No. 21-441

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,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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

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INTEREST OF AMICI CURIAE[1]

Acadiana Management Group, LLC, Albuquerque-AMG Specialty Hospital, LLC, Central Indiana-AMG Specialty Hospital, LLC, LTAC Hospital of Edmond, LLC, Houma-AMG Specialty Hospital, LLC, LTAC of Louisiana, LLC, and Las Vegas-AMG Specialty Hospital, LLC (collectively "AMG"), and Warren Boegel, Boegel Farms, LLC, and Three Bo's, Inc. (collectively "Boegel"), Amici herein, are plaintiffs in a lawsuit brought on behalf of themselves and proposed class members consisting of similarly situated debtors. Amici are former Chapter 11 debtors whose bankruptcy cases were filed before October 1, 2018, in U.S. Trustee districts, namely, the U.S. Bankruptcy Courts for the Western District of Louisiana or District of Kansas. Amici were charged and paid heightened Chapter 11 quarterly fees compared to their identically situated counterparts in Bankruptcy Administrator districts.

Amici filed suit in the U.S. Court of Federal Claims premised on illegal exaction under the Tucker Act, entitled *Acadiana Management Group, LLC, et al. v. United States of America*, No. 1:19-cv-00496 (Fed. Cl. filed Apr. 3, 2019). The Court of Federal Claims relied

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[1] In accordance with S. Ct. Rule 37.6, AMG and Boegel state that no counsel for any party authored this brief in whole or in part and no entity or person, other than counsel for AMG and Boegel, made any monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties have provided written consent for the filing of this brief, pursuant to S. Ct. Rule 37.3(a).

on *In re Buffets, LLC*, 979 F.3d 366 (5th Cir. 2020), to dismiss the *Acadiana* complaint for failure to state a claim. See 151 Fed. Cl. 121 (2020). Amici appealed, and the appeal is pending in the Court of Appeals for the Federal Circuit, bearing Case No. 2021-1941, with oral argument postponed given the grant of certiorari in this case.

In *Acadiana*, Amici seek recovery of the excessive fees paid pursuant to 28 U.S.C. 1930(a)(6)(B) (2018) on multiple grounds, including that the operative versions of 1930(a)(6)-(7) are non-uniform and thus violate the Bankruptcy Clause, Article I, § 8, Cl. 4, of the U.S. Constitution. AMG and Boegel filed an amicus brief with the Fourth Circuit in this case and filed amicus briefs in other cases on this issue. *E.g.*, *In re Mosaic Mgmt. Grp.*, *Inc.*, No. 20-12547, 2022 U.S. App. LEXIS 1239 (11th Cir. Jan. 14, 2022); *In re John Q. Hammons Fall 2006, LLC*, 15 F.4th 1011 (10th Cir. 2021).

Petitioner presents the question of whether "the Bankruptcy Judgeship Act[2] violates the uniformity requirement of the Bankruptcy Clause by increasing quarterly fees solely in U.S. Trustee districts." See Pet. for Cert. I (Sept. 20, 2021). Those who uphold the Act conclude, like the Fourth Circuit, that the 2017 Act itself "does not draw an arbitrary distinction"; rather, "the distinction is simply a byproduct of . . . the Trustee program." *In re Circuit City Stores, Inc.*, 996 F.3d 156, 166 (4th Cir. 2021). However, circuit court judges that

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[2] Pub. L. No. 115-72, Div. B, § 1004, 131 Stat. 1232 (2017 Act).

decline to eviscerate the uniformity requirement correctly recognize that Congress effectively enshrined the dual system to appease federal courts in Alabama and North Carolina.

Substantial amounts are involved. As the government explained in its response to the petition for a writ of certiorari, "the legal status of approximately $324 million in quarterly fees imposed under the 2017 amendment" is in question. U.S. Resp. at 22 (Dec. 8, 2021). The government has acknowledged potential impacts of this case on proposed class members, stating the "decision would either dispose of [*Acadiana*] or provide important guidance for its resolution." *Id.*

A decision in favor of petitioner holding that 28 U.S.C. 1930(a)(6)(B) (2018) violates the Bankruptcy Clause and ordering refund of excessive fees would resolve the present fiscal harm alleged in *Acadiana*. However, if this Court affirms the Fourth Circuit and upholds the fee increase as a mere "byproduct" of systemic division, *Acadiana*'s challenges to the systemic dichotomy, *inter alia*, remain.[3]

The government maintains the dual systems are not unconstitutional because they reflect the Judicial

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[3] See U.S. Mot., *In re Clinton Nurseries, Inc.*, No. 20-1209 (2d Cir.), Dkt. 130-1 at 4 (stating the government recognizes Amici "challenge the constitutionality of Congress's extension of the BA program in Alabama and North Carolina"), and U.S. Notice, Dkt. 130-2 at 2 (noting "in a parallel appeal now pending before the Federal Circuit, other debtors have sought to directly challenge the constitutionality of statutes governing the BA program").

Conference being "accommodated" by Congress. U.S. Resp. at 13-15 (Dec. 8, 2021). Indeed, Congressional accommodation is aptly described as "particularly relevant here." See *id*. The very depth of this accommodation, which is clearly unconstitutional, warrants exploration.

SUMMARY OF THE ARGUMENT

The question presented requires the Court to consider whether U.S. Trustee system underfunding justifies geographic-specific bankruptcy legislation, where the government has, for undisputed political reasons, subjected otherwise identically situated debtors to one of two bankruptcy systems based solely on state geography. See *Hammons*, 15 F.4th at 1025; *In re Clinton Nurseries, Inc*., 998 F.3d 56, 69 (2d Cir. 2021). Relevant to this inquiry are the concrete effects of non-uniformity on debtors and creditors, and the circumstances by which non-uniformity became the default condition. Amici also address issues inherent in the statutory mechanism by which Congress has not so much delegated, but effectively abdicated its authority under the Bankruptcy Clause to bankruptcy judges in only two states.

