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 RESPONDENTS


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## RULE 29.6 STATEMENT

The Revocable Trust of John Q. Hammons Dated December 28, 1989, as Amended and Restated has no parent corporations. All other respondents are owned either directly or indirectly by Atrium Holding Company, a Delaware corporation. Atrium Holding Company is a 100% privately held corporation.

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## BRIEF FOR THE RESPONDENTS

## INTRODUCTION

In *Siegel* v. *Fitzgerald*, 596 U.S. 464 (2022), this Court unanimously declared the 2017 Act unconstitutional under the Bankruptcy Clause, and it remanded for lower courts to consider the appropriate remedy. Notwithstanding the government's extensive efforts to avoid liability, the remedy question is ultimately straightforward. Congress imposed an unconstitutional fee increase in 2017, which this Court has struck down. Respondents were wrongly compelled to pay unlawful fees under that invalid provision. The only tenable way to erase that past violation is to refund the improper charge.

A refund is the obvious remedy, which is why courts have uniformly reached that same conclusion. It eliminates the past non-uniformity; it provides a workable, administrable remedy that, unlike the government's proposal, would not invite protracted future litigation; and it

has the simple practical effect of postponing, temporarily, the 2017 fee increase to cure a recognized constitutional defect—where any delay falls on Congress for not passing the 2020 Act with more deliberate speed. The government may prefer no remedy at all, but Congress is required to choose between *permissible* remedies—not to simply shrug and leave the non-uniform treatment in place.

Because the only viable remedy here is a refund, the judgment should be affirmed—and the government should be instructed to return the unlawful fees it collected under an unconstitutional scheme.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Bankruptcy Clause of the United States Constitution, Article I, Section 8, Clause 4, provides:

> The Congress shall have Power * * * To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States.

The Due Process Clause of the Fifth Amendment, U.S. Const. Amend. V, provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * * .

Section 1004(a) of the Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, Div. B, § 1004(a), 131 Stat. 1232 (2017 Act), provides in relevant part:

> 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.

28 U.S.C. 1930(a)(6)(B) (2018).

During the relevant periods here, Section 1930(a)(7) of Title 28 of the United States Code provided in relevant part:

> In districts that are not part of a United States trustee region as defined in section 581 of this title, the Judicial Conference of the United States may require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection * * * .

28 U.S.C. 1930(a)(7) (2018).

Section 3 of the Bankruptcy Administration Improvement Act of 2020, Pub. L. No. 116-325, 134. Stat. 5088-5089 (2021), provides in relevant part:

> (d) BANKRUPTCY FEES.—Section 1930(a) of title 28, United States Code, is amended—
>
> * * * * *
>
> (2) in paragraph (7), in the first sentence, by striking "may" and inserting "shall".
>
> (e) APPLICABILITY.—
>
> (1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section shall take effect on the date of enactment of this Act.
>
> (2) EXCEPTIONS.—
>
> * * * * *
>
> (B) BANKRUPTCY FEES.—The amendments made by subsection (d) shall apply to—
>
> (i) any case pending under chapter 11 of title 11, United States Code, on or after the date of enactment of this Act; and

> (ii) quarterly fees payable under section 1930(a)(6) of title 28, United States Code, as amended by subsection (d), for disbursements made in any calendar quarter that begins on or after the date of enactment of this Act.

## SUMMARY OF ARGUMENT

Respondents are entitled to a refund for the unconstitutional statutory fees paid under the 2017 Act. Contrary to the government's contention, it cannot simply "take the money and run." *USA Sales, Inc.* v. *Office of the U.S. Tr.*, 76 F.4th 1248, 1251 (9th Cir. 2023) (adopting same holding as every other court confronting this issue).

A. Under a century of this Court's jurisprudence, prospective-only relief is insufficient to redress a past monetary injury. If the government unlawfully collects funds, it is required to "rectify" the violation with "meaningful backward-looking relief." That relief can take the form of a refund or any other order that creates "in hindsight a nondiscriminatory scheme." But it cannot rest solely on prospective relief without violating due process.

Notwithstanding this clear law, the government insists that prospective-only relief is enough. But its position suffers from a series of demonstrable flaws. It misreads this Court's cases and fails to identify any direct statement (much less an actual holding) supporting its position. It insists that legislative intent is the overriding touchstone of the analysis. But the legislature may only choose among *permissible* options—and a purely prospective fix fails to provide the necessary "backward-looking" relief. The government further overlooks that a prospective-only scheme would itself violate the Bankruptcy Clause as an impermissible non-uniform law. Congress is not permitted to favor certain districts over others—and a decision to leave higher UST fees in place (without a

UST refund or BA clawback) is again reinstating the same disparate treatment this Court struck down in *Siegel*.

Nor can the government's theory account for the practical realities on the ground. Not all UST debtors paid the higher fees—some put the excess in escrow or refused to pay. The government never explains what happens to that class—are they required to turn over funds under an *unconstitutional* law (since the relief is prospective-only) or do they get a break, creating more disuniformity? A simple refund provides full relief, satisfies due process, and avoids these types of complications.

It is therefore unsurprising that the government fails to identify any relevant precedent supporting its position. It suggests that not every constitutional wrong receives a full remedy; but the question is whether *this* constitutional wrong receives a full remedy. All remedial law is not binary, and this Court's settled law provides a clear answer here: refunds (or other backward-looking relief) are indeed required in the context of invalid monetary exactions. Nor can the government sidestep settled law with a plea to policy. It is indeed true that refunds can cost the government money and interfere with its programmatic preferences. But that is the natural consequence of enacting an invalid law; there is no basis for asking injured parties to absorb the cost of Congress's error. And had Congress responded swiftly to the controversy, it could have limited the scope of the relief at issue. Congress has no obvious excuse for its own delay.

B. The government is also wrong that respondents somehow forfeited their due-process rights by failing to invoke a predeprivation remedy. Under settled law, due process requires retroactive relief unless an "exclusive" predeprivation remedy is both "clear and certain." If a scheme offers both predeprivation and postdeprivation

options, injured parties have the right to select either one—without any risk of forfeiting a refund.

That makes this an easy case. The Bankruptcy Code nowhere limits challenges to the predeprivation context or withdraws challenges in the postdeprivation context. The same routine bankruptcy procedures are available before or after paying an invalid fee. The government cannot now insist that respondents should have used the predeprivation option without effecting exactly the kind of "bait and switch" it admits is barred by this Court's precedents.

In any event, the government is mistaken that a true predeprivation remedy is available. Trustee fees are mandatory impositions in bankruptcy cases; they are not optional. Debtors must pay the fees or face dismissal or conversion, and a reorganization plan cannot be confirmed if fees are unpaid. Due process does not require debtors to roll the dice and risk their entire restructuring by picking an advanced fee fight with the government.

C. The government responds that if prospective-only relief is insufficient, its alternative proposal should carry the day: it suggests imposing retroactive fees—a half-decade after the fact—on all qualifying Chapter 11 cases in BA districts. But the idea that the government could collect anything approximating equal fees is wishful thinking. It would face insurmountable legal and practical hurdles, failing to correct the past non-uniformity. Courts apply a strong presumption against retroactivity, and there is no reason to presume Congress would undo closed cases and upset settled expectations of countless BA participants without saying so expressly. Yet the government cannot identify any express language supporting its fanciful proposal, and the 2020 Act *disavows* retroactive fees—reflecting Congress's unwillingness to swallow the

significant cost of unwinding three years of Chapter 11 payments in every major bankruptcy in two States.

This is a major policy question, and it should be decided by the political branches. If the government thinks this degree of chaos and disruption is advisable (and the high costs are acceptable), it should take its case to Congress. In the meantime, its ill-advised pitch in this Court founders on multiple fronts.

