No. 21-908

In the Supreme Court of the United States

KATE MARIE BARTENWERFER, PETITIONER

v.

KIERAN BUCKLEY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under Section 523(a)(2)(A) of the Bankruptcy Code, a discharge of debts under 11 U.S.C. 727 does not apply to "any debt … for money … obtained by … false pretenses, a false representation, or actual fraud." The question presented is whether a bankruptcy discharge applies to a debt a debtor owes for money obtained by her business partner's actual fraud.

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INTRODUCTION

Section 523(a)(2)(A) of the Bankruptcy Code excepts from discharge "any debt … for money … obtained by … false pretenses, a false representation, or actual fraud." The Ninth Circuit correctly held—consistent with the provision's text, context, history, and purpose—that this exception covers petitioner's debt to respondent for money petitioner obtained by the actual fraud of her business partner. Petitioner would have this Court additionally require that a debtor "knew or should have known" of the fraud for the exception to apply, and accordingly allow her to escape liability. But neither petitioner nor the cases she cites offer any textual support for this added requirement. The circuit conflict on this question is lopsided and longstanding. The delta between the two rules is narrow and unlikely to alter the outcome of many cases. And respondent has preserved arguments for prevailing even under petitioner's rule. Certiorari is unwarranted.

STATEMENT

1. In February 2005, unmarried business partners petitioner Kate Pfenninger, a licensed real estate broker, and David Bartenwerfer, an unlicensed contractor, jointly purchased a house to flip in the Noe Valley neighborhood of San Francisco for just under $900,000. C.A. E.R. 328, 339, 513:8–14, 1008, 1012, 1054. Kate and David lived together in the house until spring 2007. Pet. App. 38a. David assumed primary responsibility for remodeling, and Kate assisted, including by picking out fixtures, discussing floor plans, and receiving quotes for work. C.A. E.R. 246, 608:13–15. After extensive (if ultimately incomplete) renovations, Kate and David sold the property to respondent Kieran Buckley in March 2008 for $2.1 million. *Id.* at 342.

As California law requires, both Kate and David prepared and executed a Real Estate Transfer Disclosure Statement and a Supplement thereto. C.A. E.R. 234–240; see Cal. Civil Code § 1102.3. Kate and David attested, among other things, that the house lacked "past or present leaks or water intrusion," that they were not "aware of any significant defects/malfunctions" in the roofs and windows, and that they were unaware of any "alterations or repairs made without necessary permits" or "not in compliance with building codes." C.A. E.R. 234–240. The Statement and Supplement listed both Kate and David as "Seller," requiring both to "certif[y] that the information herein is true and correct to the best of the Seller's knowledge." *Id.* at 236. Pursuant to California law, the Seller's knowledge must be based on a "reasonable effort" to obtain "the best information reasonably available." Cal. Civil Code § 1102.5. Kate and David confirmed these attestations in the sales contract, representing that "Seller has no knowledge or notice that the property has any material defects other than as disclosed by the Seller in the [Statement and Supplement]." C.A. E.R. 220.

Kate and David's statements were false. Among other issues, certain windows had not been properly installed, there was a history of water leaks, and there was a missing fire escape. C.A. E.R. at 600:16–20; 178–179. Nor had the house received a clean bill of health from the authorities, as Kate and David had represented: electrical and plumbing work had not been approved by an inspector and there were a number of outstanding permit issues. *Id.* at 645:25–646:19.

2. After discovering these and other undisclosed defects, Buckley sued Kate and David Bartenwerfer in California State Court in 2009 alleging nondisclosure of material facts in connection with the sale. C.A. E.R. 191–195. (Kate and David married prior to Buckley's suit and petitioner is now Kate Bartenwerfer.[1])

On September 27, 2012, following a 19-day trial, a jury returned a special verdict in Buckley's favor and awarded him damages. The jury found that "David Bartenwerfer or Kate Bartenwerfer kn[e]w or reasonably should have known of the water leaks, window conditions, status of permits and knew of the fire escape issue," that "David Bartenwerfer or Kate Bartenwerfer kn[e]w or reasonably should have known that Kieran

[1] The Bartenwerfers' marriage is immaterial to this case because Kate is liable due to her preexisting business partnership with David that enabled her to obtain Buckley's money through David's fraud. Pet. App. 4a.

