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 THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Section 523(a)(2)(A) of the Bankruptcy Code provides that a discharge under Chapter 7, 11, 12, or 13 "does not discharge an individual debtor from any debt * * * for money, property, services, or an extension, renewal, or refinancing of 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." 11 U.S.C. 523(a)(2)(A). The question presented is:

Whether Section 523(a)(2)(A) bars the discharge in bankruptcy of an individual debtor's debt for money obtained by the actual fraud of her business partner, in the absence of a finding that the debtor personally committed the fraud or intended or knew of its occurrence.

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INTEREST OF THE UNITED STATES

This case concerns whether 11 U.S.C. 523(a)(2)(A) bars an individual from discharging in bankruptcy a debt for money she obtained through the fraud of her business partner, in the absence of a finding that the debtor personally committed the fraud or intended or knew of its occurrence. The United States is the Nation's largest creditor, and in that capacity it invokes Section 523(a)(2)(A) to oppose discharge of debts based on fraud. Federal agencies also may participate in bankruptcy proceedings as receivers for defrauded creditors, or as guarantors or insurers of a defrauding debtor's obligation. In addition, United States Trustees are charged with supervising the administration of bankruptcy cases. See 28 U.S.C. 581-589a; see also 11 U.S.C. 307 ("The United States trustee may raise and

may appear and be heard on any issue in any [bankruptcy] case or proceeding."). The United States therefore has a substantial interest in the question presented.

STATUTORY PROVISIONS INVOLVED

Section 523(a)(2)(A) provides:

> (a) A discharge under section 727, 1141, 1192[,] 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> * * * * *
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

11 U.S.C. 523(a)(2)(A) (footnote omitted).[1] Additional pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

1. The federal bankruptcy system has long provided insolvent debtors with the prospect of relief through a discharge of their debts. But Congress has entirely prohibited discharge for some debtors and precluded the discharge of certain kinds of debts. See, *e.g.*, *Husky Int'l Elecs., Inc.* v. *Ritz*, 578 U.S. 355, 364 (2016). The

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[1] All references to Section 523 are to the current version of the statute. In 2019, Congress amended the statute to add a reference to Section 1192 in Section 523(a)'s introductory clause. Small Business Reorganization Act of 2019, Pub. L. No. 116-54, § 4(a)(8), 133 Stat. 1086. That amendment is not relevant here.

statutory exceptions to discharge reflect Congress's "evident[]" determination that "creditors' interest in recovering full payment of [certain] debts * * * outweighed the debtors' interest in a complete fresh start." *Grogan* v. *Garner*, 498 U.S. 279, 287 (1991).

Section 523 of the Bankruptcy Code declares various categories of debts ineligible for discharge. 11 U.S.C. 523. As relevant here, Section 523 provides that a discharge under Chapter 7, 11, 12, or 13 of the Bankruptcy Code "does not discharge an individual debtor from any debt * * * for money * * * to the extent obtained by * * * false pretenses, a false representation, or actual fraud." 11 U.S.C. 523(a)(2)(A). This case concerns whether a debtor who owes a debt under state law for money she obtained through the fraud of her business partner can nonetheless discharge the debt on the ground that she did not personally commit, intend, or know about the fraud.

2. a. In 2005, petitioner—whose name was then Kate Pfenninger—purchased a home in San Francisco, California, with her then-boyfriend, David Bartenwerfer. Pet. Br. 5; Pet. App. 9a. Acting "[a]s partners," Pet. App. 3a, petitioner and Mr. Bartenwerfer decided to remodel the home and sell it at a profit, *id.* at 9a. "Mr. Bartenwerfer assumed full-time responsibility for managing the[] extensive renovations, even though he had no training or education in construction and did not possess a contractor's license." *Id.* at 37a. Petitioner "worked elsewhere." *Ibid.*

Following the renovations, petitioner and Mr. Bartenwerfer sold the property to respondent. Pet. App. 3a. In November 2007, both petitioner and Mr. Bartenwerfer signed a state-mandated transfer disclosure statement and supplement (collectively, the statement).

Id. at 10a; see *id.* at 39a-41a. Although petitioner and Mr. Bartenwerfer "attested" that they had "answered the questions * * * in 'an effort to fully disclose all material facts relating to the Property' and certified that 'the information provided [was] true and correct,'" the statement "failed to disclose numerous significant problems." *Id.* at 40a (brackets in original). Those problems included "several leaks, quite a few open permits, at least one notice of violation, several malfunctioning windows, and a missing fire escape." *Ibid.*; see, *e.g.*, *id.* at 10a. Petitioner and Mr. Bartenwerfer married after they signed the statement but before they signed the sales contract in January 2008. *Id.* at 39a n.2; Pet. Br. 7.

b. After discovering the defects, respondent sued petitioner and Mr. Bartenwerfer in state court for breach of contract, negligence, nondisclosure of material facts, negligent misrepresentation, and intentional misrepresentation. Pet. App. 3a, 10a. Following a 19-day trial, the jury found, *inter alia*, that petitioner and Mr. Bartenwerfer did not disclose information about the property's defects that they "knew or reasonably should have known." *Id.* at 10a. The jury accordingly found in respondent's favor and awarded damages on his claims for breach of contract, negligence, and nondisclosure of material facts. *Id.* at 3a; see *id.* at 10a. The jury found against respondent on his claims for negligent and intentional misrepresentation. *Id.* at 3a.

3. In April 2013, the Bartenwerfers filed for relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. 701 *et seq.* Pet. App. 3a; Pet. Br. 10. Respondent initiated an adversary proceeding against them in bankruptcy court, arguing that their state-law liability was nondischargeable because it was a "debt * * * for money * * * obtained by * * * false pretenses, a false representation,

or actual fraud." 11 U.S.C. 523(a)(2)(A); see Pet. App. 3a.

The bankruptcy court held that Section 523(a)(2)(A) prevented petitioner and Mr. Bartenwerfer from having their debt to respondent discharged. J.A. 1-18. The court determined that Mr. Bartenwerfer had actual knowledge of the false representations that he and petitioner made to respondent (and that all other elements of fraud were satisfied). J.A. 7-18; see Pet. App. 3a-4a. The court further held that although the Bartenwerfers' "marital relationship by itself [was] insufficient to impute [Mr. Bartenwerfer's] fraud" to petitioner, petitioner remained liable for that fraud under agency and partnership principles. J.A. 4; see J.A. 4-5 & n.3. Specifically, the court found that "an agency relationship existed between Mr. and Mrs. Bartenwerfer based on their partnership with respect to the remodel project: she was on title to the Property, signed the disclosure statements relating to the Property, and would financially benefit from the successful completion of the project and sale of the Property." J.A. 5 n.3; see p. 12, *infra*.