1. While courts do look to Congress's intent in shaping a remedy, Congress has already spoken—and emphatically *rejected* the government's plan to impose retroactive fees. In 2020, Congress amended the Chapter 11 fee scheme to (finally) compel uniform fees in all districts. But it textually limited that command to *future* quarterly payments. That alone is dispositive on the remedies question: When Congress confronted the option of imposing uniform fees retroactively in BA districts, it refused to do so—surely because retroactive fees would upset settled expectations, reopen closed cases, and unfairly recalibrate distributions involving hundreds or thousands of recipients in BA districts. The government has no license to ask this Court to judicially redline Congress's work and countermand Congress's refusal to extend higher fees retroactively across two States.

2. Second, even had the 2020 Act not foreclosed the government's position, the government has separately failed to identify *any* statutory authority permitting post-hoc higher fees in BA districts. The government cannot simply demand more fees because it wants to avoid giving back UST funds; it must identify affirmative power to impose post-hoc fees on BA debtors. Yet no statute authorizes a *retroactive* imposition in BA districts. Unless Congress grants that authority (which would require overriding the 2020 Act), the government lacks power to impose

retroactive fees—thus rendering UST refunds its only permissible choice.

3. Finally, the government has no realistic way to impose retroactive fees in BA districts, and its proposal promises chaos and an administrative nightmare. The government never spells out the details, but the upshot is clear: to achieve retroactive parity, the government would have to claw back and recalibrate every distribution in each qualifying Chapter 11 case pending in North Carolina and Alabama for a three-year period. That astounding proposal would invite endless disorder and confusion; it would impose severe and destabilizing effects on closed cases and confirmed plans (which were *not* negotiated on an assumption of retroactive 800% fee increases); it would promise years of litigation involving potentially hundreds (or thousands) of clawback lawsuits (as debtors, creditors, professionals, and administrators predictably refuse to return funds distributed years ago); and it would fail to equalize treatment in any event—as BA debtors have dissolved, creditors, professionals, and stakeholders have died or disbanded, and distributions have been spent.

The government cannot brush aside these serious concerns by simply shrugging and suggesting the Treasury Department will somehow figure it out. Nor can it say that collection efforts can be imperfect—this nightmare scenario is worlds away from "imperfect." This is a recipe for new rounds of protracted litigation and confusion that will upend countless bankruptcies, guarantee non-uniform fees in both UST and BA districts, and ultimately leave every key stakeholder (save maybe the government) worse off.

If Congress had an appetite for this non-solution, it had every opportunity to say so in the 2020 Act. It instead sensibly said the opposite. And the government has now

had over 1.5 years since *Siegel* was decided without formulating a genuine plan; it has briefed this issue in multiple courts, and it has yet to explain where it finds the authority to impose retroactive fees in BA districts or how it might even conceivably accomplish that task. It is past time for the government to put its money where its mouth is—yet it has failed to identify a lawful option *besides* refunds to remedy the established constitutional harm.

Because the government has no other legal or practical choice, the government should be directed to return the invalid fees it wrongly extracted under an unconstitutional statute.

## ARGUMENT

### THE 2017 ACT COMPELLED THE PAYMENT OF UNCONSTITUTIONAL FEES, AND THE PROPER REMEDY FOR THAT PAST VIOLATION IS A REFUND OF THE UNLAWFUL CHARGE

#### A. Prospective-Only Relief Cannot Redress A Past Constitutional Monetary Injury

In *Siegel*, this Court established that respondents were compelled to pay unconstitutional fees. In determining the remedy for that violation, every court confronting the issue (including four circuits, at least one district court, and multiple bankruptcy courts) has unanimously reached the same conclusion: the government must return the invalid amount. See, *e.g.*, *USA Sales, Inc.* v. *Office of the U.S. Tr.*, 76 F.4th 1248, 1253 (9th Cir. 2023) ("the government must refund the excess money it collected"); *In re Mosaic Mgmt. Grp., Inc.*, 71 F.4th 1341, 1353-1354 (11th Cir. 2023) (same); *In re Clinton Nurseries, Inc.*, 53 F.4th 15, 29 (2d Cir. 2022) (same); Pet. App. 5a, 31a-32a (same); *In re VG Liquidation, Inc.*, No. 22-50416, 2023 WL 3560414, at *7 (Bankr. D. Del. May 18, 2023) (same); *In re Circuit City Stores, Inc.*, No. 19-3091, 2022 WL

17722849, at *7 (Bankr. E.D. Va. Dec. 15, 2022) (same). The government now says it would rather keep the money, but a refund is the obvious choice. It is not enough for Congress to correct the uniformity problem going forward—which merely prevents *additional* harm. Uniformity must be restored in "hindsight," and the government cannot do that by pocketing the unlawful fees, leaving the past disparities in place, and "promising not to take the money again." *USA Sales*, 76 F.4th at 1253.

1. This common-sense result follows directly from over a century of this Court's jurisprudence. When the government unlawfully collects funds, it is "obligate[d]" to "rectify any unconstitutional deprivation" with "meaningful *backward-looking* relief." *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990) (emphasis added); accord *Reich* v. *Collins*, 513 U.S. 106, 114 (1994). It makes no difference whether refunds are authorized by statute: "'if a [government] obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation.'" *Ward* v. *Board of Cty. Comm'rs of Love Cty.*, 253 U.S. 17, 24 (1920); see also *ibid.* ("[i]t is a well-settled rule that 'money got through imposition' may be recovered back"). The government's choice is simple: it may "either award full refunds to those burdened by an unlawful [charge] or issue some other order that 'create[s] *in hindsight* a nondiscriminatory scheme.'" *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 101 (1993) (emphasis added). But it cannot simply pocket the funds: "To say that the [government] could collect these unlawful [amounts] by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property * * * arbitrarily and without due process of law." *Ward*, 253 U.S. at 24.

As these cases make clear, it accordingly is insufficient to cure a problem "prospective[ly]-only." Contra U.S. Br. 25. "[I]n *addition* to prospective relief," injured parties are "entitled * * * to a refund of the excess [funds] paid—at least unless the disparity is removed in some other manner." *McKesson*, 496 U.S. at 35. And the reason is obvious: The constitutional mandate is to "rectify" the disparate treatment (*Harper*, 509 U.S. at 101); a refusal to correct past wrongs does not "rectify" anything—it *cements* the disparity. *USA Sales*, 76 F.4th at 1253. Even where an unlawful scheme is "expressly repudiated," a prospective-only "cure" may prevent *additional* violations, but it does nothing to "cure the mischief which had been done under the earlier [scheme]." *Montana Nat'l Bank of Billings* v. *Yellowstone Cty.*, 276 U.S. 499, 504 (1928); see also *Harper*, 509 U.S. at 101 (requiring "meaningful backward-looking relief"); *McKesson*, 496 U.S. at 34-35 (confirming "prospective relief alone" is inadequate, and injured parties have "'an undoubted right to recover' the moneys [they] had paid"). Put simply, prospective-only relief wrongly "leaves the monies thus exacted in the public treasury"; it cannot "deprive" an injured party of "its legal right to recover the amount of the [funds] unlawfully exacted of it." *Montana Nat'l Bank*, 276 U.S. at 504-505.

To sum up a century of settled law: when the government unlawfully takes funds, it must "'rectify'" the violation "'in hindsight'" with "'backward-looking relief.'" *Harper*, 509 U.S. at 101 (quoting *McKesson*, 496 U.S. at 31, 40). It can always level up or level down: (i) it can "cure the invalidity * * * by refunding * * * the difference" between the baseline and the unlawful charge; or (ii) it can "assess and collect" charges from those "benefit[ting] from the rate reductions *during the contested [] period*,

calibrating the retroactive assessment to create in hindsight a nondiscriminatory scheme." *McKesson*, 496 U.S. at 40 (emphasis added). But it must provide a "meaningful" remedy *in that relevant period*—ensuring uniformity between charges "as *actually imposed*" on all parties "during the contested [] period." *Id.* at 31, 43 (emphasis in original). Otherwise, refusing "a recovery of [funds] exacted in violation of the laws or Constitution of the United States" is "itself in contravention of [due process]." *Carpenter* v. *Shaw*, 280 U.S. 363, 369 (1930).

