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 WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Section 1004(a) of the Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, Div. B, 131 Stat. 1232 (28 U.S.C. 1930(a)(6)(B) (2018)), amended the schedule of quarterly fees payable to the United States Trustee in certain pending bankruptcy cases. In *Siegel* v. *Fitzgerald*, 596 U.S. 464 (2022), this Court held that that provision contravened Congress's constitutional authority to "establish * * * uniform Laws on the subject of Bankruptcies," U.S. Const. Art. I, § 8, Cl. 4, because it was initially applied only in the 88 federal judicial districts that have United States Trustees but not in the 6 districts that have Bankruptcy Administrators. This Court left open the question of "the appropriate remedy" for the violation. *Siegel*, 596 U.S. at 480; see *id.* at 480-481. The question presented in this case is:

Whether the appropriate remedy for the constitutional uniformity violation found by this Court in *Siegel*, *supra*, is to require the United States to grant retrospective refunds of the increased fees paid by debtors in United States Trustee districts during the period of disuniformity, or is instead either to deem sufficient the prospective remedy adopted by Congress or to require the collection of additional fees from a much smaller number of debtors in Bankruptcy Administrator districts.

PARTIES TO THE PROCEEDING

Petitioner (appellee in the court of appeals) is the Office of the United States Trustee.

Respondents (appellants in the court of appeals) are John Q. Hammons Fall 2006, LLC; ACLOST, LLC; Bricktown Residence Catering Co., Inc.; Chateau Catering Co., Inc.; Chateau Lake, LLC; City Centre Hotel Corp.; Civic Center Redevelopment Corp.; Concord Golf Catering Co., Inc.; Concord Hotel Catering Co., Inc.; East Peoria Catering Co., Inc.; Fort Smith Catering Co., Inc.; Franklin/Crescent Catering Co., Inc.; Glendale Coyotes Catering Co., Inc.; Glendale Coyotes Hotel Catering Co., Inc.; Hammons of Arkansas, LLC; Hammons of Colorado, LLC; Hammons of Franklin, LLC; Hammons of Frisco, LLC; Hammons of Huntsville, LLC; Hammons of Lincoln, LLC; Hammons of New Mexico, LLC; Hammons of Oklahoma City, LLC; Hammons of Richardson, LLC; Hammons of Rogers, Inc.; Hammons of Sioux Falls, LLC; Hammons of South Carolina, LLC; Hammons of Tulsa, LLC; Hammons, Inc.; Hampton Catering Co., Inc.; Hot Springs Catering Co., Inc.; Huntsville Catering, LLC; International Catering Co., Inc.; John Q. Hammons 2015 Loan Holdings, LLC; John Q. Hammons Center, LLC; John Q. Hammons Hotels Development, LLC; John Q. Hammons Hotels Management I Corporation; John Q. Hammons Hotels Management II, LP; John Q. Hammons Hotels Management, LLC; Joplin Residence Catering Co., Inc.; JQH—Allen Development, LLC; JQH—Concord Development, LLC; JQH—East Peoria Development, LLC; JQH—Ft. Smith Development, LLC; JQH—Glendale AZ Development, LLC; JQH—Kansas City Development, LLC; JQH—La Vista CY Development, LLC; JQH—La Vista Confer-

ence Center Development, LLC; JQH—La Vista III Development, LLC; JQH—Lake of the Ozarks Development, LLC; JQH—Murfreesboro Development, LLC; JQH—Normal Development, LLC; JQH—Norman Development, LLC; JQH—Oklahoma City Bricktown Development, LLC; JQH—Olathe Development, LLC; JQH—Pleasant Grove Development, LLC; JQH—Rogers Convention Center Development, LLC; JQH—San Marcos Development, LLC; Junction City Catering Co., Inc.; KC Residence Catering Co., Inc.; La Vista CY Catering Co., Inc.; La Vista ES Catering Co., Inc.; Lincoln P Street Catering Co., Inc.; Loveland Catering Co., Inc.; Manzano Catering Co., Inc.; Murfreesboro Catering Co., Inc.; Normal Catering Co., Inc.; OKC Courtyard Catering Co., Inc.; R-2 Operating Co., Inc.; Revocable Trust of John Q. Hammons Dated December 28, 1989 as Amended and Restated; Richardson Hammons, LP; Rogers ES Catering Co., Inc.; SGF—Courtyard Catering Co., Inc.; Sioux Falls Convention/Arena Catering Co., Inc.; St. Charles Catering Co., Inc.; Tulsa/169 Catering Co., Inc.; U.P. Catering Co., Inc.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-5a) is not reported in the Federal Reporter but is available at 2022 WL 3354682. A prior opinion of the court of appeals (Pet. App. 7a-34a) is reported at 15 F.4th 1011. The opinion of the bankruptcy court (Pet. App. 35a-47a) is reported at 618 B.R. 519.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2022. A petition for rehearing was denied on January 26, 2023 (Pet. App. 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 to and including June 23, 2023, and the petition was filed on that date. The petition for a writ

of certiorari was granted on September 29, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

1. a. Federal bankruptcy cases require substantial oversight and administrative support. In 88 federal judicial districts, the United States Trustee (UST) Program, a component of the U.S. Department of Justice, performs those functions; in 6 other districts, the Bankruptcy Administrator (BA) Program, which relies on judicially appointed bankruptcy administrators, plays that role. See generally *Siegel* v. *Fitzgerald*, 596 U.S. 464, 468-469 (2022).

The UST Program began in 1978 as a congressionally created pilot program in 18 of the 94 federal judicial districts. See *Siegel*, 596 U.S. at 468. In 1986, when Congress expanded the UST Program and made it permanent, it permitted the 6 judicial districts in North Carolina and Alabama to opt out and use the BA Program, which operates under the supervision of the Judicial Conference. See *id.* at 468-469; Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (1986 Act), Pub. L. No. 99-554, §§ 111-115, 302(d)(3), 100 Stat. 3090-3095, 3121-3123 (28 U.S.C. 581 note). The BA Program was initially scheduled to phase out in 1992 and then in 2002, but it remains in place in those 6 districts. See *Siegel*, 596 U.S. at 469.

b. Although the UST Program is housed in the Department of Justice, "Congress requires that the [UST] Program be funded in its entirety by user fees paid to the United States Trustee System Fund * * * , the bulk of which are paid by debtors who file cases under Chap-

ter 11 of the Bankruptcy Code." *Siegel*, 596 U.S. at 469; see 28 U.S.C. 589a(b)(5). Specifically, Section 1930(a) directs that in those cases a "quarterly fee shall be paid to the United States trustee * * * for each quarter (including any fraction thereof) until the case is converted or dismissed, whichever occurs first." 28 U.S.C. 1930(a)(6)(A) (Supp. III 2021).

The 1986 Act imposed Chapter 11 quarterly fees in the 88 UST districts but not in the 6 BA districts, which are funded by the Judiciary's general budget. See § 302(e), 100 Stat. 3123; *Siegel*, 596 U.S. at 469. In the mid-1990s, a panel of the Ninth Circuit opined that having two distinct programs for supervising the administration of bankruptcy cases with different fees violated the uniformity requirement of the Bankruptcy Clause; on that basis, the court prospectively invalidated the provision of the statute that extended the deadline for the BA districts to join the UST Program, effectively requiring those districts to join the UST Program. See *St. Angelo* v. *Victoria Farms, Inc.*, 38 F.3d 1525, 1532-1533 (1994), amended, 46 F.3d 969 (1995).

After *Victoria Farms*, Congress amended the statutory framework but did not eliminate the BA program as the Ninth Circuit had essentially provided. Congress instead amended Section 1930(a) by adding a new paragraph (7), which provided that "[i]n districts that are not part of a United States trustee region * * * the Judicial Conference of the United States may require the debtor in a case under chapter 11 * * * to pay fees equal to those imposed by paragraph (6) of this subsection." 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)). That amendment adopted the proposal of the Judicial Conference for "elimi-

nat[ing] any *Victoria Farms* problem." *Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999 and Federal Courts Improvement Act of 1999: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary on H.R. 2112 and H.R. 1752*, 106th Cong., 1st Sess. 26 (1999); see Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States* 45 (Sept./Oct. 2001) (*2001 JCUS Report*), www.uscourts.gov/sites/default/files/2001-09_0.pdf. Congress directed that the quarterly fees collected in BA districts be deposited in a fund that offsets appropriations to the Judicial Branch, from which the BA Program is also funded. See 28 U.S.C. 1930(a)(7), 1931 (2000). And, believing that it had solved any uniformity problem, Congress "permanently exempted the six [BA] districts from the requirement to transition to the Trustee Program." *Siegel*, 596 U.S. at 469; see 2000 Act § 501, 114 Stat. 2421-2422.

