No. 21-1078

In the

Supreme Court of the United States

OFFICE OF THE UNITED STATES TRUSTEE,
Petitioner,

v.

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

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

BRIEF IN OPPOSITION

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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, violates the Constitution's requirement that "Laws on the subject of Bankruptcies" be "uniform," U.S. Const. Art. I, § 8, Cl. 4, because it raised quarterly fees for chapter 11 debtors in the rest of the country but did not raise quarterly fees for chapter 11 debtors in North Carolina and Alabama.

2. Whether the appropriate remedy for this constitutional infirmity is to require the United States Trustee to refund the portion of quarterly fees Respondents paid pursuant to the unconstitutionally non-uniform statute that Respondents would not have paid as chapter 11 debtors in North Carolina or Alabama.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, counsel for Respondents in the above-captioned case states as follows:

All Respondent entities are owned either directly or indirectly by The Revocable Trust of John Q. Hammons Dated December 28, 1989, as Amended and Restated (the "JQH Trust") and/or JD Holdings, L.L.C., a Connecticut limited liability company ("JDH"). Neither the JQH Trust nor JDH is owned by any entity and no public corporation owns 10% or more of any interest in the JQH Trust or JDH.

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OPINIONS BELOW

The opinion of the court of appeals (App. to Petition, *infra*, 1a-28a) is reported at 15 F.4th 1011. The opinion of the bankruptcy court (App. to Petition, *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, and the petition was filed on that date. Jurisdiction is proper pursuant to 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.

* * *

Ibid.

STATEMENT

1. a. Respondents are comprised of seventy-six entities operating as or associated with John Q.

Hammons Hotels & Resorts[1] who commenced chapter 11 bankruptcy cases in 2016 in the United States Bankruptcy Court for the District of Kansas. The District of Kansas is one of eighty-eight of the ninety-four judicial districts that operate within the United States Trustee ("U.S. Trustee") Program, wherein the U.S. Trustee, a division of the Department of Justice, handles bankruptcy administration tasks and receives a quarterly fee from chapter 11 debtors. The remaining six judicial districts, which encompass the three districts each in Alabama and North Carolina, operate within the Bankruptcy Administrator ("BA") Program, in which this administrative role is performed by the BA, which exists within the Judicial branch. Chapter 11 debtors in BA districts pay quarterly fees to the BA in amounts set by the Judicial Conference of the United States.

As chapter 11 debtors in a U.S. Trustee Program district, Respondents were responsible for quarterly fees payable to the U.S. Trustee pursuant to Title 28, Section 1930(a)(6) ("Section 1930(a)(6)"). From June 26, 2016 through December 31, 2017, Respondents paid the same amount of quarterly fees as they would have paid as chapter 11 debtors in BA districts. This changed when Congress amended Section 1930(a)(6) to increase those fees in several material respects, including increasing the maximum quarterly fees payable in the cases of certain chapter 11 debtors from $30,000 per quarter to up to $250,000 per quarter.

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[1] John Q. Hammons Hotels & Resorts was an organization that included, *inter alia*, thirty-five hotels across the country and related hospitality assets.

Section 1004(a), 131 Stat. 1232 (28 U.S.C. 1930(a)(6)(B) (2018) ("2017 Amendment").

The 2017 Amendment became effective in U.S. Trustee districts on January 1, 2018, and the U.S. Trustee applied the increases to all chapter 11 cases in U.S. Trustee districts, including cases that had been pending prior to the effective date. The increase had a significant impact on Respondents' quarterly fees because the formula for quarterly fees is based on disbursements, and due to the size of Respondents' businesses, the disbursement totals in their bankruptcy cases were substantial.

Though Respondents and all other chapter 11 debtors in U.S. Trustee districts paid increased fees beginning January 1, 2018, the Judicial Conference did not increase BA quarterly fees charged to chapter 11 debtors in North Carolina and Alabama. When it did raise fees, it did so only for cases filed after October 1, 2018, the date the new fees went into effect in the BA districts. 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. As a result, Respondents and chapter 11 debtors across the country paid higher quarterly fees than chapter 11 debtors in North Carolina or Alabama who filed on identical timelines.

From and after January 1, 2018, the Respondents made quarterly fee payments to the U.S. Trustee based on the disbursements outlined in Respondents' monthly operating reports. These disbursements through

December 31, 2019, totaled $1,065,171,517.36 and accompanying fees totaled $3,664,393.39. If Respondents' bankruptcy cases had been pending in a BA district, these same disbursement totals would have resulted in fee obligations of only $1,122,591.00, a difference of $2,541,802.39.

