No. 22-1238

In The Supreme Court of the United States

OFFICE OF THE UNITED STATES TRUSTEE,

Petitioner,

v.

JOHN Q. HAMMONS FALL 2006, LLC, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICI CURIAE ACADIANA MANAGEMENT GROUP, LLC, ALBUQUERQUE-AMG SPECIALTY HOSPITAL, LLC, CENTRAL INDIANA-AMG SPECIALTY HOSPITAL, LLC, LTAC HOSPITAL OF EDMOND, LLC, HOUMA-AMG SPECIALTY HOSPITAL, LLC, LTAC OF LOUISIANA, LLC, LAS VEGAS-AMG SPECIALTY HOSPITAL, LLC, WARREN BOEGEL, BOEGEL FARMS, LLC, THREE BO'S, INC., SHIEKH SHOES, LLC, MICHAEL L. NEWSOM, AND JON NEWTON IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Acadiana Management Group, LLC, Albuquerque-AMG Specialty Hospital, LLC, Central Indiana-AMG Specialty Hospital, LLC, LTAC Hospital of Edmond, LLC, Houma-AMG Specialty Hospital, LLC, LTAC of Louisiana, LLC, and Las Vegas-AMG Specialty Hospital, LLC (collectively "AMG"); Warren Boegel, Boegel Farms, LLC, and Three Bo's, Inc. (collectively "Boegel"); Shiekh Shoes, LLC; Michael L. Newsom as Trustee of the Liquidating Trust of Sivyer Steel Corporation; and Jon Newton, Trustee of the Chapter 7 estate of Bridgeport Health Care Center, Inc., amici herein, are plaintiffs in a lawsuit brought on behalf of themselves and persons similarly situated. Amici are former Chapter 11 debtors whose bankruptcy cases were filed before October 1, 2018, in U.S. Trustee districts, namely, the U.S. Bankruptcy Courts for the Western District of Louisiana, the District of Kansas, the Central District of California, the Southern District of Iowa, and the District of Connecticut.

Under the Bankruptcy Judgeship Act of 2017[2] (amending 28 U.S.C. § 1930(a)(6)), amici were charged and paid heightened Chapter 11 quarterly fees compared to their identically situated counterparts in

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[1] In accordance with S. Ct. Rule 37.6, AMG, Boegel, and all other amici curiae to this brief state that no counsel for any party authored this brief in whole or in part and no entity or person, other than counsel for these parties, made any monetary contribution intended to fund the preparation or submission of this brief.

[2] Pub. L. No. 115-72, Div. B, 131 Stat. 1229 (2017 Act).

Bankruptcy Administrator districts. Amici filed suit in the U.S. Court of Federal Claims premised on illegal exaction under the Tucker Act. See *Acadiana Management Group, LLC, et al. v. United States of America*, No. 1:19-cv-00496 (Fed. Cl. filed Apr. 3, 2019).

This Court has since unanimously held that the non-uniform fee increase violated the Bankruptcy Clause, Article I, § 8, cl. 4 of the Constitution of the United States. See *Siegel v. Fitzgerald*, 596 U.S. 464 (2022).[3] *Siegel* left open "the appropriate remedy" for the constitutional violation (*id*. at 480), which this case will decide.

Now pending in *Acadiana* is the Motion for Class Certification. On behalf of themselves and those similarly situated, amici seek refunds of the amounts paid in excess of the amounts that would have been due under Section 1930(a)(6) before its amendment by the 2017 Act (i.e., the difference between the amount paid

[3] AMG and Boegel filed amicus briefs on the constitutional infirmity in various circuit courts of appeals, including the Tenth Circuit in the captioned matter, culminating in an amicus brief to this Court in *Siegel*. See Briefs of Amici Curiae Acadiana Management Group, LLC, et al., (i) in Support of Petitioner, *Siegel v. Fitzgerald*, No. 21-441 (S.Ct. Feb. 28, 2022); (ii) in Support of Affirmance, *Siegel v. Fitzgerald*, No. 19-2240 (4th Cir. Feb. 21, 2020); (iii) in support of Appellant, *Gargula v. Smith* (*Bast Amron*), No. 20-12547 (11th Cir. Sept. 22, 2020); (iv) in Support of Appellants, *John Q. Hammons Fall 2006, LLC v. Office of the United States Trustee*, No. 20-3203 (10th Cir. Dec. 1, 2020); and (v) in Support of Appellants, *MF Global Holdings Ltd. v. Harrington*, No. 20-3863 (2d Cir. Feb. 18, 2021).

and the amount that would have been due had the case been pending in an Administrator district).

