No.

In the Supreme Court of the United States

OFFICE OF THE UNITED STATES TRUSTEE, PETITIONER

v.

JOHN Q. HAMMONS FALL 2006, LLC, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1004(a) of the Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, Div. B, 131 Stat. 1232 (28 U.S.C. 1930(a)(6)(B) (2018)), amended the schedule of quarterly fees payable to the United States Trustee in certain pending bankruptcy cases. In *Siegel* v. *Fitzgerald*, 142 S. Ct. 1770 (2022), this Court held that that provision contravened Congress's constitutional authority to "establish * * * uniform Laws on the subject of Bankruptcies," U.S. Const. Art. I, § 8, Cl. 4, because it was initially applied only in the 88 federal judicial districts that have United States Trustees but not in the 6 districts that have Bankruptcy Administrators. This Court left open the question of "the appropriate remedy" for the violation. *Siegel*, 142 S. Ct. at 1783. The question presented in this case is:

Whether the appropriate remedy for the constitutional uniformity violation found by this Court in *Siegel*, *supra*, is to require the United States Trustee to grant retrospective refunds of the increased fees paid by debtors in United States Trustee districts during the period of disuniformity, or is instead either to deem sufficient the prospective remedy adopted by Congress or to require the collection of additional fees from a much smaller number of debtors in Bankruptcy Administrator districts.

PARTIES TO THE PROCEEDING

Petitioner (appellee in the court of appeals) is the Office of the United States Trustee. Respondents (appellants in the court of appeals) are John Q. Hammons Fall 2006, LLC; ACLOST, LLC; Bricktown Residence Catering Co., Inc.; Chateau Catering Co., Inc.; Chateau Lake, LLC; City Centre Hotel Corp.; Civic Center Redevelopment Corp.; Concord Golf Catering Co., Inc.; Concord Hotel Catering Co., Inc.; East Peoria Catering Co., Inc.; Fort Smith Catering Co., Inc.; Franklin/Crescent Catering Co., Inc.; Glendale Coyotes Catering Co., Inc.; Glendale Coyotes Hotel Catering Co., Inc.; Hammons of Arkansas, LLC; Hammons of Colorado, LLC; Hammons of Franklin, LLC; Hammons of Frisco, LLC; Hammons of Huntsville, LLC; Hammons of Lincoln, LLC; Hammons of New Mexico, LLC; Hammons of Oklahoma City, LLC; Hammons of Richardson, LLC; Hammons of Rogers, Inc.; Hammons of Sioux Falls, LLC; Hammons of South Carolina, LLC; Hammons of Tulsa, LLC; Hammons, Inc.; Hampton Catering Co., Inc.; Hot Springs Catering Co., Inc.; Huntsville Catering, LLC; International Catering Co., Inc.; John Q. Hammons 2015 Loan Holdings, LLC; John Q. Hammons Center, LLC; John Q. Hammons Hotels Development, LLC; John Q. Hammons Hotels Management I Corporation; John Q. Hammons Hotels Management II, LP; John Q. Hammons Hotels Management, LLC; Joplin Residence Catering Co., Inc.; JQH—Allen Development, LLC; JQH—Concord Development, LLC; JQH—East Peoria Development, LLC; JQH—Ft. Smith Development, LLC; JQH—Glendale AZ Development, LLC; JQH—Kansas City Development, LLC; JQH—La Vista CY Development, LLC; JQH—La Vista Conference Center Development, LLC; JQH—La Vista III Development, LLC; JQH—Lake of

the Ozarks Development, LLC; JQH—Murfreesboro Development, LLC; JQH—Normal Development, LLC; JQH—Norman Development, LLC; JQH—Oklahoma City Bricktown Development, LLC; JQH—Olathe Development, LLC; JQH—Pleasant Grove Development, LLC; JQH—Rogers Convention Center Development, LLC; JQH—San Marcos Development, LLC; Junction City Catering Co., Inc.; KC Residence Catering Co., Inc.; La Vista CY Catering Co., Inc.; La Vista ES Catering Co., Inc.; Lincoln P Street Catering Co., Inc.; Loveland Catering Co., Inc.; Manzano Catering Co., Inc.; Murfreesboro Catering Co., Inc.; Normal Catering Co., Inc.; OKC Courtyard Catering Co., Inc.; R-2 Operating Co., Inc.; Revocable Trust of John Q. Hammons Dated December 28, 1989 as Amended and Restated; Richardson Hammons, LP; Rogers ES Catering Co., Inc.; SGF—Courtyard Catering Co., Inc.; Sioux Falls Convention/Arena Catering Co., Inc.; St. Charles Catering Co., Inc.; Tulsa/169 Catering Co., Inc.; U.P. Catering Co., Inc.

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United States Bankruptcy Court (D. Kan.):

In re: John Q. Hammons Fall 2006, LLC, et al., No. 16-bk-21142 (July 27, 2020)

United States Court of Appeals (10th Cir.):

In re: John Q. Hammons Fall, et al., No. 20-3203 (Oct. 5, 2021) (original order and opinion reversing and remanding for a determination of the amount of the refund)

In re: John Q. Hammons Fall, et al., No. 20-3203 (Aug. 15, 2022) (order reinstating original opinion after this Court's remand)

In re: John Q. Hammons Fall, et al., No. 20-3203 (Jan. 26, 2023) (order denying rehearing)

Supreme Court of the United States:

Office of the United States Trustee v. *John Q. Hammons Fall 2006, LLC, et al.*, 142 S. Ct. 2810 (June 13, 2022) (No. 21-1078) (granting, vacating, and remanding)

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Office of the United States Trustee, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, 1a-5a) is not reported in the Federal Reporter but is available at 2022 WL 3354682. A prior opinion of the court of appeals (App., *infra*, 7a-34a) is reported at 15 F.4th 1011. The opinion of the bankruptcy court (App., *infra*, 35a-47a) is reported at 618 B.R. 519.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2022. A petition for rehearing was denied on January 26, 2023 (App., *infra*, 48a-49a). On April 11,

2023, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including May 26, 2023. On May 10, 2023, Justice Gorsuch further extended the time to and including June 23, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1004(a) of the Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, Div. B, 131 Stat. 1232, provided:

> AMENDMENTS TO TITLE 28 OF THE UNITED STATES CODE.—Section 1930(a)(6) of title 28, United States Code, is amended—
>
> (1) by striking "(6) In" and inserting "(6)(A) Except as provided in subparagraph (B), in"; and
>
> (2) by adding at the end the following:
>
> "(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.".

Sections 2 and 3 of the Bankruptcy Administration Improvement Act of 2020, Pub. L. No. 116-325, 134 Stat. 5086-5087, provide in pertinent part:

> [(2)](a) FINDINGS.—Congress finds the following:
>
> (1) Because of the importance of the goal that the bankruptcy system is self-funded, at no cost to the taxpayer, Congress has closely monitored the funding needs of the bankruptcy system, including by re-

quiring periodic reporting by the Attorney General regarding the United States Trustee System Fund.

(2) Congress has amended the various bankruptcy fees as necessary to ensure that the bankruptcy system remains self-supporting, while also fairly allocating the costs of the system among those who use the system.

(3) Because the bankruptcy system is interconnected, the result has been a system of fees, including filing fees, quarterly fees in chapter 11 cases, and other fees, that together fund the courts, judges, United States trustees, and chapter 7 case trustees necessary for the bankruptcy system to function.

(4) This Act and the amendments made by this Act—

(A) ensure adequate funding of the United States trustees, supports the preservation of existing bankruptcy judgeships that are urgently needed to handle existing and anticipated increases in business and consumer caseloads, and provides long-overdue additional compensation for chapter 7 case trustees whose caseloads include chapter 11 reorganization cases that were converted to chapter 7 liquidation cases; and

(B) confirm the longstanding intention of Congress that quarterly fee requirements remain consistent across all Federal judicial districts.

(b) PURPOSE.—The purpose of this Act and the amendments made by this Act is to further the longstanding goal of Congress of ensuring that the bankruptcy system is self-funded, at no cost to the taxpayer.

* * * * *

[(3)](d) BANKRUPTCY FEES.—Section 1930(a) of title 28, United States Code, is amended—

(1) by striking paragraph (6)(B) and inserting 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."; and

(2) in paragraph (7), in the first sentence, by striking "may" and inserting "shall".

STATEMENT

1. a. Federal bankruptcy cases require substantial oversight and administrative support. In 88 federal judicial districts, the United States Trustee (UST) Program, a component of the U.S. Department of Justice, performs those functions; in 6 other districts, the Bank-

ruptcy Administrator (BA) Program, which relies on judicially appointed bankruptcy administrators, plays that role. See generally *Siegel* v. *Fitzgerald*, 142 S. Ct. 1770, 1776 (2022).

The UST Program began in 1978 as a congressionally created pilot program in 18 of the 94 federal judicial districts. See *Siegel*, 142 S. Ct. at 1776. In 1986, when Congress made the UST Program permanent, it permitted the 6 judicial districts in North Carolina and Alabama to opt out and use the BA Program, which operates under the supervision of the Judicial Conference. See *ibid.*; Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (1986 Act), Pub. L. No. 99-554, §§ 111-115, 302(d)(3), 100 Stat. 3090-3095, 3121-3123 (28 U.S.C. 581 note). The BA Program was initially scheduled to phase out in 1992 and then in 2002, but it remains in place in those 6 districts. See *Siegel*, 142 S. Ct. at 1776.

b. Although the UST Program is housed in the Department of Justice, "Congress requires that the [UST] Program be funded in its entirety by user fees paid to the United States Trustee System Fund * * *, the bulk of which are paid by debtors who file cases under Chapter 11 of the Bankruptcy Code." *Siegel*, 142 S. Ct. at 1776; see 28 U.S.C. 589a(b)(5). Specifically, Congress has directed that in those cases a "quarterly fee shall be paid to the United States trustee * * * for each quarter (including any fraction thereof) until the case is converted or dismissed, whichever occurs first." 28 U.S.C. 1930(a)(6)(A) (Supp. I 2019).

The 1986 Act imposed Chapter 11 quarterly fees in the 88 UST districts but not in the 6 BA districts, which are funded by the Judiciary's general budget. See § 302(e), 100 Stat. 3123; *Siegel*, 142 S. Ct. at 1776. In

the mid-1990s, a panel of the Ninth Circuit opined that having two distinct programs for supervising the administration of bankruptcy cases with different fees violated the uniformity requirement of the Bankruptcy Clause; on that basis, the court prospectively invalidated the provision of the statute that extended the deadline for the BA districts to join the UST Program, effectively requiring those districts to join the UST Program. See *St. Angelo* v. *Victoria Farms, Inc.*, 38 F.3d 1525, 1532-1533 (1994), amended, 46 F.3d 969 (1995).

After *Victoria Farms*, Congress amended the statutory framework but did not eliminate the BA program as the Ninth Circuit had essentially provided. Congress instead amended Section 1930(a) by adding a new paragraph (7), which provided that "[i]n districts that are not part of a United States trustee region * * * the Judicial Conference of the United States may require the debtor in a case under chapter 11 * * * to pay fees equal to those imposed by paragraph (6) of this subsection." Federal Courts Improvement Act of 2000 (2000 Act), Pub. L. No. 106-518, § 105, 114 Stat. 2412 (enacting 28 U.S.C. 1930(a)(7) (2000)). Congress directed that the quarterly fees collected in BA districts be deposited in a fund that offsets appropriations to the Judicial Branch, from which the BA Program is also funded. See 28 U.S.C. 1930(a)(7), 1931 (2000). And, believing that it had solved any uniformity problem, Congress "permanently exempted the six [BA] districts from the requirement to transition to the Trustee Program." *Siegel*, 142 S. Ct. at 1776; see 2000 Act § 501, 114 Stat. 2421-2422.

In 2001, the Judicial Conference directed the BA districts to impose quarterly fees "in the amounts specified in 28 U.S.C. § 1930, as those amounts may be amended from time to time." Judicial Conference of the United

States, *Report of the Proceedings of the Judicial Conference of the United States* 46 (Sept./Oct. 2001) (*2001 JCUS Report*), https://www.uscourts.gov/sites/default/files/2001-09_0.pdf. "[F]or the next 17 years, the Judicial Conference matched all [UST] Program fee increases with equivalent [BA] Program fee increases, meaning that all districts nationwide charged similarly situated debtors uniform fees." *Siegel*, 142 S. Ct. at 1777.

c. In 2017, following a sharp reduction in collections, the existing fee structure proved inadequate to fund the UST Program, and Congress temporarily increased quarterly fees in larger Chapter 11 cases. See *Siegel*, 142 S. Ct. at 1777. Specifically, 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. See § 1004(c), 131 Stat. 1232.

Despite the Judicial Conference's 2001 standing order imposing quarterly fees in BA districts "in the amounts specified in 28 U.S.C. § 1930, as those amounts may be amended from time to time," *2001 JCUS Report* 46, the BA districts did not implement the amended fee schedule by the beginning of 2018. In response, the Executive Committee of the Judicial Conference, acting on an expedited basis, ordered the BA districts to imple-

ment the amended fee schedule, but it did so only for "cases filed on or after" October 1, 2018. Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States* 11 (Sept. 13, 2018), https://www.uscourts.gov/sites/default/files/2018-09_proceedings.pdf; see *id.* at 11-12.

d. After some courts held that the 2017 Act was unconstitutionally non-uniform based on their view that Congress had not compelled the same fees in BA and UST districts, see, *e.g.*, *In re Buffets, LLC*, 597 B.R. 588, 594 (Bankr. W.D. Tex. 2019), rev'd and remanded, 979 F.3d 366 (5th Cir. 2020), Congress enacted clarifying legislation that struck the word "may" from Section 1930(a)(7) and replaced it with "shall." Bankruptcy Administration Improvement Act of 2020 (2020 Act), Pub. L. No. 116-325, § 3(d)(2), 134 Stat. 5088. As amended, the text of Section 1930(a)(7) now provides that, for BA districts, the "Judicial Conference of the United States *shall* require the debtor in a case under chapter 11 * * * to pay fees equal to those imposed by paragraph (6) of this subsection." 28 U.S.C. 1930(a)(7) (Supp. II 2020) (emphasis added). An express legislative finding explains that the change "confirm[s] the longstanding intention of Congress that quarterly fee requirements remain consistent across all Federal judicial districts." 2020 Act § 2(a)(4)(B), 134 Stat. 5086.

