No.

In the Supreme Court of the United States

ALFRED H. SIEGEL, TRUSTEE OF THE CIRCUIT CITY STORES, INC. LIQUIDATING TRUST, PETITIONER

v.

JOHN P. FITZGERALD, III, ACTING UNITED STATES TRUSTEE FOR REGION 4

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a clear and acknowledged conflict over the constitutionality of a federal statute governing the quarterly fees in large Chapter 11 bankruptcies.

The Bankruptcy Clause authorizes Congress to "establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." Notwithstanding this directive, Congress has divided the nation's bankruptcy courts into two distinct programs: 88 judicial districts operate under the U.S. Trustee program, and 6 judicial districts (all in North Carolina and Alabama) operate under the Bankruptcy Administrator program. Each program generally performs similar tasks, and each program—until recently—imposed the same quarterly fees on Chapter 11 debtors in their districts.

In the Bankruptcy Judgeship Act of 2017, however, Congress adopted a five-year increase in quarterly fees paid only in U.S. Trustee districts—increasing the maximum fee from $30,000 to $250,000 for all pending cases. 28 U.S.C. 1930(a)(6)(B) (2018). That same increase was not imposed in Administrator districts until nine months later, and it applied only to cases filed after that date. The result is a wide disparity in fees paid by identically situated debtors based solely on the geographic location of their bankruptcy. The total difference exceeds $100 million in aggregate fees in Chapter 11 cases nationwide.

In the decision below, the Fourth Circuit joined the Fifth Circuit (each over dissents) in upholding these nonuniform fees; the Second Circuit has rejected those decisions and declared the 2017 Act unconstitutional.

The question presented is:

Whether the Bankruptcy Judgeship Act violates the uniformity requirement of the Bankruptcy Clause by increasing quarterly fees solely in U.S. Trustee districts.

RELATED PROCEEDINGS

United States Bankruptcy Court (Bankr. E.D. Va.):

In re Circuit City Stores, Inc., No. 08-35653-bk (Sept. 14, 2010) (order confirming modified second amended joint plan of liquidation)

Alfred H. Siegel v. *John P. Fitzgerald (In re Circuit City Stores, Inc.)*, Nos. 19-3060-ap & 08-35653-bk (July 15, 2019) (order on quarterly fees)

United States District Court (E.D. Va.):

John P. Fitzgerald, III v. *Alfred H. Siegel (In re Circuit City Stores, Inc.)*, No. 19-536 (Sept. 13, 2019) (parties' joint certification of direct appeal)

United States Court of Appeals (4th Cir.):

Alfred H. Siegel v. *John P. Fitzgerald, III* (*In re Circuit City Stores, Inc.)*, Nos. 19-2240 & 19-2255 (Apr. 29, 2021)

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Alfred H. Siegel, Trustee of the Circuit City Stores, Inc. Liquidating Trust, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-37a) is reported at 996 F.3d 156. The opinion of the bankruptcy court (App., *infra*, 38a-55a) is reported at 606 B.R. 260.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2021. On March 19, 2020, the Court extended the time within which to file a petition for a writ of certiorari

to 150 days from "the date of the lower court judgment"; that order had the effect of extending the deadline to file this petition to September 27, 2021.[1] 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, Article I, Section 8, Clause 4, provides:

> The Congress shall have Power * * * To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States.

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

> 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.

28 U.S.C. 1930(a)(6)(B) (2018).

During the relevant periods here, Section 1930(a)(7) of Title 28 of the United States Code provided in relevant part:

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[1] Although the Court later rescinded its earlier order on July 19, 2021, it confirmed that "the deadline to file a petition for a writ of certiorari remains extended to 150 days" for "any case in which the relevant lower court judgment" "was issued prior to July 19, 2021."

> 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 * * * .

28 U.S.C. 1930(a)(7) (2018).

Other relevant statutory provisions are reproduced in the appendix to this petition (App., *infra*, 63a-69a).

INTRODUCTION

This case presents a significant constitutional question under the Bankruptcy Clause that has squarely divided the lower courts.

Notwithstanding the Constitution's directive to "establish * * * uniform Laws on the subject of Bankruptcies throughout the United States," Congress has divided the nation's bankruptcy courts into two categories: U.S. Trustee districts (covering 48 States) and Bankruptcy Administrator districts (covering North Carolina and Alabama).

In the Bankruptcy Judgeship Act of 2017, Congress imposed a massive increase in Chapter 11 quarterly fees in Trustee districts—increasing the maximum fee from $30,000 to $250,000 (an 833% increase) for all pending and future cases. Pub. L. No. 115-72, Div. B, § 1004(a), 131 Stat. 1232 (codified at 28 U.S.C. 1930(a)(6)(B) (2018)). While these new fees were mandatory in Trustee districts, the fees were merely permissive in Administrator districts (28 U.S.C. 1930(a)(7) (2018))—where the same increase was not imposed for a full nine months, and even then applied only prospectively (starting with cases filed on October 1, 2018). Thus, a debtor in North Carolina or Alabama who filed for bankruptcy before October 2018 would never be charged the fee increase, no matter how

long its bankruptcy remained pending, whereas qualifying debtors in Trustee districts were immediately assessed the increased fees—even in cases filed well before the 2017 Act, and for the full duration of their bankruptcies. This disparity has left identically situated debtors paying drastically different fees based solely on the happenstance of where their bankruptcy was filed.

In a 2-1 decision below, the Fourth Circuit nevertheless held the 2017 Act does not violate the Bankruptcy Clause. In so holding, the majority adopted a split decision of the Fifth Circuit, which itself has been expressly rejected by a contrary decision of the Second Circuit—where the full court denied rehearing without a single judge requesting a vote. The 2017 Act has thus been struck down as unconstitutional in one circuit (and multiple lower courts), but upheld in two circuits (and still other lower courts). The same challenge is now surfacing repeatedly in jurisdictions across the country, where judges are left to simply pick sides. This disarray is untenable in a constitutional area that demands "uniform[ity]." U.S. Const. Art. I, § 8, Cl. 4.

This case easily satisfies all the traditional criteria for granting review. The conflict is obvious, acknowledged, and entrenched. It involves an important legal question affecting virtually every major Chapter 11 bankruptcy over a multiyear period. There is well over a hundred million dollars at stake, and the issue turns on a constitutional question—the meaning of the Bankruptcy Clause's uniformity provision—that this Court alone can answer. An Act of Congress has been declared unconstitutional in the Second Circuit, but upheld in the Fourth and Fifth Circuits—inviting confusion and uncertainty as identically situated debtors face different fees in different parts of the country, and other debtors are left wondering what fees they will ultimately be required to pay (or what fees

they should now be litigating to recoup). There is a reason the 2017 Act has been called a "lightning rod" for controversy. Vince Sullivan, *US Trustee Says 2nd Circ. Fee Ruling Needs En Banc Redo*, Law360 (Aug. 10, 2021) <tinyurl.com/law360-ust-ca2>.

