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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case No. 15-145, Husky International Electronics
5 v. Ritz.

6 Mr. Dvoretzky.

7 ORAL ARGUMENT OF SHAY DVORETZKY

8 ON BEHALF OF THE PETITIONER

9 MR. DVORETZKY: Mr. Chief Justice, and may
10 it please the Court:

11 Congress amended the discharge bar in 1978
12 to add actual fraud as an additional ground for barring
13 discharge. That amendment must be given meaning. Our
14 interpretation is the only one that does so.

15 Consistent with the common-law understanding
16 that Congress codified, "actual fraud" is a term of art
17 that includes a recipient's knowing participation in a
18 deliberate fraudulent transfer. By contrast, the Fifth
19 Circuit's holding that actual fraud invariably requires
20 a misrepresentation makes Congress's amendment
21 superfluous because it equates actual fraud with the
22 preexisting terms, "false pretenses" and "false
23 representation."

24 Respondent's interpretation is even worse.
25 It merely restates a preexisting scienter requirement.

1 And in any event, Congress could not plausibly have
2 added "or actual fraud" to the discharge bar in order to
3 modify the previous terms to mean intentional false
4 pretenses or an intentional false representation.

5 CHIEF JUSTICE ROBERTS: You'd -- you'd
6 acknowledge, wouldn't you, that if the language we used
7 in Field against Mans is applicable, or if we meant it,
8 that you lose? Some degree of reliance is required to
9 satisfy the element of causation inherent in the phrase
10 "obtained by"?

11 MR. DVORETZKY: I don't think that language
12 is applicable here, because that language has to be --

13 CHIEF JUSTICE ROBERTS: No, no. I
14 understand, and I understand your argument there. But
15 if it is, if we think that language does apply across
16 the board, you certainly lose.

17 MR. DVORETZKY: Yes, if you believe that
18 "obtained by" invariably requires reliance, but it does
19 not. The -- the language in Field was in the context of
20 a misrepresentation case. What obtained by requires is
21 causation. In the context of a fraudulent transfer
22 where the recipient knowingly participates in a
23 deliberate fraudulent transfer, centuries of common law
24 established that he commits actual fraud himself. He
25 therefore obtains the property by actual fraud. That's

1 that --

2 JUSTICE GINSBURG: But you would have to --
3 you would have to show down the road that the -- the
4 money was obtained by Ritz. Because as I understand it,
5 it was transferred from the first company to a bunch of
6 other companies, not to Mr. Ritz himself.

7 MR. DVORETZKY: That -- that's correct,
8 Justice Ginsburg. Down the road, we would need to show
9 that our State law veil-piercing theory is correct.

10 That, however, is not the basis on which the
11 Fifth Circuit rejected our claim. The Fifth Circuit
12 rejected our claim on the sole ground that it thought
13 actual fraud invariably requires a misrepresentation.

14 JUSTICE KENNEDY: Would you have to show
15 under State law not only the veil-piercing -- that
16 there's veil piercing, but that there is fraud under
17 State law?

18 MR. DVORETZKY: Correct. We would need to
19 show two things under State law: First of all, that
20 Ritz orchestrated a fraudulent transfer by transferring
21 assets from Chrysalis to his other entities in order to
22 hinder creditors.

23 Second of all, we would have to show that he
24 perpetrated that fraud for his own personal benefit,
25 which is what would then allow us to pierce the

1 corporate veil and hold him personally liable for the
2 fraud that he committed.

3 JUSTICE KAGAN: Are you piercing the
4 corporate veil as to the first company, or as to the
5 transferee companies?

6 MR. DVORETZKY: We are piercing the -- it
7 could be either, but -- but I think we are piercing the
8 veil as to the transferee companies because we're
9 pursuing this on a recipient theory.

10 JUSTICE KAGAN: Right. Because -- because I
11 understood your whole brief to be pursuing this on a
12 recipient theory.

13 MR. DVORETZKY: Correct.

14 JUSTICE KAGAN: And your brief, you know,
15 makes some sense as that. But then when you look back
16 to your complaint, it suggests that the veil-piercing
17 actually was attempted as to the transferor company,
18 which doesn't do you any good under your theory.

19 MR. DVORETZKY: So the complaint fully spells
20 out all of the details related to the transfers. And
21 generally -- this is at Joint Appendix 97 -- asks for
22 avoidance of all fraudulent transfers to the extent
23 necessary to satisfy plaintiff's claims. Throughout the
24 litigation, the claims were then pursued on a transferee
25 theory. The Fifth Circuit understood the claim that way

1 and rejected it solely because, again, the lack of a
2 misrepresentation.

3 The problem with the Fifth Circuit's
4 interpretation is that it nullifies Congress's
5 amendment, or actual fraud. It makes it meaningless
6 simply by restating the previous terms, "false
7 pretenses" or "false representations." When Congress
8 added "or actual fraud" to the discharge bar, it was
9 legislating against the backdrop of hundreds of years of
10 common-law usage of that term.

11 For centuries, courts had used "actual
12 fraud" to refer to fraudulent transfers.

13 JUSTICE BREYER: I -- I know. And I'm
14 rather slightly self-regarding the statement. But, I
15 mean, 20, 30 years ago, I had a case on fraudulent
16 conveyance where my law clerk looked up every single
17 case in sight, poor man. And we went back to Queen
18 Elizabeth, and I wrote down what I thought it was.
19 Well, obviously, that affects my -- my -- my thinking on
20 this. And I don't have any way of knowing that it's
21 still -- what I wrote was correct. It's called
22 Burnazos, if you want to look at it. But not now.

23 The -- but the point of the classical
24 examples that we found -- let's take one of them -- is a
25 person knowing that he's about -- has creditors. He has

1 to know that he has creditors. Maybe he knows of the
2 insolvency, and he transfers money to his wife rather
3 than to the creditors. And she knows it too, and this
4 is a way of getting the money away.

5 That's a fraud classic, right?

6 MR. DVORETZKY: Yes.

7 JUSTICE BREYER: Okay. So now when I look
8 at the statute, I see these words: To the extent that
9 it's a debt, it's a debt obtained by actual fraud.

10 Now, wait. Whose debt are we talking about?
11 We're talking about Creditor C, who was a creditor of
12 the transferor. And it's the transferee, the -- the
13 wife who obtained -- she's the one who's got the money.
14 And so it sounds like the bankruptcy statute is saying
15 she's the one in her bankruptcy. Now, that can't be
16 right. And so -- so how is this supposed to work?

17 I mean, now you're -- the obvious question
18 to ask you is the question, if it doesn't mean
19 representation, give me one example of what it does
20 mean. Well, I just gave you one, and as you can see,
21 I'm -- I'm quite confused as to how that works. And I
22 haven't seen another one.

