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 FORMER BANKRUPTCY JUDGES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Miscellaneous:

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former bankruptcy judges who have expertise in the administration of bankruptcy cases and an interest in ensuring the efficient and fair administration of justice. *Amici* have a wealth of experience in overseeing debtors' compliance with obligations to the U.S. Trustee Program, including the payment of quarterly fees, and in administering the Bankruptcy Code in a uniform and fair manner under many different circumstances. They also have fashioned equitable remedies to suit a variety of bankruptcy-related issues.

Amici are opposed to any remedy that would undermine the fair administration of justice in

[1] No counsel for a party authored this brief, in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amici curiae* or their counsel made a monetary contribution to this brief's preparation or submission.

bankruptcy matters. Specifically, they view with alarm the government's proposal to seek higher fees, retroactively, from debtors in closed cases in districts that charged lower fees for certain cases. That proposal is utterly impractical and unworkable and would exacerbate rather than remedy problems of unequal treatment of similarly situated debtors in different districts.

Judge Charles G. Case II served as a bankruptcy judge for the District of Arizona from 1994 to 2013.

Judge Leif M. Clark served as a bankruptcy judge for the Western District of Texas from 1987 to 2012.

Judge Melanie L. Cyganowski served as a bankruptcy judge for the Eastern District of New York from 1993 to 2007 and was Chief Judge from 2005 to 2007.

Judge Russell F. Nelms served as a bankruptcy judge for the Northern District of Texas from 2004 to 2018.

SUMMARY OF ARGUMENT

The constitutional injury the Court found in *Siegel* v. *Fitzgerald*, 596 U.S. 464 (2022), must be remedied. The government's principal argument—that prospective relief is sufficient by itself—does nothing to correct the constitutional injury suffered by debtors that were forced to pay non-uniform fees.

As this Court has explained, "[t]here are two remedial alternatives * * * when a statute benefits one class * * * and excludes another from the benefit." *Sessions* v. *Morales-Santana*, 582 U.S. 47, 72 (2017) (internal quotation marks omitted). The Court may either "withdraw[] benefits from the favored class" or "exten[d] * * * benefits to the excluded class." *Id.* at 73; see also *McKesson Corp.* v. *Div. of AB & T*, 496

U.S. 18, 31-35, 39-40 (1990); *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239, 247 (1931) ("[E]qual treatment * * * will be attained if either their competitors' taxes are increased or their own reduced."). "The choice between these outcomes is governed by the legislature's intent, as revealed by the statute at hand." *Morales-Santana*, 582 U.S. at 73. Key to that inquiry is "the intensity of commitment to the residual policy" and "the degree of potential disruption of the statutory scheme" by leveling up or down. *Id.* at 75.

Between those two options, the government argues (Br. 34-45) that any retrospective relief should not result in repayment by the government to debtors of unconstitutionally high fees, but should instead require Chapter 11 debtors in Bankruptcy Administrator districts to pay the government, retrospectively, the eight-times-higher fees set out in Section 1004(a) of the Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, Div. B, 131 Stat. 1232 (28 U.S.C. § 1930(a)(6)(B) (2018 ed.)). The amounts the government would mulct from innocent debtors would cover cases pending during the nine months when the fees charged in Bankruptcy Administrator districts were different from those charged in U.S. Trustee districts.

That remedy would have disastrous consequences. Congress would not have intended to choose a remedy that would so severely undermine the bankruptcy system. This Court should reject the government's remedy and instead affirm the remedy every court of appeals to consider the issue has endorsed—refunds to Chapter 11 debtors in U.S. Trustee districts that paid unconstitutionally higher fees.

I. The government's remedy would destroy bankruptcy finality. Many of the debtors from which the government seeks to collect additional fees have confirmed—and consummated—plans, otherwise have closed bankruptcy cases, or have converted to Chapter 7 bankruptcies. The resolutions reached in those cases were premised on the fees charged in Bankruptcy Administrator (BA) districts at the time. Trying to reopen those cases and claw back funds distributed years ago would inevitably lead to considerable litigation over the effect of *res judicata*, equitable mootness, claim allowance, and priority, among other issues.

