Spouse? Bankruptcy Dischargeability of Vicarious Debt*, 42 Case W. Res. L. Rev. 147, 160 (1992); Bryant Smith, *Cumulative Reasons and Legal Method*, 27 Tex. L. Rev. 454, 466-468 (1949). Moreover, imputing liability to principals distributes the risk of harm. That is so because placing responsibility for a loss on a greater number of actors lessens the burden of that loss and increases the likelihood that the victim will be compensated. See, *e.g.*, Alan Q. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 Harv. L. Rev. 563, 565-570 (1988); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499, 517-519 (1961); William O. Douglas, *Vicarious Liability and the Administration of Risk I*, 38 Yale L.J. 584, 588 (1929).

B. The only question, then, is whether the Bankruptcy Code should be interpreted to incorporate those background state-law principles insofar as Congress has chosen not to directly displace them. The answer is yes.

Petitioner's personal liability to pay damages to respondent as a result of her partner's fraud creates a right to money—a debt—in respondent's hands. See 11 U.S.C. 101(12). As this Court has ruled, Congress has generally left the determination of rights "in the

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frequently be answerable for his servant's misbehaviour" because "the wrong done by the servant is looked upon in law as the wrong of the master himself").

assets of a bankrupt's estate to state law." *Butner* v. *United States*, 440 U.S. 48, 54 (1979) (addressing a security interest); see, *e.g.*, *Vanston Bondholders Protective Comm.* v. *Green*, 329 U.S. 156, 161 (1946) ("What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed, is a question which, in the absence of overruling federal law, is to be determined by reference to state law."); cf. *Meyer* v. *Holley*, 537 U.S. 280, 285-286 (2003). There are at least three important justifications for doing so: it reduces uncertainty, discourages forum shopping, and "prevent[s] a party from receiving a windfall merely by reason of the happenstance of bankruptcy." *Butner*, 440 U.S. at 55 (citation omitted); see, *e.g.*, *The Dischargeability of "Control Person" Liability for Federal Securities Fraud: Actual Fraud, Vicarious Nondischargeability, and the Vacillating Objects of the § 523(a)(2)(A) Discharge Exception*, Bankr. L. Letter, 2002 WL 1022151, at *8 (May 2002).

This Court also has already applied that general principle in interpreting a federal bankruptcy-law statute that is a predecessor of Section 523(a)(2)(A). As noted above, in *Strang* v. *Bradner*, 114 U.S. 555 (1885), the Court interpreted section 33 of the Bankruptcy Act of 1867 (the 1867 Act), Act of Mar. 2, 1867, ch. 176, § 33, 14 Stat. 517, 533 (repealed 1878), which specified the types of debts excepted from a discharge granted under that act and stated that "no debt created by the fraud or embezzlement of the bankrupt * * * shall be discharged under this act." The Court explained that "we are of opinion that [the partner's] fraud is to be imputed, for the purposes of the action, to all the members of his firm. * * * Each partner was the agent and representative of the firm with reference to all business within the scope of the partnership."

Strang, 114 U.S. at 561. Thus, the Court concluded that even innocent partners could not use bankruptcy to escape pecuniary responsibility for the fraudulent misrepresentations of their partner made in the conduct of partnership business, especially when the innocent partners "received and appropriated the fruits of the fraudulent conduct of their associate in business." *Ibid*. Those partners' honesty was irrelevant; what mattered was the character of the debt and their imputed liability.[5]

Contrary to petitioner's argument (Pet. Br. 39-47), that holding has survived the various amendments of the bankruptcy laws that followed in the wake of *Strang*. For instance, courts applied that principle in the early twentieth century, at which point the operative statutory language governing the fraud-related exception to discharge, enacted in 1903, stated that a "discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * are liabilities for obtaining property by false pretenses or false representations." In *Frank* v. *Michigan Paper Co.*, 179 F. 776 (4th Cir. 1910), the Fourth Circuit stated that under that statutory text "a false representation by one partner, by means of which property was obtained by the partnership, will in law be imputed to