ARGUMENT

I. THE DUAL BANKRUPTCY SYSTEMS HAVE DIVERGENT EFFECTS ON THE RIGHTS AND LIABILITIES OF DEBTORS AND CREDITORS.

A. The systemic differences are consequential and affect contemporary, headline-making cases.

1. While the U.S. Trustee and Bankruptcy Administrator systems ostensibly serve a similar purpose, courts have observed significant differences between the two. In January 2022, a key distinction was highlighted in the well-publicized bankruptcy of a Johnson & Johnson subsidiary, *In re LTL Management, LLC*, after the case was transferred from the Western District of North Carolina, an Administrator district, to the District of New Jersey, a Trustee district. See *In re LTL Management, LLC*, No. 21-30589 (Bankr. D.N.J. filed Oct. 14, 2021).

The transferee court grappled with the Trustee's request to reconstitute a committee appointed by the transferor court, explaining the controversy arose from one of "many differences under [the Administrator] system of oversight." Mem. Op., *LTL*, No. 21-30589, Dkt. 1212 at 4 (Bankr. D.N.J. Jan. 20, 2022). Specifically, "all decisions under 11 U.S.C. § 1102 regarding the number and membership of committees in the Western District of North Carolina are made with the express approval of the bankruptcy court." *Id.*

LTL is but one example. For decades, numerous rules of bankruptcy procedure have applied in all federal judicial districts except those in Alabama and North Carolina. In these Administrator districts, the "court, rather than the United States trustee appoints interim trustees in chapter 7 cases and trustees in chapter 11, 12 and 13 cases" and "appoints committees in chapter 9 and chapter 11 cases," among other tasks. Fed. R. Bankr. P. 9035, *Notes of Advisory Committee on Rules—1991*.

Not only do the courts in Administrator districts appoint trustees, but a "trustee that has been appointed can be removed from a specific case only for cause" and "has no right to future case appointments."[4] Moreover, the bankruptcy judge "approves the budgets of their appointee standing chapter 13 trustees." *Id.*

This heightened authority extends beyond the bankruptcy courts in Administrator districts. With the system under the Judiciary, "chief judges of the circuit courts of appeals in Alabama and North Carolina appoint the bankruptcy administrators in those districts, respectively,"[5] who then act "under supervision of" the respective Eleventh and Fourth Circuits.[6]

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[4] Sasser, Travis, *Why Bankruptcy Judges in North Carolina Still Appoint Trustees*, at 29 (Feb. 15, 2019) (Sasser Article) <https://tinyurl.com/NC-Trustee-Appointment>.

[5] *Guide to Judiciary Policy*, Vol. 1, Ch. 14, § 1420.30.20(b) (Feb. 22, 2021) <https://www.uscourts.gov/sites/default/files/guide-vol01-ch14.pdf>.

[6] See *Bankruptcy Administrator*, U.S. BANKRUPTCY ADMINISTRATOR, MIDDLE DISTRICT OF NORTH CAROLINA <http://www.

Conversely, the Trustee system exists under the Executive Branch as a component of the Department of Justice,[7] and handles trustee and committee appointments. The U.S. Trustee also "supervise[s] the administration of cases and trustees in cases," including "monitoring plans and disclosure statements" in Chapter 11 cases and filing "comments with respect to such plans and disclosure statements," performing these tasks in cases under chapters 12 and 13, "monitoring creditors' committees," and acting "to prevent undue delay." 28 U.S.C. 586(a)(3). In the Administrator system, general monitoring and comment responsibilities are handled by the Bankruptcy Administrator—who, like many other parties, is appointed by a judge.

2. The systemic duality affects standing, allowing courts in Administrator districts to disregard arguments by the Executive Branch on matters affecting debtor-creditor relations which are heard in Trustee districts. The issue of asbestos trusts in bankruptcy presents a timely example.

The Trustee system touts its "major strides in obtaining rulings prior to court approval of such plans"

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ncmba.uscourts.gov> (last visited February 16, 2022); *About the B.A.*, UNITED STATES BANKRUPTCY ADMINISTRATOR, NORTHERN DISTRICT OF ALABAMA <https://www.alnba.uscourts.gov/about-ba> (last visited Feb. 16, 2022).

[7] Indeed, U.S. Trustees in various regions have advocated for the constitutionality of the challenged fee disparity, with the earliest circuit court to consider the matter after the "[U.S.] Trustee appealed" the bankruptcy court decision in favor of the debtor. See *Buffets*, 979 F.3d at 372.

that "impose new anti-fraud and auditing requirements." See U.S. TRUSTEE PROGRAM FY 2022 PERFORMANCE BUDGET, CONGRESSIONAL SUBMITTAL at 28 (May 2021) (2022 UST Budget) <https://tinyurl.com/2022-UST-budget>. Meanwhile, the Justice Department has been relegated to filing a "Statement of Interest" regarding these liabilities in Administrator districts. See *In re Bestwall LLC*, No. 17-31795, Dkt. 1557 (Bankr. W.D.N.C. Dec. 28, 2020).

Bestwall followed *In re Kaiser Gypsum Co., Inc., In re*, in which the Justice Department attempted an active role. See Obj. to Debtors' Disclosure Stmt., No. 16-31602, Dkt. 1299 (Bankr. W.D.N.C. Nov. 6, 2018). On the issue of standing, the *Kaiser* Court found "interesting" that the government's arguments were the same as those made by U.S. Trustees in Trustee districts, although the "U.S. Trustee doesn't exist in this particular state." Hr'g Rec., No. 16-31602, Dkt. 1779 at 33:00-34:06 (Bankr. W.D.N.C. Sept. 5, 2019) (viewing "DOJ as primarily an unsecured creditor and not in a position to be arguing matters related to asbestos claims"). Moreover, the court observed that the "Bankruptcy Administrator has not made those objections." *Id*.

