No. 21-908

IN THE

Supreme Court of the United States

KATE MARIE BARTENWERFER,

Petitioner,

v.

KIERAN BUCKLEY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND PROFESSOR ANGELA K. LITTWIN AS AMICI CURIAE IN SUPPORT OF PETITIONER

TARA TWOMEY
Counsel of Record
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
1501 The Alameda, Suite 200
San Jose, CA 95126
(831) 229-0256
tara.twomey@comcast.net

ROBERT A. KLYMAN
DANIEL R. ADLER
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071

JACOB T. SPENCER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036

Counsel for the National Consumer Bankruptcy Rights Center and Professor Angela K. Littwin

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

The National Consumer Bankruptcy Rights Center is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity.[1] The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. The Center files amicus curiae briefs in systemically important cases to ensure courts have a full understanding of applicable bankruptcy law, the case, and its implications for consumer debtors.

Professor Angela K. Littwin is the Ronald D. Krist Professor in Law at the University of Texas at Austin School of Law. Her scholarship focuses on bankruptcy, consumer, and commercial law from an empirical perspective. She is the author or co-author of *The Frequency, Nature, and Effects of Coerced Debt Among a National Sample of Women Seeking Help for Intimate Partner Violence*, VIOLENCE AGAINST WOMEN (2019); *Escaping Battered Credit: A Proposal for Repairing Credit Reports Damaged by Domestic Violence*, 161 UNIV. OF PENN. L. REV. 363 (2013); and *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CAL. L. REV. 951 (2012). Professor

---

[1] Under Supreme Court Rule 37.6, counsel for amici curiae states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than amici curiae or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed letters providing blanket consent to the filing of amicus briefs.

Littwin is currently working on a study funded by the National Science Foundation in which her research team interviewed and analyzed the credit reports of 188 newly divorced women to determine whether their ex-husbands had taken out coerced debt in their names.[2] She also serves on the Center's board.

Amici have a vital interest in the outcome of this case. The rule adopted by the court of appeals threatens to saddle innocent debtors with nondischargeable debt incurred through someone else's fraud. If a debt is nondischargeable whenever there is some "partnership" between the debtor and the fraudster who incurred the debt, many innocent debtors will be weighed down for life by obligations to right wrongs they never knew were committed and had no ability to stop.

This danger is particularly acute in domestic partnerships because important personal decisions—what to drive, where to live, and what to buy—often require significant amounts of consumer debt. Empirical research suggests that over half of victims of domestic violence may be forced to incur debt they do not want or have debt fraudulently taken out in their names. And partnered women filing for bankruptcy are many times likelier than the rest of the corresponding population to have recently experienced domestic violence. Refusing to allow those victims to discharge their debts in bankruptcy proceedings would pile on adverse consequences from domestic abuse—and make it that much harder to escape abusive relationships. That result would be contrary to the purpose of

---

[2] The other principal investigators on this study are Professors Adrienne Adams and Angie Kennedy of Michigan State University.

the Bankruptcy Code, which is to give honest debtors a fresh start.

INTRODUCTION AND SUMMARY OF ARGUMENT

The general rule under the Bankruptcy Code is that debts are dischargeable. The exceptions to that rule are few and narrow. One exception is debt "for money property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by" fraud. 11 U.S.C. § 523(a)(2)(A). There is no doubt that fraud requires intent. The question in this case is *whose* intent counts.

The rule adopted by the court of appeals is that a debt is nondischargeable when incurred through fraud that either was perpetrated by the debtor or "could be imputed" to the debtor because of a "partnership relationship" with the fraudster. *In re Bartenwerfer*, 860 F. App'x 544, 546 (9th Cir. 2021). The upshot of that rule is that a debtor can be forever on the hook for a debt even if she knew nothing about—and had no ability to prevent—the fraud that gave rise to it.

