ORIGINAL

NO. 21-5385

IN THE
SUPREME COURT OF THE UNITED STATES

ALBERT MIKLOS KUN,
Petitioner,

v.

STATE BAR OF CALIFORNIA
FRANCHISE TAX BOARD
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the approximately $40,000 fine assessed by the State Bar is an excessive fine under *Timbs v. Indiana* 586 U.S.—(2019) for a $460-financial violation.
2. Whether the Court of Appeal and the District Court violated a pro se litigant's due-process right under the Fifth and Fourth Amendments by failing to grant him a hearing over the entire appeal period when recent Supreme Court cases and statutory construction were involved in a bankruptcy case.
3. Whether the district Court acted prejudicially in dismissing Petitioner's appeal pursuant to Federal Rules of Bankruptcy Procedure 8009 in violation of *AMG Capital Management LLC v.* FTC 19-508 April 22, 2021.

LIST OF ALL PARTIES TO THIS PROCEEDING

ALBERT MIKLOS KUN, Petitioner, In Pro Se and In Forma Pauperis

STATE BAR OF CALIFORNIA, Respondent

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Respondent

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INTRODUCTION

This Petition is a continuation of Petitioner's No. 17-6693 and No. 18-7911 and the PETITION FOR STAY PENDING FILING PETITION FOR WRIT OF CERTIORARI SUBMITTED TO THE Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States on June 18, 2021.

OPINIONS BELOW

(See page 1a)

JURISDICTION

This Petition is filed pursuant to Supreme Court Rule 13(3) which states in pertinent part:

> "But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or sua sponte considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment."

OPINIONS BELOW

1. The Order denying Appellant's petition for panel rehearing and petition for rehearing en banc dated May 26, 2021 is APPENDIX "A".
2. The unreported MEMORANDUM decision of the Ninth Circuit filed February 21, 2021 is APPENDIX "B".
3. Letter brief dated April 29, 2021 advising the Ninth Circuit of AMG Capital Management v. FTC is APPENDIX "C".
4. Order Dismissing Appeal in the District Court dated December 16, 2019 is APPENDIX "D".
5. Order Dismissing Appeal in Bankruptcy Court is APPENDIX "E".
6. Adversary Complaint in Bankruptcy Court dated June 4, 2019 is APPENDIX "F".

The Order of the Ninth Circuit on May 26, 2021 rehearing is attached as Appendix "A". This Petition is filed before August 4, 2021.

This Court also has jurisdiction because Petitioner is a member of the Bar of this Court.

CONSTITUTIONAL AND STATUTORY AUTHORITIES

Constitution of the United States of America, 1789(rev. 1992)

Amendment VIII

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Amendment V

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

11 USC 105(a)

> "The 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."

Federal Rules of Bankruptcy Procedure 8009

(a) Designating the Record on Appeal; Statement of the Issues.

(1) *Appellant.*

(A) The appellant must file with the bankruptcy clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented.

(B) The appellant must file and serve the designation and statement within 14 days after:

(i) the appellant's notice of appeal as of right becomes effective under Rule 8002; or

(ii) an order granting leave to appeal is entered.

A designation and statement served prematurely must be treated as served on the first day on which filing is timely.

(2) *Appellee and Cross-Appellant.* Within 14 days after being served, the appellee may file with the bankruptcy clerk and serve on the appellant a designation of additional items to be included in the record. An appellee who files a cross-appeal must file and serve a designation of additional items to be included in the record and a statement of the issues to be presented on the cross-appeal.

(3) *Cross-Appellee.* Within 14 days after service of the cross-appellant's designation and statement, a cross-appellee may file with the bankruptcy clerk and serve on the cross-appellant a designation of additional items to be included in the record.

(4) *Record on Appeal.* The record on appeal must include the following:

• docket entries kept by the bankruptcy clerk;

• items designated by the parties;

• the notice of appeal;

• the judgment, order, or decree being appealed;

• any order granting leave to appeal;

• any certification required for a direct appeal to the court of appeals;

• any opinion, findings of fact, and conclusions of law relating to the issues on appeal, including transcripts of all oral rulings;

• any transcript ordered under subdivision (b);

• any statement required by subdivision (c); and

• any additional items from the record that the court where the appeal is pending orders.

(5) *Copies for the Bankruptcy Clerk.* If paper copies are needed, a party filing a designation of items must provide a copy of any of those items that the bankruptcy clerk requests. If the party fails to do so, the bankruptcy clerk must prepare the copy at the party's expense.

(b) Transcript of Proceedings.

(1) *Appellant's Duty to Order.* Within the time period prescribed by subdivision (a)(1), the appellant must:

(A) order in writing from the reporter, as defined in Rule 8010(a)(1), a transcript of such parts of the proceedings not already on file as the appellant considers necessary for the appeal, and file a copy of the order with the bankruptcy clerk; or

(B) file with the bankruptcy clerk a certificate stating that the appellant is not ordering a transcript.

