No. 21-1119

In The Supreme Court of the United States

PAUL FRANCIS,

Petitioner,

v.

JOHN O. DESMOND, CHAPTER 7 TRUSTEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF JOHN O. DESMOND, CHAPTER 7 TRUSTEE FOR THE ESTATE OF PAUL FRANCIS

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QUESTION PRESENTED

Whether the United States Court of Appeals for the First Circuit erred when affirming judgment from the Bankruptcy Appellate Panel for the First Circuit, which affirmed the Order of the United States Bankruptcy Court for the District of Massachusetts (the "Bankruptcy Court") denying Paul Francis's discharge pursuant to 11 U.S.C. § 727(a)(6)(A) given Paul Francis's repeated failures to comply with lawful orders of the Bankruptcy Court.

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II. The opinion of the United States Court of Appeals for the First Circuit issued on April 27, 2021 and affirmed the decision of the Bankruptcy Appellate Court for the First Circuit, which denied discharge in lieu of dismissal to the Petitioner, Paul Francis. This opinion is reported at *In re Francis*, 996 F. 3d 10 (1st Cir. 2021).

JURISDICTION

The United States Court of Appeals for the First Circuit issued its decision on April 27, 2021. The Petition for a Writ of Certiorari (the "Petition") was filed on September 23, 2021 and was docketed on February 11, 2022. This Brief in Opposition to Petition for A Writ of Certiorari (the "Opposition") on behalf of John O. Desmond, Chapter 7 Trustee for the Estate of Paul Francis (the "Respondent") is submitted and filed timely on March 14, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

11 U.S.C. § 105(a) provides as follows:

[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

The relevant portion of 11 U.S.C. § 521(i)(1) provides as follows:

[I]f an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.

The relevant portions of 11 U.S.C. § 727 provide as follows:

(a)(6)(A) [T]he court shall grant the debtor a discharge, unless… the debtor has refused, in the case… to obey any lawful order of the court, other than an order to respond to a material question or to testify.

(c)(1) [T]he trustee, a creditor, or the United States trustee may object to the granting of a discharge.

STATEMENT OF THE CASE

The Petition by Paul Francis (the "Petitioner")[1] concerns the decision of the United States Court of Appeals for the First Circuit (the "Court of Appeals"), which affirmed the judgment of the United States Bankruptcy Appellate Panel for the First Circuit (the "BAP"), which affirmed an Order of the United States Bankruptcy Court for the District of Massachusetts (the "Bankruptcy Court") (the "Bankruptcy Court Order"). Petitioner repeatedly failed to comply with lawful bankruptcy court orders, including ultimately, the Bankruptcy Court Order requiring the Petitioner to show cause as to why he repeatedly failed to timely file a statement of intention and schedule of post-petition creditors.

The Petitioner filed a voluntary petition pursuant to Chapter 13 of the Bankruptcy Code on July 21, 2017.[2] Supplemental Appendix ("Supp. App.") 1; *In re*

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[1] To the extent this Opposition includes citations to the direct, verbatim language of underlying proceedings that reference the "Debtor" or to authority which employs the term "debtor", the terms "Debtor" and "debtor" refer exclusively to Paul Francis, the Petitioner.

[2] Approximately three months earlier, the Petitioner filed a chapter 13 case on April 3, 2017 which was dismissed a month later on May 3, 2017 for Petitioner's Failure to Comply with the Court's Order to file timely the Petitioner's Chapter 13 Plan, Schedules A/B-J, Statement of Financial Affairs, Summary of Assets and Liabilities, and Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period Form 122C-1. *In re Paul Francis*, Bankruptcy Petition # 17-11171.

Paul Francis, Bankruptcy Petition #17-12708. The case was converted to Chapter 11 upon Motion by the Petitioner on September 26, 2017. See Supp. App. 7 [Docket No. 43, 46].