23 MR. DVORETZKY: I think the way your
24 hypothetical works, Justice Breyer, is that the
25 recipient in that instance, the wife --

1 JUSTICE BREYER: Uh-huh

2 MR. DVORETZKY: -- commits actual fraud
3 herself.

4 JUSTICE BREYER: Yeah.

5 MR. DVORETZKY: And when she commits actual
6 fraud herself, she incurs her own debts.

7 JUSTICE BREYER: So for the fee -- the
8 problem with her is she is not trying to deceive a
9 creditor of hers. She is not -- she is not trying to
10 deceive her creditor, it's the transferor whose
11 creditors are being fraudulently deceived.

12 MR. DVORETZKY: True. But if she is
13 conspiring, in effect, with the transferor, she is
14 facilitating his fraud.

15 JUSTICE BREYER: All right. So you're
16 saying in a bankruptcy of the wife, this is money
17 obtained by fraud, which it is. And the fact that she's
18 helped him defraud his creditors is sufficient to bring
19 us under the 1924 Massachusetts Statute. It's copied
20 from the UCC, which ultimately is traced back to the
21 Statute of Elizabeth. That's how it works?

22 MR. DVORETZKY: Yes.

23 JUSTICE BREYER: Thank you.

24 MR. DVORETZKY: She -- she commits -- she
25 commits fraud. In the course of committing, fraud she

1 obtains money. She then has a debt for that money, and
2 it's nondischargeable under 523(a)(2)(A).

3 JUSTICE BREYER: Thank you.

4 MR. DVORETZKY: That understanding is
5 consistent with the common-law understanding of actual
6 fraud, which is what Congress codified in order to add
7 an additional ground for discharge. The legislative
8 history of the 1978 Code makes clear that Congress was
9 adding an additional ground for discharge, so it was
10 expanding -- an additional ground for barring discharge,
11 excuse me. So it was expanding the scope of the
12 discharge bar.

13 JUSTICE KAGAN: It does make the language
14 "false pretenses" or "false representations" completely
15 superfluous, yes?

16 MR. DVORETZKY: It does, but the key point
17 here is that it also expands upon that language, whereas
18 the Fifth Circuit's -- the Fifth Circuit's
19 interpretation also makes "false pretenses" and "false
20 representations" superfluous without giving Congress's
21 amendment any additional work to do.

22 So too for Respondent's interpretation,
23 which first of all, merely restates a preexisting
24 scienter requirement, so it gives the amendment no
25 additional broadening scope. And second of all, is

1 grammatically indefensible because "or actual fraud" is
2 not a narrowing phrase that modifies what comes before
3 it.

4 Congress could perhaps have simply replaced
5 "false pretenses" and "false representations" with "or
6 actual fraud," but that might have led to an unwarranted
7 negative inference by the deletion of terms "false
8 pretenses" and "false representations" that had been in
9 the statute for a very long time.

10 JUSTICE GINSBURG: So you -- you would like
11 the Court to -- to hold that "actual fraud" means
12 something other than false pretenses or
13 misrepresentation; that it's -- it's a broader term, it
14 includes things that were not already included, period,
15 and then whatever other issues would be -- to be
16 resolved on remand?

17 MR. DVORETZKY: That's -- that's correct,
18 Justice Ginsburg.

19 With respect to Respondent's interpretation,
20 first of all, as we established in our reply brief,
21 false pretenses and false representations already
22 required intentional fraud. No court had interpreted
23 those terms in the discharge bar before 1978 to apply to
24 innocent conduct, and so there is no basis to think that
25 when Congress added "or actual fraud" to the statute, it

1 was simply restating an existing rule.

2 This Court has, in the past, refused to
3 infer -- to interpret congressional amendments simply to
4 restate existing rules when there is a plausible --
5 indeed, settled, in light of the common-law --
6 understanding, like the one that we offer that gives the
7 amendment an additional function.

8 The other problem with Respondent's
9 interpretation, of course, is grammatical. "Or" is a
10 disjunctive term that expands on what comes before; it's
11 not a term that limits what comes before.

12 And moreover, "actual fraud" is a noun
13 phrase that in -- that represents both conduct; fraud,
14 and the way in which it is carried out, intentionally.
15 It's not simply a mens rea.

16 CHIEF JUSTICE ROBERTS: Why did Congress
17 take the term "fraud" out of the Bankruptcy Act in 1903?

18 MR. DVORETZKY: The legislative history
19 doesn't tell us why Congress did that. What we do know
20 is that when Congress took out that term in 1903, at
21 least one legislator expressed concern that this was
22 leaving a category of frauds outside the discharge bar,
23 and that that was a mistake because the -- the purpose
24 of the discharge bar has long been to afford relief only
25 for the honest but unfortunate debtor and not to allow

1 the Bankruptcy Code to be used for an engine for fraud.

2 In 1978, Congress closed that gap by adding
3 the additional ground for discharge back in.

4 CHIEF JUSTICE ROBERTS: So all -- all you've
5 got in 1903 is one -- one legislator.

6 MR. DVORETZKY: Yes. We have one legislator
7 expressing the concern --

8 CHIEF JUSTICE ROBERTS: I have a big -- this
9 isn't necessarily hostile to your position, but it's
10 kind of a big change to take fraud out of a bankruptcy
11 statute. I mean, nobody seems to know why.

12 MR. DVORETZKY: Nobody seems to know why.
13 We don't dispute, of course, that typically, most
14 commonly frauds will involve misrepresentations, and so
15 those frauds were still covered. And of course, as a
16 result of Congress's drafting, there are other discharge
17 bars that apply to narrower types of -- narrow and
18 different types of fraud.

19 And so Congress didn't completely forget
20 about fraud in 1903. It did, however, take it out of
21 this particular discharge bar, over the concern
22 expressed by at least one -- one legislator.

23 In the interim period, between 1903 and
24 1978, courts did note that the discharge bar in effect
25 at that time covered only false pretenses and false

1 representations, and that there was in fact a gap. And
2 then in 1978, as part of a comprehensive overhaul of the
3 Bankruptcy Code, Congress closed that gap.

4 And so we submit that this Court should
5 interpret the -- the discharge bar in a way that gives
6 full effect to Congress's amendment. Our interpretation
7 is consistent with the plain common-law meaning of the
8 words "actual fraud." It does not require grammatical
9 distortions, and it accords with the purpose of the
10 discharge bar, which is, again, to provide relief only
11 for honest debtors and not to allow the Bankruptcy Code
12 to be used as an engine for fraud in the way that
13 occurred in this case.

14 JUSTICE KAGAN: Ms. Murphy points out that
15 there are lots of other provisions in 523(a), which have
16 a lot of overlap on this provision on your reading. And
17 then also the fraudulent conveyance provisions, if you
18 would talk a little bit about those.

19 MR. DVORETZKY: Sure. Let me address the
20 fraudulent conveyance provisions first.

21 The fraudulent conveyance provisions are
22 targeted at the transferor, not the transferee. And so
23 our reading of 523 complements those provisions rather
24 than conflicts with them.

25 727 provides that there is no discharge at

1 all if a debtor transfers assets to -- to hinder
2 creditors within a year of the bankruptcy filing.