2. Notwithstanding this Court's unambiguous mandate, the government insists that no refunds are required, and "prospective-only relief" is the "appropriate remedy." U.S. Br. 25-27. According to the government, proper relief turns entirely on "legislative intent"—and if the legislature would rather not return the unlawful fees or redress the past disparity, "prospective-only" relief is fine. *Id.* at 13-14, 28. There accordingly is no need to do anything besides fix the problem going forward: simply "declar[e] 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)." *Id.* at 20. In fact, the government concludes, because Congress's "remedial" preference is "prospective-only relief"—and "purely prospective" relief "has already been effectuated"—the court below erred in providing *any* remedy. *Id.* at 26-28.

a. The government's position is contrary to a "century" of precedent. *McKesson*, 496 U.S. at 32; see also *Reich*, 513 U.S. at 109 (describing this Court's "long line of cases"). As exhaustively detailed above, this Court's decisions are not difficult to understand. Those decisions could not state any more plainly the government's "obligation to provide retrospective relief" (*McKesson*, 496 U.S. at 32), the necessity of equalizing treatment "during

the contested period" (*id.* at 43), or the shortcomings of "prospective relief alone" (*id.* at 34-35). There is no ambiguity in the phrase "'backward-looking relief.'" *Harper*, 509 U.S. at 101; see also *Montana Nat'l Bank*, 276 U.S. at 504-505 (declaring insufficient an "express[] repudiat[ion]" of the invalid scheme, like *Siegel*'s repudiation here, as "*not* cur[ing] the mischief which had been done under the earlier" period) (emphasis added).

So how did the government read these same cases as standing for the *opposite* proposition? It simply mischaracterizes them. Take the government's assertion that, under *McKesson*, "'prospective relief, by itself, exhausts the requirements of federal law.'" U.S. Br. 25 (quoting 496 U.S. at 31). Here is what the Court *actually* said: "*The question before us is whether* prospective relief, by itself, exhausts the requirements of federal law. *The answer is no* * * * ." *McKesson*, 496 U.S. at 31 (italicizing text the government omitted). The government's theory is incompatible with this Court's cases, and the government cannot flip *McKesson*'s holding upside-down by rewriting it.

If this Court's established practice in fact endorsed prospective-only relief, one would expect to see unequivocal holdings to that effect—clear, explicit, unambiguous statements that nothing more is required whenever the legislature prefers a forward-looking remedy and terminates the unconstitutional practice. Yet in identifying any such language, the government comes up with—nothing. It could not identify any relevant statement supporting its position, let alone explain away the plain language pointing in the opposite direction. See, *e.g.*, *USA Sales*, 76 F.4th at 1253-1254 ("Each of these cases held that the state owed the taxpayer retrospective relief even though it had already fixed the constitutional problem going forward."). Indeed, if prospective relief alone were sufficient, there is little reason this Court would ask *anything* about refunds

after unconstitutional conduct had ceased. The government cannot explain why each of these critical decisions (and their deliberate holdings) spilled so much ink talking about "backward-looking" relief if a simple "we-won't-do-it-again" statement were sufficient.[1]

b. The government asserts that prospective-only relief is appropriate because that is what Congress wants—and courts must defer to Congress's judgment on the appropriate remedy. U.S. Br. 14. The government is indeed *partially* correct that "'[t]he touchstone'" is "'legislative intent.'" *Ibid.* (quoting *Ayotte* v. *Planned Parenthood*, 546 U.S. 320, 330 (2006)). But that legislative intent is the choice between *permissible* options; the legislature cannot simply do whatever it wants. *E.g.*, *Harper*, 509 U.S. at 102 (remanding to "craft[ an] appropriate remedy," and directing that "Virginia 'is free to choose which form of relief it will provide, *so long as that relief satisfies the minimum federal requirements we have outlined*'"—"under no circumstances may it confine petitioners to a lesser

[1] Invoking *Harper*, the government says a "prior decision" can apply "'retroactively'" without "resolv[ing] * * * whether the challengers were 'entitle[d] * * * to a refund.'" U.S. Br. 20-21 (quoting 509 U.S. at 100). This is puzzling. A refund was not automatically required in *Harper* because Virginia could have *elected instead to impose the fee in hindsight on the favored class*. 509 U.S. at 100-101. The Court outlined two options for Virginia, and "prospective-only" relief was not one of them—indeed, the "prior decision" already established prospective relief, and the Court still found a "meaningful" remedy was required. Unless Virginia could establish the right to relief was forfeited, it was required to "either award full refunds to those burdened by an unlawful tax or issue some other order that 'create[s] in hindsight a nondiscriminatory scheme.'" *Id.* at 101. Absent a qualifying "predeprivation remedy," the Due Process Clause "'obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.'" *Ibid.*

remedy") (quoting *McKesson*, 496 U.S. at 51-52; emphasis added).[2]

If the government always had the choice to keep the cash, it would be the rare case where this Court would ever remand for a new remedy. But this Court routinely remands for States to implement "meaningful backward-looking" relief, even after an unconstitutional practice has ceased. There is no need to read between the lines to know the available choices do not include a prospective-only fix. See, *e.g.*, *McKesson*, 496 U.S. at 31 (enforcing "obligat[ion]" for retrospective relief to "rectify any unconstitutional deprivation" even after the Florida Supreme Court "correctly" barred "continued enforcement of the discriminatory provisions"); *Montana Nat'l Bank*, 276 U.S. at 504-505 (recognizing "an undoubted right to recover" despite "the state Supreme Court * * * expressly repudiat[ing] the [offending] construction").

c. In any event, the government's "prospective-only" preference is impermissible here for another reason: a prospective-only "remedy" would *itself* be a non-"uniform Law[] on the subject of Bankruptcies." U.S. Const. Art. I, § 8, Cl. 4. As the government reads the 2020 Act, Congress decided to let things stand exactly where they were—still saddling UST debtors with higher amounts while refusing to extend the same fees retroactively to BA debtors. In other words, Congress's "remedy" is to repeat the same

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[2] The government overlooks the context of cases like *Ayotte*, which sought only declaratory or injunctive relief (and no backward-looking remedies). See *Ayotte*, 546 U.S. at 324-325 (describing challenge to an abortion-related law "[b]efore the Act took effect," seeking to enjoin the Act). When all relief is necessarily forward-looking, a full remedy might indeed be prospective-only dictated by legislative choice. But a prospective fix is inadequate when a party seeks redress for *past* unequal treatment. *McKesson*, 496 U.S. at 35, 39-40; see also *USA Sales*, 76 F.4th at 1253-1254 (so explaining).

past mistake: it still seeks "different fee structures * * * for debtors in different bankruptcy districts," "burdening only one set of debtors with a more onerous funding mechanism." *Siegel*, 596 U.S. at 476, 480.

If the government's theory had any merit, it could answer this simple question: If the Bankruptcy Clause "does not permit arbitrary geographically disparate treatment of debtors" (*Siegel*, 596 U.S. at 476), why would it permit a prospective-only remedy that itself *codifies* that disparate treatment? That "remedy" does precisely what *Siegel* forbids: "the Clause does not permit Congress to treat identical debtors differently based on an artificial funding distinction that Congress itself created." *Id.* at 479-480.[3]

Nor is it any answer to deem this Court responsible for any "new" disparity (because this Court, not Congress, would technically adopt the remedy). According to the government, the prospective-only remedy has already been "effectuated" with the 2020 Act (U.S. Br. 25-26)—so this relief was again Congress's work. See U.S. Br. 28 (attributing the so-called "relief here" to "Congress"). And if Congress could not impose this relief by statute, there is no reason to think it could instead impose the identical relief by proxy through this Court. Cf. U.S. Br. 15 ("[c]ongressional intent determines * * * the appropriate remedy").

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[3] To further illustrate the point: Suppose that Congress, today, reenacted the 2017 law by imposing non-uniform fees retroactively in UST districts but not BA districts, covering the identical period as before. No one presumably thinks such a law could stand—yet such a law is materially indistinguishable from a law leaving *the identical system in place after the fact*. If Congress could not codify that relief via statute, the government has no basis asking this Court itself to impose the identical rule.