The 2020 Act also amended the fee schedule, retaining the $250,000 maximum quarterly fee while slightly reducing the fees payable by large debtors that do not hit that ceiling. As of April 2021, the quarterly fee for Chapter 11 debtors with quarterly disbursements of $1 million or more was "0.8 percent of disbursements but not more than $250,000." 28 U.S.C. 1930(a)(6)(B)(ii)(II)

(Supp. II 2020); see 2020 Act § 3(e)(2)(B)(ii), 134 Stat. 5089 (effective date).

e. Last year, this Court held in *Siegel*, *supra*, that the 2017 Act violated the uniformity requirement of the Bankruptcy Clause because the statutory scheme permitted unequal fees in the UST and BA districts and different fees were in fact imposed. 142 S. Ct. at 1782-1783. In reaching that conclusion, the Court recognized that there is "ample evidence that Congress likely understood, when it passed the 2017 Act, that the Judicial Conference would impose the same fee increase [in the BA districts]." *Id.* at 1782 n.2. The Court explained that the uniformity violation was nonetheless attributable to Congress because it was Congress's decision to rely on its expectation about the Judicial Conference's actions rather than to "*require* the Judicial Conference to impose an equivalent fee increase" that "led to the disparities at issue." *Ibid.* The Court expressly left open "the appropriate remedy" for the uniformity violation, in light of the government's arguments "that any remedy should apply only prospectively, or should result in a fee increase for debtors who paid less in the [BA] districts." *Id.* at 1783. The Court remanded for the Fourth Circuit "to consider these questions in the first instance." *Ibid.*

2. This separate case arose in 2016, when 76 entities associated with John Q. Hammons Hotels and Resorts sought relief under Chapter 11 of the Bankruptcy Code in the District of Kansas, a UST district. App., *infra*, 15a. Initially, the debtors paid quarterly fees under the amended schedule that took effect in January 2018. *Id.* at 38a. But in 2020, the debtors filed a motion in bankruptcy court seeking a partial refund of quarterly fees on the ground that the 2017 Act was unconstitutionally

non-uniform because the statutory fee increase was implemented differently in the UST and the BA districts. *Id.* at 35a-36a.

a. The bankruptcy court rejected the debtors' claim, ruling that the 2017 Act survives constitutional scrutiny. App., *infra*, 35a-47a. The court of appeals reversed in relevant part. *Id.* at 7a-34a. Anticipating this Court's later decision in *Siegel*, the majority concluded that the 2017 Act was unconstitutionally non-uniform. *Id.* at 11a; *id.* at 21a-30a; but see *id.* at 32a-34a (Bacharach, J., dissenting).

As relevant here, the court of appeals further held that the debtors are entitled to "a refund of the amount of quarterly fees paid exceeding the amount that Debtors would have owed in a Bankruptcy Administrator district during the same period," and it remanded for the bankruptcy court to determine that amount. App., *infra*, 32a. The court did not dispute that "courts can remedy unequal treatment either by expanding or withdrawing benefits, depending on legislative intent," or that "here, Congress intended to increase quarterly fees nationwide." *Id.* at 31a. The court reasoned, however, that the debtors here "are entitled to relief," but it "lack[s] authority over quarterly fees assessed in districts outside [the Tenth C]ircuit, and thus in [the BA districts in] Alabama or North Carolina." *Ibid.*

b. The Office of the United States Trustee filed a petition for a writ of certiorari, which presented both the question of constitutionality and the question of the appropriate remedy for any violation, and asked the Court to hold the petition pending its decision in *Siegel*, *supra*. See Pet. I, 13, *Office of the United States Trustee* v. *John Q. Hammons Fall 2006, LLC*, No. 21-1078 (filed Feb. 2, 2022).

As explained above, in *Siegel* this Court agreed with the conclusion of the court of appeals in this case that the 2017 Act was unconstitutional, 142 S. Ct. at 1780-1783, but this Court left open the question of the appropriate remedy for that violation, *id.* at 1783. After issuing the decision in *Siegel*, the Court granted certiorari in this case, vacated the court of appeals' judgment, and remanded to the court of appeals "for further consideration in light of *Siegel*." App., *infra*, 6a.

c. On remand, the court of appeals issued an unpublished order stating that it would "reinstate [its] original opinion," which had determined that a partial refund of the UST debtors' quarterly fees was the appropriate remedy. App., *infra*, 5a. The court noted that it had "careful[ly] consider[ed]" this Court's opinion in *Siegel* and the supplemental briefs it received after remand, but it did not otherwise explain its reasoning. See *ibid.*

d. The court of appeals denied a petition for rehearing. App., *infra*, 48a-49a.

REASONS FOR GRANTING THE PETITION

This case presents the question of the appropriate remedy for the constitutional violation that this Court found in *Siegel* v. *Fitzgerald*, 142 S. Ct. 1770 (2022). After being ordered by this Court to consider that remedial question on remand, the court of appeals simply reinstated its prior opinion ordering a refund to debtors who had paid increased fees between 2018 and 2021. That remedy is based on a mistaken view that individually effective relief is always required for a constitutional violation, and it is "demonstrably at odds" with the appropriate touchstone for the remedial inquiry: "Congress's intent." *United States Trustee Region 21* v. *Bast Amron LLP (In re Mosaic Mgmt. Grp., Inc.)*,

22 F.4th 1291, 1328 (11th Cir. 2022) (*Mosaic*) (Brasher, J., concurring in the result), vacated and remanded, 142 S. Ct. 2862 (2022). In this instance, that remedy is particularly misguided because Congress already provided prospective relief for the uniformity problem, thus displacing the need for further judicial relief.

This Court's review is warranted given the legal and practical significance of the question presented, which implicates approximately $326 million that Congress intended to collect from the largest users of the bankruptcy system (including respondents), not from taxpayers. The question has resulted in litigation in multiple circuits, and this case is the first to reach the Court. The Court should grant review, rather than wait for a circuit conflict to develop, because allowing any of the cases presenting this question to become final would lock in a remedy for some debtors, potentially precluding, upon this Court's subsequent review, a nationally uniform remedy for the uniformity problem identified in *Siegel*.

A. The Court Of Appeals' Decision Is Incorrect

Refunding a portion of the quarterly fees paid on behalf of the estate in this case is not the appropriate remedy for the temporary uniformity violation that this Court recognized in *Siegel*. The court of appeals concluded that the only fees that respondents should owe are equal to the amount respondents "would have owed in a Bankruptcy Administrator district during the same period," and that respondents should therefore receive a "refund of the amount of quarterly fees paid exceeding th[at] amount." App., *infra*, 32a. That is mistaken for two separate reasons. First, Congress has already provided a prospective remedy, which is all that is required. Second, even if retrospective relief were re-

quired in these circumstances, the proper remedy would be an extension of the 2017 fee increase to the BA districts—the result that Congress had intended all along—rather than a refund of that fee increase in the UST districts.

1. The proper relief in this case is prospective

a. As this Court has repeatedly recognized, a plaintiff who succeeds in establishing a constitutional equal-treatment violation is not automatically entitled to a retrospective remedy. The primary authority for crafting constitutional remedies lies with Congress. See *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 74 (1996); *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988). When determining the remedy for a statute that unconstitutionally requires discriminatory treatment, a court "must adopt the remedial course Congress likely would have chosen 'had it been apprised of the constitutional infirmity.'" *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1701 (2017) (quoting *Levin* v. *Commerce Energy, Inc.*, 560 U.S. 413, 427 (2010)).

That relief need not be retrospective. "[I]t is not true that [this Court's] jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 754 n.37 (1982). A plaintiff who suffers a violation, even the violation of an individual right, might receive no effective relief for various reasons, including the absence of a cause of action, see, *e.g.*, *Egbert* v. *Boule*, 142 S. Ct. 1793, 1802-1804 (2022), or the defendant's immunity from suit, see, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Indeed, for constitutional violations, retrospective *monetary* relief is rarely available at all. See *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-35 (1992); *Ex parte Young*, 209 U.S. 123, 159-160 (1908). And even where a

constitutional violation results in the incursion of a specific monetary cost and there is no other bar to monetary relief, the remedy need not include recovery of the payment. See *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 38 n.21 (1990) (providing that retrospective relief is required for unconstitutional tax assessments only where taxpayers lacked a meaningful opportunity to challenge the validity of tax assessments at a predeprivation hearing); see also, *e.g.*, *Comptroller of the Treasury* v. *Wynne*, 575 U.S. 542, 569 (2015) (allowing the State the flexibility to cure an impermissibly unequal tax by implementing a remedy "that would not help the [challengers] at all") (citation omitted). Ultimately, rather than a command of individually effective relief, "the touchstone for any decision about remedy is legislative intent." *Ayotte* v. *Planned Parenthood*, 546 U.S. 320, 330 (2006).

Accordingly, this Court has awarded prospective-only relief in two recent cases that found a portion of a statute unconstitutional. In *Morales-Santana*, *supra*, this Court concluded that a federal citizenship statute was unconstitutional to the extent that it afforded more favorable treatment to children born abroad of unwed U.S.-citizen mothers compared to those of unwed U.S.-citizen fathers. 137 S. Ct. at 1688-1698. The successful plaintiff asked for application of the more favorable citizenship rules to himself and, by extension, others injured by the same unequal statute. *Id.* at 1698. But the Court allowed only "prospective[]" relief, neither granting citizenship to the plaintiff nor retracting the citizenship that other persons had obtained from the unconstitutionally favorable exception. *Id.* 1701; see *id.* at 1698-1701.

Similarly, in *Barr* v. *American Association of Political Consultants*, 140 S. Ct. 2335 (2020) (*AAPC*), this Court concluded that a statute contained an exception to a robocall restriction that was unconstitutionally content-based. *Id.* at 2347 (plurality opinion). As a remedy, the challengers demanded that the favorable treatment (ability to make robocalls) be extended generally. *Id.* at 2348. The Court declined to grant that relief, instead eliminating the favorable treatment (an action that offered no tangible benefit to the challengers) on a prospective basis, with the plurality specifically noting that the Court's decision did not retrospectively "negate the liability of parties who made robocalls covered by the robocall restriction" and thereby suffered financial injury. *Id.* at 2355 n.12; see *id.* at 2363 (Breyer, J., concurring in judgment with respect to severability).

Those principles apply at least as strongly to the bankruptcy uniformity context. In the only case other than *Siegel* to invalidate a bankruptcy statute on constitutional uniformity grounds, the Court affirmed a lower-court judgment imposing purely prospective relief. *Railway Labor Execs.' Ass'n* v. *Gibbons*, 455 U.S. 457, 463-465 (1982). And in the decision that was the catalyst for Congress's authorization of the imposition of fees in the BA districts, see p. 6, *supra*, the Ninth Circuit likewise determined that a prospective-only remedy was warranted. *St. Angelo* v. *Victoria Farms*, 38 F.3d 1525 (1994), amended, 46 F.3d 969 (1995). The court held that the predecessor of the quarterly-fee statute at issue here, which had required payments in UST districts but not in BA districts, created a constitutional uniformity problem. *Id.* at 1532. But it rejected the debtor's contention that it should be relieved from paying the quarterly fees. See *id.* at 1529, 1532. The

court instead concluded that the proper remedy was to sever the provision that exempted the six BA districts from the U.S. Trustee program, and it held that the debtor remained liable for the challenged fees. *Id.* at 1533, 1535. In the aftermath of *Victoria Farms*, no court attempted to award retrospective refunds to debtors who had paid fees in UST districts during the 15-year period that fees were not collected in the BA districts.

b. The proper remedy for the constitutional defect identified in *Siegel* is a prospective mandate of equal treatment—the same relief awarded in *Morales-Santana*, *AAPC*, and *Victoria Farms*. See *Morales-Santana*, 137 S. Ct. at 1701 ("prospectively" invalidating the exception); see *AAPC*, 140 S. Ct. at 2356 (same). Such relief would normally take a form that requires equal treatment only in the future. Here, however, any need for judicially imposed relief has been obviated by Congress's actions during the pendency of this litigation because Congress has already acted prospectively to eliminate any constitutional infirmity in its prior enactments—a step that is at least as much its prerogative as the Judiciary's. As the Eleventh Circuit has explained, "when it became apparent to Congress that a disparity had developed, Congress promptly ensured that there would be no disparity in the amount of [quarterly] fees by striking the word 'may' and substituting the word 'shall,'" so that Section 1930(a)(7) now reads "that the Judicial Conference 'shall require the debtor * * * to pay fees equal to those imposed by paragraph (6).'" *Mosaic*, 22 F.4th at 1322. By thus mandating nationwide uniformity going forward, Congress itself "promptly remedied" the constitutional defect. *Ibid.*; see *id.* at 1324 (similar).

Congress's enactment of the 2020 Act—which prospectively mandates uniform fees without providing for any retrospective adjustment for the period of disuniformity—reflects Congress's legislative judgment that the appropriate remedy for the temporary disuniformity that occurred was a prospective reform of the system, not a retrospective unwinding of years of completed fee payments. And the fact that Congress already took the initiative to implement the substantive relief to which respondents are entitled makes the remedial inquiry particularly straightforward; it does not mean that respondents can now obtain even more.

2. Even if retrospective relief were appropriate, the remedy would be collections from a small number of debtors in the 6 Bankruptcy Administrator districts, not refunds to many more debtors in the 88 U.S. Trustee districts

Even if backward-looking relief were required in this case, that relief would not include the retrospective refund that the court of appeals ordered. Again, the touchstone is "the remedial course Congress likely would have chosen" if informed of the constitutional problem. *Morales-Santana*, 137 S. Ct. at 1701 (quoting *Levin* v. *Commerce Energy, Inc.*, 560 U.S. 413, 427 (2010)). Congressional intent determines whether the appropriate remedy should be the "extension or invalidation of the unequally distributed benefit or burden, or some other measure." *Levin*, 560 U.S. at 426. Deciding whether to remove or extend a benefit depends on the "intensity of [Congress's] commitment to the residual policy" and "the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.'" *Morales-Santana*, 137 S. Ct. at 1700 (citations omitted). Thus, in *Morales-Santana*, the

Court declined to "extend favorable treatment" from a small group to the "substantial majority," noting that that result would transform the "exception" into the "general rule." *Id.* at 1701. And in another recent "equal-treatment case," the Court "sever[ed]" the "relatively narrow" government-debt exception to a "broad robocall restriction." *AAPC*, 140 S. Ct. at 2354, 2355 (plurality opinion); see *id.* at 2363 (Breyer, J., concurring in judgment with respect to severability).

Here, the inquiry into congressional intent is particularly straightforward because it was the unexpected actions of the BA districts and the Judicial Conference, rather than the intended operation of Congress's statute, that led to the uniformity problem. As this Court has already recognized, there is "ample evidence that Congress likely understood, when it passed the 2017 Act, that the Judicial Conference would impose the same fee increase [in the BA districts]." *Siegel*, 142 S. Ct. at 1782 n.2. Indeed, the 2017 Act was enacted against the backdrop of a 16-year-old standing order of the Judicial Conference, which directed that a fee increase in UST districts be immediately implemented in BA districts. See pp. 6-7, *supra*. The 2000 Act, which authorized the imposition of fees in BA districts, was meant to avoid a potential uniformity problem, further illustrating that Congress expected the Judicial Conference to employ that authority. See p. 6, *supra*; see also *Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999 and Federal Courts Improvement Act of 1999: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary on H.R. 2112 and H.R. 1752*, 106th Cong., 1st Sess. 26 (1999) (noting the Judicial Conference's determination that "implementing the establishment of chap-

ter 11 quarterly fees in the bankruptcy administrator districts would eliminate any *Victoria Farms* problem"). When Congress increased fees in UST districts in 2008, the BA districts immediately implemented a corresponding increase pursuant to that standing order. See *Mosaic*, 22 F.4th at 1315 & n.21. And Congress has adopted an express finding reiterating the "longstanding intention of Congress that quarterly fee requirements remain consistent across all Federal judicial districts." 2020 Act § 2(a)(4)(B), 134 Stat. 5086. In short, there is compelling evidence that Congress both intended and expected from the outset that the 2017 fee increase be applied in BA districts, and that its error consisted only in not "requir[ing]" that result. *Siegel*, 142 S. Ct. at 1782 n.2 (emphasis omitted). It follows that when the BA districts unexpectedly failed to implement the fee increase, Congress "likely would have chosen," *Morales-Santana*, 137 S. Ct. at 1701, to remedy that problem by retroactively increasing the BA fees to the levels it had expected the Judicial Conference to impose, not by forgoing the very UST fee increase it had specifically imposed.

