No. _____

In the Supreme Court of the United States

ALEXANDER V. BROWN,
Petitioner,

v.

WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE FOR REGION 1,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 28 U.S.C. §1930(a)(6)(A) applies to a case under Chapter 11 of Title 11, United States Code, upon reopening, where the chapter 11 case was filed on March 19, 2011; a plan was confirmed in 2014 and the case closed; and the case was then reopened and closed again more than once.

2. Whether the 2017 and 2021 amendments to 28 U.S.C. §1930(a)(6)(A) and (B) should be applied retroactively to debtors whose chapter 11 cases were filed, confirmed, closed, and then reopened before the amendments became effective.

3. Whether the amendments are unconstitutional because of the disparate treatment of debtors in "United States Trustee" districts as opposed to "Bankruptcy Administrator" districts.

PARTIES TO THE PROCEEDING

Petitioner (appellant in the court of appeals) is Alexander Brown, the debtor in the underlying bankruptcy case. The respondent is William K. Harrington, United States Trustee, Region 1.

RELATED PROCEEDINGS

United States Bankruptcy Court (D. Mass.):

In re Brown, 2021 WL 2656686 (Bankr. D. Mass. June 28, 2021)

United States District Court (D. Mass.):

In re Brown, 2022 WL 1200783 (D. Mass. Apr. 22, 2022)

United States Court of Appeals (1st Cir.):

In re: Alexander V. Brown, case no. 22-1314 (Judgment entered Dec. 16, 2022)

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PETITION FOR A WRIT OF CERTIORARI

Alexander V. Brown respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the courts below do not appear to have been published. Copies of the opinions are in the appendix. The district court's opinion may also be found at *In re Brown*, 2022 WL 1200783 (D. Mass. Apr. 22, 2022). The bankruptcy court's opinion also may be found at *In re Brown,* 2021 WL 2656686 (Bankr. D. Mass. June 28, 2021)

JURISDICTION

The judgment of the court of appeals was entered on December 16, 2022. There were no post-judgment motions. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Bankruptcy Clause of the United States Constitution provides in pertinent part that "The Congress shall have Power * * * [t]o establish * * * uniform Laws on the subject of Bankruptcies throughout the United States. " U.S. Const. Art. I, § 8, Cl. 4.

In 2011, 28 U.S.C. §1930(a)(6) and (7) provided in relevant parts as follows:

(6) In addition to the filing fee paid to the clerk, a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury, in each case under chapter 11 of title 11 for each quarter (including any fraction thereof) until the case is converted or dismissed, whichever occurs first. The fee shall be $325 for each quarter in which disbursements total less than $15,000; $650 for each quarter in which disbursements total $15,000 or more but less than $75,000; $975 for each quarter in which disbursements total $75,000 or more but less than $150,000; $1,625 for each quarter in which disbursements total $150,000 or more but less than $225,000; $1,950 for each quarter in which disbursements total $225,000 or more but less than $300,000; $4,875 for each quarter in which disbursements total $300,000 or more but less than $1,000,000; $6,500 for each quarter in which disbursements total $1,000,000 or more but less than $2,000,000; $9,750 for each quarter in which disbursements total $2,000,000 or more but less than $3,000,000; $10,400 for each quarter in which disbursements total $3,000,000 or more but less than $5,000,000; $13,000 for each quarter in which disbursements total $5,000,000 or more but less than $15,000,000; $20,000 for each quarter in which disbursements total $15,000,000 or more but less than $30,000,000; $30,000 for each quarter in which disbursements total more than $30,000,000. The fee shall be payable on the last day of the calendar month following the calendar quarter for which the fee is owed.