[5] Notably, this Court has also applied the *Strang* principle of imputed liability to exceptions to discharge other than the one covering money obtained by fraud. For instance, addressing the version of the bankruptcy-law exception to discharge for debts arising from willful and malicious injury that was in effect in 1916, this Court regarded it "as entirely clear" that "partners are individually responsible for torts by a firm when acting within the general scope of its business, whether they personally participate therein or not." *McIntyre*, 242 U.S. at 139. The only question under the statute was whether "the *firm* inflicted a wilful and malicious injury"—and if it did, the exception to discharge was triggered. *Ibid.* (emphasis added).

the other partners to the extent of holding them civilly liable for the debt, and their discharge in bankruptcy will not discharge their liability as to such debt." *Id.* at 779. Other courts reached the same conclusion. See, *e.g.*, *Zimmern* v. *Blount*, 238 F. 740, 743 (5th Cir. 1917); *In re Cloutier Bros.*, 228 F. 569, 570 (D. Me. 1915).

Moreover, the leading bankruptcy law treatise has accepted the *Strang* principle over the years since *Strang* was decided. The very first edition of the treatise known today as *Collier on Bankruptcy* was published a few months after the passage of the 1898 Act, which replaced the 1867 Act that *Strang* interpreted. The 1898 Act stated in Section 17 that no discharge was available for debts "for frauds, or obtaining property by false pretenses or false representations." Act of July 1, 1898, ch. 541, § 17, 30 Stat. 544, 550 (repealed 1978). In analyzing Section 17's operation with respect to "partnership debts created by the fraud of one member," the treatise cited *Strang* and concluded that "[i]f in the conduct of partnership business * * * one partner makes false and fraudulent misrepresentations of fact to the injury of innocent persons who deal with him * * * , his partners cannot escape pecuniary responsibility therefor on the ground that such misrepresentations were made without their knowledge; especially if the partnership has had the benefit of the fraudulent act * * * . The debt being one created by fraud and by actual fraud, *even the innocent partners are not released from it by a discharge in bankruptcy*." William Miller Collier, *The Law of Bankruptcy and the National Bankruptcy Act of 1898*, at v, 173 (Matthew Bender 1899) (emphasis added).

Subsequent editions of the treatise reached the same conclusion. Those editions of the treatise interpreted the 1917 version of the relevant exception to discharge, which stated that a "discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as * * * are liabilities for obtaining property by false pretenses or false representations," and the 1970 version of that exception, which was in substance worded identically. See Frank B. Gilbert, *The Law of Bankruptcy and the National Bankruptcy Act of 1898, by Wm. Miller Collier* 421 (11th ed. 1917); 1A *Collier on Bankruptcy* ¶ 17.16, at 1640.1-1641 (James Wm. Moore & Lawrence P. King eds., 14th ed. rev. 1978).

Today, it continues to be well accepted that the question of a debtor's responsibility for a debt obtained by fraud is a state-law question as to which imputed-liability principles are in full effect—as *Strang* first held in 1885. The Collier treatise still expresses that view, just as it has done since shortly after this Court decided *Strang*. See 4 *Collier on Bankruptcy* ¶ 523.08 (16th ed. 2022). And the great weight of current authority in the lower courts supports the same conclusion. See, *e.g.*, *In re Miller*, 276 F.3d 424, 429 (8th Cir. 2002); *In re Villa*, 261 F.3d 1148, 1152 (11th Cir. 2001); *Winkler*, 239 F.3d at 749; *Calvey* v. *United States*, 448 F.2d 177, 180 (6th Cir. 1971); see also *In re Palilla*, 493 B.R. 248, 254 (Bankr. D. Colo. 2013) (stating that "a majority of courts have adopted the reasoning * * * to impute the wrongful conduct of one party to an innocent debtor for purposes of nondischargeability").

That history, and the continuing vitality of *Strang*'s holding, leads to only one conclusion: the applicability of the exception to discharge in Section 523(a)(2)(A) does not depend on whether the debtor is the person who personally committed the fraud that gave rise to the relevant debt, or whether the debtor bears some other kind of moral responsibility for the fraud because (for instance) she acted dishonestly in some way.