In apparent recognition of the administrative benefits provided by the class vehicle, the government has indicated that should respondents prevail in this case, it does not intend to oppose class certification. A decision in favor of respondents holding that refunds are required would inure to the benefit of amici and those similarly situated.

SUMMARY OF THE ARGUMENT

A bedrock principle in American law is that if the United States illegally takes (or exacts) funds from citizens, then it must return the funds. Though multiple legal grounds obligate the return of the non-uniform fees exacted, this principle underlies them all.

The principle is embodied in the distinct statutes that require refunds. The most direct of these are the appropriations acts that govern the U.S. Trustee System Fund. These acts mandate a refund, as the Trustee previously acknowledged in effort to deny injunctive relief. Additionally, the Tucker Act of 1887 and related jurisprudence require refunds of illegally-exacted sums.

And, consistent with the bedrock legal principle, this Court has roundly rejected prospective-only relief for monetary harm. Nor can this Court order a retroactive fee increase, which is prohibited here on

multiple grounds, and which Congress itself rightfully avoided.

ARGUMENT

I. Congress Has Twice Provided a Refund Remedy to Respondents.

The petitioner's focus on the intent of an imaginary Congress deliberately eschews the enactments of the real one. Congress contemplated refunds for payors into the U.S. Trustee System Fund, and without qualification, elected those refunds be paid from the System Fund. Further, as a matter of statutory and black-letter law (and principle, and logic), when the United States illegally exacts funds, the only remedy is a refund.

A. In Numerous Appropriations Acts, Congress Mandated Refunds.

1. The Refund Mandate Is Clear.

Congress has unequivocally expressed its intent that overpayments into the United States Trustee System Fund, an internal fund within the U.S. Treasury into which Chapter 11 quarterly fees are deposited pursuant to Section 1930(a)(6), shall be refunded. The "**[m]onies in the Fund shall be available** to the Attorney General without fiscal year limitation **in such amounts as may be specified in appropriations Acts** for the following purposes in connection with the

operations of United States trustees[. . .]" 28 U.S.C.A. § 589a (emphasis added). The text of the Consolidated Appropriations Act, 2023, in turn reads as follows:

> For necessary expenses of the United States Trustee Program, as authorized, $255,000,000, to remain available until expended: *Provided*, That, **notwithstanding any other provision of law, deposits of discretionary offsetting collections to the United States Trustee System Fund and amounts herein appropriated shall be available in such amounts as may be necessary to pay refunds due depositors**: *Provided further*, That, notwithstanding any other provision of law, fees deposited into the Fund as discretionary offsetting collections pursuant to section 589a of title 28, United States Code (as limited by section 589a(f)(2) of title 28, United States Code), shall be retained and used for necessary expenses in this appropriation and shall remain available until expended: *Provided further*, That to the extent that fees deposited into the Fund as discretionary offsetting collections in fiscal year 2023, **net of amounts necessary to pay refunds due depositors**, exceed $255,000,000, those excess amounts shall be available in future fiscal years only to the extent provided in advance in appropriations Acts: *Provided further*, That the sum herein appropriated from the general fund shall be reduced (1) as such fees are received during fiscal year 2023, **net of amounts necessary to pay refunds due depositors**, (estimated at $269,000,000) and

> (2) to the extent that any remaining general fund appropriations can be derived from amounts deposited in the Fund as discretionary offsetting collections in previous fiscal years that are not otherwise appropriated, so as to result in a final fiscal year 2023 appropriation from the general fund estimated at $0.

Pub. L. 117-328, 136 Stat. 4459, 4524 (2022) (emphasis added). The 2023 Appropriations Act is the most recent in a series of acts in which Congress expressly stated that refunds are *the* remedy for overpayments.[4]

The refund requirement is clear. It applies "notwithstanding any other provision of law" and mandates that deposits to the System Fund and amounts appropriated "shall be available in such amounts as may be necessary to pay refunds due depositors." Pub.

