

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
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19 of the Petitioner.

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

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24 United States, as amicus curiae, supporting the
25 Respondent.

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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16 under the repealed 1867 act, control today's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: But doesn't -- 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 too 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 you take (a)(6), converse
10 problem, you have a provision that did not
11 mention "the debtor" until 1978, added the words
12 "the debtor," and, again, no one seemed to
13 notice that there was apparently a massive
14 change in meaning. And 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 false 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 was for the substantive
9 elements of what is in the statutory text, the
10 word "fraud," that the substantive elements are
11 defined with 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 ports 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 --

25 CHIEF JUSTICE ROBERTS: Well --

1 JUSTICE JACKSON: -- the whole
2 principle of Strang is gone, the idea that
3 vicarious liability does apply per the common
4 law in this -- this situation?

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

10 So Strang is a case that arose under
11 the 1867 act. The best-case scenario is that it
12 has to do with the text, "fraud of the
13 bankrupt," which Congress repealed, got rid of,
14 didn't mention the word "fraud" again until
15 1978, did not use the terms "of the bankrupt."

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

1 that exceptions to discharge are narrowly --
2 narrowly confined to what is very clearly
3 expressed.

4 CHIEF JUSTICE ROBERTS: Your --

5 MS. HARRIS: And so this Court --

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

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

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

19 CHIEF JUSTICE ROBERTS: If she --

20 MS. HARRIS: -- acquiescence to --

21 CHIEF JUSTICE ROBERTS: -- knew about
22 it. She knew about it.

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

1 was there a duty of disclosing --

2 CHIEF JUSTICE ROBERTS: She knew --
3 knew about it and didn't do anything.

4 MS. HARRIS: Right. And so I think
5 that still begs factual questions with respect
6 to whether there is a duty of that person to
7 disclose some representations to the person who
8 is defrauded or whether there is a reckless
9 indifference in ability to control the fraud,
10 all of which would come under direct liability.

11 And so the case is not -- it's not the
12 case that you can just sort of sit idly by and
13 say, I know about the fraud. You know, I had
14 the ability to control the fraudulent --

15 CHIEF JUSTICE ROBERTS: It's -- it's
16 not the case what? It's not the case that?

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

23 CHIEF JUSTICE ROBERTS: It's, I'm
24 sorry, direct liability what? Under applicable
25 state law?

1 MS. HARRIS: No, the direct liability
2 would be the line I think the Court drew in
3 Gebser and is the traditional -- I think the
4 traditional concept in the Restatement, Second,
5 of Torts, which is, when you say the debtor or
6 another actor in a statute, who do you mean for
7 purposes of direct liability if the statute does
8 not include vicarious liability?

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

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

22 And just to take a step back for a
23 second, in terms of how this rule also cashes
24 out, most people who are sophisticated enough to
25 know that they are actually forming a

1 partnership also know that they should form an
2 LLC in order to avoid liability.

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

7 JUSTICE KAVANAUGH: Isn't that a good
8 argument, though, for then state law to change
9 -- you're not disputing, I think, that your
10 client was liable under state law -- or for the
11 Bankruptcy Code to change to create an exception
12 for a situation like this?

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

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

1 MS. HARRIS: No, I respectfully
2 disagree with that. So bankruptcy law is quite
3 clear. State law defines the debt because state
4 law defines property interests. But, under
5 cases like Brown versus Felsen, state law does
6 not define the scope of the federal discharge
7 exceptions.

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

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

22 JUSTICE GORSUCH: Ms. -- Ms. Harris,
23 I'm sorry to interrupt you, but -- but I just
24 want to follow up on Justice Kavanaugh's
25 question and take us back just -- take us back

1 just a minute. I -- I think what my colleague
2 was getting at and where I guess I'm at, so tip
3 my hand here, is we do take debts as given under
4 state law, right? That part of it is -- is --
5 we -- we take from state law.

6 MS. HARRIS: Yes.

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

10 MS. HARRIS: Correct, there's a debt
11 for money.

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

17 MS. HARRIS: Yes. And to --

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

23 MS. HARRIS: Well, I would just take a
24 step back, because the state court judgment that
25 we have here was also not for fraud, and that's

1 why there is a mini-trial in the bankruptcy
2 court for whether --

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

6 MS. HARRIS: Yes.

7 JUSTICE GORSUCH: -- not the front
8 half of the statute --

9 MS. HARRIS: Correct.

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

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

14 JUSTICE GORSUCH: By fraud, yeah.

15 MS. HARRIS: By fraudulent means.

16 JUSTICE GORSUCH: That second half.

17 MS. HARRIS: Yes.

18 JUSTICE GORSUCH: Okay. All right.

19 Thanks for clarifying that for me.

20 MS. HARRIS: Yes. And that's the
21 clarification --

22 JUSTICE SOTOMAYOR: So, under common
23 law, aren't you liable for the fraud of an agent
24 or partner?

25 MS. HARRIS: Yes, that is absolutely

1 the liability rule, but it is not the rule that
2 necessarily gets ported into federal statutes
3 all the time.

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

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

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

23 So isn't that a federal rule that we
24 announced there on dischargeability --

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

1 JUSTICE SOTOMAYOR: -- and what fraud
2 means?

3 MS. HARRIS: I -- Husky announced what
4 fraud meant as a matter of common law and said
5 fraudulent conveyance is a form of fraud. Husky
6 did not say just because you have a corporation
7 and an agent and the agent's actions --

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

12 MS. HARRIS: Right. But, for
13 corporations, I don't think just because a
14 corporation can only act through their
15 agents, it means that you read vicarious --

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

21 MS. HARRIS: Respectfully, Husky does
22 not expressly say anything with respect to
23 imputation. And the things that it does say
24 with respect to contrasting (a)(2)(A) and other
25 provisions of the code make it very curious that

1 there was -- if there was an imputation holding,
2 it was not discussed.

