No. _____

IN THE

Supreme Court of the United States

GERSON IRVING FOX,

Petitioner,

v.

ELISSA MILLER, CHAPTER 7 TRUSTEE

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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In Propria Persona

QUESTION PRESENTED

Upon proof of failure to keep adequate books and records, a debtor's discharge may be withheld under section 727(a)(3) of the Bankruptcy Code unless the debtor shows in response that recordkeeping was "justified under all of the circumstances." The provision has led to wildly inconsistent decisions.

The question presented is whether a justification for recordkeeping "under all of the circumstances," where supported by competent, admissible evidence, may be weighed and overruled on summary judgment?

PARTIES TO THE PROCEEDING

Petitioner in this Court, Defendant-Appellant below, is Gerson Irving Fox.

Respondent in this Court, Plaintiff-Appellee below, is Elissa D. Miller, in her capacity as Chapter 7 Trustee of the bankruptcy estate of Gerson Irving Fox.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court has not been published, but is available at 786 Fed. Appx. 688. Pet. App. A, *infra*. The district court's order denying appeal is reported at 589 B.R. 659. Pet. App. B, *infra*. The *Summary Judgment* entered by the United States Bankruptcy Court for the Central District of California (November 1, 2017) is unreported. Pet. App. C, *infra*.

JURISDICTION

The court of appeals filed its opinion on November 29, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 727(a)(3) of title 11 of the United States Code (the "Bankruptcy Code") states:

> (a) The court shall grant the debtor a discharge, unless—
>
> . . .
>
> (3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

STATEMENT

Section 727(a) of the Bankruptcy Code states that a bankruptcy court "shall grant the debtor a discharge" unless an enumerated ground for denial of discharge is proven. The Chapter 7 discharge is at the heart of the fresh start provisions of bankruptcy law that "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." *Williams v. United States Fid. & Guar. Co.*, 236 U.S. 549, 554-55, 35 S. Ct. 289, 290 (1915).

Interpretation of section 727(a) is of exceptional and recurring social importance. In 2019 alone, at least 469,464 individuals applied for Chapter 7 relief.[1] In 2011, 958,634 individuals did.[2]

A preponderance of the enumerated grounds for denying a discharge involve contumacious misconduct that directly interferes with the orderly administration of a bankruptcy case (§§ 727(a)(2), (3), (4), (5), (6), (7) & (11)). Several require fraudulent intent (§§ 727(a)(2), (4) & (12)). The grounds for denial are to be "construed strictly as against the objector and liberally in favor of the bankrupt." *In re Leichter*, 197 F.2d 955, 959 (3d Cir. 1952) *cert. denied*, 344 U.S. 914, 73 S. Ct. 336, 97 L. Ed. 705 (1953).

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[1] As reported by the Administrative Office of the United States Courts (https://www.uscourts.gov/sites/default/files/data_tables/bf_f2_1231.2019.pdf)

[2] See https://www.uscourts.gov/sites/default/files/statistics_import_dir/F02Dec11.pdf

Section 727(a)(3), which is at issue here, permits denial of discharge for various willful acts that prevent creditors from obtaining a clear picture of a debtor's financial condition or pre-bankruptcy business transactions (i.e. the concealment, destruction, mutilation or falsification of records). The denial of petitioner's discharge, however, was not predicated on any of these acts, but rather on his purported failure to "keep" certain books and records that he never had. "Keeping" in the context of section 727(a)(3) has been widely interpreted as having "the same meaning it would have in phrases such as 'to keep a diary' or 'to keep a record,' that is, to maintain a record by entering it in a book." *Peterson v. Scott (In re Scott)*, 172 F.3d 959, 969 (7th Cir. 1999).

