No.

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD C. KUPPERSTEIN,

Petitioner,

v.

IRENE SCHALL, Personal Representative of the Probate Estate of Fred Kuhn; and EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES OF THE COMMONWEALTH OF MASSACHUSETTS,

Respondents.

On Petition for Writ of Certiorari
To the First Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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A. QUESTIONS PRESENTED FOR REVIEW

1. Whether a state court has jurisdiction or authority to determine whether a civil action before it is subject to the automatic stay of 11 USC §362.

2. Whether the so-called "police power exception" of 11 USC §362(b)(4) permits a governmental entity to continue to collect a civil money judgment after a bankruptcy petition is filed without obtaining relief from the automatic stay from the bankruptcy court.

3. Whether the bankruptcy court has authority to permit the collection by a governmental agency of a civil money judgment notwithstanding the plain language of the bankruptcy code, by granting relief from the automatic stay "for cause".

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. RELATED PROCEEDINGS

1. In re Estate of Kuhn - BR14P0127EA – Bristol County, Massachusetts, Probate and Family Court (ongoing).
2. In re Donald C. Kupperstein – Massachusetts District Court, docket numbers 21-cv-10201-TSH and 21-cv-10202-TSH (ongoing).
3. Donald C. Kupperstein, Appellant, v. Irene Schall, Personal Representative of the Estate of Fred Kuhn; and Executive Office Of Health And Human Services, Appellees. – First Circuit Court of Appeals, docket number 20-1472 – judgment entered April 22, 2021.
4. In re Donald C. Kupperstein, Appellant – Massachusetts District Court, docket numbers 18-11772-LTS and 18-11851-LTS – judgment entered April 22, 2020.
5. Donald C. Kupperstein v. Daniel Tsai, Director of the Office of Medicaid, et al – Massachusetts District Court Case No. 1:20-cv-11868-FDS.
6. Executive Office of Health and Human Services of the Commonwealth of Massachusetts v. Donald C. Kupperstein – Bankruptcy Court for the District of Massachusetts – Adversary Proceeding No. 18-01101-MSH.
7. Irene Schall as Successor Personal Representative v. Donald C. Kupperstein – Bankruptcy Court for the District of Massachusetts – Adversary Proceeding No. 18-01100-MSH.
8. Irene Schall as Successor Personal Representative and Executive Office of Health and Human Services v. Donald C. Kupperstein – First Circuit Court of Appeals – Case No. 18-2248.
9. Donald C. Kupperstein v. Irene Schall as Successor Personal Representative and Executive Office of Health and Human Services – First Circuit Court of Appeals – Case No. 20-1262.
10. Executive Office of Health and Human Services v. Donald Kupperstein, Esq. et al – Massachusetts Superior Court case no. 15-2036 – judgment entered November 27, 2008
11. Executive Office of Health and Human Services v. Donald Kupperstein, Esq. et al – Massachusetts Appeals Court case no. 19-P-378 – judgment entered June 22, 2020.
12. In re Donald C. Kupperstein, Debtor – Chapter 7 bankruptcy case, District of Massachusetts Bankruptcy Court case number 18-10098-MSH.
13. Donald C. Kupperstein, individually and as trustee of the Norton Realty Trust, etc., v. Executive Office of Health and Human Services, et al – Massachusetts Land Court Miscellaneous Case No. 17 MISC 000593 (RBF).

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The Petitioner, DONALD C. KUPPERSTEIN, requests that the Court issue its writ of certiorari to review the judgment of the First Circuit Court of Appeals entered in this case on April 22, 2021 (petition for panel rehearing or rehearing *en banc* denied on May 25, 2021).

F. CITATION TO OPINION BELOW

Kupperstein v. Schall et al (In re Kupperstein), 2021 U.S. App. LEXIS 11944 (1st Cir. April 22, 2021).

G. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 USC § 1254.

H. CONSTITUTIONAL PROVISIONS AND LEGAL PRINCIPLES INVOLVED

Article 1, Section 8, of the Constitution grants Congress the power to enact uniform laws on the subject of bankruptcies throughout the United States.

In 28 USC §1334, Congress provided that the district courts shall have original and exclusive jurisdiction of all cases under the Bankruptcy Code, title 11 of the United States Code. However, the district courts have original but not exclusive jurisdiction of civil proceedings arising under title 11, or arising in or related to cases under title 11. The district court also has exclusive jurisdiction over the property of a debtor, as well as claims or causes of action that involve construction of 11 USC §327. Pursuant to 28 USC §157, the district courts have authority to provide that

bankruptcy cases may be referred to bankruptcy judges for the district. Almost all districts have made such referrals by local rule.