Buckley did not know, and could not have reasonably discovered, this information," and that "David Bartenwerfer or Kate Bartenwerfer's failure to disclose the information [was] a substantial factor in causing Kieran Buckley's harm." C.A. E.R. at 178–179. The court entered judgment on October 4, 2012. *Id.* at 188.

3. Rather than paying the judgment they owed Buckley, the Bartenwefers jointly filed for bankruptcy, seeking a discharge of their debts under Section 727 of the Bankruptcy Code, 11 U.S.C. 727.

Buckley filed an adversary proceeding to have the debt excepted from discharge. C.A. E.R. 191–195. Buckley invoked 11 U.S.C. 523(a)(2)(A), which provides that "[a] discharge … does not discharge an individual debtor from any debt— … for money … to the extent obtained by—(A) false pretenses, a false representation, or actual fraud."

The bankruptcy court held a two-day trial on the issue and concluded that "the Bartenwerfers possessed the requisite knowledge and intent to deceive Mr. Buckley," rendering the debt nondischargeable. C.A. E.R. 20. As to Kate, the court found that "an agency relationship existed between Mr. and Mrs. Bartenwerfer based on their partnership with respect to the remodel project: she was on title to the Property, signed the disclosure statements[,] and would financially benefit from the successful completion of the project and sale of the property." *Id.* at 5 n.3.

The Bankruptcy Appellate Panel (BAP) reversed and remanded. C.A. E.R. 34–71. Relying on *Sachan* v. *Huh* (*In re Huh*), 506 B.R. 257, 271–272 (B.A.P. 9th Cir. 2014) (en banc), the BAP held that the debt would not be excepted from discharge unless the bankruptcy court also found that Kate "'knew or had reason to know' of Mr. Bartenwerfer's fraudulent omissions." C.A. E.R. 55.

4. On remand, the bankruptcy court held a 90-minute trial and found the debt dischargeable on the ground that Buckley failed to show that Kate knew or should have known of the fraud. Pet. App. 39a–59a. First, the bankruptcy court declined to address Buckley's argument that Kate was directly liable for the fraud, finding it outside the scope of the BAP's remand. *Id*. at 47a–48a. The court characterized the "knew or should have known" standard as requiring proof that the debtor affirmatively "learns of facts that require investigation into the agent's conduct but fails to undertake such an inquiry." *Id.* at 58a. This case did not "follow [that] pattern," the court explained, because petitioner "confirmed visually whatever information she could," and "[a]s to disclosures that were not subject to visual verification, she asked Mr. Bartenwerfer to confirm their veracity." *Id.* at 56a–57a. Because "Buckley did not prove that Mrs. Bartenwerfer knew of but ignored facts that should have prompted her to investigate [her] representations," the court found that the debt she owed Buckley was dischargeable. *Id.* at 58a. (The court reached this result despite Kate's testimony that she was aware of unresolved permitting issues, C.A. E.R. 645:17–646:5, and her "waffl[ing]" about inconsistencies between her trial testimony and her written discovery responses which, according to the court, "[did] nothing for her credibility," Pet. App. 45a–46a.)

The BAP affirmed. Pet. App. 7a–30a. It found no error in the conclusion that "Mrs. Bartenwerfer's conduct [was] reasonable" and that "her reliance on [Mr. Bartenwerfer's] knowledge to make the disclosures was neither reckless nor unreasonable." *Id.* at 19a–20a. The BAP also rejected Buckley's argument that Kate was directly liable for the fraud, concluding that Kate's "actions and attitude toward the truth were simply not found to be 'reckless' or 'indifferent,' but reasonable." *Id.* at 24a.

The Ninth Circuit reversed in an unpublished opinion. Pet App. 1a–6a. Relying on this Court's decision in *Strang* v. *Bradner*, 114 U.S. 555 (1885), as well as the Ninth Circuit's prior decision in *Impulsora Del Territorio Sur, S.A.* v. *Cecchini* (*In re Cecchini*), 780 F.2d 1440 (1986), the court of appeals recognized that under "basic partnership principles, [']if, in the conduct of partnership business, … one partner makes false or fraudulent misrepresentations … his partners cannot escape pecuniary responsibility therefor upon the ground that such misrepresentations were made without their knowledge.[']" Pet. App. 5a (quoting *Strang*, 114 U.S. at 561). The court accordingly determined that "the bankruptcy court applied the incorrect legal standard for imputed liability in a partnership relationship," and found petitioner's debt "nondischargeable regardless of her knowledge of the fraud." *Id.* at 6a. Given that holding, the court declined to "address the remaining issues raised," including Buckley's arguments that the bankruptcy court erred in defining the "knew or should have known" standard, erred in applying that standard, and erred in not holding petitioner directly liable for the fraud. *Ibid.*; see Resp. C.A. Br. 39–55.

