No. 22-1238

In the
Supreme Court of the United States

OFFICE OF THE UNITED STATES TRUSTEE,
Petitioner,

v.

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

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the appropriate remedy for the constitutional infirmity the Court unanimously recognized in *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (2022) is to require the United States Trustee to refund the portion of quarterly fees respondents paid pursuant to the unconstitutionally non-uniform statute that respondents would not have been required to pay as Chapter 11 debtors in North Carolina or Alabama.

CORPORATE DISCLOSURE STATEMENT

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution

Statutes and Laws

Other Authorities

OPINIONS BELOW

The order of the court of appeals (App. to Petition, *infra*, 1a-5a) is not reported in the Federal Reporter but is available at 2022 WL 3354683. The prior opinion of the court of appeals (App. to Petition, *infra*, 7a-34a) is reported at 15 F.4th 1011. The opinion of the bankruptcy court (App. to Petition, *infra*, 35a-47a) is reported at 618 B.R. 519.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2022. The court of appeals denied petitioner's petition for rehearing on January 26, 2023 (App. to Petition, *infra*, 48a-49a). On April 11, 2023, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including May 26, 2023. On May 10, 2023, Justice Gorsuch further extended the time within which to file a petition for a writ of certiorari to and including June 23, 2023, and the petition was filed on that date. Jurisdiction is proper pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Bankruptcy Clause of the United States Constitution provides in pertinent part that "The Congress shall have Power * * * [t]o establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. Art. I, § 8, cl. 4.

The Fifth Amendment to the United States Constitution provides in pertinent part that "No person shall be * * * deprived of life, liberty, or

property, without due process of law." U.S. Const. amend. V.

Section 1, clause 2 of the Fourteenth Amendment to the United States Constitution provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

From January 1, 2018 until amendments made in 2020, 28 U.S.C. 1930(a) provided in pertinent parts as follows:

> (a) The parties commencing a case under title 11 shall pay to the clerk of the district court or the clerk of the bankruptcy court, if one has been certified pursuant to section 156(b) of this title, the following filing fees:
>
> * * *
>
> (6)(A) Except as provided in subparagraph (B), in addition to the filing fee paid to the clerk, a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury, in each case under chapter 11 of title 11 for each quarter (including any fraction thereof) until the case is converted or dismissed, whichever occurs first. * * *
>
> (B) During each of fiscal years 2018 through 2022, if the balance in the United

> States Trustee System Fund as of September 30 of the most recent full fiscal year is less than $200,000,000, the quarterly fee payable for a quarter in which disbursements equal or exceed $1,000,000 shall be the lesser of 1 percent of such disbursements or $250,000.
>
> (7) In districts that are not part of a United States trustee region as defined in section 581 of this title, the Judicial Conference of the United States may require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection. Such fees shall be deposited as offsetting receipts to the fund established under section 1931 of this title and shall remain available until expended.
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> * * *

In 2020, Congress amended Section 7 of 28 U.S.C. 1930 through Section 3 of the Bankruptcy Administration Improvement Act of 2020, Pub. L. No. 116-325, 134 Stat. 5086-5087, which provides in pertinent part as follows:

> [(3)](d) BANKRUPTCY FEES.— Section 1930(a) of title 28, United States Code, is amended— (2) in paragraph (7), in the first sentence, by striking "may" and inserting "shall".
>
> * * *

STATEMENT

1. a. Respondents are comprised of seventy-six entities operating as or associated with John Q. Hammons Hotels & Resorts[1] who commenced chapter 11 bankruptcy cases collectively in 2016 by filing bankruptcy petitions in the United States Bankruptcy Court for the District of Kansas (the "Bankruptcy Court"). Bankruptcy courts in every judicial district outside of North Carolina and Alabama operate within the United States Trustee ("Trustee") Program, wherein the Trustee, a division of the Department of Justice, handles bankruptcy administration and receives a quarterly fee from chapter 11 debtors. The remaining six judicial districts, three each in Alabama and North Carolina, operate within the Bankruptcy Administrator ("BA") Program, in which this administrative role is performed by the BA, which exists within the Judicial branch.

Title 28, Section 1930(a)(6) ("Section 1930(a)(6)") determines quarterly fees for chapter 11 debtors in Trustee districts and fees paid pursuant to the statute go to fund the Trustee Program. Chapter 11 debtors in BA districts pay quarterly fees to the BA in amounts set by the Judicial Conference of the United States ("Judicial Conference") and the BA Program is funded by the Judiciary's general budget. *See Siegel v. Fitzgerald*, 142 S. Ct. 1770, 1772 (2022).

In 2017, Congress amended Section 1930(a)(6) to increase those fees, including increasing the

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

maximum quarterly fees payable in the cases of certain chapter 11 debtors from $30,000 per quarter to up to $250,000 per quarter. § 1004(a), 131 Stat. 1232 (28 U.S.C. 1930(a)(6)(B) (2018) ("2017 Amendment"). The 2017 Amendment made no change to 28 U.S.C. Section 1930(a)(7), which provided that the Judicial Conference "may require" chapter 11 debtors to pay quarterly fees in an amount equal to the fees imposed by Section 1930(a)(6).

The 2017 Amendment became effective in Trustee districts on January 1, 2018, and the Trustee applied the increases to all chapter 11 cases, including cases pending prior to the effective date. The Judicial Conference did not increase BA quarterly fees for chapter 11 debtors in North Carolina and Alabama at that time. When it did increase quarterly fees in BA districts, the Judicial Conference did so only for cases filed after October 1, 2018, the date the increased fees went into effect in the BA districts. Judicial Conf. of the U.S., *Report of the Proceedings of the Judicial Conference of the United States* 11 (Sept. 13, 2018), https://www.uscourts.gov/sites/default/files/2018-09_proceedings.pdf.