Petitioner, now ninety-three (93) years old, was eighty-eight (88) at the time of filing for bankruptcy protection and in declining health. He was not in a fit enough physical condition to "keep" records and had not been for several years. In the four and a half years prior to filing bankruptcy, he had also been mired in legal battles stemming from the collapse of a real estate company in which he was heavily invested (supposedly as a passive investor with limited exposure). Records of the most significant transactions from that time were all in the hands of lawyers defending his interests against a dishonest business partner, bankruptcy trustees and receivers that took control of assets he co-owned, and large institutional creditors that looked to petitioner for payment when they were burned by the aforementioned business partner.

By 2015, petitioner had been wiped out financially, and the full procedural history of how he got there, was extremely convoluted. Creditors started

obtaining writs of attachment and clearing out his bank accounts in 2011, resulting in all accounts being closed other than the account into which his social security payments were deposited. In 2013, all of his interests in real estate partnerships and limited liability companies were liquidated at foreclosure sales. Any assets that were not subject to immediate execution and liquidation, such as distributions he was owed from bankruptcy cases, were subject to creditor liens. He filed bankruptcy because one creditor was on the verge of having a receiver appointed over him personally, one who would have had the keys to his house and the power to open his mail—a development that would have robbed petitioner of all dignity and privacy.

In May 2016, at a time when she was threatening a lawsuit against petitioner's son, respondent commenced an adversary proceeding against petitioner to deprive him of his Chapter 7 discharge. The original complaint was 194 paragraphs in length and included multiple claims of intentional and fraudulent conduct. However, one by one, these claims of intentional misconduct were either dismissed under Rule 12(b)(6) or abandoned and voluntarily dismissed by respondent due to lack of evidence and her inability to develop supporting evidence despite best efforts. In September 2017, respondent filed a motion for summary judgment on the only claim left standing in her complaint—her objection to discharge under section 727(a)(3). In opposition to respondent's motion, petitioner submitted evidence of the following

- That he had a heart attack in 2004 and has been in deteriorating health since then (Pet. App. D, *infra.* at ¶ 2);

- That he has had a series of mini-strokes since 2004 (*Id.*);
- That he has had cardiovascular disease for years, a pacemaker inserted, as well as severe diabetes mellitus and sleep apnea, affecting his hearing, vision and mobility (*Id.*);
- That he has been in and out of hospital for the last several years, has been bed-ridden since February 2016, is unable to walk, and has several caregivers that take care of him on a full-time basis (*Id.* at ¶¶ 2-3);
- That he became licensed as a CPA in the 1950s, briefly practiced, but has not practiced accounting in almost 60 years (*Id.* at ¶ 4);
- That he was admitted to the California State Bar in 1958 without having graduated law school, but never practiced law (*Id.* at ¶ 4);
- That he ran a jewelry company called Barry's Jewelers for most of his career, but sold his interest in 1995 and effectively retired at that time (*Id.* at ¶ 5);
- That after retiring he invested in various real estate projects with an individual named Michael Kamen, who he had known for 25 years and believed was a friend (*Id.* at ¶ 6);
- That he was "robbed blind" by Kamen over the course of several years, which escalated after petitioner began to experience health issues (*Id.* at ¶ 7);
- That most of his communications with Kamen were oral discussion and his deals were made "on a handshake" as was petitioner's custom and

practice with his prior business partner at Barry's Jewelers (*Id.* at ¶ 6);

- That Kamen did not provide him with financials or accountings for the various real property investments they had (*Id.*), and the documentation he did receive later proved to be unreliable (Id. at ¶¶ 7-11);
- That he retained counsel to assist with investigation of Kamen's fraud in 2011 and uncovered numerous instances of forged guaranties (*Id.*) ;
- That several of the real-estate holding entities he co-owned filed bankruptcy around that time and a trustee was appointed (*Id.* at ¶ 12);
- That the trustee, who was respondent's law partner, never provided him with financials or accountings and petitioner could not have provided them to respondent (*Id.*);
- That virtually all of his assets were sold off involuntarily by one of his creditors at foreclosure sales in 2013 (*Id.* at ¶ 13);
- That he has not received any salary or compensation from work for many years (*Id.* at ¶ 14);
- That he was unable to have tax returns prepared for 2013 due to a lack of income and continuing poor health, and because he would have owed no taxes due to the sizeable net operating losses he experienced (*Id.* at ¶ 14)[3];
- That he was not able to provide respondent with every document she had requested, but that he gave her everything he had (*Id.* at ¶ 16);