In order to cure the non-uniformity, Congress cannot leave respondents and similarly situated BA debtors paying different amounts during the relevant period—Congress must "calibrat[e] the retroactive assessment to create in hindsight a nondiscriminatory scheme." *McKesson*, 496 U.S. at 40; see also *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239, 247 (1931). Again, Congress's remedial choice may control, but it must be a *permissible* choice—and cementing the disparity is not permissible. See, *e.g.*, *Montana Nat'l Bank*, 276 U.S. at 504-505.

d. Aside from its legal flaws, the government's theory is also half-baked as a practical matter. Under a prospective-only scheme, the government says it can pocket the invalid UST fees. But the government never explains what should happen when those fees have *not* yet been paid. What happens, for example, with escrowed fees or withheld fees? What about any fees already returned to debtors as relief in other cases?

Under the government's proposal, should those debtors still turn over the *invalid* fees—since the remedy is prospective-only? Do those debtors instead get a free pass? If one group ultimately pays and the other does not, the government is inviting even more disuniformity. But if all groups have to pay, the government would be enforcing, prospectively, an invalid provision already struck down as unconstitutional.

A simple refund avoids these complications. If the government nevertheless wishes to craft a "take-the-money-and-run" remedy (cf. *USA Sales*, 76 F.4th at 1251), it should at least outline the full scope of its proposal.

e. Trying a different tack, the government says it is entirely common to deny relief in any number of constitutional contexts, implying there is nothing wrong with likewise denying relief here. U.S. Br. 21-22 (citing, *e.g.*, "the absence of a cause of action" or "the defendant's immunity

from suit"). But the question is not whether *every* constitutional wrong gives rise to a refund claim; the question is whether *this* constitutional wrong does. And the Court has already answered that question: there is "an undoubted right to recover" (*Montana Nat'l Bank*, 276 U.S. at 504) unless the government "'create[s] in hindsight a nondiscriminatory scheme'" (*Harper*, 509 U.S. at 101).

In any event, this case does not suffer from the same defects identified in the government's (irrelevant) examples. There is obviously no sovereign-immunity bar, and there is no need for a freestanding cause of action—because these illegal fees were imposed in a *pending* case. The only issue is whether to apply the lawful scheme or the unconstitutional scheme to calculate fees. In an active case. That is still pending. Where the unlawful fees were challenged and invalidated. And there is no reason not to correct the mistake.

Respondents' request merely involves recalculating and correcting the wrong sum imposed under an invalid provision. The government's remarkable view, by contrast, invites courts to collect a knowingly incorrect amount (already declared *unconstitutional*) and refuse to conform the total owed to the proper legal standard.

f. The government maintains "this Court has awarded prospective-only relief in two recent cases," but each is inapposite. U.S. Br. 22-23.

First, unlike here, *Sessions* v. *Morales-Santana*, 582 U.S. 47 (2017), involved immigration, not fees, taxes, dues, money, or the Bankruptcy Clause. See 582 U.S. at 77 (recognizing itself as "hardly the typical case"). The challenger was resisting deportation, and raised a gender-based equal-protection challenge to Congress's citizenship laws. *Id.* at 51-52. The requested relief (no deportation) was forward-looking, not retrospective; it had nothing to do with refunds or economic remedies. *Id.* at 77. The

challenger did not seek to adjust everyone's citizenship in the past (cf. *id.* at 77 & n.29)—and a two-Justice concurrence expressed "skeptic[ism]" that any such relief (retroactive or otherwise) was even possible, given Congress's plenary authority over citizenship. *Id.* at 78 (Thomas, J., concurring in the judgment).[4] So unlike cases seeking backward-looking relief for fees "unlawfully exacted" under an "invalid" law (*Montana Nat'l Bank*, 276 U.S. at 504-505), this case involved prospective-looking relief from a future deportation (*Morales-Santana*, 582 U.S. at 77). One case is not anything like the other.

Second, in *Barr* v. *American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020) (plurality opinion), the Court invalidated an exception to a general "robocall restriction" as favoring certain speech (government-debt collection). 140 S. Ct. at 2355. In severing the exception from the general prohibition, a plurality noted its decision "does not negate the liability of parties who [previously] made [forbidden] robocalls" (*id.* at 2355 n.12)—which the government here labels prospective-only relief (U.S. Br. 23).

Yet this statement involved a single sentence in a single footnote with no analysis or explanation of any kind. It did not address any relief sought by the actual parties, who asked to invalidate the *entire* scheme. *AAPC*, 140 S. Ct. at 2343. The broader discussion focused on principles of *severability*, not backward-looking remedies. *Id.* at 2349, 2354-2355. And the context is readily distinguishable. The forbidden conduct involved *past* robocalls; there is no way to travel back in time and un-dial those calls. But

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[4] See also, *e.g.*, *INS* v. *Pangilinan*, 486 U.S. 875, 883-884 (1988) ("the power to make someone a citizen of the United States has not been conferred upon the federal courts"; "'[c]ourts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will'").

there is indeed a way to "rectify" the government's unlawful collection of an unconstitutional fee (*McKesson*, 496 U.S. at 31)—and to do so without renting a DeLorean.[5]

At bottom, the government's reading of *Morales-Santana* and *AAPC* cannot be squared with a century of refund cases, which *do* require "meaningful backward-looking relief." *McKesson*, 496 U.S. at 31. If prospective-only relief were enough, one would expect to find scores of cases making that clear. Instead, the best the government can do is a forward-looking immigration case (involving citizenship issues where court-imposed retroactivity is not an option), and a single, unexplained footnote in *AAPC* involving a different issue (severability) under a distinct factual and statutory backdrop.

g. The government finally appeals to policy, suggesting backward-looking relief is too expensive and would frustrate Congress's legislative priorities—by forcing taxpayers (indirectly) to cover the costs of the UST program. U.S. Br. 18-19.

Yet this Court has once again already confronted, and rejected, those precise concerns. In *McKesson*, the Court batted aside Florida's plea that "rectify[ing] its unconstitutional discrimination * * * 'would plainly cause serious economic and administrative dislocation for the State.'"

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[5] The government contends that two other cases—*Railway Labor Execs.' Ass'n* v. *Gibbons*, 455 U.S. 457 (1982), and *St. Angelo* v. *Victoria Farms, Inc.*, 46 F.3d 969 (9th Cir. 1995)—also involved "purely prospective relief." U.S. Br. 23-24. Yet the challenger in *Gibbons* only *sought* purely prospective relief—he asked to *enjoin* an unconstitutional law (which was in effect for only days), and there were no fines, fees, or damages to refund or redress. See 455 U.S. at 463, 473. And the Ninth Circuit itself did not view *Victoria Farms* as an obstacle to correctly applying this Court's refund cases post-*Siegel*. See *USA Sales*, 76 F.4th at 1255. Besides, and for many reasons, this Court is not bound by the Ninth Circuit.

496 U.S. at 49-50. Simply put: "the State's interest in financial stability does not justify a refusal to provide relief." *Id.* at 50. As with Florida, the government "may not object to an otherwise available remedy for the return of real property unlawfully taken or criminal fines unlawfully imposed simply because it finds the property or moneys useful." *Id.* at 51 n.35. The government may have "other ideas about how to spend the funds" (*ibid.*), but it remains constrained by due process. *E.g.*, *Ward*, 253 U.S. at 24.

In any event, the magnitude of relief is a direct product of Congress's own delay.[6] Congress sat on its hands for over three years before passing the 2020 Act (U.S. Br. 13), and it has now sat on its hands again for over 1.5 years after *Siegel*. There is no indication it intends to "rectify" the past disparate treatment. It is not respondents' obligation to prod Congress to act (*Bennett*, 284 U.S. at 247), and respondents are not required to wait indefinitely on the off-chance the government might finally remedy a past wrong (*Montana Nat'l Bank*, 276 U.S. at 505).