Respondents' disbursements through December 31, 2019, totaled $1,065,171,517.36 and accompanying fees paid by respondents totaled $3,664,393.39. If respondents' bankruptcy cases had been pending in a BA district, these same disbursements would have resulted in fee obligations of only $1,122,591.00, a difference of $2,541,802.39. Respondents sought a refund of this overpayment of fees in the Bankruptcy Court because the 2017 Amendment's imposition of fees on debtors in only 48 states violated Article I,

Section 8 of the Constitution, which provides that laws on the subject of Bankruptcy shall be uniform.

b. This dispute exists within the framework of the Trustee-BA dual system. The management and disposition of a debtor's assets is a central component of the bankruptcy process. Prior to 1978, bankruptcy judges, called bankruptcy referees, handled all aspects of bankruptcy cases. The Trustee Program was implemented as a pilot program to take over the administrative component, and after initial success, Congress implemented it broadly in 1986. *See* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat 3088, 3090–95 (Oct. 27, 1986) ("1986 Act").

The 1986 Act put the Trustee Program in place in every district in the country except for the six districts in North Carolina and Alabama. It gave these districts until 1992 to implement the Trustee Program, and in the interim, administration of cases in North Carolina and Alabama remained the responsibility of the BA Program. *See* 1986 Act § 302(d)(3)(A), 100 Stat. 3121-3122 (28 U.S.C. 581 note). Congress provided no justification for treating debtors in these states differently.

The statutory plan enacted in 1986 never occurred, and the districts in North Carolina and Alabama remain outside the Trustee Program to this day. Prior to the 1992 deadline, Congress passed the Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 317(a), 104 Stat. 5089, 5115 (1990), which pushed back the deadline for Alabama and North Carolina to enter the Trustee Program to 2002. Then

in 2000, Congress removed altogether the language requiring these judicial districts to join the Trustee Program. *See* Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 501, 114 Stat. 2410, 2421–22 (2000). Congress provided no justification for making the dual system permanent. Debtors in 48 states remain subject to the Trustee Program, with fees imposed by Congress in Section 1930(a)(6), while debtors in North Carolina and Alabama are subject to the BA Program, in which Bankruptcy Administrators perform the Trustee functions and fees are set by the Judicial Conference.

Section 1930(a)(6) was added to the Bankruptcy Code in the 1986 Act and provided that "a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury, in each case under chapter 11 . . . for each quarter (including any fraction thereof) until a plan is confirmed or the case is converted or dismissed, whichever occurs first." 1986 Act § 117. Since the statute only established and exercised this authority over Trustee districts, it did not impose any fee requirements on chapter 11 debtors in BA districts.

In *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525 (9th Cir. 1994), *amended*, 46 F.3d 969 (9th Cir. 1995), the Ninth Circuit held that the fee disparity created by the BA-Trustee dual system was unconstitutional. The debtor argued it should not be required to pay a quarterly fee because the Trustee Program had not been implemented in North Carolina and Alabama and debtors in those states were not charged quarterly fees. *Id.* at 1529. The Ninth Circuit held that it was "federal law, rather than state law, that causes creditors and debtors to be treated

differently" in those states, and concluded that "because creditors and debtors in states other than North Carolina and Alabama are governed by a different, more costly system . . . [the fee statute] does not apply uniformly to a defined class of debtors." *Id.* at 1531–32. The Ninth Circuit struck down the amendments to Section 1930 that granted a 10-year extension for North Carolina and Alabama to enter the Trustee Program. *Id.* at 1532–33.

As noted in the Petition, Congress changed the Bankruptcy Code in 2000 in reaction to *St. Angelo*. But the change it enacted did not address the constitutional infirmity. *See Siegel*, 142 S. Ct. at 1781-82 (rejecting argument that Section 1930(a)(7) avoids unconstitutional nonuniformity). Congress amended Section 1930(a) by adding subsection 7, which provided that in the BA districts "the Judicial Conference of the United States may require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed" by 1930(a)(6). Federal Courts Improvement Act of 2000 (2000 Act), Pub. L. No. 106-518, § 105, 114 Stat. 2412 (enacting 28 U.S.C. § 1930(a)(7) (2000)). The dual systems stayed in place and quarterly fees for the Trustee Program were set by Congress as quarterly fees in BA district remained the province of the Judicial Conference.

Following the enactment of Section 1930(a)(7), the Judicial Conference decided to charge chapter 11 debtors in BA districts quarterly fees similar to Trustee Program fees, and for nearly twenty years, chapter 11 debtors in all 50 states paid essentially equal fees. Section 1930(a)(6) existed in a state of constitutional purgatory, unconstitutional but

unchallenged because none of the impacted parties suffered monetary damages sufficient to make a challenge worthwhile.[2]

2. In 2017, Congress upset this balance by amending Section 1930(a)(6) to dramatically raise quarterly fees for Trustee districts. Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, Div. B, § 1004(a)(2), 131 Stat. 1232 (2017). Congress did not make or purport to make any change to BA district fees. There is nothing in the legislative record to show whether Congress considered the constitutional implications of the change, but in *Siegel* the Court noted that the government has provided evidence that "Congress likely understood, when it passed the 2017 Act, that the Judicial Conference would impose the same fee increase." *Siegel*, 142 S. Ct. at 1782 n.2. If the Judicial Conference had done so, the existing "no harm, no foul" unconstitutionality could have continued, but the Judicial Conference did not raise fees for nearly 10 months, and when it did, it did so only for cases filed after the date the new fees went into effect. Respondents and other chapter 11 debtors across the country paid as much as 833% more in quarterly fees than chapter 11 debtors in North Carolina or Alabama who filed on an identical timeline.

On March 3, 2020, respondents filed a motion (the "Fee Motion") in the Bankruptcy Court. App. to

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[2] This elusion of the constitutional issue parallels the 25-year interregnum for bankruptcy courts' constitutional jurisdiction over non-core proceedings that occurred between the Court's *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) and *Stern v. Marshall*, 564 U.S. 462 (2011) decisions.