(2) *Cross-Appellant's Duty to Order.* Within 14 days after the appellant files a copy of the transcript order or a certificate of not ordering a transcript, the appellee as cross-appellant must:

(A) order in writing from the reporter, as defined in Rule 8010(a)(1), a transcript of such additional parts of the proceedings as the cross-appellant considers necessary for the appeal, and file a copy of the order with the bankruptcy clerk; or

(B) file with the bankruptcy clerk a certificate stating that the cross-appellant is not ordering a transcript.

(3) *Appellee's or Cross-Appellee's Right to Order.* Within 14 days after the appellant or cross-appellant files a copy of a transcript order or certificate of not ordering a transcript, the appellee or cross-appellee may order in writing from the reporter a transcript of such additional parts of the proceedings as the appellee or cross-appellee considers necessary for the appeal. A copy of the order must be filed with the bankruptcy clerk.

(4) *Payment.* At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(5) *Unsupported Finding or Conclusion.* If the appellant intends to argue on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all relevant testimony and copies of all relevant exhibits.

(c) Statement of the Evidence When a Transcript is Unavailable. If a transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be filed within the time prescribed by subdivision (a)(1) and served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the bankruptcy court for settlement and approval. As settled and approved, the statement must be included by the bankruptcy clerk in the record on appeal.

(d) Agreed Statement as the Record on Appeal. Instead of the record on appeal as defined in subdivision (a), the parties may prepare, sign, and submit to the bankruptcy court a statement of the case showing how the issues presented by the appeal arose and were decided in the bankruptcy court. The statement must set forth only those facts alleged and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is accurate, it—together with any additions that the bankruptcy court may consider necessary to a full presentation of the issues on appeal—must be approved by the bankruptcy court and must then be certified to the court where the appeal is pending as the record on appeal. The bankruptcy clerk must then transmit it to the clerk of that court within the time provided by Rule 8010. A copy of the agreed statement may be filed in place of the appendix required by Rule 8018(b) or, in the case of a direct appeal to the court of appeals, by F.R.App.P. 30.

(e) Correcting or Modifying the Record.

(1) *Submitting to the Bankruptcy Court.* If any difference arises about whether the record accurately discloses what occurred in the bankruptcy court, the difference must be submitted to and settled by the bankruptcy court and the record conformed accordingly. If an item has been improperly designated as part of the record on appeal, a party may move to strike that item.

(2) *Correcting in Other Ways.* If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected, and a supplemental record may be certified and transmitted:

(A) on stipulation of the parties;

(B) by the bankruptcy court before or after the record has been forwarded; or

(C) by the court where the appeal is pending.

(3) *Remaining Questions*. All other questions as to the form and content of the record must be presented to the court where the appeal is pending.

(f) Sealed Documents. A document placed under seal by the bankruptcy court may be designated as part of the record on appeal. In doing so, a party must identify it without revealing confidential or secret information, but the bankruptcy clerk must not transmit it to the clerk of the court where the appeal is pending as part of the record. Instead, a party must file a motion with the court where the appeal is pending to accept the document under seal. If the motion is granted, the movant must notify the bankruptcy court of the ruling, and the bankruptcy clerk must promptly transmit the sealed document to the clerk of the court where the appeal is pending.

(g) Other Necessary Actions. All parties to an appeal must take any other action necessary to enable the bankruptcy clerk to assemble and transmit the record.

(Added Apr. 25, 2014, eff. Dec. 1, 2014.)

STATEMENT OF THE CASE

In November, 2015, Petitioner filed for Chapter 11 protection to prevent the eviction of Petitioner and his mates from 381 Bush Street, Suite #200, San Francisco, CA 94104, where they had practiced continuously for 30 years. Subsequently, the State Bar commenced three (3) proceedings against Petitioner over attorney fee disputes. At the hearing level of the State Bar Court, Petitioner won one case and lost two. He appealed the two lost cases to the State Bar Appellate Department, and the Appellate Dept. granted all disputed fees to Petitioner save a $460-filing fee to the San Francisco Superior Court. That fee is the subject of these proceedings.

Meanwhile, the bankruptcy case continued; it was converted to Chapter 7, and Petitioner was discharged on June 30, 2018.

Subsequently, Petitioner was disbarred by the California Supreme Court and fined nearly $40,000 (APPENDIX "D"). When the Franchise Tax Board, acting as a collection agency for the State Bar, commenced proceedings against Petitioner, he reopened the bankruptcy case and filed an adversary complaint against both the State Bar and the Franchise Tax Board (APPENDIX

"F"). On page 3, par. 13, Petitioner claimed that pursuant to *Timbs v. Indiana* U.S. Supreme Ct.

(April 2019) the nearly $40,0000 fine was excessive on a $460-financial mistake, arguing that "The Franchise Tax Board may not enforce the subject penalties that are unconstitutionally excessive." (And, for someone living on Social Security benefits in San Francisco in 2021, a $40,000-penalty is indeed unconstitutionally excessive!)

The Bankruptcy Court summarily dismissed the complaint (APPENDIX "E"). While the bankruptcy court as an Article I Court cannot rule on the constitutionality of an issue, it certainly is entitled to issue findings of fact and conclusions of law for the District Court.