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[4] All appropriations acts from 1998-2022 provide the same treatment. See Pub. L. No. 117-103, 136 Stat. 115 (2022); Pub. L. No. 116-260, 134 Stat. 1248 (2020); Pub. L. No. 116-93, 133 Stat. 2398 (2019); Pub. L. No. 116-6, 133 Stat. 103-104 (2019); Pub. L. No. 115-141, 132 Stat. 412 (2018); Pub. L. No. 115-31, 131 Stat. 195 (2017); Pub. L. No. 114-113, 129 Stat. 2298-2299 (2016); Pub. L. No. 113-235, 128 Stat. 2184 (2015); Pub. L. No. 113-76, 128 Stat. 53-54 (2014); Pub. L. No. 113-6, 127 Stat. 244-245 (2013); Pub. L. No. 112-55, 125 Stat. 606 (2011); Pub. L. No. 111-218, 124 Stat. 3125 (2010); Pub. L. No. 111-8, 123 Stat. 572 (2009); Pub. L. No. 110-161, 121 Stat. 1900 (2007); Pub. L. No. 110-5, 121 Stat. 42 (2007); Pub. L. No. 109-108, 119 Stat. 2292 (2005); Pub. L. No. 108-447, 118 Stat. 2856 (2004); Pub. L. No. 108-199, 118 Stat. 49 (2004); Pub. L. No. 108-7, 117 Stat. 53 (2003); Pub. L. No. 107-77, 115 Stat. 751 (2001); Pub. L. No. 106-553, 114 Stat. 2762A-54 (2000); Pub. L. No. 106-113, 113 Stat. 1501A-6 (1999); and Pub. L. No. 105-227, 112 Stat. 2681-54 (1998).

L. 117-328, 136 Stat. 4524 (repeatedly referencing "refunds due depositors"). The statute imposes no limitation on the basis for the refund; all that is needed is a finding that a refund is due, for any reason.[5]

2. The U.S. Trustee Admitted the Refund Mandate Applies.

The U.S. Trustee previously acknowledged this refund obligation within the context of non-uniform fees paid under the 2017 Act. Specifically, the Trustee contended the party seeking refund "does not need setoff or injunctive relief . . . *because the statute appropriating funds to the United States Trustee Program addresses refunds*." Trustee Mem. of Law at 37-38, *In re MF Global Holdings Ltd.*, D. Ct. Doc. 13, Adv. Proc. No. 19-01379-mg (Bankr. S.D.N.Y. Nov. 21, 2019) (citing

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[5] The "explanatory statement" that Senator Leahy entered into the record before Congress passed the 2023 Appropriations Act is irrelevant to this discussion. The Act's declaration that the Leahy statement "shall have the same effect" as "a joint explanatory statement of a committee of conference," "[i]n actuality . . . means that it is not an explanatory statement of a committee of conference." *Texas Workforce Comm'n v. USDE*, No. EP-17-CV-00026-FM, 2018 U.S. Dist. LEXIS 232710, *35 (W.D. Tex. Mar. 28, 2018). Further, "Congress does not vote on a joint explanatory statement, so it 'has no force of law' and functions as legislative history." *Lawyers' Comm. for 9/11 Inquiry, Inc. v. Wray*, 424 F. Supp. 3d 26, 30 (D.D.C. 2020) (construing substantively identical appropriations text) (quoting *Goldring ex rel. Anderson v. District of Columbia*, 416 F.3d 70, 75 (D.C. Cir. 2005)). The appropriations acts are clear, and to accord Sen. Leahy's statement any authority "impermissibly elevates" what is at best "legislative history over unambiguous statutory text." See *id*. at 31 (citing *United States v. Woods*, 571 U.S. 31, 46 n.5 (2013)).

Consolidated Appropriations Act, 2019, Pub. L. 116-6, 133 Stat. 13, 103-104) (emphasis added).