3. Against this background, it is unsurprising that creditor recoveries differ between systems. Of the funds generated from Chapter 7 cases in 1990-1991, unsecured creditors received 21% in Trustee districts, compared to 14% in Administrator districts. See *Bankruptcy Administration: Justification Lacking for Continuing Two Parallel Programs*, No. GAO/

GGD-92-133, at 8 (Sept. 1992) (GAO Report) <https://tinyurl.com/GAO-92-133>.

It is also unsurprising that debtors have been subjected to non-uniform fees between systems, which disparity directly affects the funds available for creditors in each system. Under the quarterly fee scheme before the Court, Chapter 11 debtors in Trustee districts have been charged as much as *733% more*[8] than their identically situated counterparts in Administrator districts. Compare 28 U.S.C. 1930(a)(6)(A) (2018) with 28 U.S.C. 1930(a)(6)(B) (2018) (imposing maximum fees of $30,000 and $250,000, respectively).

The non-uniform fee increase had rapid effects. The Trustee Program collected $214,533,000 in quarterly fees in 2018, more than double those collected in 2017 ($96,690,000), even as filing fee deposits fell. See 2022 UST Budget at 15. Quarterly fee collections continued to increase in 2019 ($256,621,000) and 2020 ($280,827,000). See *id*. The figures for "FY 2018 and beyond exclude the portion of chapter 11 quarterly fees deposited into the general fund of the Treasury as required by statute to fund additional bankruptcy judgeships," indicating actual collections were higher. *Id*. at table n.2; see Pub. L. No. 115-72, at § 1004(b), 131 Stat. 1232 (requiring 2% of fees to be deposited in the Treasury's general fund).

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[8] The calculation is as follows: $250,000 – $30,000 = $220,000, and $220,000/$30,000 equals approximately 7.33, for an increase of approximately 733%.

According to the government, the Trustee district fee increase, which easily doubled collections, was borne by "about 10 percent of chapter 11 cases." See 2022 UST Budget at 14, n.14. Moreover, approximately "35 cases were billed the maximum amount for each of the first four quarters after the fee increase" (*id.*), such that the potential increase of 733% was, for some debtors, a reality.

Notably, after the fee increase in Trustee districts, the Trustee Program attempted to intervene in *Kaiser*[9] and *Bestwall*.[10] Thus, the Trustee Program—which prides itself on being "self-funded" by debtors in Trustee districts—devotes resources to further its agenda in Administrator districts. See 2022 UST Budget at 28.

The actions of the Justice Department and Trustee Program in *Kaiser* and *Bestwall* suggest, if not outright acknowledge, that the Administrator Program is ill-equipped and/or unwilling to address substantive concerns raised in Trustee districts. The systemic distinctions appear to have led to a series of debtor-favorable decisions in the Western District of North Carolina, into which debtors now openly maneuver.[11]

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[9] See "Justice Department Files Statement of Interest in New Asbestos Trust Proposal," Press Release No. 18-1187 (Sept. 13, 2018) <https://tinyurl.com/Kaiser-Statement-of-Interest>.

[10] See "Justice Department Files Statement of Interest Urging Transparency in the Compensation of Asbestos Claims," Press Release No. 20-1395 (Dec. 28, 2020) <https://tinyurl.com/Bestwall-Statement-of-Interest>.

[11] See, *e.g.*, "J&J Renews Fight to Halt Baby Powder Suits Using Bankruptcy," Bloomberg (Nov. 4, 2021) <https://tinyurl.

B. The systemic non-uniformity has encouraged corporate debtors to engage in the forum shopping the Bankruptcy Clause was designed to prevent.

1. The central grant of uniform bankruptcy power was to allow the "central government to eradicate the opportunities for fraud and forum-shopping engendered by varying state insolvency . . . laws." *In re Penn Cent. Transp. Co*., 384 F. Supp. 895, 915 (Regional Rail Reorg.Ct. 1974) (citing *The Federalist No. 42*, at 308 (Law ed. 1961); Story, Joseph, *Commentaries on the Constitution*, § 1109 (1833)). And generally, debtors cannot freely file in either the Trustee or Administrator jurisdiction. Venue in bankruptcy cases is established under 28 U.S.C. 1408, with requirements based on domicile, residence, principal place of business or principal assets, or on pending affiliate cases.

2. However, there is an established pattern of debtors facing mass tort actions to look to the Western District of North Carolina for relief. "Presumably, the attraction to this judicial district stems from Judge Hodges' groundbreaking claims estimation decision in *Garlock*[12] and the injunctive relief provided in

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com/J-J-Renews-Fight> and "Johnson & Johnson's 'Texas-Two-Step' Sparks Outcry over US Bankruptcy Regime," Financial Times (Oct. 27, 2021) <https://tinyurl.com/J-J-Texas-Two-Step>.

[12] *In re Garlock Sealing Techs., LLC*, 504 B.R. 71 (Bankr. W.D.N.C. 2014).