That reading of section 523(a)(2)(A) makes no sense. For one thing, the focus of section 523(a) as a whole is the "individual debtor," and there is no reason to suppose that Congress intended to prevent individual debtors from discharging debt arising from someone else's fraud. For another, there is no statutory basis for the court of appeals' imputation rule. If all that matters is the character of the debt—that it arises from fraud—then there is no reason to ask what connection, if any, the debtor has to the person who committed the fraud. Imputing the fraud from the true fraudster to the unknowing debtor is an extra step that the statute does not authorize courts to make.

Even limited by imputation, the rule adopted by the court of appeals threatens devastating consequences for innocent domestic partners. The court of appeals' rule seems to suggest a distinction between business relationships and personal ones, but as this case proves, it is difficult to draw any administrable line between the two. If Mrs. Bartenwerfer qualifies as someone in a "business partnership," then just about any spouse or domestic partner would also qualify. At the time of Mr. Bartenwerfer's purported fraud, she was not married to Mr. Bartenwerfer, was not involved in the renovation of the house whose condition was the subject of Mr. Bartenwerfer's purportedly fraudulent representations, was not aware she or Mr. Bartenwerfer had made any misrepresentations, and had not signed any formal business agreement. The court of appeals' decision means that if a debtor unknowingly chooses a fraudster to date or marry, that fateful choice could carry the accidental and weighty consequence of a lifetime of non-dischargeable debt even if the debtor has no knowledge of or power to prevent the fraudster's wrongful behavior.

That result is particularly troubling for victims of domestic violence, who are also often victims of coerced debt. Many abusers force their victims to take on debt unwillingly—for example, by fraudulently applying for credit cards or loans in their victims' names. According to one recent survey of about 250 domestic-violence victims, nearly all of them suffered some form of economic abuse, and according to another survey of almost 2,000 callers to a domestic-violence hotline, over half of them reported they were victims of coerced debt. Adrienne E. Adams, Angela K. Littwin, et al., *The Revised Scale of Economic Abuse (SEA2)*, 10(3) PSYCHOLOGY OF VIOLENCE 268, 270, 273 (2020) (citing Adrienne Adams, Angela Littwin & McKenzie Javorka, *The Frequency, Nature, and Effects of Coerced Debt Among a National Sample of Women Seeking Help for Intimate Partner Violence*, VIOLENCE AGAINST WOMEN 7, 11 (2019)). The resulting high debts and low credit scores make it all but impossible for the victims to walk away and start lives of their own—often the precise reason for the abusers' conduct. Under the rule of the court of appeals, these debts would be nondischargeable if obtained through the abusers' fraud—making it impossible even for victims who escape domestic abuse to achieve a financial fresh start.

It would be one thing if these undesirable consequences inevitably flowed from a sound reading of the statute. But they do not. Mrs. Bartenwerfer was unable to discharge the debt here only because the court of appeals rewrote the Bankruptcy Code and added an imputation concept that cannot be found anywhere in the text of section 523(a)(2)(A).

Accordingly, amici respectfully request that this Court read section 523(a)(2)(A) narrowly to (a) permit the discharge of debts owed by an individual debtor and incurred through the fraud of someone else and (b) deny discharge only when the individual debtor, unlike Mrs. Bartenwerfer, at least knew about the fraud and had some ability to prevent it. That reading is faithful not only to the statutory text, but also its purpose: providing a clean slate to potentially thousands of innocent individual debtors, including many women who are burdened by domestic abuse and coerced debt.

ARGUMENT

I. The Rule Adopted By The Court Of Appeals Punishes Innocent Victims, Including Domestic Partners.

The court of appeals held that "Mrs. Bartenwerfer's debt is nondischargeable regardless of her knowledge of the fraud." 860 F. App'x at 546–47. The premise of that remarkable result was that Mrs. Bartenwerfer was Mr. Bartenwerfer's "partner" and thus responsible for his misdeeds under agency principles. *Id.* If affirmed by this Court, the court of appeals' rule threatens to sweep in many innocent domestic partners—including those who, unlike Mrs. Bartenwerfer, are the victims of domestic abuse and coerced debt.