3 548 allows the trustee to pursue claims for
4 transfers within two years, but nothing about our
5 reading of 523 is inconsistent with that. It simply
6 provides that, in addition to those things, creditors
7 may pursue fraud claims where there is a fraudulent
8 transfer against the -- the transferee. And if the
9 transferee ends up in a double bankruptcy situation, so
10 to speak, then at that point, 523 complements the other
11 provisions.

12 With respect to the other discharge bars
13 that address fraud, there is inevitably some overlap
14 among these discharge bars. Partly that's a result of
15 Congress's drafting. Congress chose to use the word
16 "fraud" in multiple places, and so you're going to have
17 overlap as a result of that. Partly it is a result of a
18 belt-and-suspenders approach to effectuate the policy of
19 ensuring, again, that fraudulent debtors don't get away
20 with their fraud.

21 Our reading, however, does not lead to any
22 more overlap than Respondent's reading does. Either
23 way, there is going to be overlap between the false
24 pretenses and false representations type of fraud, which
25 Respondent thinks (a)(2)(A) is limited to. And

1 fiduciary fraud, for example, under (a)(4), if that
2 fiduciary fraud takes the form of a false pretense or a
3 false representation.

4 JUSTICE BREYER: All right. My question, so
5 I better ask -- no. Go. You go. I'll ask -- I don't
6 want to take your time.

7 MR. DVORETZKY: So the overlap is
8 inevitable. That's not a reason to prefer Respondent's
9 interpretation when our interpretation also gives
10 Congress's amendment additional work to do.

11 Briefly, with respect to (a)(6), it's not at
12 all clear that this -- this conduct would fit within
13 (a)(6), which has a higher standard, willful and
14 malicious injury, not just reckless disregard, which is
15 sufficient to establish actual fraud.

16 If I may, I'll reserve the remainder of my
17 time.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 JUSTICE BREYER: I'll ask. Ask.

20 CHIEF JUSTICE ROBERTS: Ms. Harrington.

21 ORAL ARGUMENT OF SARAH E. HARRINGTON

22 FOR UNITED STATES, AS AMICUS CURIAE,

23 SUPPORTING THE PETITIONER

24 MS. HARRINGTON: Thank you, Mr. Chief

25 Justice, and may it please the Court:

1 The Court of Appeals erred in holding that
2 Section 523(a) (2) (A) always requires proof of an
3 intentional misrepresentation in order to prove actual
4 fraud. There are three main reasons why Petitioner and
5 the government are right about our interpretation of
6 Section 523(a) (2) (A) .

7 The first is that this Court has said many
8 times that when Congress uses a term that has an
9 established common-law meaning, courts should give it
10 that meaning when it's used in a statute.

11 For centuries, the term "actual fraud" has
12 been used at common law to refer to schemes that are
13 in -- that -- that where property is transferred with
14 the -- with the intent to hinder, delay, or defraud a
15 creditor. There is no reason to give that text any
16 different meaning than in Section 523(a) (2) (a) .

17 The second is that our view is the only
18 thing that -- the only interpretation that gives any
19 meaning to the 1978 amendment.

20 And the third is that our view is consistent
21 with Congress's overarching purpose and the Bankruptcy
22 Code, that -- that dishonors creditors -- excuse me --
23 dishonors debtors, not be permitted to use the Code to
24 get rid of their debts.

25 Now, Respondent offers a competing textual

1 interpretation of the term -- of the phrase "or actual
2 fraud." I think Petitioner has explained well why that
3 interpretation doesn't make any sense as an -- as a
4 grammatical matter. It also wouldn't give any effect to
5 the 1978 amendment.

6 Petitioner also relies on the -- on the word
7 "obtained," which Justice Breyer was referring to as
8 well. Excuse me. Respondent does -- Respondent
9 suggests that our interpretation doesn't give any
10 meaning to the word "obtained," if obtained doesn't mean
11 that a false representation was directed at a creditor.

12 But under our view, the word "obtained"
13 actually does two things: The first thing it does is
14 the work that this Court described it as doing in
15 Cohen v. de la Cruz, which is it requires a causal
16 connection between the fraudulent act and the debtor's
17 acquisition of -- or possession of the property or
18 money.

19 But the second thing it does, in the
20 fraudulent transfer context, specifically, is it sort of
21 screens out the innocent recipient of a fraudulent
22 transfer. And so if Congress had instead used the
23 phrase "obtained as a result of actual fraud," then
24 argue -- arguably, that could have brought in an
25 innocent recipient of a fraudulent transfer, because as

1 a result, I would suggest that you focus on the
2 transaction that caused the transfer of property.

3 But "obtained by" really focuses on the
4 action of the recipient. And so it really just gets at
5 the recipient's mental state and -- and fraudulent
6 activity.

7 JUSTICE BREYER: That's the part -- you see,
8 it's still gnawing at me is I wish you had read this
9 case. Because -- because when we went through it,
10 this -- this sentence, fraudulent -- and I wouldn't
11 raise this, except the only example other than the
12 misrepresentation that you've come up with is the
13 fraudulent conveyance.

14 And what I said, after reading all --
15 "fraudulent conveyance law permits creditors to recover
16 money that a debtor has disposed of in a manner
17 similar," and then I described three paradigm cases.

18 All right. So what they're thinking of is a
19 transferor has creditors. And what he did well before
20 going into bankruptcy, but he knew he was likely to be
21 insolvent, the transferor transfers money to his friends
22 rather than the creditors, to a place that it's hard to
23 get at, you know, to somebody who is going to -- all
24 right.

25 Now, looking at this statute, it seems to me

1 that the person whose debt is going to survive
2 bankruptcy is not the transferor, because normally,
3 fraudulent conveyance law permitted his bankruptcy judge
4 to claw back the money. But that's not what you're
5 talking about. You're talking about the transferee, and
6 you're saying here, the transferee's participation in
7 the transferor's effort to defraud his creditor is
8 something that also survives.

9 And at that point I ask, of all the bad
10 things that people can do that might survive, why in
11 heaven's name do they pick on this one in respect to the
12 transferee? I mean, after all, maybe the transferee
13 robbed a bank. I mean, there are all kinds of bad
14 things that might survive, and -- and don't.

15 So was -- so am I -- something's wrong with
16 my analysis, as you understand it, and that's what I've
17 got to get into my head.

18 MS. HARRINGTON: Well, see, there are all
19 kinds of debts that -- that do survive a bankruptcy,
20 including the debt for the transferor.

21 JUSTICE BREYER: Yeah. If I got what I'm
22 talking about right, in terms of the debt.

23 MS. HARRINGTON: Well -- so I think it is
24 important to realize there are two distinct debts:
25 There's the original debtor -- there's original debt

1 from the creditor to debtor one. Debtor one transfers
2 his property to a friend. If the friend -- with the
3 intent to defraud his creditor. If the friend shares
4 that intent, then the State law or some Federal law
5 gives the creditor a cause of action to go after the
6 recipient, to go after the friend.