Bestwall."[13] Findings of Fact and Conclusions of Law, *In re DBMP LLC*, No. 20-30080, 2021 Bankr. LEXIS 2194, at n.43 (Bankr. W.D.N.C. Aug. 10, 2021). In *DBMP*, the court detailed the process by which debtors maneuvered into the venue, commonly referred to as the "Texas Two-Step":

> [T]he Project Horizon plan was to isolate the asbestos liabilities in a single affiliated corporation and file it in chapter 11. That entity could then seek Section 524(g) injunctive relief shielding the CertainTeed Enterprise from Old CertainTeed's asbestos liabilities. This strategy had been previously employed in *Bestwall*, and it would thereafter be repeated in the *Aldri[ch]* and *Murray* bankruptcy cases[14] filed in this judicial district. In each of the four cases, the Debtor corporation was represented by the Jones Day law firm.
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> * * *
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> In each case, a successful corporate enterprise with substantial asbestos liabilities briefly reincorporated in Texas and then divided itself in two under the Texas Divisional Merger statutes. This led to two companies, one with limited assets and all of the old company's asbestos liabilities, the other with most of the enterprise assets, employees, and operations.

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[13] *In re Bestwall LLC*, 606 B.R. 243 (Bankr. W.D.N.C. 2019), *aff'd*, No. 3:20-CV-105-RJC, 2022 WL 68763 (W.D.N.C. Jan. 6, 2022).

[14] *In re Aldrich Pump LLC*, No. 20-30608 (Bankr. W.D.N.C.), and *In re Murray Boiler LLC*, No. 20-30609 (Bankr. W.D.N.C.).

> The stated purpose of these actions for each corporation was to permit the asbestos bearing successor company the "option" to file bankruptcy. In short order each of these companies did in fact file bankruptcy, and immediately sought to provide injunctive relief and the benefits of Section 524(g) to its non-filing sibling. In each case, under a Funding Agreement, the healthy twin agrees to fund a plan, conditioned on it receiving Section 524(g) relief.

Id. at *24, *42-43. Nevertheless, the Western District of North Carolina concluded that "controlling law and present realities require that the Preliminary Injunction be maintained," as continued litigation of asbestos claims would "almost surely end" the reorganization effort. *Id.* at *107.

3. Debtor requests for relief in the W.D.N.C. have reportedly tended to draw few objections or other impediments. Discussing a preliminary injunction motion in *Aldrich*, the representative for future asbestos claimants argued that the injunctive relief sought was the "same injunctive relief that has been granted in dozens of other asbestos bankruptcy cases, without objection from any party." No. 20-30608, Dkt. 525 at 2 & n.6 (Bankr. W.D.N.C. Jan. 22, 2021) (noting "the ACC [Official Committee of Asbestos Personal Injury Claimants], departing from standard practice, has objected to the injunctive relief," apparently due to debtor restructuring).

And, while a committee sought the dismissal or transfer of *Bestwall* (No. 17-31795, Dkt. 495), the Bankruptcy Administrator did not seek transfer in *Bestwall*, *DBMP*, or *Aldrich* and *Murray*. This practice changed after the court preliminarily questioned the *LTL* debtor's decision to file in North Carolina. See Hr'g Rec., No. 21-30589, Dkt. 177 at 15:00-18:55 (Bankr. W.D.N.C. Oct. 22, 2021) (noting the Texas Two-Step may be viewed as either a "brilliant strategy" or "manifestly unfair," but the court "can't decide that today").

The Bankruptcy Administrator took the court's cue and, the next business day, filed a motion to transfer (Dkt. 205, Oct. 25, 2021), which the court followed with a show cause order (Dkt. 208, Oct. 26, 2021). Soon thereafter, the court transferred the case. *LTL*, No. 21-30589, 2021 WL 5343945, at *6-7 (Bankr. W.D.N.C. Nov. 16, 2021) (concluding transfer was warranted "especially considering that the 'Texas Two Step' tactic is being employed by national corporations and impacts tens of thousands of present and future claimants across the country").

4. Setting aside the issue of the various committee and Administrator appointments by judges, any restraint exhibited by the Administrator may be due partly to its funding. See GAO Report at 6 (concluding that Trustee programs were on average 22% more expensive to operate than comparable Administrator programs). In this regard, debtors who filed for Chapter 11 relief in the W.D.N.C. before October 1, 2018, enjoyed a dramatically reduced quarterly fee schedule than identically situated debtors in Trustee districts.

To illustrate, the *Bestwall* debtor filed its voluntary Chapter 11 petition on November 2, 2017, having domiciled in North Carolina months before filing.[15] Its Monthly Status Reports reflect quarterly disbursements for 2018 and fees paid thereon, which are compared to fees payable by identically situated debtors in Trustee districts as follows:

Qtr	**Disbursements**[16]	**Fees Paid**[17]	**UST Comparison**[18]
1	$2,018,898.83	$9,750	$20,188.99
2	$6,838,124.46	$13,000	$68,381.24
3	$6,016,322.65	$13,000	$60,163.23
4	$8,497,174.41	$13,000	$84,971.74

Had this debtor filed in a Trustee district, its quarterly fees for 2018 would have been **$233,705.20** instead of **$48,750**.

Moreover, notwithstanding its disbursements of $1,012,122,064.27 for the fourth quarter of 2020,[19] the debtor paid only **$30,000** in quarterly fees[20] instead of the **$250,000** maximum fee to which it would have

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[15] Mem. Op., No. 17-31795, Dkt. 891 at 7 (Bankr. W.D.N.C. July 29, 2019).

[16] No. 17-31795, Dkt. 295, 359, 397, 420, 433, 474, 617, 643, 663, 712, 743, and 770 (Bankr. W.D.N.C.).

[17] No. 17-31795, Dkt. 420, 617, 712 and 783; see also 28 U.S.C. 1930(a)(6)(A) (2018).

[18] Calculated as 1% of quarterly disbursements or $250,000, whichever is less. See 28 U.S.C. 1930(a)(6)(B) (2018).

[19] No. 17-31795, Dkt. 1489, 1538, and 1611 (Bankr. W.D.N.C.).