Individual bankruptcy filers are disproportionately likely to be the victims of domestic abuse. *See* Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CAL. L. REV. 951, 962, 1018 (2012). Domestic abuse all too frequently includes financial abuse, including in the form of "coerced debt," or "nonconsensual, credit-related transactions that occur in a violent relationship." *Id.* at 954. Because coerced debt often involves fraud—and because it is so easy to describe the average couple as being in a "partnership"—the court of appeals' rule could preclude many victims of domestic violence from discharging coerced debt in bankruptcy.

A. According to the leading study on the subject, the vast majority of women seeking services for domestic violence are likely victims of economic abuse. *See* Adams, Littwin & Javorka, *The Frequency, Nature, and Effects of Coerced Debt*, VIOLENCE AGAINST

WOMEN at 1 (citing Adrienne Adams et al., *Development of the Scale of Economic Abuse*, 14 VIOLENCE AGAINST WOMEN 563, 571 (2008)). The study found that "between *94 and 99%* of women seeking services for intimate partner violence (IPV) have experienced economic abuse." *Id.* (emphasis added). And a depressingly common form of economic abuse is coerced debt.

Coerced debt comes in a variety of forms. Sometimes, abusers coerce debt directly through fraud. For example, intimate partners with access to their significant others' social security numbers, bank account numbers, and birth dates might use that information to take out a credit card in the victim's name. Littwin, *Coerced Debt*, 100 CAL. L. REV. at 987–88. In preliminary analysis of their ongoing National Science Foundation survey of 188 newly divorced women, Professors Adams, Kennedy, and Littwin found more than 100 instances of abusive partners incurring credit card debt in participants' names without their knowledge. Abusers sometimes also forge the victim's signature or, especially in the context of same-sex domestic abuse, even impersonate the victim. *Id.* at 988–89.

Abusive partners also coerce debt through force or misrepresentations. "This might include forcing a victim to sign a financial document against her will or threatening that she would be unwise to question a given transaction." Littwin, *Coerced Debt*, 100 Cal. L. Rev. at 989. For example, a preliminary analysis of the National Science Foundation data shows that 79 women reported fearing physical harm to themselves or their loved ones if they did not accede to their abusers' requests to incur debt. Coerced debt might also involve victims signing "financial documents without knowing their contents"—because the abusers either lie about or do not give the victims sufficient time to review their contents. *Id.* at 989–91. These forms of coerced debt also create ample opportunity for the abuser to commit fraud.

One recent study suggests that many domestic-violence victims suffer from coerced debt. *See* Adams, Littwin & Javorka, *The Frequency, Nature, and Effects of Coerced Debt*, VIOLENCE AGAINST WOMEN at 7–11. Sampling calls to the National Domestic Violence Hotline, the study found that more than *half* of respondents reported "that their partner had put debt in their name either via a coercive and/or fraudulent transaction." *Id.* at 11. "A coercive transaction was reported by 43% of respondents, and about one in five women surveyed (22%) had discovered debt that a partner had generated in their name fraudulently." *Id.* And, of course, fraud may be underreported in that study because the victims might not yet have discovered their partners' fraud.

Coerced debt "becomes a major obstacle to escaping abusive relationships" because reduced credit "scores lead landlords, utility companies, and employers to refuse to do business with newly single survivors." Littwin, *Coerced Debt*, 100 CAL. L. REV. at 955. That is by design: incurring these debts is "often a conscious attempt to create barriers that would prevent the victim from leaving the abusive relationship." *Id.* at 999. The survey of callers to the National Domestic Violence Hotline found that women who reported coerced debt were 5.7 times likelier to report credit damage—and 2.5 times likelier to report financial dependence—than women without coerced debt.

Adams, Littwin, & Javorka, *The Frequency, Nature, and Effects of Coerced Debt*, VIOLENCE AGAINST WOMEN at 10, 12.

In short, it is not uncommon for abusers to deliberately trap innocent domestic partners in financial quicksand. The rule adopted by the court of appeals could compound that problem, with devastating consequences for victims of domestic abuse. Even those victims who are able to escape their abusers could be denied a financial fresh start, unable to discharge debts that they had no power to avoid—and may not even have previously known existed. *See* Littwin, *Coerced Debt*, 100 CAL. L. REV. at 997–98.