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[3] Tax returns for 2014 were not yet due when he filed bankruptcy

- That he had given many documents to attorneys and accountants defending his interests in the years before his bankruptcy and lost track of them (*Id.* at ¶ 17);
- That he provided the trustee with all of the documents in his personal possession as well as documents from his tax preparer and former attorneys (*Id.* at ¶ 18);
- That he was confident any missing pieces of information could be obtained from the bankruptcy professionals (including respondent's law partner) administering the estate of his former business partners or the various entities he had co-owned that filed bankruptcy (*Id.* at ¶ 16).

This evidence was more than adequate to justify the state of petitioner's books and records when he filed bankruptcy in 2015. Petitioner has been retired 20 years at the time of his filing and was simply not involved in the creation of most of the records requested. Whatever he had retained he provided respondent but he could not provide what he never had and, due to his declining health and serious legal problems in the years leading up to the filing, others were more involved and had the records.

Certainly, whether or not the Bankruptcy Court ultimately chose to credit these reasons justifying his recordkeeping at trial, they should have at least been sufficient to defeat a motion for summary judgment. But instead, petitioner was improperly denied the opportunity to present his side of the story clearly in a procedurally fair manner.

That is what is at stake: petitioner's right, and the right of millions of Chapter 7 debtors that will come after him, to have their day in court on the is-

sue of why their recordkeeping is justified. Given the legal and social importance of the Chapter 7 discharge, all debtors, including petitioner, must have the right to testify in their own defense as to their recordkeeping practices, and to call witnesses and submit documents that corroborate their justifications for any alleged or perceived inadequacies. The Bankruptcy Court incorrectly determined that it could and should disregard all of the explanations put forward by petitioner, determine that his recordkeeping was inadequate and unjustified as a matter of law, and take away his discharge without him ever setting foot inside a courtroom. That was and is wrong. The Ninth Circuit saw no issue with the Bankruptcy Court doing that, whereas other circuits have taken a vastly different approach, one that respects the Congressional presumption in favor of granting a discharge and correctly applies touchstone summary judgment standards to section 727(a)(3). The Court should accept certiorari to determine which Circuit's interpretation is correct. If the Fourth Circuit approach is correct, petitioner has the right to a trial, and the opportunity to fully present his case at that trial.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision deepens a split among the lower courts over the propriety of evaluating a debtor's recordkeeping justifications on summary judgment. In the Ninth, First, and Eleventh Circuits, it is fair game for a bankruptcy court to disregard a debtor's proffered justifications for recordkeeping and summarily deny a discharge notwithstanding (1) the strong public policy in favor of granting a discharge, (2) the well-established principle

that discharge exceptions should be construed liberally in favor of debtors and strictly against the objector, and (3) the even better established principle that a court should not weigh evidence on summary judgment. In the Fourth and Tenth Circuits, it is correctly recognized that the debtor's burden to show that recordkeeping is "justified under all of the circumstances of the case" is a highly fact-sensitive inquiry that is generally not susceptible to resolution on summary judgment.

This split of authority impacts hundreds of thousands of debtors who file Chapter 7 bankruptcy every year. Individuals seeking Chapter 7 relief have typically lost control of their lives in some respect and disorganized paperwork is an inevitable reality. The type of person most in need of Chapter 7 protection (e.g. underinsured individuals overwhelmed with medical debt or individuals affected by opioid addiction) will not have maintained meticulous books and records a high percentage of the time. A bankruptcy court depriving that person of a discharge under section 727(a)(3) summarily (and undercutting the entire reason for filing Chapter 7) is not, as a practical matter, considering the debtor's justification "under all of the circumstances of the case." It is considering only those facts and arguments that have been presented in a motion prepared by an adversary with greater resources typically, in response to which the debtor may have needed to address multiple issues or correct multiple mischaracterizations, all without knowing whether the court would even reach the issue of justification. Unless a debtor is asserting no justification whatsoever and conceding the issue, there should, as a rule, be a hearing where the debtor's evidence of justification can be fully presented.