On October 5, 2017, the Bankruptcy Court entered an order requiring the Petitioner to file a disclosure statement and chapter 11 plan on or before January 26, 2018. See Supp. App. 8 [Docket No. 60]. The Petitioner failed to file a disclosure statement or chapter 11 plan on or before January 26, 2018. See Supp. App. 10 [Docket No. 72]. The Bankruptcy Court thereafter ordered that the Petitioner file a disclosure statement and chapter 11 plan on or before February 12, 2018. Id. On January 30, 2018 the U.S. Trustee's office filed a Motion to Convert the Petitioner's case to Chapter 7 (the "Motion to Convert"), and thereafter supplemented its filing on March 6, 2018 on account of the Petitioner's (1) failure to comply with an order of the Court; (2) failure to provided information reasonably requested by the U.S. Trustee; (3) failure to file a disclosure statement and plan; (4) failure to pay any required fees and charges; and (5) generally for delay. Supp. App. 40, 51.

Consequently, on February 13, 2018, the Bankruptcy Court issued an order to show cause requiring the Petitioner to show cause as to "why this case should not be dismissed under 11 U.S.C. 1112(B)(1) and (B)(4)(J)" and ordered the Petitioner to respond on or before March 7, 2018. See Supp. App. 10 [Docket No. 77]. On March 20, 2018, the Court

allowed the Motion to Convert and the case was converted to Chapter 7[3]. Appendix ("App.") 1. In particular, following a hearing on the same date, the Bankruptcy Court determined:

> [a]mong other things, the Debtor could not establish that he has maintained sufficient insurance on [his residence] [11 U.S.C. Sect. 1112(b)(4)(c)], has failed to timely provide information reasonably requested by the US trustee [Sect 1112(b)(4)(h)], has failed to pay reasonable fees required under the code [Sect. 1112(b)(4)(k)], and has failed to abide by orders of the Court, namely has failed to file a plan and disclosure statement by the date set by the Court [Sect. 1112(b)(4)(e)].

Id.

On March 20, 2018, the Bankruptcy Court additionally issued an order to update (the "Order to Update") requiring the Petitioner file a statement of intention by April 19, 2018 and schedule of post-petition creditors by April 3, 2018. App. 2. The Order to Update specifically provided:

[3] The Petitioner filed a Notice of Appeal regarding the Motion to Convert on April 3, 2018. The BAP affirmed the Bankruptcy Court's allowance of the Motion to Convert on March 14, 2019. Francis v. Harrington (In re Francis), 2019 WL 1265316 (B.A.P. 1st Cir. Mar. 14, 2019).

> Failure to file the required documents with the Clerk's Office may result in the dismissal of your case. If you have questions, you may wish to consult an attorney to protect your rights. Please note that if not dismissed earlier, the case **MUST** be automatically dismissed under 11 U.S.C. §521(i) if certain documents are not filed within 45 days of the date of the filing of the petition. If you file another bankruptcy petition within 12 months of the dismissal, the automatic stay may be limited or may not take effect depending upon your circumstances.

App. 2-3. (emphasis in original). On March 21, 2018, the Trustee was appointed as the Chapter 7 Trustee of the bankruptcy estate of the Petitioner.

Given the Petitioner's failure to comply with the Order to Update, on July 5, 2018, the Bankruptcy Court entered a second order requiring the Petitioner file a schedule of post-petition creditors and statement of intent by July 19, 2018 (the "July 5th Order"). Supp. App. 55. The Bankruptcy Court cautioned in the July 5th Order, "[t]he Debtor is reminded that **refusal to obey** a lawful order of the Court is **grounds for denial of discharge in Chapter 7**." Id. (emphasis added). The Petitioner failed to file a statement of intention or schedule of post-petition creditors on or

before July 18, 2018 or a motion to extend prior to that date.

On August 13, 2018, the Bankruptcy Court issued an Order to Show Cause following the Petitioner's prior failure to comply with the Order to Update and the July 5th Order (the "Order to Show Cause"). App. 7. At its hearing on the Order to Show Cause, the Bankruptcy Court questioned the Petitioner at length concerning his receipt of the notices. App. 21. In particular, the Bankruptcy Court questioned the Petitioner as follows:

> THE COURT: Mr. Francis, we sent you a number of notices concerning things that you needed to do in connection with your case. We sent them to your counsel ... but we also sent them to you, right? Did you get those notices? . . . .
> MR. FRANCIS: Yes.
> THE COURT: All right. You opened them up and you read them. Is that right?
> MR. FRANCIS: Well, yes. My wife did it.... I don't collect the mail. My wife collect[s] the mail....
> THE COURT: ... [I]n this current bankruptcy case we sent you notices ... in March, July, and in August at least three times in connection with your list of post-petition creditors and your statement of intent. Is that how you understand it as well? You saw these notices and you opened

them and read them, or they were opened and you read them after your wife did; is that right?