Respondents sought a refund of this overpayment of fees because the 2017 Amendment is an unconstitutionally non-uniform bankruptcy law. Article I, Section 8, Clause 4 of the Constitution (the "Bankruptcy Clause") states that Congress "shall have the power . . . to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." Congress's power under this clause "extends to all cases where the law causes to be distributed, the property of the debtor among his creditors." *Railway Labor Execs.' Ass'n v. Gibbons,* 455 U.S. 457, 466 (1982) (citing *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 186 (1902)). Respondents sought relief from the bankruptcy court arguing the statute is unconstitutionally non-uniform because it required them to pay quarterly fees that they would not have been charged as chapter 11 debtors in North Carolina or Alabama.

b. This dispute exists within the framework of the Trustee-BA dual system, which has existed in some form since 1978. Prior to that date, bankruptcy judges, then called bankruptcy referees, handled all aspects of bankruptcy cases, substantive and administrative. These responsibilities included the management and disposition of a debtor's assets, a central component of the bankruptcy process. The Trustee Program was created as a pilot program in 1978 to take over the

administrative aspect of cases from the judges. The Trustee Program was successful and Congress subsequently implemented it more fully in 1986. *See* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat 3088, 3090–95 (Oct. 27, 1986) ("1986 Act").

The 1986 Act put the U.S. Trustee Program in place as a component of the U.S. Department of Justice in every district in the country except for the six districts in North Carolina and Alabama. Pursuant to the statute, in the states where the U.S. Trustee Program was put in place, the U.S. Trustee (and trustees it selects, appoints, and supervises) permanently took over the administrative role and became responsible for overseeing all bankruptcy cases. In North Carolina and Alabama, this remained the responsibility of the Bankruptcy Administrator program, which operated as a program within the judicial branch.

The 1986 Act gave the judicial districts in North Carolina and Alabama until 1992 to implement the U.S. Trustee Program. *See* 1986 Act § 302(d)(3)(A), 100 Stat. 3121-3122 (28 U.S.C. 581 note). Neither the 1986 Act nor its legislative history provided any justification for treating debtors in these states differently, but subsequent analysis and secondary sources attribute the delayed implementation to political pressures applied as a result of initial issues with the pilot program in one Alabama district. *See* GAO, Bankruptcy Administration: Justification Lacking for Continuing Two Parallel Programs 14 (GAO/GGD-92-133, 1992) ("Our discussions with bankruptcy judges and BA

program officials in Alabama and North Carolina indicated that the impetus for having the BA program in the two states was their extreme dissatisfaction with the operation of the UST pilot program in the Northern District of Alabama."); *see also* 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, 123 (1995) (noting that the chief bankruptcy judge of this district "successfully lobbied Congress to have Alabama exempted" from the U.S. Trustee Program).

The statutory plan enacted in 1986 never occurred, and the districts in North Carolina and Alabama remain outside the U.S. Trustee Program. Two years before the 1992 deadline, Congress passed the Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 317(a), 104 Stat. 5089, 5115 (1990), which pushed back the deadline for Alabama and North Carolina to enter the U.S. Trustee Program by ten years. Again, Congress provided no justification for continuing the dual system, and again, contemporaneous commenters attributed the decision to effective political lobbying, noting that "[b]ankruptcy judges in both states successfully have lobbied Congress, most particularly Senators Helms [then-Senator from North Carolina] and Heflin [then-Senator from Alabama], to avoid being placed within the United States Trustee program." *Schulman*, 74 Neb. L. Rev. at 123.

Two years before the 2002 deadline, Congress removed altogether the language requiring these judicial districts to ever join the U.S. Trustee Program. *See* Federal Courts Improvement Act of 2000, Pub. L.

No. 106-518, § 501, 114 Stat. 2410, 2421–22 (2000). Congress provided no justification for making permanent the "temporary" dual system implemented thirty-five years ago. This unconstitutionally non-uniform system for bankruptcy administration remains in place. In North Carolina and Alabama, Bankruptcy Administrators control the administration of chapter 11 debtors' estates and are paid fees set by and at the discretion of the Judicial Conference, while in the rest of the country, the U.S. Trustee Program performs this function and chapter 11 debtors pay quarterly fees set by Congress in Section 1930(a)(6).

c. The formula for quarterly fees paid to U.S. Trustees and the directive that debtors pay these fees come from Section 1930(a)(6), which was added to the Bankruptcy Code in the 1986 Act. The new section provided that "a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury, in each case under chapter 11 . . . for each quarter (including any fraction thereof) until a plan is confirmed or the case is converted or dismissed, whichever occurs first." 1986 Act § 117. Since the statute only created and took authority over U.S. Trustee districts, it did not impose any fee requirements on chapter 11 debtors in BA districts.