The plain meaning of the words "all of the circumstances of the case" and the contextual importance of the discharge to the entire Chapter 7 framework make this the only proper interpretation of section 727(a)(3).

I. THE DECISION BELOW DEEPENS A SPLIT AMONG THE LOWER COURTS.

The Ninth Circuit decision in this case—in the portion of the opinion discussing the adequacy of recordkeeping—erroneously adopted highly contested characterizations of petitioner's business sophistication, the complexity of his financial affairs pre-bankruptcy, and the extent to which he was defrauded by his former business partner, stating that petitioner "is an attorney, a Certified Public Accountant, and operated a successful business for decades... had extensive and complicated financial investments... [and] should have been able to produce more fulsome financial records than what he provided the trustee." (786 Fed. Appx. 688, 688-689.)

The fact that petitioner qualified as an accountant and as a lawyer in the 1950s but never practiced has no bearing on whether his books and records were adequate. Couching the thin analysis of the recordkeeping itself with these value judgments about the debtor merely shows that the Ninth Circuit conflated the first and second prongs of the section 727(a)(3) analysis and failed to give petitioner the benefit of every favorable inference.

On the issue of justification specifically, the Ninth Circuit's analysis was disappointingly glib. The full extent of the analysis was as follows:

> Fox argues he was unable to produce the records of the investments handled

> by his former business partner because that business partner defrauded Fox and never provided Fox with any relevant records. But even if that is true, many of the documents Fox failed to produce had no connection to his former business partner. Thus, the fact that Fox's former business partner might have withheld certain categories of records from Fox does not excuse Fox's failure to maintain records across the board.
>
> Fox also argues his age and a variety of physical ailments justified the lack of records. But Fox's counsel specifically disclaimed this justification before the bankruptcy court. And Fox does not explain why his age and physical ailments rendered him unable to file tax returns or maintain sufficient records to allow the trustee to assess his financial condition. Other individuals in similar circumstances would have far more records than what Fox maintained.

Id. at 689

The first of these two paragraphs misstates the nature of petitioner's justifications, and then dismisses the misstated justifications as being too general and inadequate to explain the absence of certain specific records without discussing what specific records the justifications do not account for, or how those records would have furthered the understanding of petitioner's financial condition. The second paragraph takes a statement made at the bankrupt-

cy court hearing out of context, ignores petitioner's testimony for why he did not file one year of tax returns, and then conflates the first and second prong again. It improperly puts the burden on petitioner to explain why his records did not allow respondent to assess petitioner's financial condition in circumstances where respondent's foundational showing that it was impossible for her to do so had not been made, or certainly not made with the type of specificity and intelligibility that would enable petitioner to rebut the arguments. Moreover, the analysis ignores the testimony petitioner offered that does explain his financial condition, including the easily verifiable fact that all of his assets were involuntarily sold from under him at foreclosure sales in 2013.

Moreover, petitioner had no business other than his investments with Michael Kamen since 1995, meaning that the Ninth Circuit's statement "many of the documents that Fox failed to produce had no connection to his former business partner" is a dubious assertion. The further assertion that he had a "lack of records" ignores the thousands of documents he handed over to the trustee, which constituted everything he possessed.

Regardless, it is undeniable that the Ninth Circuit weighed credibility and adversely decided issues of fact in dispensing with petitioner's justifications for recordkeeping when it should have left such determinations for trial where the issues could be appropriately fleshed out. Similar incorrect approaches have been taken by the First Circuit (*Harrington v. Simmons (In re Simmons)*, 810 F.3d 852, 859 (1st Cir. 2016)) and Eleventh Circuit (*Protos v. Silver (In re Protos)*, 322 Fed. Appx. 930, 935 (11th Cir. 2009).