The existing situation is intolerable, and there is no benefit to further percolation: the competing sides have been vetted in three circuits (two with extensive dissents), and lower courts remain divided after exhaustive analysis. Neither side will back down, and delay will only invite more litigation and additional confusion. The Court's immediate review is warranted.

While the government will predictably disagree on the merits of the question presented, it will have no basis for contesting the case for further review. Indeed, the government itself has already confirmed that every relevant box is checked: (i) there is a "circuit conflict" (U.S. Reh'g Pet., *In re Clinton Nurseries, Inc.*, No. 20-1209, Doc. 123 at 2 (2d Cir.) (*Clinton* Reh'g Pet.)); (ii) the Second Circuit "str[uck] down" the 2017 Act and "held" it "unconstitutional" (*id.* at 2, 8-9); (iii) the economic stakes "potentially total[] many tens of millions of dollars" in the Second Circuit alone (*id.* at 4); and (iv) the case presents a pure "question of law" affecting "'matters of public importance'" (App., *infra*, 61a) on an "important constitutional issue[]" (U.S. Mot., *In re Clinton Nurseries, Inc.*, No. 20-1209, Doc. 118-2 at 3 (2d Cir.)).

These candid assessments are both correct and compelling. Because this case presents an optimal vehicle for resolving this significant issue of federal law, the petition should be granted.

STATEMENT

A. Statutory Background

1. a. In 1978, Congress established a U.S. Trustee Pilot Program to address systemic problems in bankruptcy-case administration. See H.R. Rep. No. 764, 99th Cong., 2d Sess. 17-18 (1986). Before that time, bankruptcy courts handled both the judicial and administrative functions in every bankruptcy. This dual role often placed bankruptcy courts "in an untenable position of conflict and seriously compromised their impartiality as arbiters of disputes." U.S. General Accounting Office, *Bankruptcy Administration: Justification Lacking for Continuing Two Parallel Programs*, No. GAO/GGD-92-133, at 15 (Sept. 1992) (GAO Report) <https://tinyurl.com/GAO-92-133>. Bankruptcy courts, for example, would often appoint private trustees to administer estates in "the very same" cases before them—leaving trustees "reluctant to take positions contrary to the judges who appointed the trustee, even though a trustee was supposed to be an impartial administrator of the estate." H.R. Rep. No. 764, *supra*, at 18. Congress found "[t]his awkward relationship between trustees and judges created an improper appearance of favoritism, cronyism, and bias," and "eroded the public confidence in the bankruptcy system." *Id.* at 17-18.

To address these issues, Congress "sought to separate the administrative duties in bankruptcy from the judicial tasks, leaving the bankruptcy judges free to resolve disputes untainted" by an administrative role. H.R. Rep. No. 764, *supra*, at 18. It assigned key administrative functions to U.S. Trustees, and it housed the U.S. Trustee program in the Department of Justice. *Ibid.* As Congress explained, this placement in the Executive Branch promoted both "the separation of administrative from judicial functions" and "the independence of the U.S. Trustees." *Ibid.* In short, it was "the soundest approach": "it render[ed]

the separation of administrative and judicial functions complete, and place[d] the administrative duties in bankruptcy in the Branch of Government most capable of executing the laws." H.R. Rep. No. 595, 95th Cong., 1st Sess. 115 (1977).

In making this determination, Congress specifically rejected the alternative of "placing the program in the judicial branch under the supervision of the Administrative Office for U.S. Courts." H.R. Rep. No. 764, *supra*, at 18. Congress noted that placing the "program in the judicial branch * * * could foster the same appearances of favoritism and impropriety in the bankruptcy system" that the Trustee program "sought to eliminate." *Id.* at 20-21. Indeed, as Congress found, "housing the Program outside the judicial branch is the single most essential requirement to a successful program." *Id.* at 20.

b. In 1986, Congress declared the pilot program a success, and formally established the U.S. Trustee program nationwide—with two notable exceptions. In North Carolina and Alabama, politicians and bankruptcy judges resisted joining the Trustee program, and instead opted for a so-called Bankruptcy Administrator program. See Pub. L. No. 99-554, Tit. III, § 302(d)(3)(I), 100 Stat. 3123 (1986); see also, *e.g.*, *In re John Q. Hammons Fall 2006, LLC*, 618 B.R. 519, 522 (Bankr. D. Kan. 2020) (attributing the exception to "successful lobbying by bankruptcy judges and senators" in "North Carolina and Alabama") (citation omitted). This distinct program would perform the same general functions, but under a different arrangement: while the Trustee program was lodged in the Department of Justice, the Administrator program was lodged in the judicial branch under the Judicial Conference.

Because this exemption was designed to be temporary, North Carolina and Alabama were given limited extensions for joining the Trustee program. Pub. L. No. 99-

554, *supra*, § 302(d)(3)(A), (E). But Congress later extended the deadline for ten years and then eliminated it outright—"when a North Carolina congressman tucked a permanent exemption from the UST Program into an unrelated bill during the November 2000 lame duck session." *In re Buffets, LLC*, 979 F.3d 366, 383 (5th Cir. 2020) (Clement, J., dissenting); see also Pub. L. No. 101-650, Tit. III, § 317(a) (1990) (10-year extension); Pub. L. No. 106-518, Tit. V, § 501, 114 Stat. 2421-2422 (2000) (outright elimination). With that exemption permanent, the nation's judicial districts were left divided into two distinct categories: 88 judicial districts in 48 States were in the Trustee program, while the remaining 6 districts in North Carolina and Alabama were in the Administrator program.

In studying the division in 1992, the GAO concluded there was no reason for two separate programs to exist, and it recommended the Administrator program should be eliminated. See GAO Report, *supra*, at 18 ("[o]fficials from both the EOUST and AO agreed that it makes no sense to divide the case administration duties in bankruptcy between two programs as it is now"; "[w]e could not find any justification for continuing two separate programs"). Yet Congress left the dual system in place, and this non-uniform scheme persists today.

2. Although each program has always operated similarly, debtors in Trustee districts initially faced unequal costs: additional fees. Ever since the Trustee program's inception, Congress has imposed quarterly fees for Chapter 11 debtors with the aim of leaving the program "self-funded." H.R. Rep. No. 764, *supra*, at 25; see 28 U.S.C. 1930(a)(6). Congress, however, initially chose not to impose the same fees in Administrator districts; the funding for that separate program instead came from the judiciary's general budget. *Buffets*, 979 F.3d at 371.

That disparity was eventually challenged on constitutional grounds by debtors in the Trustee program. The dispute reached the Ninth Circuit in 1994, and the court of appeals held the unequal treatment violated the Bankruptcy Clause: "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 * * * does not apply uniformly to a defined class of debtors," "render[ing] that section unconstitutional." *St. Angelo* v. *Victoria Farms, Inc.*, 38 F.3d 1525, 1531-1532 (9th Cir. 1994) (citation omitted).

Congress responded to that decision by amending the quarterly fee statute. But rather than subjecting all debtors to a unitary fee provision, it instead tacked on a new subsection granting the Judicial Conference *discretion* to impose fees in Administrator districts: "In 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 of title 11 to pay fees equal to those imposed by" Section 1930(a)(6). Pub. L. No. 106-518, *supra*, at Tit. I, § 105, 114 Stat. 2411-2412 (codified at 28 U.S.C. 1930(a)(7)).