3 For instance, when the Court is
4 discussing the relative breadth or narrowness of
5 (a)(2)(A) for fraud, (b)(4) for defalcation,
6 (a)(6) for willful and malicious injury --
7 injury to property, there's -- and the 727 total
8 bars to discharge, it wouldn't --

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

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

20 JUSTICE SOTOMAYOR: But how about if
21 the debtor -- if she knew that her husband was
22 lying?

23 MS. HARRIS: Yes. And if you knew --
24 sorry, if you knew that the husband was
25 committing fraud?

1 JUSTICE SOTOMAYOR: Yes, if she knew
2 that the husband was lying.

3 MS. HARRIS: Yes, and that just gets
4 back to the colloquy with respect to do you have
5 other indications that would suffice to be
6 direct liability. So --

7 JUSTICE SOTOMAYOR: Why do you need
8 more? Meaning --

9 MS. HARRIS: What more --

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

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

22 JUSTICE SOTOMAYOR: All right.

23 MS. HARRIS: And, in addition to that,
24 under principles of direct liability, the debtor
25 would also be liable for encouraging fraud, for

1 inducing fraud. If you have fraudulent intent,
2 the next question is, what is the minimum amount
3 of direct involvement to complete the elements
4 of fraud? And, again --

5 JUSTICE SOTOMAYOR: Thank you,
6 counsel.

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

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

1 And why are you so sure that
2 bankruptcy has a higher standard? And, you
3 know -- you know, I do think that this would be
4 reading into the text, so we need a
5 justification for that.

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

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

23 And it's not reading something into
24 the statute to say culpability is required.
25 You're just interpreting the substance of the

1 elements. And the Court said defalcation,
2 really similar to fraud under (a)(2)(A), and the
3 thread running underneath the code is that
4 culpability is what justifies the exception from
5 the rule that discharge exceptions -- normally,
6 you get discharge. Normally, you always get
7 discharge. And for Congress to depart from that
8 principle, you need a pretty good justification.
9 And the Court said fault is that justification
10 for these exceptions.

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

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

24 JUSTICE JACKSON: But it's not -- it's
25 not contrary to what we actually said in Field,

1 and so I'm still really confused about the
2 suggestion that common law principles apply or
3 that we've said common law principles apply but
4 only when we're talking about the substantive
5 elements. And if you read Field, it's very
6 clear -- it's a Justice Souter opinion from
7 1995 -- that we -- we're saying that there was
8 no reason to doubt Congress's intent to adopt a
9 common law understanding of the terms that it
10 used in this very statute.

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

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

1 law standard. We're going to ask, what is the
2 federal standard that should govern that
3 exception?

4 And the way the Court got to the
5 conclusion that the preponderance standard was
6 the right one was by looking at other parts of
7 523(a) and trying to read them as a harmonious
8 whole.

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

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

1 The question is, does it mean the
2 debtor, does it mean anyone, does it mean
3 someone else? And you look at the context of
4 the code and the other actors to figure it out.

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

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

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

22 MS. HARRIS: Well, I think Field would
23 be contrary to the definitions and the usage
24 throughout the Bankruptcy Code had it actually
25 held that because the individual debtor is

1 defined as distinct from and juxtaposed against
2 partners, spouses, dependents, et cetera,
3 throughout the code in at least 21 places.

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

10 JUSTICE ALITO: May I take you back to
11 -- did you finish --

12 MS. HARRIS: Yes.

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

23 And then you have another argument in
24 your brief, which is that Strang was federal
25 common law. I don't know whether that's true

1 because whether a debt is dischargeable or not
2 is a question of federal bankruptcy law. But,
3 if it was a question of federal common law under
4 the pre-Erie regime whether the liability -- the
5 dischargeability of a debt by one partner is
6 discharge -- dischargeable against the other
7 partner, would we not look to what has taken the
8 place of federal common law under Erie, which
9 would be state law, so we would look to state
10 liability law?

11 MS. HARRIS: So responses on Strang
12 first and then responses on state law.

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

21 Now, with respect to whether state law
22 would then -- sorry. One more point on Strang,
23 which is it's hard to read Strang as some sort
24 of, like, lurking rule that governs the rest of
25 the code forever more when circuit courts about

1 20 years after Strang and onwards were saying
2 when they were interpreting pretty similar
3 language with respect to the total bar on fraud
4 discharge that they were not going to imply
5 imputation in -- in that setting. So it's hard
6 to say that Strang is sort of controlling
7 onwards.

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

21 So, no, I don't think the federal
22 Bankruptcy Code shifted to a world in which you
23 look at the statutory terms just governed by
24 sort of California law. That would create a
25 very non-uniform scheme. What you do have is a

1 statute that is not mentioning any kind of
2 vicarious liability, that is not creating torts,
3 that is very similar -- dissimilar for the
4 language that Congress has used when it does
5 import vicarious liability, and the point of it
6 is to discharge the honest but unfortunate
7 debtor by tracking concepts of culpability if
8 you're going to deny someone and sort of saddle
9 them with -- with -- for life with the harsh
10 penalty of a lifelong debt.

11 JUSTICE KAGAN: Could I -- could --
12 I'm not quite sure I understand your -- your
13 theory of Strang and what happened afterward,
14 because I would have thought that whatever the
15 differences in the Strang statute, as Justice
16 Alito said, that was a more hostile statute to
17 your position. And afterwards, what Congress
18 does is it amends the statute so that the text
19 of the statute actually reflects better the
20 Strang holding.

21 So shouldn't we take from that that,
22 you know, Congress looked at the Strang holding
23 and basically said let's fix the statute so that
24 we can reflect that holding quite clearly?

25 MS. HARRIS: No, for a couple of

1 reasons.

2 First of all, there's a lot of slicing
3 and dicing between the 1867 act and the 1978 act
4 in which they're -- you know, the act -- the
5 1867 act is repealed. Congress doesn't use the
6 word "fraud" for the next, like, 70-some years
7 in -- in this particular part of the discharge
8 exception. Congress is slicing and dicing,
9 like, the different parts of the -- like the
10 substantive elements of non-dischargeability
11 into different parts of the code.

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

21 And on top of that, that still doesn't
22 explain why there are so many circuit court
23 cases shortly after Strang that said we're not
24 thinking that Strang, you know, is interpreting
25 -- like, even when there is similar language,

1 they're not saying, oh, you know, it must be
2 clear from Strang that if you see words
3 like "fraud of the bankrupt" you have to make
4 sure that an innocent person is on the hook for
5 the fraud of the debtor. They said that -- you
6 know, that rule doesn't port to these very
7 similar statute -- statutory language because
8 fraudulent intent normally means culpability.

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

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice -- Justice Thomas, anything
21 further?

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

1 MS. HARRIS: That's incorrect, and a
2 footnote in our reply brief makes clear that the
3 testimony in bankruptcy court which the court
4 found -- found credible was she'd never heard of
5 the LLC. The LLC also appears to have been
6 created after the transaction in this case.

7 JUSTICE SOTOMAYOR: Got it. I -- then
8 I missed -- I'm glad I clarified that fact.
9 Thank you.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?
11 Justice Kavanaugh?