The correct approach is that of the Fourth Circuit, illustrated in *Mercantile Peninsula Bank v. French (In re French)*, 499 F.3d 345, 355-57 (4th Cir. 2007), which reversed a denial of discharge by the bankruptcy court under section 727(a)(3) for failure to correctly apply summary judgment principles. In *French*, similar to here, the creditor argued that it was "entitled to summary judgment on its inadequate records claim because French was a sophisticated debtor and thus should be held to a higher standard." (*Id.* at 355.) Reversing the bankruptcy court, the Fourth Circuit found that: "Although the sophistication factor may be important in assessing a denial of discharge under § 727(a)(3), whether French was a sophisticated debtor was itself a contested fact, and such a finding does not, in any event, justify an award of summary judgment." (*Id.*)

In a further echo of this case, the Fourth Circuit also identified a genuine issue of material fact as to "whether the records French disclosed would permit the parties to reasonably ascertain his financial condition." (*Id.* at 356.) The Fourth Circuit felt "constrained to disagree with the bankruptcy court, and conclude that it erred... [because v]iewing the evidence in the light most favorable to French, a reasonable factfinder could find that the records produced by French were sufficient to permit an assessment of his financial condition." (*Id.*)

The Fourth Circuit's decision was no outlier. The Bankruptcy Appellate Panel for the Tenth Circuit has taken a similar view, reversing a denial of discharge under section 727(a)(3) in similar circumstances, albeit where the claims of justification were far less credible than they are here. In *Bailey v. Ogden (In re Ogden)*, 1999 Bankr. LEXIS 437, *17-18,

16 Colo Bankr Ct Rep 98 (10th Cir. B.A.P. 1999), it held that:

> "While the Debtor's assertions about his record-keeping were not extensive and would not likely be terribly convincing at trial without further elaboration or, even better, discovery and production of the missing records, we believe they are sufficient to raise a genuine issue of material fact about the adequacy of his records that precludes summary judgment, at least since the records purportedly cannot now be produced for review. The Debtor's assertion that his records enabled him to know what was happening with his business implies that others could glean the same knowledge from them... [T]he Debtor's opinion alone is sufficient to get him to trial on the question; whether he will be believed at trial is another matter, not properly considered at the summary judgment stage."

This line of authority sharply diverges with the approach taken by the Ninth Circuit in this case. The Court should accept review to resolve the split of authority.

II. THIS CASE PRESENTS A RECURRING QUESTION OF EXCEPTIONAL IMPORTANCE.

Section 727(a)(3) involves two nebulous standards. Before a debtor's justification is analyzed, it is the objector's burden to establish that the debtor has failed to keep adequate records "from which the debtor's financial condition or business transactions might be ascertained." Forty years of case law since

enactment of the Bankruptcy Code has proven this standard to be highly subjective and uncertain. The inconsistencies presented by lower court decisions include the following:

- Some courts hold that a failure to keep records must make it "impossible to ascertain the debtor's financial condition" (*Meridian Bank v. Alten*, 958 F.2d 1226, 1232 (3d Cir. 1992)), while others hold that it must merely make the exercise "unduly burdensome" (*Nisselson v. Wolfson*, 139 B.R. 279, 286 (Bankr. S.D.N.Y. 1992));[4]
- Some courts hold that the objecting creditor "must show how the missing recorded information 'might' enable a particular debtor's actual financial condition or business transactions to be ascertained under the circumstances of the case" (*Strzesynski v. Devaul (In re Devaul)*, 318 B.R. 824, 833 (Bankr. N.D. Ohio 2004); while others are less exacting, and hold that creditors "should not be required to speculate about the financial condition of the debtor or hunt for the debtor's financial information" (*Cadle Co. v. Preston-Guenther (In re Guenther)*, 333 B.R. 759, 765 (Bankr. N.D. Tex. 2005));[5]
- In some courthouses, "checking account ledgers, canceled checks, bank statements, and [an] in-

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[4] Here, the Bankruptcy Court applied an even lower bar, essentially stating that it did not matter whether respondent was ultimately capable of getting to the bottom of petitioner's financial condition. *See* ER 321 ("the justification, oh, the Trustee could have gotten it from somebody else isn't a justification").