II. The government's approach would also exacerbate the very lack of uniformity that created the constitutional problem in *Siegel* v. *Fitzgerald*. Even if this Court issues a ruling applying uniformly to all cases in the BA districts, a multitude of subsidiary issues will arise in the disparate cases the government would seek to reopen. Bankruptcy courts are unlikely to decide the myriad of ensuing legal challenges in the same way. In any event, because it may be difficult to claw back distributions and there may be insufficient—or no—funds available to pay the higher fees, debtors still may end up having paid different fees from those in U.S. Trustee districts that were charged the full, higher fees. The best way to ensure that debtors pay equal fees and avoid administrative chaos is to pay refunds to debtors that were forced to pay unconstitutionally higher fees.

ARGUMENT

The government's proposed retrospective relief is unworkable. It destroys a key premise of bankruptcy—to provide debtors with a fresh start—

and would lead to years of litigation before bankruptcy courts, courts of appeals, and this Court over the propriety of clawing back distributions. It's unlikely that the government would be able to jump through all of those hoops and recoup money that has long since been spent. So the government is unlikely to achieve any semblance of uniformity between debtors in BA districts and those in U.S. Trustee districts that already paid the higher fees.

In other words, the government's remedy is no real remedy at all. Providing refunds to debtors that were forced to pay the unconstitutionally higher fees is the only meaningful remedy for the injury this Court found in *Siegel* v. *Fitzgerald*.

A. The Government's Proposed Retrospective Relief Upends Bankruptcy Finality

The government argues (Br. 34-45) that the appropriate backward-looking relief, if any, is to charge debtors that paid lower fees in BA districts the higher fees that debtors in U.S. Trustee districts paid. But many of the debtors this would apply to have closed their bankruptcy cases, confirmed reorganization plans with already-issued distributions, and/or ceased to exist. Reopening closed cases and upsetting confirmed—and substantially consummated—plans undermines fundamental principles of bankruptcy and would open a Pandora's box of issues that would be litigated for years.

1. A fundamental purpose of bankruptcy is to give a "fresh start" to the "honest but unfortunate debtor." *Marrama* v. *Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007). Bankruptcy does so by allowing debtors to resolve all claims against them in one proceeding. See

Ohio v. *Kovacs*, 469 U.S. 274, 279 (1985); H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977) (explaining that the Bankruptcy Code defines a "claim" broadly to allow for the "broadest possible relief in the bankruptcy court" by permitting "all legal obligations of the debtor * * * to be dealt with in the bankruptcy case").

For that process to work as intended, the debtor must know of all claims against it, and the resolution of those claims in bankruptcy must be final and not open to significant changes after bankruptcy has concluded. See *Sanders Confectionery Prods., Inc.* v. *Heller Fin., Inc.*, 973 F.2d 474, 481 (6th Cir. 1992) ("The Bankruptcy Code contains a strong preference for final resolution of all claims involving the debtor, largely in order for the debtor to obtain a fresh start." (internal citation omitted)). Finality is "particular[ly]" important in bankruptcy cases because "debtors, creditors, and third parties" rely extensively on the resolution of claims in bankruptcy. *USA Sales, Inc.* v. *Office of U.S. Tr.*, 76 F.4th 1248, 1255-1256 (9th Cir. 2023), petition for cert. pending No. 23-489 (filed Nov. 8, 2023).[2]

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[2] Whether and when the important value of finality in bankruptcy is so strong as to override ordinary rights of appeal—through so-called "equitable mootness"—is not before the Court. But that doctrine will have to be considered in any cases the government tries to reopen. See pp. 12-13, *infra*. And the acceptance of that doctrine by every regional court of appeals, at least for the time being, certainly demonstrates how weighty the interest on one side of the scale—finality—is in bankruptcy cases. See, *e.g.*, *In re Tribune Media Co.*, 799 F.3d 272, 286 (3d Cir. 2015) (Ambro, J., concurring) ("[E]very Circuit Court has recognized some form of equitable mootness, save the Federal Circuit (which does not hear bankruptcy appeals)." (internal citation omitted)); *id.* at 281 (majority op.) ("[B]ankruptcy is

The government's proposed retrospective remedy overturns those foundational tenets. It has now been more than five years since Section 1004(a) went into effect. In that time, Chapter 11 debtors in BA districts that were not charged the increased fees have closed their bankruptcy cases. See, *e.g.*, *In re Prescriptive Nutrition & Fitness, LLC*, No. 5:18-bk-50481, Dkt. No. 136 (Bankr. W.D.N.C. June 17, 2019) (dismissing Chapter 11 case due to accrual of unpaid administrative expenses).[3] They have also confirmed plans of reorganization and substantially consummated those plans, including by paying distributions. See, *e.g.*, *In re Black Sheep Food Grp. LLC*, No. 17-04372-5 (Bankr. E.D.N.C.) (closing after consummating confirmed plan). And some have converted their cases to Chapter 7 bankruptcies. See, *e.g.*, *In re Alevo Mfg. Inc.*, No. 6:17-bk-50877 (Bankr.

