

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -
3 KATE MARIE BARTENWERFER,)
4 Petitioner,)
5 v.) No. 21-908
6 KIERAN BUCKLEY,)
7 Respondent.)
8 - - - - -
9 Washington, D.C.
10 Tuesday, December 6, 2022

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

15
16 APPEARANCES:

17
18 SARAH M. HARRIS, ESQUIRE, Washington, D.C.; on behalf
19 of the Petitioner.

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

22 ERICA L. ROSS, Assistant to the Solicitor General,
23 Department of Justice, Washington, D.C.; for the
24 United States, as amicus curiae, supporting the
25 Respondent.

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|----|-----------------------------------|-------|
| 1 | C O N T E N T S | |
| 2 | ORAL ARGUMENT OF: | PAGE: |
| 3 | SARAH M. HARRIS, ESQ. | |
| 4 | On behalf of the Petitioner | 3 |
| 5 | ORAL ARGUMENT OF: | |
| 6 | ZACHARY D. TRIPP, ESQ. | |
| 7 | On behalf of the Respondent | 37 |
| 8 | ORAL ARGUMENT OF: | |
| 9 | ERICA L. ROSS, ESQ. | |
| 10 | For the United States, as amicus | |
| 11 | curiae, supporting the Respondent | 62 |
| 12 | REBUTTAL ARGUMENT OF: | |
| 13 | SARAH M. HARRIS, ESQ. | |
| 14 | On behalf of the Petitioner | 78 |
| 15 | | |
| 16 | | |
| 17 | | |
| 18 | | |
| 19 | | |
| 20 | | |
| 21 | | |
| 22 | | |
| 23 | | |
| 24 | | |
| 25 | | |

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P R O C E E D I N G S

(11:26 a.m.)

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

Ms. Harris.

ORAL ARGUMENT OF SARAH M. HARRIS

ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

1 discharge based on others' wrongdoing.

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

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

10 I welcome the Court's questions.

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

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

25 And, second, we know that fraud, the

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

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

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

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

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

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

25 Now another example is just the

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

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

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

25 You know, unless you have something

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

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

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

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

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

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

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

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

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

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

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

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

24 JUSTICE JACKSON: So you're saying the
25 whole principle of Strang is gone, the idea that

1 vicarious liability does apply per the common
2 law in this -- this situation?

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

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

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

1 expressed.

2 CHIEF JUSTICE ROBERTS: Your --

3 MS. Harris: And so --

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

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

14 MS. HARRIS: I would say it depends on
15 the circumstances of whether there is a
16 sufficient level of knowledge and --

17 CHIEF JUSTICE ROBERTS: If she --

18 MS. HARRIS: -- acquiescence --

19 CHIEF JUSTICE ROBERTS: -- knew about
20 it. She knew about it.

21 MS. HARRIS: Right, but the question
22 would be the circumstances of in addition to
23 knowledge, was there some sort of acquiescence,
24 was there --

25 CHIEF JUSTICE ROBERTS: She knew --

1 knew about it and didn't do anything.

2 MS. HARRIS: Right. And so I think
3 that still begs factual questions with respect
4 to whether there is a duty of that person to
5 disclose some representations to the person who
6 is defrauded or whether there is a reckless
7 indifference in ability to control the fraud,
8 all of which would come under direct liability.
9 And so the case is not -- it's not the case that
10 you can just sort of sit idly by and say I know
11 about the fraud. You know, I have the ability
12 to control --

13 CHIEF JUSTICE ROBERTS: It's -- it's
14 not the case what? It's not the case that --

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

21 CHIEF JUSTICE ROBERTS: It's -- I'm
22 sorry, direct liability what, under applicable
23 state law?

24 MS. HARRIS: No, the direct liability
25 would be the line, I think the Court drew in

1 Gebser and is the traditional -- I think the
2 traditional concept in the Restatement, Second,
3 of Torts, which is when you say the debtor or
4 another actor in a statute, who do you mean for
5 purposes of direct liability if the statute does
6 not include vicarious liability?

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

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

20 And just to take a step back for a
21 second, in terms of how this rule also cashes
22 out, most people who are sophisticated enough to
23 know that they are actually forming a
24 partnership, also know that they should form an
25 LLC in order to avoid liability.

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

5 JUSTICE KAVANAUGH: Isn't that a good
6 argument, though, for then state law to change?
7 You're not disputing, I think, that your client
8 was liable under state law or for the bankruptcy
9 code to change to create an exception for a
10 situation like this?

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

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

24 MS. HARRIS: No, I respectfully
25 disagree with that. So bankruptcy law is quite

1 clear. State law defines the debt because state
2 law defines property interests. But under cases
3 like Brown versus Gelson, state law does not
4 define the scope of the federal discharge
5 exceptions.

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

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

20 JUSTICE GORSUCH: Ms. -- Ms. Harris,
21 I'm sorry to interrupt you but -- but I just
22 want to follow up on Justice Kavanaugh's
23 question and take us back just -- take us back
24 just a minute. I -- I think what my colleague
25 was getting at and where I guess I'm at, so tip

1 my hand here, is we do take debts as given under
2 state law, right, that part of it is -- is we --
3 we take from state law.

4 MS. HARRIS: Yes.

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

8 MS. HARRIS: Correct, there's a debt
9 for money.

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

15 MS. HARRIS: Yes. And to --

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

21 MS. HARRIS: Well, I would just take a
22 step back, because the state court judgment that
23 we have here was also not for fraud and that's
24 why there is a mini-trial in the bankruptcy
25 court for whether --

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

4 MS. HARRIS: Yes.

5 JUSTICE GORSUCH: -- not the front
6 half of the statute --

7 MS. HARRIS: Correct.

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

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

12 JUSTICE GORSUCH: By fraud, yeah.
13 That's the second half.

14 MS. HARRIS: Yes.

15 JUSTICE GORSUCH: Thanks for
16 clarifying that for me.

17 MS. HARRIS: Yes. And that's the
18 clarification --

19 JUSTICE SOTOMAYOR: So under common
20 law, aren't you liable for the fraud of an agent
21 or partner?

22 MS. HARRIS: Yes, that is absolutely
23 the liability rule but it is not the rule that
24 necessarily gets ported into federal statutes
25 all the time.

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

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

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

20 So isn't that a federal rule that we
21 announced there on dischargeability --

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

23 JUSTICE SOTOMAYOR: -- and what fraud
24 means?

25 MS. HARRIS: I -- Husky announced what

1 fraud meant as a matter of common law and said
2 fraudulent conveyance is a form of fraud. Husky
3 did not say just because you have a corporation
4 and an agent and the agent's actions --

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

9 MS. HARRIS: Right, but for
10 corporations, I don't think just because a
11 corporation can only act their through their
12 agents. It means that you read vicariously --

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

18 MS. HARRIS: Respectfully, Husky does
19 not expressly say anything with respect to
20 imputation. And the things that it does say
21 with respect to contrasting (a)(2)(A) and other
22 provisions of a code make if very curious that
23 there was -- if there was an imputation holding,
24 it was not discussed.

25 For instance, when the court is

1 discussing the relative breadth or narrowness of
2 (a)(2)(A) for fraud, (b)(4) for debt location,
3 (a)(6) for willful and malicious injury to
4 property, there's -- and the 727 total bars of
5 discharge --

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

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

17 JUSTICE SOTOMAYOR: But how about if
18 the debtor -- if she knew that her husband was
19 lying?

20 MS. HARRIS: Yes. And if you knew --
21 sorry, if you knew that the husband was
22 committing fraud?

23 JUSTICE SOTOMAYOR: Yes, if she knew
24 that the husband was lying.

25 MS. HARRIS: Yes, and that just gets

1 back to the colloquy with respect to do you have
2 other indications that would suffice to be
3 direct liability. So --

4 JUSTICE SOTOMAYOR: Why do you need
5 more? Meaning --

6 MS. HARRIS: What more --

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

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

19 JUSTICE SOTOMAYOR: All right.

20 MS. HARRIS: And, in addition to that,
21 under principles of direct liability, the debtor
22 would also be liable for encouraging fraud, for
23 inducing fraud. If you have fraudulent intent,
24 the next question is what is the minimum amount
25 of direct involvement to complete the elements

1 of fraud? And, again --

2 JUSTICE SOTOMAYOR: Thank you,
3 counsel.

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

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

23 And why are you so sure that
24 bankruptcy has a higher standard? And, you
25 know -- you know, I do think that this would be

1 reading into the text, so we need a
2 justification for that.

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

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

20 And it's not reading something into
21 the statute to say culpability is required.
22 You're just interpreting the substance of the
23 elements. And the Court said defalcation,
24 really similar to fraud under (a)(2)(A), and the
25 thread running underneath the code is that

1 culpability is what justifies the exception from
2 the rule that discharge exceptions -- normally,
3 you get discharge. Normally, you always get
4 discharge. And for Congress to depart from that
5 principle, you need a pretty good justification.
6 And the Court said fault is that justification
7 for these exceptions.

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

16 And that is what I think is contrary
17 to the tenor of Bankruptcy Code and the
18 reasoning in cases like Bullock, and there's
19 also no stopping point, apparently, to that
20 position.

21 JUSTICE JACKSON: But it's not -- it's
22 not contrary to what we actually said in Field,
23 and so I'm still really confused about the
24 suggestion that common law principles apply or
25 that we've said common law principles apply but

1 only when we're talking about the substantive
2 elements. And if you read Field, it's very
3 clear -- it's a Justice Souter opinion from
4 1995 -- that we -- we're saying that there was
5 no reason to doubt Congress's intent to adopt a
6 common law understanding of the terms that it
7 used in this very statute.

8 MS. HARRIS: Yes, that is correct, and
9 we're looking at the terms in the statute. The
10 terms in the statute are the word "fraud." And
11 so the Court said the substantive elements are
12 fraud.

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

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

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

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

23 The question is, does it mean the
24 debtor, does it mean anyone, does it mean
25 someone else? And you look at the context of

1 the code and the other actors to figure it out.

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

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

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

19 MS. HARRIS: Well, I think Field would
20 be contrary to the definitions and the usage
21 throughout the Bankruptcy Code had it actually
22 held that because the individual debtor is
23 defined as distinct from and juxtaposed against
24 partners, spouses, dependents, et cetera,
25 throughout the code in at least 21 places.

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

7 JUSTICE ALITO: May I take you back to
8 -- did you finish --

9 MS. HARRIS: Yes.

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

20 And then you have another argument in
21 your brief, which is that Strang was federal
22 common law. I don't know whether that's true
23 because whether a debt is dischargeable or not
24 is a question of federal bankruptcy law. But,
25 if it was a question of federal common law under

1 the pre-Erie regime whether the liability -- the
2 dischargeability of a debt by one partner is
3 dischargeable against the other partner, would
4 we not look to what has taken the place of
5 federal common law under Erie, which would be
6 state law, so we would look to state liability
7 law?

8 MS. HARRIS: So responses on Strang
9 first and then responses on state law.

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

18 Now, with respect to whether state law
19 would then -- sorry. One more point on Strang,
20 which is it's hard to read Strang as some sort
21 of, like, lurking rule that governs the rest of
22 the code forever more when circuit courts about
23 20 years after Strang and onwards were saying
24 when they were interpreting pretty similar
25 language with respect to the total bar on fraud

1 discharge that they were not going to imply
2 imputation in -- in that setting. So it's hard
3 to say that Strang is sort of controlling
4 onwards.

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

18 So, no, I don't think the federal
19 Bankruptcy Code shifted to a world in which you
20 look at the statutory terms just governed by
21 sort of California law. That would create a
22 very non-uniform scheme. What you do have is a
23 statute that is not mentioning any kind of
24 vicarious liability, that is not creating torts,
25 that is very similar -- dissimilar for the

1 language that Congress has used when it does
2 import vicarious liability, and the point of it
3 is to discharge the honest but unfortunate
4 debtor by tracking concepts of culpability if
5 you're going to deny someone and sort of saddle
6 them with -- with -- for life with the harsh
7 penalty of a life-long debt.

8 JUSTICE KAGAN: Could I -- could --
9 I'm not quite sure I understand your -- your
10 theory of Strang and what happened afterward,
11 because I would have thought that whatever the
12 differences in the Strang statute, as Justice
13 Alito said, that was a more hostile statute to
14 your position. And afterwards, what Congress
15 does is it amends the statute so that the text
16 of the statute actually reflects better the
17 Strang holding. So shouldn't we take from that
18 that, you know, Congress looked at the Strang
19 holding and basically said let's fix the statute
20 so that we can reflect that holding quite
21 clearly?

22 MS. HARRIS: No, for a couple of
23 reasons.

24 First of all, there's a lot of slicing
25 and dicing between the 1867 act and the 1978 act

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

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

18 And on top of that, that still doesn't
19 explain why there are so many circuit cases
20 shortly after Strang that said we're not
21 thinking that Strang, you know, is interpreting
22 -- like, even when there is similar language,
23 they're not saying, oh, you know, it must be
24 clear from Strang that if you see words
25 like "fraud of the bankrupt" you have to make

1 sure that an innocent person is on the hook for
2 the fraud of the debtor. They said that -- you
3 know, that rule doesn't port to these very
4 similar statute -- statutory language because
5 fraudulent intent normally means culpability.

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

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice -- Justice Thomas, anything
18 further?

19 JUSTICE SOTOMAYOR: I have one -- I
20 have one question. I thought your Petitioner
21 and her husband had an LLC. I thought that was
22 on -- in the Joint Appendix 3.

23 MS. HARRIS: That's incorrect, and a
24 footnote in our reply brief makes clear that the
25 testimony in bankruptcy court which the court

1 found -- found credible was she'd never heard of
2 the LLC. The LLC also appears to have been
3 created after the transaction in this case.

4 JUSTICE SOTOMAYOR: Got it. I -- then
5 I missed -- I'm glad I clarified that fact.
6 Thank you.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?
8 Justice Kavanaugh?

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

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

20 JUSTICE KAVANAUGH: Right, because we
21 usually see statutes that specifically speak to
22 that.

23 MS. HARRIS: Well, because the --
24 because the Bankruptcy Code is not creating a
25 tort, and that rule is specific to creating

1 torts under Meyer versus Holley.

2 JUSTICE KAVANAUGH: Got it. Thank
3 you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett?

6 I -- I do have one last question, your
7 reliance on "individual debtor." What do you do
8 with your friend's argument that that means
9 individual as opposed to corporation?

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

17 CHIEF JUSTICE ROBERTS: Okay. Thank
18 you, counsel.

19 Mr. Tripp.

20 ORAL ARGUMENT OF ZACHARY D. TRIPP

21 ON BEHALF OF THE RESPONDENT

22 MR. TRIPP: Mr. Chief Justice, and may
23 it please the Court:

24 The question in this case is whether
25 the fraud exception to discharge includes an

1 additional unwritten requirement that the debtor
2 personally intend or know of the fraud above and
3 beyond whatever it takes to hold her liable for
4 the fraud in the first place. And the answer is
5 no. The words just aren't there.

6 And I'll start with the text. It says
7 that the bankruptcy discharge "does not
8 discharge an individual debtor from any debt for
9 money to the extent obtained by actual fraud."
10 So, as this Court put it in Cohen versus de la
11 Cruz, once it is established that specific money
12 is obtained by fraud, then "any debt arising
13 therefrom is not discharged." Full stop. The
14 text stops there. There are no more words. And
15 it's -- I think it's undisputed that Petitioner
16 is -- that this case fits the bill. Petitioner
17 obtained my client's money by means of an actual
18 fraud, and she's fully liable for the fraud. It
19 is her fraud under bedrock principles of
20 partnership law.