A year later, the Judicial Conference invoked that new authority to impose equal fees in Administrator districts. See Report of the Proceedings of the Judicial Conference of the United States 45-46 (Sept./Oct. 2001) <https://tinyurl.com/2001-jud-conf-report> (authorizing "such fees be imposed in bankruptcy administrator districts in the amounts specified in 28 U.S.C. § 1930, as those amounts may be amended from time to time"). Each program then charged uniform fees for over a decade.

3. a. The period of uniform fees ended approximately 15 years later when Congress passed the Bankruptcy

Judgeship Act of 2017, Pub. L. No. 115-72, Div. B, § 1004(a), 131 Stat. 1232.

In the 2017 Act, Congress sought to address a funding shortfall in the Trustee program.[2] It imposed a five-year increase in quarterly fees for Chapter 11 debtors in Trustee districts for any year where the balance of the Trustee fund dipped below a threshold amount ("$200,000,000"). 28 U.S.C. 1930(a)(6)(B) (2018). The heightened fee was tied to a debtor's "disbursements" and based on a sliding scale; any debtor spending over $1 million in a quarter had to pay "the lesser of 1 percent of such disbursements or $250,000." *Ibid.* While Congress left the term "disbursement" undefined, courts have consistently understood the term to cover any money spent by the debtor for any reason—including ordinary business expenses. *E.g.*, *In re Cranberry Growers Coop.*, 930 F.3d 844, 850 (7th Cir. 2019). The new fee provision thus reaches virtually every large Chapter 11 bankruptcy.

The 2017 Act dramatically increased quarterly fees for Chapter 11 debtors: it supplanted a different scale that capped out at $30,000 per quarter (an 833% increase), and resulted in Chapter 11 debtors nationwide paying multiples of their previous fees. Compare 28 U.S.C. 1930(a)(6)(A) (2018), with 28 U.S.C. 1930(a)(6)(B) (2018). Congress also imposed the fee immediately for all pending cases, with an effective date of January 1, 2018. Pub. L. No. 115-72, *supra*, at § 1004(c). The Congressional Budget Office estimated that the new fees would generate over $144 million in revenue in the first year alone—reallocating funds from the estate that would otherwise go to

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[2] Although Congress purportedly designed the fee to pay for the funding shortfall, it also allocated 2% of all amounts collected to the general treasury fund. See Pub. L. No. 115-72, *supra*, at § 1004(b), 131 Stat. 1232.

creditors or back to the debtor. CBO Cost Estimate, *H.R. 2266: Bankruptcy Judgeship Act of 2017*, at 5-6 (May 18, 2017) (reproduced at C.A. App. 280-285).[3]

Critically here, the 2017 Act's increase targeted only Trustee districts; Congress did not extend the provision to Administrator districts or amend Section 1930(a)(7) to mandate an equivalent increase. The fees in Administrator districts thus remained permissive only and subject to the Judicial Conference's discretion.

b. The Judicial Conference met later in 2018 and exercised its discretionary authority to impose the same increased fees in Administrator districts. Report of the Proceedings of the Judicial Conference of the United States 11-12 (Sept. 13, 2018) <https://tinyurl.com/2018-jud-conf-report> (authorizing "quarterly fees in chapter 11 cases filed in bankruptcy administrator districts in the amounts specified in 28 U.S.C. § 1930(a)(6)(B) for cases filed on or after October 1, 2018").

But as its terms make clear, that increase departed from fees imposed in Trustee districts in two key respects: (i) it applied for the first time on "October 1, 2018," thus guaranteeing at least nine months of non-uniform treatment between the two programs; and (ii) the Judicial Conference directed the fee to apply only prospectively ("on or after")—so that any bankruptcy filed in North Carolina

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[3] The Trustee fund's balance has remained below the threshold since the Act's effective date, resulting in increased fees every quarter since January 2018. Congress later amended Section 1930(a)(6)(B) to extend the duration of the increase (from 2021 to 2026); to increase the funding trigger from $200 million to $300 million; and eventually to eliminate the funding trigger altogether—thus ensuring the heightened fees would remain in effect. See Pub. L. No. 116-325, § 3(d)(1), 134 Stat. 5088 (2021) (fee extension and elimination of balance threshold); Pub. L. No. 116-260, Div. B, Tit. II, § 218 (2020) (balance increase from $200 million to $300 million).

or Alabama before October 2018 would never be subject to the fee, no matter how long the bankruptcy remained pending (see *Cranberry Growers*, 930 F.3d at 855); in a Trustee district, by contrast, an identically situated debtor would be charged indefinitely until the bankruptcy closed. This latter change ensured years of unequal treatment between the two programs.

4. In 2021, Congress again amended the fee statute, this time replacing the Judicial Conference's discretion with a mandatory command: while the prior version of Section 1930(a)(7) provided the Judicial Conference "may" impose equal fees in Administrator districts, the new version instructed that the Judicial Conference "shall" impose equal fees. Pub. L. No. 116-325, *supra*, at § 3(d)(2), 134 Stat. 5088.

Congress directed the change to apply to all future quarters, but it did not impose retroactive increases for the years-long period where fees were non-uniform under the 2017 Act. See Pub. L. No. 116-325, *supra*, at § 3(e)(2)(B), 134 Stat. 5089. Even under the amended version of Section 1930(a), Congress thus codified the disparate treatment between Trustee and Administrator districts at the core of this case.

B. Facts And Procedural History

1. For decades, Circuit City Stores, Inc., operated a nationwide chain of consumer-electronic retail stores. App., *infra*, 9a. In 2008, Circuit City filed for Chapter 11 bankruptcy in the Eastern District of Virginia, which is a Trustee district. *Ibid.* Two years later, the bankruptcy court confirmed Circuit City's joint-liquidation plan, formed a liquidation trust, and appointed petitioner as the liquidation trustee—tasked with "collect[ing], administer[ing], distribut[ing], and liquidat[ing] all of [Circuit City's] remaining assets." *Id.* at 39a-40a. The plan re-

quired petitioner to "'pay quarterly fees to the U.S. Trustee until the Chapter 11 Cases are closed or converted and/or the entry of final decrees.'" *Ibid.*

Circuit City's bankruptcy was still pending on the 2017 Act's effective date. In the prior seven years, petitioner paid "approximately $833,000 in quarterly fees." App., *infra*, 48a-49a. "In the first three quarters of 2018 alone, [petitioner] paid approximately $632,000" under the Act. *Id.* at 48a. "Without the increased quarterly fees, [petitioner] would have paid $56,400—a difference of approximately $575,600." *Id.* at 30a. Circuit City's disbursements continued to exceed the Act's threshold in other quarters.