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

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

23 JUSTICE KAVANAUGH: Right, because we
24 usually see statutes that specifically speak to
25 that.

1 MS. HARRIS: Well, because the --
2 because the Bankruptcy Code is not creating a
3 tort, and that rule is specific to creating
4 torts under Meyer versus Holley.

5 JUSTICE KAVANAUGH: Got it. Thank
6 you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

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

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

20 CHIEF JUSTICE ROBERTS: Okay. Thank
21 you, counsel.

22 Mr. Tripp.

23 ORAL ARGUMENT OF ZACHARY D. TRIPP

24 ON BEHALF OF THE RESPONDENT

25 MR. TRIPP: Mr. Chief Justice, and may

1 it please the Court:

2 The question in this case is whether
3 the fraud exception to discharge includes an
4 additional unwritten requirement that the debtor
5 personally intend or know of the fraud above and
6 beyond whatever it takes to hold her liable for
7 the fraud in the first place. And the answer is
8 no. The words just aren't there.

9 And I'll start with the text. It says
10 that the bankruptcy discharge "does not
11 discharge an individual debtor from any debt for
12 money to the extent obtained by actual fraud."
13 So, as this Court put it in Cohen versus de la
14 Cruz, once it is established that specific money
15 is obtained by fraud, then "any debt arising
16 therefrom is not discharged." Full stop. The
17 text stops there. There are no more words.

18 And it's -- I think it's undisputed
19 that Petitioner is -- that this case fits the
20 bill. Petitioner obtained my client's money by
21 means of an actual fraud, and she's fully liable
22 for the fraud. It is her fraud under bedrock
23 principles of partnership law.

24 Second, Strang, back at the time when
25 the statute actually said that it needed to be

1 the fraud "of the bankrupt," this Court held
2 that it was the fraud of the bankrupt by relying
3 on the same principles of partnership law that
4 still apply today. So even if those words were
5 added back to the statute, I think we would
6 still win, but without them, this case should be
7 easy.

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

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

22 I welcome the Court's questions.

23 JUSTICE THOMAS: Just to satisfy my
24 curiosity, would you include in that if -- if
25 they -- Petitioner and her husband had included

1 their infant child in the partnership or an
2 adolescent child in the partnership, would it
3 also be non-dischargeable as to that partner?

4 MR. TRIPP: I -- I -- I -- I think --

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

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

18 And I think, candidly, I -- I'd be
19 surprised if state law would find a -- you know,
20 a partnership in that circumstance that you're
21 describing, but I take the point, right, I'll
22 take the hypothetical that, yes, if they're
23 going to hold the child liable for the fraud,
24 like actually liable for the fraud outside of
25 bankruptcy, then, yes, it would be

1 non-dischargeable in the -- in the -- in
2 the child's bank -- I guess I don't know how a
3 child would be bankrupt.

4 JUSTICE THOMAS: Well, it would be the
5 partnership, wouldn't it?

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

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

23 JUSTICE BARRETT: We --

24 JUSTICE SOTOMAYOR: You keep bouncing
25 back and forth on this, and I -- I want to

1 understand your position clearly. Is it your
2 position that any debt obtained by fraud is
3 non-dischargeable, or is it your view that any
4 debt obtained by fraud in connection with a
5 partnership or agency relationship of the debtor
6 is what is non-dischargeable?

7 MR. TRIPP: I'm not adding those --
8 those -- those additional points.

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

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

20 JUSTICE SOTOMAYOR: Yes, he can be
21 liable?

22 MR. TRIPP: Can I just walk through
23 it?

24 JUSTICE SOTOMAYOR: Go ahead.

25 MR. TRIPP: I think it helps. So he

1 would clearly -- there would not be an agency
2 relationship, so he would not be liable on the
3 fraud itself.

4 JUSTICE SOTOMAYOR: He's not a
5 partner, he's not an agent.

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

11 JUSTICE SOTOMAYOR: Exactly.

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

16 JUSTICE SOTOMAYOR: Right.

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

21 And then the last question would be
22 the causal link, is, is this a liability that is
23 really for the fraudulent obtaining of money,
24 and I think that that becomes a question under
25 -- under this Court's cases about the causal

1 standard in -- in this statute, and we're not --
2 we're not asking to break any -- any new ground
3 here. This is -- so this is the easiest case.
4 There is -- there is not a word --

5 JUSTICE SOTOMAYOR: I understand. I
6 gave you a hard case for a purpose.

7 MR. TRIPP: Yeah.

8 JUSTICE SOTOMAYOR: What do we do?

9 MR. TRIPP: And I'll take -- and I
10 want to be clear. I will take this and I think,
11 as you're describing it, probably the way --
12 just the way this Court has articulated the
13 causal standard in its own cases, right, there's
14 two pieces to causation. It has said arising
15 from, resulting from, traceable to, and on
16 account of. It's used a couple different
17 formulations. I think that debt would satisfy
18 that.

19 And then the question would be, is
20 there some kind of proximate cause check on
21 that? And that's something this Court really
22 hasn't explored. It has some cases. Like
23 Archer versus Warner start to get into this, but
24 this case is not one of them. There's not any
25 -- any briefing about proximate cause. I think

1 it's not the place to get into that.

2 But I will also say that if, at the
3 end of the road, the answer is the person is
4 liable, I think that's really just the -- the
5 consequence of the plain language that Congress
6 has enacted. It -- it says --

7 JUSTICE BARRETT: Counsel --

8 JUSTICE JACKSON: Can I just --

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

18 MR. TRIPP: Yeah. Sure. So, of
19 course, (B) is an exception to (A), and so we
20 would usually think that it would operate
21 differently, and the ordinary inference that we
22 draw from the presence of references, these
23 specific references to the role of the debtor in
24 (B) and (C), is that Congress cared in (B) and
25 (C) how exactly the debtor was involved,

1 whereas, in (A), the absence of that language --

2 JUSTICE BARRETT: But why would
3 Congress have cared? I mean, I agree with you.
4 Look, I think the language cuts in your favor.
5 I'm just asking you, as a policy matter, why do
6 you think Congress would have had such a harsh
7 result on (A) whereas, in (B), when there's
8 actually a use of writing --

9 MR. TRIPP: So --

10 JUSTICE BARRETT: -- oh, just, you
11 know, you're not -- you're not liable just on
12 the debt. You -- it has to be --

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

21 JUSTICE BARRETT: But I thought that
22 history explained the materiality requirement.
23 I didn't think that it necessarily would explain
24 the writing requirement.