4. The Bankruptcy Appellate Panel for the Ninth Circuit affirmed the bankruptcy court's judgment excepting Mr. Bartenwerfer's debt from discharge but vacated the judgment as to petitioner. J.A. 22-59. The Panel agreed with the bankruptcy court that the Bartenwerfers' marriage was irrelevant and that they had formed a business "partnership/agency relationship." J.A. 42-43. The Panel held, however, that under its precedent, the debt was nondischargeable as to petitioner only if she "'knew or had reason to know' of Mr. Bartenwerfer's fraudulent omissions." J.A. 43 (quoting *In re Huh*, 506 B.R. 257, 272 (B.A.P. 9th Cir. 2014) (en

banc)). The Panel therefore remanded to the bankruptcy court for findings about petitioner's knowledge. J.A. 44.

On remand, the bankruptcy court found the debt dischargeable as to petitioner because respondent failed to show that petitioner knew or should have known of Mr. Bartenwerfer's fraud. Pet. App. 35a-59a. The Bankruptcy Appellate Panel affirmed that determination. *Id.* at 18a-20a; see *id.* at 7a-30a.

5. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-6a. As relevant here, the court reversed the judgment regarding petitioner's discharge under Section 523(a)(2)(A). *Id.* at 5a-6a. The court concluded that petitioner's fraud debt "is nondischargeable regardless of her knowledge of the fraud." *Id.* at 6a. The court relied on *Strang* v. *Bradner*, 114 U.S. 555 (1885), in which this Court held that, under a prior version of the bankruptcy law, the discharges that two partners received in bankruptcy did not relieve them of their state-law responsibility for a fraud that had been committed by a third partner, even though they did not know about the third partner's misrepresentation. *Id.* at 560-561; see Pet. App. 5a-6a.

SUMMARY OF ARGUMENT

Section 523(a)(2)(A) precludes petitioner from discharging the state-law fraud debt she owes to respondent. Petitioner's contrary argument—that she is entitled to discharge that debt unless she personally committed the fraud—finds no foothold in text, context, history, or sound bankruptcy policy.

A. 1. Under Section 523(a)(2)(A), a discharge under Chapter 7 of the Bankruptcy Code "does not discharge an individual debtor from any debt * * * (2) for money * * * to the extent 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). Petitioner's state-law debt to respondent for fraud in connection with the sale of real property falls squarely within the terms of that exception to discharge. It is undisputed that petitioner owed a debt to respondent for money that she and her business partner received from a sale of real property, and that her partner committed actual fraud in connection with that sale. Under longstanding agency and partnership principles, petitioner was liable for that fraud. She therefore held a "debt * * * for money * * * obtained by * * * actual fraud," which was nondischargeable. 11 U.S.C. 523(a)(2)(A). Were there any doubt, the statute broadly applies to "*any* debt" that falls within its terms, and it contains only a single exception that did not apply in this case. *Ibid.* (emphasis added). Nothing suggests that Congress intended other exceptions to Section 523(a)(2)(A)'s broad scope, such as the one that petitioner proposes.

2. Statutory context points in the same direction. Other provisions in Sections 523(a) and 727(a) specifically mention the debtor's conduct, intent, or knowledge. Although this Court need not decide the meaning of those provisions in this case, they would provide at least some textual hook for excluding debts based on the actions of a debtor's partner. But Section 523(a)(2)(A) lacks any similar language.

3. This Court has consistently recognized Section 523(a)(2)(A)'s breadth. It has held that the provision "prevents the discharge of all liability arising from fraud." *Cohen* v. *de la Cruz*, 523 U.S. 213, 215 (1998). That includes debts embodied in settlement agreements and consent decrees, as well as liability for treble

damages, costs, and attorney's fees. Just as each of those debts arises from fraud, so did petitioner's state-law debt for actual fraud committed by her business partner within the scope of their partnership.

4. Statutory history confirms the point. This Court long ago construed Section 523(a)(2)(A)'s predecessor as making nondischargeable the debts owed by debtors for the frauds of their partners. *Strang* v. *Bradner*, 114 U.S. 555 (1885). Nothing suggests that in enacting the current Code, Congress intended to change that rule. Instead, Congress eliminated the only text in the prior statute—the requirement that the fraud be "of the bankrupt"—that could have suggested that partners may discharge fraud debts for which partnership law makes them liable.

B. Petitioner's contrary arguments lack merit. In the courts below and in her petition for a writ of certiorari, petitioner contended that her debt was dischargeable so long as she did not know and should not have known about her business partner's fraud. Petitioner now abandons that standard, arguing instead that a fraud debt is nondischargeable only if the debtor herself committed fraud. But petitioner points to no decision of any court adopting (or even considering) that standard.

Petitioner's new standard has no basis in the text of Section 523(a)(2)(A). Petitioner relies on the phrases "individual debtor," "obtained by," and "actual fraud." But none of those phrases indicates that a debtor may discharge a fraud debt for which she is liable under state law simply because she did not personally commit the fraud.

Nor does statutory context support petitioner's argument. Petitioner observes that Section 523(a)(2)(A)'s neighbors use debtor-specific language. But that only

supports the understanding that Section 523(a)(2)(A) focuses on the nature of the debt, not the intention or conduct of the debtor. And petitioner's reliance on a grab-bag of other provisions is misplaced: Petitioner's construction of those provisions is unsupported, and they are ambiguous at best.

C. At bottom, petitioner's argument rests on her conception of sound bankruptcy policy. But this Court construes the text of the Bankruptcy Code, leaving policy determinations to Congress. And petitioner's policy arguments are unconvincing. It is reasonable for Congress to defer to state-law liability principles rather than leave victims uncompensated by permitting debtors who are liable for fraud to discharge that liability in bankruptcy. Moreover, petitioner's rule would have perverse results. Rather than limit discharge to the "honest but unfortunate debtor[]," *e.g.*, Pet. Br. 14, petitioner would permit debtors who knew about or even encouraged their partners' frauds to discharge their fraud debts. The text, context, and history of Section 523(a)(2)(A) preclude that incongruous result.

ARGUMENT

SECTION 523(a)(2)(A) BARS THE DISCHARGE OF AN INDIVIDUAL DEBTOR'S DEBT FOR MONEY OBTAINED THROUGH THE ACTUAL FRAUD OF HER BUSINESS PARTNER

The Bankruptcy Code generally permits individual debtors to receive a discharge of their pre-bankruptcy debts. See, *e.g.*, 11 U.S.C. 727. But Congress has long made exceptions to that rule. Some circumstances—including fraud in the bankruptcy process—will result in the complete denial of any discharge. See 11 U.S.C. 727(a); *Husky Int'l Elecs., Inc.* v. *Ritz*, 578 U.S. 355, 364 (2016) (referring to Section 727(a)(2) as "a blunt remedy

for actions that hinder the entire bankruptcy process"). Other circumstances will preclude discharge of particular debts. See, *e.g.*, *Brown* v. *Felsen*, 442 U.S. 127, 129 & n.1 (1979). Today, the exceptions to discharge for specific kinds of debts appear in 11 U.S.C. 523.

