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.

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

## REPLY BRIEF FOR THE PETITIONER

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**REPLY BRIEF FOR THE PETITIONER**

The court of appeals held that the appropriate remedy for the bankruptcy uniformity violation that this Court identified in *Siegel* v. *Fitzgerald*, 142 S. Ct. 1770 (2022), is to require the United States Trustee to grant retrospective refunds of the increased fees paid by debtors in 88 United States Trustee (UST) districts during the period when lower fees were being paid by debtors in 6 Bankruptcy Administrator (BA) districts. That remedy is manifestly contrary to congressional intent, as measured either by the prospective-only remedy that Congress in fact adopted or by the equally constitutional leveling-down remedy that would now collect an increased fee from a much smaller number of debtors and therefore preserve Congress's intention that the U.S. Trustee Program be sustained by user fees instead of taxpayer funds. The remedy question is legally and practically significant, implicating approximately $326

million in potential refunds. Although no circuit conflict has yet developed, the issue is pending in multiple lower courts and this Court's review is warranted to preserve its ability to adopt a uniform remedy before cases ordering a refund remedy become final.*

Respondents offer no persuasive defense of the court of appeals' holding that the appropriate remedy is a refund for the increased fees paid in the UST districts—which accounted for more than 97% of Chapter 11 filings during the relevant period, see Pet. 19-20. Respondents tellingly decline to embrace the reasoning of the courts of appeals that have adopted a retrospective leveling-up remedy of widespread refunds, but their own due-process-based approach cannot be reconciled with this Court's decisions about either constitutional remedies or due process.

**A. The Court Of Appeals' Decision Is Incorrect**

The court of appeals erred in holding that the very fee increase that Congress prescribed for large Chapter 11 debtors in UST districts in 2017 must be refunded to remedy the disparity that temporarily resulted from a lower fee in the BA districts.

1. As the government has explained (Pet. 13-17), congressional intent is the touchstone of the remedial inquiry, and the remedy that best effectuates Congress's intent here is the prospective mandate of uniform fees in UST and BA districts that Congress has already imposed in the 2020 Act. Respondents do not seriously dispute that a prospective-only remedy would

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* The same question is presented by the government's petition for a writ of certiorari in *Harrington* v. *Clinton Nurseries, Inc.*, No. 23-47 (filed July 14, 2023), which urges the Court to hold that petition pending its disposition in this case.

best serve congressional intent, and they acknowledge (Br. in Opp. 24) that the 2020 Act "did not include" any retrospective remedy.

Nevertheless, respondents contend that a "prospective-only remedy for a monetary injury would constitute a deprivation of respondents' property without due process." Br. in Opp. 13; see *id.* at 13-20. That argument is foreclosed by this Court's precedents. In *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), the Court explained that even in the case of unconstitutional tax collection—a context inherently more coercive than charging user fees to those who choose to avail themselves of the services of the bankruptcy system, see *id.* at 36—due process demands a refund remedy *only* if a taxpayer lacked a meaningful opportunity to challenge the tax assessments at a predeprivation hearing. *Id.* at 36-37. *McKesson* does not, as respondents contend (Br. in Opp. 17-20), hold that due process dictates the substantive result for the remedial analysis in cases involving the payment of money regardless of the available procedures. To the contrary, "the 'availability of a predeprivation hearing constitutes a procedural safeguard * * * sufficient by itself to satisfy the Due Process Clause.'" *Harper* v. *Virginia Dep't of Tax'n*, 509 U.S. 86, 101 (1993) (quoting *McKesson*, 496 U.S. at 38 n.21). As a result, "'meaningful backward-looking relief'" is required only "if no such predeprivation remedy exists." *Ibid.* (quoting *McKesson*, 496 U.S. at 31). Here, respondents had a full opportunity for a predeprivation hearing before the bankruptcy court, although they chose to wait until after they made most of the payments to seek a court determination of their fees. See Pet. App. 35a-36a.