MR. FRANCIS: Yes, my wife opened them but I don't know what time she get[s] them. I also want to tell you that my wife wasn't here. My wife was out of the country and then she came back. After she came back she suffered a second degree burn so that set back things when she opened things and then she wasn't here....

THE COURT: ... [B]ut you were home, right? You were living there, is that right?

MR. FRANCIS: Yes . . . .

THE COURT: ... [W]hen your wife was away out of the country and then she was ill or injured ... you got the mail and opened it, right?

MR. FRANCIS: No, I don't touch the mail . . . [M]y daughter collect[s] mail[ ] and put[s] them in a pile for her.

App. 20-23. The Bankruptcy Court further stated:

> My problem is that **it's like pulling teeth with Mr. Francis and this has been going on since March 2017, not this March.** And so **we have repeatedly issued orders to show cause** as to why he shouldn't -- various things shouldn't happen and case be dismissed, he loses his discharge because he hasn't done

what he has been required to do and it shouldn't be that way. **It can't be that way. This is the poster child for someone who has ignored what the court has required from him** . . .

App. 26. (emphasis added).

On September 25, 2018, the Bankruptcy Court entered an order, consistent with its findings, denying the Petitioner's discharge pursuant to 11 U.S.C. § 727(a)(6)(A), on the grounds that the Petitioner had repeatedly and willfully refused to obey lawful orders from the Bankruptcy Court. App. 13. The Petitioner appealed the Bankruptcy Court Order to the BAP. App. 14-16. On September 10, 2019, the BAP issued an opinion affirming the Bankruptcy Court Order. App. 29-40. On September 10, 2019, the BAP entered judgment affirming the bankruptcy court's order denying the Petitioner his discharge. App. 41.

The Petitioner appealed to the Court of Appeals as docketed on October 22, 2019. App. 42-43. On April 27, 2021, the Court of Appeals affirmed the decision of the BAP and issued a written opinion in support. In its opinion, the Court of Appeals held, *inter alia*, that : (1) U.S.C. § 521(i) did not require the Bankruptcy Court to simply dismiss the Petitioner's petition; (2) pursuant to 11 U.S.C. § 105(a), nothing in the Code should be construed to preclude the court from acting *sua sponte* to prevent abuse of process and accordingly, the bankruptcy courts possess the

authority to deny a debtor a discharge; (3) even assuming a showing of willfulness of refusal to comply with bankruptcy court orders was required, the Petitioner's repeated spurning of bankruptcy court orders without any legitimate reason supports the bankruptcy court's finding of a willful refusal; and (4) the denial of the Petitioner's discharge for having refused to obey lawful orders of the court did not contravene his due process rights.

The Petitioner now seeks this Court's review of the Court of Appeals opinion affirming the BAP decision refusing to grant the Petitioner's discharge. In accordance with Rule 15.3, the Respondent's Opposition must be filed on or before March 14, 2022 and has been timely filed.

REASONS FOR DENYING CERTIORARI

Review on a writ of certiorari is not a matter of right, but of judicial discretion. Pursuant to United States Supreme Court Rule 10, "A petition for a writ of certiorari will be granted only for compelling reasons." Enumerating further the possible character of reasons the Court considers when granting a writ of certiorari, Rule 10(a)[4] states:

> a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with the decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for the exercise of this Court's supervisory power.

Rule 10(c) clarifies that a writ of certiorari could be granted if:

> a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

[4] Rule 10(b) refers to a state court of last resort and does not apply to the Petition.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. United States Supreme Court Rule 10.

The Petition at bar asks this Court to exercise its discretion in order to grant review of the decision of the Court of Appeals. The Petition makes no allegation that the decision is in conflict with the decision of another United States court of appeals on the same important matter, nor does it argue that the decision responds to an important federal question or that it has departed from the accepted use of judicial proceedings. The Petition asks this Court to exert its supervisory power to review the Court of Appeals decision despite the fact that, in addition to the above, the decision has not decided any question of federal law that either has not been settled by this Court, or has been decided in conflict with relevant decisions of this Court.