This case concerns Section 523(a)(2)(A), which provides, in pertinent part, that "[a] discharge" under Chapter 7 "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). Under the plain text of that provision, petitioner may not discharge the state-law debt she owes to respondent for money obtained by the actual fraud of her business partner. That conclusion is reinforced by the provision's context and history, and it is consistent with sound bankruptcy policy. This Court should affirm the judgment of the court of appeals.

A. Section 523(a)(2)(A) Excepts From Discharge The Fraud Debt At Issue In This Case

1. The plain text of Section 523(a)(2)(A) precludes petitioner from discharging her debt to respondent

a. This Court's "'interpretation of the Bankruptcy Code starts where all such inquiries must begin: with the language of the statute itself.'" *Lamar, Archer & Cofrin, LLP* v. *Appling*, 138 S. Ct. 1752, 1759 (2018) (quoting *Ransom* v. *FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011)) (internal quotation marks omitted); see, *e.g.*, *Mission Prod. Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1661 (2019). Here, petitioner's debt to

respondent falls squarely within the text of Section 523(a)(2)(A)'s exception to discharge.

It is undisputed that petitioner owed a "debt" to respondent. "A 'debt' is defined in the Code as 'liability on a claim,' a 'claim' is defined in turn as a 'right to payment,' and a 'right to payment,' [the Court has] said, 'is nothing more nor less than an enforceable obligation'" to pay money. *Cohen* v. *de la Cruz*, 523 U.S. 213, 218 (1998) (citations omitted). This Court has "long recognized that the basic federal rule in bankruptcy is that state law governs the substance of claims." *Travelers Cas. & Sur. Co. of Am.* v. *Pacific Gas & Elec. Co.*, 549 U.S. 443, 450 (2007) (citations and internal quotation marks omitted); accord *Raleigh* v. *Illinois Dep't of Revenue*, 530 U.S. 15, 20 (2000). Thus, the state-court judgment entered against petitioner and in favor of respondent constituted a "debt" within the meaning of Section 523(a)(2)(A).

It is equally clear that petitioner's "debt" was "for money * * * obtained by * * * actual fraud." 11 U.S.C. 523(a)(2)(A). To obtain means "[t]o bring into one's own possession" or "to procure," *Black's Law Dictionary* 1297 (11th ed. 2019); see *Black's Law Dictionary* 972 (5th ed. 1979) ("to get possession of; to procure; to acquire, in any way"). Petitioner and Mr. Bartenwerfer brought respondent's money into their possession in exchange for the real property they renovated and sold as business partners.

The means by which petitioner and Mr. Bartenwerfer obtained the money constituted "actual fraud." 11 U.S.C. 523(a)(2)(A). The state-court jury found that petitioner and Mr. Bartenwerfer signed a disclosure statement that withheld material information about the property, and respondent paid an inflated price as a

result. Pet. App. 10a; J.A. 3-4. The bankruptcy court, in turn, found that Mr. Bartenwerfer acted with the fraudulent intent required by Section 523(a)(2)(A), and that he and petitioner were business partners. J.A. 4 & n.3, 7-18; see J.A. 42-43; *In re Bonnanzio*, 91 F.3d 296, 302 (2d Cir. 1996) ("There is substantial unanimity of view that intent to deceive" for purposes of Section 523(a)(2)(A) "is an issue of fact.").

Petitioner does not dispute that she and Mr. Bartenwerfer were business partners, that Mr. Bartenwerer committed actual fraud within the scope of the partnership, or that as a result, she became liable for the fraud under state law. See, *e.g.*, Pet. 4, 10, 30. Under bedrock principles of agency and partnership law—which California has adopted—Mr. Bartenwerfer's actions within the scope of the partnership bound the partnership, and both it and petitioner were liable for his wrongful acts or omissions, including his actual fraud. See Cal. Corp. Code §§ 16301(1), 16305, 16306(a) (West 2014); see also Uniform Partnership Act (1997) §§ 301(1), 305, 306(a); Restatement (Second) of Agency § 14A cmt. a (1958).[2] Thus, under the plain text of Section 523(a)(2)(A), petitioner owed a "debt" to respondent "for money * * * obtained by * * * actual fraud"—a debt that was then excepted from discharge in bankruptcy. 11 U.S.C. 523(a)(2)(A).

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[2] The rule that partners are liable for each other's fraud within the scope of the partnership is universal and longstanding. See, *e.g.*, J. William Callison & Maureen A. Sullivan, *Partnership Law and Practice: General and Limited Partnerships* § 8.37 (2021-2022 ed.); Theresa J. Pulley Radwan, *Determining Congressional Intent Regarding Dischargeability of Imputed Fraud Debts in Bankruptcy*, 54 Mercer L. Rev. 987, 991 n.13 (2003); *Castle* v. *Bullard*, 64 U.S. (23 How.) 172, 188-189 (1860).

b. Contrary to petitioner's suggestion (Br. 18-22), Section 523(a)(2)(A)'s exception to discharge is not limited to situations in which the individual debtor personally committed fraud. The statute includes no text suggesting that limitation; rather, Section 523(a)(2)(A) asks simply whether the "debt" is "for money * * * obtained by * * * actual fraud." 11 U.S.C. 523(a)(2)(A); see *In re M.M. Winkler & Assocs.*, 239 F.3d 746, 749 (5th Cir. 2001) ("The statute focuses on the character of the debt, not the culpability of the debtor."). "Once that determination is made, the only remaining question is who is liable, directly or vicariously, for the obligation as a matter of applicable state law." Lawrence Ponoroff, *Vicarious Thrills: The Case for Application of Agency Rules in Bankruptcy Dischargeability Litigation*, 70 Tul. L. Rev. 2515, 2550 (1998). Where, as here, "the bankruptcy debtor is liable, nondischargeability follows because there is no contrary provision in the statute." *Ibid.*; see *Husky Int'l Elecs.*, 578 U.S. at 365 (rejecting argument that would add an "additional requirement" to the "text of § 523(a)(2)(A)"); see also W. Brian Memory, *Vicarious Nondischargeability for Fraudulent Debts: Understanding the Dual Purposes of § 523(a)(2)(A)*, 20 Emory Bankr. Dev. J. 633, 665 (2004) (explaining that Section 523(a)(2)(A) reflects "deference to nonbankruptcy liability rules").

Two additional facets of the statute reinforce that conclusion. First, Section 523(a)(2)(A) excepts from discharge "*any* debt" that is "for money * * * obtained by * * * actual fraud." 11 U.S.C. 523(a)(2)(A) (emphasis added). "[R]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States* v. *Gonzales*,

520 U.S. 1, 5 (1997)). "[T]he expansive word 'any' and the absence of restrictive language" in the provision, *ibid.*, establish that Section 523(a)(2)(A) "encompasses any liability arising from money, property, etc., that is fraudulently obtained," *Cohen*, 523 U.S. at 223, without any exception for liability that arises from the fraud of a debtor's business partner.