Petition at 35a. In the Fee Motion, respondents argued that (a) 28 U.S.C. § 1930(a)(6) and the 2017 Amendment were unconstitutionally non-uniform, and (b) the 2017 Amendment was unconstitutional due to its retroactive application. *Id.* at 35a-36a.[3] The Fee Motion asked the Bankruptcy Court to order the Trustee Program to return the excess fees to respondents. *Id.*

On July 27, 2020, the Bankruptcy Court denied the Fee Motion. *Id.* The Bankruptcy Court held that Section 1930(a)(6) fit within flexibility afforded Congress to fashion non-uniform statutes in order to deal with geographically isolated problems. *Id.* at 46a. Respondents appealed the decision to the Tenth Circuit, and the court of appeals overruled the Bankruptcy Court. *Id.* at 7a.

The court of appeals held that the statute was unconstitutional and joined the Second Circuit in awarding monetary relief of a refund of the excess fees paid. *Id.* at 32a It remanded the case to the Bankruptcy Court with directions to order the refund. *Id.* at 32a (citing *In re Clinton Nurseries*, *Inc.*, 998 F.3d 56, 69-70 (2d Cir. 2021)). The court of appeals chose this remedy based on its determination that respondents were "entitled to relief" and it should ameliorate the harm that resulted from the unconstitutional treatment. *Id.* at 31a. The government's proposed remedy had been collecting additional fees from debtors outside the Tenth Circuit, which the court of appeals noted that the government conceded it could not actually order. *Id.* The

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

government filed a petition seeking review, but asked the Court to hold the petition pending disposition of *Siegel*, where the Court had already granted a petition for review "to resolve a split that had developed in the lower courts over the constitutionality of the 2017 Act." Petition for Writ of Certiorari at 13, *Off. of the U.S. Tr. v. John Q. Hammons Fall 2006, LLC et al.*, 142 S. Ct. 2810 (2022) (No. 21-1078); *Siegel*, 142 S. Ct. at 1778.

In *Siegel*, the Court concluded in a 9-0 decision that the 2017 Amendment to Section 1930(a)(6) was unconstitutionally non-uniform because "Congress exempted debtors in only 2 States from a fee increase that applied to debtors in 48 States, without identifying any material difference between debtors across those States." *Siegel*, 142 S. Ct. at 1780. It rejected the government's argument that the different fees were justified by the need to fund the Trustee Program, holding that "that shortfall stemmed not from an external and geographically isolated need, but from Congress's creation of a dual bankruptcy system which allowed certain districts to opt into a system more favorable for debtors," and the Bankruptcy Clause in the Constitution "does not allow Congress to accomplish in two steps what it forbids in one." *Id.* at 1782.

The Court did not make any finding on remedy in *Siegel* because the lower court had not reached any decision on the remedy issue. The Court reasoned that reaching a conclusion on remedy would be inappropriate given its role as a court of review rather than of "first review." *Id.* at 1783. It remanded *Siegel* for further consideration solely on the remedy issue

and took the same approach for the petition in respondents' case and two similar petitions.

Upon remand, the Tenth Circuit ordered the parties to submit briefing on the issue of remedy. App. to Petition at 5a. After the issue had been fully briefed, the Tenth Circuit reinstated its prior opinion and unanimously held that "a refund of overpayment consistent with [its] original opinion" was the proper remedy "upon careful consideration of the parties' supplemental briefs and the Supreme Court's *Siegel* opinion." *Id.* It once again remanded the case with instructions to order the government to refund the excess quarterly fees paid pursuant to the unconstitutional statute. *Id.* After seeking and obtaining two extensions, the government filed the Petition. Petition for Writ of Certiorari, *Off. of U.S. Tr. v. John Q. Hammons Fall 2006, LLC*, No. 22-1238 (filed June 23, 2023) (the "Petition").

ARGUMENT

The Tenth Circuit was correct in its determination that respondents should receive a refund of the excess fees respondents paid as a result of the constitutional infirmity. This remedy is consistent with the Court's well-settled precedent, and the remedies proposed by the government are legally flawed, impractical, and unconstitutional. There is no circuit conflict—every court of appeals that has decided this issue has rejected the government's arguments.

The government argues that the court of appeals and its brethren reached an incorrect conclusion for two reasons. First, the government

claims that a prospective-only remedy is appropriate and that Congress has already implemented one with the 2020 Amendment. Second, the government argues that refunding the overpayments is not the proper remedy because the government claims it is contrary to legislative intent.

These arguments represent the latest in the government's evolving effort to ensure that respondents and all other injured parties walk away empty-handed, essentially seeking to implement the very statute the Court unanimously rejected as unconstitutionally non-uniform. The Tenth Circuit, Second Circuit and Eleventh Circuit have all correctly rejected these arguments, and no circuit court has adopted them.

A. Prospective-Only Relief Would Deprive Respondents of Constitutional Due Process

The government's proposed "prospective-only" relief fails entirely to address the injury resulting from a statute the Court has already held to be unconstitutional. It is a symbolic remedy that renders meaningless a litigant's challenge to an unlawful statute and goes against the Court's well-established jurisprudence holding that a prospective-only remedy for a monetary injury would constitute a deprivation of respondents' property without due process.

The government's argument rests first on an inaccurate framing of the court of appeals' remedy analysis. The government asked the court of appeals to impose a fee increase on debtors in BA districts which the government "recognize[d] that [the court]

lack[ed] authority to do." App. to Petition at 31a. The court of appeals concluded that respondents "are entitled to relief," citing a Fifth Circuit dissent in *Buffets* for the argument that "[w]hat we can do is ameliorate the harm of unconstitutional treatment . . . So, we should." App. to Petition at 31a (quoting *In re Buffets, LLC*, 979 F.3d 366, 384 (5th Cir. 2020) (Clement, J., dissenting), *abrogated by Siegel v. Fitzgerald*, 142 S. Ct. 1770 (2022)). The government frames this conclusion as "based on a mistaken view that individually effective relief is always required for a constitutional violation." Petition at 11. But the lower court simply rejected the government's proposal for a remedy the government agreed it had no jurisdiction to impose. It made no finding as to whether individually effective relief was required and instead based its remedy on its conclusion that it should ameliorate the harm caused by the unconstitutional treatment.