In 2001, the Judicial Conference issued a standing order that directed the BA districts to impose quarterly fees "in the amounts specified in 28 U.S.C. § 1930, as those amounts may be amended from time to time." *2001 JCUS Report* 46. "[F]or the next 17 years, the Judicial Conference matched all [UST] Program fee increases with equivalent [BA] Program fee increases, meaning that all districts nationwide charged similarly situated debtors uniform fees." *Siegel*, 596 U.S. at 470.

c. By 2017, a sharp reduction in collections meant that the existing fee schedule would become inadequate to fund the UST Program. See *Siegel*, 596 U.S. at 470. A shortfall would have required taxpayers to bear the costs of the UST Program because the Program's congressional appropriation would no longer be offset by

the fee payments. See 28 U.S.C. 589a(b)(5). "[C]oncerned" by the prospect of such a "shortfall in the UST Fund," Congress temporarily increased the quarterly fees in larger Chapter 11 cases. *Siegel*, 596 U.S. at 470. Specifically, the Bankruptcy Judgeship Act of 2017 (2017 Act), Pub. L. No. 115-72, Div. B, 131 Stat. 1229, amended the quarterly-fee statute by adding the following subparagraph to Section 1930(a)(6):

> (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.

§ 1004(a), 131 Stat. 1232 (28 U.S.C. 1930(a)(6)(B) (2018)). The increased fees took effect in the first quarter of 2018. See § 1004(c), 131 Stat. 1232.

Despite the Judicial Conference's 2001 standing order imposing quarterly fees in BA districts "in the amounts specified in 28 U.S.C. § 1930, as those amounts may be amended from time to time," *2001 JCUS Report* 46, the BA districts did not actually implement the amended fee schedule in the first quarter of 2018. In response, the Executive Committee of the Judicial Conference, acting on an expedited basis, ordered the BA districts to implement the amended fee schedule, but it did so only for "cases filed on or after" October 1, 2018. Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States* 11 (Sept. 13, 2018), www.uscourts.gov/sites/default/files/2018-09_proceedings.pdf; see *id.* at 11-12.

d. In a typical case, Chapter 11 debtors include quarterly-fee payments in their proposed budgets. The

amounts of the payments can be litigated at the time of the budget submission; by filing an adversary proceeding to challenge fees at any time while the bankruptcy case is ongoing; or by filing a district court action after the case has terminated. See, *e.g.*, Pet. App. 35a.

After some debtors in UST districts challenged their fees under the 2017 Act, some lower courts held that the 2017 Act was unconstitutionally non-uniform because Congress had not compelled the same fees in BA and UST districts. See, *e.g.*, *In re Buffets, LLC*, 597 B.R. 588, 594 (Bankr. W.D. Tex. 2019), rev'd and remanded, 979 F.3d 366 (5th Cir. 2020). In response, Congress enacted clarifying legislation that struck the word "may" from Section 1930(a)(7) and replaced it with "shall." Bankruptcy Administration Improvement Act of 2020 (2020 Act), Pub. L. No. 116-325, § 3(d)(2), 134 Stat. 5088.

As amended by the 2020 Act, the text of Section 1930(a)(7) now provides that, for BA districts, the "Judicial Conference of the United States *shall* require the debtor in a case under chapter 11 * * * to pay fees equal to those imposed by paragraph (6) of this subsection." 28 U.S.C. 1930(a)(7) (Supp. III 2021) (emphasis added). An express legislative finding explains that the change "confirm[ed] the longstanding intention of Congress that quarterly fee requirements remain consistent across all Federal judicial districts." 2020 Act § 2(a)(4)(B), 134 Stat. 5086.

The 2020 Act also amended the fee schedule applicable in both UST and BA districts. It retained the $250,000 maximum fee from the 2017 Act but slightly reduced the fees payable by large debtors that do not hit that ceiling. Since April 2021, the fees for Chapter 11 debtors with quarterly disbursements of $1 million or more have been "0.8 percent of disbursements but

not more than $250,000." 28 U.S.C. 1930(a)(6)(B)(ii)(II) (Supp. III 2021); see 2020 Act § 3(e)(2)(B)(ii), 134 Stat. 5089 (effective date).

e. In 2022, this Court held in *Siegel* that the 2017 Act violated the uniformity requirement of the Bankruptcy Clause because the statutory scheme permitted unequal fees in the UST and BA districts and different fees were in fact imposed. 596 U.S. at 480. In reaching that conclusion, the Court 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 that Congress had mandated in the UST districts. *Id.* at 480 n.2. The Court explained that the uniformity violation was nonetheless attributable to Congress because it was Congress's decision to rely on its expectation about the Judicial Conference's actions rather than to "*require* the Judicial Conference to impose an equivalent increase" that "led to the disparities at issue." *Ibid.* The Court expressly left open "the appropriate remedy" for the uniformity violation, in light of the government's arguments "that any remedy should apply only prospectively, or should result in a fee increase for debtors who paid less in the [BA] districts." *Id.* at 480; see *id.* at 480-481. The Court remanded for the Fourth Circuit "to consider these questions in the first instance." *Id.* at 481.

2. This separate case arose in 2016, when respondents—76 entities associated with John Q. Hammons Hotels and Resorts—sought relief under Chapter 11 of the Bankruptcy Code in the District of Kansas, a UST district. Pet. App. 15a. For more than two years after the 2017 Act's amended quarterly-fee schedule took effect, respondents paid the increased quarterly

fees associated with being the debtors in a Chapter 11 proceeding with substantial disbursements. *Id.* at 38a. But in 2020, they filed a motion in bankruptcy court seeking a reduction in their quarterly fees on the ground that the 2017 Act was unconstitutionally non-uniform because the statutory fee increase had been implemented differently in UST and BA districts. *Id.* at 35a-36a; see Debtors' Mot. to Determine, Bankr. Ct. Doc. 2823 (Mar. 3, 2020) (Mot. to Determine). Respondents asked the court to "determine that all prospective UST fees due * * * shall be calculated based upon" the pre-2017-Act fee schedule. Mot. to Determine 8. They also sought a refund of $2,495,956, which represented the difference between what they paid under the 2017 Act and what they would have paid under the prior fee schedule, which had remained in effect for cases filed before October 2018 in the BA districts. See *id.* at 7.

a. The bankruptcy court denied respondents' motion, ruling that the 2017 Act did not violate the uniformity requirement of the Bankruptcy Clause. Pet. App. 35a-47a. The court of appeals reversed in relevant part. *Id.* at 7a-34a. Anticipating this Court's later decision in *Siegel*, the majority concluded that the 2017 Act was unconstitutionally non-uniform. *Id.* at 11a; *id.* at 21a-30a; but see *id.* at 32a-34a (Bacharach, J., dissenting).

As relevant here, the court of appeals further held that respondents are entitled to "a refund of the amount of quarterly fees paid exceeding the amount that [they] would have owed in a Bankruptcy Administrator district during the same period," and it remanded for the bankruptcy court to determine that amount. Pet. App. 32a. The court did not dispute that "courts can remedy unequal treatment either by expanding or withdrawing benefits, depending on legislative intent," or that "here,

Congress intended to increase quarterly fees nationwide." *Id.* at 31a. The court reasoned, however, that respondents "are entitled to relief," and that a refund would be the only way to provide that relief because the court "lack[s] authority over quarterly fees assessed in districts outside [the Tenth C]ircuit, and thus in [the BA districts in] Alabama or North Carolina." *Ibid.*

b. While *Siegel* was pending, the Office of the United States Trustee filed a petition for a writ of certiorari in this case on both the merits and remedy questions, asking the Court to hold the petition pending its decision in *Siegel*. See Pet. I, 13, *Office of the United States Trustee* v. *John Q. Hammons Fall 2006, LLC*, No. 21-1078 (filed Feb. 2, 2022). After deciding *Siegel*, the Court granted certiorari in this case, vacated the court of appeals' judgment, and remanded to the court of appeals "for further consideration in light of *Siegel*," Pet. App. 6a—which, as noted above, had left open the question of the appropriate remedy for the uniformity violation, 596 U.S. at 480-481.

3. On remand from this Court, the court of appeals issued an unpublished order stating that it would "reinstate [its] original opinion," which had determined that the appropriate remedy is a partial refund of the quarterly fees that respondents paid in a UST district. Pet. App. 5a. The court noted that it had "careful[ly] consider[ed]" this Court's opinion in *Siegel* and the supplemental briefs it received after remand, but it did not otherwise explain its reasoning on the remedial question. See *ibid.*

The court of appeals denied the U.S. Trustee's petition for rehearing. Pet. App. 48a-49a.

SUMMARY OF ARGUMENT

This case presents the question of the appropriate remedy for the constitutional violation that this Court found in *Siegel* v. *Fitzgerald*, 596 U.S. 464 (2022). At its core, the issue is whether the costs of operating the UST Program during the disputed period will be borne by the largest users of the Program (including respondents), as Congress intended, or by taxpayers, as Congress has consistently sought to avoid. The court of appeals erred in selecting the latter option.

A. The touchstone for selecting a remedy for a constitutional violation is congressional intent: the remedy Congress would have chosen if apprised of the constitutional infirmity. Where, as here, the constitutional problem arises from a lack of uniformity, the violation can be remedied either by extending or by removing the unequally distributed burden—here, either applying the 2017 fee increase to the BA debtors who did not pay it or providing partial refunds to the UST debtors who did.