Second, Section 523(a)(2)(A) includes a single exception not applicable here. The provision does not bar discharge of a fraud debt if the fraud involved "a statement respecting the debtor's or an insider's financial condition," 11 U.S.C. 523(a)(2)(A); the dischargeability of those debts is addressed in the following subparagraph, Section 523(a)(2)(B). Had Congress intended *additional* exceptions to Section 523(a)(2)(A)'s rule—like the one petitioner seeks—it would have enumerated them, too. See, *e.g.*, *Hillman* v. *Maretta*, 569 U.S. 483, 496 (2013). Thus, while petitioner observes that "[e]xceptions to discharge 'should be confined to those plainly expressed,'" Pet. Br. 17 (quoting *Bullock* v. *BankChampaign, N.A.*, 569 U.S. 267, 275 (2013)), Section 523(a)(2)(A) makes plain that petitioner's fraud debt is nondischargeable. See *Schwab* v. *Reilly*, 560 U.S. 770, 791 n.17 (2010).

2. Statutory context confirms that petitioner's debt is nondischargeable

Although the provisions of Section 523(a) were adopted at different times—potentially rendering contrasting provisions somewhat less instructive, see, *e.g.*, *Field* v. *Mans*, 516 U.S. 59, 75 (1995)—the statutory context also indicates that it is the character of the *debt* that matters under Section 523(a)(2)(A).

Unlike Section 523(a)(2)(A), several other exceptions in Section 523(a) expressly refer to the debtor's

conduct, intent, or knowledge. Section 523(a)(2)(A)'s immediate neighbor excludes from discharge a debt for money or property obtained by a written statement regarding the debtor's or an insider's financial condition that, *inter alia*, "the debtor caused to be made or published with intent to deceive." 11 U.S.C. 523(a)(2)(B)(iv). And the following provision makes presumptively nondischargeable certain consumer debts "incurred" or "obtained by an individual debtor" on the eve of filing for bankruptcy. 11 U.S.C. 523(a)(2)(C)(i). Throughout Section 523(a), other exceptions to discharge specifically mention conduct, intent, or knowledge of the debtor.[3]

The Court need not decide in this case the precise meaning of those provisions, or whether they incorporate background principles of agency and partnership law. But their specific references to the debtor's conduct, intent, or knowledge—and the absence of such references in Section 523(a)(2)(A)—support reading the statute according to its plain terms, as barring discharge of any debt arising from fraud for which a debtor is liable under state law. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

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[3] See 11 U.S.C. 523(a)(1)(C) (any debt "for a tax or customs duty * * * with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax"); 11 U.S.C. 523(a)(6) (any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity"); 11 U.S.C. 523(a)(9) (any debt for death or injury "caused by the debtor's operation" of a motor vehicle "because the debtor was intoxicated"); 11 U.S.C. 523(a)(12) (any debt for "malicious or reckless failure to fulfill any commitment by the debtor" to a federal depository institution); 11 U.S.C. 523(a)(15) (any debt for spousal and child support payments "incurred by the debtor" in the course of divorce or separation proceedings).

A comparison between Section 523(a)(2)(A) and Section 727(a)(2) supports the court of appeals' interpretation. Although both provisions concern fraud, Section 727(a)—which addresses fraud on the bankruptcy system—entirely bars any discharge; Section 523(a)(2)(A), in contrast, prohibits the discharge of only the particular fraud debt. See *Husky Int'l Elecs.*, 578 U.S. at 364. Consistent with that dichotomy, Section 727(a)(2) provides that no discharge is available where "the debtor" takes certain actions "*with intent* to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property." 11 U.S.C. 727(a)(2) (emphasis added). By contrast, Section 523(a)(2)(A)'s focus on the debt, and not the debtor, suggests that a debtor should not be able to discharge any fraud debt for which she is responsible. See, *e.g.*, Ponoroff, 70 Tul. L. Rev. at 2541-2542.[4]

3. This Court has recognized Section 523(a)(2)(A)'s breadth

Although this Court has not directly addressed the question presented under the current Bankruptcy Code, but see pp. 18-22, *infra* (discussing this Court's

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[4] Petitioner contends (*e.g.*, Br. 30-31) that Congress's use of the passive voice in Section 523(a)(2)(A) is a poor indicator that the provision covers all debts for money "obtained by" fraud. But this Court has explained that "[t]he passive voice focuses 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, *e.g.*, *Watson* v. *United States*, 552 U.S. 74, 81 (2007). And the cases on which petitioner relies (Br. 30-31) stand for the unremarkable proposition that context matters and may limit the universe of relevant actors. None holds that the passive voice is irrelevant where, as here, the context—including well-established principles of partnership and agency law—indicates that the relevant action may be taken by more than one actor.

precedent interpreting a predecessor provision), it has repeatedly recognized the breadth of Section 523(a)(2)(A)'s plain text.

In *Archer* v. *Warner*, 538 U.S. 314 (2003), the Court considered whether Section 523(a)(2)(A) "cover[ed] a debt embodied in a settlement agreement that settled a creditor's earlier claim 'for money . . . obtained by . . . fraud.'" *Id.* at 316. The Court held that the statute bars discharge of such a debt, relying in large part on *Brown* v. *Felsen*, 442 U.S. 127 (1979), which had reached the same result (under a prior iteration of the statute) regarding a stipulation and consent decree. *Archer* relied on *Brown*'s characterization of the discharge exception as "appl[ying] to all debts that 'aris[e] out of fraud.'" 538 U.S. at 321 (quoting *Brown*, 442 U.S. at 138) (second set of brackets in original). The Court held that because "[a] debt embodied in the settlement of a fraud case" arises out of fraud, it is excepted from discharge under Section 523(a)(2)(A). *Ibid.*

Archer also relied on *Cohen*, see 538 U.S. at 321, in which the Court unanimously "h[e]ld that § 523(a)(2)(A) prevents the discharge of all liability arising from fraud," including "an award of treble damages," *Cohen*, 523 U.S. at 215. The *Cohen* Court explained that neither the word "debt" nor the phrase "to the extent obtained by" limited the discharge exception to "the value of the money [or] property" obtained by fraud. *Id.* at 219 (emphasis and internal quotation marks omitted). Rather, "[o]nce it is established that specific money or property has been obtained by fraud, * * * 'any debt' arising therefrom is excepted from discharge." *Id.* at 218-219; see *id.* at 220 (explaining that "debt for" means "debt as a result of," "debt with respect to," and "debt by reason of," and thus "connot[es] broadly any liability

arising from the specified object," *i.e.*, fraud) (citations omitted).

Archer, *Brown*, and *Cohen* strongly support the court of appeals' construction of Section 523(a)(2)(A). Just as liability under a consent decree or settlement agreement, or an award of treble damages or attorney's fees, "aris[es] from" fraud, *Cohen*, 523 U.S. at 215, so does petitioner's liability for the fraud of her business partner. Accord *Lamar*, 138 S. Ct. at 1758 (describing Section 523(a)(2)(A) as "bar[ring] discharge of debts *arising from* 'false pretenses, a false representation, or actual fraud'") (emphasis added); *Field*, 516 U.S. at 61, 64 (describing Section 523(a)(2)(A) as excluding from discharge "debts *resulting from*" or "*traceable to*" fraud) (emphases added).