In the Petition, the government advances an updated version of the "appropriate relief is no relief at all" argument rejected by the court of appeals. Now, instead of seeking a remedy it concedes the Court cannot achieve, the government argues that "any need for judicially imposed relief has been obviated by Congress's actions during the pendency of this litigation because Congress has already acted prospectively [in the 2020 Act] to eliminate any constitutional infirmity in its prior enactments." Petition at 26. It is an open question whether the 2020 Act cures the constitutional infirmity or merely avoids further injury, but the answer is immaterial because a prospective-only remedy would violate respondents' due process rights.

The Petition seems to suggest the Court's equal-protection remedy jurisprudence begins and ends with *Barr v. American Association of Political Consultants*, 140 S. Ct. 2335 (2020) and *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), two recent cases involving non-monetary constitutional injury. But those holdings drew on a litany of cases in which the constitutional injury was monetary, the result of a fee or tax imposed on them via an unconstitutional statute. In those cases, the plaintiffs/petitioners had already been deprived of property by the enforcement of an unlawful statute, presenting due process concerns with a prospective-only remedy distinguishable from those in *Barr* or *Morales-Santana*. The Court has consistently held for nearly a century that for plaintiffs with monetary injuries like these, a prospective-only remedy is not sufficient.

In *Montana National Bank v. Yellowstone County*, 276 U.S. 499 (1928), the plaintiff was a national bank that had been required to pay a tax not assessed on similarly-situated state banks. *Id.* at 501-02. The tax had been enforced based on a prior Montana Supreme Court case, but that court determined that its prior decision was in error and that as a result, the state's assessment against national banks violated constitutional due process and equal protection. *Id.* However, the Montana Supreme Court denied the relief sought by the plaintiff: recovery of the taxes paid pursuant to the unlawful discrimination. *Id.*

The Court overruled the lower court and reversed the decision denying the refund of the unlawful tax. *Id.* at 504-05. It noted that the Montana

Supreme Court had correctly held that the tax assessment was unlawful. *Id.* at 504. But the Court found this holding could not suffice as remedy because invalidating the tax after it had already been paid "does not cure the mischief" that had already been done. *Id.* The Court held that the plaintiff "cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury." *Id.* at 504-05.

Like the government in 2023, the state in *Montana National Bank* argued in 1928 that the plaintiff should be barred from recovery because the state might now apply the tax in a constitutional manner – that "the taxing officers of the county, in view of the [Montana Supreme Court's] later decision, now have the power to tax the shares of state banks, and thus bring about an equality." *Id.* at 505. The Court dismissed this rhetoric, calling it a "purely speculative suggestion" and holding it "unnecessary to say more than that it nowhere appears that these officers, if they possess the power, have undertaken to exercise it, or that they have any intention of ever doing so." *Id.*

Three years later, in *Iowa–Des Moines National Bank v. Bennett*, 284 U.S. 239 (1931), the Court again heard a case involving national banks who had paid state taxes at a higher rate than domestic corporations. In language later cited in *Morales-Santana*, the Court echoed *Montana National Bank* in holding that equal treatment would be "attained if

either their competitors' taxes are increased or their own reduced." *Id.* at 247. 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," and the taxpayer may not be "remitted to the necessity of awaiting such action by the state officials upon their own initiative." *Id.* (citing *Mont. Nat'l Bank*, 276 U.S. at 504).

Montana National Bank, *Bennett*, and the line of cases that followed make clear a party "cannot be deprived of its legal right to recover" funds "unlawfully exacted" of them by virtue of unconstitutional action even if subsequent actual or potential legislative action could remedy the constitutional infirmity, because such action nevertheless "leaves the monies thus exacted in the public treasury." *See Mont. Nat'l Bank*, 276 U.S. at 504-05. The Court found that the proper remedy was a refund despite the fact that the government's intent had been to use the unconstitutional law or unconstitutional enforcement of the law to increase the amount of funds going to its coffers. *Id.*

These principles were further crystallized in 1990 in *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18 (1990). Like *Montana National Bank*, *Bennett*, and the present case, *McKesson* focused on the appropriate remedy for a constitutional violation where petitioners had

already paid fees pursuant under an unconstitutional statute. *Id.* at 25-26. The petitioner was a liquor distributor who had paid increased taxes under an unconstitutional Florida law that favored in-state distributors. *Id.* at 18. Like the Montana Supreme Court in *Montana National Bank*, the Florida Supreme Court held that the tax levied by the state was unconstitutional and acted to prevent further enforcement, but refused to award a refund for the taxes already paid by the petitioner. *Id*. at 22.

The *McKesson* Court reversed the judgment of the Florida Supreme Court. In a unanimous opinion, the Court cited *Montana National Bank* for that court's conclusion that "prospective relief alone 'd[id] not cure the mischief which had been done,'" and held that "the Due Process Clause of the Fourteenth Amendment requires the State to afford [petitioners] meaningful postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional." *Id*. at 22, 35.

The *McKesson* Court rejected the exact arguments the Petition asserts are dispositive. The state argued in *McKesson* that the petitioner should be denied retrospective relief because the legislature's intent was to collect higher payments, and it would have collected them from everyone rather than just the petitioner's category had it known of the unconstitutionality. *Id.* at 41. The Court held that "the State may not, as respondents contend, deny [the petitioner] retrospective relief on the theory that the highest tax rate would have been imposed on all distributors had the State known that the tax scheme actually enacted would be declared unconstitutional,

such that [petitioner] would have paid the same tax in any event." *Id.* at 20. The Court found that "[s]ince this approach in fact treats [petitioners] worse than [those who benefitted from their exclusion from the tax], it is inconsistent with the requirement of due process." *Id.*

The argument the Court unanimously rejected in *McKesson* mirrors perfectly the government's assertion that "even if, in the 2017 Act, Congress had in fact preferred to except the BA districts from the fee increase it imposed in UST districts, there can be little question that, had it known such a course was not constitutionally permissible, it would have extended the fee increase to the BA districts rather than abandon the entire fee increase." Petition at 19. The *McKesson* respondents also argued that providing retrospective relief "would confer a 'windfall' on petitioner by leaving it with a smaller tax burden than it would have borne were there no [constitutional] violation in the first place." *McKesson*, 496 U.S. at 41-42. Similarly, the Petition outlines purported concerns about a refund "magnify[ing] inadvertent congressional generosity." Petition at 21. The *McKesson* court noted that this line of reasoning had been "implicitly rejected" in *Montana National Bank* and *Bennett* and that it was "expressly" rejecting it in its decision, finding that regardless of any supposed "windfall," providing solely prospective relief was "inconsistent with the nature of the State's due process obligation." *Id.* at 42.

