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 FOR *AMICUS CURIAE* MF GLOBAL HOLDINGS LTD., AS PLAN ADMINISTRATOR, IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae MF Global Holdings Ltd. is the Plan Administrator ("MF Global") in the jointly administered chapter 11 cases of MF Global Holdings Ltd. and certain affiliates under a Plan of Liquidation confirmed in April 2013. *See* ECF No. 1382, *In re MF Glob. Holdings Ltd.*, 615 B.R. 415 (Bankr. S.D.N.Y. 2020) (No. 11-15059-MG). Like Petitioner, MF Global is winding down its assets under a plan confirmed years before the 2017 Act was passed and was subjected to a substantially higher quarterly fee regime under the 2017 Act than if its cases were pending in a BA district.[2] Since 2018, MF Global has incurred over $1 million more in quarterly fees than a similarly situated debtor in a judicial district where the increased fees did not apply.

MF Global, like Petitioner, has also challenged the application of the 2017 Act's quarterly fee regime to its chapter 11 case. MF Global has raised the same argument presented here, that the 2017 Act violates the uniformity requirement of the Bankruptcy Clause. In addition, MF Global has also asserted several other arguments against application of the 2017 Act, including that (i) both as a matter of statutory interpretation and of core constitutional principles, the increased fee schedule imposed by the 2017 Act should not apply retroactively to debtors like MF

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in any part, and no person or entity other than *amicus* or *amicus*'s counsel made a monetary contribution to fund its preparation or submission.

[2] Capitalized terms not defined herein have the meaning set forth in the Brief for the Petitioner ("Petitioner's Brief").

Global whose plans were confirmed before its enactment, and (ii) that the 2017 Act amounts to an excessive user fee in violation of the Takings Clause because it requires a tiny fraction of chapter 11 debtors to pay for substantially all of the budget of the UST program.

MF Global's challenge to the 2017 Act is currently pending in the Bankruptcy Court for the Southern District of New York, having been remanded to that Court by the Second Circuit following the favorable decision in *In re Clinton Nurseries, Inc.*, 998 F.3d 56 (2d Cir. 2021), *cert. pending sub nom Harrington v. Clinton Nurseries, Inc.*, No. 21-1123 (U.S. Feb. 14, 2022).[3] *See In re MF Glob. Holdings Ltd.*, 615 B.R. 415 (Bankr. S.D.N.Y. 2020), *vacated and remanded*, ECF No. 100, No. 20-3863 (2d Cir. Sept. 23, 2020). If this Court reverses the Court of Appeals' decision in this case, MF Global and other debtors similarly situated to Petitioner will also be relieved of the obligation to pay unconstitutionally higher fees than debtors in BA districts. Alternatively, however, if the Court upholds the 2017 Act under the Bankruptcy Clause, and declines to decide whether the statute was properly applied to debtors with pending cases, those challenges and appeals will still need to be adjudicated and may also eventually reach this Court. *See, e.g.*, Petitioner's Br. at 11 n.4.

Accordingly, MF Global submits this *amicus curiae* brief in support of Petitioner and urges the Court to reverse the decision of the Court of Appeals.

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[3] MF Global also filed an *amicus curiae* brief in *Clinton Nurseries*. *See* 998 F.3d 56 (2d Cir. 2021) (No. 20-1209), ECF No. 52.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns the applicability and constitutionality of the 2017 amendments to 28 U.S.C. § 1930(a)(6), passed as part of the Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, § 1001, § 1004, 131 Stat. 1224, 1229, 1232 (the "2017 Act"). The 2017 Act dramatically increased the fees payable by chapter 11 debtors in some, but not all, federal judicial districts. The *Siegel* petition presents the question whether the 2017 Act violates the Bankruptcy Clause of the Constitution. For all the reasons stated forcefully in Petitioner's Brief and the Second Circuit's decision in *Clinton Nurseries*, MF Global agrees that the 2017 Act unquestionably violated the Bankruptcy Clause's requirement that bankruptcy laws be geographically uniform.

Yet under this Court's jurisprudence, before considering this constitutional question, the Court should first decide the predicate question whether, as a matter of statutory interpretation, the 2017 Act even applies to debtors like Petitioner and MF Global, whose cases were pending at the time of the 2017 Act's enactment.

