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* JOHN Q. HAMMONS HOTELS & RESORTS, ET AL. IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici curiae[1] are comprised of seventy-six entities operating as or associated with John Q. Hammons Hotels & Resorts.[2] Amici paid more than $2.5 million in excess quarterly fees to the U.S. Trustee in connection with chapter 11 bankruptcy cases in the United States Bankruptcy Court for the District of Kansas that they would not have been required to pay as chapter 11 debtors in North Carolina or Alabama. Amici paid these excess fees as a result of the same statute at issue in the pending case.

Amici filed a motion in the bankruptcy court seeking recovery of these excess fees based on the argument that the statute at issue and the system that permits it are unconstitutionally non-uniform. After the bankruptcy court upheld the statute, Amici appealed the decision to the Tenth Circuit Court of Appeals. The court of appeals held that the statute was unconstitutionally non-uniform, reversing the bankruptcy court and remanding the case directing a refund of the excess amounts of quarterly fees paid by

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[1] Pursuant to Sup. Ct. Rule 37.6, counsel for *amici curiae* state that no counsel for any party authored this brief in whole or in part, nor did any party or other person other than *amici curiae* or their counsel make a monetary contribution to the brief's preparation or submission. All parties have consented in writing to the filing of this brief.

[2] The seventy-six individual entities comprising Amici are listed in *In re John Q. Hammons Fall 2006, LLC*, 15 F.4th 1011 (10th Cir. 2021). John Q. Hammons Hotels & Resorts was an organization that included, *inter alia*, thirty-five hotels across the country and related hospitality assets.

Amici. *In re John Q. Hammons Fall 2006, LLC*, 15 F.4th 1011 (10th Cir. 2021).

In this case, the Court will be addressing the same issue addressed by the Tenth Circuit: whether the 2017 amendment to 28 U.S.C. § 1930(a)(6) (the "2017 Amendment") is unconstitutional because it subjected chapter 11 debtors in the rest of the country to higher quarterly fees than similarly situated debtors in North Carolina and Alabama for reasons that do not and cannot qualify as a "geographically-isolated problem." Amici are among the chapter 11 debtors most harmed by the unconstitutional statute and thus have a strong interest in this Court applying its precedents to invalidate the unconstitutionally non-uniform statute and affirming that refunding the excess fees is not only the proper remedy, it is the only viable option for ameliorating the harm caused by the statute.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with Petitioner that the 2017 Amendment is unconstitutionally non-uniform because it imposes higher quarterly fees on chapter 11 debtors in the rest of the country than the quarterly fees imposed on chapter 11 debtors in North Carolina and Alabama. Amici also agree that the 2017 Amendment is part of an unconstitutionally non-uniform dual bankruptcy administration system and that the proper remedy for petitioner is a refund of the excess quarterly fees it paid pursuant to the unconstitutional statute.

The court of appeals incorrectly applied this Court's holding in *Blanchette v. Connecticut Gen. Ins. Corps.,*

419 U.S. 102 (1974) because it focused on the portion of the holding permitting Congress to solve geographically-isolated problems but did not apply the limitations the *Blanchette* Court imposed on that authority. Under *Blanchette*, a geographically non-uniform statute may be constitutional only if it is fashioned to solve a geographically-isolated problem and operates uniformly with respect to a defined class of debtors. The 2017 Amendment does neither.

The 2017 Amendment does not apply uniformly to a defined class of debtors as required in *Blanchette* because the applicable class of debtors is all chapter 11 debtors in the United States, and the 2017 Amendment imposes higher quarterly fees on only a portion of those debtors. The Second Circuit Court of Appeals and the Tenth Circuit Court of Appeals correctly concluded that even if the 2017 Amendment was fashioned to solve the problem of U.S. Trustee funding and was limited to the geographic areas where those quarterly U.S. Trustee fees are paid, the statute is unconstitutionally non-uniform because it does not apply uniformly to chapter 11 debtors.

The 2017 Amendment also fails to fit within the framework established in *Blanchette* because it was not "fashioned" to solve the type of "geographically-isolated problem" the *Blanchette* Court described. It was a statute enacted by Congress imposing increased quarterly fees on all debtors over whom Congress had the authority to do so, and any supposed geographic isolation of the problem was not a function of a problem Congress was trying to solve but rather a problem Congress created.