As the GAO noted in a 1992 study, under this system, fees were "not uniform" because "[c]hapter 11 debtors in BA districts [were] not subject to the additional quarterly fee that is levied on Chapter 11 debtors in U.S. Trustee districts." GAO, GAO/GGD-92-133, at 11. At the time, the GAO recommended that "[t]o make bankruptcy administration consistent across

the country, Congress should incorporate the BA program into the U.S. Trustee Program." *Id.* at 17. Congress instead eliminated the requirement that incorporation occur by revising, then removing the portion of the statute requiring the BA districts to join the U.S. Trustee Program

In 1994, the Ninth Circuit held that the fee disparity created by the BA-U.S.Trustee dual system was unconstitutional. In *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525 (9th Cir. 1994), *amended*, 46 F.3d 969 (9th Cir. 1995), a trustee appealed a bankruptcy court's fee judgment and sought additional payment from a debtor. The debtor argued it should not be required to pay a quarterly fee because the U.S. Trustee Program had not been implemented in North Carolina and Alabama and debtors in those states were not charged quarterly fees. *Id.* at 1529. Therefore, the debtor argued, law governing the fee system was unconstitutionally non-uniform. *Id.*

The Ninth Circuit noted that a bankruptcy law "may have different effects in various states due to dissimilarities in state law as long as the federal law itself treats creditors and debtors alike" but found that Section 1930 did not pass this threshold test. *Id.* at 1531. The court held that it was "federal law, rather than state law, that causes creditors and debtors to be treated differently in North Carolina and Alabama." *Id.* The court then looked to whether any exception to the requirement of geographic uniformity might apply, focusing on *Blanchette v. Connecticut Gen. Ins. Corps.*,

419 U.S. 102 (1974).[2] The Ninth Circuit noted that "Congress may enact non-uniform laws to deal with geographically isolated problems as long as the law operates uniformly upon a given class of creditors and debtors" but that "the [*Blanchette*] Court's holding depended on the fact that 'no provision of the Act restricts the right of any creditor wheresoever located to obtain relief because of regionalism.'" *St. Angelo*, 38 F.3d at 1529 (quoting *Blanchette*, 419 U.S. at 158–160). The Ninth Circuit distinguished the statutory scheme providing for the dual systems and different quarterly fee requirements from the statute in *Blanchette* because "Congress has provided no indication that the exemption in question was intended to deal with a problem specific to North Carolina and Alabama" and it could not "discern such a purpose in the structure of the statute or the legislative history of the amendment." *Id*. at 1531.

The Ninth Circuit also relied on the Court's conclusion in *Blanchette* and *Gibbons* that "a law must at least apply uniformly to a defined class of debtors." *Id.* (quoting *Gibbons*, 455 U.S. at 473). The Ninth Circuit concluded that "because creditors and debtors in states other than North Carolina and Alabama are governed by a different, more costly system for resolving bankruptcy disputes . . . it is clear that 28 U.S.C. 1930, *as currently amended*, does not apply uniformly to a defined class of debtors." *Id.* at 1531–32.

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[2] Like *St. Angelo*, references to *Blanchette* vary. The case is also referred to as either the *Regional Rail Reorganization Act Cases* or *3R Act Cases*. Respondents use *Blanchette* to maintain consistency with the Tenth Circuit Court of Appeals opinion.

It struck down the portion of the statute that granted a 10-year extension for North Carolina and Alabama to enter the U.S. Trustee system. *Id.* at 1532–33.

The Ninth Circuit's opinion described the constitutional infirmity as debtors in 48 states being governed by a "different" and "dissimilar" system, not simply that this different system was costlier. Congress changed the Bankruptcy Code in reaction to *St. Angelo*. The change Congress enacted operated to encourage BA districts to eliminate the *injury* caused to chapter 11 debtors, but it did not resolve this foundational constitutional issue. In 2000, Congress amended Section 1930(a) by adding a new paragraph (7), which stated that in the BA districts "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 1930(a)(6). 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)). The dual systems stayed in place and quarterly fees for the U.S. Trustee Program were set by Congress as quarterly fees in BA district remained the province of the Judicial Conference.

