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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QUESTIONS PRESENTED

1. Whether 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)), which amended the schedule of quarterly fees payable to the United States Trustee in certain pending bankruptcy cases, 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.

2. Whether, if Section 1004(a) is found unconstitutional, the appropriate remedy is to require the United States Trustee to refund a portion of the quarterly fees paid by respondents in a United States Trustee district.

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.; 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.

RELATED PROCEEDINGS

United States Bankruptcy Court (D. Kan.):

In re: John Q. Hammons Fall 2006, LLC, et al., No. 2:16-bk-21142 (July 27, 2020)

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

In re: John Q. Hammons Fall 2006, LLC, et al., No. 20-3203 (Oct. 5, 2021)

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In the Supreme Court of the United States

No.

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

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 opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 15 F.4th 1011. The opinion of the bankruptcy court (App., *infra*, 29a-41a) is reported at 618 B.R. 519.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2021. On January 3, 2022, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including February 2, 2022.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

Until amendments that were made in 2020, 28 U.S.C. 1930(a) (2018) provided in relevant parts as follows:

> (a) The parties commencing a case under title 11 shall pay to the clerk of the district court or the clerk of the bankruptcy court, if one has been certified pursuant to section 156(b) of this title, the following filing fees:
>
> * * *
>
> (6)(A) Except as provided in subparagraph (B), in addition to the filing fee paid to the clerk, a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury, in each case under chapter 11 of title 11 for each quarter (including any fraction thereof) until the case is converted or dismissed, whichever occurs first. * * *
>
> (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.

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

Ibid.

STATEMENT

1. a. The United States Trustee (UST) Program, a component of the U.S. Department of Justice, performs numerous administrative, regulatory, and enforcement functions that promote the integrity and efficiency of the bankruptcy system, such as appointing and monitoring the private trustees who administer debtors' estates, monitoring the progress of bankruptcy cases, and monitoring cases for signs of fraud. See 28 U.S.C. 586 (2018 & Supp. I 2019). The program permits bankruptcy judges to focus on judicial matters, while the U.S. Trustees serve as "bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena." H.R. Rep. No. 595, 95th Cong., 1st Sess. 88 (1977); see *id.* at 101.

The UST Program began as a pilot program in 18 judicial districts in 1978. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 408, 92 Stat. 2686-2687. Congress expanded it to 88 of the 94 federal judicial districts in 1986. See Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (1986 Act), Pub. L. No. 99-554, §§ 111-115, 100 Stat. 3090-3095. The

other six districts—in Alabama and North Carolina—were permitted to use Bankruptcy Administrators for those purposes. See § 302(d)(3), 100 Stat. 3121-3123 (28 U.S.C. 581 note). The Bankruptcy Administrators are appointed under regulations issued by the Judicial Conference of the United States, which oversees the Bankruptcy Administrator (BA) program.[1]

Although they perform similar functions in practice, the UST and BA programs have different structures and distinct funding sources. See App., *infra*, 6a-7a. The "general judicial budget" funds the BA program. *Id.* at 6a. But Congress designed the UST Program to be "self-funding" and "paid for by the users of the bankruptcy system—not by the taxpayer." H.R. Rep. No. 764, 99th Cong., 2d Sess. 22 (1986). To that end, Congress's annual appropriations for the UST Program are offset by user fees paid into the United States Trustee System Fund (UST Fund), 28 U.S.C. 589a (2018 & Supp. II 2020). The UST Fund derives revenue from various sources, including, most significantly, the quarterly fees paid by some debtors in cases filed under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101 *et seq.* See 28 U.S.C. 589a(b)(5). Specifically, Congress has directed that a "quarterly fee shall be paid to the United States trustee * * * in each case under chapter 11 of title 11 * * * for each quarter (including any fraction thereof) until the case is converted or dismissed,

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[1] Congress originally provided that those six districts would join the UST Program no later than 1992. See 1986 Act § 302(d)(3)(A), 100 Stat. 3121-3122 (28 U.S.C. 581 note). But Congress later postponed that deadline and then eliminated it altogether. See Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, Tit. III, § 317, 104 Stat. 5115; Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 501, 114 Stat. 2421-2422.

whichever occurs first." 28 U.S.C. 1930(a)(6)(A) (Supp. I 2019).