Applying the Court's longstanding presumption against retroactivity pursuant to the test articulated in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the 2017 Act should not be read to apply retroactively to debtors like Petitioner and MF Global. First, Congress did not "expressly prescribe[]" that the 2017 Act applies to pending cases. *Id.* at 280. The 2017 Act itself is silent about whether it applies to pending cases. And textual indications from other aspects of

the 2017 Act, as well as prior and more recent amendments to the quarterly fee statute, show that Congress knew how to make the 2017 Act expressly retroactive when it wanted to do so. Second, the law "operates retroactively" by significantly increasing the costs associated with pending debtors' decisions made long before to file a chapter 11 case and seek confirmation of their chapter 11 plans. Because statutes are presumed not to have a retroactive effect unless Congress expressly requires it, the 2017 Act should not be interpreted to apply to debtors like Petitioner and MF Global, and the Court of Appeals' decision should be reversed.

ARGUMENT

I. THE 2017 ACT DOES NOT APPLY RETROACTIVELY TO PETITIONER AND MF GLOBAL

A. The Court Should First Ascertain, as a Matter of Statutory Interpretation, Whether the 2017 Act Applies to Petitioner and MF Global

It is well-established that "where an otherwise acceptable construction of a statute would raise serious constitutional problems," the Court will "construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also I.N.S. v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (same). Thus, "[w]hen 'a serious doubt' is raised about the constitutionality of an act of Congress, 'it is a cardinal principle that this Court will first ascertain whether a construction of the statute is

fairly possible by which the question may be avoided.'" *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

This case, of course, raises such a "serious" constitutional question: Whether the 2017 Act imposed unconstitutionally non-uniform fees in contravention of the Bankruptcy Clause. Consequently, before analyzing that issue, the Court should first consider the predicate question whether there is a plausible interpretation of the 2017 Act by which the constitutional question could be avoided. *See id.* As explained below, such an interpretation is not only possible, it is *compelled* by this Court's longstanding presumption against retroactive application of new laws. And, indeed, such an interpretation is consistent with the decision reached by the Judicial Conference not to apply the 2017 Act's new fee schedule retroactively to already pending cases, but instead only prospectively to new cases filed after enactment.

B. Courts Presume That Statutes Apply Prospectively Only

It is a fundamental canon of statutory interpretation that "[r]etroactivity is not favored in the law . . . [and] congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265.

Because "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly," this bedrock principle of American jurisprudence works to ensure that newly enacted laws will apply only prospectively absent a clear legislative directive for retroactive application. *Id.*; *see also E. Enters. v. Apfel*, 524 U.S. 498, 533 (1998) ("Retroactive legislation . . . presents problems of unfairness . . . because it can deprive citizens of legitimate expectations and upset settled transactions." (quoting *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992))).

This Court has articulated a test for determining whether a law applies retroactively: "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so . . . there is no need to resort to judicial default rules." *Landgraf*, 511 U.S. at 280. If Congress has not expressly prescribed the statute's reach, the Court must determine whether the law actually operates retroactively and, if it does, must apply the presumption against retroactivity. *Id.* at 269–70. Finally, no statute may be given an unconstitutional retroactive effect. *See id.* at 267.

When conducting this inquiry, the Court engages in a "process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 270. In this process, "familiar considerations of fair notice, reasonable

reliance, and settled expectations offer sound guidance." *Id*.

Applying this analysis here, the 2017 Act fails both parts of the *Landgraf* test: it lacks a clear statement of retroactive intent by Congress, and it operates retroactively when applied to Petitioner and MF Global. Moreover, given the magnitude of the change, the 2017 Act has had a significant, adverse impact on all debtors, like Petitioner and MF Global, who had negotiated and confirmed plans of reorganization prior to its enactment. Therefore, this Court should find that the 2017 Act does not apply to cases pending at the time of its enactment, and certainly not to cases with confirmed plans.

C. The 2017 Act Contains No Clear Statement That It Should Apply Retroactively.

"Congress must speak clearly when it wants new rules to govern pending cases." *Martin v. Hadix*, 527 U.S. 343, 372 (1999) (Ginsburg, J., concurring in part and dissenting in part). Ambiguity in statutory language is not enough to find retroactivity. Rather, because "the only 'presumption' mentioned in [*Landgraf*] is a general presumption *against* retroactivity," *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 950 (1997), in order to make the 2017 Act retroactive, Congress must have used "statutory language that was so clear that it could sustain only one interpretation." *Lindh v. Murphy*, 521 U.S. 320, 328 n.4 (1997).