21 Second, Strang, back at the time when
22 the statute actually said that it needed to be
23 the fraud "of the bankrupt," this Court held
24 that it was the fraud of the bankrupt by relying
25 on the same principles of partnership law that

1 still apply today. So even if those words were
2 added back to the statute, I think we would
3 still win, but without them, this case should be
4 easy.

5 Third, novelty. Petitioner contends
6 that the -- that the debtor must actually intend
7 the fraud without reliance on agency law,
8 vicarious liability, or imputation, and on that
9 rule, the debtor could know, she could know that
10 her -- her -- her partner is a fraudster, profit
11 off the fraud and then turn around and discharge
12 the debt to the victim.

13 No court has ever read the statute
14 that way. Petitioner herself didn't read it
15 that way until after cert was granted, and this
16 Court should not be the first. It should just
17 read the text to mean what it says, restate what
18 it already said in Cohen and affirm.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: Just to satisfy my
21 curiosity, would you include in that if -- if
22 they -- Petitioner and her husband had included
23 their infant child in the partnership or an
24 adolescent child in the partnership, would it
25 also be non-dischargeable as to that partner?

1 MR. TRIPP: I -- I -- I -- I think --

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

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

15 And I think, candidly, I -- I'd be
16 surprised if state law would find a -- you know,
17 a partnership in that circumstance that you're
18 describing, but I take the point, right, I'll
19 take the hypothetical that, yes, if they're
20 going to hold the child liable for the fraud,
21 like actually liable for the fraud outside of
22 bankruptcy, then, yes, it would be
23 non-dischargeable in the -- in the -- in
24 the child's bank -- I guess I don't know how a
25 child would be bankrupt.

1 JUSTICE THOMAS: Well, it would be the
2 partnership, wouldn't it?

3 MR. TRIPP: It would be if -- for
4 purposes of the hypothetical, I'll assume that
5 you're extending -- like imputing liability to
6 all the members of the partnership. Then, yes,
7 it would be not dischargeable.

8 And I think, really, the right way to
9 think about the statute actually to pick up on
10 one of your questions, Justice Kavanaugh, was to
11 say that once -- once there's been a finding
12 that -- that -- that somebody is liable for
13 fraud, then -- then, basically, just the statute
14 gets out of the way of whatever the state
15 remedies are available to the victim in that
16 circumstance and it allows the victim to obtain
17 -- to get compensation, basically, to get
18 restored to the position that they would have
19 been in but for the fraud.

20 JUSTICE BARRETT: We --

21 JUSTICE SOTOMAYOR: You keep bouncing
22 back and forth on this, and I -- I want to
23 understand your position clearly. Is it your
24 position that any debt obtained by fraud is
25 non-dischargeable, or is it your view that any

1 debt obtained by fraud in connection with a
2 partnership or agency relationship of the debtor
3 is what is non-dischargeable?

4 MR. TRIPP: I'm not adding those --
5 those -- those additional points.

6 JUSTICE SOTOMAYOR: So then let me
7 give you the hypothetical different than Justice
8 Thomas's. I obtain a loan fraudulently. Later,
9 I sell that debt to my friend, Justice Thomas,
10 who has no idea about the fraud. Justice Thomas
11 then struggles to pay the debt and he files for
12 bankruptcy. He wants to discharge the debt.
13 Can he?

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

17 JUSTICE SOTOMAYOR: Yes, he can be
18 liable?

19 MR. TRIPP: Can I just walk through
20 it?

21 JUSTICE SOTOMAYOR: Go ahead.

22 MR. TRIPP: I think it helps. So he
23 would clearly -- there would not be an agency
24 relationship, so he would not be liable on the
25 fraud itself.

1 JUSTICE SOTOMAYOR: He's not a
2 partner, he's not an agent.

3 MR. TRIPP: Right. He would be liable
4 -- I take the purpose of your hypothetical that
5 he would be liable under state law basically on
6 -- on the contract, right, because it's been
7 transferred to him.

8 JUSTICE SOTOMAYOR: Exactly.

9 MR. TRIPP: Right. And then the
10 question would be, does state -- does state law
11 actually impose -- there would be two remaining
12 questions. So --

13 JUSTICE SOTOMAYOR: Right.

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

18 And then the last question would be
19 the causal link, is, is this a liability that is
20 really for the fraudulent obtaining of money,
21 and I think that that becomes a question under
22 -- under this Court's cases about the causal
23 standard in -- in this statute, and we're not --
24 we're not asking to break any -- any new ground
25 here. This is -- so this is the easiest case.

1 There is -- there is not a word --

2 JUSTICE SOTOMAYOR: I understand. I
3 gave you a hard case for a purpose.

4 MR. TRIPP: Yeah.

5 JUSTICE SOTOMAYOR: What do we do?

6 MR. TRIPP: And I'll take -- and I
7 want to be clear. I will take this and I think,
8 as you're describing it, probably the way --
9 just the way this Court has articulated the
10 causal standard in its own cases, right, there's
11 two pieces to causation. It has said arising
12 from, resulting from, traceable to, and on
13 account of. I think that debt would satisfy
14 that, and then the question would be, is there
15 some kind of proximate cause check on that? And
16 that's something this Court really hasn't
17 explored. It has some cases. Like Archer
18 versus Warner start to get into this, but this
19 case is not one of them. There's not any -- any
20 briefing about proximate cause. I think it's
21 not the place to get into that.

22 But I will also say that if, at the
23 end of the road, the answer is the person is
24 liable, I think that's really just the -- the
25 consequence of the plain language that Congress

1 has enacted. It says --

2 JUSTICE BARRETT: Counsel --

3 JUSTICE JACKSON: Can I just --

4 JUSTICE BARRETT: -- you have a good
5 argument on the text, but there is kind of an
6 anomaly here. You know, (2)(A) doesn't focus on
7 the debtor; it focuses on the debt. But then
8 (B), which is about use of a statement in
9 writing, it's material -- materially false,
10 focuses on the individual debtor, as does (C),
11 which is the luxury items, you know, within 90
12 days. Do you want to address the anomaly?

13 MR. TRIPP: Yeah. Sure. So, of
14 course, (B) is an exception to (A), and so we
15 would usually think that it would operate
16 differently, and the ordinary inference that we
17 draw from the presence of references, these
18 specific references to the role of the debtor in
19 (B) and (C), is that Congress cared in (B) and
20 (C) how exactly the debtor was involved; whereas
21 in (A), the absence of that language --

22 JUSTICE BARRETT: But why would
23 Congress have -- I mean, I agree with you.
24 Look, I think the language cuts in your favor.
25 I'm just asking you, as a policy matter, why do

1 you think Congress would have had such a harsh
2 result on (A) whereas in (B), when there's
3 actually a use of writing --

4 MR. TRIPP: So --

5 JUSTICE BARRETT: -- oh, just, you
6 know, you're not -- you're not liable just on
7 the debt. You -- it has to be --

8 MR. TRIPP: Yeah. So, actually,
9 there's a good history of this in Field versus
10 Mans. (B) is a very different provision. It
11 has a very different history and background. It
12 used to be a complete barrier to discharge, not
13 just an exception. You get no discharge at all.
14 And what was happening was that banks were
15 duping debtors into taking on credit.

16 JUSTICE BARRETT: But I thought that
17 history explained the materiality requirement.
18 I didn't think that it necessarily would explain
19 the writing requirement.

20 MR. TRIPP: I -- I -- I think it is
21 essentially a debtor-specific problem where
22 specific debtors were being duped into making
23 false statements. And so I think it's at least
24 plausible that Congress could have wanted to
25 adapt -- have a debtor-specific rule there, but

1 I also want to be clear, I think as we mentioned
2 in the briefs, I -- I think you probably would
3 impute there, too -- that's what the Fifth
4 Circuit has held in the Osborne case that we
5 cite in our briefs -- so that when you, you
6 know, make a false statement in writing to get a
7 loan through your agent, you know, you get your
8 lawyer to make the loan for you, instead of
9 doing it yourself, I think that probably would
10 be -- would be non-dischargeable.

11 But I think maybe a critical point is
12 you don't need to decide the meaning of any of
13 the other exceptions to rule in our favor here.
14 Ours is laser-focused on the text of this one --

15 JUSTICE JACKSON: But, counsel, with
16 respect to the text of this one, I guess I'm
17 trying to figure out why the way in which you're
18 interpreting it is the -- is the most narrow
19 way. You're encouraging us not to do more than
20 we have to, and I understand that, but why
21 wouldn't the text just lend itself to the kind
22 of Strang analysis of vicarious liability where
23 we look at 523(a) and it talks about, you know,
24 discharge of an individual debtor, and we may
25 even accept the Petitioner's view that it has to

1 be an individual debtor who commits the fraud
2 for the purpose of this case, and we say just
3 that -- that individual debtor's liability can
4 arise through vicarious liability, see Strang.
5 I mean, I don't -- I don't understand the -- why
6 we would have to go further and say it could be
7 anyone's fraud for the purpose of this case.

8 MR. TRIPP: I mean, I think we would
9 be perfectly happy with that. I think as long
10 as your opinion says affirmed or dismissed --

11 (Laughter.)

12 MR. TRIPP: -- as improvidently
13 granted at the bottom, we're -- we're -- we're
14 good. And --

15 JUSTICE JACKSON: Am I right that
16 that's a narrow -- it sort of seemed like you
17 were asking in your first statement here to do
18 the -- what I would consider to be the
19 maximalist thing, saying it has to be anybody --
20 it can be anybody's fraud. And then you said,
21 but there's also Strang, which seemed to me to
22 be a narrower way to do this, but maybe I'm
23 looking at it wrong.

24 MR. TRIPP: Yeah, I mean, I think,
25 candidly, we're happy with either. I think,

1 really, the -- the better reading of the text as
2 a whole is simply actually what the Court
3 already said when it was paraphrasing the
4 language of -- of the test in Cohen versus de la
5 Cruz.

6 But I guess, maybe a key sort of
7 textual point on this is, of course, it doesn't
8 say it needs to be the fraud of -- of the
9 debtor, right? That language is missing. And
10 then, as -- as per Field versus Mans and Strang,
11 I mean, really, even if it did, this -- this is
12 the fraud of the debtor, right? It all just --
13 it all just circles -- it all just circles back
14 around. And so I think there are multiple
15 layers that sort of reinforce just the -- the
16 plain meaning of the argument, the deeper you
17 dig into it.

18 JUSTICE SOTOMAYOR: Except that it's
19 not Justice Thomas's fraud. He wasn't a partner
20 with me who committed the fraud. He didn't even
21 know about the transaction, that it was
22 fraudulent. So why should he be held liable?

23 MR. TRIPP: So --

24 JUSTICE SOTOMAYOR: That's the --

25 MR. TRIPP: Yeah.

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

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

5 JUSTICE SOTOMAYOR: And somebody will
6 have to explain to me, and I'm assuming the
7 government will, why we can add that vicarious
8 liability or did under Strang, under whose
9 common law, state or federal. But we'll figure
10 that out.

11 CHIEF JUSTICE ROBERTS: Well, just
12 trying to find something you're not comfortable
13 with.

14 MR. TRIPP: Okay.

15 CHIEF JUSTICE ROBERTS: It's not clear
16 to me that Ms. Bartenwerfer's obtained access to
17 the funds involved through fraud, even if it's
18 vicarious liability. She obtained access
19 through vicarious liability, and the statute
20 requires fraud. And I'm not sure why you jump
21 right away to fraud, rather than the actual way
22 in which she obtained access, and incurred the
23 debt was not by fraud. It was by vicarious
24 liability because of the fraud of someone else.

25 MR. TRIPP: So can I -- can I take you

1 back to the text on this? Because what it --

2 CHIEF JUSTICE ROBERTS: Sure.

3 MR. TRIPP: -- what it says is that
4 what needs to happen is it needs to be for money
5 obtained by actual fraud. It is undisputed that
6 she obtained the purchase price for -- for the
7 -- she obtained the money, that's never been
8 disputed --

9 CHIEF JUSTICE ROBERTS: But she
10 incurred -- incurred the debt --

11 MR. TRIPP: She incurred --

12 CHIEF JUSTICE ROBERTS: -- by
13 vicarious liability, and it's the debt that
14 she's trying to discharge under the statute.

15 MR. TRIPP: Yeah, but the -- what the
16 statutory test is focusing on is what was the
17 means for obtaining the money? The answer to
18 that is fraud. That's been undisputed. And
19 then the question is, is she liable for the
20 fraud? And the answer to that is actually yes
21 on both the front end and the back end.

22 First, it covers any debt, and debt is
23 defined to mean liability, so I think that is --

24 CHIEF JUSTICE ROBERTS: If I could
25 just pause before I lose the --

1 MR. TRIPP: Okay.

2 CHIEF JUSTICE ROBERTS: -- the train
3 of thought. Obtained from the debtor, right?
4 That's the "obtained" you're talking about with
5 the debt.

6 MR. TRIPP: Right.

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

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

20 CHIEF JUSTICE ROBERTS: Well, just --

21 MR. TRIPP: -- the eyes of the
22 partnership laws.

23 CHIEF JUSTICE ROBERTS: I mean, just
24 because it's the first time doesn't mean it's
25 still not an argument. And the argument is,

1 yes, I understand the notion of a business
2 partnership, but, to the extent we're talking
3 about why this individual is liable, it's
4 because of the business partnership. It's not
5 because she did anything. Her eventual -- or
6 her husband did do something. And I understand
7 the idea that under state law, she's on the --
8 the -- THE hook for the debt because of -- but
9 because of vicarious liability, not because of
10 any fraud that she's responsible for.

11 MR. TRIPP: So --

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

14 MR. TRIPP: Yeah. No, so I -- I take
15 the point about vicarious liability. I think,
16 again, my -- my main reaction just -- first
17 response is the text, it doesn't differentiate
18 between vicarious and direct liability. It says
19 any liability.

20 CHIEF JUSTICE ROBERTS: It says
21 obtained.

22 MR. TRIPP: It's any -- any liability,
23 any debt for money to the extent obtained by
24 actual fraud. And so I think the text gets you
25 a long way there. I -- I mean, I think it

1 actually gets you all the way there.

2 I think another important response, I
3 think, under -- underlying some of these
4 concerns is about the -- it's getting at the
5 sense of the fresh start policy. And, you know,
6 Petitioner starts the argument with the fresh
7 start policy, but the code, as this Court has
8 recognized on numerous occasions, balances
9 multiple competing interests, and this entire
10 statute, the whole thing, all of the exceptions
11 in 523(a), are exceptions to the fresh start
12 policy, where specific creditors, a specific
13 category of debt is protected. And I think the
14 only way to understand what is it that is really
15 covered is to just focus on the statutory text.

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

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

1 MR. TRIPP: That fraud was the means
2 through which the house was obtained.

3 JUSTICE ALITO: By whom?

4 MR. TRIPP: Well, I think in that
5 sentence, it doesn't -- it doesn't indicate. It
6 doesn't matter.

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

15 MR. TRIPP: You might think that John
16 obtained the house, but it doesn't require that
17 through the fraud, but it doesn't skip over past
18 obtained to the fraud element, which is what
19 Petitioner really needs it to do.

20 JUSTICE ALITO: Well, what I'm getting
21 at is that you are relying on a semantic reading
22 of this language, and, you know, I think you're
23 right, but, in context, it could mean something
24 very different, and I don't know how much we can
25 get from context because, when I look at all the

1 provisions that have been cited, some talk about
2 the debtor, some don't talk about the debtor, it
3 looks more haphazard than a -- a -- a pattern
4 from which we can infer very much. No?