On appeal to the District Court Petitioner again claimed the unconstitutionality of the fine; however, the district Court dismissed the appeal without a hearing (APPENDIX "D"). The District Court is an Article III Court, and this was the first chance for a court to consider the issue of the unconstitutionality of the fine. The $40,0000 designated as "costs" are really "fines"; and that is the reason that *In re Findley* (APPENDIX "D", page 1, line 8) held them non-dischargeable. If they were categorized as costs they would be dischargeable under previous cases. The State Bar spent several years to convince the California Legislature to change the wording of the statute to fines, so that they would be non-dischargeable.

On appeal to the Ninth Circuit, the Ninth Circuit failed to follow the court ruling in *AMC Capital* dispute the fact that it was a Ninth Circuit case and the court's ruling was unanimous.

The District Court's ruling (APPENDIX "D") at page2, was not based on the Court's inherent power, nor were motions to dismiss filed by the appellees; it was based on Federal Rules of Bankruptcy Procedure § 8009. However, a clear reading of § 8009 merely sets forth time limits, but does not provide for dismissal. *AMC Capital* says the must strictly follow what the statute and Rules provide for, and cannot add remedies to it.

A fair reading of § 8009 does not even place the responsibility for record preparation on the appellant. Section 5 states: "If paper copies are needed, a party filing a designation of items must provide a copy of any of those items that the bankruptcy clerk requests. If the party fails to do so, the bankruptcy clerk must prepare the copy at the party's expense."

And finally, at paragraph (g), the Rule states: "All parties to an appeal must take any other action necessary to enable the bankruptcy clerk to assemble and transmit the record."

Thus, the record preparation is a joint project of the parties. The Rule does not provide for dismissal and the Court of Appeal should have followed *AMC Capital*. Petitioner again reminded the Court (APPENDIX "C") of the "excessiveness" issue, but the Ninth Circuit ignored it (APPENDIX "B").

The Ninth Circuit likewise ignored AMC *Capital Management v. FTC* despite the fact that Petitioner brought the case to the Court' attention [APPENDIX "C"]. *Amici* also brought it to the Court's attention.

Thus, over a period of almost two (2) years, involving two appeals and two reconsiderations, from August, 2019 to May, 2021, the appellate courts of the Ninth Circuit have failed to provide a hearing for Petitioner over a constitutional issue first raised on June 4, 2019.

Due process provides for a fair hearing; here, there was no hearing. The Ninth Circuit conducted hearings during COVID-19, and during the District Court appeal, prior to December 2019, COVID-19 was still in Wuhan and normal hearings were conducted.

Petitioner's request for rehearing and rehearing en banc has been denied (APPENDIX "A").

REASONS FOR GRANTING THE PETITION

Petitioner first raised the issue of excessive fines and this Court's holding in *Timbs v. Indiana* 586 U.S.___(2019) to the Bankruptcy Court on June 4, 2019 (APPENDIX "F", page 3, par. 13). Petitioner recognized that the bankruptcy court is an Article I Court and thus cannot hold a statute or rule unconstitutional. The Bankruptcy Court summarily dismissed complaint based on *In re Findley*.

The District Court, however as an Article III Court, is entitled to rule on the constitutionality of a rule; thus, Petitioner raised the issue again in that court. Again, while recognizing the constitutional issue, it ruled against Petitioner without a hearing.

By the time Petitioner's appeal reached the Court of Appeal, this court handed down its unanimous decision in *AMG Capital Management LLC v. FTC* 19-508, filed on April 22, 2021, reversing the Ninth Circuit. Petitioner immediately notified the Clerk of the Ninth Circuit of the decision (see APPENDIX " "). What this court said in *AMG Capital* is that courts cannot read into a statute a relief that is not expressly included in the statute. Federal Rule of Bankruptcy Procedure § 8009 sets forth certain time limits in filing records, but nowhere in the Rule is there any sanction mentioned for its violation. Yet, that is exactly what the District Court determined in ruling against Petitioner despite the holding of *AMG Capital.*

FRBP § 8009 is a frequently used rule throughout the United States in every federal court in bankruptcy matters; thus, its exact interpretation is of great importance to the Bankruptcy Bar.

Similarly, in light of the fact that this Court for the first time has applied the Eighth Amendment's excessive fines clause to state actions, it is of considerable

importance in all fifty states and the District of Columbia bar to establish what will be an excessive fine against attorneys in disciplinary cases.

The Court's jurisdiction is extended by due process guaranteed under the Fifth and Fourteenth Amendments to the Constitution to a fair and complete hearing and a chance to appeal. Here, the only hearing was in the Bankruptcy Court, but with none in the District Court or in the Ninth Circuit. A chance to appeal to this Court, such as this petition, is most important because it is a means to cure the defects in any other due-process violation. The Ninth Circuit ruled on a controlling issue in direct opposition to the ruling of this Court. The issue was of nationwide importance in that uniformity in bankruptcy matter has always been the court's instruction.

CONCLUSION

Petitioner respectfully requests that the Court reduce the approximately $40,000 fine to $1840 (or 4 X $460) pursuant to 11 U.S.C. 105(a). The multiplier 4 comes from the late Justice Scalia, in a punitive judgment case.

AUGUST 10, 2021

Allen Richard Kan