28 USC §157 also defines some matters within bankruptcy cases as "core" proceedings and others as "non-core". In core proceedings, the bankruptcy court (which is an Article 1 court) may enter final, appealable judgments, which are initially decided by either the district court or a Bankruptcy Appellate Panel, then may proceed to the Circuit court. For non-core proceedings, however, the bankruptcy court must prepare a report and recommendations for review by the district court, unless the parties assent to the bankruptcy court entering final judgment. There is no dispute that matters related to the automatic stay are "core" proceedings. See generally *Stern v. Marshall*, 564 US 462 (2011).

The automatic stay of 11 USC §362 is among the most fundamental of debtor protections, and courts are generally admonished to guard the stay jealously. *In re Soares,* 107 F.3d 969, 976 (1st Cir. 1997), citing, inter alia, *Kalb v. Feuerstein*, 308 US 433 (1940).

That said, Congress provided that criminal proceedings, 11 USC §362(b)(1), and certain civil proceedings may continue notwithstanding the stay. The statute, however, explicitly states that the exception for certain civil proceedings does not extend to the collection of money, even by a governmental agency. Federal courts

have no equitable authority or power to create exceptions to statutes that contravene the plain language of the statute.

I. STATEMENT OF THE CASE

Petitioner Donald C. Kupperstein is an 80-year old, semi-retired attorney in the Commonwealth of Massachusetts. In the controversy at hand, he was retained by Thomas Sheedy to assist him in acquiring certain real estate in Norton, Massachusetts, which was part of the Probate estate of Fred Kuhn. Mr. Kuhn's daughter, Carol Thibodeau, had been appointed Personal Representative of the Probate estate.

Mr. Kupperstein and Mr. Sheedy met with Ms. Thibodeau at her request to discuss a sale of Mr. Kuhn's real estate since she had no interest in keeping it. After the will was allowed by the Probate court, a sale was arranged and consummated by Ms. Thibodeau, acting in her individual capacity, not as Personal Representative.

Prior to his death, Mr. Kuhn had received Medicaid benefits, which in Massachusetts are administered by respondent Executive Office of Health and Human Services (hereinafter "MassHealth"). By state statute, the Probate court clerk is required to give notice to MassHealth of every probate petition filed so that MassHealth may exercise its statutory right to be reimbursed for the benefits paid[1].

[1] In this case, the Probate court voided the heir's deed and returned the property to the Probate estate. A new Personal Representative, respondent Irene Schall, had been appointed after Ms. Thibodeau

When MassHealth found out that the heir had sold the real estate, it began to litigate against Mr. Kupperstein and Mr. Sheedy (but not Ms. Thibodeau, personally) in both the Probate Court and the Superior Court of Massachusetts to undo the conveyance. The Probate court issued several orders against Mr. Kupperstein and eventually held him in contempt for disobeying those orders. The Probate court imposed substantial civil monetary sanctions designed to compensate MassHealth and Schall for their expenses, as well as civil incarceration if he did not pay the monetary sanctions. The Superior Court also entered a very substantial money judgment against him and in favor of MassHealth.

Being unable to pay the Probate court monetary judgments and seeing no other way to get out from under this burden, and desiring to avoid further civil incarceration for not paying the money sanctions, Mr. Kupperstein filed a petition under Title 11, Chapter 7, of the United States Code, with the assistance of a competent and experienced attorney (not present counsel).

The Probate court and the respondents were immediately notified of the filing of the bankruptcy petition. MassHealth, however, persuaded the Probate court that the automatic stay did not apply to its actions to enforce the monetary sanctions, even by way of civil incarceration until paid. The Probate court thus continued to hold hearings on its contempt judgments, post-bankruptcy petition – and still is - and on

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resigned, and the new Representative sold the property for about $250,000 - most, if not all, of which was paid to MassHealth.

two occasions incarcerated Kupperstein briefly. This was error by the Probate court because state courts do not have jurisdiction to determine the extent of the automatic stay or grant relief from it. *In re Gruntz*, 202 F.3d 1074, 1087 (9th Cir. 2000); *cf*. *In re Hamilton*, 540 F.3d 367 (6th Cir. 2008) ("We hold that a state-court judgment that modifies a discharge in bankruptcy is void ab initio and the *Rooker-Feldman* doctrine would not bar federal-court jurisdiction over the Debtor's complaint."); but see *In re Fussell*, 928 F.2d 712, 716 (5th Cir. 1991), *cert. denied,* 502 U.S. 1107, 112 S.Ct. 1203, 117 L.Ed.2d 443 (1992) ("However, we have squarely held that a bankrupt 'has no federal right to prevent the [state] courts from requiring him to repay debts that are the subject of his bankruptcy proceedings.'") (emendation in the original; citing cases).