Finally, monetary relief is consistent with both this Court's prior jurisprudence and all appellate court decisions as to remedy on this issue, and is the only way to adequately address the harm suffered by Petitioner as a result of the unconstitutional statute. The cases relied upon by the government are inapposite, and the government ignores the Court's more relevant holdings on similar issues. Moreover, the remedy proposed by the government is unfeasible and fails to make the Petitioner whole.

This Court should overturn the decision of the court of appeals.

ARGUMENT

I. The 2017 Amendment Fails the Uniformity Test the Court Established in *Blanchette*.

All appellate courts taking on the uniformity question as to the 2017 Amendment correctly point to *Blanchette* as the seminal case on the Bankruptcy Clause[3] and its uniformity requirement. *Blanchette* outlines both the scope of Congress's flexibility under the Bankruptcy Clause and the limitations of that flexibility. The *Siegel* court and the other appellate courts incorrectly upholding the 2017 Amendment err by focusing on the flexibility afforded Congress while ignoring or misconstruing the limitations to that flexibility that were an essential part of the Court's holding in *Blanchette*.

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[3] All capitalized terms herein shall have the meanings ascribed to them in Petitioner's Brief.

A. The court of appeals in *Siegel* erred in ignoring *Blanchette*'s requirement that a statute operate uniformly on a defined class of debtors.

In *Blanchette*, this Court affirmed that Congress has the ability to pass laws on the subject of bankruptcy that result in geographic differences impacting debtors. The Court held that an argument for absolute or perfect geographic uniformity "has a certain surface appeal but is without merit because it overlooks the flexibility inherent in the constitutional provision." *Id*. at 158. The Court then defined that flexibility more fully, citing its holding on tax uniformity in the *Head Money Cases* for its conclusion that a constitutional requirement of uniformity "does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Id*. at 159.

The court of appeals in *Siegel* and other appellate courts upholding the 2017 Amendment rely on this language to justify their conclusions. They hold that Congress was using the flexibility inherent in the provision to take into account differences between North Carolina and Alabama and the remainder of the country, namely Congress's decision to exempt those states from the U.S. Trustee Program, and fashioning legislation to resolve it in the states where the U.S. Trustee Program exists.

Like the argument for absolute uniformity, the *Siegel* court's interpretation of *Blanchette* "has a certain surface appeal," but it is without merit. The

Siegel court incorrectly focuses on the portion of *Blanchette* outlining Congress's power to the exclusion of the limitation the Court outlined in the paragraphs immediately following that portion of its holding. Citing Justice Frankfurter's concurrence in *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 172 (1946), the Court held that "[t]he uniformity clause requires that the Rail Act apply equally to *all* creditors and *all* debtors." *Blanchette*, 419 U.S. at 160. It then analyzed whether the statute at issue met this test:

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

Id. at 159-60.

In using *Blanchette* as the basis for its holding that the 2017 Amendment is constitutional, the court of appeals relied on the first sentence in the paragraph above, but its interpretation of that sentence renders the remainder of the Court's analysis in the above paragraph meaningless. In *Blanchette*, the Court did not look at the geographically-isolated problem being addressed (railroad bankruptcies in a particular

region), and evaluate whether it treated bankrupt railroads in that *region* and their creditors uniformly. Rather, it looked to whether the statute operated "uniformly upon *all* bankrupt railroads then operating in the United States and uniformly with respect to *all* creditors of each of these railroads." *Id.* at 160 (emphasis added).

The *Siegel* opinion's description of the *Blanchette* holding underscores the fact that the court of appeals missed the second portion of the test outlined in *Blanchette* entirely. The court of appeals frames *Blanchette* as a case "recognizing that [an] Act of Congress applicable only to rail carriers in certain regions and to carriers reorganizing within certain time period was uniform under the Bankruptcy Clause, in that it was designed to solve specific regional problem." *Cir. City*, 996 F.3d at 165. Similarly, later in the opinion the court of appeals references *Blanchette* as the Court having "allowed Congress to establish a special court and enact statute to benefit bankrupt rail carriers in the northeast and Midwest, as those were the only railroads facing the problem." *Id.* at 166.