25 MR. TRIPP: I -- I -- I think it is

1 essentially a debtor-specific problem where
2 specific debtors were being duped into making
3 false statements. And so I think it's at least
4 plausible that Congress could have wanted to
5 adapt -- have a debtor-specific rule there, but
6 I also want to be clear, I think as we mentioned
7 in the briefs, I -- I think you probably would
8 impute there too -- that's what the Fifth
9 Circuit has held in the Osborne case that we
10 cite in our briefs -- so that when you, you
11 know, make a false statement in writing to get a
12 loan through your agent, you know, you get your
13 lawyer to make the loan for you instead of doing
14 it yourself, I think that probably would be --
15 would be non-dischargeable.

16 But I think maybe a critical point is
17 you don't need to decide the meaning of any of
18 the other exceptions to rule in our favor here.
19 Ours is laser-focused on the text of this one
20 for --

21 JUSTICE JACKSON: But, counsel, with
22 respect to the text of this one, I guess I'm
23 trying to figure out why the way in which you're
24 interpreting it is the -- is the most narrow
25 way. You're encouraging us not to do more than

1 we have to, and I understand that, but why
2 wouldn't the text just lend itself to the kind
3 of Strang analysis of vicarious liability where
4 we look at 523(a) and it talks about, you know,
5 discharge of an individual debtor, and we may
6 even accept the Petitioner's view that it has to
7 be an individual debtor who commits the fraud
8 for the purpose of this case, and we say just
9 that the -- that the individual debtor's
10 liability can arise through vicarious liability,
11 see Strang. I mean, I don't -- I don't
12 understand the -- why we would have to go
13 further and say it could be anyone's fraud for
14 the purpose of this case.

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

18 (Laughter.)

19 MR. TRIPP: -- as improvidently
20 granted as the bottom, we're -- we're -- we're
21 -- we're good. And --

22 JUSTICE JACKSON: Am I right that
23 that's a narrow -- it sort of seemed like you
24 were asking in your first statement here to do
25 the -- what I would consider to be the

1 maximalist thing, saying it has to be anybody --
2 it can be anybody's fraud. And then you said,
3 but there's also Strang, which seemed to me to
4 be a narrower way to do this, but maybe I'm
5 looking at it wrong.

6 MR. TRIPP: Yeah, I mean, I think,
7 candidly, we're happy with either. I think,
8 really, the -- the better reading of the text as
9 a whole is simply actually what the Court
10 already said when it was paraphrasing the
11 language of the -- of the test in Cohen versus
12 de la Cruz.

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

25 JUSTICE SOTOMAYOR: Except that it's

1 not Justice Thomas's fraud. He wasn't a partner
2 with me who committed the fraud. He didn't even
3 know about the transaction that it was
4 fraudulent. So why should he be held liable?

5 MR. TRIPP: So --

6 JUSTICE SOTOMAYOR: That's the --

7 MR. TRIPP: Yeah.

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

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

12 JUSTICE SOTOMAYOR: And somebody will
13 have to explain to me, and I'm assuming the
14 government will, why we can add that vicarious
15 liability or did under Strang, under whose
16 common law, state or federal. But we'll figure
17 that out.

18 CHIEF JUSTICE ROBERTS: Well, just
19 trying to find something you're not comfortable
20 with --

21 MR. TRIPP: Okay.

22 CHIEF JUSTICE ROBERTS: -- it's not
23 clear to me that Ms. Bartenwerfer's obtained
24 access to the funds involved through fraud, even
25 if it's vicarious liability. She obtained

1 access through vicarious liability, and the
2 statute requires fraud. And I'm not sure why
3 you jump right away to fraud rather than the
4 actual way in which she obtained access and
5 incurred the debt was not by fraud. It was by
6 vicarious liability because of the fraud of
7 someone else.

8 MR. TRIPP: So can I -- can I take you
9 back to the text on this? Because what it --

10 CHIEF JUSTICE ROBERTS: Sure.

11 MR. TRIPP: -- what it says is that
12 what needs to happen is it needs to be for money
13 obtained by actual fraud. It is undisputed that
14 she obtained the purchase price for -- for the
15 -- she obtained the money. That's never been
16 disputed.

17 CHIEF JUSTICE ROBERTS: But she
18 incurred -- incurred the debt --

19 MR. TRIPP: She incurred --

20 CHIEF JUSTICE ROBERTS: -- by
21 vicarious liability, and it's the debt that
22 she's trying to discharge under the statute.

23 MR. TRIPP: Yeah, but the -- what the
24 statutory test is focusing on is, what was the
25 means for obtaining the money? The answer to

1 that is fraud. That's been undisputed. And
2 then the question is, is she liable for the
3 fraud? And the answer to that is actually yes
4 on both the front end and the back end.

5 First, it covers any debt, and debt is
6 defined to mean liability, so I think that it
7 naturally --

8 CHIEF JUSTICE ROBERTS: Well, if I
9 could just pause before I lose the --

10 MR. TRIPP: Okay.

11 CHIEF JUSTICE ROBERTS: -- the train
12 of thought. "Obtained from the debtor," right?
13 That's the "obtained" you're talking about with
14 the debt?

15 MR. TRIPP: Right.

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

20 MR. TRIPP: No. I want to -- well, on
21 the obtaining, I think one of the reasons
22 there's no argument in this case about the
23 obtaining element, it's never been disputed in
24 the case, is that we bought the house from both
25 of them. They were both on the title to the

1 house, so they both obtained the money. The
2 partnership obtained the money. She also
3 obtained the money through --

4 CHIEF JUSTICE ROBERTS: Well, just --

5 MR. TRIPP: -- the eyes of partnership
6 laws.

7 CHIEF JUSTICE ROBERTS: -- I mean,
8 just because it's the first time doesn't mean
9 there's still not an -- an argument. And the
10 argument is, yes, I understand the notion of a
11 business partnership, but, to the extent we're
12 talking about why this individual is liable,
13 it's because of the business partnership. It's
14 not because she did anything. Her eventual --
15 or her husband did do something. And I
16 understand the idea that under state law, she's
17 on the -- the -- the hook for the debt because
18 of -- because of vicarious liability, not
19 because of any fraud that she's responsible for.

20 MR. TRIPP: So --

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

23 MR. TRIPP: Yeah. No, so I -- I take
24 the point about vicarious liability. I think,
25 again, my -- my main reaction just -- first

1 response is the text, it doesn't differentiate
2 between vicarious and direct liability. It says
3 any liability.

4 CHIEF JUSTICE ROBERTS: It says
5 obtained.

6 MR. TRIPP: It's any -- any liability,
7 any debt for money to the extent obtained by
8 actual fraud. And so I think the text gets you
9 a long way there. I -- I mean, I think it
10 actually gets you all the way there.