[20] No. 17-31795, Dkt. 1642 (Bankr. W.D.N.C.).

been subjected in a Trustee district. See n.18. And, as of the first quarter of 2021, this debtor was still subject to the reduced fee schedule, paying a quarterly fee of **$13,000** instead of the **$66,655.27** which would have been imposed in a Trustee district.[21] As these fees are charged over the life of the case, such differences, without more, provide motivation to establish venue in Administrator districts.

To the tune of public outcry from divisional mergers, the Texas Two-Step has danced its way to Washington, D.C., where Congress is considering a number of reforms to limit forum gamification. See S. 2827, 117th Cong., 1st Sess., Sept. 23, 2021 (modifying venue requirements) and H.R. 4777, 117th Cong., 1st Sess., Nov. 3, 2021 (prohibiting divisive mergers). On February 8, 2022, the Senate Committee on the Judiciary held a hearing to address these issues, entitled "Abusing Chapter 11: Corporate Efforts to Side-Step Accountability Through Bankruptcy."[22]

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[21] Disbursements totaled $6,665,526.52 for the first quarter of 2021, but the debtor paid only $13,000 in quarterly fees in April 2021. See *Bestwall*, No. 17-31795, Dkt. 1642, 1684, 1779, and 1809 (Bankr. W.D.N.C.).

[22] See <https://tinyurl.com/Abusing-Chapter-11>. Amici do not present a position on divisive mergers, broad preliminary injunctions, or asbestos trusts in bankruptcy. Rather, Amici note circumstances that have led the same law firm repeatedly to maneuver Chapter 11 clients into the Western District of North Carolina, where the Bankruptcy Administrator has often been silent, while the Justice Department has attempted to raise substantive concerns.

II. CONGRESS RENDERED SYSTEMIC NON-UNIFORMITY THE DEFAULT.

A. Congress adopted the U.S. Trustee Program on the basis of policy.

Before the Trustee system was established, there was "particular concern" regarding the "operation of 'bankruptcy rings' among bankruptcy lawyers and the courts, within which judges appointed practitioners well known to them as trustees, set their compensation, and then ruled on disputes between their hand-picked candidates and parties to the bankruptcy." *In re Plaza de Diego Shopping Ctr., Inc.*, 911 F.2d 820, 828 & n.15 (1st Cir. 1990). "Congress decided to shift the power of appointment from judges to the U.S. Trustees" not only to relieve administrative burdens, but "more importantly . . . to avoid the possibility or appearance of a conflict of interest necessarily arising when a judge must decide matters litigated between a trustee of his own selection and other parties to the bankruptcy." *Id.* at 828 (citing H.R. Rep. No. 595, 95th Cong., 2d Sess. 88-99 (1978)) (note omitted).

Finding the U.S. Trustee pilot program generally successful, Congress permanently established the Trustee program in 1986[23] under the auspices of the Department of Justice. Congress also "amended the Bankruptcy Code to provide for the comprehensive role of the U.S. Trustees." *Plaza*, 911 F.2d at 827.

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[23] Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088 (1986) (1986 Act).

Among other divergences from prior law, the "U.S. trustee"—instead of "the court"—"shall appoint one disinterested person to serve as trustee" in a Chapter 11 case. *Id.* at 827-28. The 1986 Act "amends 11 U.S.C. 1104 to make it clear that the U.S. Trustee can seek the appointment of a trustee," and "[i]f the court orders the appointment to be made, *the U.S. Trustee makes the appointment*, subject to the court's approval." *Id*. at n.13 (quoting H.R. Rep. No. 764, 99th Cong., 2d Sess. 18 (1986), at 28) (emphasis added by court).

This "legislative history makes it abundantly clear that the amendment to 11 U.S.C. § 1104(c) was adopted for the express purpose of taking the power of appointment away from the court and giving it to the U.S. Trustee." *Id*. at 830 (holding that the lower court "exceeded its powers when it ordered the U.S. Trustee to nominate three candidates for trustee and later when it unilaterally appointed a trustee who was the nominee of one of the creditors").[24] The power shift stood in stark contrast to non-Trustee law.

B. Congress exempted Alabama and North Carolina from the U.S. Trustee Program to accommodate judges in those states.

However, the Trustee program was not established in every state because "lawmakers in Alabama and

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[24] The statute underlying this decision is presently codified at 11 U.S.C. 1104(d). See Pub. L. No. 103-394, § 211(a)(1), 108 Stat. 4106, 4125 (redesignating subsection 1104(c) as (d)).

North Carolina resisted." *Clinton Nurseries*, 998 F.3d at 69 (citation omitted). Districts in these states instead assigned oversight to a Bankruptcy Administrator program.[25]

Review by the GAO "could not find any justification for continuing two separate programs." *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>. Yet, "[b]ankruptcy judges in both states successfully . . . lobbied Congress, most particularly Senators Helms [NC] and Heflin [AL], to avoid being placed within the United States Trustee program." Schulman, Dan J., *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). These states "receiv[ed] a number of extensions."[26] *Clinton Nurseries*, 998 F.3d at 69 (citation omitted).

In 1997, the National Bankruptcy Review Commission[27] considered two proposals to incorporate

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[25] 1986 Act, § 302(d)(3)(I).

[26] See 1986 Act, § 302(d)(3)(A), (E), and Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 317(a), 104 Stat. 5089, 5115 (1990) (1990 Act) (providing a 10-year extension from October 1, 1992 until October 1, 2002).

[27] The NBRC was a nine-member commission established pursuant to the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106, and tasked with making recommendations regarding legislative or administrative actions affecting bankruptcy.