The Trustee further acknowledged that "*Congress authorized payments of refunds* from (1) deposits to the System Fund and (2) annual appropriations for the necessary expenses of the United States Trustee Program, in its most recent annual appropriation law." *Id.* at 38 (citing Pub. L. 116-6, 133 Stat. 103-104) (emphasis added). Noting judgments against the government are not payable until appeals are exhausted, the Trustee repeatedly reassured the court, the parties, and the public:

1. "[t]he US Trustee will refund any overpaid fees due . . . at that time" (*id*. at 4);

2. "[t]he US Trustee will voluntarily pay MF Global through the U.S. Trustee Program's standard refund procedure if MG obtains a final and unappealable judgment establishing its right to a refund" (*id*. at 33);

3. "because MF Global would be eligible for a refund if it is adjudged to be entitled to one after the appellate process has concluded, it is not entitled to injunctive relief" (*id.* at 38); and

4. "there is little risk MF Global will not collect if it ultimately prevails on its claims," and "[t]hus, injunctive relief should be denied" (*id.* at 39).

In another case premised on the 2017 Act, the United States likewise urged that although appeals must be exhausted, "Congress authorized payments of refunds . . . in its most recent annual appropriation law." U.S. Mem. of Law at 24, n.12, *In re SunEdison, Inc.*, D. Ct. Doc. 24, Adv. Proc. No. 19-01443-dsj (Bankr. S.D.N.Y. Mar. 10, 2020) (citing Pub. L. 116-6, 133 Stat. 103-104).

The position of the petitioner on the very question it presents to this Court is directly contrary to its earlier assertions made to prevent injunctive relief. It cannot be that there is a statutory refund remedy for an alleged constitutional violation—but only until the violation is established, and it appears payment may be required.

The contradictory positions of convenience (Pet. Br. at 29-31) are more than unsavory. For the government now to deny this remedy is an unlawful "bait and switch." See *Reich v. Collins*, 513 U.S. 106, 111 (1994) (concluding the government cannot hold out a post-deprivation remedy of refund, and then declare, after disputed amounts are paid, that no such remedy exists). Congress has spoken, and it elected the constitutional remedy of refund.

B. The Tucker Act and Jurisprudence Require Refunds of Illegal Exactions.

1. An illegal exaction is a situation "in which 'the Government has the citizen's money in its pocket.'" *Eastport S.S. Corp. v. United States*, 372 F.2d 1002,

1008, 178 Ct. Cl. 599 (Ct. Cl. 1967) (quoting *Clapp v. United States*, 117 F. Supp. 576, 580, 127 Ct. Cl. 505 (Ct. Cl. 1954)). It occurs "when the 'plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum' that was 'improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation.'" *V.I. Port Auth. v. United States*, 922 F.3d 1328, 1333 (Fed. Cir. 2019) (quoting *Eastport*, 372 F.2d at 1007); *Boeing Co. v. United States*, 968 F.3d 1371, 1383 (Fed. Cir. 2020).

2. Since at least 1881, this Court has recognized that illegal exaction claims can be brought against the United States. See *Swift & Co. v. United States*, 105 U.S. 691 (1881); see also *Erskine v. Van Arsdale*, 82 U.S. 75, 77 (1872) (referring to the collection of an "illegal tax" as an "illegal exaction"). Years prior, Congress had addressed sovereign immunity concerns by creating a Court of Claims to "hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." See Act of Feb. 24, 1855, ch. 122, 10 Stat. 612. Congress extended this jurisdiction to claims based "upon the Constitution" through passage of the Tucker Act, ch. 359, 24 Stat. 505 (1887).

The Tucker Act is now codified in part at 28 U.S.C. § 1491, where its substance and jurisdictional grant to the United States Court of Federal Claims (CFC) remain largely unchanged. It provides the CFC "jurisdiction to render judgment upon any claim against the

United States founded either upon the Constitution, or any Act of Congress . . . or for liquidated or unliquidated damages in cases not sounding in tort."[6]

3. The Tucker Act serves a "gap-filling role"[7] and confers jurisdiction upon the CFC "whenever the substantive right exists." *United States v. Testan*, 424 U.S. 392, 398 (1976) (citation omitted). This Court has impliedly recognized that the illegal exaction of money gives rise to a distinct claim under the Act:

> Where the United States is the defendant and the plaintiff is *not suing for money improperly exacted or retained*, the basis of the federal claim—whether it be the Constitution, a statute, or a regulation—does not create a cause of action for money damages unless . . . that basis . . . can fairly be interpreted as

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[6] 28 U.S.C. § 1491(a)(1). The Federal Circuit has held that the immunity waiver also applies in bankruptcy courts, who with the CFC enjoy concurrent jurisdiction to adjudicate bankruptcy fee recovery claims. *Quality Tooling, Inc. v. United States*, 47 F.3d 1569 (Fed. Cir. 1995). Under *Quality Tooling*, parties can pursue these illegal exaction claims in bankruptcy court (like respondents) or in the CFC (like amici). See *id*. at 1578-79.