The Petition does not only fail to articulate any identifiable reason within the guiding framework of Rule 10 as to why this Court should grant certiorari – in fact, flying in the face of the Rule ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."), the Petition pleads directly:

> This writ shall be granted in order to prevent the use *sua sponte* orders and unfettered use of judicial discre[a]tion in order to rule in

> contravention of clear, unambiguous, and explicit statutes and set local rules; and to preserve due process and statutory intent by applying and enforcing those statutes as written into law and not as envisioned by the courts tasked to interpret and apply them.

Petition at 9-10. If a good faith effort is made to discern the plain meaning of this basis for Petitioner's request, one is left to infer that Petitioner would like this Court to prevent, generally, "*sua sponte* orders" and judicial discretion, and to preserve "statutory intent" by way of limiting, without qualification, judicial interpretation and application of the law. Petitioner implores this Court to take troubling, ambiguous, and intangible action and such argument is void of logic and reason. Certainly, Petitioner does not offer a "compelling", even if inapplicable, reason to grant a writ of certiorari of any variety.

While it is the Respondent's position that the Petition does not adequately plead a basis for this Court to grant a writ of certiorari, the Opposition substantively responds below to the entirety of the Petitioner's arguments in order, in part, to clarify misstatements of law and fact therein.

A. The Bankruptcy Court Was Not Required to Automatically Dismiss the Petitioner's Chapter 7 Case Under 11 U.S.C. § 521(i).

The Petitioner's assertion that the Court of Appeals decision "erroneously" affirmed the BAP

Decision and argues that the "misapplication" of Section 521(i) will lead to a liberal interpretation of a statute which should, in Petitioner's opinion, call for strict application. Petition at 10-11. Petitioner's resurrected argument that Section 521(i) required dismissal of the Petitioner's bankruptcy case, and not denial of the Petitioner's discharge, is incorrect.

As articulated in In re Acosta-Rivera, 557 F.3d at 10, wherein the Court determined the bankruptcy court "acted in consonance with the statutory scheme and within the realm of its discretion" in declining to dismiss the debtor's case, the Court stated, "[t]he term 'automatic dismissal' is something of a misnomer. Typically, dismissal under this provision takes place at the instance of a 'party in interest.' ... Dismissal is, therefore, hardly 'automatic.' " (citing 11 U.S.C. § 521(i)(2) and In re Spencer, 388 B.R. 418, 421 (Bankr. D. D.C. 2008)). Significantly, in Acosta-Rivera, the Court noted, "we are reluctant to read into the statute by implication a new limit on judicial discretion that would encourage rather than discourage bankruptcy abuse. It is safe to say that Congress, in enacting BAPCPA, was not bent on placing additional weapons in the hands of abusive debtors." In re Acosta-Rivera, 557 F.3d at 13. The Court further provided, "[w]here, however, there is no continuing need for the information or a waiver is needed t**o prevent automatic dismissal from furthering a debtor's abusive conduct**, the court has discretion to take such an action. This case is of

that genre." In re Acosta-Rivera, 557 F.3d at 14. (emphasis added).[5]

As the Court of Appeals opinion made clear, the Petitioner's disagreement with certain propositions established in Acosta-Rivera does not render the decision moot. In fact, the Court of Appeals defined Acosta-Rivera as "emblematic of the majority rule." Still, Petitioner argues that Acosta-Rivera should not have been applicable to the underlying matter and relies upon "fair warning" requirements in criminal cases to distinguish the Petitioner's facts from those in Acosta-Rivera. Petition at 12. As a result, contrary to the Petitioner's assertion, Acosta-Rivera soundly supports the proposition that dismissal under § 521 is not unconditional. Instead, Acosta-Rivera supports the Bankruptcy Court's denial of the Petitioner's discharge: the Petitioner has routinely abused the bankruptcy process. As articulated above, the Petitioner consistently ignored Bankruptcy Court orders—including failing to file a disclosure statement and chapter 11 plan, failing to file a statement of intention, and failing to file a schedule of post-petition creditors.

[5] Soto v. Doral Bank (In re Soto), 491 B.R. 307, 315 (B.A.P. 1st Cir. 2013), upon which the Petitioner also cites, is entirely distinguishable from the present situation given its consideration of potential conflict between § 521(a) and § 1307(c)(9). In any event, Soto's holding, that dismissal under § 521(i)(1) did not require notice and a hearing has no bearing on the present action.