In each case, the quarterly fees required by Section 1930(a)(6) are graduated according to the amount of "disbursements"—payments to creditors, suppliers, and others—made by or on behalf of the debtor. See, *e.g.*, *Walton* v. *Jamko, Inc. (In re Jamko, Inc.)*, 240 F.3d 1312, 1313 (11th Cir. 2001). For example, under the fee schedule in effect before 2018, the fee was $325 "for each quarter in which disbursements total less than $15,000"; the fee was $650 "for each quarter in which disbursements total $15,000 or more but less than $75,000"; and so on. 28 U.S.C. 1930(a)(6) (2012). Before 2018, the maximum possible quarterly fee was $30,000, which applied to Chapter 11 cases with quarterly disbursements of more than $30 million. *Ibid.*

Under the 1986 Act, Chapter 11 quarterly fees were made applicable in the 88 UST districts but not in the 6 BA districts. See § 302(e), 100 Stat. 3123. In the mid-1990s, a divided panel of the Ninth Circuit opined that having two distinct programs for administering bankruptcy cases with different fees violated the uniformity requirement of the Bankruptcy Clause; on that basis, the court purported to invalidate the provision of the statute that allowed the six BA districts to remain outside the UST Program. See *St. Angelo* v. *Victoria Farms, Inc.*, 38 F.3d 1525, 1532-1533 (1994), amended, 46 F.3d 969 (1995).

After the *Victoria Farms* decision, Congress again amended the statutory framework, but it did not eliminate the BA program as the Ninth Circuit had essentially provided. The Judicial Conference had opposed proposals to expand the UST Program to the BA districts. See, *e.g.*, U.S. Gen. Accounting Office, *Bank-*

ruptcy Administration: Justification Lacking for Continuing Two Parallel Programs 39-43 (Sept. 1992), https://go.usa.gov/xFFq7. Rather than eliminate the BA program, Congress adopted a proposal made by the Judicial Conference in March 1996. See Judicial Conf. of the U.S., *Report of the Proceedings of the Judicial Conference of the United States* 45 (Sept./Oct. 2001) (*2001 JCUS Report*), https://www.uscourts.gov/sites/default/files/2001-09_0.pdf. Congress 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)); see *Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999 and Federal Courts Improvement Act of 1999: Hearing on H.R. 2112 and H.R. 1752 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong., 1st Sess. 26 (1999) (*1999 House Hearing*) (noting the Judicial Conference's determination that "implementing the establishment of chapter 11 quarterly fees in the bankruptcy administrator districts would eliminate any *Victoria Farms* problem"). 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.

Acting under Section 1930(a)(7), 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." *2001 JCUS Report* 46. Having avoided the potential uniformity problem in that way, Congress authorized the indefinite continuation of the BA program in the six judicial districts that employed it. See 2000 Act § 501, 114 Stat. 2421-2422.

b. For several decades, Congress's appropriations to the UST Program were fully offset by fees deposited in the UST Fund, and the Program's costs were borne by bankruptcy users and not taxpayers. In the mid-2010s, however, those deposits substantially decreased, and by Fiscal Year 2017, the balance in the UST Fund had fallen to the point that the Program's costs would no longer be fully met by user fees, thus requiring reliance on appropriated taxpayer funds. See H.R. Rep. No. 130, 115th Cong., 1st Sess. 7 (2017); App., *infra*, 8a.

Concerned about the impending burden on taxpayers, Congress bolstered the Fund by temporarily increasing quarterly fees in larger Chapter 11 cases. Accordingly, the Bankruptcy Judgeship Act of 2017, 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)). Congress specified that the amendment "shall apply to quarterly fees payable under section 1930(a)(6)" for disbursements made in any calendar quarter beginning

after the amendment's October 26, 2017 enactment. § 1004(c), 131 Stat. 1232. The increased fees therefore applied to the UST districts in the first quarter of 2018.