Petitioner challenged the 2017 Act on multiple grounds, including its non-uniformity under the Bankruptcy Clause. App., *infra*, 43a-44a.[4]

2. As relevant here, the bankruptcy court declared the Act "unconstitutionally non-uniform" under the Bankruptcy Clause. App., *infra*, 53a. As the court explained, "the Bankruptcy Clause requires bankruptcy laws to be geographically uniform" and to "'apply uniformly to a defined class of debtors.'" *Id.* at 54a. Yet "[f]or the first three quarters of 2018, newly adopted section 1930(a)(6)(B) in-

[4] Petitioner also challenged the Act as impermissibly retroactive, given the drastic fee increase after plan confirmation. App., *infra*, 10a. This theory has been rejected by every appellate judge to have confronted the issue, including all three judges on the court below. *Id.* at 23a. It would potentially excuse payment of the Act's fees for any case pending before the Act went into effect, but it would not resolve any challenge to fees incurred by debtors filing in the nine-month period between January and October 2018 (as the Act *pre-dated* those cases). The retroactivity issue thus cannot resolve the global controversy. Petitioner's challenge under the Bankruptcy Clause, by contrast, is the subject of a recognized circuit split and would resolve the fee issue for *all* debtors. Petitioner is advancing only that Bankruptcy Clause challenge before this Court.

creased quarterly fees assessed against chapter 11 debtors in only 88 of the 94 federal judicial districts throughout the country." *Id.* at 52a. Indeed, "[h]ad the Debtors filed their chapter 11 bankruptcy petitions a mere 140 miles south in Raleigh, North Carolina, the Debtors would be paying substantially lower quarterly fees than they are paying now." *Id.* at 53a (footnote omitted).

The court concluded that "[a]s the [Act] does not apply uniformly both to chapter 11 debtors with pending cases in BA districts and to chapter 11 debtors with pending cases in U.S. Trustee districts, it is unconstitutional under the Bankruptcy Clause." App., *infra*, 54a. It thus declared that "[t]he quarterly fees due and payable by [petitioner] since January 1, 2018, must be determined based on the prior version of the statute." *Ibid.*

3. The parties' jointly sought a direct appeal under 28 U.S.C. 158(d)(2), certifying that the order "'involves a matter of public importance'" and "'a question of law as to which there is no controlling decision.'" App., *infra*, 61a.

4. The Fourth Circuit granted the joint petition (App., *infra*, 57a-58a), and a divided panel reversed (*id.* at 1a-37a).

a. The majority found "no constitutional uniformity problem posed by the 2017 Amendment." App., *infra*, 14a. While the majority flagged "[a]t least" a 6-4 split among lower courts (*id.* at 15a n.9), it adopted the Fifth Circuit's view that "the Bankruptcy Clause forbids only 'arbitrary' geographic differences," and "when Congress determined that it needed to remedy a shortfall in funding for the Trustee districts, it was entitled to 'solve the evil to be remedied with a fee increase in just the underfunded districts.'" *Id.* at 17a. In so concluding, the majority conceded that the Act "may render it more expensive for some debtors in Virginia—as opposed to North Carolina or Alabama—to go through Chapter 11 proceedings." *Id.* at 18a.

But it ultimately found this was "simply a byproduct of Virginia's use of the Trustee program," and the 2017 Act fairly addressed a "'geographically isolated problem[].'" *Id.* at 15a, 18a.

As the majority concluded, "[b]ecause only those debtors in Trustee districts use the U.S. Trustees, Congress reasonably solved the shortfall problem with fee increases in the underfunded districts." App., *infra*, 18a. It accordingly held that "the 2017 Amendment does not contravene the [Bankruptcy Clause's] uniformity mandate," and "revers[ed]" the bankruptcy court's ruling that "the 2017 Amendment is unconstitutionally nonuniform." *Id.* at 18a, 23a.

b. Judge Quattlebaum dissented. App., *infra*, 23a-37a.

He initially noted that "[w]e have two types of bankruptcy courts in the United States," and "Chapter 11 debtors in districts that employ the United States Trustees pay materially more in quarterly fees than similarly situated debtors in districts that employ Bankruptcy Administrators." App., *infra*, 23a-24a. In his view, "a faithful application of the Constitution's Bankruptcy Clause renders the statutory scheme permitting these different quarterly fees unconstitutional." *Id.* at 24a.

As Judge Quattlebaum explained, the dual systems are "candidly and unapologetically nonuniform"—"Alabama and North Carolina's refusal to participate in the Trustee Program is not based on any unique attributes of those states." App., *infra*, 26a. And the 2017 Act's disparate treatment has "led to vastly disparate fees paid by similarly situated debtors in different districts." *Id.* at 29a. "Simply put," he explained, "the imposition of quarterly fees in the two bankruptcy systems is not uniform." *Id.* at 31a.

He then rejected the government's efforts to excuse "this obvious lack of uniformity." App., *infra*, 31a. He first

identified "several problems" with the government's theory that the 2017 Act was "not a substantive bankruptcy law"—despite "regularly lead[ing] to similarly situated debtors paying *more* in fees and *less* to creditors in Trustee Program districts than they would in Bankruptcy Administrator districts." *Id.* at 31a-33a. "Certainly," he reasoned, "statutes that alter the amounts similarly situated creditors receive based on geography are sufficiently substantive to implicate the Bankruptcy Clause." *Id.* at 33a.

Next, he refuted the government's assertion that "§ 1930(a)(6)(B) and (a)(7) are actually uniform," calling it "at odds with reality." App., *infra*, 34a-35a. Contrary to the government's view, fees under Section 1930(a)(7) were *not* "mandatory": "the unambiguous language of § 1930(a)(7) prior to the Act vested the Judicial Conference with discretion to assess increased quarterly fees." *Id.* at 34a. As Judge Quattlebaum concluded, "[i]f the operative version of § 1930(a)(7) used the word 'shall' rather than 'may,' this would be an entirely different case." *Id.* at 33a.

Finally, he rejected the government's argument that the 2017 Act's uneven treatment is not based on "geography" but "the unique budgetary challenges confronting the Trustee Program." App., *infra*, 35a. As Judge Quattlebaum explained, there was nothing "geographical in nature" about those problems: "those districts only face the budgetary problems because Congress treated them differently in the first place"—"[a]nd Congress did that purely based on geography." *Ibid.* And while the Bankruptcy Clause's uniformity provision "'was not intended to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for remedy only in certain regions,'" "it is a necessary safeguard to prevent laws from arbitrarily damaging creditors and debtors as a result of regionalism." 36a.

In sum, Judge Quattlebaum concluded, "no matter how you slice it, uniform means not different." App., *infra*, 36a. He accordingly would have affirmed the holding below "that § 1930(a)(6)(B) violates the Bankruptcy Clause." 31a.

REASONS FOR GRANTING THE PETITION

A. There Is A Direct, Intractable Conflict Over A Significant Constitutional Question Under The Bankruptcy Clause

The decision below further solidifies a square conflict over a significant constitutional question affecting major Chapter 11 stakeholders nationwide: whether the 2017 Act's quarterly fee increase violates the Bankruptcy Clause's uniformity requirement. That question has generated a 2-1 circuit conflict, split panels on multiple circuits, and sharply divided the lower courts. The Fourth and Fifth Circuits have now upheld the law (over strong dissents), whereas the Second Circuit has expressly rejected those decisions—and denied rehearing. The conflict is now entrenched. As it stands, the 2017 Act is unconstitutional in some parts of the country but not others, and debtors nationwide are left uncertain about the validity of the Act's quarterly fees—with massive amounts at stake.