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

25 And the way this Court paraphrased it

1 in Cohen is the same way I think, frankly, that
2 it reads on its own, and it also gets you to the
3 same place you already got in -- in Strang. And
4 so I think there -- there's a lot here to
5 support that just ordinary, plain -- plain
6 meaning of the term.

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

10 MR. TRIPP: That fraud was the means
11 through which the house was obtained.

12 JUSTICE ALITO: By whom?

13 MR. TRIPP: Well, I think, in that
14 sentence, it doesn't -- it doesn't indicate. It
15 doesn't matter.

16 JUSTICE ALITO: Well, if I just say
17 that, aren't you going to understand me to be
18 saying that it was John who obtained the house
19 by fraud? Not that somebody who obtained the
20 house in 1885, when Strang was decided, obtained
21 it by fraud, and after that time, it's had a
22 whole chain of owners, and John is only the
23 latest one?

24 MR. TRIPP: You might think that John
25 obtained the house, but it doesn't require that

1 -- through the fraud, but it doesn't skip over
2 past obtained to the fraud element, which is
3 what Petitioner really needs it to do.

4 JUSTICE ALITO: Well, what I'm getting
5 at is that you are relying on a semantic reading
6 of this language, and, you know, I think you're
7 right, but, in context, it could mean something
8 very different, and I don't know how much we can
9 get from context because, when I look at all the
10 provisions that have been cited, some talk about
11 the debtor, some don't talk about the debtor, it
12 looks more haphazard than a -- a -- a pattern
13 from which we can infer very much. No?

14 MR. TRIPP: I agree that it is
15 haphazard, and I think the right way to move
16 forward with the haphazard is to stick to the
17 text. Maybe point to sort of two other things.
18 One is (a)(19) for securities fraud. It picks
19 up common law securities fraud. And -- and
20 Petitioner admits that that picks up vicarious
21 liability. It's not clear why you would want to
22 treat those differently.

23 And then, again, as per Field versus
24 Mans -- I think this is actually a really
25 important point -- this is a provision that is

1 targeted at a common law tort fraud. This Court
2 has recognized that actual fraud picks up the
3 soil of the common law with it when Congress is
4 speaking that way, and agency law and vicarious
5 liability is an age-old bedrock way of proving
6 up fraud that is recognized in all 50 states.

7 JUSTICE ALITO: So we have to look at
8 something else to find as a basis for the
9 vicarious liability? But we would -- if the
10 statutory language is not dispositive, we would
11 have to look someplace else, in which case you
12 don't care about whether anybody would be liable
13 -- vicariously liable under any other body of
14 law? We have to look to some other body of law,
15 right?

16 MR. TRIPP: I think, yeah, you would
17 normally look to state law vicarious liability,
18 although as for these -- these -- I think it's
19 undisputed that on these partnership agency
20 principles, the vicarious liability is -- is
21 uniform.

22 JUSTICE ALITO: Well, what if the
23 particular state has some very far-reaching and
24 esoteric and sui generis under -- principle of
25 vicarious liability? Then what?

1 MR. TRIPP: I -- I think then that
2 comes back to the answers to the hypothetical,
3 and the right way -- the hypotheticals earlier
4 and -- and the right way to understand what the
5 statute is getting at. The weighty decision
6 when a -- when a state is going to attach
7 an idiosyncratic vicarious liability rule is the
8 imposition of liability in the first place.

9 That is -- that is much bigger and
10 most of the time is entered into without a
11 bankruptcy on the horizon, right? Nine times
12 out of 10 there's not going to be a bankruptcy
13 on the horizon, maybe more. And I think,
14 really, the right way to understand the statute
15 is to get out of the way of whatever state law
16 remedies are available to victims of fraud.

17 Whereas what Petitioner would do --
18 and this, I think, is very important -- is would
19 cut off a practical remedy that is critical for
20 victims of fraud in many cases. Anytime you
21 have a fraudster who has disappeared, dissipated
22 the assets, transferred them to somebody else,
23 like in Husky, then what the Petitioner -- what
24 the -- what the victim needs to do to get
25 compensated is basically to follow the money and

1 follow the liability to the people around the
2 fraudster who are liable for the fraud to the
3 victim.

4 And Petitioner would interpose through
5 that with a - novel and I think maybe shocking
6 rule of vicarious liability that -- that even if
7 you know the -- the -- the liability chain gets
8 cut off, and I think there's a good reason why
9 the states have uniformly rejected that for --
10 for --

11 JUSTICE KAGAN: But your rule is even
12 if you don't know. And, you know, this idea of
13 once there's liability the statute gets out of
14 the way, well, there's always going to be
15 liability because there wouldn't be a debt
16 unless there had been liability. So there
17 really isn't a limit. I mean, if there's a
18 debt, there's liability.

19 And I think what Ms. Harris was
20 suggesting was that even though a literal
21 reading of the statute would not give you the
22 fact that this has to be something that the
23 debtor herself was responsible for, the -- the
24 -- the underlying notions of culpability that we
25 typically think of when we think of the

1 Bankruptcy Code would suggest that result.

2 MR. TRIPP: And maybe two responses to
3 that. So one is I think she is culpable under
4 this very basic sense that it is actually her
5 fraud. She stood to benefit from it. In
6 partnership law forever, it has been that the
7 bitter comes with the sweet, not heads I win,
8 tails you lose. So I think that's a -- a basic
9 response to -- to the concerns about
10 culpability.

11 And I guess also, as I was saying
12 earlier, it's not -- there is also the second
13 check that it needs to be the liability for the
14 fraudulent obtaining of money, right? There is
15 a causal link that is required in the statute.
16 And, here, it's easy because this is liability
17 for fraud itself. We proved up all the elements
18 of fraud. And maybe that's something you could
19 explore in a future case, but it's -- it's not
20 -- it's not here today.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel. I have just one question that really
23 is out of curiosity. Why did the trial in this
24 case take 19 days?

25 MR. TRIPP: I'm -- I'm not sure I have

1 a great way to answer that other -- other than
2 to say that it was quite difficult. There were
3 a number of different problems with the house.
4 There was conflicting testimony from -- from
5 Petitioner, Petitioner's business partner. And
6 so I guess I don't have a fulsome answer to that
7 question.

8 CHIEF JUSTICE ROBERTS: Well, I'm sure
9 it's -- I'm sure it's not your fault, but that's
10 an awfully high expenditure of the funds of the
11 federal judiciary for this.

12 Justice Thomas, anything further?

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

15 MR. TRIPP: So we had findings from
16 the court on California partnership law proving
17 up the partnership, so you need to have --
18 they're in the JA at 42. You need to have the
19 co-owners of the business sharing in profits,
20 losses, management, and control, and so we had
21 findings on that.