Following the enactment of Section 1930(a)(7), the Judicial Conference decided to charge chapter 11 debtors in BA districts quarterly fees similar to U.S. Trustee Program fees, and for nearly twenty years, chapter 11 debtors in all 50 states paid essentially equal fees. The unjustified non-uniform treatment inherent in the statutory scheme and held by the Ninth Circuit to be unconstitutional remained unchanged. There were no significant challenges to the statute

because while Congress had not *required* fees in the BA districts to be equal to the fees in the U.S. Trustee Program districts (because it did not have authority to set BA fees), fees were in fact equal. Thus, Section 1930(a)(6) existed in a state of constitutional purgatory, unconstitutional but unchallenged because the impacted parties did not have sufficient monetary damages to make a challenge worthwhile.

2. In 2017, Congress upset this delicate balance by amending Section 1930(a)(6) to dramatically raise quarterly fees for U.S. Trustee districts. Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. No. 115-72, § 1004(a)(2), 131 Stat. 1224, 1232 (2017). Congress did not make or purport to make any change to BA district fees. There is nothing in the legislative record to show whether Congress considered the constitutional implications of the change. To the extent it did, Congress likely expected the Judicial Conference to adjust BA district fees in turn so the existing "no harm, no foul" unconstitutionality could continue. But the Judicial Conference did not raise BA quarterly fees. It declined to make any change for nearly 10 months, and when it did raise fees, it did so only for cases filed after the date the new fees went into effect. As a result, Respondents and other chapter 11 debtors cross the country paid as much as 833% more in quarterly fees than chapter 11 debtors in North Carolina or Alabama who filed on an identical timeline.

On March 3, 2020, Respondents filed a Motion to Determine Extent of Liability for Quarterly Fees Payable to the United States Trustee Pursuant to 28

U.S.C. § 1930(a)(6) and Memorandum in Support (the "Fee Motion") in the bankruptcy court. App. to Petition 29a. In the Fee Motion, Respondents argued that (a) that 28 U.S.C. § 1930(a)(6) and the 2017 Amendment are unconstitutionally non-uniform, and (b) that the 2017 Amendment to 28 U.S.C. § 1930(a)(6) is unconstitutionally retroactive in its application to their cases. *Id.* at 29a-30.[3] The Fee Motion asked the bankruptcy court to hold that the amount of quarterly fees payable by the Respondents should have been equal to the fees Respondents would have owed had their cases been pending in BA districts, and order the U.S. Trustee Program to return the excess fees to Respondents. *Id.*

On July 27, 2020, the Bankruptcy Court entered an order denying the relief sought by the Respondents. *Id.* at 29a. The Bankruptcy Court held that while Section 1930(a)(6) was geographically non-uniform, it fit within flexibility afforded Congress to fashion geographically non-uniform statutes in order to deal with geographically isolated problems. *Id.* at 40a. The Bankruptcy Court held that the funding needs of the U.S. Trustee Program qualified as a geographically isolated problem and that because the purpose of the 2017 Amendment was to fund the U.S. Trustee Program, it was not unconstitutional. *Id.* at 37a. The Bankruptcy Court further held that Section 1930(a)(6) is not impermissibly retroactive because it increased fees for future disbursements only. *Id.* at 35a-36a.

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[3] The retroactivity issue is not before the Court in this case.

Respondents appealed the bankruptcy court's decision to the Tenth Circuit Court of Appeals. In a 2-1 decision, the court of appeals disagreed with the Bankruptcy Court's conclusion as to uniformity. The court of appeals reversed the Bankruptcy Court and remanded the case for a refund of the excess amounts of quarterly fees paid by Respondents.

The court of appeals rejected both of the government's arguments on uniformity. First, the court of appeals dismissed the government's assertion that fees in the districts were, in fact, uniform, noting that the language in Section 1930(a)(7) prior to 2020 states only that the Judicial Conference "may" charge fees in BA districts equal to those charged in U.S. Trustee districts, and concluding that at least prior to the 2020 amendment to Section 1930(a)(7), the statute "didn't require that quarterly fees be consistent nationwide." *Id*. at 21a. Next, the court of appeals disagreed with the government's assertion that the 2017 Amendment is uniform because it is applied uniformly across U.S. Trustee districts. *Id*. The court of appeals held that the amendment is unconstitutionally non-uniform "because it allows higher quarterly disbursement fees on Chapter 11 debtors in U.S. Trustee districts than charged to equivalent debtors in Bankruptcy Administrator districts." *Id*. at 22a.