ARGUMENT

Petitioner contends (Pet. 11) that a debt for money obtained by a partner's fraud may be discharged in bankruptcy unless the debtor knew or should have known about the fraud. The Ninth Circuit correctly rejected that contention. Section 523(a)(2)(A) of the Bankruptcy Code prevents a debtor from discharging "any debt … for money … obtained by … actual fraud." It is undisputed that petitioner owes a debt to respondent for money obtained by her business partner's actual fraud. Under the plain language of the statute, that is enough to prevent petitioner from escaping her debt to respondent; there is no additional "knew or should have known" requirement.

The provision's context, history, and purpose confirm that interpretation. Section 523 expressly makes the debtor's state of mind relevant to the discharge of some kinds of debt, but not others. That indicates that when Congress intends to make an exception to discharge dependent on the debtor's mental state, it does so expressly. It did not do so in Section 523(a)(2)(A). Moreover, more than a century ago, this Court interpreted a predecessor provision to mean that one partner cannot discharge a debt for money obtained through another partner's actual fraud. See *Strang*, 114 U.S. at 561. There is no indication that Congress intended to depart from that rule, which protects victims of fraud rather than protecting the fraudster's partners.

Although there is a circuit conflict on this issue, it is lopsided in respondent's favor and longstanding. The split developed decades ago. Moreover, the only recent case on petitioner's side of the split admits that the majority rule "is consistent with the language of the fraud exception to discharge" but claims that this "just illustrates the limitations of literal interpretation of statutory language." *Sullivan* v. *Glenn*, 782 F.3d 378, 380 (7th Cir.) (Posner, J.), cert. denied, 577 U.S. 1029 (2015). Even when this issue arises, it will be the rare case where it is dispositive: Where a debtor is liable for their partner's fraud under traditional principles of agency law, the debtor often will know or should know about the fraud. Indeed, after the Eighth Circuit first announced the (incorrect) minority rule, the debt on remand was still found to be nondischargeable.

Finally, this case is not a suitable vehicle for this Court's review. Respondent has preserved a number of arguments that he would prevail even under petitioner's proposed rule. The Ninth Circuit did not address those arguments. Those additional unresolved questions would mean that the question presented may not be outcome determinative.

I. The Court of Appeals' Decision Is Correct

A. Section 523(a)(2)(A) Bars Discharge of Any Debt for Money Obtained by Fraud Without Regard to the Debtor's Awareness of the Fraud

1. "We start with the text of the Code's principal provision[]—and find that it does much of the work." *Mission Prod. Holdings, Inc.* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1661 (2019). Section 523 of the Bankruptcy Code lists "Exceptions to discharge." It provides in relevant part that a discharge of debts under 11 U.S.C. 727 "does not discharge an individual debtor from any debt":

> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—
>
> > (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition.

11 U.S.C. 523(a)(2)(A). Section 523(a)(2)(A) thus plainly states that "any debt" for "money … obtained by" actual fraud cannot be discharged. Petitioner no longer disputes that she owes a debt to respondent for money that was obtained by the actual fraud committed by her business partner.

The court of appeals correctly determined that those facts are sufficient under Section 523(a)(2)(A) to prohibit discharge of petitioner's debt to respondent. Notably, Section 523(a)(2)(A) does not include an additional clause stating that the fraud needs to have been committed "by the debtor," nor does it state that the debt is nondischargeable only if the debtor "knew or should have known" of the fraud. The provision instead excepts from discharge all debts for money that was "obtained by" actual fraud, without regard to the debtor's involvement in, or state of mind as to, the underlying fraud itself. As the Fifth Circuit has explained, the provision's text "focuses on the character of the debt, not the culpability of the debtor." *Deodati* v. *M.M. Winkler & Assocs.* (*In re M.M. Winkler & Assocs.*), 239 F.3d 746, 749 (2001).