In the bankruptcy case, Kupperstein (now represented by the undersigned) asked the bankruptcy judge to sanction MassHealth and the Personal Representative for the stay violations. Not only did the bankruptcy judge refuse to do so, he granted relief from the automatic stay so that MassHealth and Schall could collect their money judgment in any manner, and also held that the collection of a civil money judgment by a governmental agency was not stayed by the filing of a bankruptcy petition, denying Kupperstein's motion for sanctions for the stay violations.

Kupperstein appealed to the District Court, which affirmed. *In re Kupperstein*, Nos. 18-11772-LTS, 18-11851-LTS, 2020 U.S. Dist. LEXIS 70883 (D. Mass. Apr. 20,

2020). The First Circuit also affirmed. *Kupperstein v. Schall et al (In re Kupperstein)*, 2021 U.S. App. LEXIS 11944 (1st Cir. April 22, 2021).

The present Petition followed timely.

J. REASONS FOR GRANTING THE WRIT

1. The circuit courts of appeals are intractably split in their application of the "police power" exception to the automatic stay of the Bankruptcy Code. This court should grant certiorari to resolve the split and thereby ensure that courts below adhere to the plain language of the statute.

2. The extent of state court jurisdiction to determine the extent of the Bankruptcy Code's automatic stay is subject to a circuit split and is of critical importance to the uniformity of the Bankruptcy Code's application.

3. Bankruptcy courts have wide discretion to determine the existence of "cause" in various sections of the bankruptcy code. But that discretion must be exercised within the bounds of the statutes. Certiorari should be granted in order to clarify and cabin that discretion in a way that allows bankruptcy courts appropriate leeway but remains faithful to the statute.

K. JURISDICTION

Courts – whether state or federal – have only so much jurisdiction as legislatures have granted them. See *Exxon Mobil Corp. v. Allapattah Services, Inc.,* 545 US 546, 552 (2005); *Recinos v. Escobar*, 473 Mass. 734, 739 (2016) (discussing the jurisdiction of the Probate and Family courts of Massachusetts).

Article 1, Section 8, of the Constitution grants Congress the power to enact uniform laws on the subject of bankruptcies throughout the United States. *Central Va. Community College v. Katz*, 546 US 356 (2006).

In 28 USC §1334, Congress provided that the district court shall have original and exclusive jurisdiction of all cases under title 11 of the United States Code. However, the district courts have original but not exclusive jurisdiction of civil proceedings arising under title 11, or arising in or related to cases under title 11. The district court also has exclusive jurisdiction over the property of a debtor, as well as claims or causes of action that involve construction of 11 USC §327.

Because the federal district court's jurisdiction over bankruptcy cases is exclusive, state courts have no jurisdiction or authority to determine the extent or scope of the automatic stay. *In re Gruntz*, 202 F.3d 1074, 1087 (9th Cir. 2000); *cf. In re Hamilton*, 540 F.3d 367 (6th Cir. 2008) ("We hold that a state-court judgment that modifies a discharge in bankruptcy is void ab initio and the *Rooker-Feldman* doctrine would not bar federal-court jurisdiction over the Debtor's complaint.").

Other circuits disagree. *In re Fussell*, 928 F.2d 712, 716 (5th Cir. 1991) ("However, we have squarely held that a bankrupt 'has no federal right to prevent the [state] courts from requiring him to repay debts that are the subject of his bankruptcy proceedings.'") (emendation in the original; citing cases); *In re Ferren*, 203 F.3d 559 (8th Cir. 2000) (holding that where the state court determined that judicial liens were not discharged in the bankruptcy case, the bankruptcy court had no jurisdiction, pursuant to the *Rooker-Feldman* doctrine, to overturn that determination).

Certiorari should be granted in order to affirm the exclusive jurisdiction of federal courts over bankruptcy cases.