The *McKesson* Court made clear that because exaction of funds "constitutes a deprivation of property, the State must provide procedural

safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." *Id.* at 36. Prospective-only relief provides no such safeguards, and the precedent outlined above establishes that the prospective-only relief the government seeks is inconsistent with the requirements of due process.

B. The Legal and Practical Flaws in the Government's Alternative Remedy are Numerous and Each is Fatal to its Argument

In the alternative, the Petition argues that congressional intent would dictate collecting increased fees from BA district debtors rather than refunding respondents' fees. This was the government's primary argument at the court of appeals, but it has now been relegated to secondary status, presumably because various courts, including the Court in *Siegel*, expressed serious concerns as to the legal and practical viability of this remedy, including whether the proposed remedy would itself be unconstitutional.

As those questions imply and the Eleventh Circuit outlined in detail, the flaws in this approach are legion. First, divining congressional intent here is more complex than in the cases upon which the Petition relies. As the Court noted in *Siegel,* the "decision," *i.e.* intent, of Congress created the statutory scheme that resulted in this constitutional infirmity. Congress knew and intended that its changes to Section 1930(a)(6) would impact only Trustee districts because it had decided to exempt and

keep exempt BA districts from that system.[4] The Petition also relies on the 2020 Act, which imposes no retroactive relief or application, to argue that retroactive application of Section 1930(a)(7) is the very remedy Congress *would* choose.[5] Second, the argument is based on an "extension of benefits versus withdrawal" dichotomy that is not analogous to an increased financial burden imposed on debtors in 48 of 50 states and ignores cases far more on-point. Finally, even if the foregoing were not dispositive, the proposed remedy is not viable and is itself unconstitutional.

1. The purported "congressional intent" outlined in the Petition fails to support this remedy

The government's doctrinaire focus on congressional intent relies almost entirely on *Morales-Santana*. Petition at p. 11, 17 (citing *Morales-Santana*, 137 S. Ct. at 1701).[6] In doing so, the Petition

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[4] *See also Siegel v. U.S. Tr. Program (In re Circuit City Stores, Inc.)*, No. 19-03091, 2022 WL 17722849, at *5 (Bankr. E.D.Va. Dec. 15, 2022) (finding "congressional intent provides little guidance here" and that because Congress decided against retroactive assessments in the 2020 Amendment, "[c]ongressional intent is, at best, a wash.").

[5] This *ex post facto* rhetoric is also inconsistent with the Court's analysis in *Morales-Santana* wherein intent is based on the "statute at hand." *Morales-Santana*, 137 S. Ct. at 1699.

[6] The Petition also cites *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) and *Schweiker v. Chilicky*, 487 U.S. 412 (1988) for the holding that the "primary authority for crafting constitutional remedies lies with Congress," but this reference is unpersuasive. Petition at 13. The injured parties in these cases were denied a remedy because Congress had already crafted a

points to the 2020 Amendment and its reference to "the longstanding intention of Congress" for uniform fee requirements as conclusive evidence. This argument fails because (1) *Morales-Santana* shows that the 2020 intent of Congress and *its* views as to whether that intent is "longstanding" are not the relevant inquiry for the 2017 Amendment; (2) as the Court noted in *Siegel*, any analysis of congressional intent here has to take into account Congress's decision-making that led to the unconstitutional statute; and (3) the 2020 Amendment reflects Congress's decision *not* to pursue the very remedy the government claims it would choose.

In analyzing congressional intent, the *Morales-Santana* Court held that the choice "is governed by the legislature's intent, *as revealed by the statute at hand*." *Id.* at 1699 (emphasis added). The relevant congressional intent thus is the intent of Congress in 2017, in revising Section 1930(a)(6) to increase fees solely in Trustee districts.[7] The "statute at hand," Section 1930(a)(6), imposed a fee increase on every chapter 11 debtor within Congress's purview and made zero changes to Section 1930(a)(7), a statute the Court has already held was permissive. *Siegel,* 142 S. Ct. at 1780. The revised Section 1930(a)(6) was not an exception to the existing fee structure; it was the imposition of a new one. Congress's intent was to

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remedy within the statutory scheme – that case law is inapposite where Congress "unwittingly" passes an unconstitutional law.

[7] Indeed, any other reading of *Morales-Santana* would be illogical, as congressional intent may be (and often is) different as to different statutes and, of course, as to different sessions of Congress.

charge Trustee district debtors more, without any regard to what would happen in BA districts. The question of whether Congress "expected" the Judicial Conference to impose the same 800% increases is not a question of whether Congress anticipated the constitutional infirmity, but rather whether Congress anticipated the constitutional *injury*.

The Petition's focus on the 2020 Amendment and Congress's 2017 expectations also asks the Court to view the 2017 Amendment in a vacuum. This approach echoes the government's failed argument in *Siegel* asking the Court to uphold the 2017 Amendment based on its purpose of providing funding to the Trustee Program and ignore Congress's decision to create and maintain the dual systems and allow the Judicial Conference to set BA district fees. *Siegel*, 142 S. Ct. at 1781-82. The Petition cites a footnote in *Siegel* noting that the government had provided "ample evidence that Congress likely understood, when it passed the 2017 Act, that the Judicial Conference would impose the same fee increase," but omits the remainder of the footnote. "That said," the Court continued, "prior to the 2021 amendment, the fee statute did not require the Judicial Conference to impose an equivalent increase . . . [i]t is *that congressional decision* that led to the disparities at issue here." *Siegel*, 142 S. Ct. at 1782 n.2 (emphasis added).