In attempting to support a contrary rule, respondents rely (Br. in Opp. 15-17) on two decades-old cases. First, they point to *Montana National Bank* v. *Yellowstone County*, 276 U.S. 499 (1928), but *McKesson* specifically addresses that decision, citing it as an example of the "obligation to provide retrospective relief as part of its *postdeprivation* procedure." 496 U.S. at 32 (emphasis added). Second, they point to *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931), but *McKesson* also discussed *Bennett*, which it viewed as "illustrat[ing]" the *permissibility* of the leveling-down remedy of collecting additional taxes from those taxpayers who originally paid less, in lieu of providing a refund to those who paid more. *McKesson*, 496 U.S. at 39; see *id.* at 39-40. Those cases are entirely consistent with the principle, reflected in *McKesson* itself, that, as long as adequate procedures are available, the outcome of the remedial inquiry should turn on congressional intent. For the same reason, there was no due-process impediment to the Court's resolution in *Barr* v. *American Association of Political Consultants*, 140 S. Ct. 2335 (2020) (*AAPC*), which imposed a prospective remedy for an unconstitutional exception to a robocall restriction without retrospectively "negat[ing] the liability of parties who made robocalls covered by the robocall restriction," even though such parties suffered financial injury while the unconstitutional regime was in effect. *Id.* at 2355 n.12 (plurality opinion).

2. Similarly unavailing are respondents' objections to the government's alternative argument that, if backward-looking relief were required, such relief should not take the form of a broad refund, but should instead consist in collecting additional fees from the

much smaller number of BA debtors who paid less than equivalent UST debtors did.

Respondents criticize (Br. in Opp. 21) the "government's doctrinaire focus on congressional intent." That criticism is misguided. As this Court's cases have long made clear, when disparate treatment under a statute is unconstitutional, the choice between a leveling-up and a leveling-down remedy "is governed by the legislature's intent." *Sessions* v. *Morales-Santana*, 582 U.S. 47, 73 (2017); see, *e.g.*, *In re Mosaic Mgmt. Grp., Inc.*, 71 F.4th 1341, 1346 (11th Cir. 2023) (citing this Court's cases for the proposition that "congressional intent" "guide[s]" the remedial inquiry); *id.* at 1354 (Brasher, J., concurring) ("A court's choice between the two remedies must be guided by legislative intent."). That follows from the nature of the violation. Although the Constitution calls for "equality" (or here, uniformity), the method for achieving that result "is a matter on which the Constitution is silent." *Levin* v. *Commerce Energy, Inc.*, 560 U.S. 413, 426-427 (2010).

Respondents contend (Br. in Opp. 20) that determining congressional intent here is "complex." To the contrary, as all three judges on a recent Eleventh Circuit panel recognized, "it is obvious that Congress's intent supports the conclusion that [courts] must level down." *Mosaic*, 71 F.4th at 1354 (Brasher, J., concurring); see *id.* at 1351 (majority opinion) (acknowledging "the strong evidence of congressional intention preferring the maintenance of the increased level of fees"). In arguing to the contrary, respondents misconstrue the relevant inquiry, which is not whether Congress intended to enact a disuniform scheme in 2017, but what remedy Congress would likely have selected "had it been apprised of the constitutional infirmity" with that scheme.

*Levin*, 560 U.S. at 427; see Pet. 13. Nor are respondents correct in asserting (Br. in Opp. 24) that Congress "rejected" a leveling-down remedy in the 2020 Act. Indeed, as respondents themselves recognize, the absence of any backward-looking correction—neither a leveling up nor a leveling down—in the 2020 Act indicates that Congress did *not* "intend a retrospective remedy." *Ibid.* But if backward-looking relief is required, other aspects of the 2020 Act strongly support a leveling-down remedy, including Congress's decision to set both UST and BA fees at levels similar to the levels adopted in the 2017 Act and Congress's adoption of an express finding reiterating its "longstanding" commitment to uniform fees. See Pet. 19, 21-22.

When describing the apparent intentions of the 2017 Congress, respondents assert (Br. in Opp. 20) that "Congress knew and intended that its changes would impact only [UST] districts." But this Court has already recognized that there is "ample evidence that Congress likely understood, when it passed the 2017 Act, that the Judicial Conference would impose the same fee increase" in the BA districts. *Siegel*, 142 S. Ct. at 1782 n.2. Thus, respondents ultimately concede that the disparity that emerged in practice was "unwitting[]," Br. in Opp. 22 n.6, because Congress "hoped the Judicial Conference would exercise its discretion to raise [BA] fees" by a corresponding amount, *id.* at 24. Congress would not have intended, as a fallback, the opposite of what it had hoped and expected the Judicial Conference would do in the first instance. A judicial remedy that requires additional payments from debtors in the BA districts would fill the gap in the 2017 Act in the way that a more-witting Congress would have chosen, thereby avoiding a fundamental "disruption of the

statutory scheme." *Morales-Santana*, 582 U.S. at 75 (citation omitted).