Other courts have similarly held that § 521(i) does not require mechanical dismissal. Wirum v. Warren (In re Warren), 568 F.3d 1113, 1117 (9th Cir. 2009) ("We therefore hold, consistently with the First Circuit, that a bankruptcy court retains discretion to waive the § 521(a)(1) filing requirement even after the forty-five day filing deadline set forth in § 521(i)(1) has passed."); Simon v. Amir (In re Amir), 436 B.R. 1, 25 (B.A.P. 6th Cir. 2010) (court declined to dismiss case where debtor "ignored orders of the court on a continual basis and refused to cooperate with the Trustee. Only after discovering that undisclosed assets were going to be collected and liquidated did [debtor] move for dismissal under § 521(i)."). For the Petitioner to continue to represent that "the bankruptcy courts are divided regarding the reading and implementation of Section 521" is disingenuous and inaccurate. Petition at 10. There is no split in the circuits as to whether a judge has the discretion to deny discharge when a debtor willfully fails to comply with court orders. While the law of the circuit doctrine admits narrow exceptions, the Court of Appeals opinion held accurately that the Petitioner's matter "falls comfortably within the heartland of the doctrine."

The Petitioner attempts to conflate his frail contentions concerning § 521(i) with due process protections. Moreover, the Petitioner's reliance on McBoyle and Lanier, two criminal cases, does not support the notion that the Bankruptcy Court was forced to dismiss the Petitioner's chapter 7 case or that

the Bankruptcy Court Order violated the Petitioner's due process rights. The Petitioner attempts to improperly infuse those premises underlying due process requirements with a vague and ineffective false premise of "fairness." Petition at 14. However, the Petition fails to acknowledge that genuine due process protections, such as notice and an opportunity to be heard, were fully afforded to the Petitioner.

"The Supreme Court has repeatedly stated that in order to satisfy due process, notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present objections." Gonzalez-Ruiz v. Doral Fin. Corp. (In re Gonzalez-Ruiz), 341 B.R. 371, 381 (B.A.P. 1st Cir. 2006) (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, (1950)). Here, it is undisputed that the Bankruptcy Court sent two separate notices to the Petitioner, several months apart, which warned the Petitioner that his failure to comply with providing a statement of intentions and schedule of post-petition creditors could lead to a denial of his discharge. It is also undisputed that the Petitioner in fact received theses notices (despite consciously ignoring the notices) as did his counsel who appeared at the evidentiary hearing on the Order to Show Cause.

In fact, as described above, the Petitioner testified to having received the July 5th Order. App. 20. Thus, it is entirely inaccurate for the Petitioner to even

suggest that he was not given "fair warning" of the possibility that the Bankruptcy Court could deny his discharge following his failure to justify his non-compliance with supplying a statement of intentions and schedule of post-petition creditors as required by the Order to Update, and the July 5th Order and the Order to Show Cause, which were sent after the Order to Update. As articulated above, the Petitioner's claim is further belied by the fact that the Petitioner acknowledged at the hearing on the Order to Show cause that he, through his wife or daughter's gathering of the mail, received the July 5th Order and the Order to Show Cause. App. 20-23. As found by the Bankruptcy Court, the Petitioner "conscious[ly] . . . ignor[ed] mail, addressed to the Debtor and marked with the seal of this Court . . . ." App. 13. Accordingly, this Court should find no compelling reason to grant the Petition.

Further, In re Lugo, a Northern District of Indiana decision, cited by the Petitioner, does not provide any support the Petitioner's assertion that § 521 required dismissal. In Lugo, the Court expressly acknowledged, "[s]ome decisions have concluded that the court has the discretion to allow the case to proceed **if that is necessary to prevent the debtor from abusing or manipulating the bankruptcy process**, by contending the case was automatically dismissed in an effort to frustrate the trustee's administration of assets. Assuming that is so, this is not such a situation. The debtor is seeking to avoid the effect of § 521(i), not use it as a weapon against the

trustee." In re Lugo, 592 B.R. 843, 846 n.4 (Bankr. N.D. Ind. 2018) (internal citations omitted) (emphasis added). Here, unlike the situation in Lugo, the Petitioner's abuse of the Bankruptcy Code is directly at issue. As a result, this Court should deny the Petition.