4. Section 523(a)(2)(A)'s history confirms that petitioner cannot discharge her fraud debt

a. Section 523(a)(2)(A) was not an "innovation[]" when the Bankruptcy Code was enacted in 1978. *Field*, 516 U.S. at 64. Rather, it "had obvious antecedents" in earlier statutes. *Ibid.* Section 33 of the Act of Mar. 2, 1867 (1867 Act) 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." Ch. 176, 14 Stat. 533; see Act of June 22, 1874, ch. 390, § 9, 18 Stat. 180 (amending the 1867 Act without altering this provision).

Although the 1867 Act was repealed in 1878, see Act of June 7, 1878, ch. 160, 20 Stat. 99, this Court considered Section 33 of the 1867 Act in *Strang* v. *Bradner*, 114 U.S. 555 (1885). Strang, a partner in the firm Strang & Holland Brothers, made misrepresentations in the course of securing notes for his firm. *Id.* at 558.

Although Strang's partners, the Holland brothers, did not know about or "active[ly] particpat[e]" in the misrepresentations, they were held liable along with Strang in New York state court. *Ibid.*; see Br. for Pls. in Error at 1-2, 9, *Strang*, *supra* (No. 246).

This Court then granted a writ of error to review the state-court judgment. In the interim, Strang died; the Holland brothers filed for bankruptcy; and each of the brothers obtained a discharge "from all debts and demands" provable against his bankruptcy estate "other than such debts as were by law excepted from the operation of a discharge in bankruptcy." *Strang*, 114 U.S. at 556; see Br. for Defs. in Error at 2, *Strang*, *supra* (No. 246). The Holland brothers argued that their federal bankruptcy discharges had relieved them of their state-law liability. *Strang*, 114 U.S. at 556-557.

This Court unanimously disagreed. The Court observed that under its then-recent decision in *Neal* v. *Clark*, 95 U.S. 704, 709 (1878), "fraud" in Section 33 of the 1867 Act "should be construed to mean positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality." *Strang*, 114 U.S. at 559. Considering the evidence before the jury, the Court found "that the debt in question was created by positive fraud upon the part of Strang, representing his firm." *Ibid.*; see *id.* at 560.

The Court then considered whether the state-law judgment was "one from which the bankrupts"—*i.e.*, the Hollands—were "protected by their discharges" in bankruptcy. *Strang*, 114 U.S. at 560. Citing the predecessor to Section 523(a)(2)(A), the Court held that the liability had not been discharged because "the statute expressly declares that a discharge is subject, even in

respect of claims provable in bankruptcy, to the limitation that no *debt created by the fraud* of the bankrupt shall be discharged by the proceedings in bankruptcy." *Id.* at 560-561. The Court thus rejected the Holland brothers' argument that Strang's fraud had not been the fraud "of the bankrupt[s]" for purposes of Section 33's exception to discharge. Br. for Pls. in Error at 12-13, *Strang*, *supra* (No. 246); see *id.* at 12-15.

The Court explained that the Holland brothers could be "held liable" "for the false and fraudulent representations of their partner" made without their knowledge. *Strang*, 114 U.S. at 561. The Court stated that Strang's "fraud is to be imputed, for the purposes of the action, to all the members of his firm." *Ibid.* The misrepresentations were part of a "partnership transaction," and "[e]ach partner was the agent and representative of the firm with reference to all business within the scope of the partnership." *Ibid.* Thus, Strang's "partners [could not] escape pecuniary responsibility * * * upon the ground that [Strang's] misrepresentations were made without their knowledge." *Ibid.*

b. Although *Strang* considered a prior version of the statutory exception to discharge for fraud, nothing suggests that Congress has since departed from *Strang*'s holding. 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 (citation omitted); see *Lamar*, 138 S. Ct. at 1762. No such clear indication exists here. To the contrary, in the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, Congress removed the only text in the former provision—the requirement that the fraud be "of the bankrupt," 1867 Act § 33, 14 Stat. 533—that might have suggested that a debtor could discharge a debt

resulting from the fraud of her partner. See Bankruptcy Act of 1898, § 17(a)(2), 30 Stat. 550 (excluding from discharge "judgments in actions for frauds, or obtaining property by false pretenses or false representations"). And while Congress has refined the statute over time, today's text continues to focus on whether the "debt" is "for money * * * obtained by * * * false pretenses, a false representation, or actual fraud," 11 U.S.C. 523(a)(2)(A), rather than on the conduct of the debtor.[5] It is thus inappropriate to interpret Section 523(a)(2)(A) as a stark departure from *Strang*.

c. Petitioner contends (Br. 4, 15, 39-47) that *Strang* rests on federal common law abrogated by *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938). That misreads *Strang*. The Court considered both whether the Holland brothers could be subject to *liability* under principles of partnership law and whether such liability was subject to *discharge* in bankruptcy. Even if the former analysis was based on federal-common-law principles about partnership, the latter was plainly an interpretation of the federal bankruptcy law's discharge provision.

In any event, petitioner misunderstands the import of *Strang*. *Strang* is relevant not because the Court's interpretation of the 1867 Act necessarily controls the interpretation of the current statute. Rather, *Strang* provides a background rule against which Congress

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[5] The Act of Feb. 5, 1903, ch. 487, § 5, 32 Stat. 798, removed the word "fraud" from the provision, but retained the bar to discharge for "liabilities for obtaining property by false pretenses or false representations." *Ibid.* (amending Section 17 of the Bankruptcy Act of 1898). Congress reinstated a reference to "actual fraud" in Section 101 of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2590. See *Cohen*, 523 U.S. at 221 (describing the 1903 and 1978 provisions as "substantially similar") (quoting *Brown*, 442 U.S. at 129 n.1); *Field*, 516 U.S. at 65 (similar).

acted when revising the bankruptcy laws. Petitioner points to no statutory text or other indication that Congress intended to alter the basic principle that one partner is liable for another's partner's fraud (a principle that is, in any event, now reflected in partnership laws enacted by state legislatures, see p. 12 & n.2, *supra*), or the conclusion that such liability is nondischargeable in bankruptcy.