The government's focus on 2017 intent without regard to the statutory scheme is an intentionally myopic approach that parallels the flawed tautology the Court declined to accept in *Siegel*. The government argues that Congress intended to impose

a nationwide fee increase, but the evidence is clear that Congress did not intend to *impose* anything on BA district debtors. Rather, Congress wanted to generate more money for the United States Trustee Fund, and hoped the Judicial Conference would exercise its discretion to raise fees so that Congress could accomplish this without constitutional injury.

Any suggestion that the 2020 Amendment makes congressional intent "clear" also conflates Congress's prospective intent with an assertion that Congress would intend a retrospective remedy—a remedy it did not include in its "clarifying" statute. The government asserts that Congress passed the 2020 Amendment to address the constitutional infirmity it created with the changes to Section 1930(a)(6). However, despite its awareness of that infirmity and its "long-standing commitment" to equal fees, Congress chose to do nothing about the lower fees paid in BA districts since January 1, 2018. This decision suggests that Congress not only would not have chosen the government's preferred remedy had it been "apprised of the constitutional infirmity," it in fact has already rejected it.

2. The underlying statutory scheme and respondents' monetary injury render the government's *Morales-Santana* analogy unavailing

Another flaw in the Petition's discussion of the *Morales-Santana* line of cases lies in the government's analysis of extension versus abrogation. In *Morales-Santana*, the Court found that the legislative intent was clear because the unconstitutional statute was an exception to the general rule, and as a result,

extending it to general application was contrary to congressional intent. 137 S. Ct. at 1699. Therefore, the Court concluded, abrogation of the statute - withdrawal of benefits from all within its purview - was appropriate. *Id.* at 1700.

The analogy falls flat here because unlike the citizenship rights in *Morales-Santana* or the exception from robocall restrictions in *Barr*, there were no benefits conferred by the 2017 Amendment of Section 1930(a)(6). To the contrary, a burden was imposed on respondents and chapter 11 debtors in 48 states. The *Morales-Santana* Court held that in determining legislative intent, the Court looks to "measure the intensity of commitment" to the "main rule, not the exception." *Id.* at 1700. The government frames this "main rule" as Congress's desire for more fees, but when the Court talked about the "exception" in *Morales-Santana* and *Welsh*, it was considering whether the legislature would have struck the exception it created in the law and reverted to the status quo. *Id.* (citing *Welsh v. United States*, 398 U.S. 333, 367 (1970) (Harlan, J. concurring)). Unlike the statutes found unconstitutional in those two cases and *Barr*, Section 1930(a)(6) was not an "exception" to a general rule. It *was* the general rule, applying to every single chapter 11 debtor in the Trustee districts. The remedy proposed is thus not an "abrogation" nor a "withdrawal of benefits;" it is an extension of the burden imposed by the statute to a group that never was subject to it.

Moreover, the relevant "exception" in the "extension/abrogation" dichotomy is not the Trustee Program quarterly fee statute. It is, as the *St. Angelo*

court held, the 1990 amendments which represented Congress creating an exception to the general rule for debtors in North Carolina and Alabama. As the Court noted in *Siegel*, Congress's decision to carve out these two states led to the constitutional infirmity the Court addressed. *Siegel*, 142 S. Ct. at 1782, n.2. It is axiomatic that Congress cannot intend a uniform bankruptcy system while also intending that debtors in these states participate in a wholly different system where fees are determined outside of the Bankruptcy Code.

3. The government's proposal is both unrealistic and unconstitutional

Even if these flaws were not fatal to the government's argument, its proposed remedy would nevertheless fail because it is neither viable nor constitutional. The government suggests the Court order collection of increased fees from all North Carolina and Alabama debtors who would have paid them had Section 1930(a)(6) applied to their cases. The government's commitment to even attempting this remedy has already been questioned by multiple courts, and for good reason.

The proposal is rife with practical flaws. It is unclear how the Court would order the Judicial Conference to embark on these collection efforts or how they would accomplish the directive. Even in an unlikely scenario where collection went forward, most, if not all, of the cases have concluded with confirmed plans and distributed proceeds, and many entities who

would have owed increased fees likely no longer exist.[8] Moreover, many of these former debtors or creditors are themselves no longer active entities, making collection likely impossible.

These practical issues are both intertwined with and supplemental to constitutional concerns, and both components have prompted skepticism by courts hearing the government's proposal. Indeed, during argument in *Siegel*, the Court questioned whether the government believed it could actually move forward with the proposal. Transcript of Oral Argument at 74:18-21, *Siegel*, 142 S. Ct. 1770 (No. 21-441) (Roberts, J.) ("I'd be surprised if the government thought it could go and claw back from all the other debtors the fees that – claw back rather than equalize by giving back the – the fees.") The Chief Justice's skepticism is well-founded. The government's proposed remedy would not only fail to address the constitutional due process concerns outlined *supra*, it would exacerbate them by adding BA Program debtors to the existing group suffering constitutional injury.

For Trustee district debtors, the remedy the government proposes would fail to comply with due process because the *McKesson* court made clear that

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[8] The affidavit the government references in the Petition only serves to underscore the constitutional infirmity the Court addressed in *Siegel*. *See* Petition at 20, 23 (citing Haverstock Decl. ¶ 6, *In re ASPC Corp.*, D. Ct. Doc. 74-1, No. 19-ap-2120 (Bankr. S.D. Ohio Feb. 27, 2023)). While a DOJ statistician describes a detailed analysis of Trustee Program fees, any details as to the BA Program are only speculation because fees and administration of those cases were outside the purview of the Trustee Program. *Id*.

the State's "duty under the Due Process Clause to provide a 'clear and certain remedy' requires it to ensure that the tax as actually imposed on petitioner and its competitors during the contested tax period does not deprive petitioner of tax moneys in a manner that discriminates." *McKesson*, 419 U.S. at 43. The government's proposed remedy does not pass this test. It is neither clear nor certain, and all available indications suggest it will never be imposed.