1. The 2017 Act's language does not meet that heightened threshold. Rather than expressly making the new fee regime applicable to pending cases, the 2017 Act simply stated that it applied to "quarterly

fees payable . . . for disbursements made in any calendar quarter that begins on or after the date of enactment of this Act." Petitioner's Br., App. at 2a. But as this Court recognized in *Landgraf*, "[a] statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *Landgraf*, 511 U.S. at 257.

The 2017 Act is simply silent about its application to cases *pending* at the time of its enactment. Indeed, the 2017 Act's silence is striking when compared to other provisions of the 2017 Bankruptcy Judgeship Act, earlier amendments to section 1930(a)(6), and even the 2021 Act's new fee schedule, all of which contain *express* statements applying the changes to pending cases.

For example, in the section of the 2017 Bankruptcy Judgeship Act *immediately following* the section enacting the 2017 Act, Congress clarified the rules applicable to the discharge of certain governmental claims in chapter 12 cases. *See* Pub. L. No. 115-72, § 1005, 131 Stat. at 1232–34. In that section, Congress expressly identified the cases in which the amendments would apply: "The amendments made by this section shall apply to—(1) any bankruptcy case—(A) that is pending on the date of enactment of this Act; (B) in which the plan under chapter 12 of title 11, United States Code, has not been confirmed on the date of enactment of this Act; and (C) relating to which an order of discharge under section 1228 of title 11, United States Code, has not been entered." *Id.*

Similarly, when Congress extended Section 1930(a)(6) back in 1996, it provided that the

amendment would apply to pending cases. Before 1996, Section 1930(a)(6) imposed fees only until a plan was confirmed. *See St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1528 n.2 (9th Cir. 1994). In January 1996, Congress enacted the Balanced Budget Down Payment Act, which amended Section 1930(a)(6) to impose fees "until the case is converted or dismissed." *See USA Sales, Inc. v. Off. of U.S. Tr.*, 532 F. Supp. 3d 921, 935 (C.D. Cal. 2021), *appeal pending*, No. 21-55643 (9th Cir.). Courts reached different conclusions about whether the new fees were meant to apply to cases that were still pending but in which plans had been confirmed. *See id.* Congress responded by enacting the Omnibus Consolidated Appropriations Act in September 1996, which expressly made the 1996 amendment applicable to debtors whose plans were confirmed before the amendment's effective date. *Id*. Section 109(d) of that Act reads: "Section 101(a) of Public Law 104-91, as amended by section 211 of Public Law 104-99, is further amended by inserting ': Provided further, That, notwithstanding any other provision of law, the fees under 28 U.S.C. [§] 1930(a)(6) shall accrue and be payable from and after January 27, 1996, in all cases (*including, without limitation, any cases pending as of that date*), regardless of confirmation status of their plans' after 'enacted into law'." Pub. L. No. 104-208, 110 Stat. 3009 (1996) (emphasis added).

Finally, even the 2021 Act (which further amended 28 U.S.C. § 1930(a)(6)) itself contains a specific provision making its revised fee schedule applicable to cases pending at the time of its enactment: "The amendments made by subsection (d) shall apply to—(i) any case pending under chapter 11 of title 11,

United States Code, on or after the date of enactment of this Act." *See* Petitioner's Br., App. at 9a. Moreover, although Congress expressly addressed the applicability of the *2021 revised fee schedule* to pending cases, despite presumably being aware of the challenges to the 2017 Act's retroactivity and its prospective-only application in BA districts, Congress said nothing in the 2021 Act to require application of the *2017 fee schedule* to all cases pending at its enactment. *See* Petitioner's Br. at 32.

This Court "do[es] not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and [the Court's] reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. I.C.E.*, 543 U.S. 335, 341 (2005); *see also Martin*, 527 U.S. at 355 (comparing effective retroactive language with ineffective language). To the contrary, the Court assumes "'Congress acts intentionally and purposely' when it 'includes particular language in one section of a statute but omits it in another.'" *City of Chicago v. Env't Def. Fund*, 511 U.S. 328, 338 (1994) (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). The provisions applicable to chapter 12 cases in the 2017 Act, the prior amendments to section 1930(a)(6), and the 2021 Act itself all show that Congress knows how to be clear when it wants to make bankruptcy laws—and UST fees in particular—retroactively applicable to pending cases. No such express language appears in the 2017 Act.