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

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

23 JUSTICE ALITO: So we have to look at
24 something else to find as a basis for the
25 vicarious liability? But we would -- if the

1 statutory language is not dispositive, we would
2 have to look someplace else, in which case you
3 don't care about whether anybody would be liable
4 -- vicariously liable under any other body of
5 law? We have to look to some other body of law,
6 right?

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

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

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

25 That is -- that is much bigger and

1 most of the time is entered into without a
2 bankruptcy on the horizon, right, nine times out
3 of 10 there's not going to be a bankruptcy on
4 the horizon, maybe more. And I think, really,
5 the right way to understand the statute is to
6 get out of the way of whatever state law
7 remedies are available to victims of fraud.

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

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

1 for --

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

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

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

1 culpability.

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

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

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

24 CHIEF JUSTICE ROBERTS: Well, I'm sure
25 it's -- I'm sure it's not your fault, but that's

1 an awfully high expenditure of the funds of the
2 federal judiciary for this.

3 Justice Thomas, anything further?

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

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 Justice Kagan?

25 Justice Kavanaugh?

1 Justice Barrett?

2 Justice Jackson?

3 Okay. Thank you, counsel.

4 Ms. Ross.

5 ORAL ARGUMENT OF ERICA L. ROSS FOR THE UNITED STATES
6 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

7 MS. ROSS: Thank you, Mr. Chief
8 Justice, and may it please the Court:

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

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

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

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

10 I welcome the Court's questions.

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

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

19 JUSTICE SOTOMAYOR: Is Justice Thomas
20 liable --

21 MS. ROSS: So I think Justice --

22 JUSTICE SOTOMAYOR: -- for my fraud?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 not committing the fraud.

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

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

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

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

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

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

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

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

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

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

13 MS. ROSS: Yep.

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

18 MS. ROSS: Sure.

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

1 those either.

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

7 MS. ROSS: Certainly, Justice Gorsuch.

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

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

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

25 That's a good -- I can -- I can see

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

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

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

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

24 JUSTICE GORSUCH: Yes, yes.

25 MS. ROSS: -- was thinking about and I

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

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

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

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

25 On (c), I think similarly, Congress

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

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

11 JUSTICE GORSUCH: Very helpful. Thank
12 you.

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

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

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

24 MS. ROSS: I think that's right. I
25 mean, I think what -- what I would say about

1 Strang in particular is that, you know, I can
2 understand my friend's reticence to sort of
3 read of the debtor and all over the code or to
4 say wherever that's in the code, that that would
5 necessarily require imputation.

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

12 The next bankruptcy statute was in
13 1898, and what Congress did was it kept fraud,
14 but it took out "of the bankrupt." So I think
15 at least when we're thinking about this
16 provision, it's very clear that Congress, of
17 course, has never sort of reinserted "of the
18 bankrupt."

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

23 So, yes, I mean, that -- that's --
24 that's a long-winded way of saying yes, I think
25 that you could certainly limit it to that, to

1 that understanding.

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

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

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

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

22 I don't think you should say that
23 because there are a couple of those that the
24 whole statute makes no sense. And that's
25 particularly true in a -- a statute like this

1 one where we know that Congress has added -- I
2 mean, there are 19 exceptions in 523(a).
3 They've been added over the course of a hundred
4 years often in statutes that have nothing to do
5 with bankruptcy itself.

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

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

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

24 I guess if I can make one more point
25 about something you said earlier, Justice Kagan,

1 about the innocent debtor and how we think about
2 the purpose of this statute as a whole. One,
3 you know, I think it's difficult given this
4 colloquy we have just been having about how much
5 change and how these provisions have been added
6 at different times. But, two, you know, I don't
7 think it's true that because there is sort of a
8 sense of giving a debtor a fresh start as a
9 general policy matter, that's necessarily come
10 through each and every provision.

11 Obviously these are all exceptions to
12 discharge. But even beyond that, you know,
13 there are a number of them that just sort of say
14 nothing about innocence or fault to begin with.
15 And I think Congress could very rationally here
16 have decided as this Court explained in Cohen
17 that what we want here is full compensation from
18 the creditor. And given the background rules of
19 partnership, that this gets you closer to that
20 end.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas?

24 Justice Alito? Anything further?

25 Thank you.

1 Rebuttal, Ms. Harris?

2 REBUTTAL ARGUMENT OF SARAH M. HARRIS
3 ON BEHALF OF THE PETITIONER

4 MS. HARRIS: Thank you, Mr. Chief
5 Justice. Three quick points.

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

15 We're just saying you have a judgment
16 against you. It's for fraud against a fiduciary
17 that meets certain specifications. That has to
18 mean something. And that is how Congress post
19 in the world after 1867, and certainly in 1978
20 was -- appears to have been dealing with that
21 problem. So if you want to live by the text, I
22 think they have to die by the text in that
23 respect because I haven't heard a response to
24 why Congress had chosen that careful language
25 and a number of the Court's cases do say that

1 the judgment language matters.

2 It says bankruptcy courts hands off,
3 you defer to that judgment.

4 The second point is with respect to
5 the other side's theories. I don't see a
6 stopping point with respect to the vicarious
7 liability theory -- theory. Even if you take
8 seriously the idea that vicarious liability
9 could only get read in whenever Congress used
10 the word "fraud," it still doesn't appear to
11 matter if Congress uses the word "debtor."

12 And the 727 total bars to discharge,
13 the ones that don't let you discharge any of
14 your debts, even if they're unrelated, a lot of
15 those are also about fraud. So the vicarious
16 liability theory seems to get you to a pretty
17 uncomfortable place, because no one has ever
18 before thought that the bankruptcy code is a
19 mine field of vicarious liability just whenever
20 it mentions a common law term.

21 As for the state law theory, I -- I
22 think I heard the other side suggest that you
23 take whatever state law is to the point where
24 Neal versus Clark might be wrongly decided
25 because you can be liable for fraud without

1 culpable intent under a lot of state laws. You
2 certainly cannot be barred from discharging
3 fraud unless you have fraudulent intent. That's
4 been the law for -- for over a century.

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

18 And then just a final point with
19 respect to the equities here. The fraudster to
20 be very clear is always on the hook. That
21 person can never discharge the debt in
22 bankruptcy. All we are talking about here is
23 whether the person who did not know of the fraud
24 wasn't participating in it, can also be on the
25 hook forever for a life-long debt.

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

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

19 That really does not carry over to the
20 individual debtor in this case who again
21 committed no fraud herself. And we ask the
22 Court to reverse.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel. The case is submitted.

25

1 (Whereupon, at 12:39 p.m., the case
2 was submitted.)
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Official - Subject to Final Review

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|---|---|--|---|---|
| <p>1</p> <p>10 ^[1] 58:3 11:26 ^[2] 1:14 3:2 12:39 ^[1] 82:1 18 ^[2] 12:5 35:7 1867 ^[8] 4:16 12:6,9,19 33:25 34:2 74:9 78:19 1885 ^[2] 30:16 55:11 1898 ^[1] 74:13 19 ^[2] 60:15 76:2 1978 ^[8] 8:4,11 12:12,14,21 33:25 35:7 78:19 1995 ^[1] 27:4</p> | <p>above-entitled ^[1] 1:12 absence ^[1] 45:21 absolutely ^[1] 19:22 accept ^[1] 47:25 access ^[3] 50:16,18,22 accident ^[1] 75:4 account ^[2] 3:17 44:13 accountable ^[1] 81:16 acknowledging ^[1] 12:7 acquiescence ^[2] 13:18,23 acquiescing ^[1] 15:18 across ^[2] 20:5 71:6 act ^[9] 4:16 12:6,9,19 21:11 33:25,25 34:1,2 action ^[1] 65:6 actions ^[1] 21:4 actor ^[4] 5:21,23,23 15:4 actors ^[2] 29:1 31:17 acts ^[3] 4:19 12:23 23:17 actual ^[1] 3:25 6:1 38:9,17 50:21 51:5 53:24 56:18 62:12,17 64:12 actually ^[26] 6:11,23 15:23 16:2 22:14 26:22 29:21 30:4 33:16 38:22 39:6 40:21 41:9 43:11,15 46:3,8 49:2 51:20 54:1 56:15 59:20 64:14 66:19 69:8 72:10 adapt ^[1] 46:25 add ^[1] 50:7 added ^[6] 8:11 39:2 63:6 76:1,3 77:5 adding ^[1] 42:4 addition ^[2] 13:22 23:20 additional ^[2] 38:1 42:5 address ^[1] 45:12 addressing ^[1] 63:7 admits ^[1] 56:11 adolescent ^[1] 39:24 adopt ^[1] 27:5 advantage ^[1] 50:1 advocating ^[1] 42:16 affirm ^[1] 39:18 affirmative ^[1] 23:17 affirmatively ^[1] 61:14 affirmed ^[1] 48:10 afterward ^[1] 33:10 afterwards ^[1] 33:14 age-old ^[1] 56:21 agency ^[6] 39:7 42:2,23 56:20 57:10 62:16 agent ^[7] 10:17 19:20 21:4,14 28:12 43:2 47:7 agent's ^[1] 21:4 agents ^[6] 10:14 20:19 21:12 29:17 30:4 73:19 ago ^[1] 69:16 agree ^[3] 10:5 45:23 56:5 agreement ^[1] 18:13 agrees ^[1] 68:7 ahead ^[1] 42:21 aiding ^[1] 67:3 ALITO ^[12] 30:7,10 33:13</p> | <p>54:23 55:3,7,20 56:23 57:13 61:4,16 77:24 allowing ^[1] 73:6 allows ^[1] 41:16 alone ^[1] 78:13 already ^[5] 39:18 49:3 54:19 68:24 74:10 alter ^[1] 73:18 although ^[1] 57:9 ambiguity ^[1] 35:13 amended ^[1] 8:2 amendments ^[2] 34:14 35:11 amends ^[1] 33:15 amicus ^[3] 1:24 2:10 62:6 amount ^[1] 23:24 amputation ^[1] 16:15 analysis ^[1] 47:22 announced ^[2] 20:21,25 anomalies ^[1] 76:9 anomaly ^[2] 45:6,12 another ^[6] 7:25 15:4 27:13 30:20 31:14 54:2 another's ^[1] 18:19 answer ^[10] 32:6 38:4 43:16 44:23 51:17,20 60:17,22 64:17 68:21 answering ^[3] 15:8 22:7 30:10 answers ^[1] 57:18 anybody ^[2] 48:19 57:3 anybody's ^[1] 48:20 anyone's ^[5] 4:11 8:24 9:11 48:7 67:24 anyplace ^[1] 76:10 Anytime ^[1] 58:11 apparently ^[3] 8:13 26:19 63:15 appear ^[1] 79:10 APPEARANCES ^[1] 1:16 appears ^[2] 36:2 78:20 Appendix ^[1] 35:22 applicable ^[1] 14:22 applies ^[3] 4:20 10:24 28:8 apply ^[8] 4:25 10:16 12:1 26:24,25 32:13 36:12 39:1 26:24,25 32:13 36:12 39:1 approach ^[1] 50:2 arbitrary ^[1] 7:13 Archer ^[1] 44:17 aren't ^[3] 19:20 38:5 55:8 argue ^[2] 4:10 7:1 argument ^[27] 1:13 2:2,5,8,12 3:4,7 16:6 22:8,12,13 29:5 30:20 36:11,11 37:8,20 45:5 49:16 52:13,25,25 54:6 62:5 71:1,2 78:2 arguments ^[2] 36:10 71:4 arise ^[1] 48:4 arising ^[5] 10:3 38:12 44:11 64:10 81:12 arose ^[2] 4:15 12:8 around ^[4] 39:11 49:14 58:17 66:5 articulated ^[2] 44:9 68:5</p> | <p>aside ^[1] 9:5 aspect ^[1] 78:7 assess ^[1] 28:10 assets ^[4] 13:9 20:12 58:13 66:4 Assistant ^[1] 1:22 assume ^[2] 41:4 66:18 assuming ^[3] 10:5 50:6 67:18 attach ^[1] 57:22 attached ^[1] 7:22 attempting ^[1] 66:12 available ^[2] 41:15 58:7 avoid ^[1] 15:25 away ^[4] 10:7 50:21 72:22 76:22 awfully ^[1] 61:1</p> | <p>12 basics ^[2] 36:16,17 basis ^[2] 56:24 81:17 becomes ^[1] 43:21 bedrock ^[2] 38:19 56:21 begin ^[1] 77:14 beginning ^[1] 29:8 begs ^[1] 14:3 behalf ^[8] 1:18,20 2:4,7,14 3:8 37:21 78:3 behavior ^[1] 81:18 believe ^[1] 65:4 benefit ^[2] 13:7 59:21 benefits ^[1] 24:20 best ^[3] 12:9 15:7 73:14 better ^[3] 16:20 33:16 49:1 between ^[5] 7:15 33:25 37:12 53:18 71:4 beyond ^[2] 38:3 77:12 big ^[3] 9:5,7,8 bigger ^[1] 57:25 bill ^[1] 38:16 bit ^[3] 6:11 71:19,19 bitter ^[1] 59:23 blind ^[1] 15:12 body ^[2] 57:4,5 both ^[5] 51:21 52:15,16,17 76:17 bottom ^[1] 48:13 bought ^[2] 52:15 71:12 bouncing ^[1] 41:21 bound ^[1] 20:18 breach ^[1] 11:2 breadth ^[1] 22:1 break ^[1] 43:24 bridge ^[1] 74:7 brief ^[3] 30:21 35:24 66:22 briefing ^[1] 44:20 briefly ^[1] 30:13 briefs ^[2] 47:2,5 Brown ^[2] 17:3 80:12 Bu ^[1] 6:20 bucket ^[4] 64:1,19 68:22 69:1 buckets ^[1] 63:25 BUCKLEY ^[2] 1:6 3:5 Bullock ^[7] 6:12 17:7 25:6,13 26:18 81:2,8 burdens ^[1] 24:21 business ^[12] 5:5 52:8 53:1,4 60:21 61:10,16,20,21,21 62:18 66:2</p> |
| <p>2</p> <p>2)(A) ^[1] 45:6 20 ^[1] 31:23 2022 ^[1] 1:10 21 ^[1] 29:25 21-908 ^[1] 3:4</p> | <p>act ^[9] 4:16 12:6,9,19 21:11 33:25,25 34:1,2 action ^[1] 65:6 actions ^[1] 21:4 actor ^[4] 5:21,23,23 15:4 actors ^[2] 29:1 31:17 acts ^[3] 4:19 12:23 23:17 actual ^[1] 3:25 6:1 38:9,17 50:21 51:5 53:24 56:18 62:12,17 64:12 actually ^[26] 6:11,23 15:23 16:2 22:14 26:22 29:21 30:4 33:16 38:22 39:6 40:21 41:9 43:11,15 46:3,8 49:2 51:20 54:1 56:15 59:20 64:14 66:19 69:8 72:10 adapt ^[1] 46:25 add ^[1] 50:7 added ^[6] 8:11 39:2 63:6 76:1,3 77:5 adding ^[1] 42:4 addition ^[2] 13:22 23:20 additional ^[2] 38:1 42:5 address ^[1] 45:12 addressing ^[1] 63:7 admits ^[1] 56:11 adolescent ^[1] 39:24 adopt ^[1] 27:5 advantage ^[1] 50:1 advocating ^[1] 42:16 affirm ^[1] 39:18 affirmative ^[1] 23:17 affirmatively ^[1] 61:14 affirmed ^[1] 48:10 afterward ^[1] 33:10 afterwards ^[1] 33:14 age-old ^[1] 56:21 agency ^[6] 39:7 42:2,23 56:20 57:10 62:16 agent ^[7] 10:17 19:20 21:4,14 28:12 43:2 47:7 agent's ^[1] 21:4 agents ^[6] 10:14 20:19 21:12 29:17 30:4 73:19 ago ^[1] 69:16 agree ^[3] 10:5 45:23 56:5 agreement ^[1] 18:13 agrees ^[1] 68:7 ahead ^[1] 42:21 aiding ^[1] 67:3 ALITO ^[12] 30:7,10 33:13</p> | <p>54:23 55:3,7,20 56:23 57:13 61:4,16 77:24 allowing ^[1] 73:6 allows ^[1] 41:16 alone ^[1] 78:13 already ^[5] 39:18 49:3 54:19 68:24 74:10 alter ^[1] 73:18 although ^[1] 57:9 ambiguity ^[1] 35:13 amended ^[1] 8:2 amendments ^[2] 34:14 35:11 amends ^[1] 33:15 amicus ^[3] 1:24 2:10 62:6 amount ^[1] 23:24 amputation ^[1] 16:15 analysis ^[1] 47:22 announced ^[2] 20:21,25 anomalies ^[1] 76:9 anomaly ^[2] 45:6,12 another ^[6] 7:25 15:4 27:13 30:20 31:14 54:2 another's ^[1] 18:19 answer ^[10] 32:6 38:4 43:16 44:23 51:17,20 60:17,22 64:17 68:21 answering ^[3] 15:8 22:7 30:10 answers ^[1] 57:18 anybody ^[2] 48:19 57:3 anybody's ^[1] 48:20 anyone's ^[5] 4:11 8:24 9:11 48:7 67:24 anyplace ^[1] 76:10 Anytime ^[1] 58:11 apparently ^[3] 8:13 26:19 63:15 appear ^[1] 79:10 APPEARANCES ^[1] 1:16 appears ^[2] 36:2 78:20 Appendix ^[1] 35:22 applicable ^[1] 14:22 applies ^[3] 4:20 10:24 28:8 apply ^[8] 4:25 10:16 12:1 26:24,25 32:13 36:12 39:1 26:24,25 32:13 36:12 39:1 approach ^[1] 50:2 arbitrary ^[1] 7:13 Archer ^[1] 44:17 aren't ^[3] 19:20 38:5 55:8 argue ^[2] 4:10 7:1 argument ^[27] 1:13 2:2,5,8,12 3:4,7 16:6 22:8,12,13 29:5 30:20 36:11,11 37:8,20 45:5 49:16 52:13,25,25 54:6 62:5 71:1,2 78:2 arguments ^[2] 36:10 71:4 arise ^[1] 48:4 arising ^[5] 10:3 38:12 44:11 64:10 81:12 arose ^[2] 4:15 12:8 around ^[4] 39:11 49:14 58:17 66:5 articulated ^[2] 44:9 68:5</p> | <p>B</p> <p>b)(4) ^[1] 22:2 back ^[19] 15:20 17:23,23 18:13,22 19:3 23:1 24:4 30:7,11 38:21 39:2 41:22 49:13 51:1,21 57:18 68:19 70:21 backdrop ^[1] 12:23 background ^[4] 12:17 46:11 76:14 77:18 bad ^[1] 72:19 bag ^[1] 63:6 balances ^[1] 54:8 bank ^[2] 23:10 40:24 Bankrupt ^[12] 12:10,13 30:19 31:15 34:25 38:23,24 40:25 74:10,14,18,20 Bankruptcy ^[53] 3:11 4:19,22,23 7:5 8:1 9:18,23 10:11 11:5,20,21 12:18,23 16:8,16,25 17:9 18:24 24:10,24 25:8,18 26:17 29:21 30:15,24 32:13,19 35:25 36:24 38:7 40:22 42:12 58:2,3 59:17 62:13,21 66:5,7 69:25 73:10 74:12 75:5 76:5 79:2,18 80:7,8,10,22 81:5 banks ^[1] 46:14 bar ^[5] 3:18 4:7 16:4,19 31:25 barred ^[1] 80:2 Barrett ^[11] 37:5 41:20 45:2,4,22 46:5,16 62:1 69:16 70:14 73:14 barrier ^[1] 46:12 bars ^[4] 3:16 22:4 62:10 79:12 BARTENWERFER ^[2] 1:3 3:4 Bartenwerfer's ^[1] 50:16 based ^[3] 5:1 11:6 26:13 basic ^[4] 36:10 59:20,24 66:25 basically ^[8] 33:19 40:5 41:13,17 43:5 58:16 66:13 75:12</p> | <p>12 basics ^[2] 36:16,17 basis ^[2] 56:24 81:17 becomes ^[1] 43:21 bedrock ^[2] 38:19 56:21 begin ^[1] 77:14 beginning ^[1] 29:8 begs ^[1] 14:3 behalf ^[8] 1:18,20 2:4,7,14 3:8 37:21 78:3 behavior ^[1] 81:18 believe ^[1] 65:4 benefit ^[2] 13:7 59:21 benefits ^[1] 24:20 best ^[3] 12:9 15:7 73:14 better ^[3] 16:20 33:16 49:1 between ^[5] 7:15 33:25 37:12 53:18 71:4 beyond ^[2] 38:3 77:12 big ^[3] 9:5,7,8 bigger ^[1] 57:25 bill ^[1] 38:16 bit ^[3] 6:11 71:19,19 bitter ^[1] 59:23 blind ^[1] 15:12 body ^[2] 57:4,5 both ^[5] 51:21 52:15,16,17 76:17 bottom ^[1] 48:13 bought ^[2] 52:15 71:12 bouncing ^[1] 41:21 bound ^[1] 20:18 breach ^[1] 11:2 breadth ^[1] 22:1 break ^[1] 43:24 bridge ^[1] 74:7 brief ^[3] 30:21 35:24 66:22 briefing ^[1] 44:20 briefly ^[1] 30:13 briefs ^[2] 47:2,5 Brown ^[2] 17:3 80:12 Bu ^[1] 6:20 bucket ^[4] 64:1,19 68:22 69:1 buckets ^[1] 63:25 BUCKLEY ^[2] 1:6 3:5 Bullock ^[7] 6:12 17:7 25:6,13 26:18 81:2,8 burdens ^[1] 24:21 business ^[12] 5:5 52:8 53:1,4 60:21 61:10,16,20,21,21 62:18 66:2</p> |
| <p>3</p> <p>3 ^[3] 2:4 35:22 66:22 37 ^[1] 2:7</p> | <p>act ^[9] 4:16 12:6,9,19 21:11 33:25,25 34:1,2 action ^[1] 65:6 actions ^[1] 21:4 actor ^[4] 5:21,23,23 15:4 actors ^[2] 29:1 31:17 acts ^[3] 4:19 12:23 23:17 actual ^[1] 3:25 6:1 38:9,17 50:21 51:5 53:24 56:18 62:12,17 64:12 actually ^[26] 6:11,23 15:23 16:2 22:14 26:22 29:21 30:4 33:16 38:22 39:6 40:21 41:9 43:11,15 46:3,8 49:2 51:20 54:1 56:15 59:20 64:14 66:19 69:8 72:10 adapt ^[1] 46:25 add ^[1] 50:7 added ^[6] 8:11 39:2 63:6 76:1,3 77:5 adding ^[1] 42:4 addition ^[2] 13:22 23:20 additional ^[2] 38:1 42:5 address ^[1] 45:12 addressing ^[1] 63:7 admits ^[1] 56:11 adolescent ^[1] 39:24 adopt ^[1] 27:5 advantage ^[1] 50:1 advocating ^[1] 42:16 affirm ^[1] 39:18 affirmative ^[1] 23:17 affirmatively ^[1] 61:14 affirmed ^[1] 48:10 afterward ^[1] 33:10 afterwards ^[1] 33:14 age-old ^[1] 56:21 agency ^[6] 39:7 42:2,23 56:20 57:10 62:16 agent ^[7] 10:17 19:20 21:4,14 28:12 43:2 47:7 agent's ^[1] 21:4 agents ^[6] 10:14 20:19 21:12 29:17 30:4 73:19 ago ^[1] 69:16 agree ^[3] 10:5 45:23 56:5 agreement ^[1] 18:13 agrees ^[1] 68:7 ahead ^[1] 42:21 aiding ^[1] 67:3 ALITO ^[12] 30:7,10 33:13</p> | <p>54:23 55:3,7,20 56:23 57:13 61:4,16 77:24 allowing ^[1] 73:6 allows ^[1] 41:16 alone ^[1] 78:13 already ^[5] 39:18 49:3 54:19 68:24 74:10 alter ^[1] 73:18 although ^[1] 57:9 ambiguity ^[1] 35:13 amended ^[1] 8:2 amendments ^[2] 34:14 35:11 amends ^[1] 33:15 amicus ^[3] 1:24 2:10 62:6 amount ^[1] 23:24 amputation ^[1] 16:15 analysis ^[1] 47:22 announced ^[2] 20:21,25 anomalies ^[1] 76:9 anomaly ^[2] 45:6,12 </p> | | |