7 If that -- if that is successful, then
8 there's a new debt that's created from -- to the
9 creditor from the -- from the friend. And that's the
10 debt we're talking about here.

11 With respect to why that wouldn't be
12 dischargeable, when -- if you're outside the time limits
13 that are covered by 548 or 727, the transferors
14 wouldn't -- it's because the transferee, the recipient,
15 is the person who ends up with the money or the
16 property, right?

17 So the second overarching purpose of the
18 Bankruptcy Code is to let creditors get their money back
19 when they can. And so it makes sense that Congress
20 would have wanted to give maybe a stronger remedy --

21 JUSTICE BREYER: I see.

22 MS. HARRINGTON: -- against the person who
23 actually has the stuff at the end of the day.

24 And so I think that's why our -- our reading
25 is consistent with the purpose of the -- of the Code in

1 general.

2 CHIEF JUSTICE ROBERTS: Is -- is the veil
3 piercing that's going on here with respect to Chrysalis
4 as well, or just the companies to which Chrysalis's
5 assets were shifted?

6 MS. HARRINGTON: Well, you know, Mr.
7 Dvorestzky suggested that it's -- with -- with respect
8 to the recipients, recipient corporations, I think that
9 there -- there are many questions about the State law
10 cause of action that would need to be resolved on remand
11 if the Court were to reverse.

12 And I would just point out, on -- on the
13 final page of our brief, we have the text of the veil
14 piercing -- the Texas veil piercing, such that in -- in
15 order -- in order to prevail under that section, the
16 Petitioner is going to have to prove it says an actual
17 fraud for the direct personal benefit of the holder.
18 And so they're basically going to have to prove that
19 Mr. Ritz obtained money or property by actual fraud, in
20 order to prevail under the State law cause of action.

21 CHIEF JUSTICE ROBERTS: So how does that
22 work in the bankruptcy case? We say this debt can't be
23 discharged, but maybe it will turn out that it could
24 have been, depending on how -- how the State law claim
25 goes?

1 MS. HARRINGTON: There's -- so what happens
2 is there's an adversary proceeding in the bankruptcy --
3 in the larger bankruptcy proceeding itself. And so
4 instead of having parallel litigation in State court,
5 that action was stayed when the bankruptcy petition was
6 filed. And basically, all the action is transferred to
7 the bankruptcy court.

8 CHIEF JUSTICE ROBERTS: So the bankruptcy
9 court will decide the question under State law?

10 MS. HARRINGTON: Yes, yes.

11 CHIEF JUSTICE ROBERTS: Okay.

12 MS. HARRINGTON: And the bankruptcy court
13 held that it -- it wasn't satisfied in this case,
14 because the bankruptcy court viewed those Texas laws as
15 requiring a misrepresentation, and also as 523(a)(2)(a)
16 is requiring misrepresentation.

17 And so I think there -- there are a lot of
18 things that would need to be sorted out about the State
19 law cause of action on remand.

20 I just want to say one last thing on
21 redundancy, if I could. There's a couple of
22 specific provisions in 523 that the Respondent suggests
23 are redundant. One of them is 523(a)(4), and Respondent
24 suggests that -- and that's the -- that covers fraud in
25 a fiduciary capacity, such that if we're correct that

1 anything that would be covered by (a)(4) would -- would
2 also be covered by 523(a)(2)(A).

3 But that's not correct, because 523(a)(4) is
4 not -- is not limited to situations in which money or
5 property was obtained by fraud. And so it could cover a
6 fraud where a fiduciary caused one of your properties to
7 go to a third party. And -- and so that would be
8 covered by (a)(4) and wouldn't be covered by (a)(2)(a).

9 And just in general, one last thing on
10 redundancy, I think Congress is trying to be
11 comprehensive in preventing dishonest debtors from
12 discharging their debts in bankruptcy. And so Congress
13 used broad words like "fraud," and instead of sitting
14 down and thinking -- trying to think up every different
15 fraudulent scheme that people might come up with,
16 Congress just wanted to be comprehensive and say
17 "fraud," and it uses the same word "fraud" in multiple
18 places. That's going to create overlap. But that's a
19 feature of the system, and not a flaw in the system.

20 Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Ms. Murphy.

23 ORAL ARGUMENT OF ERIN E. MURPHY

24 ON BEHALF OF THE RESPONDENT

25 MS. MURPHY: Mr. Chief Justice, and may it

1 please the Court:

2 Section 523(a)(2) applies to a specific type
3 of debt, a debt for something with which the debtor has
4 fraudulently induced the creditor to part. That
5 conclusion follows from the text of the statute for at
6 least three reasons: First, because the statute
7 expressly says that the debt has to be for something
8 obtained by the debtor's conduct; second, because the
9 statute explicitly and repeatedly talks about forms of
10 conduct where the debtor obtains something by inducing
11 detrimental reliance; and third, because the statute
12 makes clear on its face that it's the creditor whose
13 detrimental reliance has to be induced.

14 Because Section 523(a)(2) applies only when
15 the debtor induces the creditor to part with something,
16 it does not apply to a debt for receiving money through
17 a fraudulent conveyance. That may be a form of fraud.
18 It may well be a form of actual fraud, but it's not a
19 form of fraud that gives rise to a debt that is subject
20 to exception from discharge under 523(a)(2).

21 JUSTICE GINSBURG: Well, what -- what would
22 Congress have to write to cover a scheme like this?

23 MS. MURPHY: Well, I think --

24 JUSTICE GINSBURG: You say it's not covered
25 under (a)(2).

1 MS. MURPHY: Sure. I think the most natural
2 way to do it would be by saying "fraudulent conveyance"
3 or "fraudulent transfer" or a "fraud that involves
4 intent to delay, defraud or -- or hinder a creditor."
5 Those are the terms that Congress uses when it's
6 legislating about fraudulent conveyance, which Congress
7 has done repeatedly and pervasively for a hundred and
8 fifty years.

9 If you look at the fraudulent conveyance
10 statutes, not a single one of them uses this term
11 "actual fraud." So this is not a term that's
12 associated, particularly with --

13 JUSTICE BREYER: Well, you have the 1924
14 Massachusetts statute copied from the Uniform Commercial
15 Code, which, in referring to fraudulent conveyance in
16 Section 7, uses these words: "Each conveyance made with
17 actual intent as distinguished from intent presumed in
18 law to" -- da, da, da -- "hinder, delay, or defraud
19 present or future creditors is fraudulent."

20 MS. MURPHY: Sure.

21 JUSTICE BREYER: I grant they did use the
22 word "actual intent," rather than "actual intent to
23 hinder delay, defraud," and then they said it is
24 fraudulent. That sounds an awful lot like the words
25 "actual fraud."