In fact, Congress has considered but declined to adopt just such a change. In 1997, a majority of the National Bankruptcy Review Commission—whose members were appointed by the President, the Chief Justice, and congressional leadership[6]—recommended that Section 523 "should be amended such that intentional action by a wrongdoer who is not the debtor cannot be imputed to the debtor" for purposes of exceptions to discharge in Section 523(a). 1 National Bankruptcy Review Commission, *Bankruptcy: The Next Twenty Years* § 1.4.7, at 223 (Oct. 20, 1997) (emphasis omitted); see *id.* at 1043, 1048, 1053 (noting that four Commissioners took no position on that recommendation). The following year, a bill was introduced in the House which would have amended Section 523 to provide that "[a] debt shall not be nondischargeable under this section based upon the conduct of an individual other than the debtor." H.R. 3146, 105th Cong., 2d Sess. § 14(f) (1998) (proposing new Section 523(g)). But Congress never adopted the vicarious-liability amendment.

d. Finally, petitioner suggests (Br. 46) that "[i]f *Strang* bakes into the Code the notion that innocent partners are always liable for their partners' wrongdoing, then imputation would reign everywhere." But it is

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[6] See National Bankruptcy Review Commission Act, Pub. L. No. 103-394, Tit. VI, § 604(a), 108 Stat. 4147 (1994).

state law—not *Strang*—that establishes partners' *liability* for one another's acts in the scope of the partnership; *Strang*'s relevance here concerns not liability, but dischargeability under federal bankruptcy law. As to that question, *Strang* does not necessarily determine how the text (or context or history) of *other* discharge exceptions should be interpreted. Nor is *Strang* the only decision of this Court to hold that partnership liability may survive a bankruptcy discharge even when the individual partner did not "personally participate" in the wrongful act. See *McIntyre* v. *Kavanaugh*, 242 U.S. 138, 139-142 (1916) (construing exception to discharge for "willful and malicious injury" in predecessor to Section 523(a)). Petitioner thus provides no sound reason for discounting *Strang*'s relevance to the proper interpretation of Section 523(a)(2)(A).

B. Contrary Interpretations Lack Merit

1. In the lower courts, petitioner contended that to hold her debt nondischargeable under Section 523(a)(2)(A), the bankruptcy court had to find that she "'knew or should have known' of Mr. Bartenwerfer's alleged fraud." J.A. 42; see Appellees'/Cross-Appellants' Principal and Responsive Br., 20-60021 C.A. Doc. 31, at 28 (Dec. 18, 2020). In seeking certiorari, petitioner likewise argued that the knew-or-should-have-known standard adopted in *Walker* v. *Citizens State Bank of Maryville*, 726 F.2d 452 (8th Cir. 1984), "is proper." Pet. 13; cf. Pet. 7 (contending that "the bankruptcy court correctly determined that Section 523(a)(2)(A) applies only to a debtor who, at a minimum, knew or should have known of her agent's fraud").

Section 523(a)(2)(A), however, lacks any text requiring that the debtor knew or should have known about her partner's fraud. Perhaps for that reason, petitioner

now abandons that standard, arguing instead that Section 523(a)(2)(A) "bars discharge only when individual debtors commit fraud." Pet. Br. 18 (capitalization and emphasis omitted). The novelty of petitioner's construction provides reason for pause. Not only did petitioner fail to give the lower courts an opportunity to consider the standard she now advocates; in this Court, she identifies no decision embracing—or even considering—that standard.

2. In any event, petitioner's new interpretation is at least as flawed as her old one. Just as Section 523(a)(2)(A) does not require a debtor's knowledge of fraud, it also does not require the debtor's personal commission of fraud.

a. Petitioner first relies (Br. 18) on the reference to the "individual debtor" in the introductory clause of Section 523(a): "A discharge under [specified provisions of Chapter 7, 11, 12, or 13] does not discharge an individual debtor from any" of the specified debts. 11 U.S.C. 523(a). But that text simply ensures that Section 523's exceptions—whatever their scope—apply to individual debtors rather than (for example) corporations. See 11 U.S.C. 1141(d)(2) ("A discharge under this chapter does not discharge a debtor *who is an individual* from any debt excepted from discharge under section 523 of this title") (emphasis added). Congress has provided a narrower set of exceptions to a Chapter 11 discharge for "a debtor that is a corporation." 11 U.S.C. 1141(d)(6). Petitioner also observes (Br. 18-20) that other provisions of the Bankruptcy Code expressly distinguish an individual debtor from insiders, spouses, and other related parties. But those provisions simply suggest that Congress knows how to distinguish debtors from their business partners and could have done so

expressly if it intended for a debtor's discharge to depend on whether she personally committed a fraud for which she shared liability with others.

b. Petitioner next observes (Br. 20) that Section 523(a)(2) "directs the bankruptcy court to determine whether the assets were 'obtained by' fraud." Petitioner acknowledges that "the passive voice" leaves it grammatically open whose fraud may count. *Ibid.* (quoting *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 128 (1977)). But she errs in suggesting (*ibid.*) that the verb "obtained" means that the debtor must personally have committed the fraud. Petitioner's debt for money obtained through her partner's fraud is a debt for money that was "obtained by" fraud (and indeed was obtained *by petitioner*).

Petitioner's colloquial examples do not advance her argument. Petitioner contends (Br. 20-21) that the sentence, "[a] pardon does not relieve the recipient from professional disbarment imposed for moral turpitude," means that if the pardon recipient "was disbarred for participating in a scheme involving moral turpitude only by someone else, the pardon gives a second chance." But petitioner's example does not use the word "obtained," and her interpretation is not clearly correct. If the pardon recipient had been disbarred for the immoral acts of a business partner for which she is liable, it would be entirely natural to read the pardon as not extending to that disbarment.

Petitioner's other example—"Jane's clerkship was obtained through hard work," Br. 20—might most naturally suggest that Jane (and only Jane) did the work. But it could also suggest that Jane's parents worked hard to put her through college and law school, or that her professors worked hard in teaching her. At most,

the example demonstrates the importance of context in determining meaning. *E.g.*, *Johnson* v. *United States*, 559 U.S. 133, 139 (2010). Thus, "Jane's clerkship was obtained through friendships" could refer not just to Jane's relationships but to those of her mother or her professor. And the context here—where fraud debts, unlike clerkships, are readily imputed to partners under background principles of agency and partnership law—suggests that the fraud may have been committed by petitioner or her business partner.

c. Petitioner next contends (Br. 21) that Section 523(a)(2)(A)'s reference to "[f]raud naturally implies the perpetrator's malintent, not innocent bystanders'." Although petitioner is correct that fraud requires *someone*'s "malintent," centuries of agency and partnership law demonstrate that partners who lack such intent are often liable for the frauds of their co-partners. In other words, they are *not* seen as "innocent bystanders" in the eyes of the law. Section 523(a)(2)(A) does nothing to disturb that reality.

3. Contrary to petitioner's arguments (Br. 22-27), the rest of Section 523 does not support her rule either.

a. Petitioner first suggests (Br. 22-23) that because Section 523(a)(2)(B) and (C) both specifically mention the debtor, Section 523(a)(2)(A) must be limited to the debtor's own conduct. That argument inverts the usual rule that "Congress acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another section of the same Act." *Russello*, 464 U.S. at 23 (citation omitted). While the Court need not decide the meaning of Section 523(a)(2)(B) and (C) in this case, there would be nothing "implausibl[e]," Pet. Br. 23, about construing those provisions to turn on the individual debtor's own intent or

actions, while recognizing that Section 523(a)(2)(A) includes no such requirement.