The *Siegel* court mistakenly interprets *Blanchette* as holding that Congress can pass geographically non-uniform laws so long as they relate to a problem which is itself geographically non-uniform. But the *Blanchette* opinion makes it clear that this is only the first part of the analysis. If solving a geographic problem and limiting impact to those within its scope were all that was required, the *Blanchette* Court would have had no need to examine whether the Rail Act operated uniformly on all railroads and no need to reference

Vanston Bondholders. The Court did so to reiterate that even if a statute is designed to address a geographically-isolated problem, it nevertheless must apply uniformly to all debtors within the defined class. Here, the defined class is all chapter 11 debtors, not all chapter 11 debtors outside of North Carolina and Alabama.

This Court's holding in *Ry. Lab. Executives' Ass'n v. Gibbons*, 455 U.S. 457, 471 (1982) highlights the flaw in the *Siegel* court's *Blanchette* analysis. In *Gibbons*, Congress was concerned with the impact of a specific railroad bankruptcy on labor claims and enacted a labor protection statute requiring payment of these claims. *Id*. at 457. The facts in *Gibbons* thus match the *Siegel* court's framing of *Blanchette* as a situation in which "Congress . . . enact[ed] a statute" applicable to specific railroads which were "the only railroads facing the problem." Yet the *Gibbons* court held that the statute violated the Bankruptcy Clause, and its analysis shows that the second portion of the *Blanchette* test is just as essential as the first.

The *Gibbons* Court, in citing *Blanchette*, noted that in *Blanchette*, "[s]ince no railroad reorganization proceeding was then pending outside of the region defined by the [Rail Act] . . . the Act in fact operated uniformly upon all railroads then in bankruptcy proceedings." *Id*. at 469-70. It held that as to the statute at issue in *Gibbons*, because "there are other railroads that are currently in reorganization proceedings [to whom the statute would not apply]," it "cannot be said to apply uniformly even to major railroads in bankruptcy proceedings throughout the

United States. . . . The employee protection provisions . . . therefore cannot be said to 'apply equally to all creditors and all debtors.'" *Id.* at 470–71 (quoting *Blanchette*, 419 U.S. at 160).

Vanston Bondholders, *Blanchette* and *Gibbons* establish that in determining whether a bankruptcy law meets the constitutional requirement of applying uniformly to a defined class of creditors and debtors, the Court considers both debtors and creditors within the reach and impact of the statute *and* similarly situated debtors and creditors outside of that group. In *Blanchette*, the Court looked to all railroads in bankruptcy proceedings in the United States at the time of the statute and during its pendency, not just the railroads in the region impacted by the statute. The Court determined that because there were none, the statute did not violate any uniformity requirement. *Blanchette*, 419 U.S. at 159-61. The Court took the same approach in *Gibbons*, again looking at all railroads in bankruptcy proceedings in the United States, and found a constitutional infirmity because there were other railroads in bankruptcy proceedings and that statute treated those railroads differently than the railroad that was subject to the statute. *Gibbons*, 455 U.S. at 470-73.

Against this backdrop, the Second Circuit Court of Appeals and the Tenth Circuit Court of Appeals both correctly applied the Court's *Blanchette* analysis to the 2017 Amendment. Like the *Siegel* court, these courts stated that the 2017 Amendment was designed to solve the problem of funding the U.S. Trustee Program in the forty-eight states where it exists, and that its impact

was limited to chapter 11 debtors in those states. Unlike the court in *Siegel*, however, the Second Circuit and Tenth Circuit then applied the second portion of the *Blanchette* test. They noted the requirement that bankruptcy laws "apply uniformly to a defined class of debtors," and held that "[b]y contrast [to the statute in *Blanchette*], the 2017 Amendment increased fees for all large Chapter 11 bankruptcy debtors in U.S. Trustee Program districts, with no showing that members of that broad class are absent in Bankruptcy Administrator districts." *Hammons*, 15 F.4th at 1024. They "reject[ed] the Trustee's arguments that the relevant class of debtors is exclusively Trustee-district debtors." *Id.* at 1025. Instead, these courts correctly defined the class to include "debtors like those here," which included debtors who "had bankruptcy cases pending in Alabama and North Carolina" in 2018 through 2020, just as this Court defined the relevant class in *Blanchette* and *Gibbons* to be "debtors like those" before the Court who "had bankruptcy cases pending" outside the area impacted by the statute. *Id.* at 1024.