[7] *United States v. Bormes*, 568 U.S. 6, 12 (2012) (explaining "[t]he Tucker Act is displaced . . . when a law assertedly imposing monetary liability on the United States contains its own judicial remedies"). While the appropriations acts require refunds here, they do not provide a specific judicial remedy. See *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1329-31 (2020) (concluding that because the Risk Corridors compensation program lacked a specific remedial scheme, petitioners could pursue a collection action in the CFC).

> mandating compensation by the Federal Government for the damage sustained.

Id. at 401-02 (internal quotation marks and citation omitted) (emphasis added). Consistent with the foregoing, courts have delineated three categories of underlying substantive claims based on (1) contract, (2) the illegal exaction of money, and (3) where money has not been paid but the claimant nevertheless asserts he is entitled to payment (so-called "money-mandating statute" claims). See *Ontario Power Generation, Inc. v. United States*, 369 F.3d 1298, 1301 (Fed. Cir. 2004).

4. The *only* remedy for illegal exaction is a refund. Where "money was wrongfully exacted . . . it is equally certain that in equity and good conscience it ought to be returned, or so much of it as is not barred by the Statute of Limitations." *United States v. Lawson*, 101 U.S. 164, 169 (1879); see also *Dooley v. United States*, 182 U.S. 222, 228-30 (1901) (collecting cases).

The same holds true today. See *Consol. Edison Co. of N.Y. v. United States*, 247 F.3d 1378, 1384 (Fed. Cir. 2001) (noting "Con Ed will receive a refund of all payments under EPACT because the United States illegally exacted those funds"); *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed. Cir. 1996) ("Tucker Act claims may be made for recovery of monies" illegally exacted, and the Act "provides jurisdiction to recover an illegal exaction"); see also *United States v. Hatter*, 532 U.S. 557 (2001) (allowing recovery of unconstitutional tax payment) and *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369 (Fed. Cir. 2000) (same).

"The refund of a penalty improperly exacted pursuant to an Act of Congress is a substantive right for money damages" (*Trayco, Inc. v. United States*, 994 F.2d 832, 837 (Fed. Cir. 1993)), and "constitutes an illegal exaction claim under the Tucker Act." *Mendu v. United States*, 153 Fed. Cl. 357, 364 (2021). Simply, the "necessary remedy to the government improperly using its authority to place a citizen's money in its pocket is a return of that sum." *V.I. Port Auth. v. United States*, 136 Fed. Cl. 7, 14 (2018) (internal quotation marks and citation omitted). It follows that an act under which funds were illegally exacted not only "can fairly be interpreted as mandating compensation" (see *United States v. Mitchell*, 463 U.S. 206, 217 (1983)), but must be.

5. The " 'illegal exaction' branch of Tucker Act jurisdiction" (*Sanford Health Plan v. United States*, 969 F.3d 1370, 1378, n.3 (Fed. Cir. 2020)) is very much alive, and the threshold is relatively low:

> [T]o establish Tucker Act jurisdiction for an illegal exaction claim, a party that has paid money over to the government and seeks its return must make a non-frivolous allegation that the government, in obtaining the money, has violated the Constitution, a statute, or a regulation.

Boeing, 968 F.3d 1371, 1383. Under established law, it is sufficient that "(1) money was paid to the government at its direction," and "(2) the government's payment directive was contrary to law." *Darby Dev. Co. v.*

United States, 160 Fed. Cl. 45, 55 (2022) (citing *Aerolineas*, 77 F.3d at 1573).