22 And as the case comes to the court,
23 they -- they affirmatively waived in the
24 sur-petition any challenge to any piece of that.

25 JUSTICE ALITO: Was this a business,

1 or were they just joint tenants, or --

2 MR. TRIPP: No, the -- the -- the
3 finding in -- in -- in the lower courts was that
4 this was a business and it was operated as a
5 business to share profits as a business.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor?

8 Justice Kagan?

9 Justice Kavanaugh?

10 Justice Barrett?

11 Justice Jackson?

12 Okay. Thank you, counsel.

13 Ms. Ross.

14 ORAL ARGUMENT OF ERICA L. ROSS
15 FOR THE UNITED STATES AS AMICUS CURIAE,
16 SUPPORTING THE RESPONDENT

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

19 The plain text of Section 523(a)(2)(A)
20 bars discharge of Petitioner's debt to
21 Respondent. That debt is, in the words of the
22 statute, a debt for money obtained by actual
23 fraud. As relevant here, a debt in bankruptcy
24 is simply an enforceable obligation under state
25 law. And under longstanding state principles of

1 agency law, Petitioner is liable, that is, she
2 owes a debt, for money obtained by the actual
3 fraud that her business partner committed in the
4 scope of their partnership.

5 Now Congress could have displaced that
6 rule in bankruptcy and required, as Petitioner
7 urges, that the debtor herself personally commit
8 the fraud. But nothing in the text suggests
9 that result. And following this Court's
10 decision in *Strang* that partners could not
11 discharge a debt created by the fraud of their
12 partner, Congress eliminated the only language
13 in the statute that might have suggested
14 Petitioner's rule.

15 Finally, Petitioner's reliance on a
16 grab bag of other provisions added at different
17 times and addressing different debts cannot
18 reverse-engineer a personal commission
19 requirement into this one.

20 I welcome the Court's questions.

21 JUSTICE THOMAS: Ms. Ross, could you
22 just comment? You heard the various
23 hypotheticals about trying to find a limit to
24 your -- to Respondent's theory that you
25 apparently share. Would you spend a few minutes

1 on that, what the limit is?

2 MS. ROSS: Certainly, Justice Thomas.
3 So I think the hypothetical --

4 JUSTICE SOTOMAYOR: Is Justice Thomas
5 liable --

6 MS. ROSS: So I think Justice --

7 JUSTICE SOTOMAYOR: -- for my fraud?

8 MS. ROSS: -- Thomas probably isn't
9 liable, and I think the reason is -- I was going
10 to give sort of -- I think there are two buckets
11 of hypotheticals. There are sort of the bucket
12 of hypotheticals where you have two transactions
13 and we're talking about the second transaction.
14 There's fraud in the first transaction. And
15 then, just like in the Justice Thomas
16 hypothetical, we're now in the second
17 transaction that didn't involve any fraud and
18 we're trying to figure it out.

19 I think, as my friend mentioned, you
20 know, some of this Court's language, the arising
21 from, doesn't give a ton of content to what the
22 actual causal requirement is, but I think we
23 would be perfectly comfortable sort of in a
24 future case that actually raised that type of --
25 type of hypothetical asking, you know, is this

1 really the causation that Congress meant when it
2 talked about "obtain." I think the answer might
3 well be no, but, again, that's not in this case.

4 The second bucket of hypotheticals I
5 think is when you have sort of the victim of
6 fraud, and I think, in a lot of those
7 hypotheticals, state law is going to deal with
8 that on the front end because state law isn't
9 going to hold that person liable.

10 So I'm thinking, for example, of, you
11 know, somebody who's defrauded and then, because
12 of the fraud, they themselves owe the debt.
13 They're not -- they're going to be able to
14 rescind that debt I believe most times. Under
15 state law, they may have a contribution action.
16 State law is going to deal with it on the front
17 end.

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

20 MS. ROSS: Sure. So -- so maybe I'm
21 sort of sticking my toe someplace I don't want
22 to be here, but, you know, there are sort of --
23 you can imagine really situations in which there
24 is fraud, you know, in -- in a different sense
25 in that the victim of the fraud is the one who

1 now owes the debt because, you know, it's credit
2 card fraud or something, and I think --

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

5 MS. ROSS: So I don't think that
6 that's how either state partnership law or
7 Congress has chosen to think about this, and I
8 think that makes sense.

9 Again, you know, I think Petitioner's
10 rule would permit or at least her rule as I
11 currently understand it would permit someone to
12 go into business with a known fraudster, know
13 about the fraud, pocket the money, spend the
14 money, dissipate all of her assets, go into
15 bankruptcy and then turn around and say to the
16 entirely innocent creditor, sorry, I'm in
17 bankruptcy now, you're out of luck.

18 CHIEF JUSTICE ROBERTS: I -- I thought
19 I understood your friend on the other side to
20 not go that far.

21 MS. ROSS: So I -- I think she's
22 attempting not to go that far. I think the
23 problem is that there are basically two possible
24 rules here. One is the knew or should have
25 known standard that she had in the petition and

1 that she abandoned when she got to the merits
2 stage. And, you know, I don't want to speak for
3 her. I have to assume that's because there's
4 nothing in the text of the statute that actually
5 says knew or should have known.

6 So now we have her new rule, and her
7 new rule on page 3 of her reply brief I think is
8 very clear that the question is whether the
9 debtor committed the fraud. And just knowing
10 about fraud under basic concepts of liability is
11 not committing the fraud.

12 So she needs something more. So she,
13 I think, is trying to get sort of an aiding and
14 abetting concept where somebody would be
15 directly liable for the fraud. But, you know,
16 that's going to leave on the table a number of
17 cases where you know about the fraud. You just
18 sort of haven't done anything yourself to push
19 it forward.

20 JUSTICE JACKSON: And in that
21 situation, I -- I'm just wondering, the
22 government's position is vicarious liability, or
23 we don't even need that, we're just interpreting
24 this to say she's wrong about it having to be
25 the debtor's fraud.

1 As I explored with -- with
2 Respondent's counsel, my thought is, isn't it
3 narrower to say even assuming she's right about
4 it needing to be the debtor's fraud, that at
5 least carries with it vicarious liability
6 through Strang and Field and whatever else, and
7 so that's all we're saying here. We're not
8 reaching, you know, Justice Thomas or Justice
9 Sotomayor's concerns about saying it's anyone's
10 fraud.