Resisting that view, respondents next attempt (Br. in Opp. 24-25) to cabin this Court's remedial jurisprudence by arguing that a leveling-down remedy is available only when the challenged scheme confers a benefit rather than a burden. Respondents are mistaken. This Court has specifically recognized that the leveling-up and leveling-down options are both available when there is "impermissible discrimination in [the] allocation of benefits *or burdens*." *Levin*, 560 U.S. at 427 (emphasis added). The tax cases illustrate the point. See *McKesson*, 496 U.S. at 36-37, 38 n.21 (holding that a leveling-down remedy is available for unconstitutional tax assessments); see also, *e.g.*, *Comptroller of the Treasury* v. *Wynne*, 575 U.S. 542, 569 (2015). Nor would a distinction between benefits and burdens be workable because a discriminatory provision inherently benefits one group relative to a second, and burdens the second group relative to the first. Just so here: The lack of uniformity benefited BA debtors relative to respondents, just as the unconstitutional exception to the robocall restriction at issue in *AAPC* benefited callers seeking to collect federal government debts relative to the challengers in that case, 140 S. Ct. at 2343 (plurality opinion).

Respondents also contend that the lower fee regime in effect in the BA districts was not the exception to the general rule of increased fees because the 2017 Act's amendment of 28 U.S.C. 1930(a)(6), which set the higher fee levels, "was the general rule, applying to every single chapter 11 debtor in the Trustee districts." Br. in Opp. 25 (emphasis omitted). That argument is puzzling. The higher fee schedule set out in Section 1930(a)(6)

was indeed the general rule, but the inadvertent persistence of lower fees paid in BA districts—the source of the "disparities" that now need to be remedied, *Siegel*, 142 S. Ct. at 1782 n.2—was an exception to the general fee increase. Cf. *id.* at 1776 (describing the BA program as an "exempt[ion]" from the otherwise-applicable requirement for each district to participate in the U.S. Trustee Program).

Finally, respondents invoke (Br. in Opp. 26-27) "practical issues" with a leveling-down remedy, speculating, without citation, that "most" of the affected bankruptcy cases "have concluded" and that "many" of the debtors "likely no longer exist." Respondents fail to acknowledge, however, that similar problems would also complicate any effort to implement their preferred refund remedy, and that a refund remedy would create those complications on a much larger scale because it would likely need to be implemented in approximately 35 times as many cases. See Pet. 23 (estimating that the higher fee applied in approximately 2,100 cases, and the lower fee in approximately 60 cases).

In any event, the potential practical difficulties do not justify the imposition of a leveling-up remedy that would contravene congressional intent. The Court has recognized that a "good-faith effort to administer and enforce * * * a retroactive assessment likely would constitute adequate relief." *McKesson*, 496 U.S. at 41 n.23. Respondents nowhere dispute that the Judicial Conference would conduct such a good-faith effort if the Court ordered a leveling-down remedy.

In their final salvo, respondents suggest (Br. in Opp. 29-30) that there is something improper about a leveling-down remedy because the practical result for challengers would be the same as if *Siegel* had not invalidated

the unequal implementation of the 2017 Act. But there is nothing unusual about a remedy for a constitutional violation based on unequal treatment that, on a practical level, does "not help the [challengers] at all." *Wynne*, 575 U.S. at 569 (citation omitted); see Pet. 14-15 (explaining that the successful challengers in *Morales-Santana* and *AAPC* did not obtain the benefits that others had unequally received). Congress was free to set fees at the level it chose in the 2017 Act in UST districts as long as the same increase would be applied in BA districts. See *Siegel*, 142 S. Ct. at 1782-1783. A remedy that redresses the constitutional injury by effectuating Congress's original intent is not a circumvention of *Siegel*, which remanded for consideration of the appropriate remedy. The appropriate remedy is what Congress itself would have done "had it been apprised of the constitutional infirmity." *Levin*, 560 U.S. at 427.