This "constitutional quagmire" on a core bankruptcy question is untenable. *In re Clinton Nurseries, Inc.*, 998 F.3d 56, 66 n.9 (2d Cir. 2021). The conflict is both clear and undeniable, and it should be resolved by this Court.

1. a. The decision below conflicts with settled law in the Second Circuit. In *In re Clinton Nurseries, Inc.*, 998 F.3d 56 (2d Cir. 2021), the Second Circuit confronted the identical question presented here, and it unanimously declared the 2017 Act unconstitutional: "We hold that the

2017 Amendment is a 'Law[ ] on the subject of Bankruptcies,' implicating the uniformity requirement of the Bankruptcy Clause," and "[w]e also hold that * * * the 2017 Amendment violated the uniformity requirement." 998 F.3d at 59 (citation omitted). In so holding, the Second Circuit expressly rejected the Fourth and Fifth Circuits' contrary position, instead siding with the dissents in those circuits. See *id.* at 68-69 & n.15.

In December 2017, the *Clinton* debtor filed its Chapter 11 case in the District of Connecticut, which is a Trustee district. 998 F.3d at 61. Starting with the first quarter of 2018, the debtor's disbursements "consistently exceeded [the 2017 Act's] threshold," triggering its "increased quarterly fees." *Ibid.* After paying those fees for over a year, the debtor challenged the fee increase under the Bankruptcy Clause. *Id.* at 61-62. As the debtor explained, the 2017 Act was "unconstitutionally non-uniform on its face," and it produced "a fee discrepancy between the UST and BA Districts." *Id.* at 62. After the bankruptcy court rejected the debtor's challenge, the Second Circuit authorized a direct appeal and reversed: "We conclude that the 2017 Amendment * * * was unconstitutional on its face insofar as it charged higher fees to debtors in UST Districts." 998 F.3d at 69.

The Second Circuit initially refuted the government's theory that the 2017 Act is not "even subject to the Bankruptcy Clause" because it is "'an administrative funding measure, not a substantive bankruptcy law.'" 998 F.3d at 63-64. The court noted that the government's argument "has been repeatedly rejected by other courts," and "for good reason." *Id.* at 64.[5] As the court explained, the 2017

[5] Indeed, the government's theory that bankruptcy fees are not on the "subject" of bankruptcy has apparently failed across the board:

Act falls squarely within this Court's "broad definition of 'bankruptcy'"—"'the subject of the relations between * * * [a] debtor and his creditors, extending to his and their relief.'" *Ibid.* (quoting *Ry. Labor Execs.' Ass'n* v. *Gibbons*, 455 U.S. 457, 466 (1982)). The 2017 Act "amends a statute, § 1930, that is literally entitled: 'Bankruptcy fees.'" *Ibid.* Moreover, because fees are granted administrative priority status, any increase in fees directly reduces the funds available to "'commercial creditors, bondholders, and shareholders'"; that "'clearly'" affects "debtor-creditor relations and impacts the relief available." *Id.* at 64-65 (quoting *MF Glob.*, 615 B.R. at 446). In short, the court concluded, "'[t]he amount of the fee due to the UST directly impacts distributions to other creditors'"; the 2017 Act is thus "'a law on the subject of bankruptcies'" and "is constitutional only if 'uniform.'" *Id.* at 64-65 & n.8 (quoting *In re Mosaic Mgmt. Grp., Inc.*, 614 B.R. 615, 623 (Bankr. S.D. Fla. 2020)).

The Second Circuit next addressed whether the 2017 Act was "unconstitutionally non-uniform on its face." 998 F.3d at 65 (emphasis altered). The court observed that "the parties do not dispute" that "there was a clear geographic discrepancy in application of the 2017 Amendment's fee increase: debtors like Clinton who filed for bankruptcy in UST Districts were charged the increase beginning January 1, 2018; debtors who filed for bankruptcy in BA Districts before October 1, 2018, were never charged the increase." *Ibid.* While the government offered two theories to excuse this "inconsistent" treatment, the court "f[ound] neither argument persuasive." *Ibid.*

"every bankruptcy court that has addressed the constitutionality of the 2017 Amendment under the Bankruptcy Clause" has "concluded that the 2017 Amendment is 'on the subject of Bankruptcies.'" 998 F.3d at 64 (quoting *In re MF Glob. Holdings Ltd.*, 615 B.R. 415, 446 (Bankr. S.D.N.Y. 2020)).

First, the Second Circuit rejected the government's argument that the statute itself was "facially uniform"—and any disparity was due to the Judicial Conference's "unauthorized" delay in increasing "BA District[]" fees. 998 F.3d at 65-66. The government admitted there was a "lexical distinction" between Section 1930(a)(6) (the increase "*shall*" be imposed in Trustee districts) and Section 1930(a)(7) (the increase "*may*" be imposed in Administrator districts). *Id.* at 65 (emphases added). But the government argued that courts should "ignore" that textual distinction, and instead read "both provisions as imposing * * * a mandatory obligation." *Id.* at 66 (suggesting this better reflected "Congress's intent"). In the government's view, "'[t]he failure to *implement* a fee statute consistently * * * does not render the statute itself unconstitutional.'" *Ibid.* (emphasis added).

The Second Circuit declared this argument directly at odds with the statutory text: "by the plain terms of the statute, while § 1930(a)(6) *required* application of the increase in UST Districts, § 1930(a)(7) *permitted* application of the increase in BA Districts." 998 F.3d at 65. The court explained that it could not "simply overlook Congress's decision to use the permissive term 'may' in § 1930(a)(7)." *Id.* at 66. Although there were "limited scenarios" where "the word 'may' can impose a mandatory directive," the court found Congress's choice of the "permissive term" "intentional here": "Congress used 'shall' in numerous other places in § 1930—and even in § 1930(a)(7) itself"—and this Court has "caution[ed] against ignoring contexts in which 'Congress' use of the permissive "may" * * * contrasts with the legislators' use of a mandatory "shall" in the very same section.'" *Ibid.* (quoting *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001)). The Second Circuit also found it "telling" that the Judicial Conference "apparently

understood the 2017 Amendment" the same way: "as authorizing, but not requiring, it to impose a fee increase in BA Districts." 998 F.3d at 67. In sum, the court concluded, there was "no ambiguity in the statute's grant of permissive authority to the Judicial Conference to adjust fees." *Ibid.*[6]

Second, the Second Circuit rejected the government's invocation of the "'geographically isolated problem' exception." 998 F.3d at 67 (citing *Blanchette* v. *Connecticut Gen. Ins. Corp.*, 419 U.S. 102 (1974)). The Second Circuit acknowledged that both the "Fifth Circuit[]" and "Fourth Circuit[]" reached the opposite conclusion, but it found those circuits "overlooked a critical distinction." *Id.* at 68. As the Second Circuit explained, in crafting the key exception, *Blanchette* allowed Congress to target a "particular geographic region" in the Rail Act "because all of the country's bankrupt railroads at the time *were located in the designated region*." *Id.* at 67 (emphasis added). Because "there were no bankrupt railroad companies located outside the statutorily designated region," "'the Rail Act in fact operate[d] uniformly upon all bankrupt railroads then operating in the United States.'" *Id.* at 68-69 & n.13