The court of appeals based its opinion on this Court's holding in *Blanchette.* It noted that the Fourth Circuit Court of Appeals and the Fifth Circuit Court of Appeals had examined *Blanchette* and held the statute to be constitutional because while the statute only affects debtors in forty-eight states, it affects those

debtors equally and was enacted to fund a system that only exists in those forty-eight states. But the court of appeals instead agreed with the Second Circuit Court of Appeals that a conclusion of constitutionality based on *Blanchette* is a flawed interpretation of this Court's holding. *In re John Q. Hammons Fall 2006, LLC*, 15 F.4th 1011, 1025 (10th Cir. 2021).

The court of appeals noted this Court's emphasis in *Blanchette* that the statute in question had "addressed a geographically isolated problem and no members of the class of debtors [i.e. bankrupt railroads, the class of debtors at issue in *Blanchette*] existed outside the defined region . . . " *Id.* It contrasted that with the facts in this case, holding that because "[c]ommon 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." *Id.*

In reaching this conclusion, the court of appeals directly "reject[ed] the U.S. Trustee's arguments that the relevant class of debtors is exclusively U.S. Trustee-district debtors and that the U.S. Trustee Program underfunding is a geographically isolated problem warranting geographic-specific legislation." *Id.* Noting that "[n]o one disputes that political maneuvering, not bankruptcy-policy considerations, led to the dual bankruptcy-administration system," the court of appeals found no geographically isolated problem because "[n]othing distinguishes Alabama and North Carolina from the forty-eight other states in

bankruptcy-administration matters," quoting the Second Circuit's reasoning in concluding that the uniformity requirement of the Constitution "bars Congress from assessing disparate fees on debtors simply on grounds that it 'has chosen to treat them differently.'" *Id.* (citing *Clinton Nurseries*, 998 F.3d at 69).

After finding the statute unconstitutional, the court of appeals addressed the issue of the appropriate legal remedy. The government argued that refunding Respondents' fees was not the appropriate remedy and that the court of appeals should instead "withdraw benefits," which would be accomplished by raising fees on debtors in North Carolina and Alabama. *Id.* at 25a. The court of appeals held that Respondents were "entitled to relief" and that while it did not have the authority to remake the bankruptcy system, it could instead ameliorate the harm that resulted from the unconstitutional treatment. *Id.* It joined with the Second Circuit in awarding monetary relief in the form of a refund of the excess fees paid, and remanded the case to the Bankruptcy Court for such refund. *See Clinton Nurseries*, 998 F.3d at 70.

In dissent, Judge Bacharach stated that he agreed with much of the opinion, but disagreed that the 2017 Amendment was unconstitutional. *Id.* at 26a (Bacharach, J., dissenting). He noted that "Politics" was the only reason for the different systems, but agreed with the majority's conclusion that Respondents had challenged only the 2017 Amendment as opposed to the dual-system dichotomy. *Id.* He stated that while "[p]erhaps there shouldn't be two separate systems,"

the court of appeals shouldn't question Congress's approach unless and until the broader issue of the separate systems was before it rather than the non-uniform fees charged to debtors within them. *Id.* at 27a-28a. Judge Bacharach said he would have held that the 2017 Amendment was constitutional because "[t]he dual systems created different financial needs," and therefore Congress's approach "wasn't arbitrary and didn't violate the Bankruptcy Clause." *Id.*

ARGUMENT

The court of appeals was correct in its determination that the 2017 Amendment is unconstitutionally non-uniform and that Respondents should receive a refund of the fees they overpaid as a result of this constitutional infirmity.

A. The Court of Appeals Correctly Applied *Blanchette* in Holding the 2017 Amendment is Unconstitutionally Non-Uniform.

The *Blanchette* and *Gibbons* cases are both the seminal cases in which this Court has established the breadth and limits of Congress's flexibility within this requirement and among the only cases in which the Court has even discussed uniformity in bankruptcy laws. In analyzing these key cases, the Fourth Circuit Court of Appeals, Fifth Circuit Court of Appeals, and other courts that have found the 2017 Amendment constitutional commit an error of interpretation that the court of appeals and the Second Circuit in *Clinton Nurseries* avoided. The courts erroneously upholding the 2017 Amendment focus on the portion of the *Blanchette* opinion holding that despite the uniformity

requirement, Congress has the power to "fashion legislation to resolve geographically isolated problems," but ignore the limitation on that power the Court outlined in the same breath.