11 MS. ROSS: Certainly, Justice Jackson.
12 So, you know, I think the way that we would
13 think about this is, if you take the -- the
14 Strang view, which is what I take you to have
15 just articulated, and you limit it to this
16 provision, because, of course, it's pellucidly
17 clear everybody agrees that Strang was about the
18 predecessor to this provision, then I think that
19 is narrow.

20 I guess what I would say is that you
21 don't even need to get there because, if you
22 just look at the plain text of the statute,
23 there is just -- Congress has just made a
24 choice, we think an entirely reasonable one, to
25 pick up on state law determinations about who is

1 liable for fraud and not to then ask, you know,
2 to what extent, why were they liable, et cetera.

3 JUSTICE GORSUCH: Ms. -- Ms. Ross, I
4 want to throw you back where your -- your toe
5 was stuck earlier, and I just want to make sure
6 I understand it. I -- I've got your answer to
7 the first bucket of hypotheticals as you call
8 it. Tell me more about the second.

9 MS. ROSS: Already regretting it, but
10 sure, here I go. So I -- I think that in the
11 second bucket of hypotheticals, you could sort
12 of construct a situation in which I'm defrauded
13 and -- and the result of my being defrauded is
14 that I owe a debt, and that debt was obtained by
15 -- is for money that was obtained by fraud in
16 some sense.

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

21 JUSTICE GORSUCH: I got it. Thank
22 you.

23 MS. ROSS: Yep.

24 JUSTICE GORSUCH: Okay. My other set
25 of questions concerned the question Justice

1 Barrett posed to your friend a moment ago about
2 (b) and (c) --

3 MS. ROSS: Sure.

4 JUSTICE GORSUCH: -- which say that,
5 you know, loosely, (b) says that it's
6 non-dischargeable if an individual debtor
7 misrepresents his or her financial circumstances
8 in a writing. And the second one says luxury
9 goods, the individual debtor goes on a shopping
10 spree 90 days before bankruptcy, can't discharge
11 those either.

12 In what world does it make sense or
13 how does the government rationalize those --
14 those provisions which focus on the individual
15 debtor with this one, which the government says
16 does not?

17 MS. ROSS: Certainly, Justice Gorsuch.

18 So if I could just take them each in
19 turn. (b), as my friend mentioned, is a
20 carveout from (a), so we're necessarily in a
21 world where Congress wanted to make it easier to
22 discharge those debts, so there are more things
23 that you have to prove, so, in (b), for example,
24 as Justice Barrett pointing at -- pointed out,
25 you need to have a writing.

1 Nobody thinks that because there's a
2 writing requirement in (b) there's a require --
3 writing requirement in (a). That's just not
4 what Congress wrote.

5 JUSTICE GORSUCH: Let me just push
6 back there, and if Congress was concerned with
7 if the policy judgment were proceeds in fraud
8 regardless who committed them, should be --
9 should be non-dischargeable, those debts, right?

10 That's a good -- I can -- I can see
11 that policy argument. That's rational. I can
12 also see a rational argument that -- that it's
13 got to be the individual debtors. And so, when
14 I'm talk between two rational policy arguments
15 as a judge, you know, it doesn't do much for me,
16 right? I mean, that's -- that's across the
17 street.

18 But -- but, here, you -- you -- you do
19 have a suggestion that a misrepresentation in
20 writing about your financial condition by your
21 partner would not be a problem and could be
22 dischargeable or, if I bought luxury goods for
23 my friends or my partners, those debts would be
24 dischargeable.

25 So I -- I -- it's -- it's -- the two

1 policy judgments seem to me to be tugging at
2 each other here. I could understand one or the
3 other, but it's very hard for me to understand a
4 little bit of this and a little bit of that.

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

9 JUSTICE GORSUCH: Yes, yes.

10 MS. ROSS: -- was thinking about, and
11 I think the inference runs exactly in our favor
12 and exactly counter to my friend's point that,
13 you know, because it's in (b) and (c) you have
14 to sort of read it into (a) is not how
15 we normally view it.

16 JUSTICE GORSUCH: But give me a
17 rational explanation.

18 MS. ROSS: Sure. So the rational
19 explanation on (b) is that the particular
20 practice actually was written statements where
21 financial services companies would have a
22 consumer say, you know, it would say, please
23 list all your debts, but then they'd say, no,
24 no, just list one, that's okay.

25 And so they were sort of duping people

1 into making that kind of a misrepresentation.
2 That's why we have the writing requirement, I
3 think. And I think it's rational for Congress
4 to say, we think this is a really bad thing that
5 consumer -- that -- that these companies are
6 doing and so we're going to limit sort of the
7 ripple effects. If -- if they kind of get away
8 with it somehow, we're just going to limit it,
9 we're just not going to go any further.

10 On (c), I think similarly, Congress
11 there was creating a presumption of fraud, so
12 things that fall within (c), the shopping spree,
13 are presumptively fraudulent for purposes of
14 (a).

15 You know, I think you could read that
16 either way, allowing imputation or not. But
17 even if you think it doesn't, I think it's
18 entirely rational for Congress to have focused a
19 presumption on people who know themselves that
20 they're about to go into bankruptcy.

21 JUSTICE GORSUCH: Very helpful. Thank
22 you.

23 JUSTICE SOTOMAYOR: And I guess the
24 best way to deal with Justice Barrett and
25 Justice Gorsuch's views that it means that those

1 provisions mean the debtor is to say something
2 like the debtor's fraud is what's at issue, but
3 it includes the alter ego of the debtor, such as
4 partners and agents of the debtor.

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

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

9 MS. ROSS: I think that's right. I
10 mean, I think what -- what I would say about
11 Strang in particular is that, you know, I can
12 understand my friend's reticence to sort of
13 read of the debtor in all over the code or to
14 say that wherever that's in the code, that that
15 would necessarily require imputation.

16 I don't think the Court needs to cross
17 that bridge here. I think it's very clear that
18 when Congress was responding to Strang, you
19 know, that was in the 1867 statute, the "fraud
20 of the bankrupt" language. It had already been
21 repealed by the time Strang came to this Court.

22 The next bankruptcy statute was in
23 1898, and what Congress did was it kept "fraud,"
24 but it took out "of the bankrupt." And so I
25 think at least when we're thinking about this

1 provision, it's very clear that Congress, of
2 course, has never sort of reinserted "of the
3 bankrupt."

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

8 So, yes, I mean, that -- that's --
9 that's a long way -- winded way of saying yes, I
10 think that you could certainly limit it to that,
11 to that understanding.