1 MS. MURPHY: And -- and to be clear, we
2 don't dispute that fraudulent conveyance is a form of
3 actual fraud. It's just not a form of actual fraud that
4 falls within the scope of this particular exception
5 because this exception says more than just the words
6 "actual fraud." It says that you have to have a debt
7 for money, property, services or credit to the extent
8 obtained by false pretenses, false representations and
9 --

10 JUSTICE BREYER: Well, a --

11 MS. MURPHY: -- actual fraud.

12 JUSTICE BREYER: The -- the friend who
13 obtained the \$40,000 which the friend knew was owed to
14 the creditor of the transferor has obtained money, money
15 through -- it is a debt. She owes the debt. She now
16 owes the debt to the creditors of the transferor because
17 she has the 40,000 knowing that it's wrongly conveyed.
18 So she now owes the debt to the creditors, and her debt
19 was obtained by actual fraud.

20 MS. MURPHY: I don't think it was.

21 JUSTICE BREYER: Because?

22 MS. MURPHY: Because she didn't use the
23 fraud to obtain the money. And this gets back to what
24 you were talking about when you were giving the
25 hypothetical. The fraud in a fraudulent conveyance is

1 the first debtor concealing or misrepresenting the
2 nature --

3 JUSTICE BREYER: That's true.

4 MS. MURPHY: -- of the conveyance to the
5 creditor.

6 JUSTICE BREYER: But it doesn't say --

7 JUSTICE KENNEDY: We're not limited --

8 JUSTICE BREYER: Sure.

9 JUSTICE KENNEDY: We're not limited to
10 fraudulent conveyances here. You want to read the
11 statute and say something like for money obtained from
12 the innocent party in the first instance by. And
13 that -- that -- but fraud can continue through --
14 through a whole chain.

15 MS. MURPHY: Sure and -- and --

16 JUSTICE KENNEDY: And -- and if it continues
17 through the whole chain, the person on the end of the
18 chain may have never had any relation with the innocent
19 party at all.

20 MS. MURPHY: Well, I think that what you
21 need to have the fraud that comes within (a)(2) is
22 inducement. Now, the inducement, the fraudulent
23 inducement, it doesn't have to be direct. It's not our
24 position that, you know, unless the misstatement is made
25 expressly to the creditor, the debt doesn't count. You

1 can have, you know, a misstatement that you cause to be
2 made, that the statute actually uses that language
3 causing a misrepresentation to be made that the victim
4 at the end, the creditor ultimately relies upon.

5 So we're not saying there has to be a direct
6 relationship here.

7 JUSTICE SOTOMAYOR: I'm totally confused
8 because I think -- I was following you up until that
9 last statement.

10 MS. MURPHY: Okay.

11 JUSTICE SOTOMAYOR: All right?

12 I was following you up to when you said that
13 it has to be a debt you obtain by fraud from the person.

14 MS. MURPHY: Yes.

15 JUSTICE SOTOMAYOR: Whether I agree with you
16 or not, that's a different issue because I'm not sure
17 that you fully answered Justice Breyer. But I don't
18 understand where the inducement comes into this. Why --
19 why did -- you can commit fraud against a person
20 directly in a variety of different ways that don't
21 require a misrepresentation. And we know that actual
22 fraud doesn't, as a matter of fact, require a
23 misrepresentation.

24 MS. MURPHY: Well, as far as I can tell, and
25 Petitioner hasn't suggested otherwise, there's really

1 only two forms of fraud here. There is -- there is
2 misrepresentation or fraudulent conveyance. They really
3 haven't pointed to anything else. So, you know, the
4 question, I think, really is: Is fraudulent conveyance
5 supposed to be in this statute? And in this particular
6 statute, I think fraudulent conveyance sticks out like a
7 sore thumb.

8 JUSTICE KAGAN: Well, you just said you're
9 not contesting that fraudulent conveyance is a form of
10 actual fraud; is that right?

11 MS. MURPHY: When it's done with intent, you
12 know, the necessary intent to make it actual fraud. But
13 yes, that's right.

14 JUSTICE KAGAN: So, now, this language -- I
15 mean, the language just seems a lot more simple than
16 you're making it, because you add inducement to the
17 language, you add from the creditor to the language.
18 But the language doesn't say any of those things. It
19 just says is there a debt? And we know that there is a
20 debt here. The debt is for money. The language says,
21 well, what has to be true of that money? It has to be
22 obtained by actual fraud.

23 And here, the money, the allegation is, was
24 obtained by fraudulent concealment. So whether or not
25 the creditor has been induced and whether or not the

1 money has come from the creditor seems to be irrelevant
2 under this very simple statutory phrase.

3 MS. MURPHY: I think that there is two --
4 two problems with that, in our view.

5 First, I don't agree that the fraud is how
6 you obtained the money. You obtained money, and by
7 doing so helped someone else commit a fraud on their
8 creditor. But you did not use fraud to obtain the money
9 in a fraudulent conveyance. You have been a participant
10 in a fraud on someone else. So I think even --

11 JUSTICE SOTOMAYOR: That leaves out every
12 conspiracy theory that exists. I mean, if you're
13 helping someone by accepting the money, you're
14 committing a crime.

15 MS. MURPHY: Right. But this statute says
16 more. It says that you have to obtain the money that is
17 what gives rise to the debt. It's a very different --

18 JUSTICE SOTOMAYOR: A conspiracy theory says
19 you don't have to commit every act.

20 MS. MURPHY: The -- the question --

21 JUSTICE KAGAN: The transferee -- the
22 transferee obtains the money by way of the fraudulent
23 conveyance, right? How else does the transferee obtain
24 the money?

25 MS. MURPHY: The transferee obtains the

1 money through the transferor that decides to give them
2 the money, and that --

3 JUSTICE KAGAN: Through a fraudulent
4 conveyance.

5 MS. MURPHY: The fraud occurs on the back
6 end. Because of the transfer, there is then fraud when
7 the debtor effectively, you know, either conceals the
8 transaction, that's the fraud, or conceals the true
9 nature of the transaction.

10 JUSTICE BREYER: What about Mr. Ponzi's
11 cousin who, in fact, had nothing to do with any of the
12 misrepresentations, but knowing the entire truth says
13 Ponzi, my friend, when you get those bags of cash, hide
14 them under my bed, all right?

15 Now, he himself has not, in fact, lied to
16 anybody or made any misrepresentations, but he's part of
17 the big scheme.

18 MS. MURPHY: Well --

19 JUSTICE BREYER: And I take it we would say
20 that that money under the bed has been obtained by
21 actual fraud, hasn't it?

22 MS. MURPHY: Not by him.

23 JUSTICE BREYER: Oh, so you're going to get
24 him off, too.

25 MS. MURPHY: I mean, I'm not quite sure in

1 your hypothetical, where, you know --

2 JUSTICE BREYER: There was -- I mean, you
3 know, there are dozens and dozens of cases where --
4 where people do have misrepresentations. There is no
5 doubt there's a misrepresentation in this thing. But
6 after all, not every participant in the great scheme
7 himself lies.