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concerned primarily with achieving a workable outcome for a diverse array of stakeholders, and the reliable finality of a confirmed and consummated plan allows all interested parties to organize their lives around that fact."). Opponents of the doctrine do not deny the importance of finality but assert that it must yield to the important right of appeal. *E.g.*, *In re One2One Commc'ns, LLC*, 805 F.3d 428, 447 (3d Cir. 2015) (Krause, J., concurring) ("Even if the doctrine worked as intended and consistently promoted finality, its deleterious effect on our system of bankruptcy adjudication presents an independent reason to reject it. By excising appellate review, equitable mootness not only tends to insulate errors by bankruptcy judges or district courts, but also stunts the development of uniformity in the law of bankruptcy.").

[3] The cases cited in this and following paragraphs below, except where noted, were identified following the government's methodology. Pet. Br. 39 n.4.

M.D.N.C.); *In re Pinpoint Warehousing, LLC*, No. 3:17-bk-31701 (Bankr. W.D.N.C.).[4]

Seeking additional fees in any of those cases would undo much of the work the bankruptcy court has accomplished. Bankruptcy courts would have to reopen closed cases. And, where distributions have been paid in closed or still open cases, the court would have to recalibrate and claw back distributions over the past several years to recoup funds necessary to pay the government.

In cases with confirmed reorganization plans, those plans were carefully negotiated under the assumption of the lower fees. Because creditors in Chapter 11 cases compete for a "piece of the pie" out of a limited universe of debtors' assets, when creditors vote on plans, they do so based on the distributions they were going to receive that are calculated from the overall assets a debtor has. *In re ICL Holding Co.*, 802 F.3d 547, 553 (3rd Cir. 2015). A post-confirmation assertion of an additional claim—and a substantial one at that—changes the circumstances in which the plan was negotiated and undermines the creditors' reliance when they voted on the plan. That is one of the reasons the proponent of a Chapter 11 plan loses the statutory right to modify a plan once it has been "substantial[ly] consummat[ed]." 11 U.S.C. § 1127(b);

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[4] The government performed a search for Chapter 11 cases using the Lexis CourtLink database. Pet. Br. 39 n.4. That search does not capture cases that were initially Chapter 11 cases but then converted to Chapter 7, and so are categorized as Chapter 7 cases in the CourtLink database. In some of those cases, including the cases cited above, the debtor paid the relevant lower Chapter 11 fees during the applicable timeframe before conversion to Chapter 7. The government's remedy would apply to those cases as well.

see *id.* § 1101(2) (defining "substantial consummation" to mean when "transfer of all or substantially all of the property proposed by the plan to be transferred," and "commencement of distribution under the plan" have occurred).

And those plans might not have been confirmable if the higher fees had been in effect. One of the confirmation requirements is that a Chapter 11 plan be feasible, meaning that the debtor is able to make the payments contemplated under the plan. See *In re Paige*, 685 F.3d 1160, 1187 (10th Cir. 2012) (citing 11 U.S.C. § 1129(a)(11)). But it's possible that the imposition of eight-times-greater fees would have rendered plans infeasible because the debtors' estates did not have sufficient resources to pay those fees. Those plans, then, under the government's theory should never have been confirmed in the first place, and perhaps those bankruptcies should have been converted to Chapter 7 cases under 11 U.S.C. § 1112. Now that the plans have been confirmed, and distributions paid, it is impossible to unscramble the egg, and the government does not even try to suggest how those complications can be managed if its retrospective remedy is granted.

2. Once the government upsets finality by seeking these additional fees, significant litigation over numerous complicated issues will ensue from debtors, creditors, professionals, and others who will oppose any attempt to claw back funds distributed years ago. See *In re Circuit City Stores, Inc.*, No. 08-35653-KRH, 2022 WL 17722849, at *4 (Bankr. E.D. Va. Dec. 15, 2022) (acknowledging "the flood of litigation that may

ensue as those collection efforts are challenged").[5] Those issues would need to be resolved by the bankruptcy courts in the first instance but would inevitably reach the courts of appeals and likely this Court, tying up the judicial system for years to come.