There is particularly clear evidence that Congress would have chosen to remedy the disparity by extending its fee increase to the small number of debtors in the BA districts who did not pay it. As this Court already explained in *Siegel*, the enacting Congress "likely understood" that the 2017 Act's fee increase would be imposed in the BA districts, consistent with the Judicial Conference's standing order and past practice. 596 U.S. at 480 n.2. Although Congress inadvertently enabled the disparity by not *mandating* that result, there can be no serious dispute that, if informed at the time of the constitutional violation, Congress would have remedied it by imposing uniformly *higher* fees across all districts. Indeed, that is exactly what Congress did when it

learned of the potential uniformity problem that emerged in application. In the 2020 Act, Congress specified that the Judicial Conference "shall" impose equal fees. And, far from thinking that UST debtors should get refunds, Congress set the new nationwide fees at levels similar to the 2017 Act—and thus far higher than the pre-2017-Act schedule.

The underlying arithmetic further confirms what Congress would have chosen. The BA districts accounted for less than 3% of Chapter 11 filings in 2018, and less than 2% of the large cases affected by the disparate fee increase. It is implausible that Congress would have chosen to transform the inadvertent "exception" to the fee increase in that tiny sliver of cases into the "general rule" by vitiating the increase entirely and reversing fee payments in over 98% of cases during the relevant time. *Sessions* v. *Morales-Santana*, 582 U.S. 47, 76 (2017). That preference against refunds is particularly clear because the 2017 Act increased fees to support the longstanding goal that the bankruptcy system be self-funding, at no cost to the taxpayer.

B. 1. In light of that congressional intent, the most appropriate remedy here is purely prospective: a mandate of equal, increased fees in UST and BA districts going forward. Purely prospective relief is an appropriate remedy for constitutional violations. In fact, that is the remedy this Court selected in two recent cases that found a portion of a statute unconstitutional in circumstances where, as here, congressional intent supported eliminating an exception that unconstitutionally favored a small class. *Barr* v. *American Ass'n of Political Consultants*, 140 S. Ct. 2335, 2354-2355 (2020) (*AAPC*) (plurality opinion); *Morales-Santana*, 582 U.S. at 72-76.

There is particularly strong evidence that Congress would have selected a prospective-only remedy here because a uniform, prospective fee increase is what Congress actually chose in the 2020 Act, after some courts—but not yet this Court—had found a uniformity violation based on the 2017 Act's implementation. Congress has the prerogative to remedy constitutional infirmities in statutes, with judicial relief serving as an interim solution until Congress steps in. Given Congress's prompt action here, no further judicial relief is necessary.

2. The court of appeals erred by rejecting prospective relief on the theory that a successful constitutional challenger must obtain individually effective relief. As this Court's decisions in *Morales-Santana*, *AAPC*, and a long line of tax cases make clear, where the constitutional violation is a denial of equal or uniform treatment, there is nothing unusual about a remedy that ends the disparate treatment but, on a practical level, does not otherwise make the challenger better off. And respondents' primary argument—that due process requires retrospective relief—is contrary to this Court's decisions holding that a meaningful opportunity for a predeprivation hearing is "sufficient by itself to satisfy the Due Process Clause." *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 101 (1993) (citation omitted). Because a predeprivation hearing was available to respondents (and other debtors in UST districts), due process does not take the prospective-only option off the table.

C. Alternatively, even if considerations of due process were deemed to require retrospective relief, the proper remedy would be to create uniformity by extending the 2017 Act's fee increase to the small group of debtors in the BA districts who paid too little rather than providing refunds to a vastly larger group of debt-

ors in the UST districts. Having debtors in the BA districts pay their fair share is the result Congress expected all along. In contrast, the court of appeals' widespread-refund remedy would contravene congressional intent by leaving taxpayers to foot the bill—likely in the hundreds of millions of dollars—even though Congress imposed the fee increase precisely to avoid having taxpayers subsidize the operations of U.S. Trustees. The refunds would effectively turn the 2017 Act on its head.

Although a retrospective remedy that requires additional collections would be more administratively complex than purely prospective relief, it could be imposed consistent with the due-process rights of the BA debtors. And this Court has emphasized that a good-faith effort at administering such a remedy would suffice. On a practical level, even if a retrospective-collection plan did not eliminate the entire disparity, it would almost certainly leave in place a smaller disuniformity than would result from a retrospective refund plan that needed to be implemented in more than 50 times as many cases. For all of those reasons, respondents (and other debtors in UST districts) are not entitled to a refund of the increased fees that they paid between January 2018 and March 2021.

ARGUMENT

RETROSPECTIVE REFUNDS ARE NOT THE APPROPRIATE REMEDY FOR THE DISPARATE FEES THAT WERE PAID BY LARGE CHAPTER 11 DEBTORS UNDER THE 2017 ACT

The court of appeals ordered a refund of approximately $2.5 million to respondents based on a mistaken view that individually effective relief is always required for a constitutional violation. That result is at odds with

the touchstone for the remedial inquiry: congressional intent. The only remedy consistent with congressional intent here is to increase fees on the BA debtors to UST levels—either prospectively or retrospectively. Congress has already provided that remedy on a prospective basis, which is all that is required; a prospective-only remedy is the most appropriate here, both as a matter of congressional intent and as a matter of practical considerations. But even if retrospective relief were required, the proper remedy would be a retrospective extension of the 2017 Act's fee increase to a very small number of debtors in the BA districts—the result that Congress expected all along—rather than a refund of that fee increase to the vastly larger group of debtors in the UST districts. The court of appeals' contrary approach would extend the exception that had applied to about 2% of large Chapter 11 debtors to the other 98%. The Court should reject that approach, which would pass on to taxpayers hundreds of millions of dollars in increased fees that Congress specifically sought to impose on the largest users of the bankruptcy system.

A. Congress Manifestly Would Have Chosen To Charge Uniform Increased Fees In UST And BA Districts Had It Been Apprised Of The Constitutional Violation

"[T]he touchstone for any decision about remedy is legislative intent." *Ayotte* v. *Planned Parenthood*, 546 U.S. 320, 330 (2006). When determining the remedy for a statute that unconstitutionally authorizes discriminatory treatment, a court "must adopt the remedial course Congress likely would have chosen 'had it been apprised of the constitutional infirmity.'" *Sessions* v. *Morales-Santana*, 582 U.S. 47, 77 (2017) (quoting *Levin* v. *Commerce Energy, Inc.*, 560 U.S. 413, 427 (2010)). Here, there can be no serious dispute that the remedial course

that an informed Congress "would have willed," *Levin*, 560 U.S. at 427, is the imposition of higher fees at 2017 Act levels in the small sliver of cases that received inadvertently favorable treatment: namely, Chapter 11 cases in the 6 BA districts that commenced before October 2018 and had quarterly disbursements of $1 million or more in at least one quarter between January 1, 2018 and March 31, 2021.

a. Congressional intent determines whether the appropriate remedy is the "extension or invalidation of the unequally distributed benefit or burden, or some other measure." *Levin*, 560 U.S. at 426. Deciding whether to remove or extend a benefit or burden depends on the "intensity of [Congress's] commitment to the residual policy" and "the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Morales-Santana*, 582 U.S. at 75 (citation omitted). Thus, in *Morales-Santana*, the Court declined to "extend favorable treatment" from a small group to the "substantial majority," because such an extension would have transformed the "exception" into the "general rule." *Id.* at 77. And in another recent "equal-treatment case," the Court "sever[ed]" the "relatively narrow" exception for government-debt-related calls from a "broad robocall restriction." *Barr* v. *American Ass'n of Political Consultants*, 140 S. Ct. 2335, 2354, 2355 (2020) (*AAPC*) (plurality opinion); see *id.* at 2363 (Breyer, J., concurring in the judgment with respect to severability).

Here, the inquiry into congressional intent is particularly straightforward because it was the unexpected actions of the BA districts and the Judicial Conference, rather than the intended operation of the statutory scheme, that led to a disparity in implementation. As

this Court has already recognized, 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*, 596 U.S. at 480 n.2.

The backdrop for the 2017 Act illustrates Congress's expectations. The 2017 Act adopted an increased fee schedule in Section 1930(a)(6) to operate alongside Section 1930(a)(7)'s existing statutory authorization for the Judicial Conference to "require the debtor" in a case in a BA district "to pay fees equal to those imposed by paragraph (6) of this subsection." 28 U.S.C. 1930(a)(7) (2012). And although the statute merely authorized, rather than required, the Judicial Conference to impose "equal" fees, Congress had every reason to expect that the Judicial Conference would exercise its authority to implement a corresponding fee increase in the BA districts. In fact, the Judicial Conference had originally sought statutory authority to impose fees in BA districts precisely to avoid a potential uniformity problem. See pp. 3-4, *supra*. Once the Judicial Conference obtained that authority, it implemented a standing order that remained in place at the time of the 2017 Act's enactment and directed that fees in BA districts track "the amounts specified [for UST districts] in 28 U.S.C. § 1930, *as those amounts may be amended from time to time*." *Siegel*, 596 U.S. at 470 (quoting *2001 JCUS Report* 46) (emphasis added). And that directive had actually been followed. "Under this standing order, for the next 17 years, the Judicial Conference matched all [UST] Program fee increases with equivalent [BA] Program fee increases, meaning that all districts nationwide charged similarly situated debtors uniform fees." *Ibid.*

Congress's reaction to the disparity that arose when the BA districts did not implement the 2017 Act's fee increase provides further evidence of Congress's commitment to the "general rule," *Morales-Santana*, 582 U.S. at 77, of increased fees in the 2017 Act. In the 2020 Act, Congress specified that, prospectively, the Judicial Conference *must* impose the same fees in the BA districts that Congress imposed in the UST districts. 2020 Act § 3(d)(2), 134 Stat. 5088. And, acting with respect to both UST and BA districts, Congress set the fees for the largest debtors at amounts similar to those in the 2017 Act. Compare 28 U.S.C. 1930(a)(6)(B)(ii)(II) (Supp. III 2021) (setting quarterly fees for debtors with quarterly disbursements of $1 million or more in amounts ranging from $8000 to $250,000), and 28 U.S.C. 1930(a)(6)(B) (2018) ($10,000 to $250,000). Those fees were substantially higher than the $6500 to $30,000 range that applied to such large debtors before the 2017 Act. See 28 U.S.C. 1930(a)(6) (2012). Congress thus resolved the disuniformity by mandating, on a prospective basis, that debtors in BA and UST districts pay equal fees that were substantially higher than those in effect before the 2017 Act.