Any alleged policy disruption here is also minimal. A refund here would not tie Congress's hands for future (uniform) fee increases or prevent Congress from reallocating the existing UST System Fund surplus to cover a refund in this case. Contra U.S. Br. 36 n.3. At bottom, a refund would have the modest practical effect of postponing the effective date of the 2017 Act—and Congress could have limited the length of any delay with prompt corrective action. Its failure to respond quickly is not an excuse

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[6] The government notes a full refund for "*all*" UST debtors might "cost the government an estimated $326 million." U.S. Br. 35. While those funds would provide material relief for Chapter 11 debtors, the government oversells the grave impact such an amount would have on the multi-*trillion* dollar federal fisc.

for shortchanging those injured by Congress's unconstitutional legislation.

### B. Due Process Requires "Meaningful Backward-Looking Relief" Unless An "Exclusive" Predeprivation Remedy Is Both "Clear And Certain"—All Conditions The Government Cannot Meet

After pages of insisting that prospective-only remedies are sufficient, the government finally acknowledges this Court's cases requiring "'meaningful backward-looking relief.'" U.S. Br. 29. According to the government, however, such relief is required "*only* if a [party] lacked a meaningful opportunity to challenge" a fee "at a predeprivation hearing." *Ibid.* In the government's view, it makes no difference if a postdeprivation hearing is also available—"the availability of a predeprivation hearing constitutes a procedural safeguard * * * sufficient by itself to satisfy the Due Process Clause." *Ibid.* (internal quotation marks omitted; citing *Harper*, 509 U.S. at 101, and *McKesson*, 496 U.S. at 38 n.21).

The government is wrong. It plucks out supplanted language from *Harper* and *McKesson* that is dicta; it distorts this Court's subsequent holdings in *Reich* and *Newsweek*, which limit that dicta (and the predeprivation-remedy exception); and it flunks each aspect of this Court's controlling standard—which requires an "*exclusive*" predeprivation remedy that is both "clear and certain." *Newsweek, Inc.* v. *Florida Dep't of Revenue*, 522 U.S. 442, 443-444 (1998) (per curiam) (emphasis added). As the government itself admits, absolutely nothing in the Bankruptcy Code specifies when the quarterly fees should be challenged. There is nothing that says only prepayment challenges are acceptable, and nothing that says post-payment challenges are disallowed (much less that debtors forfeit their refund rights by waiting). The Code

is ultimately silent—aside from a strict threat that debtors must pay the mandatory fees or face dismissal or conversion of their bankruptcy cases. Few debtors are willing to stake their entire corporate restructuring on convincing a court that a withheld UST fee is unconstitutional.[7]

As other courts have recognized, the government's argument "based on the *McKesson* dicta and the availability of a predeprivation remedy has been squarely rejected by the Supreme Court." *Mosaic Mgmt.*, 71 F.4th at 1349; see also *USA Sales*, 76 F.4th at 1254 (this Court "has explained that due process requires post-payment relief unless a 'reasonable taxpayer would have thought that [the pre-payment remedy] represented * * * the *exclusive* remedy for unlawful taxes'") (alterations and emphasis in original). The government cannot short-circuit its due-process obligations with (theoretical) predeprivation relief when postdeprivation relief is indisputably available.

1. Under this Court's clear authority (*Reich* and *Newsweek*), debtors are "entitled to pursue what appear[s] to be a 'clear and certain' postdeprivation remedy, regardless of the [government's] predeprivation remedies." *Reich*, 513 U.S. at 113; accord *Newsweek*, 522 U.S. at 443-444. This holding is directly at odds with the government's position. U.S. Br. 34 ("a predeprivation hearing * * * obviates any due-process concerns").

In *Newsweek*, for example, the Court expressly rejected a theory indistinguishable from the government's.

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[7] Few cases better highlight that risk than this case. Respondents' Chapter 11 plan was confirmed in May 2018, five months after the 2017 Act went into effect and five months before the Judicial Conference declined to apply the fee increase retroactively, locking in the non-uniform scheme. Respondents had to pay the unconstitutional fees to obtain confirmation of their plan. See 11 U.S.C. 1129(a)(12). Failure to pay the fees would have put at risk respondents' billion-dollar restructuring.

Earlier in that case, a lower court "concluded Newsweek was afforded due process because it could have pursued [its] prepayment remedy." 522 U.S. at 443. This Court reversed, faulting the lower court for "fail[ing] to consider our decision in *Reich*." *Ibid.* As this Court explained, even with "adequa[te]" predeprivation procedures, relief is still required unless the predeprivation process is "'the exclusive remedy.'" *Id.* at 444 (quoting *Reich*, 513 U.S. at 111). If the government wishes to cut off postdeprivation review, it must "'maintain an *exclusively* predeprivation remedial scheme'" that is "'clear and certain.'" *Ibid.* (quoting *Reich*, 513 U.S. at 110-111; emphasis added). If a party has "no way of knowing from either the statutory language or case law that he could not pursue a postpayment refund," due process requires full relief: "While Florida may be free to require taxpayers to litigate first and pay later, due process prevents it from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund when paying the tax." *Id.* at 444-445.

Under this clear precedent, the government's "reliance" on "predeprivation procedures [is] entirely beside the point (and thus error)." *Reich*, 513 U.S. at 111. Unless it is plain that a predeprivation challenge is "the *exclusive* remedy," parties may pursue a "postdeprivation remedy, regardless of the [government's] predeprivation remedies." *Id.* at 113; see also *id.* at 114 (ultimately "remand[ing] for the provision of '"meaningful backward-looking relief,"' "consistent with due process and our *McKesson* line of cases").[8]

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[8] The Court also confirmed that a debtor need not be aware of its claim in advance: parties "need not have taken any steps to learn of the possible unconstitutionality of their [fees] at the time they paid them," and "may not now be put in any worse position for having failed to take such steps." *Reich*, 513 U.S. at 114.

2. This dooms the government's position. *Reich* and *Newsweek* confirm the availability of any postdeprivation scheme is sufficient to preserve respondents' rights: unless the Bankruptcy Code set out an *exclusive* predeprivation remedy, respondents can challenge the invalid fee before or after the fact. And the government itself readily concedes that postdeprivation challenges are permitted: "The amounts of the [fee] 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." U.S. Br. 5-6. It is a mystery how the government nevertheless reads the Code to impose *any* duty to challenge the fees in advance, much less an *exclusive* obligation—at the penalty of forfeiting a debtor's due-process rights to a meaningful refund.

In response, the government contends that *Reich* and *Newsweek* "dealt with the narrow circumstance of a 'bait and switch.'" U.S. Br. 33. This makeshift explanation might reference words used in those opinions, but it cannot account for either case's full rationale—which unequivocally rejected the existence of a predeprivation hearing as sufficient to foreclose further relief. *Newsweek*, 522 U.S. at 444-445; *Reich*, 513 U.S. at 113. And the government's theory also founders on its own terms: In what sense is the government itself not trying its own bait and switch? As the government admits, the Code nowhere limits challenges to the predeprivation context or withdraws challenges in the postdeprivation context; the same bankruptcy procedures are open and available before or after paying an invalid fee. Both are equally acceptable for a party to assert and preserve its rights. It is puzzling how the government could extinguish respondents' due-process rights by invoking an *available* remedy—without any

notice or rationale for suddenly limiting refunds to predeprivation challenges.[9]

3. In any event, aside from its (admitted) non-exclusivity, the government is also wrong to think the Code's predeprivation process is "clear and certain." *Atchison, T. & S.F. Ry. Co.* v. *O'Connor*, 223 U.S. 280, 285, 286-287 (1912) (citing "risk[s]" that qualify as paying "under duress").