Moreover, even if, in the 2017 Act, Congress had in fact preferred to except the BA districts from the fee increase it imposed in UST districts, there can be little question that, had it known such a course was not constitutionally permissible, it would have extended the fee increase to the BA districts rather than abandon the entire fee increase. That conclusion follows from the comparative impact of the general policy (the fee increase in the UST districts) relative to the exception (the retention of the prior fee schedule in the BA districts): There are 6 BA districts, which accounted for less than 3% of the Chapter 11 filings in 2018, and the 88 UST

districts accounted for more than 97% of such filings. See *U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2018*, Tbl. F-2, https://www.uscourts.gov/sites/default/files/data_tables/bf_f2_1231.2018.pdf. Just as in *Morales-Santana*, a remedy should not "extend favorable treatment" from a small group to the "substantial majority," thereby transforming the "exception" into the "general rule." 137 S. Ct. at 1701.

Furthermore, the 2017 Act's fee increase served a longstanding principle. Since the creation of the UST Program, Congress has sought to ensure that its costs are borne "by the users of the bankruptcy system—not by the taxpayer." H.R. Rep. No. 764, 99th Cong., 2d Sess. 22 (1986); see 2020 Act § 2(a)(1) and (2), 134 Stat. 5086 (reiterating "the importance of the goal that the bankruptcy system is self-funded, at no cost to the taxpayer"; noting that Congress "has amended" fees "as necessary to ensure that the bankruptcy system remains self-supporting, while also fairly allocating the costs of the system among those who use the system"). The fee increase in the 2017 Act was needed precisely to counteract an imminent shortfall in user funds that threatened to shift significant financial liability to taxpayers. See H.R. Rep. No. 130, 115th Cong., 1st Sess. 7-8 (2017).

Requiring a refund for debtors who paid the fee increase in UST districts would potentially inflict on taxpayers approximately $326 million in fees that Congress unequivocally sought to impose on the users of the UST Program. See Haverstock Decl. ¶ 6, *In re ASPC Corp.*, D. Ct. Doc. 74-1, No. 19-ap-2120 (Bankr. S.D. Ohio Feb. 27, 2023) (Haverstock Decl.) (calculating the aggregate

difference for the relevant period). That result would inappropriately "extend the special treatment Congress inadvertently afforded to creditors in the [BA] districts, despite its manifest intent to raise the fees in all districts." *Mosaic*, 22 F.4th at 1330 (Brasher, J., concurring in the result). Magnifying inadvertent "congressional generosity" towards the BA districts in that fashion would convert a narrow exception "into something unanticipated and obviously undesired by the Congress." *Rogers* v. *Bellei*, 401 U.S. 815, 835 (1971). It would violate "th[is] Court's remedial preference * * * to salvage rather than destroy the rest of the law passed by Congress and signed by the President." *AAPC*, 140 S. Ct. at 2350. And retroactively eliminating the 2017 Act's fee increase in the UST districts would create a major "potential disruption of the statutory scheme," *Morales-Santana*, 137 S. Ct. at 1700 (quoting *Heckler* v. *Mathews*, 465 U.S. 728, 739 n.5 (1984)), whereas extending the fee increase to the BA districts that were expected to be subject to it under the Judicial Conference's standing order would create no disruption of that scheme at all.

The 2020 Act provides further evidence of Congress's commitment to the "general rule," *Morales-Santana*, 137 S. Ct. at 1701, that it had adopted in the 2017 Act. After some courts had held that the 2017 Act was unconstitutionally non-uniform, see, *e.g.*, *In re Buffets, LLC*, 597 B.R. 588, 594 (Bankr. W.D. Tex. 2019), rev'd and remanded, 979 F.3d 366 (5th Cir. 2020), Congress did not revoke the amended fee schedule in Section 1930(a)(6) to reduce the UST Program fees to the levels being collected in the BA districts, nor did it direct any refunds for debtors in UST districts. Instead, it specified that, prospectively, the Judicial Conference was required to impose the same fees in the BA districts

that Congress imposed in the UST districts. 2020 Act § 3(d)(2), 134 Stat. 5088. And, acting with respect to both the UST and the BA districts, Congress set the fees for the largest debtors at levels similar to those in the 2017 amendments. Compare 28 U.S.C. 1930(a)(6)(B)(ii)(II) (Supp. II 2020) (setting quarterly fees at $8,000 to $250,000 for the largest debtors), and 28 U.S.C. 1930(a)(6)(B) (2018) (setting quarterly fees at $10,000 to $250,000 for the largest debtors). Those fees were substantially higher than the pre-2017 fees. See 28 U.S.C. 1930(a)(6) (2012) (setting quarterly fees of $6,500 to $30,000 for the largest debtors). In short, Congress resolved the disuniformity by leveling-up fees in BA districts to UST levels, not by leveling-down UST fees to the pre-2017 schedule that had lingered on in the BA districts.

In these circumstances, the remedy that Congress would have selected is unusually clear: an equal fee increase in all districts, rather than no fee increase anywhere. For that reason, to the extent that some retrospective elimination of the disparity were required, but see pp. 13-17, *supra*, the appropriate course would be to direct the Judicial Conference to increase fees on debtors in BA districts for the relevant period. See *Mosaic*, 22 F.4th at 1330 (Brasher, J., concurring in the result).*

In fact, as this Court previously recognized, a "good-faith effort to administer and enforce" a retroactive collection from those who made lower payments can "con-

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* Such a remedy could be implemented consistent with the due-process rights of debtors in BA districts, see *McKesson*, 496 U.S. at 41 n.23, particularly because to the extent the Judicial Conference elected to impose fees in the BA districts, those fees were required to be "equal to those imposed" in UST districts, 28 U.S.C. 1930(a)(7) (2018).

stitute adequate relief" for differential treatment. *McKesson*, 496 U.S. at 41 n.23. And that remedy is particularly appropriate because the increased fees would need to be sought from only a miniscule fraction of Chapter 11 debtors (*i.e.*, the largest debtors among fewer than 3% of Chapter 11 debtors nationwide). There were approximately 17,000 cases pending in the UST districts in the first three quarters of 2018, and approximately 500 cases pending in the BA districts during that time. See Haverstock Decl. ¶¶ 5, 10. Approximately 12% (or 2,100) of the UST cases had quarterly disbursements of more than $1,000,000. *Id.* ¶ 5. Assuming a similar proportion of large cases in the BA districts, approximately 60 cases with quarterly disbursements of more than $1,000,000 were pending during the first three quarters of 2018. So a complete leveling-down remedy would require refunds in approximately 2,100 cases. By contrast, a leveling-up remedy would require additional payments only in approximately 60 cases. There can be no serious question which remedy Congress would have preferred.

Where the remedy that Congress would have chosen for a constitutional violation is clear, "a court cannot 'use its remedial powers to circumvent the intent of the legislature.'" *Ayotte*, 546 U.S. at 330 (citation omitted). The Court should reject petitioner's request to adopt a remedy that is "demonstrably at odds with Congress's intent." *Mosaic*, 22 F.4th at 1328 (Brasher, J., concurring in the result).

B. The Question Presented Warrants This Court's Review

The question presented has substantial legal and practical importance. After taking the rare step of deeming unconstitutional a portion of a duly enacted statute, this Court specifically left open the question of

the appropriate remedy for the violation and directed lower courts to consider the remedial question "in the first instance" in *Siegel*, 142 S. Ct. at 1783; in this case, Pet. App. 6a ("remand[ing] to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Siegel*"); and in two other cases, see *Harrington* v. *Clinton Nurseries, Inc.*, 143 S. Ct. 297 (2022) ("remand[ing] to the United States Court of Appeals for the Second Circuit for further consideration in light of *Siegel*"); *Bast Amron LLP* v. *United States Trustee Region 21*, 142 S. Ct. 2862 (2022) ("remand[ing] to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Siegel*"). Despite this Court's own attention to the remedial question, the two lower courts that have resolved that question to date have provided scant analysis in reinstating their pre-*Siegel* opinions without reconciling their chosen remedy with powerful indicia of contrary congressional intent. See App., *infra*, 5a; *In re Clinton Nurseries, Inc.*, 53 F.4th 15, 29 (2d Cir. 2022). Those decisions should not serve as the last word on this important legal question.

In addition to the legal importance of the question presented, the practical stakes are considerable. If the decision below stands and becomes the rule nationwide, it has the potential to cost the U.S. government as much as $326 million, either undermining other government programs, or being passed along to taxpayers or future debtors rather than the users of the bankruptcy system that Congress has repeatedly determined should be responsible. See 2020 Act § 2(a)(1) and (2), 134 Stat. 5086. In this case alone, a refund of approximately $2.5 million is at stake. App., *infra*, 15a.

Although a circuit conflict has not yet emerged, it is likely to do so. Given the breadth of the UST program, which spans 88 judicial districts in every regional circuit, this issue has been litigated across the country. The underlying question of constitutionality came to this Court on a 3 to 2 circuit conflict. See *Siegel*, 142 S. Ct. at 1778 n.1. With the passage of time, a division as to remedy could readily develop, particularly given the substantial legal arguments against the position adopted by the court of appeals here. See pp. 12-23, *supra*.

In fact, the question of the appropriate remedy for the *Siegel* uniformity violation is currently pending in two additional circuits, see *Mosaic*, No. 20-12547 (11th Cir. argued Feb. 13, 2023); *USA Sales, Inc.* v. *Office of the United States Trustee*, No. 21-55643 (9th Cir. argued June 7, 2023), and a consent petition for a direct appeal from bankruptcy court to the Fourth Circuit is pending in *Siegel* itself, see *Siegel* v. *United States Trustee Program*, No. 19-ap-3091, 2022 WL 17722849 (Bankr. E.D. Va. Dec. 15, 2022), petition for direct appeal pending, No. 23-135 (4th Cir.). Some of those courts may disagree with the decision below about the remedial question. In particular, the Eleventh Circuit—which ordered supplemental briefing on the remedial question and heard argument on the issue four months ago—could issue its decision soon. See *Mosaic*, No. 20-12547. The Eleventh Circuit had previously upheld the 2017 Act against a uniformity challenge; but notably, Judge Brasher concurred in the judgment because, although he would have ruled (in accord with this Court's subsequent *Siegel* decision) that the 2017 Act was unconstitutionally non-uniform, he concluded that

a refund would not be the appropriate remedy for the violation.

Judge Brasher, the only member of the panel who had occasion to reach the remedial question, expressly "disagree[d] with [the Tenth Circuit's] reasoning," *Mosaic*, 22 F.4th at 1330 (Brasher, J., concurring in the result), which the decision below has now reinstated, see App., *infra*, 5a. Judge Brasher explained that "[o]rdering a refund of the higher fees collected in Trustee districts would extend the special treatment Congress inadvertently afforded to creditors in the Bankruptcy Administrator districts, despite its manifest intent to raise the fees in all districts." *Mosaic*, 22 F.4th at 1330. Rather than a remedy of "treat[ing] the eighty-eight districts like the six districts," he deemed it "plain * * * that the remedy that most accords with Congress's intent would be for the Judicial Conference to apply the general rule—the higher fee—in the Bankruptcy Administrator districts." *Ibid.*

This Court should grant review rather than await the development of a circuit split. Given the nature of the question, the Court should not allow judgments in any of the cases presenting this question to become final, lest it prevent itself from being able to resolve the issue and impose a nationwide remedy. If this Court denies review now but a circuit split later develops, the judgment in this case will have become final, requiring a refund to the debtors here and potentially to debtors in approximately 69 other bankruptcy cases within the Tenth Circuit in which increased quarterly fees were paid under the 2017 Act, who might seek refunds on the heels of the lower court's decision in this case. Once that happens, any subsequent holding by this Court that the proper remedy is prospective-only or a leveling-

down remedy would be unable to rescind the multi-million-dollar windfall to the debtors in this case and to any additional debtors whose cases become final in the interim. It would be particularly unfortunate if allowing a refund to take effect in this case would thus preclude the ultimate adoption by this Court of a nationally uniform remedy for the uniformity violation at issue in these cases.

In light of the value of providing a uniform remedy for the full set of cases challenging the 2017 Act's fee increase, review is warranted now. At a minimum, the Court should hold the petition in this case and in other cases presenting the remedial question while that question remains pending before other courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2023

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 20-3203
(16-21142)
(United States Bankruptcy Court
for the District of Kansas)

IN RE: JOHN Q. HAMMONS FALL 2006, LLC; ACLOST, LLC; BRICKTOWN RESIDENCE CATERING CO., INC.; CHATEAU CATERING CO., INC.; CHATEAU LAKE, LLC; CITY CENTRE HOTEL CORP.; CIVIC CENTER REDEVELOPMENT CORP.; CONCORD GOLF CATERING CO., INC.; CONCORD HOTEL CATERING CO., INC.; EAST PEORIA CATERING CO., INC.; FORT SMITH CATERING CO., INC.; FRANKLIN/CRESCENT CATERING CO., INC.; GLENDALE COYOTES CATERING CO., INC.; GLENDALE COYOTES HOTEL CATERING CO., INC.; HAMMONS OF ARKANSAS, LLC; HAMMONS OF COLORADO, LLC; HAMMONS OF FRANKLIN, LLC; HAMMONS OF FRISCO, LLC; HAMMONS OF HUNTSVILLE, LLC; HAMMONS OF LINCOLN, LLC; HAMMONS OF NEW MEXICO, LLC; HAMMONS OF OKLAHOMA CITY, LLC; HAMMONS OF RICHARDSON, LLC; HAMMONS OF ROGERS, INC.; HAMMONS OF SIOUX FALLS, LLC; HAMMONS OF SOUTH CAROLINA, LLC; HAMMONS OF TULSA, LLC; HAMMONS, INC.; HAMPTON CATERING CO., INC.; HOT SPRINGS CATERING CO., INC.; HUNTSVILLE CATERING, LLC; INTERNATIONAL CATERING CO., INC.; JQH—ALLEN DEVELOPMENT, LLC; JQH—CONCORD DEVELOPMENT, LLC; JQH—EAST PEORIA DEVELOPMENT, LLC; JQH—FT. SMITH DEVELOPMENT, LLC; JQH—GLENDALE AZ DEVELOPMENT, LLC; JQH—KANSAS CITY DEVELOPMENT, LLC; JQH—LA VISTA CY DEVELOPMENT, LLC; JQH—LA VISTA CONFERENCE CENTER DEVELOPMENT, LLC; JQH—LA VISTA III