Illegal exaction can occur when "the exaction is based on an asserted statutory power." *Aerolineas*, 77 F.3d at 1573; see also *Eastport*, 372 F.2d at 1008 (quoting *Clapp*, 117 F. Supp. at 580) (illegal exactions occur if "based upon a power supposedly conferred by a statute"). While the classic illegal exaction claim is a tax refund suit, "[a]nother example is a suit to recover improper or excessive fees connected with the provision of government services." *Columbus Reg'l Hosp. v. United States*, 990 F.3d 1330, 1348 (Fed. Cir. 2021) (citing *Nat'l Veterans Legal Servs. Program v. United States*, 968 F.3d 1340, 1348-49 (Fed. Cir. 2020) and *Figueroa v. United States*, 466 F.3d 1023, 1029 (Fed. Cir. 2006)).

In this case, the "asserted statutory power" was unconstitutional, and bankruptcy fees were "required to be paid contrary to law." See *Aerolineas*, 77 F.3d at 1572-73. The CFC "has long possessed jurisdiction to consider constitutional claims . . . under the 'illegal exaction' doctrine." *Consol. Edison*, 247 F.3d at 1384 (citing *New York Life Ins. Co. v. United States*, 118 F.3d 1553 (Fed. Cir. 1997); *Eastport*, 372 F.2d at 1009; and *Mallow v. United States*, 161 Ct. Cl. 446, 454 (1963) (Court of Claims has jurisdiction of claim to recover a fine imposed under an unconstitutional statute as a claim founded upon an Act of Congress)); see also *Hatter*, 532 U.S. 557 (recognizing claim for social security taxes paid in violation of the Compensation Clause) and *Cyprus Amax*, 205 F.3d 1369 (recognizing illegal

exaction claim for taxes paid in violation of the Export Clause).

The Tucker Act, with its "necessary remedy" of the return of sums illegally exacted, provides an alternative statutory basis to affirm the Tenth Circuit and all other courts of appeals to rule post-*Siegel*.[8]

II. This Court Has Squarely Rejected Prospective-Only Relief for Monetary Harm.

Certainly, "courts may attempt, within the bounds of their institutional competence, to implement what the legislature would have willed had it been apprised of the constitutional infirmity." *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, 427 (2010). But the remedies to be considered must be *real*, and must be constitutionally permissible. In this case, "relief" in the form of the *Siegel* decision holding the disparate fees unconstitutional, combined with a congressional mandate for future fee equalization, is neither real nor constitutionally permissible.

By its own admission, the government collected approximately $326 million (Pet. Br. at 35) pursuant to the fee increase which is irrefutably unconstitutional. Prospective-only declaratory relief is not a sufficient remedy for constitutional violations that occurred in the past and resulted in past monetary harm.

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[8] See *USA Sales, Inc. v. Office of the United States Tr.*, 76 F.4th 1248 (9th Cir. 2023); *United States Tr. Region 21 v. Bast Amron LLP*, 71 F.4th 1341 (11th Cir. 2023); and *Clinton Nurseries, Inc. v. Harrington*, 53 F.4th 15 (2d Cir. 2022).

McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco, 496 U.S. 18, 22 (1990); *Mont. Nat'l Bank v. Yellowstone Cty. of Mont.*, 276 U.S. 499, 504-05 (1928).

This Court more recently rejected a similar prospective relief argument in *United States v. Hatter*, 532 U.S. 557 (2001). In *Hatter*, federal judges who were appointed before 1984 sought to recover Social Security taxes they paid after Congress extended the Social Security system to cover all federal employees on January 1, 1984. Although the law allowed most federal employees hired before 1984 to opt out of Social Security, then-sitting federal judges, even those appointed before 1984, could not.

The judges filed suit in the Court of Federal Claims, alleging that the imposition of Social Security taxes on them violated the Compensation Clause, U.S. Const. Art. III, § 1, and this Court agreed. 532 U.S. at 572. The Court then considered whether prospective-only relief was sufficient, namely, "whether any such violation ended when Congress subsequently increased the salaries of all federal judges by an amount greater than the new taxes." *Id*. at 578.

The government argued that a subsequent salary increase that all judges received in 1984 cured any earlier diminution of salaries in a lesser amount. *Id*. This Court flatly disagreed: judges who were required to pay the unconstitutional taxes would still have "a permanent salary disadvantage." *Id*. Just as a subsequent pay raise for all would not cure an earlier "pay cut that left [certain] judges at a permanent disadvantage," but

rather "would perpetuate the very harm that the Compensation Clause seeks to prevent" (*id*. at 579), the "later statutory salary increases did not cure the preceding unconstitutional harm" caused by the tax. *Id*. at 581.