If a debtor fails to pay required quarterly fees, the default rule is the court "shall" convert the Chapter 11 case to a liquidation under Chapter 7 or dismiss the case altogether. 11 U.S.C. 1112(b)(1), (b)(4)(K) (listing "failure to pay any fees or charges required under chapter 123 of title 28" as grounds supporting "for cause" conversion or dismissal). The threat of having a case converted or dismissed cannot possibly provide the sort of "pre-deprivation hearing" that would satisfy due process or avoid a customary refund in cases involving unlawfully collected fees. See, *e.g.*, *McKesson*, 496 U.S. at 38 n.21 (this Court has "long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has *not provided a fair and meaningful predeprivation procedure*") (emphasis added); *USA Sales*, 76 F.4th at 1254 ("the UST collected illegal excess quarterly

[9] The government is likewise wrong to elevate *McKesson*'s passing remarks over *Reich* and *Newsweek*. *McKesson*'s brief reference to predeprivation process was dicta; *Reich*'s and *Newsweek*'s *holdings* (supported by developed rationales) were not. Compare *McKesson*, 496 U.S. at 38-39 ("Florida requires taxpayers to raise their objections to the tax in a postdeprivation refund action"—leaving no occasion to *hold* anything concerning predeprivation process). It is thus little surprise this Court itself did not perceive any inconsistency between *McKesson* (on the one hand) and *Reich* and *Newsweek* (on the other)—the latter involved *both* predeprivation and postdeprivation options, whereas the former did not.

fees from USA Sales, paid to avoid the 'serious disadvantage' of liquidation or dismissal of the bankruptcy proceeding").

And while the government suggests this issue could be adjudicated at a pre-dismissal hearing (U.S. Br. 29-30), that is cold comfort to a debtor who faces *dismissal* if its challenge is ultimately rejected. Indeed, the government's own resources underscore the danger of guessing wrong. In the Bankruptcy Administrator's official instructions concerning Chapter 11 quarterly fees for the Northern District of Alabama, debtors are clearly warned: "Failure to pay quarterly fees pursuant to 28 U.S.C. § 1930 has significant legal consequences. The United States Bankruptcy Administrator will move for dismissal or conversion of your Chapter 11 case if you fail to make payment when due." U.S. Bankruptcy Administrator for the Northern District of Alabama, *Instructions Concerning Chapter 11 Quarterly Fees* § V; see also *id.* § I ("FAILURE TO MAKE PAYMENT IN FULL WHEN DUE WILL RESULT IN THE FILING OF A MOTION TO DISMISS OR CONVERT THE CASE.") (capitalization and emphasis in original). Those risks are no less pronounced in UST districts. See, *e.g.*, *USA Sales*, 76 F.4th at 1252 ("Failure to pay such fees risked liquidation and dismissal of the case.").

The government further overlooks the practical impediments to refusing to pay. Chapter 11 cases are often adversarial and complex, with the prospect of a successful restructuring highly uncertain. It is rarely prudent to devote time and resources to a distracting satellite fight over fees, especially if dismissal is a potential consequence. Nor can a bankruptcy plan be confirmed without payment of fees (11 U.S.C. 1129(a)(12)), meaning an entire restructuring could be frozen until the fee issue is resolved. There

is no basis for asking a debtor, acting as the estate's fiduciary, to put the entire reorganization at risk to wage a fee fight with the government. See, *e.g.*, *VG Liquidation*, 2023 WL 3560414, at *6; see also *Atchison*, 223 U.S. at 286-287 ("the plaintiff could have had no certainty of ultimate success, and we are of opinion that it was not called upon to take the risk of having its contracts disputed and its business injured").[10]

Unsurprisingly, the natural remedy for unconstitutional fees is a refund—not a dare for debtors to refuse to pay and hope for the best. Contrary to the government's contention, the Constitution does not mandate self-help; it nowhere says constitutional injuries can be ignored simply because the injured party *might* have defied the law and dodged the government's misconduct—by ignoring an *existing* mandate to pay (unlawful) fees. Unless a pre-deprivation remedy is both available and "'*exclusive*,'" "it was reasonable for [respondents] to pay the quarterly fees * * * and to challenge them only later." *USA Sales*, 76 F.4th at 1254-1255; *Mosaic Mgmt.*, 71 F.4th at 1350 (same).

### C. Contrary To The Government's Contention, There Is No Viable Option (Legally Or Practically) For Imposing Retroactive Fees In BA Districts

If the government must provide relief at all, it insists the appropriate remedy is collecting higher fees retroactively in BA districts, not refunding what it unlawfully extracted from UST debtors. U.S. Br. 34-45. The government's position faces insurmountable legal and practical

[10] Indeed, a debtor's fiduciary obligations could require forgoing a fee dispute even in the face of clear unconstitutionality if the resolution of that issue would inject undue uncertainty or delay into the restructuring process.

hurdles: it has already been foreclosed by Congress; it demands a new *retroactive* fee campaign with zero statutory authority (much less any unmistakable legislative directive); and it would predictably, and inevitably, impose severe and destabilizing effects on dozens of bankruptcy cases—promising to create deep mischief without meaningfully redressing any constitutional injury.

It has now been over 1.5 years since the *Siegel* decision, and the government's proposal remains entirely half-baked. It apparently is still unaware of exactly how many cases its plan would affect. It has no idea how many debtors, creditors, professionals, or administrators received funds, how it would claw back those funds, how it would then recalibrate who gets what in each bankruptcy, and what to do if any debtors or creditors then object to the new plan—as some (previously confirmed) plans will look materially different once the government retroactively extracts shockingly higher fees.

When this Court said the government may "level up" or "level down," it meant *meaningfully* level down—not simply offer empty gestures designed to avoid liability while inviting far greater problems. When this issue arose on remand in *Siegel*, the debtor posed to the government a simple question: How exactly does the government plan to achieve these claw backs? The government's answer was a general shrug in the direction of the Treasury Department—saying Treasury knows how to collect fees in the ordinary course (despite this course being anything but ordinary). That apparently reflects the full extent of the government's concrete plan for retroactively collecting those fees. And it shows the government has devoted no serious thought about the immense magnitude of the intractable task the government now invites, much less the disaster awaiting courts in dealing with reopening

dozens of closed cases and handling (predictably) hundreds or thousands of actions from BA participants who refuse to accede to the government's severe retroactive request.

And the government's brief in this Court fares no better. It glides past the extreme nature of its proposal, but it is worth pausing for a moment to take it seriously. The government is asking this Court, without any input from Congress, to unleash a massive fee campaign across two States, seeking retroactive clawbacks from hundreds or thousands of BA participants in dozens of bankruptcy actions. This campaign (presumably handled by some federal actor) will upset settled expectations, risk unwinding successful restructurings, haul countless parties back into court, and invite endless new controversy—with affected stakeholders unsure who to hold accountable. Cf. *Printz* v. *United States*, 521 U.S. 898, 920 (1997).

There is a reason this Court will not read ordinary statutes to have retroactive effect unless the political branches themselves have carefully balanced the competing costs. *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 272-273 (1994); *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208-209 (1988). And there is likewise reason this Court will not presume Congress delegated major policy questions to unelected bodies absent clear directives in statutory text. *West Virginia* v. *EPA*, 142 S. Ct. 2587, 2609 (2022). Yet the government's proposal here hits another level entirely—it asks this Court, acting alone, to impose a retroactive charge on countless parties in two separate States, when Congress has sat silently by and provided no affirmative direction. (Aside, of course, from *refusing* a retroactive imposition in 2020.) This, in short, is leagues apart from a typical "level-up-or-level-down" decision left in the hands of the judiciary. If the government truly believes this kind of unsettling confusion and

disorder is the best way to resolve this dispute, it should make its case to Congress.

There is only one lawful option awaiting the government: providing a full refund of the UST fees it unconstitutionally extracted from respondents. The government's contrary arguments are meritless.