2. In MF Global's case and in the Courts of Appeals that have considered whether the 2017 Amendment applies to pending cases, the

Government has sought to overcome the presumption against retroactivity by citing an estimate from the Congressional Budget Office ("CBO") of the 2017 Act's budgetary effect. As an initial matter, however, relying on an obscure reference in a CBO report prepared for an unrelated purpose to supplant the presumption against retroactivity does not accomplish the purpose of the presumption. Requiring *Congress* to "make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U.S. at 268. To the extent legislative history can *ever* reflect such "clear intention"—and there is significant doubt that it can[4]—the legislative history must, at a minimum "plausibly be read as reflecting [a] *general agreement*" in Congress before it will satisfy *Landgraf*'s express statement rule. *Id.* at 263 (emphasis added).

Second, even if legislative history could override the presumption against retroactivity and the absence of an express retroactivity provision like those included in related contexts, the CBO estimate is particularly ill-suited for that task. It is a six-page document analyzing whether the 2017 Act's creation of 18 new permanent bankruptcy judgeships would be offset by revenues generated from the quarterly fee increase.

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[4] *See Landgraf*, 511 U.S. at 287–88 (Scalia, J., concurring in the judgments) ("If it is a 'clear statement' we are seeking, surely it is not enough to insist that the statement can 'plausibly be read as reflecting general agreement'; the statement must clearly reflect general agreement. No legislative history can do that, of course, but only the text of the statute itself. That has been the meaning of the 'clear statement' retroactivity rule from the earliest times.").

In the midst of that report, the CBO twice mentions that it *assumed* the quarterly fee increase would apply to "ongoing Chapter 11 bankruptcy cases." CBO Cost Estimate, *H.R. 2266: Bankruptcy Judgeship Act of 2017* (May 18, 2017) (reproduced at C.A. App. 280–85). The CBO did not explain why it made that assumption. Accordingly the CBO estimate is hardly sufficient to override *Landgraf*'s presumption against application of new statutes to pending cases.

Aside from statutory text, "the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76 (1984); *see also Eldred v. Ashcroft*, 537 U.S. 186, 209–10 n.16 (2003); *Thornburg v. Gingles*, 478 U.S. 30, 44 n.7 (1986). Here, however, the House Judiciary Committee Report accompanying the 2017 Act contains nothing even suggesting that the quarterly fee increase would apply to pending cases. It does confirm, though, that the CBO estimate relied on by the Government "*was not available at the time of filing of this report*." H.R. Rep. No. 115-130, at 9 (2017) (emphasis added). And while the House Judiciary Committee Report includes an informal estimate of the budget impact of the 2017 Act, it does not mention *any* of the assumptions the CBO later used.

There is thus simply no evidence that anyone in Congress who voted for the 2017 Act—passed as part of a large appropriations bill at the behest of the

UST[5]—ever contemplated whether it was appropriate to apply it retroactively to pending cases, much less that the issue was carefully considered by the majority of Congress enacting it. *Landgraf*, 511 U.S. at 268. There are no floor debates discussing retroactivity; no House or Senate committee reports stating that the fee increase would apply to pending cases; and no evidence that anyone in Congress ever even read the post-Committee CBO estimate or agreed with its assumptions.[6] Passing references in a CBO document cannot demonstrate the "general agreement" necessary to show clear congressional intent to make a law retroactive. *Id.* at 262.

3. The Government has also sought to distinguish Congress's decision to make the 1996 amendments to section 1930(a)(6) expressly applicable to pending

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[5] *See* U.S. Department of Justice, *UST Program FY 2022 Performance Budget Congressional Submission* 14 (May 2021) ("To ensure the Program could continue to offset its appropriation, . . . [a] modified version of the USTP's proposal to adjust quarterly fees for the largest chapter 11 debtors was enacted in October 2017 with the passage of the Bankruptcy Judgeship Act of 2017."), *available at* https://www.justice.gov/jmd/page/file/1398586/download.