And although direct statistics on this issue are unavailable, coerced debt incurred by fraud is likely a commonplace occurrence in bankruptcy filings. Female bankruptcy filers are up to twelve times likelier than other women to have experienced domestic abuse. Littwin, *Coerced Debt*, 100 CAL. L. REV. at 962, 1018.[3] Indeed, nearly *one in five* "married or cohabiting female participants" in a 2007 study by the Consumer Bankruptcy Project "experienced domestic abuse in the year before filing for bankruptcy." *Id.* And there are hundreds of thousands of individual bankruptcy filings[4]—and nearly 10 million victims of

---

[3] Although empirical studies in this area have generally focused on women experiencing abuse in opposite-sex relationships, domestic abuse—including financial abuse—can and does occur in every form of domestic partnership.

[4] *See* United States Courts, *U.S. Bankruptcy Courts—Business and Non-Business Cases Commenced* (Dec. 31, 2021),

domestic abuse[5]—every year. If even a small fraction of those domestic-abuse victims file for bankruptcy, and if even a small fraction of those filers have experienced coerced debt involving fraud, then affirming the court of appeals' rule could saddle hundreds or thousands of innocent individual debtors with non-dischargeable debt fraudulently incurred by their abusers.

B. This Court could not endorse the court of appeals' rule without creating a grave risk that it would extend to victims of domestic abuse. Consider coerced debt through fraud. In that circumstance, money or credit is "obtained by . . . false pretenses, a false representation, or actual fraud"—by the *abuser* applying for credit in the *victim's* name. 11 U.S.C. § 523(a)(2)(A). And the domestic-violence victim could be prevented from discharging a fraudulent debt of which she herself was the victim. If the character of the debt is all that matters, then the victim has no recourse, regardless of whether the victim had any ability to prevent the fraud—or even the opportunity to discover it.

The court of appeals' rule could similarly sweep in victims coerced to incur debt through force or misrepresentations. A leading study on coerced debt reports,

---

https://www.uscourts.gov/sites/default/files/data_tables/bf_f2_1231.2021.pdf (reporting nearly 400,000 non-business bankruptcy filings in 2021).

[5] Sharon G. Smith et al., *The National Intimate Partner & Sexual Violence Survey: 2010-2012 State Report*, CENTERS FOR DISEASE CONTROL AND PREVENTION 118 (2017), available at https://bit.ly/3v2vvi6.

for example, that some victims of abuse initially refuse to sign fraudulent loan applications, but ultimately do so after enduring physical abuse. *See* Littwin, *Coerced Debt*, 100 CAL. L. REV. at 989. Again, if the character of the debt is all that matters, the resulting debt could be nondischargeable—even if the victim had no way of knowing whether the documents contained falsehoods and no way to avoid signing them.[6]

To be sure, the court of appeals' rule applies only where the fraud can be "imputed" to an individual debtor based on a partnership with the fraudster. But that rule does not create a bright line. After all, it is not easy to tell where a domestic relationship ends and a "partnership" begins. Many of the things domestic partners commonly do also have important financial consequences and can be loosely characterized as business transactions. People in domestic partnerships often buy and sell personal and real property.

[6] Currently, there are no effective legal remedies that directly address coerced debt. *See generally* Angela Littwin, *Escaping Battered Credit: A Proposal for Repairing Credit Reports Damaged by Domestic Violence*, 161 UNIV. OF PENN. L. REV. 363 (2013). For example, debt coerced by fraud is a form of identity theft, but law enforcement officials sometimes refuse to provide police reports (which are necessary as evidence) when the perpetrator was a domestic partner. *Id.* at 392. Moreover, federal identity theft law excludes coerced debt created by force. *Id.* at 393–94. Similarly, contract law doctrines such as duress do not provide relief because the creditor is usually an innocent third party who gave value, albeit value that went to the abuser rather than the victim. Adams, Littwin & Javorka, *The Frequency, Nature, and Effects of Coerced Debt*, VIOLENCE AGAINST WOMEN at 15. The lack of specific legal remedies for coerced debt leaves victims dependent on generally applicable debtor-creditor law, such as bankruptcy, for relief.