Official - Subject to Final Review

| | | | | |
|--|--|--|--|--|
| careful ^[1] 78:24 | 19 34:24 35:24 42:15 44:7 | Congress ^[63] 4:6 6:1,2,5, | 17:9,18 18:22,25 21:25 25: | 11,11,22 9:15 12:15 13:5,6, |
| careless ^[4] 8:17,19 9:3 75:7 | 47:1 50:15 56:12 66:23 68:7 | 7,9,11 7:6,13,22 8:16,19 9: | 17,23 26:6,9 27:11,15,21 | 7 15:3 20:8,12,15 21:7 22: |
| carelessness ^[2] 75:13,18 | 7 74:7,16 76:12,22,23 80:20 | 2,11,14,20 11:1,17 12:11, | 28:1,10,13 30:2,4 34:10 | 9,13,18 23:21 28:11,20,24 |
| cares ^[1] 6:11 | clearly ^[7] 3:14 12:25 23:17 | 21 20:3 26:4 31:11 33:1, | 35:9,25,25 37:23 38:10,23 | 29:4,7,8,11,14,15,22 31:16 |
| carries ^[1] 67:20 | 33:21 35:12 41:23 42:23 | 14,18 34:2,5,15 35:10 44: | 39:13,16 40:6 44:9,16 49: | 33:4 35:2,14 36:15 37:7, |
| carry ^[1] 81:19 | client ^[2] 16:7 18:6 | 25 45:19,23 46:1,24 56:19 | 2 54:7,16 56:17 61:7,13 | 15 38:1,8 39:6,9 42:2 45:7, |
| carveout ^[1] 70:10 | client's ^[2] 10:17 38:17 | 62:20 63:2 64:16 65:22 68: | 62:8 74:6,11 77:16 81:22 | 10,18,20 47:24 48:1 49:9, |
| Case ^[38] 3:4 6:13 10:21 11:5, | closer ^[1] 77:19 | 13 70:11,19,21 71:23 72: | Court's ^[8] 5:10 25:6 39:19 | 12 52:3 56:2,2 59:14 62: |
| 12 12:8,9 14:9,9,14,14, | co-owners ^[1] 61:10 | 18,25 73:8 74:8,13,16 75:7, | 43:22 62:24 63:10 64:10 | 22 66:24 69:21,24 70:5 73: |
| 15,18 15:8,17 20:10 27:15 | code ^[31] 3:18 4:17,25 7:5 | 7 76:1,13,20 77:15 78:8,11, | 78:25 | 16,18,19 74:3,20,22 75:6,7 |
| 36:3 37:24 38:16 39:3 43: | 8:1 10:11 12:14,21,22 16: | 18,24 79:9,11 | courts ^[3] 31:22 61:19 79:2 | 77:1,8 79:11 81:20 |
| 25 44:3,19 47:4 48:2,7 52: | 9,18,19 20:6 21:22 25:25 | Congress's ^[2] 9:6 27:5 | covered ^[2] 27:17 54:15 | debtor's ^[10] 3:25 4:2 8:4 |
| 13,15 57:2 60:10,15 61:13 | 26:17 29:1,21,25 31:22 32: | connection ^[1] 42:1 | covers ^[1] 51:22 | 10:6 20:9 24:7 48:3 67:15, |
| 64:14,18 81:20,24 82:1 | 19 34:8 35:7,11 36:24 54: | consensus ^[1] 27:18 | create ^[4] 5:5 16:9 30:6 32: | 19 73:17 |
| cases ^[16] 6:4 11:3,15 17:2, | 7 59:17 74:3,4 75:5 79:18 | consequence ^[1] 44:25 | 21 | debtor-specific ^[2] 46:21, |
| 6 26:18 34:19 43:22 44:10, | Cohen ^[8] 38:10 39:18 40: | consequences ^[1] 81:16 | created ^[2] 36:3 63:1 | 25 |
| 17 58:11 67:7 78:25 80:11 | 6 49:4 54:17 77:16 81:2, | consider ^[1] 48:18 | creates ^[1] 20:3 | debtors ^[11] 3:12,16,19 4:3, |
| 81:1,2 | 10 | considered ^[1] 21:14 | creating ^[5] 11:1 32:24 36: | 7,21 5:7,9 46:15,22 71:3 |
| cashes ^[1] 15:21 | colleague ^[1] 17:24 | considers ^[1] 34:11 | 24,25 73:1 | debtors' ^[1] 3:15 |
| category ^[1] 54:13 | colloquy ^[2] 23:1 77:4 | consign ^[1] 5:8 | credible ^[1] 36:1 | debts ^[16] 3:13,19,24 4:5,8 |
| causal ^[6] 40:13 43:19,22 | come ^[5] 11:16 14:8 25:7 | consistent ^[1] 22:15 | credit ^[2] 46:15 65:16 | 12:20 18:1 25:10 63:7 70: |
| 44:10 60:6 64:12 | comes ^[3] 57:18 59:23 61: | constantly ^[1] 12:22 | creditor ^[3] 20:16 66:6 77: | 12,24 71:13 72:13 78:10 |
| causation ^[2] 44:11 64:16 | 13 | construct ^[1] 69:2 | 18 | 79:14 81:12 |
| cause ^[2] 44:15,20 | comfortable ^[3] 50:4,12 | constructive ^[2] 4:4 26:10 | creditors ^[2] 5:8 54:12 | December ^[1] 1:10 |
| century ^[1] 80:4 | 64:13 | construed ^[1] 17:11 | critical ^[2] 47:11 58:10 | decide ^[1] 47:12 |
| cert ^[1] 39:15 | comment ^[1] 63:12 | construing ^[3] 28:7,13,15 | cross ^[1] 74:6 | decided ^[3] 55:11 77:16 79: |
| certain ^[1] 78:17 | commission ^[1] 63:8 | consumer ^[2] 72:12,20 | Cruz ^[2] 38:11 49:5 | 24 |
| certainly ^[9] 17:16 63:17 | commit ^[3] 4:4 23:9 62:22 | contentends ^[1] 39:5 | culpability ^[9] 6:10 9:10 | decision ^[4] 20:8 25:6 57: |
| 68:1 70:7 71:20 73:20 74: | commits ^[1] 48:1 | content ^[1] 64:11 | 24:10 25:21 26:1 33:4 35: | 21 62:25 |
| 25 78:19 80:2 | committed ^[13] 4:7,14 9: | context ^[5] 12:6 28:16,25 | 5 59:15 60:1 | deeper ^[1] 49:16 |
| cetera ^[3] 29:11,24 68:17 | 23 22:14 24:8,19 25:15 26: | 55:23,25 | culpable ^[6] 4:15 25:16 59: | defalcation ^[6] 6:14,16 8:3 |
| chain ^[2] 55:13 58:23 | 10 49:20 62:18 66:24 70: | contract ^[1] 43:6 | 19 80:1 81:7,18 | 25:14,17,23 |
| challenge ^[1] 61:15 | 23 81:21 | contrary ^[4] 26:16,22 29: | curiae ^[3] 1:24 2:11 62:6 | defer ^[3] 9:18 79:3 80:6 |
| change ^[7] 8:8,13 12:17 16: | committing ^[2] 22:22 67:1 | 20 80:7 | curiosity ^[3] 39:21 60:14 | defies ^[1] 37:10 |
| 6,9,13 77:5 | common ^[24] 10:12,13,24 | contrast ^[2] 7:15 30:1 | 61:4 | define ^[1] 17:4 |
| changed ^[2] 36:13 74:20 | 11:6,11,15,19 12:1 19:19 | contrasting ^[1] 21:21 | curious ^[2] 21:22 26:8 | defined ^[5] 10:11 11:10 29: |
| check ^[2] 44:15 60:4 | 20:2 21:1 26:24,25 27:6 | contribution ^[1] 65:5 | currently ^[1] 66:1 | 23 40:8 51:23 |
| CHIEF ^[36] 3:3,9 13:2,4,17, | 28:16 30:22,25 31:5 50:9 | control ^[5] 4:16 14:7,12 15: | cut ^[2] 58:10,24 | defines ^[2] 17:1,2 |
| 19,25 14:13,21 35:15 36:7 | 56:10,17,19 76:16 79:20 | 13 61:11 | cuts ^[2] 8:20 45:24 | definitely ^[1] 37:16 |
| 37:4,17,22 50:11,15 51:2,9, | companies ^[2] 72:11,20 | controlling ^[1] 32:3 | | definition ^[1] 30:3 |
| 12,24 52:2,7,20,23 53:12, | company ^[3] 20:13,16,18 | conversation ^[1] 24:5 | | definitions ^[1] 29:20 |
| 20 60:12,24 61:22 62:7 65: | company ^[3] 20:13,16,18 | converse ^[1] 8:9 | | defrauded ^[5] 14:6 65:1 |
| 8,18 66:8 77:21 78:4 81: | compensated ^[1] 58:16 | convert ^[1] 5:16 | | 69:2,3,9 |
| 23 | compensation ^[2] 41:17 | conveyance ^[1] 21:2 | | deliberately ^[1] 78:12 |
| child ^[4] 39:23,24 40:20,25 | 77:17 | conveyed ^[1] 20:12 | | deny ^[2] 4:25 33:5 |
| child's ^[1] 40:24 | competing ^[1] 54:9 | convincing ^[1] 27:20 | | depart ^[1] 26:4 |
| choice ^[2] 9:6 68:14 | complete ^[2] 23:25 46:12 | corporation ^[4] 21:3,11,15 | | Department ^[1] 1:23 |
| chose ^[1] 9:3 | components ^[1] 80:6 | 37:9 | | dependents ^[2] 29:24 37: |
| chosen ^[3] 25:11 65:22 78: | concept ^[2] 15:2 67:4 | corporations ^[2] 21:10 37: | | 15 |
| 24 | concepts ^[2] 33:4 66:25 | 12 | | depends ^[1] 13:14 |
| circles ^[2] 49:13,13 | concerned ^[3] 30:14 69:15 | Correct ^[4] 11:7 18:8 19:7 | | describe ^[1] 65:19 |
| circuit ^[3] 31:22 34:19 47:4 | 70:21 | 27:8 | | describing ^[3] 40:18 43:17 |
| circumstance ^[3] 40:17 | concerns ^[3] 54:4 59:25 | counsel ^[10] 24:3 35:16 37: | | 44:8 |
| 41:16 43:16 | 67:24 | 18 45:2 47:15 60:13 62:3 | | determination ^[1] 16:21 |
| circumstances ^[3] 13:15, | conclusion ^[2] 3:21 28:2 | 67:17 77:22 81:24 | | determinations ^[1] 68:15 |
| 22 69:22 | conclusively ^[1] 32:7 | counter ^[1] 72:2 | | determine ^[2] 28:8 29:13 |
| cite ^[1] 47:5 | condition ^[1] 71:10 | counts ^[2] 4:11 20:10 | | dicing ^[2] 33:25 34:5 |
| cited ^[1] 56:1 | confined ^[2] 11:1 12:25 | couple ^[7] 6:19 7:12 33:22 | | die ^[1] 78:22 |
| clarification ^[1] 19:18 | confirms ^[1] 6:12 | 75:15,15,23 76:9 | | differences ^[1] 33:12 |
| clarified ^[1] 36:5 | conflicting ^[1] 60:20 | course ^[8] 25:8 45:14 49:7 | | different ^[16] 4:20 16:16 |
| clarifying ^[1] 19:16 | confronting ^[1] 6:14 | 50:4 68:6 71:21 74:17 76: | | 17:7 25:19 34:6,8,15 42:7 |
| Clark ^[2] 4:3 79:24 | confused ^[1] 26:23 | 3 | | 46:10,11 55:24 60:19 63:6, |
| clear ^[19] 17:1 24:14 27:3, | | COURT ^[50] 1:1,13 3:10 5: | | 7 65:14 77:6 |
| | | 8 6:3,13,15 9:18,23 14:25 | | differentiate ^[1] 53:17 |
| | | | D | |
| | | | D.C ^[4] 1:9,18,20,23 | |
| | | | damages ^[1] 81:13 | |
| | | | days ^[3] 45:12 60:15 69:25 | |
| | | | de ^[2] 38:10 49:4 | |
| | | | deal ^[5] 7:16 64:22 65:6 73: | |
| | | | 14,21 | |
| | | | dealing ^[2] 27:15 78:20 | |
| | | | Dean ^[1] 6:4 | |
| | | | death ^[1] 5:2 | |
| | | | debt ^[62] 4:12 5:14,15 7:17, | |
| | | | 17 8:22 9:12,16 10:3 13: | |
| | | | 12 17:1,7 18:6,8 20:14 21: | |
| | | | 6 22:2 25:17 29:11 30:23 | |
| | | | 31:2 33:7 38:8,12 39:12 | |
| | | | 40:8 41:24 42:1,9,11,12 | |
| | | | 44:13 45:7 46:7 50:23 51: | |
| | | | 10,13,22,22 52:5 53:8,23 | |
| | | | 54:13 59:6,9 62:10,11,12, | |
| | | | 13,17 63:1 65:3,4,16 69:4, | |
| | | | 4,8 78:13 80:8,10,21,25 | |
| | | | debtor ^[88] 3:23 4:11 5:12, | |
| | | | 17,20,22 6:24,24,25 7:3,6, | |
| | | | 7,11,14,14,19,21,21,23 8:6, | |