DEVELOPMENT, LLC; JQH—LAKE OF THE OZARKS DEVELOPMENT, LLC; JQH—MURFREESBORO DEVELOPMENT, LLC; JQH—NORMAL DEVELOPMENT, LLC; JQH—NORMAN DEVELOPMENT, LLC; JQH—OKLAHOMA CITY BRICKTOWN DEVELOPMENT, LLC; JQH—OLATHE DEVELOPMENT, LLC; JQH—PLEASANT GROVE DEVELOPMENT, LLC; JQH—ROGERS CONVENTION CENTER DEVELOPMENT, LLC; JQH—SAN MARCOS DEVELOPMENT, LLC; JOHN Q. HAMMONS 2015 LOAN HOLDINGS, LLC; JOHN Q. HAMMONS CENTER, LLC; JOHN Q. HAMMONS HOTELS DEVELOPMENT, LLC; JOHN Q. HAMMONS HOTELS MANAGEMENT I CORPORATION; JOHN Q. HAMMONS HOTELS MANAGEMENT II, LP; JOHN Q. HAMMONS HOTELS MANAGEMENT, LLC; JOPLIN RESIDENCE CATERING CO., INC.; JUNCTION CITY CATERING CO., INC.; KC RESIDENCE CATERING CO., INC.; LA VISTA CY CATERING CO., INC.; LA VISTA ES CATERING CO., INC.; LINCOLN P STREET CATERING CO., INC.; LOVELAND CATERING CO., INC.; MANZANO CATERING CO., INC.; MURFREESBORO CATERING CO., INC.; NORMAL CATERING CO., INC.; OKC COURTYARD CATERING CO., INC.; R-2 OPERATING CO., INC.; REVOCABLE TRUST OF JOHN Q. HAMMONS DATED DECEMBER 28, 1989 AS AMENDED AND RESTATED; RICHARDSON HAMMONS, LP; ROGERS ES CATERING CO., INC.; SGF—COURTYARD CATERING CO., INC.; SIOUX FALLS CONVENTION/ARENA CATERING CO., INC.; ST. CHARLES CATERING CO., INC.; TULSA/169 CATERING CO., INC.; U.P. CATERING CO., INC., DEBTORS

JOHN Q. HAMMONS FALL 2006, LLC; ACLOST, LLC; BRICKTOWN RESIDENCE CATERING CO., INC.; CHATEAU CATERING CO., INC.; CHATEAU LAKE, LLC; CITY 1012 CENTRE HOTEL CORP.; CIVIC CENTER REDEVELOPMENT CORP.; CONCORD GOLF CATERING CO., INC.; CONCORD HOTEL CATERING CO., INC.; EAST PEORIA CATERING CO., INC.; FORT SMITH CATERING CO., INC.; FRANKLIN/CRESCENT CATERING CO., INC.; GLENDALE COYOTES CATERING CO., INC.; GLENDALE

COYOTES HOTEL CATERING CO., INC.; HAMMONS OF ARKANSAS, LLC; HAMMONS OF COLORADO, LLC; HAMMONS OF FRANKLIN, LLC; HAMMONS OF FRISCO, LLC; HAMMONS OF HUNTSVILLE, LLC; HAMMONS OF LINCOLN, LLC; HAMMONS OF NEW MEXICO, LLC; HAMMONS OF OKLAHOMA CITY, LLC; HAMMONS OF RICHARDSON, LLC; HAMMONS OF ROGERS, INC.; HAMMONS OF SIOUX FALLS, LLC; HAMMONS OF SOUTH CAROLINA, LLC; HAMMONS OF TULSA, LLC; HAMMONS, INC.; HAMPTON CATERING CO., INC.; HOT SPRINGS CATERING CO., INC.; HUNTSVILLE CATERING, LLC; INTERNATIONAL CATERING CO., INC.; JQH—ALLEN DEVELOPMENT, LLC; JQH—CONCORD DEVELOPMENT, LLC; JQH—EAST PEORIA DEVELOPMENT, LLC; JQH—FT. SMITH DEVELOPMENT, LLC; JQH—GLENDALE AZ DEVELOPMENT, LLC; JQH—KANSAS CITY DEVELOPMENT, LLC; JQH—LA VISTA CY DEVELOPMENT, LLC; JQH—LA VISTA CONFERENCE CENTER DEVELOPMENT, LLC; JQH—LA VISTA III DEVELOPMENT, LLC; JQH—LAKE OF THE OZARKS DEVELOPMENT, LLC; JQH—MURFREESBORO DEVELOPMENT, LLC; JQH—NORMAL DEVELOPMENT, LLC; JQH—NORMAN DEVELOPMENT, LLC; JQH—OKLAHOMA CITY BRICKTOWN DEVELOPMENT, LLC; JQH—OLATHE DEVELOPMENT, LLC; JQH—PLEASANT GROVE DEVELOPMENT, LLC; JQH—ROGERS CONVENTION CENTER DEVELOPMENT, LLC; JQH—SAN MARCOS DEVELOPMENT, LLC; JOHN Q. HAMMONS 2015 LOAN HOLDINGS, LLC; JOHN Q. HAMMONS CENTER, LLC; JOHN Q. HAMMONS HOTELS DEVELOPMENT, LLC; JOHN Q. HAMMONS HOTELS MANAGEMENT I CORPORATION; JOHN Q. HAMMONS HOTELS MANAGEMENT II, LP; JOHN Q. HAMMONS HOTELS MANAGEMENT, LLC; JOPLIN RESIDENCE CATERING CO., INC.; JUNCTION CITY CATERING CO., INC.; KC RESIDENCE CATERING CO., INC.; LA VISTA CY CATERING CO., INC.; LA VISTA ES CATERING CO., INC.; LINCOLN P STREET CATERING CO., INC.; LOVELAND CATERING CO., INC.; MANZANO

CATERING CO., INC.; MURFREESBORO CATERING CO., INC.; NORMAL CATERING CO., INC.; OKC COURTYARD CATERING CO., INC.; R-2 OPERATING CO., INC.; REVOCABLE TRUST OF JOHN Q. HAMMONS DATED DECEMBER 28, 1989 AS AMENDED AND RESTATED; RICHARDSON HAMMONS, LP; ROGERS ES CATERING CO., INC.; SGF—COURTYARD CATERING CO., INC.; SIOUX FALLS CONVENTION/ARENA CATERING CO., INC.; ST. CHARLES CATERING CO., INC.; TULSA/169 CATERING CO., INC.; U.P. CATERING CO., INC., APPELLANTS

v.

OFFICE OF THE UNITED STATES TRUSTEE, APPELLEE

ACADIANA MANAGEMENT GROUP, LLC; ALBUQUERQUE-AMG SPECIALTY HOSPITAL, LLC; CENTRAL INDIANA-AMG SPECIALTY HOSPITAL, LLC; LTAC HOSPITAL OF EDMOND, LLC; HOUMA-AMG SPECIALTY HOSPITAL, LLC; LTAC OF LOUISIANA, LLC; LAS VEGAS-AMG SPECIALTY HOSPITAL, LLC; WARREN BOEGEL; BOEGEL FARMS, LLC AND THREE BO'S, INC., AMICI CURIAE

Filed: Aug. 15, 2022

ORDER AND JUDGMENT[*]

Before **BACHARACH, EBEL**, and **PHILLIPS**, Circuit Judges.

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[*] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

This matter is before the court following our receipt of the United States Supreme Court's order granting certiorari, vacating our judgment, and remanding for further consideration in light of *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (2022). *See Office of the United States Trustee v. John Q. Hammons Fall 2006, LLC,* 142 S. Ct. 2810 (2022). The Supreme Court's judgment issued on July 15, 2022. That same day, we recalled our mandate and ordered the parties to file supplemental briefs regarding the impact of *Siegel* on this appeal.

Upon careful consideration of the parties' supplemental briefs and the Supreme Court's *Siegel* opinion, we reinstate our original opinion, *In re: John Q. Hammons Fall 2006, LLC,* 15 F.4th 1011 (10th Cir. 2021). We reverse and remand for determination of Appellants' quarterly Chapter 11 fees and a refund of overpayment consistent with our original opinion.

Entered for the Court,

Gregory A. Phillips
Circuit Judge

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. 21-1078

OFFICE OF THE UNITED STATES TRUSTEE,
PETITIONER

v.

JOHN Q. HAMMONS FALL 2006, LLC, ET AL.

Filed: June 13, 2022

Case below, 15 F.4th 1011.

On petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Siegel* v. *Fitzgerald*, 596 U.S. ———, 142 S. Ct. 1770, ——— L. Ed. 2d ——— (2022).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 20-3203

IN RE: JOHN Q. HAMMONS FALL 2006, LLC; ACLOST, LLC; BRICKTOWN RESIDENCE CATERING CO., INC.; CHATEAU CATERING CO., INC.; CHATEAU LAKE, LLC; CITY CENTRE HOTEL CORP.; CIVIC CENTER REDEVELOPMENT CORP.; CONCORD GOLF CATERING CO., INC.; CONCORD HOTEL CATERING CO., INC.; EAST PEORIA CATERING CO., INC.; FORT SMITH CATERING CO., INC.; FRANKLIN/CRESCENT CATERING CO., INC.; GLENDALE COYOTES CATERING CO., INC.; GLENDALE COYOTES HOTEL CATERING CO., INC.; HAMMONS OF ARKANSAS, LLC; HAMMONS OF COLORADO, LLC; HAMMONS OF FRANKLIN, LLC; HAMMONS OF FRISCO, LLC; HAMMONS OF HUNTSVILLE, LLC; HAMMONS OF LINCOLN, LLC; HAMMONS OF NEW MEXICO, LLC; HAMMONS OF OKLAHOMA CITY, LLC; HAMMONS OF RICHARDSON, LLC; HAMMONS OF ROGERS, INC.; HAMMONS OF SIOUX FALLS, LLC; HAMMONS OF SOUTH CAROLINA, LLC; HAMMONS OF TULSA, LLC; HAMMONS, INC.; HAMPTON CATERING CO., INC.; HOT SPRINGS CATERING CO., INC.; HUNTSVILLE CATERING, LLC; INTERNATIONAL CATERING CO., INC.; JQH—ALLEN DEVELOPMENT, LLC; JQH—CONCORD DEVELOPMENT, LLC; JQH—EAST PEORIA DEVELOPMENT, LLC; JQH—FT. SMITH DEVELOPMENT, LLC; JQH—GLENDALE AZ DEVELOPMENT, LLC; JQH—KANSAS CITY DEVELOPMENT, LLC; JQH—LA VISTA CY DEVELOPMENT, LLC; JQH—LA VISTA CONFERENCE CENTER DEVELOPMENT, LLC; JQH—LA VISTA III DEVELOPMENT, LLC; JQH—LAKE OF THE OZARKS DEVELOPMENT, LLC; JQH—MURFREESBORO DEVELOPMENT, LLC; JQH—NORMAL DEVELOPMENT,

LLC; JQH—NORMAN DEVELOPMENT, LLC; JQH—OKLAHOMA CITY BRICKTOWN DEVELOPMENT, LLC; JQH—OLATHE DEVELOPMENT, LLC; JQH—PLEASANT GROVE DEVELOPMENT, LLC; JQH—ROGERS CONVENTION CENTER DEVELOPMENT, LLC; JQH—SAN MARCOS DEVELOPMENT, LLC; JOHN Q. HAMMONS 2015 LOAN HOLDINGS, LLC; JOHN Q. HAMMONS CENTER, LLC; JOHN Q. HAMMONS HOTELS DEVELOPMENT, LLC; JOHN Q. HAMMONS HOTELS MANAGEMENT I CORPORATION; JOHN Q. HAMMONS HOTELS MANAGEMENT II, LP; JOHN Q. HAMMONS HOTELS MANAGEMENT, LLC; JOPLIN RESIDENCE CATERING CO., INC.; JUNCTION CITY CATERING CO., INC.; KC RESIDENCE CATERING CO., INC.; LA VISTA CY CATERING CO., INC.; LA VISTA ES CATERING CO., INC.; LINCOLN P STREET CATERING CO., INC.; LOVELAND CATERING CO., INC.; MANZANO CATERING CO., INC.; MURFREESBORO CATERING CO., INC.; NORMAL CATERING CO., INC.; OKC COURTYARD CATERING CO., INC.; R-2 OPERATING CO., INC.; REVOCABLE TRUST OF JOHN Q. HAMMONS DATED DECEMBER 28, 1989 AS AMENDED AND RESTATED; RICHARDSON HAMMONS, LP; ROGERS ES CATERING CO., INC.; SGF—COURTYARD CATERING CO., INC.; SIOUX FALLS CONVENTION/ARENA CATERING CO., INC.; ST. CHARLES CATERING CO., INC.; TULSA/169 CATERING CO., INC.; U.P. CATERING CO., INC., DEBTORS

JOHN Q. HAMMONS FALL 2006, LLC; ACLOST, LLC; BRICKTOWN RESIDENCE CATERING CO., INC.; CHATEAU CATERING CO., INC.; CHATEAU LAKE, LLC; CITY 1012 CENTRE HOTEL CORP.; CIVIC CENTER REDEVELOPMENT CORP.; CONCORD GOLF CATERING CO., INC.; CONCORD HOTEL CATERING CO., INC.; EAST PEORIA CATERING CO., INC.; FORT SMITH CATERING CO., INC.; FRANKLIN/CRESCENT CATERING CO., INC.; GLENDALE COYOTES CATERING CO., INC.; GLENDALE COYOTES HOTEL CATERING CO., INC.; HAMMONS OF ARKANSAS, LLC; HAMMONS OF COLORADO, LLC; HAMMONS OF FRANKLIN, LLC; HAMMONS OF

FRISCO, LLC; HAMMONS OF HUNTSVILLE, LLC; HAMMONS OF LINCOLN, LLC; HAMMONS OF NEW MEXICO, LLC; HAMMONS OF OKLAHOMA CITY, LLC; HAMMONS OF RICHARDSON, LLC; HAMMONS OF ROGERS, INC.; HAMMONS OF SIOUX FALLS, LLC; HAMMONS OF SOUTH CAROLINA, LLC; HAMMONS OF TULSA, LLC; HAMMONS, INC.; HAMPTON CATERING CO., INC.; HOT SPRINGS CATERING CO., INC.; HUNTSVILLE CATERING, LLC; INTERNATIONAL CATERING CO., INC.; JQH—ALLEN DEVELOPMENT, LLC; JQH—CONCORD DEVELOPMENT, LLC; JQH—EAST PEORIA DEVELOPMENT, LLC; JQH—FT. SMITH DEVELOPMENT, LLC; JQH—GLENDALE AZ DEVELOPMENT, LLC; JQH—KANSAS CITY DEVELOPMENT, LLC; JQH—LA VISTA CY DEVELOPMENT, LLC; JQH—LA VISTA CONFERENCE CENTER DEVELOPMENT, LLC; JQH—LA VISTA III DEVELOPMENT, LLC; JQH—LAKE OF THE OZARKS DEVELOPMENT, LLC; JQH—MURFREESBORO DEVELOPMENT, LLC; JQH—NORMAL DEVELOPMENT, LLC; JQH—NORMAN DEVELOPMENT, LLC; JQH—OKLAHOMA CITY BRICKTOWN DEVELOPMENT, LLC; JQH—OLATHE DEVELOPMENT, LLC; JQH—PLEASANT GROVE DEVELOPMENT, LLC; JQH—ROGERS CONVENTION CENTER DEVELOPMENT, LLC; JQH—SAN MARCOS DEVELOPMENT, LLC; JOHN Q. HAMMONS 2015 LOAN HOLDINGS, LLC; JOHN Q. HAMMONS CENTER, LLC; JOHN Q. HAMMONS HOTELS DEVELOPMENT, LLC; JOHN Q. HAMMONS HOTELS MANAGEMENT I CORPORATION; JOHN Q. HAMMONS HOTELS MANAGEMENT II, LP; JOHN Q. HAMMONS HOTELS MANAGEMENT, LLC; JOPLIN RESIDENCE CATERING CO., INC.; JUNCTION CITY CATERING CO., INC.; KC RESIDENCE CATERING CO., INC.; LA VISTA CY CATERING CO., INC.; LA VISTA ES CATERING CO., INC.; LINCOLN P STREET CATERING CO., INC.; LOVELAND CATERING CO., INC.; MANZANO CATERING CO., INC.; MURFREESBORO CATERING CO., INC.; NORMAL CATERING CO., INC.; OKC COURTYARD CATERING CO., INC.; R-2 OPERATING CO., INC.;

REVOCABLE TRUST OF JOHN Q. HAMMONS DATED DECEMBER 28, 1989 AS AMENDED AND RESTATED; RICHARDSON HAMMONS, LP; ROGERS ES CATERING CO., INC.; SGF—COURTYARD CATERING CO., INC.; SIOUX FALLS CONVENTION/ARENA CATERING CO., INC.; ST. CHARLES CATERING CO., INC.; TULSA/169 CATERING CO., INC.; U.P. CATERING CO., INC., APPELLANTS

v.