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[6] The Second Circuit acknowledged that, "in [later] amending § 1930(a)(7) to replace 'may' with 'shall,' the 2020 Act purport[ed] to 'confirm the longstanding intention of Congress that quarterly fee requirements remain consistent across all Federal judicial districts.'" 998 F.3d at 66 n.9 (quoting Pub. L. No. 116-325, § 2(a)(4)(B)). But the court found Congress's post-hoc statement unpersuasive. As the court explained, "'[t]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one,'" especially when the 2020 Congress was "inevitably" taking into account "the constitutional quagmire" that the 2017 Act produced. *Ibid.* Ultimately, the court concluded, "the ordinary meaning of 'may' as permissive" "outweighs Congress's subsequent statement regarding [the word's] earlier meaning"—which Congress "oddly purported to confirm in a statute" by "amend[ing] that very language." *Ibid.*

(quoting *Blanchette*, 419 U.S. at 159-160). Congress, in short, was merely targeting a "'national rail transportation crisis'" that was naturally "isolated" in a single "geographic area." *Ibid.*

As the Second Circuit explained, "[h]ere, by contrast," there is no such naturally isolated problem: "the 2017 Amendment's fee increase applies to the class of debtors whose disbursements exceed $1 million, and there has been no suggestion that members of that broad class are absent in the BA Districts." 998 F.3d at 68-69. As the court noted, to "'survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors.'" *Ibid.* (quoting *Gibbons*, 455 U.S. at 473). Yet here, "[t]wo debtors, identical in all respects save the geographic locations in which they filed for bankruptcy, are charged dramatically different fees." *Ibid.*[7]

Finally, unlike the Fourth and Fifth Circuits, the Second Circuit also rejected the notion that the UST's "funding shortfall" was itself a "'geographically isolated problem'"—justifying Congress's unequal treatment of UST debtors because UST debtors alone use the UST system. 998 F.3d at 69. As the Second Circuit explained, this "problem" was not some natural result of geography, but an artificial product of Congress's doing: "the distinction between UST Districts and BA Districts * * * exist[s] only because Congress chose—for politically expedient reasons—to create a dual bankruptcy system." *Ibid.* (citing *Buffets*, 979 F.3d at 383 (Clement, J., dissenting)); see also *id.* at 69 n.15 (citing Quattlebaum, J., dissenting, for

[7] On this point, the Second Circuit endorsed the bankruptcy court's reasoning in *this* case, which the 2-1 Fourth Circuit later reversed. See 998 F.3d at 69 n.14. Had this case arisen in Connecticut instead of Virginia, it would have come out the opposite way.

a "similar[]" point). The Second Circuit found it "inexplicable" that the Bankruptcy Clause requires Congress to "enact uniform laws on the subject of bankruptcy . . . except when Congress elects to treat debtors non-uniformly." *Ibid.* (ellipsis in original). "Such reasoning," the Second Circuit declared, would leave the Bankruptcy Clause's uniformity requirement "effectively meaningless." *Ibid.*

"In sum," the court concluded, "we cannot evade a finding of non-uniformity through either a contortion of the statutory text or an application of the 'geographically isolated problem' exception." 998 F.3d at 69. It thus "h[e]ld" that (i) the 2017 Act was "unconstitutionally non-uniform on its face because it *mandated* a fee increase in UST Districts but only *permitted* a fee increase in BA Districts"; and (ii) the debtor was "entitled to a refund of the amount in excess of the fees it would have paid in a BA District during the same time period." *Id.* at 69-70.

b. Numerous lower courts in multiple jurisdictions have reached the same conclusion and declared the 2017 Act unconstitutional. *E.g.*, *USA Sales, Inc.* v. *Office of the U.S. Tr.*, No. 19-2133, 2021 WL 1226369, at *17 (C.D. Cal. Apr. 1, 2021); *In re Life Partners Holdings, Inc.*, 606 B.R. 277, 286 (Bankr. N.D. Tex. 2019) ("the 2017 Amendment is unenforceable because it is unconstitutionally non-uniform"); *In re Buffets, LLC*, 597 B.R. 588, 597 (Bankr. W.D. Tex. 2019) ("After careful consideration of § 1930(a)(6)(B), this Court holds the amendment unconstitutional as applied to this case due to its lack of uniformity for the first three quarters of 2018."), rev'd, 979 F.3d 366 (5th Cir. 2020); see also App., *infra*, 54a ("As the amendment to section 1930(a)(6) does not apply uniformly both to chapter 11 debtors with pending cases in BA districts and to

chapter 11 debtors with pending cases in U.S. Trustee districts, it is unconstitutional under the Bankruptcy Clause.").

2. a. A divided panel of the Fifth Circuit reached the opposite conclusion in *In re Buffets, LLC*, 979 F.3d 366 (5th Cir. 2020). The majority recognized that "[d]ebtors nationwide" have challenged the 2017 Act under the Bankruptcy Clause, with "[b]ankruptcy courts" "disagree[ing] on the constitutionality of the fee increase." 979 F.3d at 370. The majority also candidly flagged "uncertainty about [the Bankruptcy Clause's] meaning today," finding that "[u]niformity in particular * * * 'continues to be a source of analytical confusion.'" *Id.* at 377. But the majority ultimately "f[ou]nd no uniformity problem" and upheld the 2017 Act as "constitutional." *Id.* at 370, 377.

In 2016, the *Buffets* debtor filed its Chapter 11 case in the Western District of Texas, which is a Trustee district. 979 F.3d at 372. "In each of the first three quarters of 2018, [the debtor] reported over $1 million in total disbursements," activating the 2017 Act's "substantial" fee increase. *Id.* at 370, 372. The debtor "refused to pay" and instead challenged the Act on multiple grounds, including its "constitutionality." *Id.* at 372. As relevant here, the bankruptcy court agreed, holding the 2017 Act "violated the Constitution by increasing fees only in Trustee districts," and ruling the Act should apply only to cases filed "after the Administrator districts implemented the [same] fee increase." *Ibid.* The Fifth Circuit authorized a direct appeal, and a split panel reversed. *Id.* at 373, 382.

After first rejecting the debtor's alternative challenges,[8] the majority addressed "the main event: whether

[8] Specifically, the panel held that (i) qualifying "disbursements" include "all payments made by a debtor, not just 'bankruptcy-related'

[the 2017 Act's] fee increase violates constitutional uniformity requirements." 979 F.3d at 376.