B. The Court of Appeals Did Not Err in Affirming the Decision to Deny the Petitioner's Discharge Pursuant to 11 U.S.C. § 105(a).

The Petitioner's argument that 727(c)(1) requires a different result is also incorrect. In particular, the Petitioner's assertion that the Bankruptcy Court lacked authority to *sua sponte* deny the Petitioner's discharge is without merit, given that the Bankruptcy Court properly exercised its discretion under 11 U.S.C. § 105(a) in denying the Petitioner's discharge. 11 U.S.C. § 105(a) states:

> [t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Thus, the plain language of §105(a) grants a bankruptcy court judge power to "issue any order necessary or appropriate to carry out the provisions of this title" and expressly grants power to act "sua sponte" as is "necessary or appropriate to enforce . . . court orders . . . ."

In the underlying matter, the Bankruptcy Court acted squarely within its discretion under § 105(a).[6] The Bankruptcy Court entered the Bankruptcy Court Order in response to the Petitioner's repeated failures to comply with lawful court orders. In fact, prior to the entry of the Bankruptcy Court Order the Petitioner had already failed to comply with multiple orders. As the Bankruptcy Court noted:

> it's like pulling teeth with Mr. Francis and this has been going on since March 2017, not this March. And so we have repeatedly issued orders to show cause as to why he shouldn't -- various things shouldn't happen and case be dismissed, he loses his discharge because he hasn't done what he has been required to do and it shouldn't be that way. It can't be that

[6] Further, the Bankruptcy Court's exercise of its discretion pursuant to § 105 is not in conflict with provisions of the Bankruptcy Code as asserted by the Petitioner. As articulated above Section 105 is clear in that it grants the Bankruptcy Court with authority prevent abuse of the bankruptcy process – this is in addition and does not conflict with §727(c)(1).

> way. **This is the poster child for someone who has ignored what the court has required from him** . . .

App. 26. (emphasis added). It is a direct consequence of the Petitioner's repeated failures to comply with multiple Bankruptcy Court orders—despite receiving the orders and choosing to ignore them—that the Court of Appeals was correct in affirming that the Bankruptcy Court acted within its discretion. Given the Petitioner's continued failures to comply with court orders, this case is "one of the rare circumstances the court may act, *sua sponte* to deny a debtor a discharge . . . in the interest of justice to 'prevent an abuse of process." In re Burrell, 148 B.R. 820, 823 (Bankr. E.D. Va. 1992) (where court, *sua sponte*, denied debtor's discharge pursuant to 11 U.S.C. § 727(a)(8)).

Still further, and contrary to the Petitioner's assertion, courts in other jurisdictions have determined it is appropriate for a Court to exercise its equitable powers and authority under 11 U.S.C. 105 to *sua sponte* deny a debtor's discharge under Section 727 of the Bankruptcy Code. As articulated In re Asay, 364 B.R. 423, 425 (Bankr. D. N.M. 2007), the court found *sua sponte* denial of discharge appropriate, under 11 U.S.C. § 727(a)(8), holding 11 U.S.C. § 105(a) "empowers the court to 'carry out the provisions of this title' and take any action necessary to 'prevent an abuse of process' so that it is appropriate for the Court to invoke 11 U.S.C. §

727(a)(8) *sua sponte* and refuse to grant a debtor a discharge when that debtor has received a discharge in a prior proceeding commenced within six years before the date of the filing of the current petition." In re Asay, 364 B.R. at 426–27 (internal citations omitted). To the contrary, the Petitioner's reliance on In re Briggs and In re Korte are not applicable given that they fail to support the proposition that a court cannot *sua sponte* deny a debtor's discharge pursuant to §727(a)(6). Instead, in In re Briggs, the court's holding was limited to § 1325(a)(1), and in no way concerns § 727. In In re Korte, the court, while noting that "importantly" § 727 exists to "prevent the debtor's abuse of the Bankruptcy Code," did not hold a Bankruptcy Court may not *sua sponte* deny a debtor's discharge. Korte v. Internal Revenue Serv. (In re Korte), 262 B.R. 464, 471 (B.A.P. 8th Cir. 2001). Rather in In re Korte the court upheld denial of a debtor's discharge pursuant to §§ 727(a)(2)(A) and (a)(4)(A).