OFFICE OF THE UNITED STATES TRUSTEE, APPELLEE

ACADIANA MANAGEMENT GROUP, LLC; ALBUQUERQUE-AMG SPECIALTY HOSPITAL, LLC; CENTRAL INDIANA-AMG SPECIALTY HOSPITAL, LLC; LTAC HOSPITAL OF EDMOND, LLC; HOUMA-AMG SPECIALTY HOSPITAL, LLC; LTAC OF LOUISIANA, LLC; LAS VEGAS-AMG SPECIALTY HOSPITAL, LLC; WARREN BOEGEL; BOEGEL FARMS, LLC AND THREE BO'S, INC., AMICI CURIAE

Filed: Oct. 5, 2021

Appeal from the United States Bankruptcy Court
for the District of Kansas
(16-21142)

Before BACHARACH, EBEL, and PHILLIPS, Circuit Judges.

PHILLIPS, Circuit Judge.

Appellants, seventy-six Chapter 11 debtors associated with John Q. Hammons Hotels & Resorts (Debtors), argue that they incurred more than $2.5 million of quarterly Chapter 11 disbursement fees from January 2018 through December 2020. First, Debtors fault the

bankruptcy court's statutory interpretation, arguing that it applied the quarterly fees retroactively to pending cases against Congress's intent. We conclude that the presumption against retroactivity doesn't apply here, because Congress increased the quarterly bankruptcy fees prospectively. Second, and alternatively, Debtors fault Congress, arguing that charging different Chapter 11 disbursement fees depending on the location of the bankruptcy filing violates the uniformity requirement of the Bankruptcy Clause, U.S. Const. art I, § 8, cl. 4. On this point, we conclude that Debtors must prevail. Accordingly, we reverse and remand for recalculation of the quarterly Chapter 11 disbursement fees and a refund of overpayments.

BACKGROUND

I. Historical Background

The federal judiciary is divided into ninety-four judicial districts. Nearly all judicial districts have a bankruptcy court. The Department of Justice, through its Trustee Program, administers bankruptcy proceedings for eighty-eight judicial districts.[1] *E.g.*, *In re Cir. City*

[1] The Eastern and Western Districts of Arkansas share a bankruptcy court. *See* United States Courts, https://www.uscourts.gov/about-federal-courts/federal-courtspublic/court-website-links (last visited August 10, 2021). And the judicial districts for the Virgin Islands, Northern Mariana Islands, and Guam don't have bankruptcy courts. *See* Boston College Law Library, Bankruptcy Courts, https://lawguides.bc.edu/c.php?g=350874&p=2367777 (last visited August 10, 2021). But the Trustee Program still covers bankruptcy proceedings in these districts. *See* Judicial Districts Covered by USTP Regions, Department of Justice, https://www.justice.gov/ust/judicial-districts-covered-ustp-regions (last visited August 10, 2021).

Stores, Inc., 996 F.3d 156, 160 (4th Cir. 2021). The Judicial Conference, through its Bankruptcy Administrator Program, administers bankruptcy proceedings in the remaining six districts, located in Alabama and North Carolina. *Id.* (footnote omitted). This system of dual bankruptcy programs began in 1978. *See* Pub. L. No. 95-598, §§ 224-32, 92 Stat. 2549, 2662-65 (1978). Before then, bankruptcy judges in all judicial districts supervised and administered their own bankruptcy proceedings. H.R. Rep. No. 95-595, at 4 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 5965-66. In 1978, Congress launched a pilot trustee program (1) to alleviate the administrative burdens on bankruptcy judges, (2) to remove any appearance of bias arising from judges' administering cases, and (3) to establish bankruptcy-court "watchdogs." *Id.*; Pub. L. No. 95-598, §§ 224-32, 92 Stat. at 2662-65.

In 1986, Congress made the program permanent in all judicial districts, but allowed Alabama and North Carolina until 1992 to join. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, §§ 111-17, 302(d), 100 Stat. 3088, 3090-96, 3119-23 (1986).

But in 1990, Congress extended the temporary delay until 2002. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 317(a), 104 Stat. 5089, 5115 (1990). Then in 2000, Congress granted Alabama and North Carolina a permanent exemption from joining the Trustee Program. Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 501, 114 Stat. 2410, 2421-22 (2000).

This left the country with two different bankruptcy-administration programs. Each has a separate fund-

ing source. The general judicial budget funds Bankruptcy Administrators in Alabama and North Carolina. *Matter of Buffets, L.L.C.*, 979 F.3d 366, 383 (5th Cir. 2020); *cf.* 28 U.S.C. § 1930(a)(7). Debtors' fees fund the Trustee Program everywhere else.[2] H.R. Rep. No. 99-764, at 22 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5227, 5234.

Chapter 11 debtors pay quarterly disbursement fees. 28 U.S.C. § 1930(a)(6). Bankruptcy courts calculate and collect these fees based on the size of quarterly "disbursements" paid creditors. *Id.* At first, Congress imposed these fees only in Trustee districts. *See Buffets*, 979 F.3d at 371. But in 1994, the Ninth Circuit ruled that imposing a "different, more costly system" on debtors everywhere except Alabama and North Carolina violated the Bankruptcy Clause's requirement that bankruptcy laws be uniform. *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1531-33 (9th Cir. 1994). The next year, Congress enacted § 1930(a)(7), which allowed the Judicial Conference to require debtors "to pay fees equal to those imposed" in Trustee districts.[3] Federal Courts Improvement Act of 2000 § 105. A year later,

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[2] Though Congress annually appropriates funds to the Trustee Program, it offsets appropriations with the bankruptcy fees collected. H.R. Rep. No. 115-130, at 6-7 (2017), *as reprinted in* 2017 U.S.C.C.A.N. 154, 159.

[3] In a 2020 amendment effective on January 12, 2021, Congress amended "may" to "shall." Bankruptcy Administration Improvement Act of 2020, Pub. L. No. 116-325, § 3(d)(2), 134 Stat. 5086, 5088 (2020); *see* 28 U.S.C. § 1930(a)(7) (2021) (providing that "the Judicial Conference of the United States shall require [Chapter 11 debtors] to pay fees equal to those imposed" in Trustee districts). For quarters in 2021 and afterward, Congress has restored equilibrium for fees charged in Bankruptcy Administrator and Trustee districts.

the Judicial Conference set fees in Bankruptcy Administrator districts "in the amounts specified [for Trustee districts], as those amounts may be amended from time to time." *Report of the Proceedings of the Judicial Conference of the United States* 45-46 (2001), https://www.uscourts.gov/sites/default/files/2001-09_0.pdf.

For the next seventeen years or so, Trustee and Bankruptcy Administrator districts charged the same quarterly fees. That changed with Congress's 2017 Amendment to § 1930(a)(6), which mandated increased quarterly Chapter 11 disbursement fees for large debtors in Trustee districts. Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. No. 115-72, § 1004(a)(2), 131 Stat. 1224, 1232 (2017). With this Amendment, Congress sought to secure funding levels in the Trustee Program districts, whose declining bankruptcy filings had reduced fees that contributed to overall funding. H.R. Rep. No. 115-130, at 6-7 (2017), *as reprinted in* 2017 U.S.C.C.A.N. 154, 159; *see also Cir. City Stores*, 996 F.3d at 161. Under the 2017 Amendment, each year from 2018 through 2022, fees would increase for debtors with at least $1 million quarterly disbursements if "as of September 30 of the most recent full fiscal year," Trustee Program funds were below $200 million.[4] § 1004(a)(2). This substantially raised fees for these Trustee Program

[4] Congress also intended to finance eighteen new bankruptcy judgeships. *See* H.R. Rep. No. 115-130, at 7. To that end, Congress allocated 98% percent of the fees to the Trustee Program fund and 2% percent to the general Treasury fund. *See* § 1004.

debtors, from a maximum of $30,000 to the lesser of either $250,000 or one percent of the quarterly disbursement.[5] *Id.*; 28 U.S.C. § 1930(a)(6) (2008).

For quarters beginning on and after January 1, 2018, quarterly Chapter 11 disbursement fees increased on all large debtors in Trustee districts, even debtors whose bankruptcy cases were pending before that date. *See, e.g.*, *Buffets*, 979 F.3d at 372. Bankruptcy Administrator debtors got a better deal. The Judicial Conference didn't increase quarterly fees for those debtors until October 2018, and then, the increase didn't apply prospectively to pending cases.[6] Thus, in Bankruptcy Administrator districts, unlike in Trustee districts, large debtors with cases pending before October 2018 incurred no increased fees however long their cases remained pending. *E.g.*, *Buffets*, 979 F.3d at 372.

II. Procedural Background

In June 2016, Debtors filed Chapter 11 bankruptcy cases in the District of Kansas, a Trustee district.[7] Their cases remained pending in January 2018 when the 2017 Amendment took effect. After that, their quarterly fees markedly increased. As of December 31, 2019, Debtors had paid over $2.5 million more in quarterly fees than they would have paid had they filed in a Bankruptcy Administrator district.

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[5] In the 2020 Amendment, Congress reduced fees to the lesser of 0.8% of the disbursement or $250,000. § 3(d)(1).

[6] *Report of the Proceedings of the Judicial Conference of the United States* 11-12 (2018), https://www.uscourts.gov/sites/default/files/2018-09 proceedings.pdf.

[7] Because of their many business locations, Debtors had the flexibility to have filed in the Bankruptcy Administrator districts instead.

In the bankruptcy court, Debtors challenged the quarterly Chapter 11 disbursement-fee increase. They argued that the 2017 Amendment was unconstitutional "because it was unequally applied during the first three quarters of 2018 and because it was applied retroactively both without clear Congressional intent and only in states where the United States Trustee Program operates—excluding bankruptcy petitions filed in North Carolina and Alabama." Debtors/Appellants' App. vol. 71 at 9871. The bankruptcy court rejected both arguments and declined to redetermine Debtors' quarterly disbursement fees. We review under 28 U.S.C. § 158(d)(2).

DISCUSSION

On appeal, Debtors maintain (1) that the bankruptcy court erred in interpreting the 2017 Amendment to require increased fees retroactively, and (2) that the 2017 Amendment violates the Constitution's Bankruptcy Clause by applying a bankruptcy law nonuniformly. We review these legal issues de novo, beginning with the retroactivity challenge.[8] *See In re Herd*, 840 F.2d 757, 759 (10th Cir. 1988) (citation omitted).

I. Retroactivity

Debtors argue that applying the 2017 Amendment to their bankruptcy cases, which were pending in January 2018, is "impermissibly retroactive." Opening Br. at 42. Specifically, they contend that the Amendment's fee increases apply only to bankruptcy cases *filed* after January 1, 2018, not to cases *pending* then. The Fourth

[8] We address the retroactivity challenge first, because if Debtors prevailed on this issue we wouldn't need to decide the constitutionality of the 2017 Amendment under the Bankruptcy Clause.

and Fifth Circuits have rejected this argument. *Cir. City Stores*, 996 F.3d at 168-69; *Buffets*, 979 F.3d at 374-76. We do too.

Obviously, if Congress applies a new law to earlier events, this raises notice issues and could upset "settled expectations." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) (footnote omitted). So courts apply a presumption against retroactivity when interpreting statutes. *See id.* at 277, 114 S. Ct. 1483. Under this canon of construction, we presume that Congress didn't intend a statute to have a "genuinely 'retroactive' effect." *Id.* We employ a two-step analysis in assessing whether the presumption applies. *Id.* at 280, 114 S. Ct. 1483. First, we employ ordinary statutory-interpretation tools "to determine whether Congress has expressly prescribed the statute's proper reach." *Id.* If so, our analysis stops there. *Id.* If not, second, we "must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* "If the statute would operate retroactively, our traditional presumption [against retroactivity] teaches that it does not govern absent clear congressional intent favoring such a result." *Id.*

Debtors contend that we should apply the presumption against retroactivity to the 2017 Amendment; that is, they argue that the 2017 Amendment's text is ambiguous about whether it applies to already-pending cases and that it would have an impermissible retroactive effect if applied in such cases. We interpret the 2017

Amendment as increasing fees in pending cases. *Accord Cir. City Stores*, 996 F.3d at 168-69; *Buffets*, 979 F.3d at 374-75. Under § 1930(a)(6), debtors owe quarterly fees "in *each* case" and "for *each* quarter," regardless of case filing date. *Id.* (emphasis added). And the 2017 Amendment shows that Congress intended to increase quarterly fees for all disbursements paid on or after January 1, 2018. The 2017 Amendment ties the quarterly-fee increase to the disbursement date, no matter when the bankruptcy case was filed. The increase applies to "quarterly fees payable . . . for *disbursements* made in any calendar quarter that begins on or after the date of enactment." § 1004 (emphasis added). The legislative history contains similar language. *See* H.R. Rep. No. 115-130, at 10 (providing that the fee increase "applies to quarterly fees payable for any quarter that begins on or after the effective date of this legislation").