Official - Subject to Final Review

| | | | | |
|--|--|---|---|---|
| <p>differently [2] 45:16 56:13 difficult [2] 60:18 77:3 dig [1] 49:17 direct [14] 14:8,17,22,24 15:5,9,10,16 23:3,17,21,25 30:1 53:18 directly [3] 23:18 32:16 67:5 disagree [2] 16:25 18:14 disappeared [2] 8:5 58:12 discharge [4] 3:24 4:5,20 5:1 12:20,21,24 17:4,10,14 22:5 26:2,3,4,12 29:10 32:1,8 33:3 34:4 35:12 37:25 38:7,8 39:11 42:12 46:12,13 47:24 51:14 62:10 63:1 69:25 70:12 77:12 79:12,13 80:13,21 81:5,6 dischargeability [2] 20:21 31:2 dischargeable [7] 20:15 21:6 30:23 31:3 41:7 71:12,14 discharged [2] 13:12 38:13 discharging [5] 3:17,19 4:8 9:13 80:2 disclose [1] 14:5 discussed [2] 21:24 32:7 discussing [1] 22:1 discussion [1] 76:18 dishonest [2] 3:16 5:7 dismissed [1] 48:10 displace [1] 16:22 displaced [1] 62:20 dispositive [1] 57:1 disputed [2] 51:8 52:14 disputing [1] 16:7 dissimilar [1] 32:25 dissipate [1] 66:4 dissipated [1] 58:12 distinct [3] 3:23 12:16 29:23 distinction [1] 31:15 distinguishing [2] 30:12 37:11 district [1] 15:10 doing [6] 6:8 20:4 47:9 72:21 76:13 78:9 done [2] 25:15 67:8 doubt [1] 27:5 draw [1] 45:17 drew [1] 14:25 driver [1] 75:20 driving [1] 7:18 drunk [2] 7:18 75:20 duped [1] 46:22 duping [2] 46:15 72:15 duty [1] 14:4</p> | <p>earth [1] 78:8 easier [1] 70:11 easiest [1] 43:25 easy [2] 39:4 60:7 effect [3] 30:15,16,18 effects [1] 72:22 ego [1] 73:18 either [5] 36:19 48:25 65:21 70:1 73:6 element [2] 52:14 55:18 elements [10] 11:8,10 17:13 23:25 25:23 27:2,11,16 34:7 60:8 eliminate [1] 4:22 eliminated [1] 63:2 else's [1] 3:15 elsewhere [1] 76:21 embezzlement [1] 30:19 employees [1] 21:15 employer [1] 30:3 enacted [3] 35:9,11 45:1 enacting [1] 12:22 encouraging [3] 15:18 23:22 47:19 end [6] 44:23 51:21,21 64:23 65:7 77:20 enforceable [1] 62:14 engaged [1] 7:18 enough [2] 15:22 24:16 entered [1] 58:1 entire [1] 54:9 entirely [3] 66:6 68:14 73:8 equities [1] 80:19 ERICA [3] 1:22 2:9 62:5 Erie [1] 31:5 escape [1] 5:7 esoteric [1] 57:15 especially [2] 9:12 11:20 ESQ [4] 2:3,6,9,13 ESQUIRE [2] 1:18,20 essentially [3] 15:18 24:6 46:21 established [1] 38:11 et [3] 29:11,24 68:17 even [30] 4:3 10:4 12:6 13:7 15:12 17:17 20:3,15 21:16 29:3 32:14 34:22 37:12,13 39:1 47:25 49:11,20 50:17 58:22 59:2,11 67:13,18 68:11 73:7 75:9 77:12 79:7,14 eventual [1] 53:5 everybody [1] 68:7 evidence [2] 6:10 27:20 evident [1] 17:6 exact [2] 7:2,17 exactly [5] 7:13 43:8 45:20 72:1,2 example [3] 7:25 64:25 70:13 examples [1] 7:13 Except [1] 49:18 exception [13] 6:15,16,17 16:9 17:14 25:19 26:1 27:</p> | <p>25 32:9 34:5 37:25 45:14 46:13 Exceptions [17] 3:13 4:2 5:22 12:24 17:5,10 26:2,7 35:12 47:13 54:10,11 76:2 77:11 78:10 80:13 81:9 excuse [2] 75:15 76:17 exists [1] 80:9 expect [1] 11:21 expenditure [1] 61:1 explain [3] 34:19 46:18 50:6 explained [2] 46:17 77:16 explanation [2] 72:7,9 explore [1] 60:10 explored [2] 44:17 67:16 expressed [3] 3:14 13:1 35:13 expressly [1] 21:19 extending [1] 41:5 extent [6] 28:10 38:9 53:2,23 68:17 76:20 extinguishing [2] 3:13 11:22 extremely [1] 26:8 eyes [2] 5:6 52:21</p> | <p>find [4] 40:16 50:12 56:24 63:13 finding [2] 41:11 61:19 findings [2] 61:6,12 fine [1] 26:11 finish [2] 22:7 30:8 First [21] 5:19 7:20 10:20 12:4 18:12 28:21 31:9 33:24 38:4 39:16 48:17 51:22 52:24 53:16 57:24 64:4 68:22 69:9 71:21 75:17 78:6 fits [1] 38:16 fix [1] 33:19 flesh-and-blood [1] 37:16 focus [5] 5:12,13 45:6 54:15 70:4 focused [1] 73:8 focuses [3] 5:13 45:7,10 focusing [2] 5:17 51:16 follow [3] 17:22 58:16,17 following [1] 62:24 follows [1] 3:21 footnote [1] 35:24 foreseeable [1] 81:17 forever [3] 31:22 59:22 80:25 form [3] 15:24 21:2 23:8 forming [2] 15:23 16:3 forth [1] 41:22 forward [2] 56:7 67:9 found [2] 36:1,1 frankly [1] 54:17 fraud [166] 3:18,20,25 4:4,7,9,11,14 5:16,25 6:1,17 8:24,24 10:6,11,14 11:6,9,13 12:10,12 13:6,10,13 14:7,11 15:16,19 18:11,17,18,19,23 19:9,11,12,20 20:9,11,23 21:1,2,7 22:2,9,14,22 23:9,18,22,23 24:1,7,8,20 25:24 26:10 27:10,12,16,17,20 28:9,22 29:12 30:18 31:25 34:3,25 35:2 37:25 38:2,4,9,12,18,18,19,23,24 39:7,11 40:12,14,20,21 41:13,19,24 42:1,10,25 48:1,7,20 49:8,12,19,20 50:17,20,21,23,24 51:5,18,20 53:10,24 54:24 55:1,10,12,17,18 56:9,10,17,18,22 58:7,11,18 59:21 60:8,9 62:13,18,23 63:1,22 64:4,7,21 65:2,14,15,17,19 66:3,24,25 67:1,5,7,15,19,25 68:16 69:5 70:22 73:1,17 74:9,13 78:16 79:10,15,25 80:3,23 81:13,14,16,21 fraud-related [1] 4:12 frauds [1] 76:19 fraudster [5] 39:10 58:12,18 66:2 80:19 fraudulent [16] 4:1,6 6:3 9:25 16:21 21:2 23:23 26:11,12 35:5 40:10 43:20 49:22</p> | <p>60:5 73:3 80:3 fraudulently [2] 20:12 42:8 fresh [5] 3:12 54:5,6,11 77:8 friend [6] 42:9 64:9 66:9 69:16 70:9 74:19 friend's [3] 37:8 72:2 74:2 friends [1] 71:13 front [4] 19:5 51:21 64:23 65:7 Full [2] 38:13 77:17 fully [1] 38:18 fulsome [1] 60:22 funds [2] 50:17 61:1 fundr [6] 21:17 35:18 48:6 61:3 72:24 77:24 future [2] 60:10 64:14</p> |
| G | | | | |
| <p>Garner [1] 27:14 gave [1] 44:3 Gebser [4] 11:3,14 15:1,7 Gelson [1] 17:3 General [2] 1:22 77:9 generis [1] 57:15 gets [11] 19:24 22:25 31:15 41:14 53:24 54:1,18 58:23 59:4 74:21 77:19 getting [6] 15:17 17:25 54:4 55:20 57:21 81:5 give [6] 7:12 42:7 59:12 63:25 64:11 72:6 given [5] 7:4 18:1 23:15 77:3,18 gives [1] 3:11 giving [1] 77:8 glad [1] 36:5 goods [2] 69:24 71:12 GORSUCH [19] 17:20 18:5,10,16 19:1,5,8,12,15 68:18 69:11,14,19 70:7,20 71:20,24 72:6 73:11 Gorsuch's [1] 73:15 got [12] 12:11 28:1 34:12 36:4 37:2 53:12 54:19 66:16 68:21 69:11 71:3 76:7 gotten [1] 24:20 govern [2] 27:24 36:13 governed [1] 32:20 government [5] 4:10 12:7 50:7 70:3,5 government's [1] 67:12 governs [3] 25:19 31:21 80:16 grab [1] 63:6 granted [2] 39:15 48:13 great [1] 60:17 Grogan [1] 27:14 ground [1] 43:24 grounds [1] 30:12 guess [13] 16:20 17:25 24:4,11 40:24 47:16 49:6 60:2,22 68:10 73:13 75:14 76:</p> | | | | |