L. THE POLICE POWER EXCEPTION

This Court has repeatedly recognized that the automatic stay of 11 USC §362 is "one of the fundamental debtor protections provided by the bankruptcy laws." See, e.g., *Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection*, 474 US 494, 503 (1986). Even so, Congress provided that some civil proceedings should continue. Among them is a section colloquially known as the "police power exception", 11 USC §362(b)(4), which provides that the stay does not prohibit,

> under paragraph (1), (2), (3), or (6) of subsection (a) of this section, [] the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the

> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment **other than a money judgment**, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power; …

See *Id*. (emphasis added). The statute is abundantly clear: the police power exception does not apply to the collection of a civil money judgment, even by the government. Nothing in the statute allows for judicial discretion, equitable or otherwise.

All of the courts below, however, found that the collection of a money judgment for civil contempt by a governmental agency is not stayed by 11 USC §362(b)(4). They concluded that they have equitable authority to read an exception into the statutory language. This they cannot do. *Law v. Siegel*, 134 S. Ct. 1188 (2014) (bankruptcy court may not contravene express provisions of the bankruptcy code in order to impose sanctions on a "dishonest" debtor). Not even the broad equitable power under 11 USC §105 can be used in that manner. *Id*.

There is no exception in the statute for collection of a money judgment by a governmental agency for compensatory civil contempt sanctions.

> The task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself. In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, "the sole function of the courts is to enforce it according to its terms."

United States v. Ron Pair Enterprises, Inc., 489 US 235, 241 (1989) (internal citations omitted).

The lower courts primarily relied on *In re Dingley*, 852 F.3d 1143 (9th Cir. 2017) and *Alpern v. Lieb*, 11 F.3d 689 (7th Cir. 1993), to support their conclusions that collection of a civil compensatory money judgment for contempt is not excepted from the automatic stay. Even assuming those courts were right in finding an unwritten, equitable exception to the statutory prohibition of collection of a civil contempt sanction by a governmental agency, those cases are inapposite to this case. In *Dingley*, the civil contempt sanctions were imposed because of litigation misconduct. There is no litigation misconduct in this case relating to the Probate court matters; all that the Probate court is doing is compensating the respondents. See *In Re Erhardt*, 618 BR 832, 843 (ND Illinois 2020) (distinguishing *Dingley* because the contempt findings were not related to the "dignity of the court" but were intended to enforce private rights); see also *Porter v. Nabors Drilling USA, LP*, 854 F.3d 1057 (9th Cir. 2017) (finding that an action to collect a private party's claim under the California Private Attorney General Act of 2004 is not excepted from the automatic stay, distinguishing *Dingley*). In *Alpern v. Lieb*, 11 F.3d 689 (7th Cir. 1993), the court held that an action to impose money sanctions for a Rule 11 violation was exempt from the automatic stay. Even if that were a tenable conclusion, Rule 11 sanctions are not at issue in this case as respects the Probate court matters, so Alpern does not

support the conclusions of the courts below. *In re McKenna*, 566 BR 286 (Bankr. D. Rhode Island 2017) (declining, at least by necessary implication, to follow Alpern and holding that actions to enforce and collect a money judgment for Rule 11 sanctions are not excepted from the stay); *SEC v. Brennan*, 230 F.3d 65, 71 (2nd Cir. 2000) ("It is well established that the governmental unit exception of § 362(b)(4) permits the *entry* of a money judgment against a debtor so long as the proceeding in which such a judgment is entered is one to enforce the governmental unit's police or regulatory power." … anything beyond entry of the order violates the stay) (emphasis in the original; citing cases).

The First Circuit's decision in this case conflicts with its own precedent. In *Parker v. United States*, 153 F.2d 66 (1st Cir. 1946), the First Circuit reversed the district court's refusal to release Parker from civil confinement for not paying a money judgment for civil contempt after Parker filed a bankruptcy petition and received a discharge[2]. Civil contempt was distinguished from criminal contempt in Parker. The cases hold that *civil* contempt – like the judgment against Kupperstein – is for the purpose of "recompense to a private party", *Id*. All that the respondents herein want is to be paid the money sanctions and judgments ordered by the state courts. As *Parker* holds, such debts are dischargeable, and granting relief from the automatic

[2] Whether Mr. Kupperstein will eventually receive a bankruptcy discharge is an open question, not presented in this case.

stay so that a dischargeable debt can be collected is error, as is refusing to find that such collection activity is a stay violation.