Despite the Judicial Conference's 2001 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 six 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 implement the amended fee schedule, but it did so only for "cases filed on or after" October 1, 2018. Judicial Conf. of the U.S., *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.

c. After some courts held that the 2017 amendment was unconstitutional based on their view that Congress had authorized different fees in BA and Trustee 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 explained that the change was intended to "confirm 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 the 2020 Act, Congress also amended the quarterly-fee schedule, slightly reducing the fees payable by the largest debtors. 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).

2. In 2016, 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. Initially, the debtors paid quarterly fees under the amended schedule that took effect in January 2018. But in 2020, the debtors filed a motion in bankruptcy court seeking a partial refund of quarterly fees on the ground that the 2017 Amendment was unconstitutionally non-uniform because the statutory fee increase was implemented differently in the UST districts and the BA districts.

The bankruptcy court rejected the debtors' claim. The court did not address the question whether the quarterly-fee statute is a "Law[] on the subject of Bankruptcies," U.S. Const. Art. I, § 8, Cl. 4, but concluded that the law survives scrutiny because it "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," App., *infra*, 40a. The court also concluded that that the law was not "impermissibly retroactive" because, like prior quarterly-fee amendments, "the 2017 Amendment assesses no new fees against *past* disbursements; ra-

ther, it only increases fees for *future* disbursements." *Id.* at 35a.

3. a. The debtors obtained permission for a direct appeal from the bankruptcy court to the court of appeals, which affirmed in part, reversed in part, and remanded in a partially divided opinion. App., *infra*, 1a-28a.

The court of appeals unanimously affirmed the dismissal of the debtors' retroactivity claim, concluding that "Congress increased the quarterly bankruptcy fees prospectively." App., *infra*, 5a; see *id.* at 10a-15a; *id.* at 26a-28a (Bacharach, J., dissenting) (disagreeing with the majority only as to its uniformity holding).

The majority of the court of appeals then concluded that the 2017 Amendment was unconstitutionally non-uniform and that the debtors were entitled to a refund of the additional fees they paid under the law. App., *infra*, 5a; *id.* at 15a-26a.

At the outset, the court of appeals concluded that the 2017 Amendment qualifies as a substantive bankruptcy law that must be "'uniform'" because a "fee increase reduces what creditors receive" in the bankruptcy case and "governs relations between debtors and creditors." App., *infra*, 15a-17a (citation omitted).

The court of appeals then held that the 2017 Amendment was unconstitutional. App., *infra*, 17a-24a. The court took the view that the statute is non-uniform because it "merely permitted the Judicial Conference to impose the same quarterly fees on Bankruptcy Administrator debtors as Congress did on Trustee debtors" but did not "require that quarterly fees be consistent nationwide." *Id.* at 20a. It emphasized that the version of Section 1930(a)(7) that existed when Congress enacted the 2017 Amendment provided that the Judicial

Conference "may" impose equal fees in BA districts. *Id.* at 18a (citation omitted). The court acknowledged that "Congress enacted this 'may require' term * * * to resolve any conceivable uniformity problems" with the statute and that the word "may" can impose a mandatory directive in some circumstances, but it nonetheless determined that "Congress intended to use 'may' in a permissive sense" in the 2017 Amendment because it used the word "'shall'" elsewhere in the statute. *Ibid.* (citation omitted); see *id.* at 18a-19a.