***1. The government says that Congress's intent controls—while ignoring Congress already refused to authorize retroactive relief***

a. While courts crafting constitutional remedies consult "the legislature's intent" (*Morales-Santana*, 582 U.S. at 73), Congress's intentions here were unmistakable. In 2020, Congress revised the fee scheme to address this very issue, and it did so by mandating equal fees *prospectively only*. See Pub. L. No. 116-325, §§ 3(d)(2), 3(e)(2)(B), 134 Stat. 5088-5089 (2021). It was aware of the non-uniform treatment; it stated its belief that fees ought to be (and ought to have been) the same in all districts; and yet it *still* decided against imposing retroactive fees. If Congress would prefer retroactive fees in BA districts, one has to wonder why Congress rejected precisely that relief in 2020.

In suggesting otherwise, the government simply asks the wrong question. According to the government, Congress undoubtedly would prefer a scheme imposing higher fees everywhere rather than abandoning those higher fees nationwide. U.S. Br. 37. But the question here is not whether *going forward* Congress would want to level down for everyone (indeed, it surely would); the question here is whether Congress would wish to remedy *past unequal treatment* by imposing a severe and disruptive *retroactive remedy*. And that presents a very different question.

Retroactive impositions are profoundly disruptive. They eviscerate settled expectations, create deep unfairness, and frustrate completed transactions. Retroactive impositions are harmful in general, and particularly harmful to the goals of bankruptcy, which stress the importance of finality and a fresh start. *USA Sales*, 76 F.4th at 1255-1256. A decision to reopen closed cases will impose serious costs at a systemic level and on individual bankruptcies. If the pursuit unwinds even one reorganization, the government would risk closing a company, destroying the jobs of those who work there, and imposing real-world costs on countless individuals. Congress would presumably take those costs into account before deciding to save money by avoiding refunds for its unlawful fees.

There is a reason the judiciary traditionally refuses to presume a law has retroactive effect absent unmistakable legislative directive. See, *e.g.*, *Landgraf*, 511 U.S. at 265-267 (describing the "antiretroactivity principle" and its longstanding jurisprudential roots); *id.* at 270 ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent."). Yet here there is no indication that Congress would have balanced that distinct policy question—whether to apply the 800% fee increase retroactively—the same way it balanced the *separate* question whether to increase BA fees going forward. And "[a] legislator who supported a prospective statute might reasonably oppose retroactive application of the same statute." *Landgraf*, 511 U.S. at 286.

The government cannot substitute the lack of *any* retroactive language with a cavalier insistence that Congress would necessarily endorse a severe retroactive imposition (and chaos for confirmed plans, consummated plans, closed cases, and long-ago-spent distributions) simply be-

cause it embraced *prospective* uniformity. In fact, the *relevant* question—whether Congress would desire to impose *retroactive* liability to remedy the unconstitutional treatment—is not even addressed in the government's brief.

b. Contrary to the government's contention, it makes no difference that, at the time of the 2020 Act, this Court had not yet declared the 2017 Act unconstitutional. The fact is that Congress was perfectly aware that debtors in BA districts were not paying equal fees; that fees were thus *not* consistent across all federal districts; and that a disparity would continue to exist under the 2020 Act. And yet Congress was unwilling to correct the disuniformity. If Congress truly believed that everyone in BA districts should have been paying higher fees all along (no matter what), it would have imposed higher fees retroactively in those districts. It instead did the opposite—despite being fully aware of the constitutional crisis over non-uniform fees.

It is not hard to read between the lines: while Congress valued uniform treatment going forward, it was unwilling to accept the grave cost of a retroactive imposition in BA districts. The government cannot insist upon pursuing that same retroactive imposition now without overriding Congress's judgment. See *Ayotte*, 546 U.S. at 330 ("a court cannot 'use its remedial powers to circumvent the intent of the legislature'").

In the end, Congress had its chance to impose retroactive liability in the 2020 Act. There is no need to guess about Congress's preferences because Congress has made those preferences clear: when amending Section 1930(a)(7) to make fees mandatory in all districts, *it elected to apply that change prospectively only*. See Pub. L. No. 116-325, *supra*, § 3(e). Congress elected against "leveling down," and a retroactive clawback would require

rejecting the express effective date of the 2020 legislation. The government cannot ask this Court to do what Congress refused without flouting legislative intent.

***2. The government has failed to identify any statutory authority permitting it to collect higher fees in BA districts during the relevant period***

a. The government's proposal faces another independent defect: even had the 2020 Act not foreclosed its position, the government still has zero statutory authority to collect higher fees in BA districts in past quarters.

If the Treasury Department (or whatever agency the government selects) does indeed ask BA debtors, creditors, professionals, and administrators to return past distributions to cover higher fees, what would be the source of that authority? Nothing in Section 1930 authorizes the imposition of higher fees in past quarters. Nothing in the 2020 Act grants that permission. Not only does the government lack any actual support from Congress, but the only statutory authority cuts the other way: again, in the 2020 Act, Congress refused to apply the fee increase retroactively and did not authorize higher BA fees in past quarters.

Even if the government genuinely believes Congress would tolerate a severe retroactive clawback, the government currently has no affirmative power to impose higher fees in the relevant period. It needs congressional authorization to pursue a retroactive remedy—which it has neither sought nor obtained. That again leaves a single lawful answer: respondents cannot "be remitted to the necessity of awaiting such action by [Congress]," but are "entitled,"

now, "to obtain * * * refund of the excess of [fees] exacted from them." *Bennett*, 284 U.S. at 247.[11]

b. The government's proposal nonetheless asks this Court, acting alone, to launch a new retroactive fee campaign in two States affecting hundreds or thousands of stakeholders. And it asks this Court to do so without seeking that authority from Congress (or any branch with political accountability).

The Court should not presume Congress would authorize retroactive liability in BA districts. There is no actual statute. There is no clear statement. There is no showing Congress considered the harsh consequences and balanced the relevant considerations. There is no hint Congress would accept the high negative costs rather than return the invalid fees. See *Landgraf*, 511 U.S. at 272-273.

As in *Landgraf*, this Court recognized that a decision acceptable for *prospective* application may be deemed unacceptable for retroactive liability. 511 U.S. at 285-286; *Bowen*, 488 U.S. at 208 ("a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms"). The UST fee problem has been known since 2018. Congress has had over five years to pass appropriate legislation. It has now had over 1.5 years since

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[11] The same retroactivity-based issues tend not to arise in cases seeking *prospective-only* relief. In such instances, courts can often strike statutory exceptions (or recognize severability instructions) to leave a statute operational. See, *e.g.*, *Morales-Santana*, 582 U.S. at 76-77; *Levin* v. *Commerce Energy, Inc.*, 560 U.S. 413, 420 (2010). Here, however, as with most retroactive remedies, a legislative body must enact positive law authorizing retroactive impositions before a "level down" option is legally viable.

*Siegel* was decided. In all that time, Congress has not authorized higher post-hoc fees in BA districts. Yet the government now wants *the judiciary* to order a coercive regulatory program to reopen closed cases, destroy finality, and collect new fees for distributions made a half-decade ago.

That quintessential policy question is reserved to the political branches. *West Virginia*, 142 S. Ct. at 2609. Congress alone is supposed to make these sensitive decisions—and a severe retroactive imposition (with consequences for hundreds or thousands of stakeholders) is about as sensitive as it gets. If courts will not even read an *existing* statute to have retroactive effect without clear direction from Congress, there is no basis for asking a court to *devise* a retroactive program on its own. It is remarkable for the government to ask this Court, not Congress, to resolve that major policy question. See *Landgraf*, 511 U.S. at 273.

If the government wishes to impose retroactive liability on BA districts, it has sought out the wrong audience. It should go across the street and seek affirmative permission from Congress.

***3. The government has no legal or practical means of retroactively imposing uniform fees in BA districts—and its "ready-shoot-aim" proposal invites an administrative morass***

Aside from these many defects, the government's proposal blinks reality. The government has no realistic means of tracing all the funds distributed in dozens of BA bankruptcies to hundreds or thousands of recipients, many of whom may no longer exist. Chapter 11 plans are generally structured to take into account available funds. There is no fair means of asking debtors to pay higher fees unilaterally without first clawing back all distributions

and asking each recipient (creditors, professionals, administrators, equity holders, etc.) to pay their pro-rata share. See *Siegel*, 596 U.S. at 475; *Clinton Nurseries*, 998 F.3d at 64. And once the 2017 Act's staggering fees are imposed on those bankruptcies, there is no guarantee each confirmed or consummated plan would still even work—assuming a reorganized debtor remains in existence.