Even so, Debtors argue that we should draw a negative inference from the 2017 Amendment's not more specifically applying its fee increases to pending cases. Debtors contend that whether the 2017 Amendment applies to those cases is ambiguous. Debtors contrast the 2017 Amendment's language to Congress's language in a clarifying amendment for a 1996 fee increase, which specified that it applied to pending cases. Debtors also point to amendments to Chapter 12 of the Bankruptcy Code contained in the same act as the 2017 Amendment, which did so also.

We decline to draw a negative inference. Debtors haven't overcome the 2017 Amendment's language increasing quarterly fees for all post-enactment disburse-

ments. Additionally, Debtors' legislative examples differ. Congress intended the 1996 clarifying amendment to resolve judicial disagreement about whether a 1996 fee increase applied in pending cases. *Cir. City Stores*, 996 F.3d at 168 (citation omitted). By contrast, the 2017 Amendment increases all quarterly fees for disbursements made after its effective date. And when enacting the 2017 Amendment, "Congress operated under [a] widespread understanding that fee increases apply to postenactment disbursements in pending cases." *Buffets*, 979 F.3d at 374 (citation omitted).

Similarly, a negative inference doesn't arise from the Chapter 12 amendment, because that amendment addresses a different subject from § 1930(a)(6)'s. *Cf. Martin v. Hadix*, 527 U.S. 343, 356, 119 S. Ct. 1998, 144 L. Ed. 2d 347 (1999) (finding a proposed negative inference inapposite because it depended on legislation on a "wholly distinct subject matter[ ]"). That amendment enlarged the scope of Chapter 12 discharge by expanding what debts are dischargeable. *See* Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2017, § 1005; *see also Buffets*, 979 F.3d at 375 n.5 (citation omitted). To preserve existing rights in discharge, Congress clarified that the amendment didn't reach pending cases with existing discharge orders. *Buffets*, 979 F.3d at 375 n.5. Congress needn't have employed similar language when addressing the unrelated matter of Chapter 11 quarterly-fee increases, long assumed applicable to pending cases. *See id.* (citation omitted).

Even if we viewed the 2017 Amendment as ambiguous, we still wouldn't apply the presumption against retroactivity. We conclude that the 2017 Amendment

doesn't operate retroactively. The presumption against retroactivity applies only when "the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269-70, 114 S. Ct. 1483. As described, to have a retroactive effect, a new provision must "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280, 114 S. Ct. 1483. We've previously ruled that an amendment increasing § 1930(a)(6)'s quarterly fees wasn't retroactive, because the amendment merely "trigger[ed] prospective assessment of fees from the amendment's effective date." *In re CF & I Fabricators of Utah, Inc.*, 150 F.3d 1233, 1237 (10th Cir. 1998) (citation omitted). Most courts have concluded that the 2017 Amendment isn't retroactive, reasoning that the fee increase applies prospectively. *See, e.g., Buffets*, 979 F.3d at 375-76. We're persuaded by the Fifth Circuit's reasoning that the fee increase resembles a property-tax increase after a home purchase. *See id.* at 376 (citation and footnote omitted). The Supreme Court has described such taxes as "uncontroversially prospective." *Landgraf*, 511 U.S. at 269 n.24, 114 S. Ct. 1483 (citation omitted).

Debtors can't refute this reasoning. Instead, they argue that "[w]hen the increased fees were applied to [their] bankruptcy cases, new legal obligations . . . were retroactively applied to their decision to file" in a Trustee district, rather than a Bankruptcy Administrator district. Opening Br. at 47. Debtors miss the mark. The issue is whether the 2017 Amendment's increasing of quarterly fees is retroactive. *Cf.* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 264 (2012) ("[R]etroactivity is to be

judged with regard to the act or event that the statute is meant to regulate[.]"). The 2017 Amendment imposes no new legal consequences on disbursement fees before January 2018. Thus, we reject Debtors' retroactivity challenge to the 2017 Amendment. Even if Debtors' expectations were unsettled, legislation isn't "unlawful solely because it upsets otherwise settled expectations."[9] *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729-30, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984) (citations omitted).

II. Bankruptcy Clause Uniformity

A. The 2017 Amendment is a Law on "the Subject of Bankruptcies"

The Bankruptcy Clause authorizes Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States," thus requiring geographic uniformity. U.S. Const. art I, § 8, cl. 4. The United States Trustee first contends that we needn't determine whether the 2017 Amendment violates this limitation, because the Amendment isn't a substantive law "on the subject of bankruptcies." The Trustee contends that the Amendment concerns an administrative matter and is not subject to the uniformity requirement. In that regard, the Trustee likens dual-system quarterly Chap-

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[9] And we note that the 2017 Amendment was preceded by some tremors. In 2015, the Department of Justice signaled plans to seek a fee increase soon, and the next year, the department proposed increasing fees in October 2016. U.S. Dep't of Justice, *U.S. Trustee Program: FY 2017 Performance Budget Congressional Submission* 9-10 (2016), https://go.usa.gov/xpYS3; U.S. Dep't of Justice, *U.S. Trustee Program: FY 2016 Performance Budget Congressional Submission* 7 (2015), https://go.usa.gov/xpYJu.

ter 11 disbursement fees to statutorily optional bankruptcy appellate panels, which only some judicial circuits use, or to optional local rules among bankruptcy courts. The Trustee also notes that 28 U.S.C. § 1930(f)(3) allows bankruptcy courts to waive some fees.

Every court that has addressed the Trustee's argument has rejected it, and for good reason. *See, e.g.*, *In re Clinton Nurseries, Inc.*, 998 F.3d 56, 64 (2d Cir. 2021) ("The Trustee's argument has been repeatedly rejected by other courts." (collecting cases)); *cf. Buffets*, 979 F.3d at 377 ("The consensus view of bankruptcy courts that Chapter 11 fees are Bankruptcy Clause legislation is likely correct."). The 2017 Amendment fits within the Supreme Court's broad definition of "bankruptcy" as "the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief." *Ry. Lab. Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 466, 102 S. Ct. 1169, 71 L. Ed. 2d 335 (1982) (internal quotation marks and citations omitted). The Amendment concerns a statute (§ 1930(a)(6)) imposing fees that a debtor must pay before paying creditors. *See, e.g.*, *Clinton Nurseries*, 998 F.3d at 64 ("Under § 1930(a)(6), a debtor must pay preconfirmation [quarterly] fees as an administrative priority expense before it pays its commercial creditors, bondholders, and shareholders." (internal quotation marks and citation omitted)). Any fee increase reduces what creditors receive. *Buffets*, 979 F.3d at 377 (citation omitted); *see Clinton Nurseries*, 998 F.3d at 64 ("[A]ny change in fees imposed pursuant to § 1930 affects the amount of funds available for distribution to lower-priority creditors." (internal quotation marks and citation omitted)). Unlike the Trustee's examples,

§ 1930(a)(6) requires debtors to pay potentially significant sums: by December 2019, the 2017 Amendment increased Debtors' fees more than $2.5 million. *Cf. Buffets*, 979 F.3d at 377 ("[U]nlike the varying procedures that only indirectly might lead to different outcomes, the fee increase has a direct effect on what creditors receive[.]" (citation omitted)).

We also reject the Trustee's argument that if every law bearing on distributions to creditors qualified as "laws on the subject of bankruptcies," the Bankruptcy Clause would extend even to taxes and business regulations. The 2017 Amendment and § 1930(a)(6) in which it rests are laws on the subject of bankruptcies. It governs relations between debtors and creditors. Indeed, Congress enacted the 2017 Amendment under the authority given by the Bankruptcy Clause. *See* 163 Cong. Rec. H3003-03 (daily ed. May 1, 2017) (statement of Rep. John Conyers). And 28 U.S.C. § 1930 is entitled "Bankruptcy fees," as part of "An Act to establish a uniform Law on the Subject of Bankruptcies," Pub. L. No. 95-598, 92 Stat. 2549. *See Clinton Nurseries*, 998 F.3d at 64 (finding persuasive that "[t]he 2017 Amendment amends a statute, § 1930, that is literally entitled: 'Bankruptcy fees'" (citation and footnote omitted)). So the 2017 Amendment governs debtor-creditor relations and thus concerns "the subject of bankruptcies," leaving it subject to the Bankruptcy Clause's uniformity requirement.

B. Uniformity

To defeat Debtors' constitutional challenge, the Trustee argues two alternative theories: (1) that the pre-2020 Amendment versions of § 1930(a)(6) and (7) to-

gether in fact already require uniform quarterly disbursement fees in all judicial districts, and (2) more narrowly, that the 2017 Amendment is constitutionally uniform because it increased quarterly fees on all large debtors in Trustee districts. Again, we're unpersuaded.

1. Sections 1930(a)(6) and (7) Didn't Impose Uniform Quarterly Fees Across All Judicial Districts

Until the 2020 Amendment revised "may" to "shall" in § 1930(a)(7), Bankruptcy Administration Improvement Act of 2020, Pub. L. No. 116-325, § 3(d)(2), 134 Stat. 5086, 5088 (2020), that section provided that the Judicial Conference "may require" debtors in Bankruptcy Administrator districts "to pay fees equal to those imposed" in Trustee districts. Federal Courts Improvement Act of 2000. The Trustee argues that "may require" is mandatory, requiring the Judicial Conference to impose the same quarterly fees as imposed in Trustee districts. To bolster this point, the Trustee notes that Congress enacted this "may require" term after *St. Angelo*, to resolve any conceivable uniformity problems.

But the pre-2020 Amendment § 1930(a)(7)'s "may" is permissive. Granted, "the mere use of 'may' is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority." *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198-99, 120 S. Ct. 1331, 146 L. Ed. 2d 171 (2000) (citations omitted). But for two reasons, we're persuaded that Congress intended to use "may" in a permissive sense. First, in the very next sentence in § 1930(a)(7), Congress used "shall." *Id.* ("Such fees shall be deposited as offsetting receipts to the fund established under section 1931 of this title and shall remain available

until expended."); *see Lopez v. Davis*, 531 U.S. 230, 241, 121 S. Ct. 714, 148 L. Ed. 2d 635 (2001) (finding persuasive "Congress' use of the permissive 'may'" in "contrast[ ] with the legislators' use of a mandatory 'shall' in the very same section"). And second, Congress also repeatedly used "shall" elsewhere in § 1930. *See*, *e.g.*, 28 U.S.C. § 1930(a)(6) ("[A] quarterly fee shall be paid to the United States trustee. . . . ").

Disregarding the plain language, the Trustee contends that the 2020 Amendment's amending "may" to "shall" shows Congress's longstanding intent that § 1930(a)(7) be mandatory. The Trustee emphasizes that in the "Findings and Purpose" section of the Act containing the Amendment, Congress stated that the legislation "confirm[s] the longstanding intention of Congress that quarterly fee requirements remain consistent across all Federal judicial districts." Response Br. at 31 (alteration omitted) (quoting Bankruptcy Administration Improvement Act of 2020 § 2(a)(4)(B)).

Though this finding merits some weight, it doesn't control our interpretation of the earlier Congress's intent in enacting § 1930(a)(7). *See Haynes v. United States*, 390 U.S. 85, 87 n.4, 88 S. Ct. 722, 19 L. Ed. 2d 923 (1968) ("The view of a subsequent Congress . . . provide[s] no controlling basis from which to infer the purposes of an earlier Congress." (citations omitted)). Indeed, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980) (citation and footnote omitted). The clear ordinary meaning of "may" outweighs Congress's 2020 view of

any purportedly longstanding intention.[10] *Accord Clinton Nurseries*, 998 F.3d at 66 n.9 ("[T]he Congress that passed the 2020 Act inevitably looked through the lens of the constitutional quagmire that resulted [from use of the word 'may']. . . . We conclude that the ordinary meaning of 'may' as permissive rather than mandatory . . . outweighs Congress's subsequent statement regarding its earlier meaning[.]" (citation omitted)).

Additionally, as the Second and Fifth Circuits reasoned in rejecting the Trustee's position, "[it] is . . . telling that the Judicial Conference itself apparently understood the 2017 Amendment as authorizing, but not requiring, it to impose a fee increase in [Bankruptcy Administrator] Districts." *Id.* at 67; *see Buffets*, 979 F.3d at 378 n.10 (citation omitted). Thus, § 1930(a)(7) merely permitted the Judicial Conference to impose the same quarterly fees on Bankruptcy Administrator debtors as Congress did on Trustee debtors. So at least before the 2020 Amendment, § 1930 didn't require that quarterly fees be consistent nationwide.[11] *Accord Clinton Nurseries*, 998 F.3d at 67-68; *Buffets*, 979 F.3d at 378 n.10. So we now assess the 2017 Amendment for unconstitutional nonuniformity.

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[10] *Cf. GTE Sylvania, Inc.*, 447 U.S. at 108, 100 S. Ct. 2051 ("[T]he starting point for interpreting a statute is the language of the statute itself.").

[11] Though, as the Trustee contends, "courts should, if possible, interpret ambiguous statutes to avoid rendering them unconstitutional," *United States v. Davis*, -— U.S. ——, 139 S. Ct. 2319, 2332 n.6, 204 L. Ed. 2d 757 (2019), § 1930(a)(7) is unambiguous.

2. The 2017 Amendment is Unconstitutionally Nonuniform

We hold that the 2017 Amendment is unconstitutionally nonuniform, because it allows higher quarterly disbursement fees on Chapter 11 debtors in Trustee districts than charged to equivalent debtors in Bankruptcy Administrator districts. We acknowledge that the Fourth and Fifth Circuits have upheld the Amendment against a Bankruptcy Clause challenge. *Cir. City Stores*, 996 F.3d at 165; *Buffets*, 979 F.3d at 378-79. But we agree with the Second Circuit's well reasoned and unanimous ruling to the contrary. *See Clinton Nurseries*, 998 F.3d at 69-70.

In upholding the Chapter 11 quarterly disbursement-fee increase, the Fourth and Fifth Circuits relied on *Blanchette v. Connecticut General Insurance*, 419 U.S. 102, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974), which ruled that in enacting bankruptcy laws, Congress may "take into account differences that exist between different parts of the country, and . . . fashion legislation to resolve geographically isolated problems." 419 U.S. at 159, 95 S. Ct. 335; *see Cir. City Stores*, 996 F.3d at 166 (comparing the quarterly-fees issue to *Blanchette*); *Buffets*, 979 F.3d at 378 (same). In *Blanchette*, the Supreme Court upheld legislation creating a special court and laws for bankrupt railroads in the northeast and midwest regions of the country. 419 U.S. at 108, 159-61, 95 S. Ct. 335. At the time of enactment, all the bankrupt railroads were operating there. *Id.* at 160, 95 S. Ct. 335. The Fourth and Fifth Circuits likened the geography-specific legislation in *Blanchette* to the 2017 Amendment's geographic distinction between the eighty-eight Trustee districts and the six Administrator

districts in Alabama and North Carolina. *Cir. City Stores*, 996 F.3d at 166; *Buffets*, 979 F.3d at 378. The Trustee would have us adopt this reasoning.