And there is no doubt that Congress was deliberate about selecting a *higher* uniform rate to increase the total fees collected. The 2020 Act included an express finding reiterating the "longstanding intention of Congress that quarterly fee requirements remain consistent across all Federal judicial districts," 2020 Act § 2(a)(4)(B), 134 Stat. 5086—an intention Congress had expressed in 2000 when it first authorized the Judicial Conference to impose equal BA fees to avoid any uniformity concerns. And Congress also explained that "[t]he purpose" of the 2020 Act "is to further the long-

standing goal of Congress of ensuring that the bankruptcy system is self-funded, at no cost to the taxpayer." *Id.* § 2(b), 134 Stat. 5086. In short, there is compelling evidence that Congress both intended and expected that the 2017 Act's fee increase would be applied in BA districts, and that its mistake consisted only in not "requir[ing]" that result. *Siegel*, 596 U.S. at 480 n.2 (emphasis omitted).

b. This case is unusual given the abundance of evidence that Congress always intended that BA debtors would pay higher fees. Most unequal-treatment cases address a disparity that Congress actually intended rather than one that materialized contrary to its expectations. And looking to the indicia of intent on which courts rely in typical cases, there is additional compelling evidence of a congressional preference for increasing BA fees rather than refunding UST fees.

Even assuming, counterfactually, that the Congress enacting the 2017 Act had somehow preferred to except the BA districts from the fee increase, there can be little question what it would have done had it been informed that such a course was impermissible. It would have extended the fee increase to the BA districts rather than abandon the entire fee increase. That conclusion follows from the comparative impact of the general policy (the fee increase in the UST districts) relative to the exception (the retention of the prior fee schedule in the BA districts): There are 88 UST districts, which accounted for more than 97% of the Chapter 11 filings in 2018, and only 6 BA districts, which accounted for less than 3% of such filings. See *U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending December 31, 2018*, Tbl. F-2, www.

uscourts.gov/sites/default/files/data_tables/bf_f2_1231.2018.pdf. Respect for congressional intent means that a remedy should not "extend favorable treatment" from a small group to the "substantial majority," thereby transforming an "exception" that was available for only a few into the "general rule" applicable to everyone. *Morales-Santana*, 582 U.S. at 77.

That is particularly clear here because the 2017 Act's fee increase served a longstanding principle: Since the creation of the UST Program in 1986, Congress has sought to ensure that its costs are borne "by the users of the bankruptcy system—not by the taxpayer." H.R. Rep. No. 764, 99th Cong., 2d Sess. 22 (1986); see 2020 Act § 2(a)(1), 134 Stat. 5086 (reiterating "the importance of the goal that the bankruptcy system is self-funded, at no cost to the taxpayer"). In light of that "long-standing goal," Congress "has amended" user fees "as necessary to ensure that the bankruptcy system remains self-supporting, while also fairly allocating the costs of the system among those who use the system." 2020 Act § 2(a)(2) and (b), 134 Stat. 5086. The fee increase in the 2017 Act was enacted precisely to counteract an imminent shortfall in user funds that threatened to shift significant financial liability to taxpayers. See H.R. Rep. No. 130, 115th Cong., 1st Sess. 7-8 (2017). That context further illustrates why Congress would prefer to fix the disparity in the implementation of that increase by collecting additional fees from a handful of debtors in the BA districts, rather than asking taxpayers to bear the costs of refunding fees in the UST districts.

B. The Proper Relief In This Case Is Prospective

Core remedial principles dictate that congressional intent should be effectuated and that the appropriate

remedy for the violation that the Court found in *Siegel* is to provide for nationally uniform, increased fees. The most appropriate way to effectuate that remedy is on a purely prospective basis. Prospective relief is a well-established form of remedy where a statute has unconstitutionally benefited one class relative to another, and no constitutional obstacle prevents the Court from adopting that remedy here. Prospective-only relief would involve declaring that the disuniform fees were unlawful (as this Court already did in *Siegel*) and that fees must be uniform going forward (as Congress has already provided in the 2020 Act). In the usual case, that is the relief a court would properly afford. Given Congress's action in 2020, no further relief is required.

1. Prospective relief is often the most appropriate remedy for a constitutional violation

As this Court has repeatedly recognized, a plaintiff who succeeds in establishing a constitutional equal-treatment violation is not automatically entitled to a retrospective remedy. The primary authority for crafting constitutional remedies lies with Congress. See *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 74 (1996); *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988). For that reason, as discussed above, courts "must adopt the remedial course Congress likely would have chosen" had it been informed of the constitutional problem. *Morales-Santana*, 582 U.S. at 77.

Although this Court's decisions generally *apply* retroactively, it does not follow that retrospective *relief* is required as a matter of course. To the contrary, the Court has carefully "distinguish[ed] the question of retroactivity * * * from the distinct remedial question." *American Trucking Ass'ns* v. *Smith*, 496 U.S. 167, 178 (1990) (plurality opinion). Thus, in *Harper* v. *Virginia*

Department of Taxation, 509 U.S. 86 (1993), the Court determined that a prior decision "applie[d] retroactively" but explained that that conclusion did not resolve the remedial question whether the challengers were "entitle[d] * * * to a refund." *Id.* at 100; see *id.* at 131-132 (O'Connor, J., dissenting) (reiterating that questions of retroactivity and of remedy "are analytically distinct," and that the remedial inquiry "is not whether to apply new law or old law, but what relief should be afforded once the prevailing party has been determined under applicable law"). Here, that means that Congress's fee scheme was unconstitutional in relevant part from the moment the fee disparity first arose in 2017; but that does not mean that respondents are "entitle[d]" to a retrospective correction of that disuniformity. *Id.* at 100.

Likewise, "it is not true that [this Court's] jurisprudence ordinarily supplies a remedy in civil damages for every legal wrong." *Nixon* v. *Fitzgerald*, 457 U.S. 731, 754 n.37 (1982). A plaintiff who suffers a violation, even the violation of an individual right, might receive no individually effective relief for various reasons, including the absence of a cause of action, see, *e.g.*, *Egbert* v. *Boule*, 596 U.S. 482, 491-493 (2022), or the defendant's immunity from suit, see, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Indeed, for constitutional violations, retrospective monetary relief is rarely available at all. See *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-35 (1992); *Ex parte Young*, 209 U.S. 123, 159-160 (1908). For that reason, prospective relief—such as an order enjoining continued disparate treatment in the future—is the more common remedy.

Even where a constitutional violation results from the imposition of a specific monetary cost and there is no other bar to monetary relief, the remedy need not

include recovery of the payment. See *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 38 n.21 (1990) (providing that retrospective relief is required for unconstitutional tax assessments only where taxpayers lacked a meaningful opportunity to challenge the validity of tax assessments at a predeprivation hearing); see also, *e.g.*, *Comptroller of the Treasury* v. *Wynne*, 575 U.S. 542, 569 (2015) (allowing the State the flexibility to cure an impermissibly unequal tax by implementing a remedy "that would not help the [challengers] at all") (citation omitted). Ultimately, rather than a command of individually effective relief, "the touchstone for any decision about remedy is legislative intent." *Ayotte*, 546 U.S. at 330.

Consistent with those principles, this Court has awarded prospective-only relief in two recent cases that found a portion of a statute unconstitutionally discriminatory. In *Morales-Santana*, the Court concluded that a federal statute about the acquisition of U.S. citizenship was unconstitutional because it afforded more favorable treatment to children born abroad of unwed U.S.-citizen mothers than it did to those of unwed U.S.-citizen fathers. 582 U.S. at 55-72. The successful plaintiff, who had an unwed U.S.-citizen father, asked for application of the more favorable citizenship rules to himself and, by extension, others injured by the same unequal statute. *Id.* at 72. In particular, he sought the relief of having his treatment for citizenship purposes retrospectively equalized with the treatment he would have received had he been born to an unwed U.S.-citizen mother—the recognition of his claim to U.S. citizenship from birth, which in turn would serve as a defense against his removal. *Ibid.* But the Court allowed only "prospective[]" relief, neither "extending to [the chal-

lenger's] father (and, derivatively, to [the challenger]) the benefit of [the unconstitutional provision]" nor retracting the benefits that other persons had obtained from the unconstitutionally favorable treatment of their mothers. *Id.* at 72, 77; see *id.* at 72-77.