Section 523(a)(2)(A)'s context confirms this interpretation. Section 523(a) protects certain categories of creditors by listing categories of debts that are excepted from discharge in bankruptcy. "The various exceptions to discharge in § 523(a) reflect a conclusion on the part of Congress 'that the creditors' interest in recovering full payment of debts in these categories outweigh[s] the debtors' interest in a complete fresh start.'" *Cohen* v. *de la Cruz*, 523 U.S. 213, 222 (1998) (alteration in original) (quoting *Grogan* v. *Garner*, 498 U.S. 279, 287 (1991)).

Notably, some of Section 523(a)'s exceptions to discharge operate independently of the debtor's mental state, whereas others depend on it. For example, subsection 5 protects a creditor's right to recover any debt "for a domestic support obligation," subsection 7 protects any debt "for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit," subsection 13 "any debt … for any payment of an order of restitution issued under title 18," and so on. 11 U.S.C. 523(a)(5), (7) and (13). As with the provision at issue here, those provisions do not consider the debtor's intent or whether she knew or should have known every fact constituting the basis for her debt. Rather, they focus on the character of the debt itself. For example, if a debtor owes a debt for an order of restitution under the federal criminal code, Section 523(a)(13) does not "concern itself with the debtor's conduct or guilt or the propriety of the obligations imposed in the criminal case." 4 Collier on Bankruptcy ¶ 523.19 (16th ed. 2021). So long as "the order at issue is in the nature of restitution" and "it was entered pursuant to the federal criminal code," the debtor cannot discharge the debt, regardless of her precise level of intent with respect to the underlying crime. *Ibid.*

By contrast, where Congress intended for dischargeability to hinge on a debtor's state of mind, it made that clear. For example, one provision in Section 523(a) excepts from discharge debts for money obtained by certain false statements relating to the debtor's financial condition, but only where "the debtor caused [the statement] to be made or published with intent to deceive." 11 U.S.C. 523(a)(2)(B)(iv). Similarly, subsection 6 excepts debts "for willful and malicious injury by the debtor to another" and subsection 12 excepts debts "for malicious or reckless failure to fulfill any commitment by the debtor to a Federal depository institutions regulatory agency." 11 U.S.C. 523(a)(6) and (12). Where the debtor's intent matters, the Code says so—and where it does not, it does not. See 4 Collier on Bankruptcy ¶ 523.08 (16th ed. 2021) (contrasting Section 523(a)(2)(A) with Section 523(a)(2)(B) and concluding that "accepted principles of statutory construction" support the Ninth Circuit's position).

Congress has imposed express state-of-mind requirements—including petitioner's "knew or should have known" standard—throughout the Bankruptcy Code, making clear that where no such requirement is provided none is intended. See 11 U.S.C. 1305 (certain claims "shall be disallowed if the holder … knew or should have known that prior approval by the trustee … was practicable and was not obtained."); see also, *e.g.*, 11 U.S.C. 727(a)(2) (barring discharge where "the debtor, with intent to hinder, delay, or default a creditor," transferred certain property); 11 U.S.C. 727(a)(4)(A) (barring discharge where "the debtor knowingly and fraudulently, in or in connection with the case … made a false oath or account"); 11 U.S.C. 548(a)(1)(A) (allowing avoidance of transfers "if the debtor … made such transfer … with actual intent to hinder, delay, or defraud"). Congress did not include a debtor state-of-mind requirement in Section 523(a)(2)(A), confirming that no such standard applies.

2. This Court's decisions further support the decision below. More than a century ago, this Court interpreted Section 523(a)(2)(A)'s predecessor to reach the same conclusion as the Ninth Circuit below and there is no indication that Congress abrogated this result in the interim. In *Strang* v. *Bradner*, 114 U.S. 555 (1885), Strang secured money for his eponymous firm, Strang & Holland Brothers, through fraudulent misrepresentations in which "there was no active participation by his partners, the Messrs. Holland." *Id.* at 558. The Holland brothers then filed for bankruptcy and sought to discharge all of their debts. *Id.* at 556. Under the Bank-

ruptcy Act of 1867, "[t]he statute except[ed] from the operation of a discharge any 'debt created by the fraud or embezzlement of the bankrupt.[']" *Ibid.* (quoting Act of Mar. 2, 1867, ch. 176, § 33, 14 Stat. 533).