For BA district debtors, the government's proposal would violate due process rights as an unconstitutional retroactive deprivation of property.[9] The Court made clear in *Landgraf v. USI Film Products* that statutes with retroactive application are unconstitutional when they violate fundamental fairness principles, particularly as to well-settled expectations. 511 U.S. 244, 245 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."). This jurisprudence has already come up in this case because the government relied on it in arguing that Section 1930(a)(6) was not unconstitutionally retroactive because debtors were aware that Congress could raise quarterly fees by statute. The same

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[9] The government effectively conceded this point during the *Siegel* argument. Transcript of Oral Argument at 71:1-6, *Siegel*, 142 S. Ct. 1770 (No. 21-441) (Counsel for the government stating that "[the petitioner] says there might be some due process-type concerns that would prevent somebody from being charged—from having to pay this fee after the fact . . . And I would say perhaps that is true.")

argument cannot be made as to Section 1930(a)(7) and its language providing that the Judicial Conference "may" raise such fees, and as a result the purported collection effort the government describes would itself likely violate their due process rights as well.[10]

C. The Tenth Circuit Correctly Concluded that a Refund is the Only Way to "Ameliorate the Harm" Caused by the Unconstitutional Statute

In *Siegel*, the Court rejected the government's attempt to use the existence of the separate systems as justification for treating debtors in the two systems differently, holding that the Bankruptcy Clause "does not allow Congress to accomplish in two steps what it forbids in one." *Siegel*, 142 S. Ct. at 1782. The Petition argues that the Court should allow Congress to nevertheless impose increased fees on debtors in one system because Congress intended to collect those fees and would have done so absent the constitutional infirmity it created. Just as the Constitution does not allow Congress to accomplish in two steps what it forbids in one, it cannot allow the government to accomplish in three steps what the Court rejected in

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[10] The government has argued that no due process concerns exist here because "the BA debtors were on notice that they were underpaying fees because the governing statute provided that, if the Judicial Conference elected to impose fees in the BA districts (which it had), those fees were supposed to be 'equal to those imposed' in UST districts." Petition for Writ of Certiorari at 18, *Harrington v. Clinton Nurseries, Inc., et al.* (No. 23-47) (filed July 14, 2023) (*Clinton Nurseries* Pet.). This argument is simply a rehash of the same "may means shall" argument the Court rejected in *Siegel*. *See Siegel*, 142 S. Ct. at 1779-80.

two. The Tenth Circuit and all other circuit courts correctly found that refund of fees to debtors is the proper constitutional remedy.

REASONS FOR DENYING THE PETITION

The government provides two reasons it claims justify the Court granting review: (1) the government's assertion that the question has "substantial legal and practical importance"; and (2) the government's contention that a circuit conflict is "likely to" develop. Both contentions fail. The government's assertions as to both the legal and practical importance of the Court determining remedy rest upon a misreading of the *Siegel* opinion and flawed, exaggerated assertions of the impact of denial. The government's assertions that a significant circuit conflict is "likely to" occur is based on the government's hope that a circuit agrees with an argument that has failed before every single circuit court judge that has heard it.

A. The Petition does not present a Question of Substantial Legal and Practical Importance

The Petition asserts that the remedy question has substantial legal and practical importance based on the Court's holding in *Siegel* and the government's assertions of the supposed high stakes associated with denial. The Petition's reading of *Siegel* misstates the reasons for the Court's remedy demurral and subsequent remand, and the government's claims as to the stakes are both overstated and non-dispositive on the issue of granting review.

Contrary to the government's apparent assertions otherwise, the Court's decision in *Siegel* did

not contain a determination that remedy was a question of "substantial legal and practical importance." Petition at 23-24. Rather, the Court determined that as "a court of review, not of first view," it could not address the remedy issue because the parties had raised a number of arguments which "[t]he court below . . . ha[d] not yet had an opportunity to address" because it had found the statute to be constitutional. *Siegel*, 142 S. Ct. at 1783 (citations omitted).

The Court thus declined to rule on remedy not because it viewed the remedy question as substantially important, but because the court below had not had any need to address it. If anything, the *Siegel* record suggests the Court did not view remedy as worthy of review. In the government's petition for review in that case, it stated that "[r]eview would also resolve the legal status of approximately $324 million in quarterly fees imposed under the 2017 amendment" because the issue had been fully briefed at the circuit court and the question would be "fairly included in the scope . . . such that this Court would be able to resolve it in this case if it were to agree with petitioner about the merits." Brief for the Respondent at 22-23, n.7, *Siegel*, 142 S. Ct. 1770 (No. 21-441). Yet the Court did not take up the issue.

As outlined herein, the remedy question is not one of substantial legal importance because the Court identified the proper remedy for monetary injury from unconstitutional "exaction" of funds a century ago and has confirmed the validity of that holding ever since. Moreover, the body of litigants impacted is limited,

and the government's description of the amounts at stake is not consistent with the facts.

The Petition claims the "practical stakes are considerable" because the decision below "has the potential to cost the U.S. government as much as $326 million." Petition at 24. The word *potential* is stretched to its limits in the government's claim – the assertion assumes that every single debtor who paid an increased quarterly fee would both seek and receive a refund if review is denied. Neither the Petition nor the *Siegel* briefing offer any support for the government's implication that a ruling on remedy in this case would have any impact beyond this and other cases in which debtors timely pursued their rights to a refund.

B. No Circuit Conflict Exists Nor Looms

The Petition implores the Court to grant review because the government warns the Court that a circuit conflict will soon emerge. But such a conflict is purely aspirational and grows more unlikely by the day. The Petition fails to cite a single case in which any court found Section 1930(a)(6) unconstitutional but declined to order a refund of fees. In the absence of any such precedent, the government relies heavily on Judge Brasher's concurrence in *U.S. Tr. Region 21 v. Bast Amron LLP (In re Mosaic Mgmt. Grp., Inc.)*, 22 F.4th 1291 (11th Cir. 2022) (Brasher, J. concurring), *vacated and remanded*, 142 S. Ct. 2862 (2022).