Administrator districts into the Trustee system.[28] Commissioner Jeffery Hartley[29] noted one proposal called for immediate conversion, and the other would recommend to Congress that the "statutory schedule providing for the incorporation of the Bankruptcy Administrator system into the U.S. Trustee system on October 1, 2002 should remain unchanged[.]" See NBRC Submittal, nn.2586 & 2587. Both proposals were rejected. See *id*.

Just a few years later, the deadline was not only changed, but eliminated altogether. The government has recently explained how Judge James Hancock (N.D.Ala.) and Judge Thomas Milton Moore (E.D.N.C.), among others in those states, expressed dislike of the Trustee system, and with the aid of Senator Heflin, were successful in remaining exempt. See U.S. Br., *Acadiana*, No. 21-1941, Dkt. 26 at 39 (Fed. Cir. Nov. 5, 2021). According to the government, Congress exempted these states "at the request of federal courts in Alabama and North Carolina." *Id.* at 22.

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[28] See Hartley, J. and Gose, J., *The Bankruptcy Administrator Program and the U.S. Trustee Program* (NBRC Submittal) <https://tinyurl.com/nbrc-submittal>.

[29] Hartley was the Campaign Coordinator for Senator Heflin in 1990. See *Jeffery J. Hartley*, HELMSING LEACH, ATTORNEYS AT LAW <https://tinyurl.com/jeffery-hartley>. While serving as law clerk to a bankruptcy judge in Alabama, he was appointed to the NBRC on Senator Heflin's recommendation. See *The Third Branch*, Vol. 27, No. 1, at 9 (1995) <https://tinyurl.com/the-third-branch>.

These states "were granted a permanent exemption[30] from the UST program in an unrelated law." *Clinton Nurseries*, 998 F.3d at 69 (citation omitted). It was "a North Carolina congressman" who "tucked" in the "permanent exemption." *In re Buffets, LLC*, 979 F.3d 366, 383 (5th Cir. 2020) (Clement, J., dissenting). Ironically, the Justice Department at the time recognized the uniformity issue, and further observed that "section 303 [of H.R. 833, eliminating the deadline] is not referenced in the table of contents." See H.R. Rep. No. 106-123, at 216 (1999) (Justice Dep't comments) <https://tinyurl.com/bankruptcy-reform-act>.

III. CONGRESS DELEGATED ITS AUTHORITY UNDER THE BANKRUPTCY CLAUSE TO CERTAIN JUDGES IN TWO STATES.

A. The U.S. Trustee and Bankruptcy Administrator systems are subject to the Bankruptcy Clause.

1. To suggest that the systems are "administrative machinery" not subject to any constitutional uniformity requirement is to disregard relevant legislation and jurisprudence. Trustee oversight of Title 11 bankruptcy cases, 28 U.S.C. 586, like the fee statute, 28 U.S.C. 1930, were adopted in a 1978 "act to establish a uniform Law on the Subject of Bankruptcies." See *In re MF Glob. Holdings Ltd.*, 615 B.R. 415, 446 (Bankr.

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[30] See Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 501 (section 501), 114 Stat. 2410, 2421-22 (2000) (2000 Act).

S.D.N.Y. 2020), and Pub. L. No. 95-598, 92 Stat. 2549 (1978) (1978 Act).

While the "subject of bankruptcies is incapable of final definition," it is not limited to, but rather "*nothing less* than 'the subject of the relations between . . . debtor and his creditors, extending to his and their relief.'" *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513-14, 58 S. Ct. 1025, 1032 (1938) (quoting *In re Reiman*, 20 Fed. Cas. 490, No. 11,673) (emphasis added). "This power 'extends to *all cases* where the law causes to be distributed, the property of the debtor among his creditors.'" *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 466, 102 S. Ct. 1169, 1175 (1982) (quoting *Hanover National Bank v. Moyses*, 186 U.S. 181, 186 (1902)) (emphasis added). The bankruptcy power also covers "all intermediate legislation, affecting substance and form, but tending to further . . . distribution and discharge." *Moyses*, 186 U.S. at 186, 22 S. Ct. at 860; *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602, 55 S. Ct. 854, 869, n.18 (1935) (citation omitted).

2. The conclusion that a law is "'on the subject of Bankruptcies' within the meaning of the Bankruptcy Clause" does "necessarily reject[]" the contention that the law was "enacted by Congress pursuant to its powers under the Necessary and Proper Clause, not pursuant the Bankruptcy Clause, because it does not alter a debtor's relationships to its creditors." See *MF Glob.*, 615 B.R. at 446 (internal citations omitted). Moreover, the Necessary and Proper Clause "is not itself a grant of power, but a *caveat* that the Congress possesses all

the means necessary to carry out the specifically granted 'foregoing' powers of § 8 'and all other Powers vested by this Constitution. . . .'" *Kinsella v. United States*, 361 U.S. 234, 247, 80 S. Ct. 297, 304 (1960) (emphasis in original). Its reach is incidental to an enumerated power; no "great substantive and independent power" may be "implied as incidental to other powers, or used as a means of executing them." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 411 (1819).

The Ninth Circuit has rejected the contention that the "Trustee program serves a purely administrative function and therefore is not constrained by the requirements of the Uniformity Clause,"[31] explaining:

> The statute clearly governs the relationship between creditor and debtor and, accordingly, falls within the scope of the Uniformity Clause. The U.S. Trustees have assumed the supervisory roles of the bankruptcy judges. Indeed, the statute entrusts U.S. Trustees with extensive discretion to appoint interim and successor trustees, monitor and supervise bankruptcy proceedings, examine debtors, advise the bankruptcy courts, and even, in some circumstances, to seek dismissal of cases. See, *e.g.*, 11 U.S.C. §§ 343, 701, 703, 704, 707 & 727; 28 U.S.C. § 586. Thus, the U.S. Trustees' activities have a direct effect upon the rights and liabilities of both debtors and creditors.