The Petitioner argues further that "statutory construction dictates that Congress did not intend for the 'bankruptcy court' to be.. an envisioned plaintiff or party in interest to pursue a denial or discharge action…" Petition at 22. In this regard, too, the Petitioner could not be more wrong. As the Court of appeals made clear, the truth is a direct contradiction: it is legislative history that supports a bankruptcy court's exercise of its *sua sponte* authority. Congress added the second sentence of § 105(a) "expressly intending to broaden the authority of bankruptcy

courts to act, *sua sponte*, to promote the Code's provisions." In re Kestell, 99 F. 3d 146, 148 (4th Cir. 1996). The Petition relies heavily on errors related to statutory intent and statutory construction, when it is the intent and construction of § 105(a) that strengthens the Respondent's position.

C. The Court of Appeals Did Not Err in Affirming the Decision to Deny Petitioner a Discharge Pursuant to 11 U.S.C. § 727(a)(6)(A).

The Court of Appeals affirmed the BAP Decision to uphold the Bankruptcy Court judgment, and in doing so determined that the Petitioner was properly denied a discharge pursuant to 11 U.S.C. § 727(a)(6)(A). Section 727(a)(6)(A) states, "[t]he court shall grant the debtor a discharge, unless . . . the debtor has refused, in the case . . . to obey any lawful order of the court, other than an order to respond to a material question or to testify . . . ." Here, it is unquestionable that the Petitioner failed to obey the Order to Update and the July 5th Order as he failed to supply any response. Moreover, there is no dispute that the Order to Update, the July 5th Order, and the Order to Show Cause were lawfully issued by the Bankruptcy Court.

Further, the record is clear that the Petitioner "refused" to comply with its orders. According to Riley v. Tougas (In re Tougas), 354 B.R. 572, 578 (Bankr. D. Mass. 2006), "the plaintiff must show some degree of volition or wilfulness [sic]on the part of the debtor in failing to comply with the order." (citation omitted).

Here, the record lacks any circumstances mitigating the Petitioner**'s** failure to comply with the Order to Update, the July 5th Order, or the Order to Show Cause. Cf. In re Tougas, 354 B.R. at 578 (denial of discharge not appropriate where "[debtor's] illness, frequent household moves, and the absence of clear instructions from [debtor's] counsel to produce the missing records by a date certain" caused noncompliance). As the Petitioner testified, the reason the Petitioner failed to comply with the Order to Update, July 5th Order, and Order to Show Cause was that it was his practice to leave collecting, opening, and reading mail to his wife and daughter. App. 22-23. In fact, the Petitioner testified as follows:

> THE COURT: . . . you got the mail and opened it, right?
>
> MR. FRANCIS: No, I don't touch the mail.
>
> THE COURT: You just ignored the mail?
>
> MR. FRANCIS: Yes. Once it came –

App. 23. Moreover, unlike in In re Tougas, at the hearing on the Order to Show Cause, counsel for the Petitioner stated that she "explained to him that it is the procedure order that we need to do everything that this Court issues . . . ." App. 19.

According to Smith v. Jordan (In re Jordan), 521 F.3d 430, 433 (4th Cir. 2008) "[t]he party objecting to discharge satisfies [establishing lack of compliance

was willful and intentional] by demonstrating the debtor received the order in question and failed to comply with its terms." (citing La Barge v. Ireland (In re Ireland), 325 B.R. 836, 838 (Bankr. E.D. Mo. 2005), Katz v. Araujo (In re Araujo), 292 B.R. 19, 24 (Bankr. D. Conn. 2003)). Here, the Petitioner testified to receipt of the Order to Update, July 5th Order, and Order to Show Cause:

> THE COURT: All right. Okay. So they came to the house. Your wife collected them.
>
> MR. FRANCIS: Yeah.
>
> …
>
> THE COURT: . . . You saw these notices and you opened them and read them or they were opened and you read them after your wife did; is that right?
>
> MR. FRANCIS: Yes, my wife opened them but I don't know what time she get them.