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| | | | | |
|--|---|--|---|--|
| <p>24 guilty ^[1] 13:6 <hr/> H haled ^[1] 9:16 half ^[5] 18:12,13 19:3,6,13 hand ^[1] 18:1 hands ^[1] 79:2 haphazard ^[3] 56:3,6,7 happen ^[1] 51:4 happened ^[2] 7:8 33:10 happening ^[2] 15:13 46:14 happy ^[2] 48:9,25 harassment ^[1] 15:11 hard ^[4] 31:20 32:2 44:3 71:18 harmonious ^[1] 28:4 HARRIS ^[6] 1:18 2:3,13 3:6,7,9 5:11,18 7:4 8:16 9:8 10:4,19 11:7 12:3 13:3,14,18,21 14:2,15,24 16:11,24 17:20 18:4,8,15,21 19:4,7,10,14,17,22 20:22,25 21:9,18 22:11,20,25 23:6,14,20 25:3 27:8 28:17 29:19 30:9 31:8 33:22 35:23 36:17,23 37:10 59:10 75:3 78:1,2,4 harsh ^[2] 33:6 46:1 Hartford ^[1] 7:8 heads ^[1] 59:23 hear ^[1] 3:3 heard ^[4] 36:1 63:12 78:23 79:22 held ^[7] 10:10,13 20:14 29:22 38:23 47:4 49:22 helpful ^[2] 16:12 73:11 helps ^[1] 42:22 herself ^[5] 22:15 39:14 59:14 62:22 81:21 high ^[1] 61:1 higher ^[2] 24:10,24 history ^[6] 8:1 46:9,11,17 76:12,23 hold ^[5] 38:3 40:20 64:24 69:8 81:15 holding ^[5] 21:23 33:17,19,20 34:16 Holley ^[2] 10:21 37:1 homes ^[1] 5:5 honest ^[2] 3:11 33:3 honestly ^[1] 11:2 honored ^[1] 11:2 hook ^[7] 14:16 25:12 26:13 35:1 53:8 80:20,25 horizon ^[2] 58:2,4 hostile ^[2] 30:17 33:13 house ^[8] 52:15,17 54:24 55:2,9,11,16 60:19 huge ^[1] 8:6 humans ^[1] 37:16 hundred ^[1] 76:3 husband ^[8] 10:17 22:18,21,24 23:11 35:21 39:22</p> | <p>53:6 Husky ^[6] 20:8,10,25 21:2,18 58:14 hypothetical ^[8] 40:19 41:4 42:7 43:4 57:18 63:18 64:6,15 hypotheticals ^[8] 57:19 63:13 64:1,2,19,22 68:22 69:1 <hr/> I idea ^[10] 7:22 11:25 42:10 53:7 59:3 76:8 79:8 80:5,7 81:3 identified ^[1] 5:21 idiosyncratic ^[1] 57:22 idly ^[1] 14:10 imagine ^[1] 65:13 imply ^[1] 32:1 import ^[1] 33:2 important ^[4] 31:14 54:2 56:16 58:9 impose ^[4] 4:18 24:17 43:11,15 imposed ^[1] 24:16 imposition ^[1] 57:23 improvvidently ^[1] 48:12 imputation ^[8] 21:20,23 32:2,12,15 39:8 73:6 74:5 impute ^[1] 47:3 imputing ^[1] 41:5 include ^[2] 15:6 39:21 included ^[1] 39:22 includes ^[3] 30:4 37:25 73:18 including ^[4] 7:1 80:16 81:13,13 incorrect ^[1] 35:23 incurred ^[5] 3:17 50:22 51:10,10,11 indicate ^[1] 55:5 indications ^[2] 5:19 23:2 indifference ^[2] 4:14 14:7 indifferent ^[3] 6:7 9:15 78:13 individual ^[35] 3:22 4:21 5:19,22 7:11 8:22 12:15 13:5,7 20:17 28:11 29:8,10,14,15,22 31:16 36:15 37:7,9,14 38:8 45:10 47:24 48:1,3 53:3 69:21,24 70:4 71:3 74:20,22 75:19 81:20 individuals ^[1] 37:12 inducing ^[1] 23:23 infant ^[1] 39:23 infer ^[1] 56:4 inference ^[2] 45:16 72:1 injury ^[2] 6:18 22:3 innocence ^[1] 77:14 innocent ^[3] 35:1 66:6 77:1 inquire ^[1] 30:12 insert ^[1] 24:7 instance ^[3] 12:5 21:25 28:</p> | <p>21 instances ^[2] 75:19 78:12 instead ^[3] 9:25 12:14 47:8 intend ^[2] 38:2 39:6 intent ^[16] 4:1,6,15 6:3,6,14 9:25 17:8 23:23 25:16 26:11,13 27:5 35:5 80:1,3 intentional ^[1] 3:15 interests ^[2] 17:2 54:9 interpose ^[1] 58:20 interpreting ^[6] 25:22 30:15 31:24 34:21 47:18 67:13 interrupt ^[2] 16:19 17:21 involve ^[1] 64:7 involved ^[3] 20:10 45:20 50:17 involvement ^[2] 23:25 24:16 irrationally ^[1] 4:7 isn't ^[9] 13:12 16:5 20:20 50:2 59:8 63:23 64:23 67:17 73:23 issue ^[1] 73:17 items ^[1] 45:11 itself ^[5] 37:14 42:25 47:21 60:8 76:5 <hr/> J JA ^[1] 61:9 JACKSON ^[13] 10:4 11:4,24 26:21 28:6 29:6 30:11 45:3 47:15 48:15 62:2 67:10 68:1 Jackson's ^[1] 50:2 jettisoning ^[1] 31:12 John ^[3] 55:9,13,15 John's ^[2] 54:23,24 Joint ^[2] 35:22 61:17 judge ^[1] 71:5 judgment ^[12] 9:19,21 17:18 18:22 25:14 32:12,15,16 70:22 78:15 79:1,3 judgments ^[2] 71:16 78:11 judiciary ^[1] 61:2 jump ^[1] 50:20 Justice ^[165] 1:23 3:3,9 5:11 6:20 8:15 10:4 11:4,24 13:2,4,17,19,25 14:13,21 16:5,18 17:20,22 18:5,10,16 19:1,5,8,12,15,19 20:7,23 21:5,13 22:6,17,23 23:4,7,19 24:2,4 26:21 27:3 28:6 29:6 30:7,10,10 33:8,12 35:15,17,17,19 36:4,7,7,8,9,20 37:2,4,4,17,22 39:20 40:2 41:1,10,20,21 42:6,7,9,10,17,21 43:1,8,13 44:2,5 45:2,3,4,22 46:5,16 47:15 48:15 49:18,19,24 50:1,2,5,11,15 51:2,9,12,24 52:2,7,20,23 53:12,20 54:23 55:3,7,20 56:23 57:13 59:2 60:12,24 61:3,4,16,22,22,</p> | <p>24,25 62:1,2,8 63:11,17,19,19,21,22 64:5 65:8,18 66:8 67:10,23,23 68:1,18 69:11,14,15,19 70:7,14,20 71:20,24 72:6 73:11,13,14,15,22 75:2,16 76:25 77:21,23,24 78:5 81:23 justification ^[4] 25:2,4 26:5,6 justifies ^[1] 26:1 juxtaposed ^[2] 29:23 31:16 <hr/> K KAGAN ^[9] 8:15 24:4 33:8 36:7 59:2 61:24 75:2,16 76:25 KATE ^[2] 1:3 32:16 KAVANAUGH ^[8] 16:5,18 36:8,9,20 37:2 41:10 61:25 Kavanaugh's ^[1] 17:22 keep ^[1] 41:21 kept ^[1] 74:13 key ^[2] 36:15 49:6 KIERAN ^[1] 1:6 kills ^[1] 7:18 kind ^[7] 32:23 44:15 45:5 47:21 72:16,22 75:3 kinds ^[1] 81:14 knowing ^[1] 66:24 knowledge ^[3] 13:16,23 14:19 known ^[4] 22:10 66:2,15,20 knows ^[1] 23:16 <hr/> L la ^[2] 38:10 49:4 lack ^[1] 4:5 language ^[21] 9:2,3 31:25 33:1 34:13,14,22 35:4 44:25 45:21,24 49:4,9 55:22 57:1 63:2 64:10 74:10 78:9,24 79:1 large ^[1] 75:18 laser-focused ^[1] 47:14 last ^[4] 4:23 11:21 37:6 43:18 Later ^[1] 42:8 latest ^[1] 55:14 Laughter ^[1] 48:11 law ^[103] 3:11 4:20 5:6 10:12,13,24 11:6,11,15,19 12:2 14:23 16:3,6,8,13,21,25 17:1,2,3,8,10,11,17 18:2,3,7,20 19:9,10,20 20:2 21:1 24:10 25:9,10,17 26:24,25 27:6,23 28:16 30:15,22,24,25 31:5,6,7,9,18 32:5,9,11,11,13,21 36:11,13,14,15,19 38:20,25 39:7 40:9,16 43:5,10,14 50:9 53:7 56:10,17,19,20 57:5,5,8 58:6</p> | <p>59:22 61:7 62:15,16 64:22,23 65:5,6,21 68:15 69:7 76:16 79:20,21,23 80:4,6,9,11,14,14,16 laws ^[4] 4:18 52:22 80:1,17 lawyer ^[1] 47:8 layers ^[1] 49:15 least ^[9] 5:13 16:23 28:18 29:25 46:23 65:25 67:20 74:15 76:10 leave ^[1] 67:6 leaves ^[1] 16:20 lend ^[1] 47:21 less ^[1] 9:10 level ^[2] 13:16 15:15 liabilities ^[3] 3:17 9:13 11:22 liability ^[86] 4:19,22,24 10:8,18,23 11:14,20 12:1 14:8,17,18,22,24 15:5,6,9,16,25 16:13 17:16,19 19:23 20:1,5 23:3,21 24:16,17 25:9 26:15 28:18 29:3 30:6 31:1,6 32:24 33:2 36:18 39:8 40:7,8,14 41:5 43:15,19 47:22 48:3,4 50:8,18,19,24 51:13,23 52:10 53:9,15,18,19,22 56:12,21,25 57:8,11,16,23,24 58:17,22,23 59:4,6,7,9 60:4,7 66:25 67:12,20 78:14 79:7,8,16,19 liable ^[38] 13:13 16:8,14 19:20 23:13,18,22 25:16 32:16 38:3,18 40:20,21 41:12 42:18,24 43:3,5 44:24 46:6 49:22 51:19 52:10 53:3 57:3,4 58:18 62:16 63:20,24 64:24 67:5 68:16,17 69:8 76:18 79:25 81:12 life ^[1] 33:6 life-long ^[2] 33:7 80:25 likely ^[2] 6:7 9:10 limit ^[8] 24:15 59:8 63:13,16 68:5 72:21,23 74:25 limited ^[1] 12:5 limiting ^[1] 24:14 line ^[2] 14:25 25:5 link ^[3] 40:13 43:19 60:6 linked ^[1] 81:9 list ^[2] 72:13,14 literal ^[1] 59:11 little ^[2] 71:19,19 live ^[1] 78:21 LLC ^[4] 15:25 35:21 36:2,2 loan ^[3] 42:8 47:7,8 location ^[2] 17:7 22:2 logic ^[1] 25:5 long ^[3] 4:11 48:9 53:25 long-winded ^[1] 74:24 longstanding ^[1] 62:15 look ^[24] 7:5 8:2 9:2,25 10:20 11:3,5 20:7 28:15,25 29:14 31:4,6 32:20 45:24 47:23 55:25 56:23 57:2,5,</p> |
|--|---|--|---|--|