The court of appeals also rejected the government's argument that imposing a fee increase in only the UST districts would be a permissible response to a budgetary shortfall that was specific to those districts, given the broad leeway that this Court's decisions have given Congress when it legislates under the Bankruptcy Clause. App., *infra*, 21a-24a. The court acknowledged that "the Fourth and Fifth Circuits have upheld the Amendment against a Bankruptcy Clause challenge" on that basis, but it "agree[d]" with the Second Circuit's ruling "to the contrary," reasoning that the 2017 Amendment impermissibly treated large debtors differently. *Id.* at 21a-23a (citing *Clinton Nurseries, Inc.* v. *Harrington (In re Clinton Nurseries, Inc.)*, 998 F.3d 56, 69-70 (2d Cir. 2021); *Siegel* v. *Fitzgerald (In re Circuit City Stores, Inc.)*, 996 F.3d 156, 166 (4th Cir. 2021), cert. granted, No. 21-441 (Jan. 10, 2022); and *Hobbs* v. *Buffets, L.L.C. (In re Buffets, L.L.C.)*, 979 F.3d 366, 378-379 (5th Cir. 2020)).

Finally, the court of appeals 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 remanded for the bankruptcy court

to determine that amount. App., *infra*, 26a. The court did not dispute the government's contentions 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." *Id.* at 25a. Nevertheless, the court rejected the contention that refunding the increased fees was not the appropriate remedy for the constitutional violation it had found. In its view, the debtors "are entitled to relief," but the court could not equalize the fees by ordering increases in the BA districts because it "lack[s] authority over quarterly fees assessed in districts outside [its] circuit, and thus in Alabama or North Carolina." *Ibid.*

b. Judge Bacharach dissented as to the court of appeals' uniformity ruling. App., *infra*, 26a-28a.

Judge Bacharach explained that "[b]ecause of the dual system" of United States Trustees and Bankruptcy Administrators, judicial "districts varied in their funding needs." App., *infra*, 27a. When Congress "responded to the budget shortfall," it "'defined classes of debtors' based on the system in place." *Ibid.* (quoting *Railway Labor Execs.' Ass'n* v. *Gibbons*, 455 U.S. 457, 473 (1982)) (brackets omitted). Judge Bacharach concluded that Congress's decision "to raise fees in the jurisdictions creating the budget shortfall" had "tailor[ed] the financial solution to the need itself" and comported with the Bankruptcy Clause. *Id.* at 27a-28a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that the quarterly-fee statute as amended in 2017 exceeded Congress's constitutional authority because the fee increase was not immediately applied in the six districts with Bankruptcy Administrators rather than United States Trustees. As

the government explained in its response to the petition for a writ of certiorari in *Siegel* v. *Fitzgerald*, cert. granted, No. 21-441 (Jan. 10, 2022), that conclusion is incorrect and the question presented is the subject of a circuit conflict.[2] The same question, however, is already presented in *Siegel*, as will be the question of the appropriate remedy, if the Court finds that the applicability of different fees in different districts was unconstitutional. Accordingly, the government respectfully requests that the Court hold this petition pending the Court's decision in *Siegel* and then dispose of the petition as appropriate in light of that decision.

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[2] After the Court granted certiorari in *Siegel*, the Eleventh Circuit upheld the constitutionality of the quarterly-fee statute in *United States Trustee Region 21* v. *Bast Amron LLP (In re Mosaic Mgmt. Grp., Inc.)*, No. 20-12547, 2022 WL 136707 (Jan. 14, 2022), further deepening the circuit conflict.

CONCLUSION

The Court should hold the petition for a writ of certiorari pending disposition of *Siegel* v. *Fitzgerald*, *supra* (No. 21-441), and then dispose of the petition as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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FEBRUARY 2022

APPENDIX A

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 Stores, Inc.*, 996 F.3d 156, 160 (4th Cir. 2021). The Ju-

[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).

dicial 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 funding 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, the Judicial Conference set fees in Bankruptcy Administrator districts "in the amounts specified [for Trustee

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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.

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 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).

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[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.

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

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.

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

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[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.

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 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.

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[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.

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 disbursements. 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 Chapter 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.

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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.

§ 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) together in fact already require uniform quarterly disbursement fees in all judicial districts, and (2) more nar-

rowly, 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 B

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.