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[31] This decision terms U.S. Const. Art. I, § 8 as the "Uniformity Clause." See 38 F.3d at 1529.

St. Angelo v. Victoria Farms, Inc., 38 F.3d 1525, 1530 (9th Cir. 1994). The court struck down section 317(a) of the 1990 Act, which provided an extension to Alabama and North Carolina and, at that time, "guarantee[d] that creditors and debtors in the 48 other states are governed by a[] dissimilar, more costly bankruptcy system than members of the same groups in Alabama and North Carolina." *Id*. at 1533.[32]

3. The Bankruptcy Clause "contains an affirmative limitation or restriction upon Congress' power: bankruptcy laws must be uniform throughout the United States." *Gibbons*, 455 U.S. at 468, 102 S. Ct. at 1176. The requirement "is geographical, and not personal" uniformity. *Moyses*, 186 U.S. at 188, 22 S.Ct. at 860, 46 L.Ed. 1113. Certainly, the two non-contiguous states lack any naturally existing common problem that could justify differential treatment.

B. Congress unconstitutionally delegated power to bankruptcy judges in Alabama and North Carolina.

1. While correctly described as "extensions" and a "permanent exemption" unconstitutional in its own right, these characterizations fail to adequately capture the level of authority Congress delegated in

[32] This decision had no practical effect, and questions of judicial authority have plagued courts below. See *Buffets*, 979 F.3d at 384 (Clement, J., dissenting) (stating "[w]e have no greater authority than our colleagues on the Ninth Circuit to remake the bankruptcy system").

successive Acts. To fully appreciate the extreme delegation of power requires textual comparison:

> (3) JUDICIAL DISTRICTS FOR THE STATES OF ALABAMA AND NORTH CAROLINA.
>
> (A) Notwithstanding paragraphs (1) and (2), and any other provision of law, the amendments made by subtitle A of title II of this Act, and section 1930(a)(6) of title 28 of the United States Code (as added by section 117(4) of this Act), shall not –
>
> (i) become effective in or with respect to a judicial district specified in subparagraph (E) until, or
>
> (ii) apply to cases while pending in such district before,
>
> **such district elects to be included** in a bankruptcy region established in section 581(a) of title 28, United States Code, as amended by section 111(a) of this Act, ~~or October 1, 1992, October 1, 2002, whichever occurs first~~ except that the amendment to section 105(a) of title 11, United States Code, shall become effective as of the date of the enactment of the Federal Courts Study Committee Implementation Act of 1990.
>
> (B) Any election under subparagraph (A) shall be made upon a **majority vote of the chief judge of such district and each bankruptcy judge in such judicial district** in favor of such election.
>
> * * *

> (E) Subparagraph (A) applies to the following:
>
> (i) The judicial districts established for the State of Alabama.
>
> (ii) The judicial districts established for the State of North Carolina.

Pub. L. No. 99-554, Tit. III, § 302(d)(3) (1986); Pub. L. No. 101-650, Tit. III, § 317(a), (c) (1990) (extending the deadline until October 1, 2002); and Pub. L. No. 106-518, Tit. V, § 501 (2000) (striking the deadline) (emphasis added).

Having eliminated the deadline for North Carolina and Alabama to join the Trustee system, section 302(d)(3) of the 1986 Act renders non-uniformity the permanent default condition. Uniformity will require a majority vote of the chief judge and bankruptcy judges in each Administrator district. With this textual background, a number of problems are evident.

2. Each Administrator district has at least two bankruptcy judges,[33] and obviously one chief district judge. Thus, in every Administrator district, Article I bankruptcy judges have power to overrule a chief judge's vote to opt into the Trustee system.

Even assuming Congress *could* delegate to the Judiciary the power to decide whether to enter the

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[33] Northern District of Alabama (5), Middle District of Alabama (2), Southern District of Alabama (2), Western District of North Carolina (3), Middle District of North Carolina (3), and Eastern District of North Carolina (3).

Trustee system, Congress could not subjugate Article III judicial power to Article I bankruptcy judges in this manner. See, *e.g.*, *Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594 (2011); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S. Ct. 2858 (1982). As this Court has observed regarding bankruptcy court jurisdiction:

> A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely. . . . We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush.

Stern, 564 U.S. 462, 502-03, 131 S. Ct. 2594, 2620.

3. More broadly, section 501 constitutes an unlawful delegation of power under the Bankruptcy Clause. The section permanently renders application of a law meant to be of general applicability entirely dependent on the whim of (primarily) bankruptcy judges in each district.

The Constitution specifically vests in Congress the power "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." Art. I, § 8, Cl. 4. "The peculiar terms of the grant certainly deserve notice. Congress is not authorized merely to pass laws, the operation of which shall be uniform, but to *establish* uniform laws on the subject throughout the United States." *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193-94 (1819) (emphasis added).

"Alexander Hamilton stated that the federal government had 'exclusive jurisdiction' where the Constitution granted Congress the power to make uniform laws." *In re Hood*, 319 F.3d 755, 764 (6th Cir. 2003). Such power "'must necessarily be exclusive; because if each State had power to prescribe a DISTINCT RULE, there could not be a UNIFORM RULE.'" *Id.* (quoting *The Federalist No. 32*, at 155 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001)). The "justification for the grant of exclusivity was not a mere desire to have one system, but a system that rose above individual states' interests." *Id.* "As Joseph Story noted, there were fears that each state would frame a bankruptcy system that 'best suits its own local interests, and pursuits' or that was marked 'by undue domestic preferences and favours.'" *Id.* (citing Joseph Story, *Commentaries on the Constitution* §§ 1102, 1104 (1833), in *The Founders' Constitution* (Philip B. Kurland & Ralph Lerner eds., 1987)). Clearly, the Bankruptcy Administrator system owes its existence to an undue domestic preference of and favor sought by the bankruptcy bench and bar in Alabama and North Carolina.