In a decision issued prior to *Siegel*, the Eleventh Circuit found Section 1930(a)(6) was constitutional, and Judge Brasher joined the majority in its holding because while he disagreed on constitutionality, he

believed the refund remedy was inappropriate. *Id.* The government presumably hoped that Judge Brasher would convince his colleagues as to this conclusion on remedy following remand. In fact, the opposite occurred. The court of appeals unanimously concluded that refunding the unconstitutional overpayment of fees was the proper remedy. *U.S. Tr. Region 21 v. Bast Amron LLP (In re Mosaic Mgmt. Grp., Inc.)*, 71 F.4th 1341 (11th Cir. 2023). Judge Brasher wrote a concurrence to explain that he had rescinded the "bottom line conclusions" he had previously drawn and on which petitioner relies. *Id.* at 1354 (Brasher, J. concurring).[11]

The Eleventh Circuit held the debtors were entitled to retrospective relief in the form of a refund of the increased portion of fees paid due to their participation in the Trustee Program. *Id.* at 1353-54. The circuit court's detailed analysis directly addressed the arguments the Petition asserts. First, the Eleventh Circuit "readily rejected" the government's argument that retroactive collections from comparable debtors in the BA districts would be an appropriate remedy. *Id.* at 1348. It found jurisdictional issues would preclude its ability to enforce the proposed "clawbacks" and that it was unclear whether Congress or the Judicial Conference could even implement retroactive collections because "the relevant bankruptcy estates have probably made substantial

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[11] The government has once again pivoted, now arguing that the *Mosaic* court's agreement with the Second Circuit and Tenth Circuit actually operates in favor of granting review due to the purported danger of other courts following the *Mosaic* reasoning. *Clinton Nurseries* Pet. at 19-20.

distributions or undergone other substantial change, or even closed." *Id*.

The Eleventh Circuit acknowledged there was some evidence that congressional intent could support prospective-only relief, but found that "legislative intent cannot overcome the requirements of due process." *Id*. at 1352-53 (citing *Reich v. Collins*, 513 U.S. 106 (1994) and *Newsweek, Inc. v. Fla. Dep't of Revenue*, 522 U.S. 442, 445 (1998)).[12] It also determined that *Morales-Santana* had no bearing on the monetary remedy issue because the "right to citizenship issue … is very different from the inequality in trustee fees at issue in this case." *Id*. at 1352.

Judge Brasher joined his colleagues in ordering that a refund was the appropriate remedy to redress the constitutional injury to the debtors. Recognizing the stark reversal of his previous position, Judge Brasher explained that he had since "acquired new wisdom or more critically, [] discarded old ignorance" that led him to "change his bottom-line conclusion." *Id.* at 1354 (Brasher, J. concurring) (quoting *Ring v. Arizona*, 536 U.S. 84 (2002) (Scalia, J. concurring) (internal quotations omitted)). He recognized due process mandated a refund to a party who challenged the fee despite his prior conclusions cited throughout the Petition. Judge Brasher concluded a level-up

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[12] As the Eleventh Circuit noted, the procedural posture in both *Reich* and *Newsweek* was identical to that presented here: the Court had already held the underlying statute was unconstitutional and the subject of the case was the injured party's right to monetary relief in the form of a refund. *Mosaic*, 71 F.4th at 1351.

remedy was the "only option" because there is "no lawful way to implement a backward-looking level down remedy" given that "[t]he creditors and debtors in the favored class of bankruptcy cases have their own due process rights that prevent us from retroactively assessing higher fees in those cases." *Id*.

The *Mosaic* holding negates the government's only asserted evidence of an impending circuit split. Nine circuit court judges have taken on the issue of the appropriate remedy for this constitutional violation, and seven of them have done it twice. Not a single judge has agreed with the government's arguments. Like the Court's decision in *Siegel*, the circuit courts' collective holding on remedy has been unanimous.

This substantive uniformity is further buttressed by the analysis of bankruptcy judges taking on the issue following *Siegel*. On remand, the *Siegel* bankruptcy court analyzed the remedy issue in detail and ordered the government to refund the unconstitutional fees. *See Siegel v. U.S. Tr. Program, (In re Circuit City Stores, Inc.)*, No. 19-03091, 2022 WL 17722849 (Bankr. E.D.Va. Dec. 15, 2022). The bankruptcy court held that "[p]rospective relief alone provides no relief" and would serve only "to cement the unconstitutional treatment." It found *Morales-Santana* and *Barr* "easily distinguishable" because no amount of monetary relief "could possibly redress the constitutional injury" in either case and concluded implementation of the proposed retroactive

assessments "is far too speculative and ineffective to accord proper relief to the Trustee." *Id.* at *4.[13]

Similarly, the Bankruptcy Court for the District of Delaware concluded that a refund to the trustee of excess fees paid is the appropriate remedy for harm caused by the unconstitutional non-uniformity. *Pitta v. Vara (In re VG Liquidation, Inc.)*, No. 18-11120, 2023 WL 3560414, at *7 (Bankr. D. Del. May 18, 2023). Finding that "[i]t is no remedy for this Trustee's injury that future trustees will not be similarly harmed," the bankruptcy court rejected the proposed prospective-only relief and based its decision on the "ample precedent" of the Court for ordering a refund "for unconstitutional overpayments to a governmental entity." *Id.* (citing *McKesson*, 496 U.S. at 35).

The hypothetical circuit split the government describes in the Petition does not exist, and any pretense of its existence is contradicted to the growing consensus represented by the *Siegel* case on remand and the conclusions of every other circuit that has considered the issue.[14]

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[13] Echoing the *Mosaic* court's due process concerns, the court noted that such assessments would "undoubtedly upset the expectations of parties who have extensively negotiated and consented to plan terms, only to have their expected distributions diluted through the payment of user fees and any attendant expenses …" *Id.*

[14] In the *Clinton Nurseries* petition, the government suggests that the Court should "await the potential development of a circuit split" and delay its decision on this Petition until every circuit court where the issue is pending has decided it. *Clinton Nurseries* Pet. at 21. The government's proposal is flawed in two respects: (1) the Court's should not base its decision to exercise

CONCLUSION

The Petition fails to identify a substantive or practical reason for the Court to exercise its discretion to grant review. The Court should deny the Petition.

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its discretion and further delay resolution of respondents' case on potential disagreement between pending cases and those already decided; and (2) in the event the government is finally successful in convincing a single court of appeals to adopt one of its flawed arguments, any such ruling would exist as an outlier rather than indicate a conflict.