The *Siegel* court's definition of the class of debtors impacted by the 2017 Amendment is inconsistent with the *Blanchette* Court's holding. The *Siegel* court's incorrect conclusion flows directly from this flaw in its analysis. The *Siegel* court incorrectly framed *Blanchette* as allowing the statute in question to benefit rail carriers in the region impacted "as those were the only railroads facing the problem." Based on this interpretation, it held that "[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." *Cir. City*, 996 F.3d at 166. Had the court of appeals read *Blanchette* correctly and defined the class of debtors not as debtors who "use the U.S. Trustees" but instead as chapter 11 debtors in the United States, it would have reached a different – and correct – conclusion.

B. The court of appeals in *Siegel* also erred in its determination that funding the U.S. Trustee Program is a "geographically-isolated problem" within the flexibility inherent in the Bankruptcy Clause.

The *Siegel* court's holding is incorrect even if the Court finds that the 2017 Amendment is legislation fashioned by Congress to address a "geographically-isolated problem warranting geographic-specific legislation" because the statute does not apply uniformly to chapter 11 debtors. However, this underlying premise is also incorrect.

The court in *Siegel* found that the 2017 Amendment qualifies as legislation addressing a geographically-isolated problem because the purpose of the amendment is funding the U.S. Trustee Program and the amendment is limited to the geographic area in which the program exists. But using the existence of the U.S. Trustee Program to justify the non-uniformity of the statute perpetrates a logical fallacy, akin to creating the "inexplicable rule" that "Congress must enact uniform laws on the subject of bankruptcy . . . except when Congress elects to treat debtors non-uniformly." *In re Clinton Nurseries, Inc.*, 998 F.3d 56, 69 (2d Cir. 2021)*; see also Matter of Buffets, L.L.C.*, 979

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

In reaching this conclusion, the *Siegel* court relies on *Blanchette* and, in turn, the holding in *Head Money Cases,* 112 U.S. 580 (1884), to analogize the 2017 Amendment to the geographically discriminatory statutes in those cases. This reliance goes past the point of analogy and borders on farce. In both *Blanchette* and the *Head Money Cases*, the geographically-isolated problem, the "evil to be remedied" (as the *Head Money Cases* Court described it), was a problem that existed entirely outside of the actions of Congress. These were contemporary, emerging problems requiring legislative intervention in the best interest of the country: in *Head Money Cases*, an European immigration boom and in *Blanchette,* a national rail crisis. *Head Money Cases*, 112 U.S. 580, 595 (1884); *Blanchette*, 419 U.S. at 108-09. Here, the problem could not be more inapposite: Congress excluding North Carolina and Alabama from a system it initially required them to join simply because powerful political factions worked to reverse that mandate.

The other obvious flaw in this argument is in the first portion of the *Blanchette* language. Here, Congress did not "fashion legislation" to solve an isolated problem. The 2017 amendment applies to *every single debtor* within the U.S. Trustee Program, which constitutes every debtor over whom Congress has the authority to set fees. Framing the legislation as a decision by Congress to focus on debtors in the U.S. Trustee Program implies that Congress chose to

exclude debtors in North Carolina and Alabama when it enacted the 2017 Amendment. In fact, as Congress conceded when it changed the word "may" to "shall" in Section 1930(a)(7) effective Jan. 12, 2021, Congress limited the statute to debtors in these states not by design, but because it *could not* raise fees in the other two. It could only instruct the Judicial Conference to do so.

II. CONGRESS HAS FAILED TO RESOLVE THE CONSTITUTIONAL PROBLEM IT CREATED AND IDENTIFIED

A. The Dual System of Bankruptcy Administration is Unconstitutional and Has Been Since Its Inception.

While the present dispute centers on the 2017 Amendment, which itself is unconstitutional, the Amendment and the non-uniform fees it imposes exist within the U.S. Trustee-BA dichotomy. This dual system is unconstitutionally non-uniform and always has been. This unconstitutional lack of uniformity was highlighted by the Ninth Circuit in *St. Angelo v. Victoria Farms, Inc*., 38 F.3d 1525 (9th Cir. 1994), *amended*, 46 F.3d 969 (9th Cir. 1995), and Congress recognized it and took action to address it in 2000. But even courts upholding the 2017 Amendment acknowledge that the constitutional infirmity the Ninth Circuit identified remained as the monetary injury it caused was abated.