But the Second Circuit rejected the analogy to *Blanchette* and we're more persuaded by that court's reasoning than by the Fourth and Fifth Circuit's. *Cf. Clinton Nurseries, Inc.*, 998 F.3d at 68-69. As the Second Circuit reasoned, though *Blanchette* permitted geography-specific legislation, the challenged Act there still satisfied the Bankruptcy Clause's requirement that a law "apply uniformly to a defined class of debtors."[12] *Gibbons*, 455 U.S. at 473, 102 S. Ct. 1169; *see Blanchette*, 419 U.S. at 159-61, 95 S. Ct. 335; *see also Clinton Nurseries, Inc.*, 998 F.3d at 68. The Act applied uniformly to all bankrupt railroads. *Blanchette*, 419 U.S. at 159-61, 95 S. Ct. 335; *see Clinton Nurseries, Inc.*, 998 F.3d at 68. And so the Act also addressed a geographically isolated problem: no members of the class of debtors existed outside the defined region, *see Blanchette*, 419 U.S. at 159-60, 95 S. Ct. 335; that is, "all members of the class of debtors impacted by the statute were confined to a sole geographic area," *Clinton Nurseries*, 998 F.3d at 68. By contrast, the 2017 Amendment increased fees for all

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[12] We acknowledge that the Bankruptcy Clause doesn't require perfect uniformity. *See In re Reese*, 91 F.3d 37, 39 (7th Cir. 1996) (Posner, C.J.). For instance, state property laws may affect what property is available for distribution. *Stellwagen v. Clum*, 245 U.S. 605, 613, 38 S. Ct. 215, 62 L. Ed. 507 (1918) (citation omitted). But the "flexibility inherent in the constitutional provision," that the Trustee relies on, Br. of Appellee at 33 (quoting *Buffets*, 979 F.3d at 378), has limits, *see, e.g.*, *Gibbons*, 455 U.S. at 473, 102 S. Ct. 1169 (requiring bankruptcy laws to apply uniformly to classes of debtors). For the reasons discussed, Congress has encountered the bounds of this flexibility with the 2017 Amendment.

large Chapter 11 bankruptcy debtors in Trustee Program districts, with no showing that "members of that broad class are absent in [Bankruptcy Administrator] districts." *Id.* at 68-69. Common sense tells us that in 2018 through 2020, debtors like those here had bankruptcy cases pending in Alabama and North Carolina. So unlike the Act challenged in *Blanchette*, the 2017 Amendment neither applies uniformly to a class of debtors nor addresses a geographically isolated problem. As the Second Circuit reasoned, the 2017 Amendment "presents the exact problem avoided in *Blanchette*:" it substantially increased fees, potentially by millions, for one debtor but not another "identical in all respects save the geographic locations in which they filed for bankruptcy." *Clinton Nurseries*, 998 F.3d at 69 (footnote omitted).

In so holding, we reject the Trustee's arguments that the relevant class of debtors is exclusively Trustee-district debtors and that the Trustee Program underfunding is a geographically isolated problem warranting geographic-specific legislation.[13] No one disputes that political maneuvering, not bankruptcy-policy considerations, led to the dual bankruptcy-administration system

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[13] We acknowledge that, as the Trustee argues, the Supreme Court has struck down a bankruptcy law for lack of uniformity only once, and the stricken legislation amounted to "nothing more than a private bill" governing "only . . . one regional debtor." *Gibbons*, 455 U.S. at 471, 473, 102 S. Ct. 1169 (footnote omitted). But the Bankruptcy Clause's uniformity requirement extends past private bills. We acknowledge that in *Gibbons*, the Court didn't "impair Congress' ability under the Bankruptcy Clause to define classes of debtors and to structure relief accordingly." *Id.* at 473, 102 S. Ct. 1169. But uniformity requires that "a law must at least apply uniformly to a defined class of debtors." *Id.*

(which we're not criticizing, but simply noting in analyzing uniformity). *See id.* at 69 (citation omitted); *Buffets* (*Buffets Concurrence*), 979 F.3d at 383 (Clement, J., concurring in part and dissenting in part). Nothing distinguishes Alabama and North Carolina from the forty-eight other states in bankruptcy-administration matters. *Buffets Concurrence*, 979 F.3d at 383. The Bankruptcy Clause's uniformity requirement bars Congress from assessing disparate fees on debtors simply on grounds that it "has chosen to treat them differently." *Id.*; *Clinton Nurseries*, 998 F.3d at 69 (declining to create "the following inexplicable rule: Congress must enact uniform laws on the subject of bankruptcy . . . except when Congress elects to treat debtors nonuniformly").

The Bankruptcy Clause precludes increasing fees based just on the location of the bankruptcy court. *Cf. Buffets*, 979 F.3d at 378 ("[T]he uniformity requirement forbids . . . 'arbitrary regional differences in the provisions of the Bankruptcy Code.'" (quoting *In re Reese*, 91 F.3d 37, 39 (7th Cir. 1996) (Posner, C.J.))). That is what the 2017 Amendment does. Thus, we hold that the 2017 Amendment's fee disparities fail under the uniformity requirement of the Bankruptcy Clause. The Amendment imposed higher quarterly fees on large debtors in Trustee districts.[14]

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[14] On appeal, Debtors argue that the dual bankruptcy-program system itself is unconstitutional, even if quarterly fees are consistent across all judicial districts. Debtors didn't preserve this argument in the bankruptcy court, raising it, if at all, in their reply brief, and the bankruptcy court didn't decide the question. *See Rosewood Servs., Inc. v. Sunflower Diversified Servs., Inc.*, 413 F.3d 1163, 1167 (10th Cir. 2005) ("Because this . . . argument was not made below,

C. We Remand for Determination of Debtors' Quarterly Fees

Debtors request monetary relief for "the excess fees they paid." Opening Br. at 50. The Trustee argues that we shouldn't grant that requested relief. The Trustee reasons that courts can remedy unequal treatment either by expanding or withdrawing benefits, depending on legislative intent, and that, here, Congress intended to increase quarterly fees nationwide. Though raising fees in Alabama and North Carolina might solve this problem, the Trustee recognizes that we lack authority to do that. So he asks that we declare the 2017 Amendment unconstitutional without granting further relief.

We lack authority over quarterly fees assessed in districts outside our circuit, and thus in Alabama or North Carolina. *Cf. Buffets Concurrence*, 979 F.3d at 384 ("The *St. Angelo* court had no power to force Alabama and North Carolina into the [Trustee] system, which is why the constitutional infirmity persists and we are having this debate today. We have no greater authority than our colleagues on the Ninth Circuit to remake the bankruptcy system."). But Debtors are entitled to relief. *Cf. id.* (proposing reducing debtors' fees as a remedy: "What we can do is ameliorate the harm of unconstitutional treatment. So, we should."). The Second Circuit awarded monetary relief to remedy debtors'

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it is waived on appeal." (citation omitted)); *Hungry Horse LLC v. E Light Elec. Servs., Inc.*, 569 F. App'x 566, 572 (10th Cir. 2014) (unpublished) (explaining that we needn't consider issues not raised until the reply brief below and not addressed by the district court (citation omitted)).

harms from the 2017 Amendment. *See Clinton Nurseries*, 998 F.3d at 69-70 ("To the extent that [debtor] has already paid the unconstitutional fee increase, it is entitled to a refund of the amount in excess of the fees it would have paid in a [Bankruptcy Administrator] District during the same time period."). We do so as well. Thus, we remand to the bankruptcy court for a refund of the amount of quarterly fees paid exceeding the amount that Debtors would have owed in a Bankruptcy Administrator district during the same period. This ruling is limited to Debtors in the instant appeal, who have standing to seek this refund.

CONCLUSION

We reverse and remand for determination of Debtors' quarterly Chapter 11 fees and a refund of overpayment consistent with this opinion.

BACHARACH, Circuit Judge, dissenting.

I agree with much of the majority's excellent opinion. In my view, however, the 2017 amendment does not violate the Bankruptcy Clause. So I respectfully dissent.

The majority points out that our nation has two separate bankruptcy systems. One system uses U.S. trustees in the bankruptcy courts in 48 states, 4 territories, and the District of Columbia. *See* Judicial Districts Covered by USTP Regions, Department of Justice, https://www.justice.gov/ust/judicial-districts-covered-ustp-regions (last visited September 3, 2021). By contrast, the bankruptcy courts in 2 states use bankruptcy administrators rather than U.S. trustees. Why the difference in systems? Politics. So we might reasonably question the need for separate bankruptcy systems in different states. But as the majority points out, the debtors

didn't preserve their challenge to the dual systems. Maj. Op. at 1025 n.14.

Given the failure to preserve that challenge, we must consider the constitutionality of the 2017 amendment rather than the dual system of U.S. trustees and bankruptcy administrators. Because of the dual system, districts varied in their funding needs. This difference led to a budget shortfall in districts using U.S. trustees. *See* H.R. Rep. No. 115-130, at 8-9 (2017).

Congress responded to the budget shortfall. To do so, Congress "define[d] classes of debtors" based on the system in place. *Ry. Lab. Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 473, 102 S. Ct. 1169, 71 L. Ed. 2d 335 (1982). Based on this classification, Congress "structure[d] relief" through separate funding processes in districts using U.S. trustees and bankruptcy administrators. *Id.*; *see Blanchette v. Connecticut Gen. Ins. Corps.* (*Regional Rail Reorganization Cases*), 419 U.S. 102, 159, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974) (Congress may "take into account differences that exist between different parts of the country"). This approach allowed Congress to recoup the additional funds by targeting districts using U.S. trustees. By tailoring the financial solution to the need itself, Congress didn't run afoul of the Bankruptcy Clause. *In re Circuit City Stores, Inc.*, 996 F.3d 156, 166 (4th Cir. 2021); *Matter of Buffets, L.L.C.*, 979 F.3d 366, 378-80 (5th Cir. 2020).

Perhaps there shouldn't be two separate systems, but the debtors forfeited their challenge to the existence of two separate systems. If we put aside that forfeited challenge, we have little reason to question Congress's approach. The dual systems created different financial

needs, and Congress decided to raise fees in the jurisdictions creating the budget shortfall. That approach wasn't arbitrary and didn't violate the Bankruptcy Clause.

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

Case No. 16-21142 Jointly Administered

IN RE: JOHN Q. HAMMONS FALL 2006, LLC, ET AL.,
DEBTORS

Signed: July 27, 2020

ORDER DENYING DEBTORS' MOTION TO DETERMINE EXTENT OF LIABILITY FOR QUARTERLY FEES PAYABLE TO THE UNITED STATES TRUSTEE

ROBERT D. BERGER, United States Bankruptcy Judge

Article I, Section 8, Clause 4 of the United States Constitution provides that Congress shall have power "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." In their "Motion to Determine Extent of Liability for Quarterly Fees Payable to the United States Trustee Pursuant to 28 U.S.C. § 1930(a)(6),"[1] Debtors[2] argue that Congress violated this "Bankruptcy Clause" when it amended 28 U.S.C. § 1930(a)(6) in 2017 to adjust the quarterly fee

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[1] ECF 2823.

[2] "**Debtors**" are The Revocable Trust of John Q. Hammons dated December 28, 1989 as Amended and Restated and 75 of its subsidiaries and affiliates.

payable to the United States Trustee in large Chapter 11 cases. Moreover, Debtors argue, application of that "2017 Amendment" to their cases—which had already been filed when the amendment was enacted—is unconstitutionally "retroactive" under *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).[3] Debtors' motion seeks an order directing the Trustee to refund them $2,495,956, representing the difference between the fees Debtors actually paid and the fees Debtors allege they would have paid under the previous version of § 1930(a)(6). For the reasons that follow, this Court will deny the motion.[4]

A. The 2017 Amendment to 28 U.S.C. § 1930(a)(6)

Section 1930(a)(6) provides that a Chapter 11 debtor must pay a quarterly fee to the Trustee until the case is converted or dismissed. Such fees are deposited into the United States Trustee System Fund (the "UST System Fund") to offset the cost of trustee operations.[5] The

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[3] The "antiretroactivity principle" articulated in *Landgraf* "finds expression in several provisions of our Constitution," including the Due Process Clause. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 266, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

[4] Because the Court will deny Debtors' motion on substantive grounds, it need not reach the Trustee's argument that the motion is procedurally improper (i.e., that Debtors' challenge to § 1930 should have been brought via adversary proceeding rather than by motion). *See, e.g.*, *In re Exide Techs.*, 611 B.R. 21, 25 n.2 (Bankr. D. Del. 2020).

[5] *See* 28 U.S.C. § 589a(a), (b)(5); *but see* Bankruptcy Judgeship Act of 2017, Pub. L. 115-72, § 1004(b), 131 Stat. 1224, 1232 (2017) (temporarily diverting 2% of the quarterly fees collected through § 1930(a)(6) from the UST System Fund to the general fund of the Treasury).

quarterly fee, which is based on that quarter's disbursements and calculated on a sliding scale, was capped at $30,000 when Debtors filed for bankruptcy in 2016.[6] However, on October 26, 2017, Congress amended § 1930(a)(6) to add the provision Debtors now challenge as unconstitutional (the "**2017 Amendment**"):

> 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,[7] 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.[8]

The 2017 Amendment became effective on January 1, 2018.[9] Because the UST System Fund was below the $200 million threshold at the end of the 2017, 2018, and 2019 fiscal years,[10] the 2017 Amendment increased the

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[6] Under the previous version of § 1930(a)(6), which now constitutes most of § 1930(a)(6)(A), the sliding scale began at $325 for each quarter in which disbursements totaled less than $15,000 and maxed out at $30,000 for each quarter in which disbursements totaled more than $30 million. *See* 28 U.S.C. § 1930(a)(6) (2016).

[7] Congress increased the threshold in 2019 to $300 million for fiscal years 2020 and 2021. *See* Department of Justice Appropriations Act, 2020, Pub. L. No. 116-93, div. B, tit. II, § 219, 133 Stat. 2317, 2415 (2019).

[8] 28 U.S.C. § 1930(a)(6)(B); *see* § 1004(a), 131 Stat. at 1232.

[9] *See* § 1004(c), 131 Stat. at 1232 ("The amendments made by this section shall apply to quarterly fees payable under section 1930(a)(6) of title 28, United States Code, as amended by this section, for disbursements made in any calendar quarter that begins on or after the date of enactment of this Act.").

[10] *See* U.S. Dep't of Justice, *Chapter 11 Quarterly Fees*, https://www.justice.gov/ust/chapter-11-quarterly-fees ("The balance in

quarterly fee for each quarter in which disbursements exceeded $1 million, and the cap on that fee increased from $30,000 to $250,000.[11] As a result, Debtors have collectively paid (by their calculation) $2,495,956 more in quarterly fees than they would have under the previous version of § 1930(a)(6).

B. Bankruptcy Administrator Districts and 28 U.S.C. § 1930(a)(7)

The United States Trustee system ("UST system") was first introduced in 1979 as a pilot program in eighteen federal judicial districts.[12] With the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Congress expanded the system nationwide to include all remaining districts except—as a result of successful lobbying by bankruptcy judges and senators—the six federal judicial districts in North Carolina and Alabama.[13] Although the Bankruptcy Act of 1986 required those two states to join the UST system

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the Fund as of September 30, 2017 was less than $15 million. . . . The balance in the Fund as of September 30, 2018 was less than $45 million. . . . The balance in the Fund as of September 30, 2019 was less than $135 million.").