[5] Here, petitioner's financial condition was self-evident. He had been devastated financially, all his assets had been lost in foreclosure sales, and the documents he provided showed that.

come tax return" are insufficient to preserve a discharge (*In re Juzwiak*, 89 F.3d 424, 428 (7th Cir. 1996)), while in others it is excusable to keep no records at all (*In re Oesterle*, 651 F.2d 401, 405 (5th Cir. 1981));

- Some courts find a genuine issue of material fact over whether records are adequate when the trustee contends that the documents provided by the debtor "are not organized and do not permit the trustee to reconstruct the debtor's financial situation... [and further] contends that the debtor did not file tax returns." (*Taunt v. Patrick (In re Patrick)*, 290 B.R. 306, 312 (Bankr. E.D. Mich. 2003)), while others find no genuine issue of material fact in virtually identical circumstances (*Turoczy Bonding Co. v. Strbac (In re Strbac)*, 235 B.R. 880, 884 (B.A.P. 6th Cir. 1999)).

Debtors thus face a lamentable degree of unpredictability over the threshold issue of whether books and records are inadequate. There are no safe harbors. Going into bankruptcy, debtors never know if their books and records will be deemed organized enough for others to understand their financial condition. Moreover, even if their records are adequately kept by the standards of most, they are menaced by the possibility that a motivated plaintiff will present the records as inadequately kept anyway. Skillful rhetoric on this point can work. A debtor that finds him or herself having to prove the negative that he or she is not trying to hide something faces a difficult battle. That is arbitrary and unfair.

On top of this, there is no uniform formulation of the standard for adequate recordkeeping that the bankruptcy court will adopt, or what documents will

satisfy that standard on any given day. All of these uncertainties heighten the need for the justification prong of the statute to act as a more robust guarantor of the debtor's right to due process and presumptive entitlement to a discharge. But the case law surrounding justification only convolutes the problem further, as discussed above.

This will be a recurring issue. It will continue to divide lower courts until clarity is provided by this Court, and it will affect the hundreds of thousands of Chapter 7 debtors each year in ways that will not always manifest themselves in published, Circuit-level authority. Impecunious debtors, especially those who have not been allowed to wipe the slate clean, will face great practical difficulty litigating their way back to this Court when they encounter the same injustice as petitioner, and they will be deprived of the benefits of the discharge for the considerable length of time it takes for the appellate process to play out. Accordingly, it is imperative that the Court takes the opportunity to resolve this issue now.

As it is essentially a moving target, section 727(a)(3) will continue to be an attractive proposition for creditors, and a weak link in section 727's laudable goal of reserving a denial of discharge for only the most unworthy. Petitioner is not in that class of unworthy debtors that should be left with the stigma of a denial of discharge and without peace from creditors. "This Court has acknowledged that a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discourage-

ment of preexisting debt.' " *Grogan v. Garner*, 498 U.S. 279, 286, 111 S. Ct. 654, 659, 112 L. Ed. 2d 755, 764 (1991). As currently interpreted, section 727(a)(3) undermines that goal, undermines the important social function of the discharge, and allows the honest but unfortunate debtor to be caught in a capricious trap. As such, this case presents an issue of exceptional importance that should be reviewed.

CONCLUSION

The petition for a writ of certiorari should be granted. In addition to this being an opportunity to resolve a split of Circuit-level authority on an issue of exceptional public importance, it is an opportunity to rectify a gross injustice against a very elderly man. Petitioner provided thousands of pages of documents—everything in his possession—to respondent. He has strong justifications, both general and specific, for any perceived inadequacies in his records that he should be given the opportunity to try. Respondent, if she is confident that his justifications will not pass muster, should have nothing to fear from such a trial.

Respectfully submitted.

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February 27, 2020