One question presented in *Strang* was the same question as here: "[W]hether the [Holland brothers] can be held liable for the false and fraudulent representations of their partner, it being conceded that they were not made by their direction nor with their knowledge." *Strang*, 114 U.S. at 561. This Court held they could: A partner's "fraud is to be imputed … to all the members of his firm" for purposes of the discharge exception, and "his partners cannot escape pecuniary responsibility therefor upon the ground that such misrepresentations were made without their knowledge." *Ibid.*

The statute's history confirms that *Strang*'s rule survives in Section 523(a)(2)(A). Cf. *Cohen*, 523 U.S. at 221 (canvassing "[t]he history of the fraud exception [to] reinforce[] our reading of § 523(a)(2)(A)"). Section 17a(2) of the Bankruptcy Act of 1898 barred discharge of "judgments in actions for frauds, or obtaining property by false pretenses or false representations." Act of July 1, 1898, ch. 541, § 17, 30 Stat. 550. This language is, if anything, broader than the language at issue in *Strang*, which required the fraud "of the bankrupt." Congress amended Section 17a(2) in 1903 to except all "liabilities for obtaining property by false pretenses or false representations." Act of Feb. 5, 1903, ch. 487, § 5, 32 Stat. 798. That language remained unchanged for the next seventy-five years, during which time "cases construing section 17a(2) of the [Bankruptcy] Act uniformly held that debts created by the fraud of the agent of a principal-debtor were nondischargeable[.]" 4 Collier on Bankruptcy ¶ 523.08. "The Bankruptcy Act of 1978 enacted a 'substantially similar' provision," which, with only "slight amendment," became today's Section 523(a)(2)(A). *Cohen*, 523 U.S. at 221 (quoting *Brown* v. *Felsen*, 442 U.S. 127, 129 n.1 (1979)).

This gradual evolution offers no indication that Congress intended to abrogate *Strang*, much less the "clear indication [of] Congress[ional] inten[t]" this Court requires to "read the Bankruptcy Code to erode past bankruptcy practice." *Pa. Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 563 (1990).

Protecting fraud victims over fraudsters' head-in-the-sand partners also makes good sense. Although one of the Bankruptcy Code's general aims is to provide honest debtors with a "fresh start," "[t]he statutory provisions governing nondischargeability reflect a congressional decision to exclude from the general policy of discharge certain categories of debts." *Grogan* v. *Garner,* 498 U.S. 279, 286–87 (1991). "Congress evidently concluded that the creditors' interest in recovering full payment of debts in these categories outweighed the debtors' interest in a complete fresh start." *Ibid.* As this Court explained, it is "unlikely that Congress … would have favored the interest in giving perpetrators of fraud a fresh start over the interest in protecting victims of fraud." *Ibid.* That interest in protecting victims of fraud similarly explains the choice to give victims priority over fraudsters' partners who benefit from and are liable for the fraud, without regard to whether the partners knew or should have known of the fraud.

B. Petitioner's Counterarguments Lack Merit

Petitioner contends that her approach "avoids creating new exceptions from discharge that are not plainly expressed in the statute." Pet. 13. But the statute expressly provides that "any debt" for "money … obtained by … actual fraud" cannot be discharged. 11 U.S.C. 523(a)(2)(A). Petitioner offers no analysis of the statutory text and never explains where she finds a "knew or should have known" requirement. That's because that standard is missing from the statute, and petitioner would need to engraft additional statutory language that is absent. Congress's choice to include similar requirements elsewhere in the Code, but not in Section 523(a)(2)(A), forecloses petitioner's position.

Petitioner reasons mostly from policy, explaining that "[t]he purpose of the discharge in bankruptcy is to give relief to the 'honest but unfortunate debtor.'" Pet. 14. But "[t]he issue at stake is not the debtor's entitlement to discharge, but rather the creditor's entitlement to have its claim carved out of the discharge." Lawrence Ponoroff, *Vicarious Thrills: The Case for Application of Agency Rules in Bankruptcy Dischargeability Litigation*, 70 Tul. L. Rev. 2515, 2531 n.58 (1996). And in choosing between the victims and the fraudster's partners who pocketed the victims' money, it is perfectly reasonable—and indeed the "more reflective policy judgment"—for Congress to favor the former. *Id.* at 2562.