8 MS. MURPHY: Sure. But --

9 JUSTICE BREYER: And those people, I would
10 think, would -- you would expect to have fall within --
11 since they're part of the big Ponzi scheme, they would
12 be right within this statute and their debts would not
13 be forgiven --

14 MS. MURPHY: Well --

15 JUSTICE BREYER: -- because they weren't the
16 ones who lied.

17 MS. MURPHY: (a) just -- it's not a
18 conspiracy statute. And Petitioner themselves, they
19 offer as their example something that doesn't fall
20 within (a)(2), aiding and abetting somebody else's
21 fraud. So they -- they say that this is one of the ways
22 in which this statute -- you know, they have to give
23 some theories as to what narrows this statute so that it
24 doesn't completely swallow the additional fraud
25 provisions that Congress has added here. And that's

1 part of their theory, is that, you know, you do have to
2 have used the fraud to obtain it yourself.

3 But I think that part of it is that you
4 can't just look at the term "actual fraud" in isolation,
5 just as the other side agrees that you can't look at the
6 term "false representation" in isolation. Because they
7 assume that false representation means fraudulent
8 misrepresentation. That's not what the statute says,
9 and that's not what false representation means at common
10 law.

11 At common law, false representation includes
12 negligent misrepresentation and innocent
13 misrepresentation. If you look at the Restatement in
14 1976, it expressly says that. So does Prosser. So
15 they're agreeing that you can't just take these terms
16 and pluck them out of the statute and say, oh, what did
17 it mean at common law? That's the end of the analysis.
18 The question is, what did these terms mean in this
19 statute? And when you look at this statute, Congress
20 put the term "actual fraud" next to a bunch of terms
21 that by their nature speak of inducement.

22 JUSTICE KAGAN: But it would be a very
23 strange thing, Ms. Murphy, if -- if I agreed with you,
24 if I were Congress and I said, I want to make it really
25 clear that this should be only intentional, false

1 pretenses and false representation. There are a
2 gazillion ways to do that, but starting with the simple
3 one, saying intentional false pretenses and an
4 intentional false representation.

5 But the one thing I wouldn't do, I think, is
6 to say actual fraud. Because actual fraud is not
7 synonymous with -- with intent. Actual fraud refers
8 to -- to conduct that's done with a certain kind of
9 intent. And that conduct, as you just said, includes
10 more than false representation and false pretenses.

11 So I wouldn't use a term that had to do with
12 conduct just to state a mens rea requirement.

13 MS. MURPHY: So -- so here's why -- and two
14 responses as to why I don't think it's actually that
15 unusual in this context. I mean, first of all, this
16 isn't a theory that we concocted after the fact. The
17 sponsors of the bill, when they introduced this
18 legislation on the House and Senate floor, both of the
19 key sponsors said what Subsection (a) was intended to
20 do, and I quote, "It was intended to codify current case
21 law, e.g., Neal v. Clark, interpreting fraud as actual
22 or intentional fraud rather than implied fraud."

23 But if they --

24 JUSTICE KAGAN: But if I have that case
25 right, that case is actually a case about a fraudulent

1 conveyance. It's not a case about a false
2 representation. So they said, look at this case. It's
3 a case about a fraudulent conveyance that suggests that
4 there's more fraud in the world than just
5 misrepresentations. And we want to make clear that
6 that's going -- that that's supposed to be a part of
7 this.

8 MS. MURPHY: That's ignoring the second half
9 of what the sponsor said, because they didn't say, we
10 intend this to codify Neal v. Clark, period.

11 And Neal v. Clark didn't hold that
12 fraudulent conveyance was something that comes within
13 the scope of the statute. It held that the fraudulent
14 conveyance there did not come within the scope of the
15 statute --

16 JUSTICE GINSBURG: Whatever --

17 MS. MURPHY: -- because --

18 JUSTICE GINSBURG: Whatever may have been
19 said in -- in the course of the legislative history, the
20 statute says "or." And I think you would concede that
21 your reading requires converting "or" into "by"; that
22 is, misrepresentation, false pretenses by actual fraud.

23 MS. MURPHY: I think that's a fair
24 statement, but I think that this case is pretty
25 analogous to the McNally case where this Court also had

1 the disjunctive "or" before it in interpreting the Mail
2 Fraud Statute. And in that case the Court -- it was a
3 very similar situation where you had a statute that was
4 on the books, you had decisions from this Court
5 interpreting that statute, and then Congress added to
6 the statute language that was mirroring the language of
7 this Court's cases.

8 And in that circumstance, the Court said,
9 you know what, we have to look at that language in light
10 of the fact that they took it from our cases.

11 And here, if you look at the -- the cases
12 that they took this language from, they are cases that
13 use actual fraud to distinguish intentional fraud from
14 constructive fraud. They are not cases that use actual
15 fraud to say, oh, here's what kind of fraud counts under
16 this statute, fraudulent conveyance.

17 In fact, the only cases that happen to
18 involve fraudulent conveyance and the term "actual
19 fraud" are cases where the Court held that the debt did
20 not fall within the scope of the exception to discharge.

21 JUSTICE GINSBURG: Do you have any other
22 example in all of the U.S. Code where the word and
23 series of words A, or B, or C, and "or" is taken to mean
24 "by," and refer not to a discrete category, but modifies
25 the earlier category.

1 MS. MURPHY: I'm not sure I have an example
2 where it would -- you know, where -- where it quite
3 works like that. But what I would say is that there are
4 many places in the U.S. Code where an item that comes at
5 the end of or later in a list is used to inform the
6 meaning of the word before it. And if you look at *Neal*
7 *v. Clark* itself, that's exactly the reasoning the Court
8 employed there.

9 The reason the Court concluded that the only
10 kind of fraud that counted was intentional fraud was
11 because the next item in the list was embezzlement. And
12 the Court said because embezzlement requires intent,
13 we're going to infer from that term that fraud requires
14 intent as well.

15 So the basic principle that adding language
16 to a statute can inform and limit the words that come
17 before it is nothing that extraordinary. It's just --

18 CHIEF JUSTICE ROBERTS: Can you give me an
19 example in common parlance, not -- not in the U.S. Code,
20 where someone would speak along the lines you're saying
21 the statute is written?

22 MS. MURPHY: Sure. There's an example in a
23 statutory construction book of the phrase "cats, dogs,
24 or domesticated animals." When you're thinking about
25 that phrase, "domesticated animals" is the one that

1 tells you cats doesn't include lions and tigers. And
2 it's given in the context of --

3 CHIEF JUSTICE ROBERTS: That's not great --

4 MS. MURPHY: -- the veterinarian says, you
5 know, I will treat these three types of animals. It's
6 limiting the one that comes before it.

7 I think another phrase that I came across
8 was highways, bridges, and public sidewalks. You know,
9 "public sidewalks" is what tells you that bridges
10 doesn't include the one in my backyard. So the third
11 term can be a term that informs the meaning. Now, here
12 I'm -- I don't think you have to conclude that that's
13 the only thing "actual fraud" achieves in this statute
14 in order to accept our reading of the statute.