After holding that the Bankruptcy Clause does not *per se* restrict Congress from enacting bankruptcy laws with a geographic component, the Court in *Blanchette* established the threshold test that should apply to any such bankruptcy law. Citing Justice Frankfurter's concurrence in *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156 (1946), the Court held that "[t]he uniformity clause requires that the Rail Act apply equally to *all* creditors and *all* debtors." It determined that this requirement was met because there was no other railroad reorganization proceeding pending outside the geographic region subject to the Act on or during its effective date:

> The national rail transportation crisis that produced the Rail Act centered in the problems of the rail carriers operating in the region defined by the Act, and these were the problems Congress addressed. No railroad reorganization proceeding, within the meaning of the Rail Act, was pending outside that defined region on the effective date of the Act or during the 180-day period following the statute's effective date. Thus the Rail Act in fact operates uniformly upon all bankrupt railroads then operating in the United States and uniformly with respect to all creditors of each of these railroads.

Id. at 160.

In so holding, the *Blanchette* Court established that bankruptcy laws must operate uniformly as to a class that includes both the debtors a statute impacts and similar debtors who are *outside* the reach of the statute. Any other interpretation, including the reasoning employed by the Fourth Circuit and Fifth Circuit, would render meaningless the *Blanchette* Court's analysis outlined above.

This Court confirmed the importance of the second portion of this analysis—whether a bankruptcy law operates uniformly on all creditors and all debtors—when it invalidated a bankruptcy law on the basis of unconstitutional non-uniformity in *Gibbons*. 455 U.S. at 471. In *Gibbons*, in a particular railroad's bankruptcy case, the bankruptcy court had ordered that no claim for employee labor protection would be payable out of the railroad's estate. *Id.* This order was in direct conflict with a labor protection statute enacted by Congress that required that the specific railroad pay these labor protection claims. *Id.*

The *Gibbons* Court resolved this conflict by declaring the statute enacted by Congress was unconstitutionally non-uniform. The Court cited the language above from *Blanchette* and noted that in *Blanchette*, "[s]ince no railroad reorganization proceeding was then pending outside of the region defined by: the *Blanchette* statute, the statute in *Blanchette* "in fact, operated uniformly upon all railroads then in bankruptcy proceedings." *Id.* at 470-71. The *Gibbons* Court distinguished the labor protection statute at issue, holding that because "there are other railroads that are currently in reorganization

proceedings [to whom the statute would not apply]," it "cannot be said to apply uniformly even to major railroads in bankruptcy proceedings throughout the United States" and "[t]he employee protection provisions . . . therefore cannot be said to 'apply equally to all creditors and all debtors.'" *Gibbons*, 455 U.S. at 470-71 (quoting *Blanchette*, 419 U.S. at 160).

In *Vanston Bondholders*, *Blanchette* and *Gibbons*, this Court established a threshold test for determining whether a bankruptcy law is unconstitutionally non-uniform: the Court will examine whether the statute applies uniformly to a defined class of creditors and debtors, and will define that class to include both debtors and creditors within the reach and impact of the statute *and* similarly situated debtors and creditors outside of that group. In *Blanchette*, the Court looked to all railroads in bankruptcy proceedings in the United States at the time of the statute and during its pendency, not just the railroads in the region impacted by the statute. The Court determined that because there were none, the statute did not violate any uniformity requirement. *Blanchette*, 419 U.S. at 159-61. In *Gibbons*, the Court again looked at all railroads in bankruptcy proceedings in the United States, and reached a different conclusion because there were other railroads in bankruptcy proceedings and the statute treated those railroads differently than the railroad that was subject to the statute. *Gibbons*, 455 U.S. at 470-71.

The court of appeals correctly applied these precedents to the 2017 Amendment. The court noted the requirement that bankruptcy laws "apply

uniformly to a defined class of debtors," and held that "[b]y contrast [to the statute in *Blanchette*], the 2017 Amendment increased fees for all large Chapter 11 bankruptcy debtors in U.S. Trustee Program districts, with no showing that members of that broad class are absent in Bankruptcy Administrator districts." App. to Petition 24a. The court of appeals "reject[ed] the government's arguments that the relevant class of debtors is exclusively U.S. Trustee-district debtors." *Id.* at 25a. It instead defined the class to include "debtors like those" before it, meaning chapter 11 debtors who "had bankruptcy cases pending in Alabama and North Carolina" in 2018 through 2020, just as this Court defined the relevant class in *Blanchette* and *Gibbons* to be "debtors like those" before the Court who "had bankruptcy cases pending" outside the impact of the statutes at issue. *Id.* at 1024.