Petitioner also relies on *Neal* v. *Clark*, 95 U.S. 704 (1877), and seeks to diminish *Strang* as "an aberration in need of clarification" that "did not actually consider the particular issue" and "assume[d] away and d[id] not analyze the issue of dischargeability." Pet. 9, 19–20; see *id.* at 14–15, 18–23. But as explained above, pp. 11–12, *supra*, *Strang* squarely decided the question presented in determining the liability of the Holland brothers, Strang's un-knowing partners. *Strang* held that the partners could not "escape pecuniary responsibility… upon the ground that [Strang's] misrepresentations were made without their knowledge." 114 U.S. at 561.

Neal addressed a different question and is fully consistent with *Strang*. As this Court explained in *Strang*,[2] *Neal* held that "fraud" means "positive fraud, or fraud in fact, involving moral turpitude or intentional wrong." *Strang*, 114 U.S. at 559 (citing *Neal*, 95 U.S. at 709). Here, it is undisputed that *Neal*'s requirement is satisfied by Mr. Bartenwerfer's actual fraud.

Strang subsequently addressed—and decided in respondent's favor—the question presented here: whether the actual fraud *Neal* requires can be committed by a debtor's partner rather than the debtor herself. See Ponoroff, 70 Tul. L. Rev. at 2537 ("*Strang* is not in any way inconsistent with the basic holding in *Neal*"); Ralph Brubaker, *The Dischargeability of "Control Person" Liability for Federal Securities Fraud: Actual Fraud, Vicarious Nondischargeability, and the Vacillating Objects of the § 523(a)(2)(A) Discharge Exception*, 22 Bankruptcy Law Letter No. 5, at 8 (May 2002) (similar).

Petitioner also cites several recent decisions of this Court interpreting Section 523, but none supports adding an atextual "knew or should have known" requirement to Section 523(a)(2)(A). Pet. 16–17, 22–23.

First, petitioner invokes this Court's statement that "courts that have previously construed this statute[] routinely requir[e] intent," Pet. 16 (quoting *Field* v. *Mans*, 516 U.S. 59, 68 (1995)). Petitioner similarly invokes *Bullock* v. *BankChampaign, N.A.*, 569 U.S. 267 (2013), to argue that "fraud requires at least some level of scienter." Pet. 17. But there is no dispute that the fraud here involved, at a minimum, the fraudulent intent of respondent's business partner. *Field* and *Bullock*

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[2] Justice Harlan authored this Court's opinion in both *Neal* and *Strang*. Justice Harlan and the unanimous Court that joined him in *Strang* did not see any conflict with the earlier-decided *Neal*.

do not address, much less support, petitioner's effort to add a second intent requirement that the debtor herself "knew or should have known" of the actual fraud.

Petitioner also cites (Pet. 16) *Field*'s comment that "it would … take a very clear provision to convince anyone of anything so odd" as to "bar discharge to a debtor who made unintentional and wholly immaterial misrepresentations having no effect on a creditor's decision." *Field*, 516 U.S. at 68. But *Field*'s holding—that Section 523(a)(2)(A) requires a creditor's "justifiable reliance" on a fraudulent statement to avoid discharge, *id.* at 74–75—is not at issue in this case. See C.A. E.R. 178–179. And there is nothing "odd" about holding a debtor liable for money she owes a defrauded creditor as a result of her partner's actual fraud. To the contrary, it is perfectly sensible for Congress to favor "protecting victims of fraud" over giving a fresh start to fraudsters' partners. *Grogan*, 498 U.S. at 287.

Finally, petitioner cites *Kawaauhau* v. *Geiger*, 523 U.S. 57 (1998), which held that harm inadvertently caused by medical malpractice does not qualify as "willful and malicious injury" within the meaning of Section 523(a)(6). Pet. 26 (quoting 11 U.S.C. 523(a)(6)). But *Geiger*, which addressed a purely negligent action in the context of a different statutory provision, is fundamentally inapposite. This Court's interpretation of the *express* willfulness requirement in that provision does nothing to support petitioner's argument that an unstated "know or should have known" standard should be added to Section 523(a)(2)(A).