This Court remanded the case to the Federal Circuit, who in turn remanded to the Court of Federal Claims to award damages to the judges. See *Hatter v. United States*, 21 Fed. Appx. 928 (Fed. Cir. 2001). Thus, when faced with unconstitutional taxes imposed on one group, this Court rejected the argument that prospective relief is sufficient, and held that damages (i.e., refunds) are the appropriate relief. 532 U.S. at 580-81.

Neither *Sessions v. Morales-Santana*, 582 U.S. 47 (2017) (a non-monetary injury case) nor other later decisions purport to overrule or modify *Hatter*.[9] For reasons stated by this Court in *Hatter*, prospective relief would leave respondents and amici at a permanent disadvantage, would not cure the unconstitutional harm they have suffered, and should be rejected.

The Trustee further posits that refunds would impose a hardship on the U.S. Trustee Program and taxpayers. Pet. Br. at 35-40. In essence, the Trustee argues that Congress would not provide a proper remedy here because it would be expensive and inconvenient. Yet "[i]t goes without saying that the fact that a given law or procedure is efficient, convenient, and useful in

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[9] Justices Ginsburg, Kennedy, and Breyer joined in both majority opinions in *Hatter* and *Morales-Santana*. Justice Breyer authored *Hatter*, and Justice Ginsburg authored *Morales-Santana*.

facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Stern v. Marshall*, 564 U.S. 462, 501 (2011) (internal quotation marks and citation omitted). This Court has found "no reason why such relief as damages . . . would prove unworkable," entirely rejecting the government's suggestion of administrative difficulties. *Hatter*, 532 U.S. at 580.

While this Court need not divine the intent of a hypothetical Congress, Congress is only permitted lawful options that comport with the Constitution and this Court's jurisprudence. Under both, it is not enough that Congress would prefer not to spend money to cure the problem.

III. This Court Cannot Order a Retroactive Fee Increase in Administrator Districts.

Respondents, amici, and others similarly situated are entitled to a "clear and certain remedy" for constitutional violations. *McKesson*, 496 U.S. 18, 43. While lawsuits premised on the increase were pending, Congress passed the Bankruptcy Administration Improvement Act of 2020, which was signed into law in 2021 (2021 Act). Therein, Congress amended Section 1930(a)(7) in effort to address this very problem, and made the fee change *prospective* only. See Pub. L. No. 116-325, § 3(e), 134 Stat. 5086, 5088. Congress displayed no desire for the host of administrative and legal obstacles along the path of retroactive fee increases. It did not impose increased retroactive fees to

redress the past disparate treatment, as *McKesson* would require to vitiate the refund remedy. See 496 U.S. at 40-43.

Because Congress has not acted, this Court may not order retroactive fee increases. Absent Congressional authorization, neither the judiciary (see *Nat'l Veterans, supra*[10]) nor the executive (see *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989)) may exact fees or taxes.

Without express Congressional authorization, the judiciary, including the Bankruptcy Administrators, are powerless to enforce a retroactive fee increase in Administrator districts—the only other option under *McKesson*, and which Congress *could have*, but *did not elect* in the 2021 Act. The glaring failure of Congress to authorize a retroactive fee increase in Administrator districts while it directly addressed the constitutional infirmity in this case leaves this Court with a single choice of remedy: refunds to Trustee district debtors who overpaid.

CONCLUSION

Adoption of the petitioner's position would render meaningless the multiple statutes that prescribe the

[10] In *National Veterans*, PACER fees set by the judiciary for purposes other than those delineated by Congress were deemed "collected in the absence of statutory authorization" and for which "the government is liable." 968 F.3d at 1348 and 1357 (internal quotation marks and citation omitted).

remedy for this constitutional violation, and would eviscerate 150 years of federal jurisprudence. It would also deprive respondents, amici, and those similarly situated of the relief counseled by established law.

The petitioner's position not only fails to "cure the mischief" already done (*Mont. Nat'l Bank*, 276 U.S. at 504-05), but also promotes future mischief in national policy-making. This result cannot be countenanced by this Court.

For the foregoing reasons, the Court should affirm the Tenth Circuit's judgment and order refund of the non-uniform quarterly fees.

Respectfully submitted,

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