First, bankruptcy courts would have to grapple with the impact of *res judicata*, and of principles governing forfeiture of legal arguments, on efforts to obtain additional fees. "Once confirmed, a Chapter 11 plan acts like a contract that binds the parties that participate in the plan." *In re Dial Bus. Forms, Inc.*, 341 F.3d 738, 743 (8th Cir. 2003) (internal quotation marks omitted). Accordingly, "creditors cannot later raise objections to the actual terms of the [reorganization plan] or the confirmation order, as these were deemed waived when they failed to object to the confirmation." *In re FFS Data, Inc.*, 776 F.3d 1299, 1308 (11th Cir. 2015) (alteration in original) (internal quotation marks omitted); see also 11 U.S.C. § 1141(a) ("[T]he provisions of a confirmed plan bind the debtor, * * * and any creditor * * * whether or not the claim or interest of such creditor * * * is impaired under the plan and whether or not such creditor * * * has accepted the plan.").[6]

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[5] Another complication is that even debtors that continue to exist likely no longer have counsel and have no money to hire counsel. So, to challenge the additional collection of fees, debtors, and others who may be asked to give up funds, would have to figure out whether and how they can afford new counsel with money that may also have to come from the debtor's long-since-disposed-of estate.

[6] There is yet another reason, beyond *res judicata* and forfeiture, why bankruptcy courts would need to decide whether to allow belated claims for additional fees. Under 11 U.S.C. § 502(b)(9), claims are required to be filed by a fixed deadline, known as the "bar date." Bar dates are treated similarly to statutes of

Provisions in confirmed plans for debtors in BA districts locked in the amounts owed under the then-applicable lower fees. See, *e.g.*, *In re Morehead Mem'l Hosp.*, No. 2:17-bk-10775, Dkt. No. 932 ¶ 45 (Bankr. M.D.N.C. Aug. 7, 2018) (confirmation order); *In re Kaiser Gypsum Co.*, No. 3:16-bk-31602, Dkt. No. 2746, at 20 (Bankr. W.D.N.C. July 28, 2021) (confirmation order). And it does not appear that the government challenged the then-applicable fees before the North Carolina and Alabama district courts before plans were confirmed as a violation of uniformity. The courts may decide that ordinary principles regarding forfeiture of arguments apply, and that therefore the government's "failure to object to * * * confirmation precludes its post-confirmation challenge[s] to the terms of the plan[s]" to recoup additional fees. *In re Northington*, 876 F.3d 1302, 1319 (11th Cir. 2017)

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limitations and must be strictly observed because they enable a debtor to know the claims and amounts asserted against the debtor's estate. *In re Kolstad*, 928 F.2d 171, 173 (5th Cir. 1991). And some plans, including those of BA district Chapter 11 cases that would be subject to the government's remedy, expressly contain bar dates for administrative claims, including fees owed to a Bankruptcy Administrator. See, *e.g.*, *In re Ace Motor Acceptance Corp.*, No. 3:18-bk-30426, Dkt. No. 277, art. 1.2 (Bankr. W.D.N.C May 11, 2020) (BA district Chapter 11 confirmed plan setting administrative claims bar date 30 days after confirmation). Whether to allow a tardy claim is left to the discretion of the bankruptcy court, which considers a number of factors such as the reason for delay, the length of delay and its impact on efficient court administration, whether the debtor was prejudiced by the delay, and the creditor's good faith. *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 385 (1993). Given the drastic increase in fees the government would be seeking, the years that have gone by, and the fact that most debtors have resolved their bankruptcies and consummated plans, it's likely that bankruptcy courts would disallow the government's claims.

(Wilson, J., dissenting) (citing *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 276 (2010)).