**B. The Question Presented Warrants This Court's Review**

Respondents' assertion that this Court's review is unwarranted is equally unavailing.

Respondents contend (Br. in Opp. 32) that the question presented lacks legal and practical significance. They are wrong on both counts. This case involves an important legal question concerning the remedy for the invalidation of an Act of Congress. It presents a stark choice between a remedy that reflects congressional intent and one that effectively nullifies a fee increase that Congress specifically enacted in service of its long-held and repeatedly articulated intent to ensure the self-funding of the bankruptcy system. See Pet. 20. That question—which this Court acknowledged but did not resolve in *Siegel*, see 142 S. Ct. at 1783—is legally important. It is also practically significant. This case alone involves more than $2.5 million; and the nation-

wide resolution of this question implicates approximately $326 million in potential refunds.

Respondents emphasize (Br. in Opp. 32-36) that there is not a conflict in the courts of appeals that have addressed the remedial question in the year since *Siegel*. But a federal statute has been held unconstitutional. Judging the constitutionality of an Act of Congress is "the gravest and most delicate duty" of the courts, *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citation omitted), and often justifies certiorari in the absence of a split. See, *e.g.*, *Allen* v. *Cooper*, 140 S. Ct. 994, 1000 (2020); *United States* v. *Alvarez*, 567 U.S. 709, 714 (2012) (noting that circuit conflict arose "[a]fter certiorari was granted"). Although this Court did not decide the remedial question in *Siegel*, that was only to give the lower courts an "opportunity" to consider the question "in the first instance." 142 S. Ct. at 1783. Now the Court should delineate the effects of its previous declaration that a federal statute is unconstitutional.

Moreover, the current agreement in result among three circuits is far from compelling. The Second and Tenth Circuit's decisions provide no meaningful analysis, see *In re Clinton Nurseries, Inc.*, 53 F.4th 15, 29 (2d Cir. 2022), petition for cert. pending, No. 23-47 (filed July 14, 2023); Pet. App. 1a-5a, 31a-32a (10th Cir.). And the Eleventh Circuit's decision relies on a mistaken reading of this court's due-process cases to reach a result that the majority acknowledged to be contrary to Congress's intent, *Mosaic*, 71 F.4th at 1351, and that Judge Brasher described as inconsistent with the normal operation of "equal treatment law," *id.* at 1354 (Brasher, J., concurring). Respondents conspicuously fail to adopt the Eleventh Circuit's primary reasoning

in their own merits arguments. See Br. in Opp. 13-30 (failing to cite *Mosaic* in those arguments).

The remedial question is currently pending in two other circuits. See *Siegel* v. *United States Trustee Program*, No. 23-1678 (4th Cir.) (opening brief due Aug. 15, 2023) (expedited appeal); *USA Sales, Inc.* v. *Office of the United States Trustee*, No. 21-55643 (9th Cir. argued June 7, 2023). Given the serious weaknesses in the arguments for a widespread-refund remedy, see Pet. 12-23; pp. 2-9, *supra*, another court of appeals may reach a contrary result, thus creating a conflict.

In the meantime, however, the Court should not permit the remedy in any circuit to be dictated by the earliest decisions, which contravene congressional intent, usurp Congress's primary authority to determine the remedy, and effectively eliminate, in parts of the country, the very fee increase that Congress specifically sought to impose in the 2017 Act. Allowing those decisions to become final would prevent this Court from effectuating a nationally uniform remedy if it eventually decides to reject widespread refunds to debtors in UST districts. See Pet. 26-27. As of now, 414 cases, encompassing potential total claims of approximately $89 million dollars, could be controlled by the decisions of the court of appeals in this case and of the Second Circuit in *Clinton Nurseries* if the judgments in those cases are permitted to become final.

If, however, the Court prefers to avoid that result while awaiting the potential development of a circuit split, it should hold this petition, as well as those in other cases presenting the same question (see p. 2 n.*, *supra*), for as long as that question remains pending before other courts of appeals. Although respondents object to "further delay[ing] resolution" of their case, Br.

in Opp. 37 n.14, that additional delay is amply justified by the need to preserve this Court's ability to effectuate a uniform remedy in all judicial districts.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the Court should grant the petition.

Respectfully submitted.

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