[6] While the 2017 Act was passed with no study by Congress about the impact on debtors of increased fees, it should be noted that in 1993, Congress directed the Judicial Conference to study whether Congress should adopt "graduated" filing fees in chapter 11 and chapter 13 cases "based on [the value of] assets, liabilities, or both" and report back to Congress by March 31, 1998. *See* Pub. L. No. 103-121, § 111, 107 Stat. 1153, 1165 (1993). The Judicial Conference's report to Congress rejected the concept, and observed that "[a] graduated fee system could invite constitutional challenges on "equal protection" or "taking" grounds." *See Study: Filing Fees Should Remain Fixed*, 32 Bankr. Ct. Dec. Weekly News & Comments 5 (Apr. 14, 1998).

cases, without doing the same for the 2017 Act. Pointing to a 2007 revision to the quarterly fee schedule that was not made expressly applicable to pending cases but did not lead to retroactivity challenges, one court adopted the UST's position that this reflects a "widespread understanding" that "fee increases apply to postenactment disbursements in pending cases." *See Hobbs v. Buffets, L.L.C. (In re Buffets, L.L.C.)*, 979 F.3d 366, 374–75 (5th Cir. 2020). This is a major overgeneralization. The 2007 changes were *de minimis* adjustments to the quarterly fee schedule, which merely raised the minimum fees by amounts ranging from $125 to $20,000 per quarter and changed the cap from $10,000 reached at disbursements of $5,000,000, to $30,000 reached at disbursements of $30,000,000. *Compare* 28 U.S.C. § 1930(a)(6) (2006) *with* 28 U.S.C. § 1930(a)(6) (2008).

These 2007 amendment changes are nothing like the 2017 Act, which fundamentally altered the structure of the quarterly fee regime, and caused even the Judicial Conference to defer applying the new regime to cases in BA districts (and to do so only prospectively in newly filed cases). *See* Petitioner's Br. at 9. Indeed, the 2017 Act was the first significant change in the quarterly fee regime since the 1996 amendments (which, for the first time, required payment of quarterly fees after confirmation). Unsurprisingly, regime changes like those in 1996 and 2017 raise retroactivity questions that are not raised when *de minimis* changes are made to the fee schedule.

4. At bottom, to override the presumption against retroactivity, it is not enough for this Court to think Congress most likely intended to apply the new fee

regime to pending cases, or that if Congress had thought about it, it would have done so. The presumption against retroactivity requires the Court to assume Congress *did not* intend to apply the law retroactively unless it "expressly prescribed" a retroactive reach. *Landgraf*, 511 U.S. at 280. "Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate." *Id.* at 273. Because the UST cannot show that the 2017 Act contains the requisite unambiguous instruction to apply the new fee regime to pending cases, the Court should hold that it does not apply to Petitioner, MF Global, and other debtors with cases pending at its enactment.

D. The 2017 Act Operates Retroactively When Applied To Petitioner and MF Global

The second step under *Landgraf* requires the Court to consider whether the law has a retroactive effect. A law has retroactive effect if it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. "The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id*. at 270.

In *Vartelas v. Holder*, 566 U.S. 257 (2012), this Court considered whether the presumption against

retroactivity applied to certain changes in immigration laws. Vartelas pleaded guilty in 1994 to conspiring to make or possess counterfeit checks. *Id.* at 264. At the time of Vartelas' guilty plea, lawful permanent residents who had committed similar crimes could take brief trips abroad without having to reapply for re-admission upon their return. *Id.* at 263. In 1996 Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act, 110 Stat. 3009–546, which, among other things, required lawful permanent residents who had committed a crime to reapply for admission and face potential exclusion anytime they sought to reenter the country. *Vartelas*, 566 U.S. at 263. When, after a brief trip abroad, Vartelas was denied reentry, he challenged his exclusion on the ground that IIRIRA should not have been applied retroactively to him. Among other things, the Government argued that the law did not have retroactive effect because it applied only to *future* entries to the country. *Id.* at 269–70. The Supreme Court squarely and unequivocally rejected this argument, calling it "disingenuous." It held that although "Vartelas' return to the United States *occasioned* his treatment as a new entrant," the "*reason* for the 'new disability' imposed on him" was his pre-IIRIRA guilty plea. *Id.* (emphasis added). The law therefore attached new disabilities (the need to reapply for admission) to past transactions (Vartelas' guilty plea) and thus operated retroactively.