Courts have found non-exclusive or concurrent authority in areas where Congress has not already acted (*Sturges*, *supra*, recognizing that Congress had not exercised its power to enact uniform bankruptcy laws), and in the area of state exemptions. See 11 U.S.C. 522(b)(2); see also *Sticka v. Applebaum*, 422 B.R. 684, 688-89 (B.A.P. 9th Cir. 2009) ("Congress has not occupied the field of bankruptcy regulation to the point of

preempting state exemption statutes"). With respect to the Judiciary:[34]

> [This Court's] approach to other nonadjudicatory activities that Congress has vested either in federal courts or in auxiliary bodies within the Judicial Branch has been identical to [its] approach to judicial rulemaking: consistent with the separation of powers, Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary.

Mistretta v. U.S., 488 U.S. 361, 387-88, 109 S. Ct. 647, 663 (1989). In *Mistretta*, for example, this Court concluded there is "no separation-of powers impediment to the placement of the Sentencing Commission within the Judicial Branch," because the "sentencing function long has been a peculiarly shared responsibility among the Branches of Government and has never been thought of as the exclusive constitutional province of any one Branch." *Id*., 488 U.S. at 390, 109 S.Ct. at 664

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[34] Bankruptcy courts are creatures of Article I in which Congress vested "'essential attributes' of the judicial power of the United States." *N. Pipeline Constr. Co. v. Marathon Pipe Line Co*., 458 U.S. 50, 84-85, 102 S. Ct. 2858, 2878 (1982). The Bankruptcy Amendments and Federal Judgeship Act of 1984 addressed jurisdictional concerns, and in current practice, bankruptcy courts function in a manner largely indistinguishable from Article III courts. "Modern bankruptcy courts . . . adjudicate a far broader array of disputes than their earliest historical counterparts." *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 717, 135 S. Ct. 1932, 1967 (2015) (Thomas, J., dissenting).

(citation omitted). Moreover, such placement did not "increase[] the Branch's authority." *Id.*, 488 U.S. at 395, 109 S. Ct. at 667.

Conversely here, it is well-recognized that Congress has plenary power to enact uniform bankruptcy laws. Having adopted the Trustee system in forty-eight states, Congress, in section 501, ceded the balance of its authority to a combination of Article I and Article III judges in only two states. Effectively, Congress authorized "delegates to consider and vote . . . in [its] place." *Id.*, 488 U.S. at 425, 109 S. Ct. at 682 (citations omitted) (Scalia, J., dissenting). For obvious reasons, no Administrator district has voted to join the Trustee system.

On the issue of separation of powers, Justice Gorsuch recently voiced particularly salient concerns:

> The framers understood, too, that it would frustrate "the system of government ordained by the Constitution" if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals. Through the Constitution, after all, the people had vested the power to prescribe rules limiting their liberties in Congress alone. No one, not even Congress, had the right to alter that arrangement. As Chief Justice Marshall explained, Congress may not "delegate . . . powers which are strictly and exclusively legislative."

Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (multiple citations omitted) (Gorsuch, J., dissenting).

Section 501 fails to meet any criterion for permissible delegation. It neither "authorize[s] another branch to 'fill up the details,'" nor makes its application "depend on executive fact-finding." See *id.* at 2136-37. Nor does the "Constitution separately vest[]" the authority conferred, such that the discretion is already within the scope of judicial power. See *id*. Rather, it is wholly undisputed that judicial districts in the other 48 states have no such authority.

To the extent the Court finds the "intelligible principle" doctrine potentially applicable, Congress did not supply any "intelligible principle to guide the delegee's use of discretion." Cf. *id.*, 139 S. Ct. at 2123. The delegation of power is, quite simply, "do what a majority want in each district, if and when you ever want."

"It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge." *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 687, 100 S. Ct. 2844, 2887 (1980) (Rehnquist, J., concurring). The textual comparison between Acts, without more, reveals that section 501 "sounds all the alarms the founders left for us." See *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting).[35]

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[35] Notably, 28 U.S.C. 581, regarding "United States trustees," suggests that Alabama and North Carolina *are* in the Trustee system. See 28 U.S.C. 581(a)(4), (21). Only the notes to the statute indicate otherwise.

4. In addition to the concern that states would frame their own bankruptcy laws and systems, the uniformity condition has been attributed to a desire to eliminate private laws of bankruptcy. The latter concern was expressed by Justice Rehnquist in *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 102 S. Ct. 1169 (1982). *Gibbons* struck down an act which "[b]y its terms . . . applie[d] to only one regional bankrupt railroad." 455 U.S. at 470, 102 S. Ct. at 1177. In so ruling, the Court noted that the "uniformity requirement was drafted in order to prohibit Congress from enacting private bankruptcy laws." 455 U.S. at 472, 102 S. Ct. at 1178. While section 501 does not identify an individual debtor, it was passed at the behest of federal courts in two states for the sole purpose of preserving their power, and is, in a sense, a "private bankruptcy law."

CONCLUSION

Piling one constitutional infirmity on top of another, Congress not only violated the Bankruptcy Clause, but also improperly delegated its authority thereunder—all in an unprecedented attempt to appease the bankruptcy bench and bar in two states. As the systems espouse markedly distinct approaches and power differentials, it was just a matter of time before systemic differences could no longer be ignored. And, with bankruptcy judges in both systems recognizing the distinctions as affecting the cases before them, that time has now come.

For the foregoing reasons, the Court should reverse the Fourth Circuit's judgment and order refund of the non-uniform quarterly fees.

Respectfully submitted,

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