15 "Actual fraud" in this statute -- you know,
16 the concept of misrepresentation doesn't have to be
17 completely synonymous with the concept of false
18 representation. What you can essentially view "actual
19 fraud" as doing is putting a thumb on the scale of the
20 broadest conception of misrepresentation possible, even
21 if that's broader than the common law tort of false
22 misrepresentation.

23 So one thing that some courts have said when
24 looking at this statute is that it's not clear that
25 false representation reached future looking, you know,

1 statements about whether I intend to perform in the
2 future. And some courts have said, well, you know, we
3 don't need to resolve that debate anymore because now
4 that the statute says "actual fraud," that's good enough
5 to tell us that the kinds of misrepresentations that
6 come within the scope of this statute include any kind
7 of misrepresentation that induces the creditor to part
8 with something, even if it might not technically have
9 qualified as false representation at common law.

10 So I think that there's plenty of ways for
11 this term to do work without having it kind of put this
12 sore thumb into the statute of fraudulent conveyance,
13 which is just nothing like the rest of the terms in this
14 statute.

15 It's nothing like false statements, false
16 representations, false financial statements. All of
17 those types of conduct that this statute has always
18 covered involve inducing the creditor to part with
19 something. And that's what differentiates (a)(2) from
20 the 18 other exceptions in the statute.

21 This is not the intentional fraud provision.
22 There's plenty of other provisions in the statute that
23 cover forms of intentional fraud, some of them by
24 directly using the word "fraud," others like (a)(6) by
25 covering intentional injuries to property interests.

1 So it's not as if you need to put this
2 remedy into (a) (2) in order to ensure that if you really
3 do have intentional fraud in the receipt of a fraudulent
4 conveyance, there will be a means of having a debt
5 that's nondischargeable. So I don't know why you kind
6 of strain to get it in here where it seems like such a
7 poor fit.

8 And the other thing that I think is worth
9 keeping note of is that Congress has legislated, quite
10 specifically, on fraudulent conveyance for 150 years.
11 And there are two things that you can note repeatedly
12 when Congress does so.

13 First of all, it uses particular language
14 of -- of fraudulent conveyance. It talks about a
15 fraudulent conveyance or a fraudulent transfer, or a
16 transfer made with intent to injure, hinder, delay, or
17 defraud a creditor.

18 But the other thing is that the remedies
19 Congress has created for fraudulent conveyance are not
20 creditor-specific. They are instead consistent with the
21 basic principle of equitable distribution.

22 Under 727(a) (2), you have a complete bar to
23 discharge which benefits everybody because no debtor
24 gets a discharge.

25 Under 548(a) (1) and the other provisions

1 that allow the trustee to void transactions, the money
2 comes back to the estate and then gets distributed
3 equitably to all creditors.

4 Here, instead, you have a creditor who's
5 basically jumping the line and saying we should get all
6 of this money, even though within the context of the
7 Chrysalis bankruptcy, the trustee did not see fit to try
8 to void these transactions, and there was no attempt by
9 the trustee to void transactions in this bankruptcy,
10 either.

11 So you end up with a remedy that is really
12 nothing like the ones that Congress has offered when it
13 is actually legislating clearly on the topic of
14 fraudulent transfers --

15 JUSTICE SOTOMAYOR: I don't know that that
16 moves me that much.

17 Does that mean that if you're a -- if you've
18 accepted a fraudulent amount of money, you get to keep
19 it?

20 MS. MURPHY: Absolutely not, because --

21 JUSTICE SOTOMAYOR: Well, that's what you're
22 saying --

23 MS. MURPHY: No, I'm not. Because the
24 trustee's powers allow them to void the transaction and
25 --

1 JUSTICE SOTOMAYOR: But if they choose not
2 to, that still means you get to keep it.

3 MS. MURPHY: Well --

4 JUSTICE SOTOMAYOR: That one creditor has --

5 MS. MURPHY: The creditor has the ability to
6 --

7 JUSTICE SOTOMAYOR: -- the expense, et
8 cetera.

9 MS. MURPHY: -- try and get the trustee to
10 void the transaction, and the trustee can void the next
11 transaction on down the line as well. The statutory
12 powers include, you know, if -- if the recipient then
13 fraudulently conveys away the property, you can keep
14 undoing the transfers until you ultimately get at the
15 property. So there's plenty of ability for the trustee
16 to get at the property without resorting to this.

17 Now, we're not saying that there can never
18 be a creditor-specific remedy for the receipt of a
19 fraudulent conveyance. If, say, you have a trustee who
20 has that debt against the recipient, I think the right
21 thing for them to do is to go use the Subsection (a)(6)
22 exception, which allows an exception for willful and
23 malicious injury to the property interests of another.

24 And courts have -- every court that's looked
25 at that question has said that (a)(6) is an appropriate

1 place for this kind of debt to be accepted from
2 discharge. So you've got courts who have looked at this
3 question and said --

4 JUSTICE GINSBURG: What does it take to
5 show -- what is it, the phrase "malicious," or what?

6 MS. MURPHY: "Willful and malicious --

7 JUSTICE GINSBURG: Oh.

8 MS. MURPHY: -- injury to" --

9 JUSTICE GINSBURG: -- what -- what does it
10 take to show that?

11 MS. MURPHY: So it can be either subjective
12 intent to cause injury, or it can be a substantial
13 certainty that injury will result. There's a bit
14 of dispute below in the -- in the courts of appeals
15 about whether an objective substantial certainty that
16 harm will result is sufficient, or you need a subjective
17 substantial certainty.

18 I'm not sure, at the end of the day, that
19 ever is an outcome determinative distinction.

20 But for this case, it makes no difference at
21 all, because the Fifth Circuit is the circuit that
22 applies the broader objective test. And applying that
23 objective text here, the Fifth Circuit concluded, as did
24 the two courts below, that these transfers were not made
25 with intent to injure the Petitioner, and were not even

1 made with substantial certainty that injury to the
2 Petitioner --

3 JUSTICE BREYER: That's your case.

4 MS. MURPHY: -- would result.

5 JUSTICE BREYER: And I'm still -- as Justice
6 Sotomayor said, seemed to me there is a -- look what
7 you're saying here. The bankrupt or insolvent person
8 transfers the jewels to his wife. Okay? And now what
9 this would be saying under their reading is the jewels
10 survive her bankruptcy, and quite right, that her
11 husband's trustee could have clawed it back before, but
12 he didn't. And so now it went through her bankruptcy,
13 and if it survives, somebody can get it.

14 And -- and maybe the fair thing to do is to
15 do what you do with environmental cases or you have a
16 bunch of people who are victims and they divide it up,
17 because you're quite right, that all of the creditors
18 who might have shared in the jewels are the victims, the
19 creditors of the transferor. But so what? I mean, how
20 does -- how does that help you with your basic argument?
21 It just -- it's a different argument that says that this
22 particular creditor shouldn't get all of it.