Similarly, in *AAPC*, this Court invalidated a statute that contained an exception to a general prohibition on making robocalls to cell phones, holding that an exception for calls about government debts was unconstitutionally content-based. 140 S. Ct. at 2347 (plurality opinion). As a remedy, the challengers requested that the favorable treatment (the ability to make certain robocalls) be extended generally. *Id.* at 2348. The Court declined to grant that relief, instead eliminating altogether the exception's favorable treatment on a prospective basis—an action that granted no tangible benefit to the challengers. *Id.* at 2355; see *id.* at 2357 (Sotomayor, J., concurring in the judgment with respect to severability); *id.* at 2363 (Breyer, J., concurring in the judgment with respect to severability). The plurality specifically noted that the Court's decision did not "negate the liability of parties who [had previously] made robocalls covered by the robocall restriction" and who had thereby suffered financial injury from the application of the unconstitutional disparity. *Id.* at 2355 n.12.

Those principles apply at least as strongly to the bankruptcy uniformity context. In the only case other than *Siegel* in which this Court invalidated a bankruptcy statute on constitutional uniformity grounds, the Court affirmed a lower-court judgment imposing purely prospective relief. *Railway Labor Execs.' Ass'n* v. *Gibbons*, 455 U.S. 457, 463-465 (1982). And in the decision that was the catalyst for Congress's authorization of the imposition of fees in the BA districts, see pp. 3-4, *supra*,

the Ninth Circuit had likewise determined that a prospective-only remedy was warranted. *St. Angelo* v. *Victoria Farms, Inc.*, 38 F.3d 1525 (1994), amended, 46 F.3d 969 (1995). The court held that the predecessor of the quarterly-fee statute at issue here, which had required payments in UST districts but not in BA districts, created a constitutional uniformity problem. *Id.* at 1532. But it rejected the debtor's contention that it should be relieved from paying the quarterly fees. See *id.* at 1529, 1532. The court instead concluded that the proper remedy was to sever the provision that exempted the 6 BA districts from the UST Program, and it held that the debtor remained liable for the challenged fees. *Id.* at 1533, 1535.[1] In the aftermath of *Victoria Farms*, no court awarded retrospective refunds to debtors because they had paid fees in UST districts during the 15-year period that fees were not collected in the BA districts.

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[1] In *USA Sales, Inc.* v. *Office of the United States Trustee*, 76 F.4th 1248 (9th Cir. 2023), petition for cert. pending, No. 23-489 (filed Nov. 8, 2023), which presents the same remedial question as this case, the Ninth Circuit distinguished *Victoria Farms* on the ground that in that case "the debtor did not seek a refund," and instead "the UST sought higher fees due to a dispute over the calculation of the debtor's disbursements." *Id.* at 1255. But that distinction makes no difference to the remedial inquiry. Retrospective application of the *Victoria Farms* ruling either would have excused the debtor from paying any quarterly fees for the period when the fees were not collected in the BA districts (as the debtor had argued) or would have imposed those fees on BA debtors. But the *Victoria Farms* court imposed neither of those outcomes, instead calculating the debtor's fees under the provisions applying in UST districts and therefore requiring the debtor to pay the higher fees. See 38 F.3d at 1535.

2. Requiring higher fees on a prospective-only basis is the remedy most consistent with congressional intent

If Congress had been apprised of the 2017 Act's constitutional infirmity, there is overwhelming evidence that it would have extended the fee increase to the BA districts. Accordingly, the most appropriate remedy in this case is prospective-only relief—namely, a requirement that, going forward, BA debtors be charged the higher fees imposed in UST districts. In normal circumstances "prospective relief, by itself, exhausts the requirements of federal law." *McKesson*, 496 U.S. at 31; see *Morales-Santana*, 582 U.S. at 77 ("prospectively" invalidating the unconstitutional exception); see *AAPC*, 140 S. Ct. at 2356 (same).

Here, there is particularly direct evidence that Congress would have selected a prospective-only remedy because that is exactly what Congress chose to implement once the potential constitutional infirmity under the 2017 Act came to light. Congress enacted the 2020 Act after some courts held that the 2017 Act was unconstitutionally non-uniform. See, *e.g.*, *In re Buffets, LLC*, 597 B.R. 588, 594 (Bankr. W.D. Tex. 2019), rev'd and remanded, 979 F.3d 366 (5th Cir. 2020). But Congress did not revoke the amended fee schedule in Section 1930(a)(6) by reducing the UST Program fees to the levels still being collected in the BA districts, nor did it direct any refunds for debtors in UST districts. See p. 17, *supra*. Instead, the 2020 Act simply mandated equal treatment going forward without directing any retrospective adjustments.

That remedy—selected by the governmental branch with primary authority for crafting remedies for constitutional violations—fully effectuated "the appropriate

remedy" of "a *mandate* of equal treatment." *Heckler* v. *Mathews*, 465 U.S. 728, 740 (1984); see *Morales-Santana*, 582 U.S. at 77 (observing that the Court's prospective remedy revoking favorable treatment for both mothers and fathers would govern "[i]n the interim," but that "[g]oing forward, Congress may address the issue and settle on a uniform prescription that neither favors nor disadvantages any person on the basis of gender"). In the wake of the 2020 Act, there is no valid reason for the Court to go further, which would require "us[ing] its remedial powers to circumvent the intent of the legislature," *Heckler*, 465 U.S. at 739 n.5 (quoting *Califano* v. *Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring in part and dissenting in part)).

Nor, of course, does it matter that respondents "did not seek" the remedy of prospectively higher fees in the BA districts. *Morales-Santana*, 582 U.S. at 77 n.29. "The issue turns on what the legislature would have willed. 'The relief the complaining party requests does not circumscribe this inquiry.'" *Ibid.* (quoting *Levin*, 560 U.S. at 427).

Thus, although a prospective remedy might normally take the form of "declaratory" or "injunctive relief," *McKesson*, 496 U.S. at 31, Congress's actions during the pendency of this litigation have obviated any need for judicially imposed relief because Congress has already acted prospectively to eliminate any constitutional infirmity in its prior enactments—a step that is at least as much its prerogative as the Judiciary's. The 2020 Act—which prospectively mandates uniform fees without providing for any retrospective adjustments for the temporary period of disuniformity—reflects Congress's judgment that the appropriate remedy here is a prospective reform, not a retrospective unwinding of years

of completed fee payments. Because Congress has specifically addressed the issue by providing the "uniform" regime that it wishes to govern "[g]oing forward," no "interim" remedy from this Court is required. *Morales-Santana*, 582 U.S. at 77. And the fact that Congress already took the initiative to implement the substantive relief to which respondents are entitled should end the remedial inquiry; it does not mean that respondents can now obtain even more relief from the courts.

3. In rejecting a prospective remedy, the court of appeals misapplied this Court's remedial precedents

The court of appeals in this case recognized that "courts can remedy unequal treatment either by expanding or withdrawing benefits, depending on legislative intent," and further recognized that "here, Congress intended to increase quarterly fees nationwide." Pet. App. 31a. In deeming a refund to be necessary, however, the court reasoned that respondents "are entitled to relief" and that relief could not take the form of increased fees in the BA districts because the Tenth Circuit "lack[s] authority over quarterly fees assessed in [the BA] districts," which are "outside [that] circuit." *Ibid.* That reasoning is mistaken.

As an initial matter, a challenger is not entitled to individually effective relief in each case. The overarching principle governing the remedial inquiry is legislative intent, not ensuring that every successful challenger personally benefits. For that reason, there is nothing unusual about a remedy for a constitutional violation based on unequal treatment that eliminates the inequality but, on a practical level, otherwise does "not help the [challengers] at all." *Wynne*, 575 U.S. at 569 (citation omitted). In fact, that is precisely what happened in *Morales-Santana* and *AAPC*. The challenger

in *Morales-Santana* did not receive the benefit of the more favorable citizenship rules applicable to mothers, see 582 U.S. at 72, 77, and the challengers in *AAPC* did not obtain the ability to make robocalls, see 140 S. Ct. at 2356 (plurality opinion). The constitutional injuries were remedied in those cases even though this Court did not provide the plaintiffs with individually effective relief.

Nor does it matter that the court of appeals "lack[s] authority over quarterly fees" assessed in BA districts located in Alabama and North Carolina. Pet. App. 31a. As an initial matter, this Court has nationwide authority, including in its oversight of the Judicial Conference, so any such limitation is no longer relevant now that the remedial issue has reached this Court. More fundamentally, the answer to the remedial question turns on congressional intent, not on the particulars of the relief requested, the parties joined, or the forum chosen by the refund-seeking challengers. See *Morales-Santana*, 582 U.S. at 77 n.29. And because the appropriate relief here is purely prospective and has already been effectuated by Congress, no additional exercise of judicial authority to command action in BA districts is needed.