They also often renovate real property, sometimes to increase its value, sometimes to improve their living conditions, and oftentimes both. And virtually all domestic partners incur debts of one kind or another—from mortgages and auto loans to credit card debt incurred to buy products that both partners use.

Courts have generally acknowledged the problem of determining where a relationship ends and a partnership begins, but not solved it. They consistently hold, for example, that the fact of marriage alone is not enough to support imputed liability for a spouse's fraud. The relationship needs to be something more—a true business partnership. *E.g.*, *In re Allison*, 960 F.2d 481, 485–86 (5th Cir. 1992); *In re Lansford*, 822 F.2d 902, 904–05 (9th Cir. 1987). But this case itself proves how unworkable the supposedly neat division between a merely personal relationship and a "partnership" can be. The court of appeals was willing to impute fraud to someone who, at the time Mr. Bartenwerfer made inadequate disclosures about the home he had renovated, was not even his wife, much less his coconspirator. The two lived together and agreed to renovate the property together, but had no formal business partnership, and the trier of fact found she knew nothing about his fraud. Pet. App. 58a–59a. If the rule adopted by the court of appeals is broad enough to cover even those circumstances, then it could sweep in a vast range of financial activities carried out by one or both members of a domestic partnership. And victims of domestic abuse would have no way of knowing whether their abusers' fraud would be imputed to them until they had already taken the drastic step of filing for bankruptcy to obtain a now unachievable fresh start.

C. Courts should not treat domestic partners, especially where one is a domestic-violence victim, like formal business partners and impute fraud to them even if they knew nothing about it. Unlike formal business partners, domestic partners do not have the same incentive to investigate and root out fraud. Formal business partners have every reason to ask each other the hard questions and undertake appropriate diligence. Domestic partners often cannot: "Spouses may be especially vulnerable to one another's deceptions and susceptible to wishful thinking about each other's character or financial prospects," and "the prospective harm from the nondischargeability of particular debts may be overshadowed by a spouse's desire to avoid acts, such as demanding access to hard facts regarding the other spouse's conduct, which might cause unpleasant disruption of a sensitive relationship." Steven H. Resnicoff, *Is It Morally Wrong to Depend on the Honesty of Your Partner or Spouse? Bankruptcy Dischargeability of Vicarious Debt*, 42 CASE W. RES. L. REV. 147, 172–73 (1992).

For domestic-violence victims in particular, declining to interrogate an abuser about financial affairs is a matter not just of keeping the peace, but of self-preservation. *See* Resnicoff, 42 CASE W. RES. L. REV. at 173, 179. Then, too, even if domestic-violence victims discover fraud, they often will not be in a position to do anything about it. Various personal ties, such as a shared home or children, not to mention the threat of further abuse, might make it impossible to leave. There is no good reason to "punish an innocent spouse for failing to take heroic steps to change the intra-family power structure." *Id.* at 180. Because the court of appeals' is unlikely to change innocent debtors' "conduct with respect to the relationship," it serves only to "punish[] these debtors for wrongs they did not commit." *Id.* at 156.

The standard adopted by the court of appeals is also at odds with decisions declining to hold innocent domestic partners liable for the frauds of their partners. For example, spouses who did not participate in tax fraud may win equitable relief from joint tax liabilities. *E.g.*, *Resser v. Comm'r*, 74 F.3d 1528, 1544–45 (7th Cir. 1996); *Price v. Comm'r*, 887 F.2d 959, 962 (9th Cir. 1989). And courts have consistently held that when one spouse burns down the family home for the insurance money without the knowledge of the other, the innocent spouse gets his or her share of the proceeds. *E.g.*, *McCracken v. Gov't Emps. Ins. Co.*, 325 S.E.2d 62 (S.C. 1985); *Delph v. Potomac Ins. Co.*, 620 P.2d 1282 (N.M. 1980); *Watts v. Farmers Ins. Exch.*, 98 Cal. App. 4th 1246 (2002). Similarly, courts have held that innocent spouses are entitled to pension payments even if their fraudster spouses would not be. *E.g.*, *Ret. Bd. of Emps.' Ret. Sys. v. Randall*, 249 A.3d 629, 633–35 (R.I. 2021).