The last time that this court addressed a similar issue was in *Ohio v. Kovacs*, 469 US 274 (1985). In that case, Kovacs was ordered by the State of Ohio to clean up a hazardous waste site. He failed to do so, so the state obtained the appointment of a receiver. Kovacs filed a bankruptcy case. The state took the position that the clean-up order, which was an injunction, was not a "debt" dischargeable in bankruptcy, but the bankruptcy court disagreed. The state appealed. The Sixth Circuit held that since the state court receiver had done the clean-up, what the state wanted was the payment of money, presumably to compensate the receiver, collection of which was a stay violation. This court agreed. Because the money debt was presumptively dischargeable, the Sixth Circuit was affirmed. Consistent with Parker and Kovacs, the sanctions against Kupperstein are presumptively dischargeable.

Not all court related actions, post-petition, violate the stay. The First Circuit has distinguished between "ministerial" actions and "judicial" actions. *In re Soares*, 107 F.3d 969 (1st Cir. 1997). The action of a clerk in entering a pre-petition judgment on the docket is "ministerial", while a judge holding a trial post-petition in a matter commenced pre-petition, for example, is a "judicial" act. A "judicial" act post-petition is void, *Id*. The actions of the respondents in the Probate court, post-petition, were

indisputably civil and judicial, and thus void. The lower courts erred in finding otherwise.

For all of these reasons, this Court's intervention by way of certiorari is essential to restoring the vitality of the automatic stay in bankruptcy – a fundamental debtor protection – and resolving the circuit splits identified herein.

M. RELIEF FROM THE AUTOMATIC STAY

To obtain relief from the automatic stay, a movant is required to "show cause for relief, in addition to a colorable claim on property of the estate." *U.S. v. Fleet Bank of Mass. (In re Calore Express Co.), Inc.*, 288 F.3d 22, 36 (1st Cir. 2002). While the statute gives some examples of "cause", the examples are not exclusive. See *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 US 365 (1988). However, determining whether "cause" exists must be accomplished within the parameters of the bankruptcy code. *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 24-25, 120 S.Ct. 1951, 147 L.Ed.2d 13 (2000) ("Bankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of creditors' entitlements, but are limited to what the Bankruptcy Code itself provides."). See also *Law v. Siegel*, 134 S. Ct. 1188 (2014) (reversing a bankruptcy court's determination to surcharge a debtor's homestead exemption in order to compensate the bankruptcy trustee for litigation misconduct by the debtor).

The First Circuit has undertaken to clarify what "cause" means. See *Peaje Investments LLC v. García-Padilla*, 845 F.3d 505, 511 (1st Cir. 2017)[3]. This court has also considered the meaning of "cause". *Raleigh v. Ill. Dep't of Revenue*, supra ("The tax litigation will be subject to an automatic stay, but the stay can be lifted by the bankruptcy court for cause, see 11 U. S. C. § 362(d)(1), which could well include, among other things, a lack of good faith in attempting to avoid tax proceedings, or in attempting to favor private creditors who might escape the disadvantage of a priority tax claim under the trustee's proposed rule.")

The statute is necessarily rather amorphous. This gives bankruptcy courts discretion to fashion the relief they find to be appropriate in the circumstances. *In re Laguna Associates Ltd. Partnership*, 30 F.3d 734, 737 (6th Cir. 1994) ("Because the Code provides no definition of what constitutes "cause" under either Section 362(d) or Section 1112(b), courts must determine whether discretionary relief is appropriate on a case-by-case basis.")

But the exercise of discretion cannot rest solely on the court's disdain for a debtor's actions, as seems to be the case here, in order to find "cause". *Law v. Siegel*, 134 S. Ct. 1188 (2014). Clearly the lower courts disapproved of Kupperstein's actions, both pre- and post-petition. But they cannot use notions of equity to disregard the

[3] This was a case under the Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), see 48 U.S.C. §§ 2101-2241, which has provisions nearly identical to 11 USC §362.

plain language of a statute. *Id*. This is especially true in this case since the "cause" was never clearly stated by the lower courts – not even the bankruptcy court.

Certiorari is needed in order to cabin the meaning of "for cause" in a way that is true to the statute and gives effect to the automatic stay, yet affords bankruptcy courts sufficient discretion to adjudicate the cases before them.

N. CONCLUSION

The Petitioner requests that the Court grant this petition for a writ of certiorari.

June 22, 2021

Respectfully submitted,
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