12 JUSTICE KAGAN: Do you think Ms.
13 Harris is right that this was all kind of like
14 an accident, you know, that you take the
15 Bankruptcy Code as a whole and you say whether
16 it says "of the debtor," whether it doesn't say
17 "of the debtor," Congress was careless, Congress
18 wasn't thinking about it, it means nothing.

19 Now, even if she's right about that,
20 she might still lose because the text is the
21 text. But I'm just wondering whether you think
22 that that's right, that this is basically
23 carelessness.

24 MS. ROSS: So I guess I'd make a
25 couple of questions -- or, excuse me, a couple

1 of points, Justice Kagan.

2 The first is that I don't think it's
3 carelessly -- carelessness writ large. I think
4 there may be individual instances where maybe,
5 you know, in her two drunk driver ones, like,
6 you can't make sense of it.

7 I don't think you should say that
8 because there are a couple of those that the
9 whole statute makes no sense. And that's
10 particularly true in a -- a statute like this
11 one where we know that Congress has added -- I
12 mean, there are 19 exceptions in 523(a).
13 They've been added over the course of a hundred
14 years, often in statutes that have nothing to do
15 with bankruptcy itself.

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

20 And I think least of any place where
21 you would say that is (a)(2)(A) because we have
22 this history of Strang where it looks very clear
23 what Congress is doing.

24 We also have this background rule that
25 is -- you know, runs throughout partnership in

1 all 50 states, through the common law, through
2 both Neal and -- or, excuse me, Strang and its
3 discussion of Neal that partners are liable for
4 the frauds of their partners. And so, you know,
5 to the extent that Congress may have been
6 unclear elsewhere, I just don't think that that
7 can get you away from the clear meaning and the
8 clear history of this provision.

9 I guess, if I can make one more point
10 about something you made -- you said earlier,
11 Justice Kagan, about sort of the innocent debtor
12 and how we think about the purpose of this
13 statute as a whole.

14 One, you know, I think it's difficult
15 given this colloquy that we've just been having
16 about how much change and how these provisions
17 have been added at different times.

18 But, two, you know, I don't think it's
19 true that because there is sort of a sense of
20 giving a debtor a fresh start as a general
21 policy matter, that's necessarily come through
22 each and every provision. Obviously, these are
23 all exceptions to discharge.

24 But, even beyond that, you know, there
25 are a number of them that just sort of say

1 nothing about innocence or fault to begin with.
2 And I think Congress could very rationally here
3 have decided, as this Court explained in Cohen,
4 that what we want here is full compensation from
5 the creditor and given the background rules of
6 partnership, that this gets you closer to that
7 end.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas?

11 Justice Alito, anything further?

12 Anything?

13 Thank you.

14 Rebuttal, Ms. Harris.

15 REBUTTAL ARGUMENT OF SARAH M. HARRIS

16 ON BEHALF OF THE PETITIONER

17 MS. HARRIS: Thank you, Mr. Chief
18 Justice. Three quick points.

19 First of all is with respect to the
20 text, one unexplained aspect of the other side's
21 textual reading is what on earth Congress was
22 doing when it used specific language throughout
23 the exceptions in 523 to refer to debts for
24 various judgments and why Congress was not there
25 deliberately trying to say, in those instances

1 alone, we are indifferent to whether the debt
2 reflects vicarious liability or not.

3 We're just saying you have a judgment
4 against you. It's for fraud against a fiduciary
5 that meets certain specifications. That has to
6 mean something. And that is how Congress post
7 in the world after 1867 and certainly in 1978
8 was -- appears to have been dealing with that
9 problem. So, if you want to live by the text, I
10 think they have to die by the text in that
11 respect because I haven't heard a response to
12 why Congress had chosen that careful language.

13 And a number of the Court's cases do
14 say that the judgment language matters. It
15 says, bankruptcy courts, hands off, you defer to
16 that judgment.

17 A second point is with respect to the
18 other side's theories. I don't see a stopping
19 point with respect to the vicarious liability
20 theory -- theory if you -- even if you take
21 seriously the idea that vicarious liability
22 could only get read in whenever Congress used
23 the word "fraud," it still doesn't appear to
24 matter if Congress uses the word "debtor."

25 And the 727 total bars to discharge,

1 the ones that don't let you discharge any of
2 your debts, even if they're unrelated, a lot of
3 those are also about fraud. So the vicarious
4 liability theory seems to get you to a pretty
5 uncomfortable place because no one has ever
6 before thought that the Bankruptcy Code is a
7 mine field of vicarious liability just whenever
8 it mentions a common law term.

9 As for the state law theory, I -- I
10 think I heard the other side suggest that you
11 take whatever state law is to the point where
12 Neal versus Clark might be wrongly decided
13 because you can be liable for fraud without
14 culpable intent under a lot of state laws. You
15 certainly cannot be barred from discharging
16 fraud unless you have fraudulent intent. That's
17 been the law for -- for over a century.

18 And the idea that you're just sort of
19 having state law components that you defer to in
20 bankruptcy is contrary to the idea that, no, you
21 start off in bankruptcy with a debt, they exist
22 under state law, and the point of bankruptcy is
23 to get rid of that debt as a matter of federal
24 law. And that's why cases from Brown versus
25 Felsen onwards have said these discharge

1 exceptions are questions of federal law. You
2 look to federal law rules. You are not trying
3 to say whatever state's law -- whatever a state
4 law is governs, including fanciful state laws.

5 And then just a final point with
6 respect to the equities here. The fraudster to
7 be very clear is always on the hook. That
8 person can never discharge the debt in
9 bankruptcy. All we are talking about here is
10 whether the person who did not know of the
11 fraud, wasn't participating in it, can also be
12 on the hook forever for a lifelong debt.

13 And so, when we talk about cases like
14 Cohen or cases like Bullock, the thread that
15 runs underneath them is the idea that the whole
16 reason you get the strong medicine of not
17 getting a discharge under the federal bankruptcy
18 rules, where the norm is discharge, is that you
19 yourself are culpable.

20 That's what Bullock is talking about
21 when it talks about the exceptions all linked by
22 fault, and that's also what Cohen is talking
23 about when it's saying the reason why you can be
24 liable for debts for anything arising from that
25 fraud, including treble damages, including all

1 kinds of stuff, is because you set the fraud in
2 motion. It -- it's reasonable to hold you
3 accountable for the consequences of that fraud
4 on that basis because they're the foreseeable
5 results of your culpable behavior.

6 That really does not carry over to the
7 individual debtor in this case, who again
8 committed no fraud herself. And we ask the
9 Court to reverse.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel. The case is submitted.

12 (Whereupon, at 12:39 p.m., the case
13 was submitted.)

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