23 MS. MURPHY: Well, I think it's actually
24 kind of true in every fraudulent conveyance case because
25 typically the --

1 JUSTICE BREYER: It's also true in every
2 misrepresentation case. If it survives bankruptcy --

3 MS. MURPHY: Not at all. No, it's
4 absolutely not true. In a misrepresentation case, the
5 misrepresentation was made to the creditor. So the
6 creditor -- the debt that the creditor is trying to get
7 the money for is directly related to inducing that
8 creditor to part with the money.

9 JUSTICE BREYER: So he does, perhaps, to a
10 thousand. He lied to a thousand people.

11 MS. MURPHY: Well, then each one of them --

12 JUSTICE BREYER: There are a thousand
13 victims. And here we have, let's say, a thousand
14 victims, all those creditors who didn't get the money
15 they should have gotten. I mean, it's the same problem,
16 isn't it?

17 MS. MURPHY: I -- I don't think it is
18 because in that context you have a creditor-specific
19 injury and a creditor-specific remedy, and I think you
20 need that, too, in the fraudulent conveyance context.

21 So if, for instance, you know, the jewels
22 belonged to one of the creditors, then they're going to
23 go use (a) (6) and get the jewels back. They're not
24 going to have a problem. (a) (6) is available for that
25 intentional injury to their property --

1 JUSTICE BREYER: I see.

2 MS. MURPHY: -- interest.

3 So you don't need it over here when you have
4 a very different statute that has been focused on this
5 concept of inducement. And I would note here, every
6 single one of this Court's cases that involved (a)(2)
7 has always had a debtor who is using fraud to induce the
8 creditor to part with something. That's the way this
9 statute had been understood up until the Seventh
10 Circuit's decision came along and -- and had this new
11 idea that you could get at fraudulent conveyance through
12 this statute.

13 Before that, it was pretty commonly
14 understood that what (a)(2) was about, that
15 differentiated it from other provisions, was that it was
16 about fraudulent inducement. And that's the ultimate
17 problem here. They may have a debt. They may have a
18 debt that even involves actual fraud, but they don't
19 have a debt for anything with which Petitioner was ever
20 fraudulently induced to part resulting in my client
21 obtaining anything by the kind of fraud that counts
22 under 5 -- Section 523(a)(2).

23 If there are no further questions.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Dvorestzky, you have four minutes

1 remaining.

2 REBUTTAL ARGUMENT OF SHAY DVORESTZKY

3 ON BEHALF OF THE PETITIONER

4 MR. DVORETZKY: Thank you.

5 A veterinarian's office with a sign saying
6 that the veterinarian treats dogs, cats or domesticated
7 animals treats more than just dogs and cats. Surely
8 that office will also treat guinea pigs and hamsters.
9 And so the "domesticated animals" phrase does have
10 something in common with dogs and cats, just as
11 "fraudulent transfers" has something in common with
12 false pretenses and false representations.

13 These are all schemes to cheat creditors.
14 But by adding "or actual fraud," Congress was expanding
15 upon the pre-existing terms, expanding upon dogs and
16 cats to cover something additional.

17 Respondent does not have any theory for what
18 Congress was doing through this language to expand upon
19 the previous terms.

20 With respect to false representation, courts
21 had unanimously interpreted false representations to
22 refer to the tort of deceit. In his brief, Respondent
23 equates false representations with the tort of deceit.
24 Even if false representations might have been understood
25 as something else, adding "or actual fraud" would not

1 narrow false representations to exclude unintentional --
2 unintentional representations. It would at best simply
3 show that you could also have a discharge bar for an
4 intentional misrepresentation.

5 With respect to Neal, Neal has to be
6 understood in light of what was at issue at -- in that
7 case. The -- the fundamental premise of Neal was that
8 some forms of fraudulent transfers are fraud under the
9 predecessor of Section 523(a)(2)(A). And so the only
10 reason that the Court drew a line there between
11 "intentional" and "unintentional" participation was on
12 the premise that if the participation had been
13 intentional, that would have been nondischargeable
14 fraud.

15 With respect to the statutory text here,
16 nothing about the statute talks about inducing a
17 creditor to part with anything. It simply talks about
18 obtaining money by fraud. And for the reasons that I
19 explained earlier, a transferee commits fraud and,
20 therefore, incurs a new debt for which he is liable if
21 he knowingly participates in a fraudulent transfer.

22 Ms. Murphy made the point that there --
23 suggested that there's something anomalous about allowing
24 creditors to pursue a fraudulent transfer remedy for the
25 benefit of an individual creditor. There's nothing

1 anomalus about that. State fraudulent transfer laws
2 exist outside of bankruptcy, and so before the
3 bankruptcy stay takes effect, it is essentially a
4 free-for-all where creditors can pursue their rights
5 under State fraudulent transfer laws.

6 JUSTICE BREYER: We -- we treat -- we treat
7 in our veterinarian clinic domestic animals, your --
8 domestic animals or your household -- domestic animals,
9 your dog -- your -- your favorite friends or your
10 domestic pets, you see. Domestic pets is meant to say
11 which domestic animals? Domestic animals, dogs, cats,
12 or household pets? Domestic animals seems to cover the
13 whole thing. They're saying, or it's like, i.e.,
14 household pets.

15 JUSTICE KENNEDY: Come on and answer --

16 JUSTICE BREYER: Well, not for you. I mean,
17 it's good for you, this word "or."

18 (Laughter.)

19 JUSTICE BREYER: I grant you, I've had a
20 horrible time trying to find an example.

21 But -- but it could be it means i.e. She's
22 saying it means i.e., household pets.

23 MR. DVORETZKY: Not when Congress adds "or
24 domestic animals" as a specific amendment. That has to
25 be given some effect.

1 Lastly, (a)(6) doesn't solve this problem.
2 If (a)(6) simply covered any intentional wrong, it would
3 simply subsume all of the discharge bars. Any
4 intentional misrepresentation would fall within (a)(6).
5 (a)(6) has to be given a narrower construction in order
6 to differentiate it from the other bars.

7 Moreover, (a)(6) doesn't apply in Chapter
8 13. In particular in 2005 when Congress reformed
9 Chapter 13 to crack down on fraud, it did not mean to
10 allow the sort of scheme that went on in this case or
11 the sort of fraudulent transfer that Justice Breyer
12 hypothesized to -- to lead to a discharge.

13 JUSTICE SOTOMAYOR: Are you limiting actual
14 frauds to just fraudulent conveyances? Are there other
15 deceptive schemes that you would include?

16 MR. DVORETZKY: There are. I think the
17 Heartland usage of "actual fraud" at common law, most
18 commonly it did refer to fraudulent transfers to hinder
19 creditors. There were -- may I answer?

20 There were also other types of conveyances,
21 conveyances to defeat a divorcing spouse's interest, for
22 example, the devastatit in Neal to diminish an estate.
23 We also give an example in our brief of undue influence.
24 These are also forms of actual fraud, but the Heartland
25 of it is fraudulent conveyances.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 The case is submitted.

3 (Whereupon, at 11:59 a.m., the case in the
4 above-entitled matter was submitted.)

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