Like the 2017 Amendment, the coexistence of BA districts and U.S. Trustee Program districts is unconstitutional. These dual systems treat debtors

differently without any justification for doing so, which puts them firmly outside the flexibility inherent in the Bankruptcy Clause. The differences between the two systems are not theoretical; the involvement of the Department of Justice in bankruptcy cases through the U.S. Trustee program can significantly impact the shape and disposition of a debtor's bankruptcy cases. *See, e.g.*, *In re LTL Mgmt., LLC*, Case No. 21-30589, 2022 WL 596617 (Bankr. D. N.J. Feb. 25, 2022); *In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. 2021).[4]

The management and disposition of a debtor's assets is a central component of the bankruptcy process. The U.S. Trustee Program was created as a pilot program in 1978 to take over the administrative aspect of cases from judges, who prior to that time handled both substantive and administrative functions. The U.S. Trustee Program was successful and Congress subsequently implemented it more fully in 1986. *See* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat 3088, 3090–95 (Oct. 27, 1986) ("1986 Act"). Pursuant to the 1986 Act, in every district in the country except for the six districts in North Carolina

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[4] One of the many examples of the differences in the two systems is the right to appoint committees of unsecured creditors. Pursuant to 11 U.S.C. § 1102(a)(1), Congress has directed that the U.S. Trustee "shall appoint a committee of creditors . . . ". No such directive exists within the BA system. The appointment of a committee in North Carolina and Alabama is an action that can only be taken by the court, rather than a directive accomplished by the administrator, and the court is not required to do so. 11 U.S.C. § 1102(a)(2). *See In re LTL Mgmt., LLC*, Case No. 21-30589, 2022 WL 609549 (Bankr. D. N.J. Jan. 20, 2022).

and Alabama, the U.S. Trustee Program permanently took over the administrative role as a component of the U.S. Department of Justice. In North Carolina and Alabama, this function was the responsibility of the Bankruptcy Administrator program, which operated as a program within the Judicial branch.

The 1986 Act gave the judicial districts in North Carolina and Alabama until 1992 to implement the U.S. Trustee Program. *See* 1986 Act § 302(d)(3)(A) 3122 (28 U.S.C. 581 note). Neither the 1986 Act nor its legislative history provided any justification for treating debtors in these states differently.

The statutory plan enacted in 1986 never occurred. Congress passed the Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 317(a), 104 Stat. 5089, 5115 (Dec. 1, 1990), which pushed back the deadline for Alabama and North Carolina to enter the U.S. Trustee Program by ten years, then two years before the 2002 deadline, Congress removed altogether the language requiring these judicial districts to ever join the U.S. Trustee Program. *See* Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 501, 114 Stat. 2410, 2421–22 (Sept. 13, 2000) ("2000 Act"). Although Congress still provided no justification whatsoever for making the "temporary" situation from 1986 permanent, contemporaneous commenters attributed the eschewing of the deadline to effective political maneuvering, noting that "[b]ankruptcy judges in both states successfully have lobbied Congress, most particularly Senators Helms [then-Senator from North Carolina] and Heflin [then-Senator from Alabama], to avoid being placed within the United States Trustee

program." Dan J. Schulman, *The Constitution, Interest Groups, and the Requirements of Uniformity: The United States Trustee and the Bankruptcy Administrator Programs*, 74 Neb. L. Rev. 91, 123 (1995).

The formula for fees paid to U.S. Trustees and the directive that debtors pay them are both part of the Bankruptcy Code. The 1986 Act added 28 U.S.C. § 1930(a)(6) to the Code. The new section provided that "a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury, in each case under chapter 11 . . . for each quarter (including any fraction thereof) until a plan is confirmed or the case is converted or dismissed, whichever occurs first." 1986 Act at § 117. Since the statute only created and took authority over U.S. Trustee districts, it did not impose any fee requirements on chapter 11 debtors in BA districts.

As the GAO noted in a 1992 study, under this system, fees were "not uniform" because "[c]hapter 11 debtors in BA districts [were] not subject to the additional quarterly fee that is levied on Chapter 11 debtors in Trustee districts." U.S. Gov't Accountability Office, GAO/GGD-92-133, Bankruptcy Administration: Justification Lacking for Continuing Two Parallel Programs 11 (1992). That GAO report ended with a recommendation that "[t]o make bankruptcy administration consistent across the country, Congress should incorporate the BA program into the Trustee Program." *Id.* at 17.