The majority initially noted that the "uniformity requirement" in fact "limit[s] * * * congressional power," but not as "'a straightjacket that forbids Congress to distinguish among classes of debtors.'" 979 F.3d at 377 (quoting *Gibbons*, 455 U.S. at 469). Instead, the majority asserted, "the uniformity requirement forbids only 'arbitrary regional differences in the provisions of the Bankruptcy Code.'" *Id.* at 378 (quoting *In re Reese*, 91 F.3d 37, 39 (7th Cir. 1996) (Posner, C.J.)). As a result, Congress is allowed "'to take into account differences that exist between different parts of the country," and "'to fashion legislation to resolve geographically isolated problems.'" *Ibid.* (quoting *Blanchette*, 419 U.S. at 159).

The majority then held this "uniformity" exception doomed the constitutional challenge: "Congress confronted the problem of an underfunded Trustee Program where it found it: in the Trustee districts." 979 F.3d at 378. The majority conceded that the 2017 Act "does make it more expensive for a debtor in Texas than a debtor in North Carolina to go through bankruptcy." *Ibid.* But it found that "indirect[] * * * geographic dimension" irrelevant: in the majority's view, "only 'arbitrary' geographic differences are unconstitutional," and this distinction was not "arbitrary"—"[o]nly debtors in Trustee Districts use

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expenses"—adopting the same conclusion as "our sister circuits," 979 F.3d at 373-374; (ii) the 2017 Act applies immediately to all "pending" cases, finding the Act's text "straightforward," *id.* at 374-375; (iii) the fee increase was not "impermissibly retroactive," as it does not "'affect[] vested rights'" and "applies only to future disbursements," *id.* at 375-376; and (iv) the fee increase was not unconstitutionally "excessive" or a "taking," *id.* at 380-382; accord *id.* at 382 (Clement, J., dissenting in part) ("concur[ring]" on these points).

trustees, so Congress could 'solve "the evil to be remedied"' with a fee increase in just the underfunded districts." *Ibid.*[9]

The majority finally distinguished a challenge to the 2017 Act from a direct attack on Congress's "underlying" "'dual UST/BA system.'" 979 F.3d at 379-380 & n.11. According to the majority, even if it was "'irrational and arbitrary'" to establish non-uniform districts, Congress had a rational "justification" for imposing non-uniform fees: "a need to ensure that the Trustee Program remains funded by users of the bankruptcy court." *Id.* at 379. The majority admitted that "nothing more than 'political influence' [may have] resulted in the dual systems," but the majority again found that beside the point: "'[A]s long as the two regimes co-exist, they will face funding problems that may be unique to only one of them.'" *Id.* at 380 (quoting *MF Glob.*, 615 B.R. at 447-448). And the majority held it constitutional for "Congress to have those who benefit from the Trustee Program fill the hole in its finances." *Id.* at 379-380; see also *id.* at 379 n.12 (weighing in on the then-"5-3" split "in favor of constitutionality"). That holding is irreconcilable with the Second Circuit's contrary position. See *Clinton*, 998 F.3d at 69 (explicitly rejecting that Congress could "charge dramatically different fees" for otherwise "identical[ly]" situated UST debtors to address "the funding shortfall plaguing the UST system").[10]

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[9] Although the majority accepted the government's "geographically-isolated-problem" theory, it rejected its separate belief that the statute itself was "uniform" and any problem resulted solely from the Judicial Conference's "delayed implementation." 979 F.3d at 378 n.10 (the government's theory "ignores that section 1930(a)(7) says the Judicial Conference '*may* require'").

[10] Because the majority found "no uniformity problem," it declined to address the government's theory that the fee statute is not "a law

Judge Clement dissented. 979 F.3d at 382-385. She noted that "[w]e currently have two systems, one of which is more expensive than the other, and the sole factor that determines into which system a debtor is placed is the state in which the debtor files for bankruptcy." *Id.* at 382. Because "[t]hose two systems are not a uniform law on the subject of bankruptcies," she would have declared Congress's scheme unconstitutional and "order[ed the debtor] to pay the lower fee." *Id.* at 382, 384-385.

Judge Clement initially rejected the majority's justification for charging different fees to a Texas debtor and "lower fees [to] an identically situated debtor in Alabama or North Carolina." 979 F.3d at 382. As Judge Clement reasoned, it was no answer that only Texas debtors use Trustees, because that "fails to address why the Texas debtor is required to use the Trustee in the first place, when Alabama and North Carolina debtors get to use less-expensive Administrators." *Id.* at 383. In her view, the majority's contrary position "relies on a flawed tautology: Congress can justify treating bankrupts differently because it has chosen to treat them differently (higher fees because different programs)." *Ibid.*

Judge Clement also highlighted the "sole reason states are treated differently"—"regional political influence." 979 F.3d at 383. As she explained, "[t]he UST Program was originally intended to be a uniform, nationwide program, but 'well[-]connected and motivated trustees and judges' convinced North Carolina's senators to resist expanding the UST Program." *Ibid.* Yet "[n]othing about North Carolina or Alabama distinguishes them from any

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'on the subject of Bankruptcies.'" 979 F.3d at 377. While technically leaving the issue undecided, the majority recognized that "every bankruptcy court" "has rejected" the government's theory, and this "consensus" is "likely correct." *Ibid.*

other states in terms of whether BA or UST is a better fit—the distinction is an arbitrary political relic." *Ibid.* In the end, Judge Clement asserted, this "arbitrary regional difference" has produced a "dis-uniform law on the subject of bankruptcies." *Id.* at 384. And because the 2017 Act now mandates new fees in Trustee districts alone, "the problem is once again causing harm." *Id.* at 383-384.

Judge Clement concluded this treatment was "unconstitutional" and "violates the Bankruptcy Clause": "For no better reason than political influence, debtors in two states enjoy a system subject to lower fees than those in the other forty-eight states." 979 F.3d at 384. Indeed, Judge Clement declared, "'[t]his is the type of "regionalism" the Uniformity Clause was intended to prevent.'" *Id.* at 384-385.

b. Unlike the Second Circuit (and the panel dissents), numerous lower courts have agreed with the split Fourth and Fifth Circuits and upheld the 2017 Act against Bankruptcy Clause challenges. *E.g.*, *In re ASPC Corp.*, No. 19-2120, 2021 WL 2935845, at *7 (Bankr. S.D. Ohio July 13, 2021) (recognizing circuit conflict but siding with the Fourth and Fifth Circuits); *In re Point.360*, No. 19-1442, Hearing Tr. 9-10 (Bankr. C.D. Cal. Mar. 31, 2021) (oral order); *Acadiana Mgmt. Grp., LLC* v. *United States*, 151 Fed. Cl. 121, 131-132 (Fed. Cl. 2020) ("agree[ing]" with the Fifth Circuit that "the amendment to § 1930 is not a violation of the uniformity requirement of the Bankruptcy [C]lause"); *In re SCI Direct, LLC*, No. 19-6056, 2020 WL 5929612, at *10 (N.D. Ohio Sept. 22, 2020) ("agree[ing] with the majority of courts that have upheld the constitutionality of the 2017 amendment under the Bankruptcy Clause"); *John Q.*, 618 B.R. at 525-526 ("the 2017 Amendment satisfies the Bankruptcy Clause"); *MF Glob.*, 615 B.R. at 444, 447 ("recogniz[ing] the contrary views" but "conclud[ing] that the 2017 Amendment is a uniform law

on the subject of bankruptcies"); *Mosaic Mgmt.*, 614 B.R. at 624 ("[b]ecause the Amendment effected a fee increase only in districts where the UST is active" "the Amendment is uniform"); *In re Clayton Gen., Inc.*, No. 15-64266, 2020 Bankr. LEXIS 842, at *20 (Bankr. N.D. Ga. Mar. 30, 2020) ("the amendment to Section 1930(a)(6)" "does not violate the bankruptcy clause as a non-uniform law"); *In re Exide Techs.*, 611 B.R. 21, 37-38 (Bankr. D. Del. 2020) ("the Court finds that section 1930(a)(6) is uniform").