[11] The 2017 Amendment thus increased the maximum fee for each quarter in which disbursements exceeded $1 million by $220,000, or 733% of the original maximum fee.

[12] *See* Dan J. Schulman, *The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and the Bankruptcy Administrator Programs*, 74 Neb. L. Rev. 91, 119 (1995).

[13] *See id.* at 123.

by October 1, 1992, Congress later extended the deadline for ten years[14] and subsequently removed it altogether.[15] As a result, and even though 28 U.S.C. § 581(a) requires the Attorney General to appoint United States trustees in regions that specifically include North Carolina and Alabama, today's Chapter 11 debtors in those two states participate in a Bankruptcy Administrator system (**"BA system"**) instead.[16] Because the BA system is separate from the UST system,[17] section 1930(a)(6) does not require Chapter 11 debtors in North Carolina and Alabama to pay any fees to the United States Trustee.

In *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525 (9th Cir. 1994),[18] a divided panel of the Ninth Circuit held that § 317(a) of the Judicial Improvements Act of 1990, which amended 28 U.S.C. § 581(a) by extending the deadline for North Carolina and Alabama to enter the UST system from 1992 to 2002, violated the Bankruptcy Clause.[19] In response, Congress—rather than

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[14] *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 317(a), 104 Stat. 5089 (1990).

[15] *See* Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 501, 114 Stat. 2410 (2000).

[16] *See* Schulman, *supra* note 12, at 119-20.

[17] The two systems are located in different branches of government: the UST system is part of the Department of Justice, whereas the BA system is part of the Administrative Office of the United States Courts. *See id.*

[18] The Ninth Circuit amended *St. Angelo* the following year by removing the paragraph beginning "We need not" and the first two words of the following paragraph ("In addition"). *See St. Angelo v. Victoria Farms, Inc.*, 46 F.3d 969 (9th Cir. 1995).

[19] "In the absence of any evidence that Congress was addressing a geographically isolated problem or some other legitimate concern,

require those states to enter the UST system—enacted 28 U.S.C. § 1930(a)(7), under which the Judicial Conference of the United States "may require" a Chapter 11 debtor in a district outside the UST system "to pay fees equal to those imposed" by § 1930(a)(6).[20] The Judicial Conference did so in 2001, ordering that such fees "as . . . amended from time to time" be imposed in BA districts.[21] Thus, although the constitutional issue identified in *St. Angelo* remained, the "injury" identified in that case (i.e., the fee discrepancy) was eliminated. This was the case until 2018, when—despite the Judicial Conference's 2001 order—BA districts did not implement the 2017 Amendment until October 1, 2018, and then only in newly-filed cases.[22] In contrast, the UST system has applied the 2017 Amendment since January 1, 2018, to pending and newly-filed cases alike.

C. The 2017 Amendment Is Not "Retroactive" Under *Landgraf*

Because they filed their Chapter 11 cases in 2016, before Congress amended § 1930(a)(6), Debtors argue that for the Trustee to apply the amendment to them would be impermissibly "retroactive" under *Landgraf v. USI*

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we are required to hold that its decision to ignore the [Bankruptcy] Clause in enacting section 317(a) renders that section unconstitutional." *St. Angelo*, 38 F.3d at 1532.

[20] Such fees are used to fund the operation and maintenance of the United States courts, not the UST system. *See* 28 U.S.C. §§ 1930(a)(7), 1931.

[21] *See* Report of the Proceedings of the Judicial Conference of the United States 45-46 (Sept./Oct. 2001), https://www.uscourts.gov/sites/default/files/2001-09_0.pdf.

[22] *See* Report of the Proceedings of the Judicial Conference of the United States 11 (Sept. 13, 2018), https://www.uscourts.gov/sites/default/files/2018-09 proceedings.pdf.

Film Prods., 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).[23] However, the Tenth Circuit rejected a similar argument in 1998. Before 1996, Chapter 11 debtors were only required to pay quarterly trustee fees until plan confirmation. That year, Congress amended § 1930(a)(6) to require payment of the fee until the case was converted or dismissed. In *In re CF & I Fabricators of Utah, Inc.*, 150 F.3d 1233 (10th Cir. 1998), a Chapter 11 debtor argued that it would be impermissibly retroactive under *Landgraf* to assess the newly-applicable post-confirmation fees against debtors whose Chapter 11 plans had already been confirmed (and, in that particular debtor's case, substantially consummated) when § 1930(a)(6) was amended. The Tenth Circuit rejected that argument, holding that the 1996 amendment to § 1930(a)(6) did not operate "retroactively" under *Landgraf* because it "only trigger[ed] *prospective* assessment of fees." *See CF & I*, 150 F.3d at 1237 (citation omitted). Like the amendment of § 1930(a)(6) at issue in *CF & I*, the 2017 Amendment assesses no new fees against *past* disbursements; rather, it only increases fees for *future* disbursements. If increasing the future fees of a Chapter 11 debtor with a

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[23] "A statute does not operate 'retroactively' merely because it is applied in a case arising from conduct antedating the statute's enactment. . . . Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269, 114 S. Ct. 1483. Under *Landgraf*, a law has "retroactive" effect where it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280, 114 S. Ct. 1483. "If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." *Id.*

confirmed plan is not retroactive under *Landgraf*, application of the 2017 Amendment to Debtors—whose Chapter 11 plans had not even been filed when the 2017 Amendment was enacted—is not retroactive under *Landgraf* either.[24] The majority of bankruptcy courts to have considered this issue agree that application of

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[24] Debtors cite *Lindh v. Murphy*, 521 U.S. 320, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997), in their *Landgraf* analysis. According to the Tenth Circuit:

> *Lindh* merely clarified that *Landgraf* does not make traditional rules of statutory construction completely irrelevant to retroactivity problems. If the district court, using normal rules of construction, can conclude that a statute should not be applied to the case before the court, there is no need to address *Landgraf*'s question of whether the statute would have a retroactive effect.

F.D.I.C. v. UMIC, Inc., 136 F.3d 1375, 1385 (10th Cir. 1998). Here, using normal rules of construction, the Court concludes that the 2017 Amendment does apply to Debtors' cases. *See Exide*, 611 B.R. at 27 (The language of the subsection indicates that the object of the amendment is not cases, but disbursements. . . . Similarly, the temporal reach of the amendment is also expressly defined, not through case dates, but through fiscal years: 2018 through 2022. . . . The legislative history supports this interpretation. . . . The 2017 Amendment partially displaced the fee schedules contained in section 1930(a)(6) but did not amend the introductory sentence.); *see also* § 1004(c), 131 Stat. at 1232 ("The amendments made by this section shall apply to quarterly fees payable under section 1930(a)(6) of title 28, United States Code, as amended by this section, for disbursements made in any calendar quarter that begins on or after the date of enactment of this Act."); Obj. of the United States to Debtor's Mot. ¶ 97, ECF 2868 ("Debtors effectively ask the Court to re-write the amendment to apply to quarterly fees payable in 'any calendar quarter that begins on or after the date of enactment other than in pending cases.' But those are not the words that Congress wrote.").

the 2017 Amendment to pending cases is not "retroactive" under *Landgraf*.[25] *See, e.g.*, *MF Global Holdings Ltd. v. Harrington (In re MF Global Holdings Ltd.)*, 615 B.R. 415, 432-35 (Bankr. S.D.N.Y. 2020); *In re Exide Techs.*, 611 B.R. 21, 27-30 (Bankr. D. Del. 2020). Therefore, Debtors' first argument fails.

D. The 2017 Amendment Does Not Violate the Bankruptcy Clause

Next, Debtors argue that the 2017 Amendment violates the Bankruptcy Clause, under which Congress has the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." According to Debtors, the 2017 Amendment is unconstitutionally "non-uniform" because Chapter 11 debtors in BA districts were not subject to increased quarterly trustee fees until October 1, 2018, and then only in newly-filed cases. This Court disagrees.

"To survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors." *Ry. Labor Execs. Ass'n v. Gibbons*, 455 U.S. 457, 473, 102 S. Ct. 1169, 71 L. Ed. 2d 335 (1982). That clause, however, "does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 159, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974). Rather, the Bankruptcy Clause "forbids

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[25] Although some cases have held that the 2017 Amendment is "retroactive" under *Landgraf*, those cases involved Chapter 11 debtors with already-confirmed plans. *See In re Life Partners Holdings, Inc.*, 606 B.R. 277 (Bankr. N.D. Tex. 2019); *In re Buffets, LLC*, 597 B.R. 588 (Bankr. W.D. Tex. 2019).

only two things. The first is arbitrary regional differences in the provisions of the Bankruptcy Code. The second is private bankruptcy bills—that is, bankruptcy laws limited to a single debtor—or the equivalent." *In re Reese*, 91 F.3d 37, 39 (7th Cir. 1996) (Posner, C.J.) (citing *Gibbons*, 455 U.S. at 472, 102 S. Ct. 1169).

At issue in *Blanchette* was the Rail Act, which "[b]y its terms . . . only applied to rail carriers operating in a region defined to include the Midwest and Northeast of the United States" and "solely applied to railroads that were in reorganization on January 21, 1974, or entered reorganization within 180 days thereafter."[26] Citing *The Head Money Cases*, 112 U.S. 580, 595, 5 S. Ct. 247, 28 L. Ed. 798 (1884),[27] the *Blanchette* Court held that the Rail Act satisfied the Bankruptcy Clause because it was "designed to solve 'the evil to be remedied.'" *Blanchette*, 419 U.S. at 161, 95 S. Ct. 335.

> Our construction of the Bankruptcy Clause's uniformity provision comports with this Court's construction of other "uniform" provisions of the Constitution. The Head Money Cases . . . involved the levy on ships' agents or owners of a 50-cent tax for any passenger not a United States citizen who entered an American port from a foreign port "by steam

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[26] Schulman, *supra* note 12, at 112; *see Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 109-11, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974).

[27] *Cf. United States v. Ptasynski*, 462 U.S. 74, 83 n.13, 103 S. Ct. 2239, 76 L. Ed. 2d 427 (1983) ("Although the purposes giving rise to the Bankruptcy Clause are not identical to those underlying the Uniformity Clause, we have looked to the interpretation of one clause in determining the meaning of the other.") (citing *Blanchette*, 419 U.S. at 160-61, 95 S. Ct. 335).

> or sail vessel." Individuals engaged in transporting passengers from Holland to the United States challenged the levy as contrary to Art. I, s 8, cl. 1, under which Congress is empowered to lay and collect "all Duties, Imposts and Excises (which) shall be uniform throughout the United States." The argument was that the head tax violated the uniformity clause because it was not also levied on noncitizen passengers entering this country by rail or other inland method of transportation. The Court upheld the tax, stating: "The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case . . . is uniform and operates precisely alike in every port of the United States where such passengers can be landed." 112 U.S. at 594, 5 S. Ct. at 252.
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> That the tax was not imposed on noncitizens entering the Nation across inland borders did not render the tax nonuniform since "the evil to be remedied by this legislation has no existence on our inland borders, and immigration in that quarter needed no such regulation." Id., at 595, 5 S. Ct. at 252. Similarly, the Rail Act is designed to solve "the evil to be remedied," and thus satisfies the uniformity requirement of the Bankruptcy Clause.

Blanchette, 419 U.S. at 160-61, 95 S. Ct. 335.[28] According to *Blanchette*, a law does not violate the Bankruptcy

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[28] *Cf. Ptasynski*, 462 U.S. at 83, 103 S. Ct. 2239 ("Where Congress defines the subject of a tax in nongeographic terms, the Uniformity Clause is satisfied."); *id.* at 82, 103 S. Ct. 2239 ("[T]he Framers did not intend to restrict Congress' ability to define the class of objects to be taxed. They intended only that the tax apply wherever the classification is found.").

Clause simply because it operates in a particular geographic region: "This argument has a certain surface appeal but is without merit because it overlooks the flexibility inherent in the constitutional provision." *Id.* at 158, 95 S. Ct. 335.

Against this background, this Court joins the bankruptcy courts of Delaware and the Southern District of New York in holding that the 2017 Amendment satisfies the Bankruptcy Clause.[29] *Cf. MF Global*, 615 B.R.at 446-48; *Exide*, 611 B.R. at 36-38. Like the Rail Act at issue in *Blanchette*, the 2017 Amendment was designed to solve "the evil to be remedied"—here, the depletion of the UST System Fund. The lack of a concurrent fee increase in North Carolina and Alabama did not render the amendment itself non-uniform, because the UST system does not operate in those states; as in *Blanchette*, "the evil . . . has no existence" there. Like the Rail Act, the 2017 Amendment operates on a uniform class of debtors (here, Chapter 11 debtors within the UST system) and applies with the same force and effect in every place where such debtors are found. *Cf. MF Global*, 615 B.R. at 446-47:

> We agree with those cases that have concluded that the 2017 Amendment applies uniformly to debtors in UST Districts to solve the depleting funding unique to the UST Districts. The BA Districts do not sup-

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[29] Because the Court holds that the 2017 Amendment is constitutional under the Bankruptcy Clause, the Court does not reach the Trustee's argument that the Congress enacted the 2017 Amendment under its power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers." U.S. Const. art. I, § 8, cl. 18, which does not require uniformity.

> port the UST Fund and the UST Fund does not support the BA Program. The Plaintiffs do not challenge the dual UST/BA system as unconstitutional, and as long as the two regimes co-exist, they will face funding problems that may be unique to only one of them.

Debtors here do not challenge the dual UST/BA system either. While *St. Angelo* would suggest that § 501 of the Federal Courts Improvement Act of 2000 (which removed the deadline for North Carolina and Alabama to enter the UST system) is unconstitutional, the constitutionality of § 501 is not before this Court. The only law at issue here is the 2017 Amendment, which—because it was "designed to solve the evil to be remedied" and applies uniformly to a defined class of debtors—satisfies the Bankruptcy Clause. And because the 2017 Amendment satisfies the Bankruptcy Clause, Debtors' second argument fails.

E. Conclusion

Because the 2017 Amendment is not retroactive under *Landgraf* and does not violate the Bankruptcy Clause, Debtors' motion is hereby denied.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 20-3203
(16-21142)
(United States Bankruptcy Court
for the District of Kansas)

IN RE: JOHN Q. HAMMONS FALL 2006, LLC, ET AL.,
DEBTORS

JOHN Q. HAMMONS FALL 2006, LLC, ET AL.,
APPELLANTS

v.

OFFICE OF THE UNITED STATES TRUSTEE, APPELLEE

ACADIANA MANAGEMENT GROUP, LLC, ET AL.,
AMICI CURIAE

Filed: Jan. 26, 2023

ORDER

Before **BACHARACH, EBEL**, and **PHILLIPS**, Circuit Judges.

Appellee's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ CHRISTOPHER M. WOLPERT
CHRISTOPHER M. WOLPERT, Clerk