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| | | | | |
|---|---|--|--|---|
| 8 68:12 71:22 80:14 looked [1] 33:18 looking [3] 27:9 28:3 48:23 looks [2] 56:3 76:12 loosely [1] 69:20 lose [3] 51:25 59:24 75:10 losses [1] 61:11 lot [6] 5:24 33:24 54:20 64:21 79:14 80:1 lots [1] 31:17 low [1] 16:4 lower [1] 61:19 luck [1] 66:7 lurking [1] 31:21 luxury [3] 45:11 69:23 71:12 lying [2] 22:19,24 <hr/> M <hr/> made [5] 20:15 21:6 24:14 29:5 68:13 main [2] 10:21 53:16 malicious [2] 6:18 22:3 management [1] 61:11 Mans [7] 10:9 11:5,8 17:12 46:10 49:10 56:15 many [2] 34:19 58:11 MARIE [1] 1:3 marriage [1] 5:4 massive [1] 8:13 material [1] 45:9 materiality [1] 46:17 materially [1] 45:9 matter [11] 1:12 10:23 21:1 26:9 28:20 36:19 45:25 55:6 77:9 79:11 80:11 matters [1] 79:1 maximalist [1] 48:19 mean [29] 15:4 16:19 18:18, 18 28:23,24,24 29:16,16 39:17 40:8 45:23 48:5,8, 24 49:11 51:23 52:23,24 53:25 54:25 55:23 59:8 71:6 73:16,25 74:23 76:2 78:18 meaning [9] 8:3,13 17:8 23:5 31:12 47:12 49:16 54:22 76:22 means [11] 20:24 21:12 29:14 35:5 37:8 38:17 40:11 51:17 55:1 73:15 75:8 meant [2] 21:1 64:16 medicine [1] 81:4 meets [1] 78:17 member [1] 24:18 members [1] 41:6 mention [6] 7:20,23 8:10 11:13 12:12 29:4 mentioned [4] 30:13 47:1 64:9 70:9 mentioning [2] 11:15 32:23 mentions [4] 7:21 11:18 29:6 79:20 | merits [1] 66:16 Meyer [2] 10:20 37:1 might [5] 55:15 63:3 64:17 75:10 79:24 mine [1] 79:19 mini-trial [1] 18:24 minimum [3] 15:9,15 23:24 minute [1] 17:24 minutes [1] 63:15 misconduct [3] 3:25 6:12 9:23 misrepresentation [2] 71:9 72:16 misrepresentations [1] 20:16 misrepresents [1] 69:22 missed [1] 36:5 missing [1] 49:9 moment [1] 69:16 money [28] 5:15 8:23 13:8 18:7,9 19:11 29:11 38:9, 11,17 40:11 43:20 51:4,7, 17 52:9,17,18,19 53:13,23 58:16 60:5 62:12,17 66:3, 4 69:5 most [4] 15:22 47:18 58:1 65:4 mostly [1] 5:3 motion [1] 81:15 motor [1] 7:19 move [1] 56:6 Ms [80] 3:6,9 5:11,18 7:4 8:16 9:8 10:4,19 11:7 12:3 13:3,14,18,21 14:2,15,24 16:11,24 17:20,20 18:4,8, 15,21 19:4,7,10,14,17,22 20:22,25 21:9,18 22:11,20, 25 23:6,14,20 25:3 27:8 28:17 29:19 30:9 31:8 33:22 35:23 36:17,23 37:10 50:16 59:10 62:4,7 63:11, 17,21,23 65:10,20 66:11 68:1,18,18,24 69:13,18 70:7 71:20,25 72:8 73:20,24 75:2,14 78:1,4 much [6] 12:5 55:24 56:4 57:25 71:5 77:4 multiple [2] 49:14 54:9 must [5] 3:14 22:14 34:23 35:12 39:6 <hr/> N <hr/> narrow [4] 3:14 47:18 48:16 68:9 narrower [2] 48:22 67:18 narrowly [2] 12:24,25 narrowness [1] 22:1 nature [1] 7:4 Neal [4] 4:3 76:17,18 79:24 necessarily [7] 18:18 19:24 24:12 46:18 70:10 74:5 77:9 necessary [1] 22:12 | need [13] 23:4 24:21 25:1 26:5 27:19 40:7,12 47:12 61:8,9 67:13 68:11 70:15 needed [2] 32:11 38:22 needing [1] 67:19 needs [12] 15:10,11 40:11, 13 49:8 51:4,4 55:19 58:15 60:4 67:2 74:6 never [5] 36:1 51:7 52:14 74:17 80:21 new [4] 11:23 43:24 66:21, 22 next [4] 3:4 23:24 34:3 74:12 nine [1] 58:2 Nobody [1] 70:16 non-dischargeability [1] 34:7 non-dischargeable [7] 39:25 40:23 41:25 42:3 47:10 69:21 70:24 non-uniform [1] 32:22 nondisclosure [1] 32:17 Nor [1] 4:15 norm [1] 81:6 normal [1] 16:15 normally [7] 26:2,3 34:11 35:5 57:8 71:22 72:5 notes [1] 74:19 nothing [9] 62:23 66:19 75:8 76:4 77:14 notice [2] 8:12 15:11 noticed [1] 8:8 notion [3] 10:13,22 53:1 notions [1] 59:15 novel [1] 58:21 novelty [1] 39:5 number [4] 60:19 67:6 77:13 78:25 <hr/> O <hr/> obligation [1] 62:14 obtain [3] 41:16 42:8 64:17 obtained [39] 5:15 8:23 18:11,17 19:11 24:8 28:9 29:12 38:9,12,17 40:11 41:24 42:1 50:16,18,22 51:5,6,7 52:3,4,9,17,18,19 53:21,23 54:24 55:2,9,10,11,16,18 62:12,17 69:4,5 obtaining [7] 28:22 40:10 43:20 51:17 52:12,14 60:5 Obviously [1] 77:11 occasions [1] 54:8 odd [1] 32:10 officers [1] 21:15 often [1] 76:4 Okay [9] 18:5,10 29:15 37:17 50:14 52:1 62:3 69:14 72:14 once [4] 38:11 41:11,11 59:4 one [38] 7:20,21 8:8,12 9:9 | 21:7 24:19 28:3 31:2,19 35:19,20 37:6 41:10 43:14 44:19 47:14,16 52:9,12 55:14 56:9 59:19 60:13 63:9 65:15 66:14 68:14 69:23 70:5 71:17 72:14 73:21 76:1,24 77:2 78:7 79:17 ones [3] 11:23 75:20 79:13 only [11] 5:20,23 7:9 20:10 21:11 27:1 29:16 54:14 55:13 63:2 79:9 onwards [3] 31:23 32:4 80:12 operate [1] 45:15 operated [1] 61:20 operating [1] 7:19 opinion [2] 27:3 48:10 opposed [2] 24:8 37:9 opposite [1] 34:10 oral [7] 1:13 2:2,5,8 3:7 37:20 62:5 order [2] 10:2 15:25 ordinary [2] 45:16 54:21 Osborne [1] 47:4 other [34] 4:1 5:24 6:19 9:20 11:15,16 12:22 21:21 23:2 24:19,19 25:7 26:15 28:3,19 29:1 31:3,14,17 37:15 47:13 56:8 57:4,5 60:17,17 63:6 66:9 69:14 71:17,18 78:7 79:5,22 others [1] 3:23 others' [3] 3:20 4:8 5:1 out [21] 10:18 11:16 15:22 25:7 29:1,9 34:12 41:14 47:17 50:10 58:2,6 59:4 60:14 61:4 64:8 66:7 70:14 71:23 74:14 76:8 outside [1] 40:21 over [5] 55:17 74:3 76:3 80:4 81:19 owe [3] 40:8 65:2 69:4 owes [2] 62:17 65:16 own [3] 24:7 44:10 54:18 owners [1] 55:13 <hr/> P <hr/> p.m [1] 82:1 PAGE [2] 2:2 66:22 paraphrased [1] 54:16 paraphrasing [1] 49:3 part [3] 18:2 22:11 34:4 participating [1] 80:24 particular [6] 9:16,19 34:4 57:14 72:9 74:1 particularly [3] 16:12 32:10 75:25 partner [15] 13:5,6 19:21 31:2,3 39:10,25 43:2 49:19 52:8 60:21 61:5 62:18 63:2 71:11 partners [10] 12:16 23:8 24:19 29:24 31:17 62:25 71:13 73:19 76:18,19 | partners' [1] 4:19 partnership [23] 13:9 15:24 24:18 38:20,25 39:23, 24 40:17 41:2,6 42:2 52:18,22 53:2,4 57:10 59:22 61:7,8 62:19 65:21 76:15 77:19 partnerships [2] 5:5 16:3 parts [3] 28:3 34:6,8 passive [5] 4:13 5:14 6:2,5 28:22 past [1] 55:17 pattern [1] 56:3 pause [1] 51:25 pay [1] 42:11 pellucidly [1] 68:6 penalty [1] 33:7 people [10] 10:13 15:17,22 16:1,2,14 37:15 58:17 72:15 73:9 per [3] 12:1 49:10 56:14 percent [1] 12:20 perfectly [2] 48:9 64:13 performing [1] 6:12 permit [2] 65:25 66:1 person [12] 14:4,5,16 25:14 29:16,17 35:1 43:15 44:23 64:24 80:21,23 personal [1] 63:8 personally [2] 38:2 62:22 petition [1] 66:15 Petitioner [22] 1:4,19 2:4, 14 3:8,19 35:20 38:15,16 39:5,14,22 54:6 55:19 56:11 58:8,14,20 60:21 62:16, 21 78:3 Petitioner's [6] 47:25 60:21 62:10 63:4,5 65:24 phrase [1] 36:16 pick [2] 41:9 68:15 picks [3] 56:9,11,18 piece [2] 40:7 61:15 pieces [2] 40:5 44:11 place [11] 4:23 11:21 16:20 31:4 32:6 38:4 44:21 54:19 57:24 69:9 79:17 places [1] 29:25 plain [6] 44:25 49:16 54:21, 21 62:9 68:12 plausible [1] 46:24 please [4] 3:10 37:23 62:8 72:12 pocket [1] 66:3 point [21] 4:21 12:18 25:9 26:19 28:6 31:19 33:2 34:15 40:18 47:11 49:7 53:15 56:8,16 72:2 76:24 79:4,6, 23 80:9,18 pointed [1] 70:14 pointing [1] 70:14 points [3] 42:5 75:16 78:5 policy [9] 45:25 54:5,7,12 70:22 71:1,4,16 77:9 port [3] 10:23 27:22 35:3 |
|---|---|--|--|---|

Official - Subject to Final Review

| | | | | |
|--|--|--|--|---|
| <p>ported [1] 19:24 posed [1] 69:16 position [8] 26:20 28:17 30:17 33:14 41:18,23,24 67:12 possessed [1] 9:24 possible [1] 66:13 post [1] 78:18 potential [1] 15:11 practical [1] 58:10 practice [1] 72:10 pre-Erie [1] 31:1 predecessor [1] 68:8 premise [1] 25:8 preponderance [1] 28:2 presence [1] 45:17 presumption [2] 73:1,9 presumptively [1] 73:3 pretenses [2] 8:23,24 pretty [4] 16:4 26:5 31:24 79:16 price [1] 51:6 principle [9] 10:16 11:25 12:23 20:2 21:16 24:14 26: 5 35:8 57:15 principles [12] 10:7,12 11: 6 12:17 23:21 26:15,24,25 38:19,25 57:11 62:15 probably [7] 15:7,14 25:6 44:8 47:2,9 63:23 problem [6] 8:9 16:15 46: 21 66:13 71:11 78:21 problems [1] 60:19 proceeds [1] 70:22 profit [1] 39:10 profits [2] 61:10,21 proof [1] 27:17 property [4] 6:18 17:2 22:4 54:24 proposition [1] 17:12 prose [1] 31:13 protected [1] 54:13 prove [1] 70:13 proved [1] 60:8 proving [2] 56:21 61:7 provision [10] 7:2 8:10 37: 13 46:10 56:16 68:6,8 74: 16 76:23 77:10 provisions [12] 5:24 6:22 7:1,16 9:20 10:1 21:22 56: 1 63:6 70:4 73:16 77:5 proximate [2] 44:15,20 purchase [1] 51:6 purports [1] 11:19 purpose [5] 43:4 44:3 48:2, 7 77:2 purposes [4] 15:5 25:18 41:4 73:3 pursuant [1] 17:11 push [2] 67:8 70:20 put [4] 9:3,4 25:11 38:10</p> <hr/> <p style="text-align: center;">Q</p> <p>question [30] 13:21 15:8</p> | <p>17:15,23 18:6,11,16,19 19: 9,11 22:15 23:24 28:21,23 30:24,25 32:9 35:20 36:14 37:6,24 43:10,18,21 44:14 51:19 60:13,23 66:23 69: 15 questions [11] 5:10 14:3 22:7 24:13 39:19 41:10 43: 12 63:10 69:15 75:15 80: 13 quick [1] 78:5 quickly [1] 36:9 quite [5] 6:11 16:25 33:9, 20 60:18</p> <hr/> <p style="text-align: center;">R</p> <p>raised [1] 64:14 rather [1] 50:21 ratification [2] 34:10,11 ratified [1] 35:10 ratify [1] 34:16 ratifying [1] 31:11 rational [7] 71:1,2,4 72:7,8, 18 73:8 rationalize [1] 70:3 rationally [1] 77:15 reaching [1] 67:23 reaction [1] 53:16 read [15] 4:23 17:15,17 20: 5 21:12 27:2 28:4 31:20 39:13,14,17 72:4 73:5 74: 3 79:9 reading [11] 10:5 11:23 25: 1,4,20 26:14 36:18 49:1 55:21 59:12 78:8 reads [1] 54:18 real [1] 9:6 realize [2] 5:4 9:2 really [18] 25:24 26:23 41:8 43:20 44:16,24 49:1,11 54: 14 55:19 56:15 58:4 59:8 60:13 64:16 65:13 72:19 81:19 reason [8] 11:17 27:5 35:6 52:9 58:24 63:24 81:4,11 reasonable [2] 68:14 81: 15 reasoning [1] 26:18 reasons [4] 25:11 32:7 33: 23 52:12 REBUTTAL [3] 2:12 78:1, 2 reckless [1] 14:6 recognized [4] 6:4 54:8 56: 18,22 refer [4] 6:24,25 7:3 78:10 reference [1] 3:24 references [3] 37:14 45:17, 18 referred [2] 8:3,7 referring [1] 6:23 reflect [3] 3:14 4:14 33:20 reflects [4] 17:18 33:16 35: 7 78:14</p> | <p>regardless [1] 70:23 regime [1] 31:1 regretting [1] 68:24 reinforce [1] 49:15 reinserted [1] 74:17 rejected [1] 58:25 relationship [2] 42:2,24 relative [1] 22:1 relevant [3] 5:23,23 62:13 reliance [3] 37:7 39:7 63:5 relying [5] 10:8,9,22 38:24 55:21 remaining [1] 43:11 remedies [2] 41:15 58:7 remedy [1] 58:10 repealed [4] 4:16 12:11 34: 2 74:11 repeated [1] 35:10 replaced [1] 31:15 reply [2] 35:24 66:22 representations [1] 14:5 require [2] 55:16 74:5 required [3] 25:21 60:6 62: 21 requirement [11] 9:9 17:9 38:1 40:11 46:17,19 63:9 64:12 70:17,18 72:17 requirements [1] 6:6 requires [3] 6:9,14 50:20 requiring [2] 4:1 6:2 rescind [2] 65:4 69:10 respect [15] 7:9 11:11 14:3 21:19,21 23:1 29:2 31:18, 25 47:16 78:6,23 79:4,6 80:19 respectfully [2] 16:24 21: 18 Respondent [10] 1:7,21, 25 2:7,11 4:10 10:22 37: 21 62:6,11 Respondent's [3] 4:24 63: 14 67:17 responding [1] 74:8 response [4] 53:17 54:2 59:25 78:23 responses [4] 10:19 31:8, 9 59:18 responsible [4] 10:14 22: 9 53:10 59:14 rest [1] 31:21 restate [1] 39:17 Restatement [1] 15:2 restitution [2] 10:1,2 restored [1] 41:18 result [4] 46:2 59:17 62:24 69:3 resulting [1] 44:12 results [2] 13:13 81:18 reticence [1] 74:2 reverse [1] 81:22 reverse-engineer [1] 63:8 rid [2] 12:11 80:10 ripple [1] 72:22 road [1] 44:23</p> | <p>ROBERTS [32] 3:3 13:2,4, 17,19,25 14:13,21 35:15 36:7 37:4,17 50:11,15 51: 2,9,12,24 52:2,7,20,23 53: 12,20 60:12,24 61:22 65:8, 18 66:8 77:21 81:23 role [1] 45:18 ROSS [24] 1:22 2:9 62:4,5, 7 63:11,17,21,23 65:10,20 66:11 68:1,18,24 69:13,18 70:7 71:20,25 72:8 73:20, 24 75:14 routine [1] 5:4 rule [25] 10:24 15:21 16:1, 14 19:23,23 20:20 25:19 26:2 31:21 35:3 36:25 39: 9 46:25 47:13 57:23 58:22 59:2 62:21 63:4 65:25,25 66:21,22 76:14 rules [8] 4:20 16:13,16 32: 13 66:14 77:18 80:14 81:6 running [1] 25:25 runs [4] 5:20 72:1 76:15 81: 3</p> <hr/> <p style="text-align: center;">S</p> <p>saddle [1] 33:5 saddled [1] 9:16 same [7] 5:9 7:2,17 34:13 38:25 54:17,19 SARAH [5] 1:18 2:3,13 3:7 78:2 satisfy [2] 39:20 44:13 saying [21] 8:16 10:15 11: 17,24 15:8 20:9 22:13 23: 11 27:4 31:23 34:23 36:12 48:19 53:13 55:9 60:2 67: 22,24 74:24 78:15 81:11 says [18] 9:2,22 28:9 29:7, 10 38:6 39:17 45:1 48:10 51:3 53:18,20 66:20 69:20, 23 70:5 75:6 79:2 scenario [1] 12:9 scheme [1] 32:22 school [2] 15:9,10 scope [3] 17:4 32:8 62:19 scot-free [1] 15:17 scrutiny [1] 7:24 sea [2] 8:7 12:16 second [16] 5:25 7:21 9:14 15:2,21 19:13 38:21 40:10 60:3 64:3,6,19 68:23 69:1, 23 79:4 Section [2] 3:22 62:9 securities [2] 56:9,10 see [8] 20:2 34:24 36:21 40: 3 48:4 70:25 71:2 79:5 seem [3] 7:24 8:15 71:16 seemed [3] 8:12 48:16,21 seems [3] 8:20 29:17 79: 16 sell [1] 42:9 selling [1] 5:5 semantic [1] 55:21</p> | <p>sense [12] 16:15 54:5 59: 20 61:5 65:14,23 69:6 70: 2 75:21,24 76:9 77:8 sentence [2] 5:2 55:5 series [1] 5:22 seriously [1] 79:8 services [1] 72:11 set [3] 16:16 69:14 81:14 setting [1] 32:2 share [2] 61:21 63:15 shareholder [4] 20:11,17 21:8,14 sharing [1] 61:10 she'd [1] 36:1 she's [11] 13:12 23:16 38: 18 51:14 52:10 53:7,10 66: 11 67:14,18 75:9 shifted [1] 32:19 shocking [1] 58:21 shopping [2] 69:24 73:2 shortly [1] 34:20 shouldn't [2] 30:14 33:17 show [1] 27:20 showing [1] 27:13 side [3] 28:19 66:9 79:22 side's [2] 78:7 79:5 signed [2] 23:8,9 significance [3] 7:23 8:6 9:21 significant [1] 9:1 significantly [1] 9:10 silent [1] 34:16 similar [6] 7:7 25:24 31:24 32:25 34:22 35:4 similarly [1] 72:25 simply [2] 49:2 62:14 Since [3] 4:3 13:8 34:14 single [1] 11:18 sit [1] 14:10 situation [8] 12:2,3 16:10, 22 23:14,15 67:11 69:2 situations [1] 65:13 skip [1] 55:17 slicing [2] 33:24 34:5 soil [1] 56:19 Solicitor [1] 1:22 somebody [7] 41:12 50:5 55:10 58:13 65:1,9 67:4 someone [2] 34:16 72:23 somehow [9] 3:15 7:18,19 12:15 26:12 28:25 33:5 50: 24 66:1 someplace [2] 57:2 65:11 sometimes [1] 11:3 sophisticated [1] 15:22 sorry [7] 14:22 16:19 17:21 22:21 31:19 65:8 66:6 sort [31] 11:19 13:23 14:10 25:15 31:20 32:3,11,21 33: 5 48:16 49:6,15 56:8 63: 25 64:1,13,20 65:11,12 67: 3,8 69:1 72:4,15,21 74:2, 17 76:8 77:7,13 80:5 SOTOMAYOR [32] 19:19</p> |
|--|--|--|--|---|