* * *

The conflict over this fundamental constitutional question is square and intractable. It has generated a 2-1 circuit conflict and multiple dissents. The Fourth Circuit adopted the Fifth Circuit's position, which the Second Circuit then flatly rejected—and all three circuits reversed the lower court. The deep division on appeal reflects the broader division nationwide. The debate has been fully exhausted at each level, with each side confronting, and rejecting, the opposing analysis. Neither side will back down, and additional percolation is pointless: one view of the Bankruptcy Clause is correct and the other is wrong, and the remaining courts will simply line up on either side—while the issue continues to generate turmoil.

The 2017 Act is now unconstitutional in some areas but not others, and there is no realistic prospect that this conflict will resolve itself. Review is urgently warranted.

B. The Question Presented Is Exceptionally Important And Warrants Review In This Case

The question presented is of substantial legal and practical importance. The courts of appeals are divided over the constitutionality of a federal law. This Court alone can say what the Bankruptcy Clause means. The issue arises repeatedly in bankruptcies nationwide, and the practical stakes are significant: the issue will determine the proper allocation of millions of dollars across virtually

every major Chapter 11 case pending during a nine-month period.[11] There is a reason the government itself has repeatedly conceded the issue's obvious importance.

The Bankruptcy Clause issue will continue generating "uncertainty" and "'confusion'" (*Buffets*, 979 F.3d at 377) until this Court intervenes, and this case is the ideal vehicle for resolving the question. Certiorari is warranted.

1. a. The legal importance of this dispute is difficult to overstate. The courts disagree over the constitutionality of a federal statute. The 2017 Act has been invalidated in the Second Circuit (and various lower courts), leaving it semi-operative nationwide. Some debtors (*e.g.*, in New York) will be seeking significant refunds while other debtors (*e.g.*, in Texas) will continue paying unconstitutional fees. And debtors in other jurisdictions will continue incurring litigation costs that could otherwise go to creditors or restructuring.

As the government admits, the Second Circuit's "decision str[uck] down a federal statute and create[d] a conflict with the Fourth and Fifth Circuits." *Clinton* Reh'g Pet., *supra*, at 1. In such circumstances, "certiorari is usually granted because of the obvious importance of the case." Stephen M. Shapiro et al., *Supreme Court Practice* § 4.12, at 264 (10th ed. 2013) (confirming a petition's certworthiness "[w]here the decision below holds a federal statute unconstitutional").

b. Review is also essential in light of the overriding importance of "uniform[ity]" in the bankruptcy context. U.S.

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[11] Make no mistake: any Chapter 11 case pending during that nine-month period (January-September 2018) will be charged unequal fees indefinitely until that case is closed, converted, or dismissed. The aggregate financial stakes are thus not limited to nine months of quarterly fees but potentially *years* of non-uniform payments. *E.g.*, *Life Partners*, 606 B.R. at 287 & n.41.

Const. Art. I, § 8, Cl. 4. Here, there are two layers of disuniformity: the non-uniformity under Congress's fee scheme and the non-uniformity from the circuit conflict. Three circuits have resolved the same question in opposite ways while splitting two panels. Lower courts are likewise fractured. The disarray is untenable. The Constitution does not require "uniform" laws "throughout the United States" so that debtors can be assessed different fees solely due to the happenstance of where they filed for bankruptcy.

Given uniformity's importance, this Court routinely grants review to resolve even shallow conflicts over bankruptcy issues. *E.g.*, *Husky Int'l Elecs., Inc.* v. *Ritz*, 136 S. Ct. 1581 (2016) (2-1 split); *Baker Botts L.L.P.* v. *ASARCO LLC*, 135 S. Ct. 2158, 2163 (2015) (1-1 split); *Harris* v. *Viegelahn*, 135 S. Ct. 1829, 1836 (2015) (1-1 split). The uncontested 2-1 split here is more than enough.

c. Finally, the practical stakes are serious. The 2017 Act "substantial[ly]" increases Chapter 11 quarterly fees for large debtors in 48 States. *Buffets*, 979 F.3d at 370. There were 7,095 Chapter 11 cases filed in 2018,[12] and those cases can take years to resolve. The fee increase applies to any debtor with quarterly disbursements exceeding $1 million—meaning any debtor who spent $1 million on *anything* (including operating costs) in any given quarter. *E.g.*, *Cranberry Growers*, 930 F.3d at 850. While not every case will cross Section 1930(a)(6)(B)'s threshold, the sheer numbers remain staggering: the government itself admitted that its Second Circuit loss alone (accounting for only 1,185 Chapter 11 bankruptcies in 2018, see *Caseload*

[12] See U.S. Courts, *Federal Judicial Caseload Statistics: U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2018*, Tbl. F-2 <https://tinyurl.com/chapter-11-cases-2018> (*Caseload Statistics*).

Statistics, *supra*) would "potentially total[] many tens of millions of dollars" (*Clinton* Reh'g Pet., *supra*, at 4), and the CBO estimated that the fee increase would generate over $144 million of revenue in its first year—and similar amounts every subsequent year. CBO Cost Estimate, *supra*, at 5-6.

This issue will thus determine the proper allocation of tens or hundreds of millions of dollars in Chapter 11 cases. The question is recurring nationwide—and it threatens to impair the finality of bankruptcy cases as debtors litigate the issue. Each side of the split has staked out its position, and the competing arguments have been ventilated. There is no point in wasting additional judicial and party resources to watch the same conflict reappear. The question is ripe for immediate review.

2. This case is the optimal vehicle for deciding this important question. The dispute turns on a pure question of law. There are no factual or procedural impediments. App., *infra*, 47a n.19 ("there were no material facts in dispute" and "the matters raised in the Pleadings were purely dispositive questions of law"). It was squarely raised and resolved at each stage below, and it was certified for a direct appeal. Each court exhaustively addressed the question, and the Fourth Circuit split 2-1—with both the majority and dissent carefully probing the competing positions. The body of law is well-developed and the case-specific stakes are significant—with over $700,000 hanging in the balance. *Id.* at 47a-48a. And the legal issue is cleanly presented: Circuit City filed for bankruptcy before the 2017 Act went into effect; made qualifying disbursements during the relevant period; and would have been spared the increased fee had it instead filed in an Administrator district. Its rights were determined by geography and a non-uniform bankruptcy law.

There is no conceivable obstacle to deciding the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2021