Nor has the government acknowledged the statutory obstacles it will face under the Bankruptcy Code. For example: Does the government have the authority to reopen closed cases, and would its fee request satisfy that standard?[12] It is possible any claims for higher post-hoc fees have been discharged (11 U.S.C. 1141)? Are those fees barred by the terms of any confirmed plans? How would it meet the requirement for post-confirmation plan modifications (11 U.S.C. 1127)? What should courts do if the increased fees render a confirmed plan unworkable, especially if that plan has been *consummated*? How would equitable mootness play into this? Would creditors who voted to accept a plan based on projected distributions be bound by a revised plan that claws back and reduces those distributions? What happens from a priority perspective if the government cannot track down distributions to lower-priority creditors but claws back distributions from higher priority creditors—would that violate rules of absolute priority? See *Czyzewski* v. *Jevic Holding Corp.*, 137 S. Ct. 973, 979, 983-984 (2017) (setting out those rules). And so on.

The government has no answer for these questions. In fact, its brief does not even *mention* the obstacles that

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[12] See 11 U.S.C. 350(b) ("[a] case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause").

might arise under the Code when distributions made long ago are suddenly needed to cover a pro rata share of higher trustee fees.

Nor has the government confronted the seriousness of the constitutional challenges its proposal will inevitably face. *E.g.*, *Mosaic Mgmt.*, 71 F.4th at 1355 (Brasher, J., concurring) ("a level-up refund remedy is our only option because there is no lawful way to implement a backward-looking level-down remedy"). While some retroactive legislation is tolerated, the Constitution's Due Process Clause limits severe retroactive effects, and the government's proposal skirts the outer boundary. *McKesson*, 496 U.S. at 40 n.23. It involves an extreme passage of time—clawing back distributions made over a half-decade earlier. It invites profound unfairness and unsettled expectations, interfering with confirmed plans, consummated plans, and closed cases—where all parties have long since moved on. The 2020 Act established Congress's intention *not* to pursue higher post-hoc BA fees—and stakeholders were entitled to rely on that legislative determination. At some point, the constitutional line is crossed, and it would be crossed here: the obliteration of finality, reopening of closed cases, and unwinding of consummated plans reach a step too far under this Court's cases. See *Mosaic Mgmt.*, 71 F.4th at 1355 (Brasher, J., concurring) ("too much time has passed to increase the fees consistent with due process"; "[t]his is especially true of bankruptcy cases that have already been closed and the estate's assets distributed or reorganized").

Even putting legal hurdles aside, this says nothing of the predictable real-world fallout of the government's proposal. Most distribution recipients (if you can find them) will not willingly hand over funds received years ago in closed cases; they will resist the government, gen-

erating thorny litigation (with both statutory and constitutional defenses) challenging the government's untimely collection efforts. Courts will be left handling a new wave of litigation while unscrambling the egg of closed cases—dealing with protracted questions about how to reallocate funds when higher fees suddenly consume a chunk of negotiated distributions. Rather than end one constitutional controversy, the government's proposal would instead ignite another—inviting years of additional litigation.

Rather than responsibly address any of these obvious issues, the government breezily suggests "bankruptcy administrators * * * could simply refer unpaid fees to the Treasury Department for collection, as they already do." Gov't Opening Br. 42, *Siegel* v. *Vetter (In re Circuit City)*, No. 23-1678 (4th Cir.) (filed Aug. 15, 2023). It requires scant comment to think the Treasury Department's routine process is not designed to grapple with anything remotely resembling this situation—involving the reopening of closed cases, lawsuits to claw back distributions, recalibrating the pro-rata share of thousands of bankruptcy participants, and so on.

The government has now had over 1.5 years since this Court declared the 2017 Act unconstitutional. It has briefed the remedies question in multiple courts (now including this one). Yet it apparently still has no idea how it would actually seek to impose higher fees retroactively in every single qualifying BA case—or any rough sense of the true level of disruption this would cause. See, *e.g.*, U.S. Br. 38-39 & n.4 (limited to proffering "approximat[ions]" based on extrapolations from limited data—and guessing how many cases "could" be affected).

Finally, notwithstanding all the problems above, the government insists it is easier to collect higher fees from debtors in two States than refund excess fees to debtors

in 48 States. This downplays the obvious difference between those two options. A refund simply leads to more funds to distribute in accordance with an existing plan. A clawback attempt—targeting thousands of recipients—involves identifying and chasing down *every distribution of funds* from each relevant bankruptcy; chasing down each recipient to demand a repayment of their pro-rata share; and, inevitably, handling hundreds or thousands of collection efforts—which themselves could lead to full-blown constitutional litigation. It is not enough to compare rote numbers; one of these options is not like the other.

In sum, while the government has floated a theoretical "level down" option, the question is no longer hypothetical. The government must identify a concrete action plan for clawing back funds. It must identify statutory authority for carrying out that plan. It must cultivate information on the plan's feasibility, including the number of debtors, creditors, professionals, and administrators involved, including how many remain solvent or in business, and how it plans to litigate challenges to its retroactive impositions. The government cannot wait indefinitely for (non-existent) new legislation authorizing retroactive relief, nor for some new legal or regulatory directive that may never come. And the government cannot shift the burden to the injured party to pursue that legislative relief or explain to the government how best to do its job. See *Bennett*, 284 U.S. at 247 (so concluding).

The government has had every opportunity to show up with a viable scheme for imposing retroactive fees, if it were serious about the undertaking. It instead filed another brief underscoring how unprepared the government is to assume an unprecedented task of unknown magnitude. While this Court hinted "a good-faith effort to administer and enforce such a retroactive assessment *likely* would constitute adequate relief" (*McKesson*, 496 U.S. at

40 n.23 (emphasis added)), the government's effort here falls woefully short of good faith—and the predictable hurdles the government's scheme invites shuts the door on any realistic prospect of achieving uniformity in the relevant period.[13]

There is an obvious reason that Congress did not impose retroactive fees in the 2020 Act—despite proclaiming that higher fees should have been imposed all along. There is no real-world mechanism for attempting to collect those fees without making the situation immeasurably worse.[14]

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This Court declared the 2017 Act unconstitutional under the Bankruptcy Clause, and the government is now responsible for refunding the invalid fees it exacted under that unlawful provision. The government may prefer to avoid responsibility for past constitutional injuries. But prospective relief cannot restore uniformity for past periods where that treatment was unequal, and Congress has

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[13] In any event, this Court suggested that "miss[ing] a few in-state taxpayers" might not defeat a retroactive effort to level down. *McKesson*, 496 U.S. at 40 n.23. The government's ill-concocted plans will predictably miss far more than a "few" BA participants. And that hardly establishes why an *unsuccessful* good-faith effort should be enough. This "good-faith" concept was flagged in a single footnote of a single case; it was dicta, since the issue was not presented; and it was framed as a "likely" outcome—not even a definitive statement of the law. If the government wishes to rely on that concept here, it has to justify this Court adopting the standard as a *holding*.

[14] The government sidesteps its proposal's practical failings, arguing courts should not take those "practical difficulties" into account. U.S. Br. 44-45. But the point is not what courts find more practical—the point is that feasibility informs what the *legislature itself* would find acceptable. When it is obvious that one option is implausible, it is fair to presume Congress would not adopt it.

already shut the door on a retroactive "level down" remedy—by imposing higher BA fees prospectively only. Nor has the government devised a plausible way to claw back funds distributed years ago without inviting chaos and disrupting closed cases long-since resolved. The reason for the government's failure is obvious: there is no viable way to retroactively impose fees in BA districts. A full refund is the government's only constitutionally permissible option, and it is time to put this controversy to rest.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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