There is no reason for bankruptcy, the very purpose of which is to provide a fresh start to honest but unfortunate debtors, to be the exception to this general rule of leniency for innocent domestic partners. Choosing to date or marry the wrong person—much less being the victim of domestic abuse—should not carry with it the burden of debt fraudulently incurred by someone else. That heavy consequence may be the sort of thing a formal business partner contemplates when he hangs a shingle joining his name to another's in a new business venture. But it is not what anyone embarking on a romantic relationship would even consider, much less take steps to guard against. Even those getting married do not do that; only about five percent of them sign prenuptial agreements. Sean H. Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 828 (2007). This Court should interpret section 523(a)(2)(A) in a way that avoids miring innocent domestic partners in nondischargeable debt for reasons they did not control—or even know about.

II. The Court of Appeals' Rule Has No Basis in the Statutory Text.

If section 523 of the Bankruptcy Code required saddling innocents with debts incurred by fraudsters, that would be the end of the matter. Those in Mrs. Bartenwerfer's shoes could pursue relief only from Congress. But the rule adopted by the court of appeals is *not* required by the statute. Section 523 eliminates the relief of discharge only in the rarest circumstances, which do not include fraud committed by someone else without the knowledge of the debtor. Accordingly, the many negative consequences of the rule adopted by the court of appeals—including weighing down victims of domestic violence with nondischargeable coerced debt—are unnecessary and unlawful.

"One of the primary purposes" of the bankruptcy laws "is to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.'" *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). In keeping with that purpose, bankrupt debtors may generally seek and receive a clean slate—a discharge of their debts. 11 U.S.C. § 727.

Section 523 of the Bankruptcy Code sets out narrow exceptions to that rule of discharge, including "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by . . . false pretenses, a false representation, or actual fraud." 11 U.S.C. § 523(a)(2)(A). Like all exceptions to discharge, this exception for fraud must be construed narrowly. *See*, *e.g.*, *Law v. Siegel*, 571 U.S. 415, 424 (2014); *Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998).

The parties have offered competing interpretations of the scope of that exception. Mrs. Bartenwerfer says that it applies only to those who committed the fraud, and thus innocent debtors can discharge debts even if they arose from their partners' fraud. Pet. Br. 18–27. Mr. Buckley and the court of appeals, by contrast, contend that the exception ensnares not only those who participated in or knew about the fraud, but anyone to whom the fraud can be imputed, through some sort of agency relationship. Br. in Opp. 9. Only Mrs. Bartenwerfer's argument is consistent with the text of section 523 and the purpose of the Bankruptcy Code.

Section 523(a)(2)(A) carves out from the rule of discharge debt "for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by" fraud." 11 U.S.C. § 523(a)(2)(A). The question, of course, is *whose* fraud counts. If the rest of section 523 is any indication, it must be that of the "individual debtor" herself. Many of the exceptions could not be clearer that they require the debtor's culpability. The statute provides, for example, that the Code "does not discharge an individual debtor from any debt" arising from:

- written misrepresentations, but only if "the debtor caused [them] to be made or published [them] with intent to deceive," *id.* § 523(a)(2)(B)(iv);
- "consumer debts . . . for luxury goods or services," but only if "incurred by an individual debtor," *id.* § 523(a)(2)(C)(i)(I);
- a "willful and malicious injury by the debtor to another entity or to the property of another entity," *id.* § 523(a)(6); and
- "death or personal injury caused by the debtor's operation of a motor vehicle," *id.* § 523(a)(9).

Other exceptions do not make this second reference to "the debtor" or "an individual debtor," but they do not need to. For example, section 523(a)(5) carves out debts incurred in connection with "a domestic support obligation." 11 U.S.C. § 523(a)(5). Congress scarcely needed to say *whose* obligation; it is obviously the individual debtor's. Another example: The Code "does not discharge an individual debtor from any debt" arising from "fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." *Id.* § 523(a)(4). The only person who could be "acting" one way or another in that sentence is the "individual debtor" mentioned in at the top of section 523. The fraud exception at issue here, in section 523(a)(2)(A), functions in much the same way. Congress did not include a second reference to "the individual debtor," so as to eliminate all doubt as to whose fraud it must be, but there is no other logical candidate.