> (7) In districts that are not part of a United States trustee region as defined in section 581 of this title, the Judicial Conference of the United States may require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection. Such fees shall be deposited as offsetting receipts to the fund established under section 1931 of this title and shall remain available until expended

The Bankruptcy Judgeship Act of 2017 (2017 Act), Pub. L. No. 115-72, Div. B, 131 Stat. 1229, amended the quarterly-fee statute by adding the following subparagraph to Section 1930(a)(6): (B) During each of fiscal years 2018 through 2022, if the balance in the United States Trustee System Fund as of September 30 of the most recent full fiscal year is less than $200,000,000, the quarterly fee payable for a quarter in which disbursements equal or exceed $1,000,000 shall be the lesser of 1 percent of such disbursements or $250,000. § 1004(a), 131 Stat. 1232 (28 U.S.C. 1930(a)(6)(B) (2018)). The increased fees took effect in the first quarter of 2018.

In 2021, 28 U.S.C. §1930(a)(6)(B) was amended to the following: (B)(i) During the 5-year period beginning on January 1, 2021, in addition to the filing fee paid to the clerk, a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury, in each open and reopened case under chapter 11 of title 11, other than under subchapter V, for each quarter (including any fraction thereof) until the case is closed, converted, or dismissed, whichever occurs first.

(ii) The fee shall be the greater of-

(I) 0.4 percent of disbursements or $250 for each quarter in which disbursements total less than $1,000,000; and

(II) 0.8 percent of disbursements but not more than $250,000 for each quarter in which disbursements total at least $1,000,000.

(iii) The fee shall be payable on the last day of the calendar month following the calendar quarter for which the fee is owed.

(7) In districts that are not part of a United States trustee region as defined in section 581 of this title, the Judicial Conference of the United States shall require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection. Such fees shall be deposited as offsetting receipts to the fund established under section 1931 of this title and shall remain available until expended.

STATEMENT OF THE CASE

In *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007), this court reiterated that the principal purpose of the Bankruptcy Code is to grant a "'fresh start'" to the "'honest but unfortunate debtor'", quoting from *Grogan v. Garner,* 498 U.S. 279, 286, 287, 111 S. Ct. 654, 112 L.Ed.2d 755 (1991). While chapter 11 of the Bankruptcy Code is primarily used by corporations for reorganization or liquidation, an individual is also

permitted to use chapter 11, even if not "engaged in business". *Toibb v. Radloff,* 501 U.S. 157 (1991).

Seeking that "fresh start", Mr. Brown commenced the underlying bankruptcy case under chapter 13 of title 11 of the United States Code on March 19, 2011, due to financial problems resulting in part from rental real estate he owns. He voluntarily converted it to chapter 11 on July 20, 2012. After proceedings not material to his appeal, a plan was confirmed on September 9, 2014, and the case was administratively closed soon thereafter. See *Lehman v. Revolution Portfolio LLC,* 166 F.3d 389, 392 (1st Cir. 1999).

The case was reopened pursuant to 11 U.S.C. §350 more than once, the last time being September 17, 2018. In 2020, after the reasons for reopening were resolved, he requested that the case again be closed. This time, however, the bankruptcy judge denied the request to close the case and ordered Mr. Brown to file certain information, which he did.

After hearings, the United States Trustee (UST) filed a motion to dismiss the case. In essence, the UST alleged that cause existed because after the case was reopened each time, Mr. Brown did not file Monthly Operating Reports or pay quarterly fees to the UST while it was reopened. Mr. Brown responded that the UST had not sent bills for the fees as it normally does, which the UST admitted, and further responded that the statute upon which the UST was relying had been amended to add language regarding the fees in reopened cases <u>after</u> his case was commenced and the plan confirmed, as well as after the case was closed and after the case was reopened. The amendment, which

expressly sunsets after five years, was probably in response to the COVID-19 pandemic, which caused a severe reduction in the funding for the United States Trustee Program, which funding comes primarily, if not entirely, from user fees. The Massachusetts Department of Revenue was the only creditor to support dismissal.

Unpersuaded, the bankruptcy court issued a Memorandum of Decision, and dismissed the case. Mr. Brown filed a motion for relief from dismissal, raising an issue of jurisdiction. The UST objected, to which Mr. Brown replied. The court denied that motion. Appeal to the District Court was taken timely, which affirmed. Further appeal was taken to the First Circuit, which also affirmed.