The court of appeals also correctly rejected the government's second argument—that the 2017 Amendment is legislation fashioned by Congress to address a "geographically isolated problem warranting geographic-specific legislation." *Id*. The court found that underfunding of a system that by Congress's design does not apply uniformly cannot qualify as the "geographically isolated problem" that flexibility in the Bankruptcy Clause permits Congress to address. *Id.* Instead, the court of appeals followed the reasoning of the Second Circuit, which held that accepting the government's argument would be akin to creating the "inexplicable rule" that "Congress must enact uniform laws on the subject of bankruptcy . . . except when Congress elects to treat debtors non-uniformly." *Clinton Nurseries*, 998 F.3d at 69*; cf.*, *Matter of Buffets*,

L.L.C., 979 F.3d 366, 383 (5th Cir. 2020) (Clement, J., concurring in part and dissenting in part).

After concluding that the 2017 Amendment was unconstitutional, the court of appeals joined the Second Circuit Court of Appeals as the only circuit courts of appeal to rule on the issue of proper remedy for this constitutional violation. *See Clinton Nurseries*, 998 F.3d at 70. As outlined *infra*, the court of appeals rejected the government's suggested relief as granting nothing beyond a declaration of unconstitutionality because it determined that Respondents were entitled to relief and a declaration would do nothing to address Respondents' harm. App. to Petition 26a. Instead, the court of appeals mirrored the Second Circuit in holding that Respondents should be refunded the approximately $2.5 million in excess fees they paid as a result of the unconstitutional statute. *Id.*

Monetary relief is the sole remedy for Respondents' constitutional harm, and the court of appeals was correct in concluding it had no other option than to refund Respondents' overpayment. The declaratory relief the government sought not only went beyond the authority of the court of appeals, it would present significant logistical concerns, and, most importantly, would do nothing to address the harm suffered by Respondents. Respondents were charged—and paid—more than $2.5 million to the U.S. Trustee pursuant to a statute that violates the Constitution. The only way to ameliorate that harm is to return those funds to Respondents.

B. Any Grant of Certiorari Should be Limited to Question 1

The government asks this Court to grant certiorari but "hold this petition pending the Court's decision in *Siegel* and then dispose of the petition as appropriate in light of that decision." Pet. for Cert. at 13. The government's request presupposes that the Court's decision to grant the *Siegel* petition will address all of the issues raised in this petition. *Siegel v. Fitzgerald*, cert. granted, No. 21-441 (Jan. 10, 2022). Reviewing the petitions in the two cases and the government's response to the petition in *Siegel* shows this assumption may be inaccurate. In fact, the *Siegel* petition raises only one of the two questions presented in the present case, and the second question in this case does not meet the requirements for certiorari under U.S. Sup. Ct. R. 10. As a result, The Court should deny the U.S. Trustee's request for certiorari as to Question 2. Alternatively, if the Court grants the petition in full, it should consolidate this case with *Siegel* to ensure that the Court can adequately address both issues presented in this appeal.

The constitutionality of the 2017 Amendment is unquestionably the subject of a circuit conflict. In granting certiorari in *Siegel*, this Court has already determined that it should resolve the conflict and rule on this important constitutional question. Respondents agree that certiorari should be granted as to the constitutional uniformity question, which is Question 1 in the petition. However, the petition should be granted limited to that question. The Court should deny certiorari on the second question presented by the

government: whether the appropriate remedy for Respondents is the refund of quarterly fees they paid under this unconstitutional system since January 1, 2018.

Unlike the constitutional non-uniformity issue, the question of remedy is not the subject of a circuit split and does not involve an unsettled important question of federal law. The only appellate courts to address the issue of remedy have unanimously held that the appropriate remedy is to direct the government to issue a refund in the amount of overpayments made under the unconstitutional law. App. to Petition 26a; *Clinton Nurseries*, 998 F.3d at 70. The analysis of the court of appeals and the Second Circuit on this remedy issue is correct because the relief granted is only possible remedy that can ameliorate the harm caused to the aggrieved parties. The government offers no alternative; in effect, it argues that the appropriate remedy is no remedy at all. That the Tenth Circuit Court of Appeals rejected this argument is not novel, groundbreaking or noteworthy. There is nothing about the issue of remedy that merits certiorari.