II. The Split Is Lopsided, Longstanding, and Has Limited Practical Significance

1. Petitioner has identified a longstanding split of authority, but it is lopsided in respondent's favor and

the decisions that favor petitioner fail to reckon with the Bankruptcy Code's text.

In addition to the Ninth Circuit's (unpublished) opinion below, three other Courts of Appeals have interpreted Section 523(a)(2)(A) as respondent does. The Fifth Circuit in *Winkler* engaged in a detailed analysis of the text of Section 523(a)(2)(A) to conclude that "the plain meaning of the statute is that debtors cannot discharge any debts that arise from fraud so long as they are liable to the creditor for the fraud." 239 F.3d at 749, 752. The Eleventh Circuit recognized a similar rule: "[U]nder *Neal* and *Strang* and their progeny, a debt may be excepted from discharge when the debtor personally commits actual, positive fraud, *and also when such actual fraud is imputed to the debtor under agency principles*." *Hoffend* v. *Villa* (*In re Villa*), 261 F.3d 1148, 1151 (11th Cir. 2001) (emphasis added), cert denied, 535 U.S. 1112 (2002). And the Sixth Circuit reached a similar result, holding that the fraud of a debtor's partner is grounds for nondischargeability where the fraud was conducted on behalf of the partnership in the ordinary course of the partnership's business—which was the case here. *See Banc-Boston Mortg. Corp.* v. *Ledford* (*In re Ledford*), 970 F.2d 1556 (6th Cir. 1992), cert. denied, 507 U.S. 916 (1993).

By contrast, the two cases on petitioner's side of the split—from the Seventh and Eighth Circuits—are thinly reasoned and fail to address the Code's text. Judge Posner's opinion in *Sullivan* v. *Glenn* admits that focusing on the nature of the debt and not the debtor's state of mind "is consistent with the language of the fraud exception to discharge," but presses on nonetheless, explaining that this language merely "illustrates the limitations of literal interpretation of statutory language." 782 F.3d at 380. The opinion quotes petitioner's "knew or should have known standard" from the Eighth Circuit's per curiam decision in *Walker* v. *Citizens State Bank* (*In re Walker*), 726 F.2d 452 (1984), and justifies that rule with reference to economic policy rather than statutory text. See *Sullivan*, 782 F.3d at 382 ("[T]here is, so far as we can determine, no net social benefit to be obtained by embracing the [alternative] position[.]").

For its part, *Walker* was decided decades earlier and did not analyze the Bankruptcy Code's text. It instead rests on a citation to a Second Circuit decision from 1941, *In re Lovich*, 117 F.2d 612. See *Walker*, 726 F.2d at 454 (citing *Lovich*). But *Lovich*—which petitioner claims further deepens the split in authority, Pet. Br. 24—addressed a different provision of bankruptcy law (regarding general grounds for denying a debtor's discharge rather than the non-dischargeability of specific debts) in a prior version of the statute. The opinion in *Lovich* did not discuss *Strang* and instead reached its conclusion mainly "[o]n principle." *Lovich*, 117 F.2d at 614–615.[3]

The conflict at issue has accordingly persisted for decades. This Court has repeatedly denied certiorari when prior petitions invoked the same conflict to seek review. See *Sullivan*, 782 F.3d 378, cert. denied, 577

[3] Petitioner also overstates the depth of the split by citing *Levy* v. *Indus. Fin. Corp.*, 16 F.2d 769 (4th Cir. 1927), aff'd, 276 U.S. 281 (1928)). See Pet. 24. Like *Lovich*, *Levy* addressed a different question under a different provision of a different version of the statute. See *Levy*, 16 F.2d at 771 (Under "section 14(b) of the Bankruptcy Act [of 1898,] . . . [i]s the bankrupt entitled to discharge, notwithstanding the making of the false statements in writing, because the money which was obtained by means thereof was received, not by him, but by the corporation?").

U.S. 1029; *In re Villa*, 261 F.3d 1148, cert denied, 535 U.S. 1112; *In re Ledford*, 970 F.2d 1556, cert. denied, 507 U.S. 916.