The court of appeals, of course, thought that there is. It held that section 523(a)(2)(A) makes nondischargeable debts stemming from fraud committed by the debtor or anyone in an agency relationship with him. That agency theory would not work even if the statute did contemplate that the fraud can be committed by someone other than the debtor. The statute says nothing about imputation or agency; it says "actual fraud." So the court of appeals could have held that it exempts from discharge any debts arising from fraud, full stop. But the court did not adopt that rule, and no other court has endorsed it, because of its obvious unfairness. A rule that applies equally to unrepentant fraudsters and honest but unlucky debtors—say, the victims of identity theft—would be hard to defend. Yet there is no statutory hook for the court of appeals' compromise rule: Either the debt must be "obtained by [the individual debtor's] fraud," or it must be "obtained by [anyone's] fraud"; there's no plausible middle ground, no matter whether that person had any agency relationship with the debtor.

The court of appeals' holding also lacks support in the case law. It relied heavily on *Strang v. Bradner*, 114 U.S. 555 (1885), *see In re Bartenwerfer*, 860 F. App'x at 546, but that case was not rooted in statutory text either. When *Strang* was decided, the bankruptcy laws excluded from discharge "debt created by the fraud or embezzlement of the bankrupt," not the bankrupt or those in an agency relationship with him. 1867 Bankruptcy Act, § 33, 14 Stat. at 517, 533. *Strang* rested on the common-law principle that partners, innocent or not, should be liable for the debts incurred by their fellow partners "for the benefit of [the] firm." 114 U.S. at 561–62. After *Erie*, there's no basis for concocting a federal common-law gloss on the Bankruptcy Code. In any event, *Strang* conflated liability and dischargeability. That a debtor is liable for a debt does not mean that the debt should be nondischargeable. Debtors are liable for all their debts; that is why they declare bankruptcy in the first place. The question here is whether they should be stuck with those debts for life.

Mr. Buckley's brief in opposition also relies on decisions from courts of appeals holding that section 523(a)(1)(A) "focuses on the character of the debt, not the culpability of the debtor." Br. in Opp. 9 (quoting *In re M.M. Winkler & Assocs.*, 239 F.3d 746, 749 (5th Cir. 2001)). But none of those opinions have carried that principle to its logical conclusion, and for good reason: If the character of the debt is all that matters, then there is no halfway stopping point that would render debts nondischargeable only if the debtor is in an agency relationship with the fraudster. And of course that principle still requires culpability—just someone else's rather than the debtor's. If culpability matters—and it should, because the purpose of denying discharge is to punish those few who do not deserve it—then it should be the debtor's own. Only that approach is consistent with the text of the statute and the fresh-start purpose of the Bankruptcy Code. *See, e.g.*, *In re Walker*, 726 F.2d 452, 454 (8th Cir. 1984); *In re Huh*, 506 B.R. 257, 266–71 (B.A.P. 9th Cir. 2014).

In short, this is not one of those cases where one side has statutory text on its side and the other can appeal only to fairness. In those cases, statutory text will always win, and any unfairness can be addressed, if at all, by Congress. Here, the problem is not just that the rule adopted by the court of appeals is remarkably punitive, but that there is no textual basis for it. The statute requires culpability on the part of the debtor herself—which means that she at the very least knew about, and was in a position to do something about, the fraud that gave rise to the debt.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted.

TARA TWOMEY
Counsel of Record
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
1501 The Alameda, Suite 200
San Jose, CA 95126
(831) 229-0256
tara.twomey@comcast.net

ROBERT KLYMAN
DANIEL R. ADLER
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071

JACOB T. SPENCER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036

Counsel for the National Consumer Bankruptcy Rights Center and Professor Angela K. Littwin

July 26, 2022