The government elects to rely on the *Siegel* filings throughout the Petition rather than make an independent case for certiorari as to the questions presented in this case. As noted *supra*, Respondents agree with both the government and the *Siegel* petitioners (and this Court) that the uniformity question is an important constitutional question, the subject of clear conflict between circuits, and is worthy of this Court's grant of certiorari. But the same cannot be—and has not been—said about the question of

monetary relief. The Second Circuit and Tenth Circuit spoke with one voice in declaring monetary relief to be the appropriate remedy. *Id.* Unlike the uniformity issue, neither circuit even suggested in its opinion that the issue of remedy for this type of constitutional violation was the subject of circuit conflict or unsettled by this Court.

Nor does the government offer any argument otherwise. In its single paragraph outlining reasons for granting the petition, the government references the circuit conflict on the issue of constitutionality, but provides no reference or citation to any conflict, unsettled question, or any other justification for the government's argument that the remedy question meets the high standard for certiorari. Pet. for Cert. at 12-13. The only reference to remedy in the petition aside from summarizing the holding of the court of appeals is the government's assertion in that single paragraph in support of granting the petition that "the question of the appropriate remedy" would be presented in *Siegel* if the Court holds § 1930(a)(6)(B) to be unconstitutional. *Id*. at 13.

The government's contention that a question noticeably absent from the *Siegel* Petition will be addressed in this Court's consideration of that case is without merit. The petition and the government's filings in *Siegel* establish that *Siegel* is a case in which, as the government itself concedes, "[t]he petition raises a single question." Reply Brief for Petitioner in *Siegel v. Fitzgerald*, O.T. 2021, No. 21-441, p. 21. This case, again in the government's own telling via its questions presented, plainly presents two separate questions for

the Court to resolve. Pet. for Cert., p. (I). The first is the same question raised in *Siegel:* whether the non-uniform quarterly fees charged under the U.S. Trustee-BA dual system are unconstitutional in light of the Bankruptcy Clause's uniformity requirement. *Id.* The second question is a question not listed in the Questions Presented by either party in *Siegel*: "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." *Id.*

In the Petition, the government acknowledges that *Siegel* does not directly present the question of remedy because the decision below in that case "had no need to address what the appropriate remedy would be." Brief for Respondent in *Siegel v. Fitzgerald*, O.T. 2021, No. 21-441, p. 23, n.7. However, in a portion of its *Siegel* briefing advocating that the Court take up that case rather than awaiting a case like Respondents' which presents both issues, the government argued the Court could grant certiorari without prejudice to Respondents because the remedy question was briefed in the lower court proceedings and "is fairly included in the scope of a question about a law's constitutionality, such that this Court would be able to resolve it" in the *Siegel* case. *Id.*

The fact that this Court *could* choose to take up an issue entirely different from a case where the issue is directly before it. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018), the only case the government cites in support of this argument does not stand for the proposition that this Court necessarily addresses remedial issues when

it resolves constitutional questions. Brief for Respondent in *Siegel*, p. 23, n.7. Rather, it simply is an example of an instance where the Court did so at its discretion. *Lucia*, 138 S.Ct. at 2055. The Court's future decision in *Siegel* could contain no discussion of or determination on remedy, which could place Respondents in the untenable position of having had certiorari granted yet stayed on a question that remains unaddressed.

The government's statement that the question of remedy may be "fairly included" in *Siegel* is inconsistent with the government's filings. The U.S. government's response in *Siegel* did not raise the remedy issue as a separate question, but its petition here does, suggesting the U.S. Trustee believes it to be separate rather than part and parcel of the existing *Siegel* question. Moreover, the government's apparent assertion that remedy is "fairly included" anytime this Court takes up a legal issue would arguably run counter to the purpose of requiring specific, narrow questions to be presented to this Court.

CONCLUSION

Granting the petition in the manner requested by the government would mean granting certiorari on a question presented to this Court, but holding further consideration of that question based on a separate case in which that question is *not* presented. The Court should deny certiorari as to Question 2, or alternatively, consolidate this case with *Siegel* so it can properly determine the issue of remedy with the appropriate proceedings and parties included.

Respectfully submitted,

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