2. The divide in authority is also less significant than petitioner suggests, as the delta between liability under traditional partnership principles and petitioner's "knew or should have known" standard is sufficiently narrow as to rarely matter in practice. In many cases where a partner's fraud is sufficiently connected to the activity of the partnership as to justify the imputation of liability under traditional agency principles and state law, the partner knew or should have known about the fraud. See *Miske* v. *Coxeter*, 139 Cal. Rptr. 3d 626, 631 (Ct. App. 2012) (Under California law, "all partners in a partnership are bound by the fraud of a copartner acting within the scope of his or her authority in a partnership transaction."); see Revised Unif. P'ship Act § 305 (holding partners liable for only acts done "in the ordinary course of business of the partnership or with authority of the partnership").

Petitioner offers nothing concrete to show otherwise. To the contrary, the cases petitioner relies upon are mostly decades old—suggesting the issue is not often dispositive. And in one of the two court of appeals cases coming out petitioner's way, the bankruptcy court on remand found that applying petitioner's heightened standard had no effect on the outcome of the case. See *Citizens State Bank v. Walker* (*In re Walker*), 53 B.R. 174, 182 (Bankr. W.D. Mo. 1985) ("[T]he debtor 'should have known of the fraud' within the meaning of the standard set down by the court of appeals.").

Petitioner contends that the question "*potentially* impacts every joint transaction or endeavor that may be construed as a partnership." Pet. 28–29 (emphasis added). But petitioner gives no reason to think that the issue *actually* arises in very many cases. It does not. Fortunately, only in a small subset of partnerships does one partner obtain money through a business partner's fraud and attempt to protect the proceeds of that fraud in bankruptcy. Even less often is the fraud one about which the debtor neither knew nor should have known. And petitioner's contentions about "indefinite involuntary servitude" are plainly baseless. *Id.* at 28.

Finally, petitioner invokes the Constitution's uniformity requirement for bankruptcy laws. Pet. 28 (citing U.S. Const. art. I, § 8, cl. 4). But this petition implicates no actual bankruptcy-uniformity issue. Cf. *Siegel* v. *Fitzgerald*, cert. granted, No. 21-441 (oral argument scheduled for Apr. 18, 2022) (raising such an issue). And the fact that a petition for certiorari identifies a circuit split involving bankruptcy does not suffice to justify review. See, *e.g.*, *Rockwell* v. *Hull* (*In re Rockwell*), 968 F.3d 12 (1st Cir. 2020), cert. denied, 141 S. Ct. 1372 (2021).

III. This Case Is Not an Ideal Vehicle

Because the Ninth Circuit correctly adopted respondent's interpretation of Section 523(a)(2)(A), it had no occasion to address respondent's additional, well-preserved arguments that he would prevail even under petitioner's rule. See Pet. App. 6a; Resp. C.A. Br. 39–55. As explained above, see pp. 2–3, *supra*, petitioner was a registered real estate broker who was a partner in a venture to flip multiple properties. She signed a state-mandated disclosure statement as "Seller" falsely representing the condition of the property she and her partner sold to respondent. After a 19-day trial, a state-court jury entered a special verdict finding that the "Bartenwerfers failed to disclose information that they knew or should have known about water leaks, window conditions, permits and the fire escape." C.A. E.R. 4, 178–179. Not only is it the case that petitioner knew or should have known of her partner's fraud, she was directly liable for it.

As respondent argued below, the bankruptcy court reached a contrary result only by making multiple errors of law and fact, including by (1) refusing to address respondent's argument that petitioner was directly liable for the fraud, see Resp. C.A. Br. 45–52; (2) erroneously characterizing the knew or should have known standard to require proof that petitioner affirmatively "learn[ed] of facts that require[d] investigation … but fail[ed] to undertake such an inquiry," *id.* at 32–33, 43–45 (quoting Pet. App. 58a); and (3) misapplying the law to the facts, *id.* at 43–45.

The Ninth Circuit did not address these additional well-preserved arguments, however, which means that the question presented may not be outcome determinative. If this Court were to affirm, then respondent would prevail. But if this Court were to grant certiorari and reverse without resolving those additional issues, respondent still could prevail on remand.

The only certain result of this Court's review would be to prolong petitioner's decade-long attempt to escape her liability to respondent for the money she obtained from him by her business partner's fraud. This Court should deny review and bring this matter to an end.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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