Rather, it depends on what state law says about the debtor's legal responsibility for the debt. Here, because petitioner is legally responsible for her partner's fraud under state law, nondischargeability under the fraud exception requires only a causal connection between the fraudulent conduct and the existence or continuation of the debt—and in this case nobody disputes that such a causal connection exists.

C. Petitioner suggests that a parade of horribles will follow if this Court upholds the Ninth Circuit's decision. See, *e.g.*, Pet. Br. 38-39. In particular, she insists that an innocent debtor may face "life-long liability" based purely on the fraud of the debtor's spouse. *Id.* at 28.

That argument is incorrect for several reasons. First, state law already accounts for the differences between business partners and life partners. "[I]t is axiomatic that the marital relationship does not alone give rise to either a legal partnership or an agency." Ponoroff, *supra*, at 2552 (citing, *e.g.*, Unif. P'ship Act § 6 (1995)). Courts have recognized that distinction in applying Section 523. See, *e.g.*, *In re Allison*, 960 F.2d 481, 485 (5th Cir. 1992) (holding that the agency rule under which the fraud of one partner may be imputed to his co-partners does not pertain between spouses who are not jointly operating a business). Even co-owning property is not, by itself, enough to create a general partnership. See Rev. Unif. P'ship Act § 202(c)(1) (2021). Accordingly, no debtor will be subject to the Section 523(a)(2)(A) exemption from discharge merely by virtue of being married to a fraudster; the debtor would have to have taken additional steps to enter into a formal partnership or other agency arrangement with her spouse, presumably because she wished to realize various benefits from such an arrangement.

Second, petitioner's argument proves too much, because the logic of that argument would suggest that there is something wrong or unfair with underlying state law on imputed liability. As discussed above, however, state law defines the scope of imputed liability for fraud, see *Butner*, 440 U.S. at 55, and—across the country—that law holds general partners liable for one another's fraud. See pp. 14-16, *supra*. Therefore, the argument misses the point that when a person decides to become a general partner with another party, even one who is or later becomes her spouse, she becomes subject to whatever liability is associated with that status.

There is nothing inherent in bankruptcy law that suggests that those state-law consequences must necessarily be avoided when the person whose spouse is a fraudster decides to file for bankruptcy. As is true in many places in the Code, Congress simply decided in enacting Section 523(a)(2)(A) not to wade into altering the scope of imputed state-law liability for fraud, instead choosing to except "*any* debt * * * obtained by * * * actual fraud"—regardless of the basis for holding the debtor responsible for that fraud. 11 U.S.C. 523(a)(2)(A) (emphasis added). That choice is fully consistent with federal respect for the States' laws except where Congress expressly provides otherwise, and with a desire to protect the defrauded creditor rather than the person who would be subject to liability outside of the bankruptcy context—both perfectly reasonable and laudable bankruptcy-related aims. See pp. 16-21, *supra*.

Finally, to the extent that state law on imputed liability does give rise to any policy concerns, those concerns can be addressed by the States themselves. If States were to encounter situations in which unfairness resulted from individuals being held responsible for their spouse's bad acts under agency principles, States could address that problem—for instance, by creating agency-law exceptions for those particular situations. Cf. *Ohio* v. *Kovacs*, 469 U.S. 274, 285-286 (1985) (O'Connor, J., concurring) (responding to a concern that the Court's conclusion that an environmental clean-up obligation was discharged could have harsh effects by noting that state legislatures are empowered to alter the result by changing state law to give clean-up judgments "the status of statutory liens or secured claims"). But this Court should not deform federal law in order to undermine the States' choices about imputed liability. What governs here is the plain text of Section 523(a)(2)(A), which prevents discharge of "any debt * * * obtained by * * * actual fraud" regardless of the debtors' personal honesty.

CONCLUSION

This Court should affirm the Ninth Circuit's judgment.

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