App. 21-22. As further stated by the court in In re Jordan, "such a showing then imposes upon the debtor an obligation to explain his non-compliance." In re Jordan, 521 F.3d at 433. Simply stating that others were responsible for collecting the mail, as the Petitioner has, is not a sufficient justification for noncompliance. See In re Ireland, 325 B.R. at 838

("the trustee can establish that the debtor refused to obey a court's order for purposes of 11 U.S.C. § 727(a)(6)(A) if the court mailed the order to the address listed by debtor on his petition."); In re Araujo, 292 B.R. at 24 ("It is true that the Petitioner might have lacked actual knowledge of the [Order]. However, that was [the debtor's] own fault. That is because, as discussed above, it was the [debtor's] responsibility to maintain a current mailing address on file with the court at all times during the pendency of this chapter 7 case. Moreover, the Debtor was on notice . . . entry of the [order] should have come as no surprise to [the debtor]."); see also Lassman v. Spalt (In re Spalt), 593 B.R. 69, 91 (Bankr. D. Mass. 2018) (debtor could not avoid denial of discharge by claiming delegation of responsibility to non-debtor). Here, the Petitioner provided no legally cognizable reason for his noncompliance. The Court of Appeals correctly opined that the Petitioner's "repeated spurning of bankruptcy court orders without any legitimate reason amply supports the bankruptcy court's finding of a willful refusal." Certainly, the Petition contains no compelling reason which would justify a writ of certiorari.

D. This Petition Presents No Issue Meriting This Court's Review.

That review on a writ of certiorari is not a matter of right, but judicial discretion, appears to be lost on the Petitioner. As enumerated in detail above, the Court of Appeals decision is not in conflict with the

decision of any other United States Court of Appeals. To the contrary, the decision is safely, inarguably within the majority when there exists any circuit-based decision; more frequently, there is no authority that disputes the holdings put forth by the Court of Appeals in this matter. Indeed, there is no important federal question raised by the Court of Appeals decision, nor does the Petition articulate the existence of a federal question, whether or not it posits that the Court of Appeals considered one.

In all contexts, the Petition is, at best, without merit, and moreso, tends to conflate unrelated issues, misapply law, and misstate fact. Despite the plain language of Rule 10 clarifying that a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law, the Petitioner boldly attempts to create a nexus based upon what the Petitioner claims to be a factual mistake: "… the appeals court re-affirmed the BAP ruling while making a factual mistake. The factual mistake may have caused the error in the ruling." Petition at 8. Without even supporting evidence for such a poorly aimed contention, the Petition unequivocally ignores the need for the pleading of a compelling reason.

Further, the Petitioner argues that this Court should grant a writ of certiorari on the basis that the Court of Appeals did not apply and interpret existing

law appropriately. While it is curious that it is, in fact, the Petitioner that misapplies properly stated rules of law, even if the Petitioner proffered arguments with accuracy, the Petition would still fall short of meriting a writ of certiorari.

E. Issues of Policy Should Be Addressed to Congress.

The Petitioner attempts to raise arguments related to unspecific policy concerns which may arise should this Court fail to grant the Petition. Such an attempt is made despite the fact that the Petitioner has had the opportunity to address his arguments in front of the BAP, and now has benefitted from appearing before the Court of Appeals. The issues that the Petitioner has raised throughout the underlying proceedings are exclusively within the jurisdiction of the Court of Appeals, and those issues have been fully and thoroughly adjudicated. For the Petitioner to now argue that "the judgments below have become published opinions… and to allow the rulings to remain as good case law will not just erode and disregard statutory laws, codes, local rules and regulations; but will also undermine Congressional intent" is a transparent and ill-advised attempt to circumvent any proper channel to shape legislation. Even if the Petitioner's concerns about the erosion of Congressional intent were remotely viable – which they are not – the Petitioner should address such arguments with Congress. The history of the relationship between legislative intent and judicial

interpretation relative to the issues addressed by the Court of Appeals decision is one that is untarnished, clear, and without a need for further resolution. Should that landscape ever shift, it is the legislative branch, not this Court, that should re-define policy.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Respondent respectfully requests that this Court enter an Order denying Paul Francis's Petition For A Writ of Certiorari.

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CHAPTER 7 TRUSTEE OF
THE ESTATE OF PAUL FRANCIS,

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