Section 523(a)(2)(A)'s exception to discharge does not apply to "a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. 523(a)(2)(A). Section 523(a)(2)(B) steps in to decide when such misstatements bar discharge, and it "plainly" functions to "heighten[] the bar to discharge"—that is, to make more debts dischargeable. *Lamar*, 138 S. Ct. at 1763. A debt is nondischargeable under subsection (2)(B) only if the fraudulent misstatement was in writing; if the creditor reasonably relied on the misstatement; and if "the debtor caused [the misstatement] to be made or published with intent to deceive." 11 U.S.C. 523(a)(2)(B)(iv). Congress adopted those requirements "to moderate the burden on individuals who submitted false financial statements, not because lies about financial condition are less blameworthy than others, but because the relative equities might be affected by practices of consumer finance companies," which had historically "encouraged such falsity by their borrowers for the very purpose of insulating their own claims from discharge." *Field*, 516 U.S. at 76-77; see *Lamar*, 138 S. Ct. at 1764. Given that understanding, Congress might reasonably have sought to reduce the ripple effects of false financial statements by limiting nondischargeability to statements that the debtor herself made with intent to deceive.

Petitioner's reliance on Section 523(a)(2)(C) is also misplaced. That provision seeks to "prevent the practice of loading up on debt prior to filing," *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, 244 (2010), by rendering presumptively nondischargeable the debts incurred for luxury goods or services and

large cash advances by "an individual debtor" shortly before filing for bankruptcy. 11 U.S.C. 523(a)(2)(C)(i)(I) and (II); see *Hersh* v. *United States ex rel. Mukasey*, 553 F.3d 743, 760 (5th Cir. 2008), cert. denied, 559 U.S. 1005 (2010). As discussed above (see pp. 24-25, *supra*), references to "an individual debtor" do not suggest that consumer debts may not be imputed. But Congress might well have determined that only the debtor's own high-spending actions in the run up to declaring bankruptcy are likely to be abuses of the bankruptcy system.

b. Petitioner next suggests (Br. 24-26) that passive-voice constructions in Section 523(a)(1), (3), (4), (12), (14), (14A), and (18) all require their referent to be the individual debtor who filed the bankruptcy case—and that Section 523(a)(2)(A) must function the same way. See Pet. Br. 33. But the plain-text reading of Section 523(a)(2)(A) as applying to all fraud debts does not depend solely on the absence of the phrase "of the debtor" or the use of the passive voice. Rather, it flows from several textual indicators and statutory history. See pp. 10-23, *supra*.

In any event, petitioner's largely unsupported interpretations of other provisions lack merit. Contrary to her assertion (Br. 24-25), courts have held debts nondischargeable under Section 523(a)(1) and (4) even when they arose from the actions of another. See, *e.g.*, *In re Rizzo*, 741 F.3d 703, 706-708 (6th Cir. 2014) (Section 523(a)(1)); *In re Cowin*, 864 F.3d 344, 351 (5th Cir. 2017) (Section 523(a)(4)). And petitioner's readings of Section 523(a)(12), (14), (14A), and (18) (Br. 25-26) are unpersuasive. Those provisions ensure that debtors do not evade their obligations to programs with countless beneficiaries—by funding capital requirements for depository institutions, paying the tax debts already

covered under Section 523(a)(1), and repaying loans received from retirement plans. They should not necessarily be construed as limited to the actions of the debtor rather than her agent (such as a tax preparer who filed a late return). Petitioner's reading of Section 523(a)(3) (Pet. Br. 24-25), related to filing incomplete schedules, is irrelevant: Filing schedules is a debtor's duty under the Bankruptcy Code, see 11 U.S.C. 521(a)(1), not a liability defined by state law. And it is far from clear that if a debtor employed an agent to fill out the schedules for her, the bankruptcy system would hold her harmless for the agent's omissions.

c. Petitioner contends (Br. 26-27) that still other provisions not at issue here show that when Congress intended to bar discharge regardless of the individual debtor's intent, it used words like "order" and "judgment," whereas Section 523(a)(2)(A) requires bankruptcy courts to "ask whether the *individual debtor* has committed fraud, including possessing the requisite intent." But petitioner again points to no language in Section 523(a)(2)(A) focusing the inquiry so narrowly and foreclosing imputation.

Petitioner's suggestion that an exception for fraud "judgments" (or "orders," etc.) would render nondischargeable *more* debts than does Section 523(a)(2)(A) contravenes history and logic. Under the Bankruptcy Act of 1898, the relevant provision excluded from discharge "debts" that "are judgments in actions for frauds, or obtaining property by false pretenses or false representations." § 17(a)(2), 30 Stat. 550. "In 1903, Congress substituted 'liabilities' for 'judgments.'" *Brown*, 442 U.S. at 138 (quoting Act of Feb. 5, 1903, § 5, 32 Stat. 798). As this Court has explained, the change "was intended to broaden the coverage of the fraud

exceptions." *Grogan* v. *Garner*, 498 U.S. 279, 290 (1991); see *Brown*, 442 U.S. at 138. "Absent a clear indication from Congress of a change in policy, it would be inconsistent with this earlier expression of congressional intent to construe the exceptions to allow some debtors facing fraud judgments to have those judgments discharged." *Grogan*, 498 U.S. at 290.

C. The Plain-Text Reading Of Section 523(a)(2)(A) Furthers Sound Bankruptcy Policy

1. Much of petitioner's argument turns on her conception of sound bankruptcy policy. See, *e.g.*, Pet. Br. 16-17, 23, 27-29, 36-39, 45-47. But this Court does not "sit to assess the relative merits of different approaches to various bankruptcy problems." *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 13 (2000). Rather, it adopts the most "natural reading of the text," cognizant that "[a]chieving a better policy outcome—if what petitioner urges is that—is a task for Congress, not the courts." *Id.* at 13-14.

Petitioner suggests at the outset that denying a discharge "can be 'a financial death sentence' and reflects an 'extreme penalty for wrongdoing.'" Pet. Br. 17 (quoting 3 Bankr. Litig. § 14:1 (Sept. 2021 update)). But that language better describes the complete denial of *any* discharge under Section 727. See 3 Bankr. Litig. § 14:1 & nn. 13.60 and 13.70 (quoting *In re Chalasani*, 92 F.3d 1300, 1310 (2d Cir. 1996) ("Clearly, § 727 imposes an extreme penalty for wrongdoing."), and *In re Hudson*, 420 B.R. 73, 100 (Bankr. N.D.N.Y. 2009) ("A finding under § 727(a)(4) is the 'death penalty of bankruptcy.'") (citation omitted)). Petitioner's own source explains that whether Section 523 or Section 727 applies is "radically different from the point of view of the debtor." 3 Bankr. Litig. § 14:7 (Sept. 2021 update).