In 1994, the Ninth Circuit held that the fee disparity created by the BA-U.S. Trustee dual system

was unconstitutional. In *St. Angelo*, a debtor argued it should not be required to pay a quarterly fee because similarly situated debtors in North Carolina and Alabama were not charged quarterly fees. *St. Angelo,* 38 F.3d. at 1529.

The Ninth Circuit noted that a bankruptcy law "may have different effects in various states due to dissimilarities in state law as long as the federal law itself treats creditors and debtors alike" but found that Section 1930 did not pass this threshold test. *Id.* at 1531. The court held that it was "federal law, rather than state law, that causes creditors and debtors to be treated differently in North Carolina and Alabama." *Id.* Having concluded the law was non-uniform, the court then looked to whether any exception to the requirement of geographic uniformity might apply. *Id*. Finding none, the court determined that the lack of uniformity identified by the debtors violated the Bankruptcy Clause and was unconstitutional. *Id*.

Like courts examining the 2017 Amendment, the Ninth Circuit's analysis centered on *Blanchette.* The Ninth Circuit distinguished the quarterly fee statute from the statute upheld in *Blanchette* because unlike the *Blanchette* statute, as to the quarterly fee statute "Congress has provided no indication that the exemption in question was intended to deal with a problem specific to North Carolina and Alabama" and the court could not "discern such a purpose in the structure of the statute or the legislative history of the amendment." *Id*. The Ninth Circuit concluded that "because creditors and debtors in states other than North Carolina and Alabama are governed by a

different, more costly system for resolving bankruptcy disputes . . . it is clear that 28 U.S.C. 1930, *as currently amended*, does not apply uniformly to a defined class of debtors." *Id.* at 1531–32. It struck down the amendments to Section 1930 that granted a 10-year extension for North Carolina and Alabama to enter the U.S. Trustee system. *Id.* at 1532–33.

Congress acknowledged the constitutional infirmity identified in *St. Angelo* and passed legislation in 2000 on BA districts in an attempt to remedy the statutory deficiencies. Congress amended Section 1930(a) by adding a new paragraph (7), which stated that in the BA districts "the Judicial Conference of the United States may require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed" by 1930(a)(6). 2000 Act at § 105 (enacting 28 U.S.C. § 1930(a)(7)).

Although Section 1930(a)(7) prevented the constitutional injury of chapter 11 debtors outside the BA districts paying quarterly fees while chapter 11 debtors inside BA districts did not, it did not address the Ninth Circuit's holding that debtors being governed by a "different" and "dissimilar" system was unconstitutional. But there were no significant challenges to the statute because while Congress had not *required* fees in the BA system to be equal, fees were, in fact, equal. Following the enactment of Section 1930(a)(7), the Judicial Conference decided to charge chapter 11 debtors in BA districts quarterly fees similar to U.S. Trustee fees, and for nearly twenty years, chapter 11 debtors across the country paid essentially equal fees. Section 1930(a)(6) and the dual

systems existed in a state of constitutional purgatory, unconstitutional but unchallenged because the impacted parties did not suffer sufficient monetary damages to make a challenge worthwhile.

This changed when Congress enacted the 2017 Amendment and did not make or purport to make any change to BA district fees. Chapter 11 debtors were subjected to 833% fee increases and paid millions more to the U.S. Trustee while chapter 11 debtors in North Carolina and Alabama continued with business as usual, and the types of constitutional challenges that led to the *St. Angelo* decision reemerged, leading to the present case before the court, Amici's case, and the other cases referenced in the Petition.

B. Congress Has Previously Attempted and Failed to Address Known Constitutional Infirmities within the Bankruptcy System.

This is not the first time Congress has been made aware of a constitutional bankruptcy issue and responded with an unsuccessful attempt to address it. In one of the first challenges to the modern state of bankruptcy law, this Court, like the court in *St. Angelo*, outlined a constitutional infirmity, and just as it did following *St. Angelo*, Congress changed the law in response. In both instances the statute Congress enacted did not address the core constitutional issue. The Court's prior analysis as to Congress's unsuccessful remedial measures also applies here.