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|--|---|---|--|---|
| <p>20:7,23 21:5,13 22:6,17,23 23:4,7,19 24:2 35:19 36:4 41:21 42:6,17,21 43:1,8,13 44:2,5 49:18,24 50:1,5 61: 23 63:19,22 73:13,22</p> <p>Sotomayor's [1] 67:24</p> <p>Souter [1] 27:3</p> <p>speaking [1] 56:20</p> <p>specific [7] 36:25 38:11 45: 18 46:22 54:12,12 78:9</p> <p>specifically [2] 6:24 36:21</p> <p>specifications [1] 78:17</p> <p>specifies [1] 3:22</p> <p>spend [2] 63:15 66:3</p> <p>spouses [3] 5:3 29:24 37: 15</p> <p>spre [2] 69:25 73:2</p> <p>stage [1] 66:17</p> <p>standard [10] 24:11,24 27: 16,20,23,24 28:2 43:23 44: 10 66:15</p> <p>stands [1] 17:12</p> <p>star [1] 7:11</p> <p>start [9] 3:12 25:7 38:6 44: 18 54:5,7,11 77:8 80:8</p> <p>starts [2] 12:14 54:6</p> <p>state [63] 4:18 9:18 14:23 16:3,6,8,13,21 17:1,1,3,8, 17,18 18:2,3,7,22 24:15,17 25:9,10,16 27:22 31:6,6,9, 18 32:5,10,11,13 36:11,13 40:9,16 41:14 43:5,10,10, 14 50:9 53:7 57:8,14,22 58:6 62:14,15 64:22,23 65: 5,6,21 68:15 69:7 79:21,23 80:1,6,9,16,16</p> <p>state's [1] 80:15</p> <p>stated [1] 40:6</p> <p>statement [4] 23:9 45:8 47: 6 48:17</p> <p>statements [4] 23:11,12 46:23 72:10</p> <p>STATES [9] 1:1,14,24 2:10 27:19 56:22 58:25 62:5 76: 16</p> <p>statute [58] 5:16 8:17 9:12 10:25 11:14,18 15:4,5 18: 12,14 19:3,6 25:21 26:15 27:7,9,10 28:8,14,15 29:6, 7 30:5,16,17 31:12,13 32: 23 33:12,13,15,16,19 34: 12 35:4 38:22 39:2,13 41: 9,13 43:23 50:19 51:14 54: 10 57:20 58:5 59:4,12 60: 6 62:12 63:3 66:19 68:12 74:9,12 75:24,25 77:2</p> <p>statute's [1] 36:13</p> <p>statutes [5] 8:18 19:24 30: 2 36:21 76:4</p> <p>statutory [7] 11:9 32:20 35: 4 40:6 51:16 54:15 57:1</p> <p>step [3] 15:20 18:22 21:16</p> <p>stick [1] 56:7</p> <p>sticking [1] 65:11</p> | <p>still [10] 14:3 25:16 26:13, 23 34:18 39:1,3 52:25 75: 10 79:10</p> <p>stood [1] 59:21</p> <p>stop [1] 38:13</p> <p>stopping [2] 26:19 79:6</p> <p>stops [1] 38:14</p> <p>Strang [42] 4:15 10:9 11:25 12:4,8 30:11,21 31:8,10,19, 20,23 32:3,6 33:10,12,17, 18 34:17,20,21,24 36:11, 12 38:21 47:22 48:4,21 49: 10 50:8 54:19 55:11 62:25 67:21 68:4,7 73:23 74:1,8, 11 76:12,17</p> <p>strange [2] 31:10 34:9</p> <p>street [1] 71:7</p> <p>strong [1] 81:4</p> <p>stronger [1] 35:8</p> <p>struggles [1] 42:11</p> <p>stuck [2] 24:21 68:20</p> <p>stuff [1] 81:14</p> <p>sub [1] 34:16</p> <p>subject [1] 5:21</p> <p>submitted [2] 81:24 82:2</p> <p>substance [1] 25:22</p> <p>substantive [5] 11:8,10 27: 1,11 34:7</p> <p>suffice [1] 23:2</p> <p>sufficient [3] 13:16 14:19 22:12</p> <p>suggest [3] 29:18 59:17 79:22</p> <p>suggested [2] 10:10 63:3</p> <p>suggesting [1] 59:11</p> <p>suggestion [2] 26:24 71:9</p> <p>suggests [2] 9:5 62:23</p> <p>sui [1] 57:15</p> <p>support [1] 54:21</p> <p>supporting [3] 1:24 2:11 62:6</p> <p>supposed [1] 29:18</p> <p>SUPREME [2] 1:1,13</p> <p>surpetition [1] 61:15</p> <p>surprised [1] 40:16</p> <p>sweeping [1] 4:24</p> <p>sweet [1] 59:23</p> | <p>32:20</p> <p>test [4] 40:6 42:15 49:4 51: 16</p> <p>testimony [2] 35:25 60:20</p> <p>text [34] 3:21 8:20,20 9:4 11:9 12:10 25:1,5 27:17 33:15 37:11 38:6,14 39:17 45:5 47:14,16,21 49:1 51: 1 53:17,24 54:15 56:8 62: 9,23 66:19 68:12 71:22 75: 10,11 78:7,21,22</p> <p>textual [3] 5:18 49:7 78:8</p> <p>textually [1] 5:13</p> <p>Thanks [1] 19:15</p> <p>themselves [4] 4:4,8 65:2 73:9</p> <p>theories [1] 79:5</p> <p>theory [9] 4:25 13:5 33:10 40:3 63:14 79:7,7,16,21</p> <p>there's [3] 6:19 12:16 17: 17 18:5,8 22:4 25:8 26:18 30:3 33:24 34:13 35:6 37: 14 41:11 44:10,19 46:2,9 48:21 52:13 54:20 58:3,24 59:4,5,8,9 64:4 66:18 70: 16,17</p> <p>therefrom [1] 38:13</p> <p>They've [1] 76:3</p> <p>thinking [6] 26:14 34:21 64:25 71:25 74:15 75:8</p> <p>thinks [1] 70:16</p> <p>Third [2] 39:5 40:12</p> <p>third-party [1] 20:11</p> <p>THOMAS [16] 5:11 6:20 35: 17 39:20 40:2 41:1 42:9, 10 61:3 63:11,17,19,23 64: 5 67:23 77:23</p> <p>Thomas's [2] 42:8 49:19</p> <p>though [3] 16:6 20:15 59: 11</p> <p>thread [2] 25:25 81:2</p> <p>three [2] 40:5 78:5</p> <p>throughout [7] 4:25 5:20 7:12 29:21,25 76:15 78:9</p> <p>throw [2] 68:19 76:8</p> <p>thrown [1] 34:12</p> <p>tie [1] 35:14</p> <p>tip [1] 17:25</p> <p>Title [2] 30:2 52:16</p> <p>today [3] 16:2 39:1 60:11</p> <p>today's [1] 4:16</p> <p>toe [2] 65:11 68:19</p> <p>ton [2] 34:13 64:11</p> <p>took [2] 21:16 74:14</p> <p>top [1] 34:18</p> <p>tort [4] 20:4 32:17 36:25 56: 17</p> <p>tort-based [1] 4:2</p> <p>tort-creating [1] 30:5</p> <p>tort-related [1] 6:19</p> <p>torts [5] 11:1,15 15:3 32:24 37:1</p> <p>total [3] 22:4 31:25 79:12</p> <p>traceable [1] 44:12</p> | <p>tracking [1] 33:4</p> <p>traditional [2] 15:1,2</p> <p>train [1] 52:2</p> <p>transaction [6] 36:3 49:21 64:3,4,7 69:10</p> <p>transactions [2] 5:4 64:2</p> <p>transferred [2] 43:7 58:13</p> <p>treat [1] 56:13</p> <p>treating [1] 7:2</p> <p>treble [1] 81:13</p> <p>trial [1] 60:14</p> <p>TRIPP [49] 1:20 2:6 37:19, 20,22 40:1,4 41:3 42:4,14, 19,22 43:3,9,14 44:4,6 45: 13 46:4,8,20 48:8,12,24 49: 23,25 50:3,14,25 51:3,11, 15 52:1,6,11,21 53:11,14, 22 55:1,4,15 56:5 57:7,17 59:18 60:16 61:6,18</p> <p>true [7] 8:18 23:10,12,16 30:22 75:25 77:7</p> <p>trustee [3] 7:9,10,10</p> <p>trying [15] 28:4,10 29:9,13 40:2 47:17 50:12 51:14 63: 13 64:8 67:3 71:22 76:8 78:12 80:15</p> <p>Tuesday [1] 1:10</p> <p>tugging [1] 71:16</p> <p>turn [3] 39:11 66:5 70:9</p> <p>two [14] 7:16 9:8 36:10 43: 11 44:11 56:8 59:18 63:25 64:2 66:13 71:4,15 75:20 77:6</p> <p>type [4] 7:17 9:19 64:14,15 typically [1] 59:16</p> | <p>uniform [1] 57:12</p> <p>uniformly [1] 58:25</p> <p>UNITED [5] 1:1,14,24 2:10 62:5</p> <p>universal [1] 20:1</p> <p>unless [3] 8:25 59:7 80:3</p> <p>unrelated [1] 79:14</p> <p>unsophisticated [1] 5:3</p> <p>until [3] 8:11 12:12 39:15</p> <p>unwitting [2] 3:18 5:9</p> <p>unwritten [1] 38:1</p> <p>up [10] 4:12 17:22 41:9 56: 9,11,18,22 60:8 61:8 68:15</p> <p>urges [1] 62:22</p> <p>usage [1] 29:20</p> <p>uses [1] 79:11</p> <p>using [7] 6:2,5 7:6,7,9,14 9: 20</p> |
| V | | | | |
| <p>various [2] 63:12 78:11</p> <p>vehicle [1] 7:20</p> <p>versus [19] 3:5 4:3 10:9,21 11:4,8 17:3,11 27:14 37:1, 15 38:10 44:18 46:9 49:4, 10 56:14 79:24 80:12</p> <p>vicarious [48] 4:18,24 10:8, 18,23 11:14,19 12:1 14:18 15:6 17:16,19 20:1,5 26: 14 28:18 29:3 30:6 32:24 33:2 36:18 39:8 47:22 48: 4 50:7,18,19,23 51:13 52: 10 53:9,15,18 56:11,20,25 57:8,11,16,23 58:22 67:12, 20 78:14 79:6,8,15,19</p> <p>vicariously [2] 21:12 57:4</p> <p>victim [8] 39:12 41:15,16 58:15,19 64:20 65:15,19</p> <p>victims [2] 58:7,11</p> <p>view [4] 41:25 47:25 68:4 72:5</p> <p>viewed [1] 20:18</p> <p>views [1] 73:15</p> <p>VII [1] 30:2</p> <p>voice [5] 4:13 5:14 6:2,5 28:22</p> | | | | |
| W | | | | |
| <p>waived [1] 61:14</p> <p>walk [2] 42:14,19</p> <p>wanted [9] 9:17 46:24 70: 11</p> <p>wants [1] 42:12</p> <p>Warner [1] 44:18</p> <p>Washington [4] 1:9,18,20, 23</p> <p>way [35] 7:2,5 11:16 25:7 27:13 28:1 39:14,15 41:8, 14 44:8,9 47:17,19 48:22 50:21 53:25 54:1,14,16,17 56:6,20,21 57:19,20 58:5,6 59:5 60:17 68:2 73:6,14, 21 74:24</p> <p>weighty [1] 57:21</p> | | | | |

Official - Subject to Final Review

| | |
|--|---|
| <p>welcome ^[3] 5:10 39:19 63:10</p> <p>whatever ^[9] 25:11 33:11 38:3 41:14 58:6 67:21 79:23 80:15,15</p> <p>whatsoever ^[1] 26:13</p> <p>whenever ^[3] 11:12 79:9,19</p> <p>whereas ^[3] 45:20 46:2 58:8</p> <p>Whereupon ^[1] 82:1</p> <p>wherever ^[1] 74:4</p> <p>whether ^[23] 6:14 8:6 9:22,24 13:15 14:4,6 18:25 28:11 29:2 30:22,23 31:1,18 32:5 37:24 57:3 66:23 75:5,6,11 78:13 80:23</p> <p>who's ^[4] 6:7 7:18 28:21 65:9</p> <p>whole ^[13] 5:21 11:25 25:9 28:5 49:2 54:10 55:13 75:5,24 76:7 77:2 81:3,4</p> <p>whom ^[3] 16:1 28:8 55:3</p> <p>will ^[4] 44:7,22 50:5,7</p> <p>willful ^[2] 6:17 22:3</p> <p>willfully ^[1] 15:12</p> <p>willy-nilly ^[1] 10:25</p> <p>Wilson ^[1] 6:4</p> <p>win ^[2] 39:3 59:23</p> <p>window ^[1] 34:12</p> <p>winds ^[1] 4:12</p> <p>within ^[2] 45:11 73:2</p> <p>without ^[5] 6:5 39:3,7 58:1 79:25</p> <p>withstand ^[1] 7:24</p> <p>wondering ^[2] 67:11 75:11</p> <p>word ^[12] 7:6,9 9:21 11:9,13 12:12 16:20 27:10 34:3 44:1 79:10,11</p> <p>words ^[7] 8:11 24:7 34:24 38:5,14 39:1 62:11</p> <p>work ^[2] 6:21 36:19</p> <p>world ^[6] 12:19 28:12 32:19 70:2,11 78:19</p> <p>writ ^[1] 75:18</p> <p>writes ^[1] 8:17</p> <p>writing ^[10] 45:9 46:3,19 47:6 69:23 70:15,17,17 71:10 72:17</p> <p>written ^[1] 72:10</p> <p>wrongdoing ^[1] 5:1</p> <p>wrongly ^[1] 79:24</p> <p>wrongs ^[1] 3:15</p> <p>wrote ^[1] 70:19</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>years ^[4] 8:3 31:23 34:3 76:4</p> <p>Yep ^[1] 69:13</p> <p>yoke ^[1] 9:11</p> <p>yourself ^[4] 26:11 47:9 67:8 81:7</p> <hr/> <p style="text-align: center;">Z</p> <hr/> | <p>ZACHARY ^[3] 1:20 2:6 37:20</p> |
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