4. Due-process concerns do not counsel against a prospective remedy

a. Respondents do not seriously dispute that a prospective-only remedy would best serve congressional intent, and they have acknowledged that the 2020 Act "did not include" any retrospective remedy. Br. in Opp. 24. Respondents' only argument against prospective relief is the assertion that a "prospective-only remedy for a monetary injury would constitute a deprivation of respondents' property without due process." *Id.* at 13; see *id.* at 13-20.

That argument is foreclosed by this Court's precedents. In *McKesson*, *supra*, 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 496 U.S. at 36; see also, *e.g.*, *Nashville, Chattanooga & St. Louis Ry. Co.* v. *Alabama*, 128 U.S. 96 (1888)—due process requires "meaningful backward-looking relief" *only* if a taxpayer lacked a meaningful opportunity to challenge the tax assessments at a predeprivation hearing. 496 U.S. at 31. *McKesson* does not, as respondents contend (Br. in Opp. 17-20), hold that due process dictates a specific 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*, 509 U.S. at 101 (quoting *McKesson*, 496 U.S. at 38 n.21).

Here, respondents had a full opportunity for a predeprivation hearing before the bankruptcy court. See Pet. App. 35a-36a; p. 8, *supra*. Although respondents waited to challenge the increased fees until after they made multiple quarterly-fee payments, when they finally brought their challenge they sought not only a retrospective refund but also asked the bankruptcy court to "determine that all prospective UST fees due likewise shall be calculated" under the pre-2017-Act fee schedule. Mot. to Determine 8.

Nor was there any plausible legal barrier to a predeprivation uniformity challenge to the increased fees before they were paid. In fact, debtors in many cases (in addition to this one) objected to and obtained a hear-

ing about the calculation of quarterly fees that they had not yet paid. See, *e.g.*, Mot. to Determine at 2, Bankr. Ct. Doc. 672, *In re Clinton Nurseries, Inc.*, No. 17-31897 (Bankr. D. Conn. Apr. 17, 2019) (seeking to pay fees "through the conclusion of these cases[] under the pre-amendment fee structure" in addition to a refund); Compl. ¶ 2, Bankr. Ct. Doc. 1, *MF Global Holdings Ltd.* v. *Harrington*, No. 19-1379 (Bankr. S.D.N.Y. Nov. 21, 2019) (seeking, in adversary proceeding to determine quarterly fees, a "declaratory judgment that [the plaintiff] is not subject to the [2017 Act's] increased quarterly fee schedule going forward" as well as retrospectively); see also, *e.g.*, Preston Decl. ¶¶ 35-36, Bankr. Ct. Doc. 17, *MF Global Holdings*, *supra* (Nov. 21, 2019) (describing debtor's withholding of quarterly-fee payment pending litigation in light of its position on the 2017 Act's fee increase); *Cranberry Growers Coop.* v. *Layng*, 930 F.3d 844, 847-848 (7th Cir. 2019) (debtor withheld disputed amounts of quarterly-fee payments and obtained a predeprivation bankruptcy court hearing as to the correct amount); Compl. ¶¶ 28-29, 33, Bankr. Ct. Doc. 1, *Chatz* v. *Layng (In re Midwest Banc Holdings, Inc.)*, No. 23-00011 (Bankr. N.D. Ill. Jan. 25, 2023) (debtor sought relief from U.S. Trustee request for additional payment where debtor unilaterally paid fees at pre-2017-Act levels).[2]

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[2] Indeed, the tax context is unusual in light of concerns that "premature judicial interference" could disrupt the flow of government revenue, leading governments to limit predeprivation opportunities to challenge the exaction of a tax. *Bob Jones Univ.* v. *Simon*, 416 U.S. 725, 747 (1974); see *CIC Servs., LLC* v. *IRS*, 141 S. Ct. 1582, 1586 (2021); *McKesson*, 496 U.S. at 36-37. While the Tax Anti-Injunction Act bars any "suit for the purpose of restraining the assessment or collection of any tax," 26 U.S.C. 7421(a), no provision of

The availability of a predeprivation hearing is "sufficient by itself to satisfy the Due Process Clause." *Harper*, 509 U.S. at 101 (citation omitted). For that reason, there is no due-process obstacle to a purely prospective remedy in this case. And if respondents had sought a ruling on the uniformity issue in a predeprivation hearing before they paid increased fees, they would have been able to get the uniformity issue resolved and the unequal treatment rectified in the form of a declaration that ensured equal treatment while they were paying fees.

In offering a more expansive interpretation of what due process requires, respondents have disregarded the key language in *McKesson* and *Harper*. Instead, they rely (Br. in Opp. 15-17) on two decades-old cases: *Montana National Bank* v. *Yellowstone County*, 276 U.S. 499 (1928), and *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931). But *McKesson* specifically addressed both cases and made clear they required retrospective relief only in circumstances when a predeprivation hearing was not available. Thus, *McKesson* cited *Montana National Bank* as an example of a State's "obligation to provide retrospective relief" where the State offers only a "*post*deprivation procedure." 496 U.S. at 32 (emphasis added). And *McKesson* viewed *Bennett* as reflecting the same principle that a taxpayer who was "forced to pay a discriminatorily high tax" because there was no predeprivation opportunity to challenge the exaction was entitled to a retrospective remedy, *McKesson*, 496 U.S. at 35; see *Iowa National Bank* v. *Stewart*, 232 N.W. 445, 448 (Iowa 1930), rev'd sub nom. *Iowa-Des Moines National Bank*

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federal law generally bars a suit for the purpose of restraining the imposition of a user fee for a government service.

v. *Bennett*, 284 U.S. 239 (1931); *id.* at 459 (Wagner, J., dissenting). Accordingly, both of those cases are consistent with the principle, reflected in *McKesson* itself, that, as long as adequate predeprivation procedures are available, a retrospective remedy is not required.

For similar reasons, there was no due-process impediment to the resolution in *AAPC*, which imposed a prospective remedy for an unconstitutional exception to a robocall restriction but did not retrospectively "negate the liability of parties who made" unlawful robocalls, even though such parties suffered financial injury while the unconstitutional regime was in effect. 140 S. Ct. at 2355 n.12 (plurality opinion). Absent a due-process barrier to prospective-only relief, congressional intent governs.

b. The Eleventh and Ninth Circuits have invoked separate due-process concerns in embracing a refund remedy, but those concerns lack merit. As all three members of the Eleventh Circuit panel acknowledged, the touchstone of the remedial inquiry is congressional intent. See *United States Trustee Region 21* v. *Bast Amron LLP (In re Mosaic Mgmt. Grp., Inc.)*, 71 F.4th 1341, 1346 (11th Cir. 2023), petition for cert. pending, No. 23-278 (filed Sept. 21, 2023) (*Mosaic*); *id.* at 1354 (Brasher, J., concurring). And—again as all three members recognized—a refund remedy is not the remedy that Congress would have chosen here. See *id.* at 1351 (majority opinion) (acknowledging "the strong evidence of congressional intention preferring the maintenance of the increased level of fees"). Concurring in the judgment, Judge Brasher explained that "it is obvious that Congress's intent supports the conclusion that we must level down," and observed that "[a]s a matter of equal

treatment law, that is where the inquiry ends." *Id.* at 1354.

Nonetheless, the Eleventh Circuit concluded that the Due Process Clause requires a refund remedy. See *Mosaic*, 71 F.4th at 1350-1353. The Ninth Circuit has since agreed, viewing the Eleventh Circuit's due-process concerns as overcoming the principle that "congressional intent is normally the touchstone for determining the remedy for this type of constitutional violation." *USA Sales, Inc.* v. *Office of the United States Trustee*, 76 F.4th 1248, 1256 (9th Cir. 2023), petition for cert. pending, No. 23-489 (filed Nov. 8, 2023).

The Eleventh Circuit read this Court's decisions in *Reich* v. *Collins*, 513 U.S. 106 (1994), and *Newsweek, Inc.* v. *Florida Department of Revenue*, 522 U.S. 442 (1998) (per curiam), as abrogating the *McKesson* principle that due process requires retrospective relief only where a taxpayer lacked a meaningful opportunity to challenge the tax assessments at a *pre*deprivation hearing. That was incorrect: *Reich* and *Newsweek* dealt with the narrow circumstance of a "bait and switch" where a State, by statute, set up a procedure that promised that a refund *would* be available in a postdeprivation proceeding, but then "reconfigure[d] its scheme, unfairly" to an "exclusively predeprivation" remedy after a taxpayer reasonably relied on the apparent availability of a postdeprivation refund remedy in forgoing a predeprivation challenge. *Reich*, 513 U.S. at 110-111 (emphasis omitted); see *Newsweek*, 522 U.S. at 444-445. Those circumstances are not present here: Congress has not enacted a statute codifying refunds as its preferred remedy; respondents did not pay increased fees in reliance on such a statute; and there is no bait-and-switch concern triggering additional due-process con-

siderations and constraining the remedial options otherwise available. Nor do *Reich* and *Newsweek* reflect any implicit rejection of *McKesson*, which both decisions repeatedly cited as the governing case in this area, *Reich*, 513 U.S. at 110, 114; *Newsweek*, 522 U.S. at 443-444, and which this Court has subsequently continued to apply. See, *e.g.*, *Wynne*, 575 U.S. at 569.