Here, as in *Vartelas*, the 2017 Act "attaches new legal consequences" (dramatically increased fees) "to events completed before its enactment" (debtors' chapter 11 petitions and confirmation of liquidation plans). *Id.* at 273. Importantly, after commencing a

chapter 11 case, quarterly fees must be paid until the case is converted or dismissed. *E.g.*, Petitioner's Br. at 10. As in *Vartelas*, Petitioner and MF Global therefore have no practical ability at this point to avoid the dramatic increase in quarterly fees. Indeed, because both Petitioner's and MF Global's plans are liquidating plans, they *must* distribute all estate property and pay administrative expenses; they have no discretion to stop making disbursements to avoid quarterly fees.[7] In contrast, debtors who are aware of the new fee regime before they file for bankruptcy or pursue confirmation of a plan can take actions to limit their exposure, such declining to file for chapter 11, consolidating debtors, or pursuing similar strategies. Because applying the 2017 Act would thus "increase a party's liability for past conduct," it operates retroactively. *Landgraf*, 511 U.S. at 280; *see generally In re Burk Dev. Co.*, 205 B.R. 778, 796–98 (Bankr. M.D. La. 1997) (prior amendment to Section 1930(a)(6) operated retroactively when applied to chapter 11 cases with confirmed plans).

Moreover, "the nature and extent of the change in the law" caused by the 2017 Act is extreme, violating the "fair notice" concern considered when determining whether a statute applies retroactively. *See Landgraf*, 511 U.S. at 270. When Petitioner's and MF Global's cases were commenced and their liquidating plans

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[7] The term "disbursements" does not necessarily bear any relationship to a debtor's cash available to make the UST payments, since it simply covers all outgoing payments by an estate, from paydowns on revolving lines of credit to employee payroll to professional fees to creditor distributions. *See, e.g.*, *Cranberry Growers Coop. v. Layng*, 930 F.3d 844, 850 (7th Cir. 2019) (disbursements to be construed broadly).

were approved, quarterly fees were capped at $30,000 per debtor, and that cap could be reached only when disbursements reached $30,000,000 in a single quarter for a single debtor. The 2017 Act, however, substantially increased those fees to over 800% of their previous amount. The pre-2017 Act cap of $30,000 per debtor is now met any time disbursements reach $3 million, and the new cap of $250,000 is triggered when disbursements reach $25 million in a quarter. In fact, MF Global has paid on behalf of its affiliated debtors' estates more to the UST in quarterly fees during the past three years than it paid in the six years between its 2011 bankruptcy filing and the 2017 Act.[8]

Moreover, the broader statutory context of section 1930(a)(6) confirms the "activity Congress targeted" through the quarterly fees is the debtor's use of the bankruptcy system. *Vartelas*, 566 U.S. at 269–70. The introductory paragraph to section 1930(a) provides that "[t]he parties *commencing a case* under title 11 shall pay to the clerk of the district court or the clerk of the bankruptcy court, . . . the following filing fees." 28 U.S.C. § 1930(a) (emphasis added). This language makes clear the *reason* a party must pay any of the fees imposed by subsection (a)—including the quarterly fees of subsection (a)(6)—is that this party has "commenc[ed] a [bankruptcy] case"

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[8] Under the prior fee schedule the three debtors with estates still being administered under MF Global's Plan paid $758,925 in aggregate UST fees from Q2-2013 through Q4-2017, whereas those three debtors' aggregate fees for just two quarters—Q1-2018 and Q4-2019—were $800,159 under the 2017 Act's new fee schedule. *See* Appellants' Br. at 18, *In re MF Glob. Holdings Ltd.*, No. 20-3863 (2d Cir. Feb. 11, 2021), ECF No. 35.

and made use of the bankruptcy system. That is, but for the commencement of a chapter 11 case, a business will have no liability for quarterly fees based on disbursements made in the ordinary course of business. Like in *Vartelas*, although future disbursements are the *occasion* for the increased fee regime to be applied to debtors like MF Global, the *reason* they are subject to that regime at all is their past decision to file for bankruptcy and the terms of their confirmed plans. A retroactive application of the 2017 Act would thus impose enormously greater consequences for these debtors and their creditors than could have been anticipated when their cases were commenced and their plans were confirmed.

* * *

In sum, the 2017 Act operates retroactively by significantly raising the costs associated with the chapter 11 plans of Petitioner and MF Global, long after their bankruptcy cases were filed and their plans were confirmed. However, because the 2017 Act does not expressly state that it was intended to apply retroactively to pending cases, the presumption against retroactivity compels the conclusion that Congress did not intend this result. The Court should therefore hold that, as a matter of statutory interpretation, the 2017 Act does not apply to debtors like Petitioner and MF Global, whose cases were pending when Congress enacted the 2017 Act.

CONCLUSION

For the foregoing reasons, the Court should reverse.

March 3, 2022

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