In 1978, the Bankruptcy Reform Act created the current system of United States Bankruptcy Courts for

each district and provided that these courts "shall exercise all of the jurisdiction conferred by this section on the district courts." *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53 (1982), (quoting 28 U.S.C. § 151(a) (Supp. IV 1981)). "Congress knew that this provision raised serious constitutional concerns because it permitted an Article I tribunal to exercise the same jurisdiction bestowed upon an Article III court, but the risk of invalidation was deemed worth achieving the goal of setting up a faster and cheaper method to accomplish reorganization." *In re Marshall*, 600 F.3d 1037 (9th Cir. 2010) (citing U.S. Code Cong. & Admin. News 1978, p. 5963), *aff'd sub nom.*, *Stern v. Marshall*, 564 U.S. 462 (2011).

In *Northern Pipeline*, a six-judge plurality of this Court held that the bankruptcy judges could not be constitutionally vested with jurisdiction to decide a debtor's state-law contract claim against a third party because they were not Article III judges. *Northern Pipeline*, 458 U.S. at 88 fn. 40 (Brennan, J., plurality) (joined by Justices Marshall, Blackmun, and Stevens) (citations omitted); *see also Id.* at 91–92 (Rehnquist, J., concurring) (joined by Justice O'Connor). The Court's holding was stayed in order to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication." *Id.* at 88.

In response to *Northern Pipeline*, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (July 10, 1984) (the "1984 Act"). The 1984 Act did not provide bankruptcy judges with Article III authority, but described their authority as including "core proceedings

arising under title 11, or arising in a case under title 11." *Id.* at § 104; 28 U.S.C. § 157(b).

The constitutional infirmity outlined by the Court in *Northern Pipeline* remained unaddressed for approximately thirty years, until *Stern v. Marshall*, 564 U.S. 462 (2011). *Stern* involved a bankruptcy proof of claim asserting a defamation claim and the debtor's counterclaim, both of which involved substantial financial liabilities. *Id.* at 470. The bankruptcy court concluded that the counterclaim was a "core proceeding" under Section 157(b)(2)(C), which includes in that definition "counterclaims by the estate against persons filing claims against the estate." *Id.* at 471; 28 U.S.C. § 157(b)(2)(C). The Court held that while the bankruptcy judge may have statutory authority to resolve this claim, because the bankruptcy judge was not an Article III judge, the judge did not have constitutional authority to do so. *Stern*, 564 U.S. at 482. The Court noted that despite the *Northern Pipeline* holding, "the bankruptcy courts under the 1984 Act exercise the same powers they wielded under the Bankruptcy Act of 1978." *Id.* In doing so, the Court concluded that Congress had failed to resolve the constitutional issue it had identified thirty years prior.

Both *Stern* and this case involve previously-highlighted constitutional problems where Congress passed legislation that was intended to address those problems but was ultimately unsuccessful. As this Court made clear in *Stern*, Congress's desire to avoid a constitutional issue cannot act as the saving grace for an unconstitutional statute. The continued existence of the constitutional infirmity caused the harm to chapter

11 debtors like Amici and Petitioner, and this Court can and should address that injury.

III. THE MONETARY REMEDY SOUGHT BY PETITIONER IS THE SOLE LEGAL AND PRACTICAL RESOLUTION TO PETITIONER'S CLAIMS

A. The Court's Precedents Support Monetary Relief and the Government Relies on Inapposite Cases Involving Non-Monetary Harm

The government has consistently argued that even if the Court finds that Petitioner and other chapter 11 debtors were charged dramatically higher fees as a result of an unconstitutional status, it should not return the excess fees to these debtors. The government contends that "a mandate of equal treatment" is instead the appropriate remedy because the "right invoked is that to equal treatment." This argument fails on multiple levels. First, the language the government has invoked is misleading and inapplicable here because the cited cases that involve discrimination and equal protection – the "equal treatment" being referenced is designed to account for non-economic injuries and does not involve imposing monetary penalties on parties not involved in the litigation. Second, even within that constitutional jurisprudence this Court has already favored monetary remedies in situations where a party has been required to make payments in violation of the Constitution.