In short, neither respondents nor the courts of appeals have identified any exception to the holdings of *McKesson* and *Harper* that a predeprivation hearing—like the one available to respondents—obviates any due-process concerns about a prospective-only remedy.

C. Even If Retrospective Relief Were Necessary, The Correct Remedy Would Collect More Fees From A Small Number Of Debtors In BA Districts, Not Grant Refunds To A Far Larger Number Of Debtors In UST Districts

Even if backward-looking relief were required in this case, that relief would not include the retrospective refund that the court of appeals ordered. As explained above, the only retrospective remedy that would be consistent with congressional intent would be extending the fee increase to BA districts. To the extent that due process requires retrospective equalization, it is well established that the Constitution permits that equalization by collecting additional fees from those who benefited from favorable treatment under the unconstitutional disparity. Here, if any retrospective elimination of the disparity were required, but see pp. 19-34, *supra*, the appropriate course would be to direct the Judicial Conference to pursue a good-faith effort to collect increased fees from the few dozen large debtors who paid lower quarterly fees in BA districts.

1. As this Court has recognized in the tax context, even when due process requires "meaningful backward-

looking relief," the government "retains flexibility in responding" to the determination that a fee was "impermissibly discriminatory." *McKesson*, 496 U.S. at 31, 39. The government may choose to level up or to level down. In other words, it may either provide "refunds to those burdened by an unlawful [fee]," or "assess and collect back [fees] from [those] who benefited from" the unlawful disparity; either choice will suffice to "create in hindsight a nondiscriminatory scheme." *Id.* at 40; see *Harper*, 509 U.S. at 101. Choosing which method to use for achieving "equality" (or, here, uniformity) "is a matter on which the Constitution is silent." *Levin*, 560 U.S. at 426-427. The choice should reflect congressional intent. See *Morales-Santana*, 582 U.S. at 77; pp. 14-15, *supra*.

To the extent that backward-looking relief were required in this case, the appropriate remedy would be the leveling-down approach of collecting additional fees from debtors in the BA districts. As discussed, there is overwhelming evidence that, if apprised of the constitutional infirmity in 2017, Congress would have chosen to remedy it by extending the 2017 Act's fee increase to the BA districts. See pp. 14-19, *supra*. Here, that remedy could be implemented retrospectively by collecting additional fees from those who paid too little under an unconstitutionally disparate regime. See, *e.g.*, *McKesson*, 496 U.S. at 40. A leveling-down remedy is thus the only appropriate retrospective remedy in this case.

2. The practical implications of the court of appeals' refund remedy further illustrate its incompatibility with congressional intent. Providing a refund for *all* UST-district debtors who, unlike similarly situated BA-district debtors, paid the 2017 Act's increased fees would cost the government an estimated $326 million. See Haverstock Decl. ¶ 6, *In re ASPC Corp.*, D. Ct. Doc.

74-1, No. 19-ap-2120 (Bankr. S.D. Ohio Feb. 27, 2023) (Haverstock Decl.) (calculating the aggregate difference in fees paid in UST cases that were pending during the relevant period relative to the fees that would have been charged under the pre-2017-Act schedule). And, although Congress unequivocally sought to impose those fees on the largest users of the UST program, see p. 19, *supra*, the cost of the refunds would now be borne by taxpayers.[3]

While the actual cost to taxpayers could be somewhat lower, insofar as not every affected UST debtor would likely seek a refund, the total would nonetheless probably be in the hundreds of millions of dollars. In addition to individual suits that have been and continue to be filed seeking refunds, see 28 U.S.C. 2401(a) (setting six-year limitations period for claims against the United States), there is a putative class action on behalf of all affected debtors pending in the Court of Federal Claims. See *Acadiana Mgmt. Grp., LLC* v. *United*

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[3] The payments would be drawn from a taxpayer-funded indefinite general appropriation, such as the Judgment Fund, 31 U.S.C. 1304(a) (2018 & Supp. I 2019), because the specific appropriation for the UST System Fund may be used only for "programmatic refunds payable in the ordinary course," such as "adjustments between a debtor's estimated and actual quarterly expenditures," and may not be used for amounts owed pursuant to "final judgments [or] awards," *Explanatory Statement Submitted by Mr. Leahy, Chair of the Senate Committee on Appropriations, Regarding H.R. 2617, Consolidated Appropriations Act, 2023*, 168 Cong. Rec. S7819, S7920 (daily ed. Dec. 20, 2022); see Consolidated Appropriations Act, 2023 (2023 Appropriations Act), Pub. L. No. 117-328, § 4, 136 Stat. 4462 (2022) (giving the explanatory statement "the same effect with respect to the allocation of funds and implementation of [the Act] as if it were a joint explanatory statement of a committee of conference"); see also 2023 Appropriations Act, Div. B, Tit. II, 136 Stat. 4524 (setting out appropriation for the UST System Fund).

States, No. 19-496 (Ct. Fed. Cl. filed Apr. 3, 2019). And the cost could substantially *exceed* $326 million if debtors were to prevail on a theory, raised in a recently filed refund action, that, under the court of appeals' decision in this case, all increased fees paid by UST debtors under the 2017 Act at any time should be refunded—even for cases filed after uniformity among UST and BA districts had been restored. See Compl. ¶¶ 2-3, 9, *US Realm Powder River, LLC* v. *Layng*, No. 23-2015 (Bankr. Ct. D. Wyo.) (filed Sept. 19, 2023) (contending that the debtor, which filed its bankruptcy petition on October 31, 2019, is entitled to a refund despite the fact that a BA debtor that filed its case on that date would have been charged the same fees).

The imposition of a substantial cost on taxpayers would be particularly troubling here because, ever since the creation of the UST Program, Congress has consistently sought to ensure that its costs are borne "by the users of the bankruptcy system—not by the taxpayer." H.R. Rep. No. 764, 99th Cong., 2d Sess. 22 (1986); see p. 19, *supra*. And the 2017 Act was enacted in order to counteract a shortfall in UST program funds that threatened to shift significant financial liability to taxpayers. See pp. 4-5, *supra*. Ordering a remedy that imposes hundreds of millions of dollars in refund liability on taxpayers would undermine the central goal of the 2017 Act—and would indeed be the very opposite of its intended effect.

A refund remedy would also vastly extend the special treatment that Congress inadvertently allowed to be bestowed on a handful of debtors in the BA districts, despite Congress's clear intent to raise fees in all districts nationwide. Magnifying inadvertent "congressional generosity" towards the BA districts in that fash-

ion would convert a narrow exception "into something unanticipated and obviously undesired by the Congress." *Rogers* v. *Bellei*, 401 U.S. 815, 835 (1971). It would violate "th[is] Court's remedial preference * * * to salvage rather than destroy the rest of the law passed by Congress and signed by the President." *AAPC*, 140 S. Ct. at 2350 (plurality opinion). And retroactively eliminating the 2017 Act's fee increase in the UST districts would create a major "potential disruption of the statutory scheme," *Morales-Santana*, 582 U.S. at 75 (quoting *Heckler* v. *Mathews*, 465 U.S. 728, 739 n.5 (1984)), whereas extending the fee increase to the BA districts as Congress expected to occur under the Judicial Conference's 2001 standing order would create no disruption of that scheme at all. Those considerations further confirm that a collection remedy would be the only appropriate retrospective remedy.

Implementing a retrospective collection remedy would not require the impossible. As this Court has recognized, a "good-faith effort to administer and enforce" a retroactive collection from those who made lower payments can "constitute adequate relief" for differential treatment. *McKesson*, 496 U.S. at 41 n.23. Notably, pursuing a targeted collection effort instead of trying to make refunds would mean that the unpaid fee increase would need to be recovered from only a miniscule fraction of Chapter 11 debtors—namely, the largest debtors among fewer than 3% of Chapter 11 debtors nationwide. There were approximately 17,000 cases pending in the 88 UST districts in the first three quarters of 2018, and approximately 500 cases pending in the 6 BA districts during that time. See Haverstock Decl. ¶¶ 5, 10. Approximately 2100 (or about 12%) of the UST cases had quarterly disbursements of more than $1 million and

thus were subject to the non-uniform fees. *Id.* ¶ 5. Assuming a similar proportion of large cases in the BA districts, approximately 60 BA cases would have quarterly disbursements of more than $1 million during the relevant time. But the actual figure appears to be even lower: By searching the public dockets, the government has been able to identify only 38 cases in BA districts in which Chapter 11 debtors paid the lower fees in at least one quarter.[4] So a complete leveling-up remedy could require refunds in approximately 2100 cases. By contrast, a leveling-down remedy would require the collection of additional payments in approximately 40 cases. There can be no serious question which remedy Congress would have preferred.