REASONS FOR GRANTING THE PETITION

In 2017, Congress enacted a temporary increase in the fee rates applicable to large Chapter 11 cases to address a shortfall in the UST Fund, probably as a result of a precipitous decline in the number of chapter 11 cases filed because of the Coronavirus pandemic. The 2017 Act provided that the fee raise would become effective in the first quarter of 2018, would last only through 2022, and would be applicable to currently pending and newly filed cases. Apparently because the Judicial Conference applied the fee raise to districts in the Bankruptcy Administrator program, the Fourth Circuit ultimately held that the fee increase did not violate the uniformity requirement of the Constitution's Bankruptcy Clause because the increase applied only to debtors in Trustee Program districts.

In *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (2022), however, this court reversed the Fourth Circuit because the "dual scheme" of the bankruptcy system is prohibited by the Bankruptcy Clause, and thus unconstitutional.

Here, the courts below held that even though "reopened" did not appear in 28 U.S.C. §1930 in the 2011 version of the statute, and did not appear in the statute until the 2020 amendment, the pre-amendment statute nonetheless required the filing of monthly reports and payment of quarterly fees in reopened cases. However, when Congress amends the bankruptcy laws, it does not write "on a clean slate." *Dewsnup v. Timm*, 502 U.S. 410 (1992), quoting *Emil v. Hanley,* 318 U.S. 515, 521 (1943). The omission of "and reopened" in the statute prior to January 1, 2021, must be presumed to be intentional. *Lamie v. United States Trustee*, 540 U.S. 526 (2004) (omission of "debtor's attorney" from the compensation section of the bankruptcy code presumed to be intentional).

Particularly telling is the fact that the fee increase sunsets after five years. Congress is presumed to know that the prior version of the statute was not applicable to *reopened* cases, else it would not have needed to add "and reopened" to the amended statute. In addition, Congress is presumed to know that when the amendment sunsets, "and reopened" will no longer be in the statute. In essence, the courts below improperly added words to the prior version of the statute and made that interpretation retroactive.

The First Circuit simply ignored Mr. Brown's argument regarding retroactivity. Retroactivity is the

exception, not the norm, in part because it affects settled expectations and here because nothing in the statute expressly makes it retroactive. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 946 (1997) (False Claims Act case). It relied, instead, on the mistaken notion that Mr. Brown had failed to filed 21 monthly reports, mostly during the reopened periods, but also on two occasions pre-confirmation. That was error because there is simply no way that the bankruptcy court would, or could, confirm a plan if the monthly reports were not filed and the fees paid; the UST would have objected to confirmation. See 11 U.S.C. §1129(a)(12). As to the post-closing reports, whether they were even required is the question presented, but the First Circuit essentially adopted the bankruptcy court's reasoning – "reopened" is the same as "open".

In holding that a debtor is required to pay quarterly fees even in reopened cases, the First Circuit relied on an unpublished case, *In re Barbetta*, *LLC*, No. 11–04370–8, 2014 WL 3638853 (Bankr. E.D.N.C. July 23, 2014), issued well before the amendments referenced above. But the district court for the Central District of California has held otherwise, in a decision that presaged this court's opinion *Siegel v. Fitzgerald*. *USA Sales, Inc. v. Office Of US Trustee*, 532 F. Supp. 3d 921 (C.D. Cal. 2021). The *USA Sales* court held that the 2017 amendment to 28 U.S.C. §1930(a)(6)(B) does not apply to cases that were commenced prior to the effective date of the 2017 amendment – i.e., is not retroactive. Following *Siegel*, the Second Circuit relied heavily on *USA Sales* to give effect to the *Siegel* opinion

after remand in *Harrington v. Clinton Nurseries, Inc.*, 143 S. Ct. 297 (2022).

CONCLUSION

The Court should grant this Petition in order to clarify the effect of the 2017 and 2020 amendments to the statute and resolve the conflict between the Second Circuit's holding in *USA Sales* that the 2017 amendment does not apply to cases commenced prior to that amendment, and the First Circuit's essential holding that it does.

Respectfully submitted,

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