Of course, "a finding of nondischargeability" of a particular debt still "prevents a bankrupt from getting an entirely 'fresh start,'" *United States* v. *Sotelo*, 436 U.S. 268, 279-280 (1978), and petitioner suggests (*e.g.*, Br. 12-13) that the consequences may be particularly severe given the specific circumstances of her case. But such observations "provide[] little assistance in construing a section expressly designed to make some debts nondischargeable." *Sotelo*, 436 U.S. at 280.

Moreover, petitioner's protestation (*e.g.*, Br. 14) that she is an "honest but unfortunate debtor[]," ignores that her liability under state law turns on longstanding agency and partnership principles that do not consider fraudsters' business partners to be innocent. Contrary to petitioner's assertions, there is nothing inherently unfair about declining to disturb that rule in bankruptcy. "[L]iability for a partner's fraud or other intentional misconduct simply matches the benefit and the risks derived from that partner's activities committed in the ordinary course of business." Ponoroff, 70 Tul. L. Rev. at 2550; see *id.* at 2554. It also reflects the principle that, as compared to third parties, partners are better able to assess the responsibility of their partners and to supervise their activities. See, *e.g.*, *Smyth* v. *Strader*, 45 U.S. (4 How.) 404, 416 (1845). Just as it is "unlikely that Congress . . . would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud," *Cohen*, 523 U.S. at 222 (citation omitted), it is unlikely that Congress would have favored the business partner of a fraudster over those victims, especially when the partner partook in the proceeds received from the victims. In any event, if individuals seek to avoid incurring personal liability for partnership debts—and hence the risk

that such debts will be nondischargeable—they may be able to choose corporate forms that achieve that outcome. See, *e.g.*, Cal. Corp. Code Tit. 2.6 (West 2014).[7]

2. Petitioner likewise errs in contending (*e.g.*, Br. 28-29, 38, 45-46) that adherence to the plain language of Section 523(a)(2)(A) would yield untenable results for *other* types of relationships. Petitioner's characterization of the court of appeals' rule as "anyone's-fraud-counts," Pet. Br. 30 (capitalization and emphasis omitted), ignores the important limiting role played by state law, which establishes the debtor's liability for the debt sought to be discharged.

State law already addresses some of petitioner's hypotheticals. For example, petitioner posits (Br. 28) that a plain-text reading of Section 523(a)(2)(A) would yield nondischargeability in "virtually any marriage where one spouse engages in financial misconduct." But like the courts below, most States recognize that the marital relationship itself does not give rise to a legal partnership or agency. See, *e.g.*, *In re Tsurukawa*, 258 B.R. 192, 198 (B.A.P. 9th Cir. 2001); *In re Gordon*, 293 B.R. 817, 823 (Bankr. M.D. Ga. 2003); Ponoroff, 70 Tul. L. Rev. at 2552; J.A. 42-43. While petitioner complains about nondischargeability for fraud debts based on partnership, principal-agent, or employer-employee relationships, see, *e.g.*, Pet. Br. 38, 47, such nondischargeability is reasonable. Doctors who participate in a medical partnership, for example, should not be able to avoid debt for False Claims Act liability through discharge in bankruptcy, where they stood to benefit from

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[7] Petitioner and Mr. Bartenwerfer "operate" such an entity—a "property development business" named RJUOP I, LLC—but they apparently opted not to use it for the sale of the property at issue here. J.A. 3.

(and likely could have prevented) their partner's commission of Medicare fraud.

3. Indeed, petitioner's approach would fail to serve even her own conceptions of bankruptcy policy. Petitioner repeatedly asserts (Br. 14) that the "core aim of" bankruptcy is to "reliev[e] honest but unfortunate debtors" of their pre-bankruptcy debts. See Br. 28, 47. But petitioner's rule—that Section 523(a)(2)(A) bars discharge only when the debtor herself committed the fraud, *e.g.*, Pet. Br. 18—would grant discharge far more broadly. It would permit a debtor to discharge her fraud debt—leaving the victim uncompensated—where the debtor knew or should have known of the fraud. And it would apparently permit discharge even where the debtor *encouraged* and benefited from the fraud, so long as she did not herself commit it. Petitioner posits no rationale sufficient to overcome the plain text of Section 523(a)(2)(A) and require that incongruous result.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 11 U.S.C. 523 (2018 & Supp. II 2020) provides:

Exceptions to discharge

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

(1) for a tax or a customs duty—

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

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

(i) was not filed or given; or

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

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

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

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

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

(B) use of a statement in writing—

(i) that is materially false;

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

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

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

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

(I) consumer debts owed to a single creditor and aggregating more than $500[1] for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief under this title are presumed to be nondischargeable; and

(II) cash advances aggregating more than $750[1] that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief under this title, are presumed to be nondischargeable; and

(ii) for purposes of this subparagraph—

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[1] See Adjustment of Dollar Amounts notes below.

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

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

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

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

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

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

(5) for a domestic support obligation;

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

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

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

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

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

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

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

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

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

(10) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act

in which the debtor waived discharge, or was denied a discharge under section 727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act;

(11) provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any State, issued by a Federal depository institutions regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union;

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

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

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

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

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

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

(16) for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case;

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

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

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

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

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

(19) that—

(A) is for—

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

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

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

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

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

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

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

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, under section 17a(1), 17a(3), or 17a(5) of the Bankruptcy Act, under section 439A[2] of the Higher Education Act of 1965, or under section 733(g)[2] of the Public Health Service Act in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

(c)(1) Except as provided in subsection (a)(3)(B) of this section, the debtor shall be discharged from a debt

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[2] See References in Text note below.

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

(2) Paragraph (1) shall not apply in the case of a Federal depository institutions regulatory agency seeking, in its capacity as conservator, receiver, or liquidating agent for an insured depository institution, to recover a debt described in subsection (a)(2), (a)(4), (a)(6), or (a)(11) owed to such institution by an institution-affiliated party unless the receiver, conservator, or liquidating agent was appointed in time to reasonably comply, or for a Federal depository institutions regulatory agency acting in its corporate capacity as a successor to such receiver, conservator, or liquidating agent to reasonably comply, with subsection (a)(3)(B) as a creditor of such institution-affiliated party with respect to such debt.

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

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

2. 11 U.S.C. 727 provides:

Discharge

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case—

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the

petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within 8 years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort;

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter;

(11) after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instruc-

tional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in this paragraph shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.); or

(12) the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that—

(A) section 522(q)(1) may be applicable to the debtor; and

(B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee;

(3) the debtor committed an act specified in subsection (a)(6) of this section; or

(4) the debtor has failed to explain satisfactorily—

(A) a material misstatement in an audit referred to in section 586(f) of title 28; or

(B) a failure to make available for inspection all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested for an audit referred to in section 586(f) of title 28.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge—

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of—

(A) one year after the granting of such discharge; and

(B) the date the case is closed.