Although a refund is easier to implement in any given case, refunds will not be awarded in every case if, for instance, some debtors have ceased to exist. In fact, the disparity in the approximate number of affected UST and BA cases is so large that there is no realistic prospect that granting refunds in UST districts would *actually* create a more uniform scheme than either a targeted collection effort or even the status quo. For example, if it turns out that a refund would be requested

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[4] To identify those cases, we searched the Lexis CourtLink database for all docket entries in bankruptcy courts in the BA districts that were Chapter 11 cases filed before October 1, 2018, and that included a reference that would correspond to a quarterly-fee payment for a disbursement over $1 million under the pre-2017-Act schedule ("30,000" OR "20,000" OR "13,000" OR "10,400" OR "9750" OR "6500" OR "30000" OR "20000" OR "13000" OR "10400" OR "9750" OR "6500"). We then reviewed the 280 results to eliminate cases that had closed before January 1, 2018, or where the referenced number was unrelated to a fee payment for a quarter between January 1, 2018 and March 31, 2021, yielding 38 cases that paid the lower fees.

and obtained in 90% of eligible UST cases, but additional fees could be successfully collected in only 30% of the relevant BA cases, the refund remedy will still be less uniform. Refunds with 90% success would leave debtors paying higher fees in approximately 210 cases and lower fees in approximately 1930 cases. By contrast, a 30% success rate in making additional collections from BA debtors would leave debtors paying higher fees in approximately 2112 cases and lower fees in approximately 28 cases. From the perspective of uniformity, the second scenario, with only 28 outliers, would be preferable.

Or, to take an extreme example, even a 95% refund rate in UST cases would leave in place a smaller disparity than a *0% success rate* in collecting additional payments in the BA districts: The 95%-successful refund scenario would result in debtors paying higher fees in approximately 105 cases and lower fees in approximately 2035 cases; but a completely unsuccessful collection effort in BA districts would result in debtors paying higher fees in approximately 2100 cases and lower fees in approximately 40 cases. In other words, a prospective-only remedy or the most meager retrospective collection effort will still result in fewer outliers—and thus more uniformity—than a retrospective refund remedy. To the extent that retrospective equality (at either the higher or lower level) is the goal, the better approach, as a practical matter, would be to do nothing more, or to attempt to collect higher fees in the BA districts.

3. Respondents have made (Br. in Opp. 20-30) scattershot arguments against a targeted leveling-down remedy that would seek to collect additional fees from debtors in BA districts: They dispute that Congress

would have intended a collection remedy over a refund remedy, suggest that a collection remedy is not available in these types of cases, contend that a collection remedy would raise its own due-process concerns, and argue that a collection remedy faces insurmountable practical difficulties. Those arguments are unavailing.

First, respondents suggest (Br. in Opp. 20) that determining congressional intent here is "complex." To the contrary, "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"). The court of appeals in this case likewise agreed that "Congress intended to increase quarterly fees nationwide." Pet. App. 31a. Indeed, this Court has already concluded 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*, 596 U.S. at 480 n.2. Thus, respondents themselves conceded that the fee 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 requiring 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).

Respondents also 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 involves a benefit rather than a burden. But this Court has specifically recognized that either leveling up or leveling down can be used 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.*, *Wynne*, 575 U.S. at 569. Nor would a distinction between benefits and burdens be workable: A discriminatory provision inherently benefits one group relative to a second, which means it can also be described as burdening the second group relative to the first. 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. See 140 S. Ct. at 2343 (plurality opinion).

Respondents next suggest (Br. in Opp. 27) that collecting additional fees would infringe the due-process rights of BA debtors. But this Court has already explained that "the retroactive assessment of a tax increase does not necessarily deny due process to those whose taxes are increased." *McKesson*, 496 U.S. at 40 n.23. Even if such an assessment "upsets otherwise settled expectations," the collection does not rise to the level of a due-process violation unless it is "so harsh and oppressive" that the interference with settled expectations is "undu[e]." *Id.* at 40-41 n.23 (citations omitted); cf. *United States* v. *Carlton*, 512 U.S. 26, 31-32 (1994)

(upholding the constitutionality of a retroactive tax assessment that Congress adopted "as a curative measure" because Congress was "act[ing] to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss"); *United States* v. *Sperry Corp.*, 493 U.S. 52, 65 (1989) (explaining that the retroactive imposition of a user fee was consistent with due process because "[i]t is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them").

Here, BA debtors had particularly little reason to assume that their fees would continue at pre-2017-Act levels. Congress had periodically increased fees in UST districts, and those fee increases had historically been implemented in lockstep in BA districts. See *Siegel*, 596 U.S. at 470. And the 2001 standing order of the Judicial Conference specifically directed that quarterly fees in BA districts reflect "the amounts specified in 28 U.S.C. § 1930, *as those amounts may be amended from time to time*." *Ibid.* (quoting *2001 JCUS Report* 46) (emphasis added). In addition, although the relevant statutory provision had provided discretion to the Judicial Conference as to *whether* to impose any quarterly fees by providing that the fees "may" be imposed, it specified that any such fees were required to be "equal to those imposed" in UST districts. 28 U.S.C. 1930(a)(7) (2012); *ibid.* ("[i]n districts that are not part of a United States trustee region * * * the Judicial Conference of the United States may require the debtor in a case under chapter 11 * * * to pay fees *equal to those imposed by paragraph (6) of this subsection*") (emphasis added). That, too, put BA debtors on notice that, because the

Judicial Conference had long ago chosen to impose fees in the BA districts, those fees would remain equal to those imposed in UST districts, including after any periodic increases under Section 1930(b)(6). Given that historical backdrop, seeking additional collections from BA-district debtors who received an inadvertent windfall from the temporary delay in imposing the 2017 Act's fee increase would not be so "harsh and oppressive," *McKesson*, 496 U.S. at 40 n.23 (citation omitted), as to transgress those debtors' due-process rights.

Finally, respondents invoke (Br. in Opp. 26-27) potential "practical issues" with a leveling-down remedy, speculating, without citation, that "many" of the debtors "likely no longer exist." Respondents fail to acknowledge, however, that those issues could also complicate any effort to implement their preferred refund remedy—and on a much larger scale because a refund remedy would need to be implemented in more than 50 times as many cases. See pp. 38-39, *supra*. And whatever practical problems would in fact arise from a retroactive assessment, 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 and officials in BA districts could be expected to undertake such a good-faith effort if the Court were to order a leveling-down remedy.

Finally, while practical concerns further illustrate why a prospective-only remedy is the best option here, potential practical difficulties with a retrospective remedy still could not justify the imposition of a retrospective leveling-*up* remedy because "a court cannot 'use its remedial powers to circumvent the intent of the legisla-

ture.'" *Ayotte*, 546 U.S. at 330 (quoting *Califano*, 443 U.S. at 94 (Powell, J., concurring in part and dissenting in part)). The Court should reject respondents' request to adopt a refund remedy that would be demonstrably at odds with congressional intent.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

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APPENDIX

1. Sections 2 and 3 of the Bankruptcy Administration Improvement Act of 2020, Pub. L. No. 116-325, 134 Stat. 5086-5087, provide in pertinent part:

[(2)](a) FINDINGS.—Congress finds the following:

(1) Because of the importance of the goal that the bankruptcy system is self-funded, at no cost to the taxpayer, Congress has closely monitored the funding needs of the bankruptcy system, including by requiring periodic reporting by the Attorney General regarding the United States Trustee System Fund.

(2) Congress has amended the various bankruptcy fees as necessary to ensure that the bankruptcy system remains self-supporting, while also fairly allocating the costs of the system among those who use the system.

(3) Because the bankruptcy system is interconnected, the result has been a system of fees, including filing fees, quarterly fees in chapter 11 cases, and other fees, that together fund the courts, judges, United States trustees, and chapter 7 case trustees necessary for the bankruptcy system to function.

(4) This Act and the amendments made by this Act—

(A) ensure adequate funding of the United States trustees, supports the preservation of existing bankruptcy judgeships that are urgently needed to handle existing and anticipated increases in business and consumer caseloads, and provides long-overdue additional compensation for chapter 7 case trustees whose caseloads include chapter 11

reorganization cases that were converted to chapter 7 liquidation cases; and

(B) confirm the longstanding intention of Congress that quarterly fee requirements remain consistent across all Federal judicial districts.

(b) PURPOSE.—The purpose of this Act and the amendments made by this Act is to further the longstanding goal of Congress of ensuring that the bankruptcy system is self-funded, at no cost to the taxpayer.

* * * * *

[(3)](d) BANKRUPTCY FEES.—Section 1930(a) of title 28, United States Code, is amended—

(1) by striking paragraph (6)(B) and inserting the following:

"(B)(i) During the 5-year period beginning on January 1, 2021, 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 open and reopened case under chapter 11 of title 11, other than under subchapter V, for each quarter (including any fraction thereof) until the case is closed, converted, or dismissed, whichever occurs first.

"(ii) The fee shall be the greater of—

"(I) 0.4 percent of disbursements or $250 for each quarter in which disbursements total less than $1,000,000; and

"(II) 0.8 percent of disbursements but not more than $250,000 for each quarter in which disbursements total at least $1,000,000.

"(iii) The fee shall be payable on the last day of the calendar month following the calendar quarter for which the fee is owed."; and

(2) in paragraph (7), in the first sentence, by striking "may" and inserting "shall".

2. Section 1004(a) of the Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, Div. B, 131 Stat. 1232, provided:

AMENDMENTS TO TITLE 28 OF THE UNITED STATES CODE.—Section 1930(a)(6) of title 28, United States Code, is amended—

(1) by striking "(6) In" and inserting "(6)(A) Except as provided in subparagraph (B), in"; and

(2) by adding at the end the following:

"(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.".