The government has cited *Sessions v. Morales-Santana*, 137 S. Ct 1678, 1698 (2017) for the premise

that "a mandate of equal treatment" is appropriate here. But even a cursory examination of *Sessions* shows it is factually distinguishable and did not involve consideration of a monetary remedy. *Sessions* hinged on an exception to U.S. citizenship laws providing citizenship rights to children of unwed mothers who had lived in the country for one year prior to birth but not to children of unwed fathers living in the country for the same period of time. *Sessions*, 137 S.Ct. at 1682. The litigant was a child of a father who did not fall within the exception, and the two alternatives the Court considered were extending benefits to the litigant (i.e. applying the exception to fathers as well) or withdrawing those benefits to the children of mothers within the exception. *Id*. at 1698. The Court thoroughly examined Congress's intent in enacting both the statute and the exception and determined that applying the exception to unwed fathers was not the proper remedy. *Id*. at 1698-1700.

Viewing *Sessions* as in any way instructive here requires multiple logical leaps: equating uniformity under the Bankruptcy Clause and non-uniform treatment as a debtor as analogous to equal protection and gender-based discrimination, and equating payment of excess fees with denial of citizenship and the rights attendant thereto. It also asks the Court to look to a case in which no monetary remedy was even *sought* in denying Petitioner monetary relief. Moreover, to the extent the equal protection analogy is valid, in a case far more analogous, this Court has already held that repayment of excess funds paid is, in fact, an appropriate remedy for a constitutional violation like the one suffered by Petitioner.

In *Iowa–Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239 (1931), the petitioners were national banks who had paid state taxes at a higher rate than domestic corporations based on the actions of a county tax collector misinterpreting or defying state tax law. In discussing the appropriate remedy, the Court noted that equal treatment could be attained either by reducing the taxes of the petitioners or increasing the taxes of their competitors. *Id*. at 247. The Court conceded that the state might still have the power to "equalize the treatment" of the petitioners but found this was "not material." *Id*. Mirroring the *Sessions* language upon which the government relies, the Court held that "[t]he right invoked [by petitioners] is that to equal treatment, and such treatment will be attained if either their competitors' taxes are increased or their own reduced." *Id*. The Court held that the proper remedy was to provide the petitioners "refund of the excess of taxes exacted from them" because "it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid." *Id*. Thus, even within the framework of equal protection that the government argues should apply, this Court's jurisprudence would favor refunding Petitioner the excess funds it paid.

B. The Government's Proposed Remedy is Akin to No Remedy Because it Fails to Ameliorate Petitioner's Harm and is Not a Plausible Alternative

The Second Circuit Court of Appeals and the Tenth Circuit Court of Appeals were correct in their conclusions that monetary relief is the sole remedy for the constitutional harm resulting from the 2017 Amendment. Petitioner was required to pay significant fees to the U.S. Trustee pursuant to a statute that violates the Constitution. The only way to ameliorate that harm is to return those funds to Petitioner.

The government's proposed remedy of a "mandate of equal treatment" is as nonsensical as it is impossible. The parties subject to this "equal treatment" would be all chapter 11 debtors in North Carolina and Alabama whose cases were pending as of January 1, 2018 or filed between that date and October 1 of that year that paid less in quarterly fees than they would have if the fees outlined in the 2017 Amendment applied. Such a resolution would stand in direct contradiction to the actions of the Judicial Conference, a body presided over by the Chief Justice of this Court, which determined the amounts and timing of those fees.

This directive would also be impossible to implement. Most if not all of these chapter 11 cases are long-since closed, and the funds of these bankruptcy estates have already been distributed to creditors or disposed of pursuant to plans confirmed by final, non-appealable orders of the bankruptcy courts in those districts. The government is in effect asking this Court

to reopen all of those cases and conscript the bankruptcy courts in those districts as a *de facto* collection agency, all to avoid making debtors whole for the constitutional harm they have suffered.

The lack of legal support and impracticality of the government's proposed remedy have caused every single court that has considered it to reject it, and for good reason. The only proper and plausible relief available in this case is the relief requested by Petitioner: a refund of the excess fees paid by the Petitioner as a consequence of this unconstitutionally non-uniform statute.

CONCLUSION

The judgment of the court of appeals should be reversed. The Court should hold that the 2017 Amendment is unconstitutional and ameliorate Petitioner's harm by ordering the U.S. Trustee to return to Petitioner the excess fees it paid as a result of the statute.

Respectfully submitted,

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