Second, imposing these fees on unsuspecting debtors now would raise constitutional issues because due process requires giving "people of common intelligence fair notice of what the law demands of them." *United States* v. *Davis*, 139 S. Ct. 2319, 2325 (2019) (internal quotation marks omitted). As the government itself acknowledged during oral argument in *Siegel* v. *Fitzgerald*, there are due process concerns with requiring debtors and creditors to pay these fees many years after the fact. 4/18/22 Tr. at 71; see *USA Sales*, 76 F.4th at 1256 (holding that its "choice of remedy [for constitutional injury] is constrained by USA Sales' due process rights"); *In re Mosaic Mgmt. Grp.*, 71 F.4th 1341, 1355 (11th Cir. 2023) (Brasher, J., concurring) ("[T]here is 'some temporal point' beyond which 'the retroactive imposition of a significant tax burden may be so harsh and opposed as to transgress the constitutional limitation.'" (quoting *McKesson Corp.* v. *Div. of AB & T*, 496 U.S. 18, 40 n.23 (1990))), petition for cert. pending, No. 23-278 (filed Sept. 22, 2023).

Third, courts would have to determine whether equitable mootness prevents the government's belated attempts to collect additional fees. Equitable mootness "is a pragmatic principle, grounded in the notion that, with the passage of time after a judgment in equity and implementation of that judgment, effective relief on appeal becomes impractical, imprudent, and therefore inequitable." *Mac Panel Co.* v. *Virginia Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002). It is often invoked in bankruptcy cases where it is "impractical and imprudent to upset the plan of reorganization" after the plan is effective. *Ibid.*

(internal quotation marks omitted). Courts differ on whether and when they find equitable mootness applicable; but, given the practical hurdles to collecting additional fees, equitable mootness is likely to feature prominently in ensuing litigation if the Court holds that the government's retrospective remedy is appropriate.

Fourth, there are numerous practical difficulties with collection efforts. As discussed above, once distributions have been paid, the government would need to track down and claw back money from creditors. That money may have already been used and may no longer be available for the government to claim. And creditors may be difficult to track down. Moreover, distributions occur by priority, which is determined in accordance with the Bankruptcy Code. *Czyzewski* v. *Jevic Holding Corp.*, 580 U.S. 451, 463 (2017). Clawing back distributions, then, should be done starting with lower-priority creditors. But, if the government isn't able to track down lower-priority creditors or those creditors lack funds, the bankruptcy courts would have to determine whether to allow claw backs from higher-priority creditors.

Tellingly, the government does not point to a single Chapter 11 case in a BA district where it could seek increased fees without reopening a closed case and/or unsettling a confirmed reorganization plan. That's because one or more of these issues would arise in every case in which the government would attempt to collect additional fees.

3. Providing refunds to Chapter 11 debtors in U.S. Trustee districts does not cause these problems. As the government concedes (Br. 39), "a refund is easier to implement in any given case." That's because, once a refund is issued by the federal government, there

are simply additional funds to distribute in accordance with an existing plan. So refunds do not require modifying plans or substantially changing the conditions under which the plan was negotiated and confirmed in the first place.

B. The Government's Remedy Exacerbates Lack of Uniformity

The purpose of any remedy is to fix the constitutional injury the Court identified in *Siegel* v. *Fitzgerald*, which is the lack of uniformity in the fees paid by Chapter 11 debtors in U.S. Trustee districts and BA districts. The government's remedy is largely illusory—because of the plethora of practical and legal obstacles, it is unlikely the government will be able to collect *any* additional fees from BA Chapter 11 debtors that paid the lower fees. But even if the government successfully could recoup *some* additional fees, its remedy only makes uniformity worse.

As discussed above, there are numerous legal and practical hurdles to collecting any additional fees from debtors that paid lower fees. Bankruptcy courts and appellate courts may decide that the government is legally foreclosed from seeking increased fees because it failed to object to the fees before a plan was confirmed, or because of equitable mootness, due process concerns, or other legal issues. And, because some debtors and creditors will be unable to pay some or all of the higher fees even if a court orders such payment, the end result is that debtors in BA districts that paid lower fees will likely still not end up paying the same fees their counterparts in U.S. Trustee districts paid.

The government acknowledges that collection efforts won't be 100% successful, no doubt realizing

the myriad complications to its proposed relief. Instead, it tries to argue that, percentage-wise, trying to collect additional fees from BA district debtors will be more successful than seeking refunds. Pet. Br. 39-40. That suffers from two flaws.

First, the government fails to identify even one case where it will be able to seek additional fees. The government cannot simply wave away the many hoops it must first jump through before it can collect even one additional cent. Second, the government assumes that, if it is able to collect additional fees in any case, it will collect 100% of those additional fees. But, if the government cannot trace and claw back sufficient distributions, it may be able to recoup only a small fraction of the fees it claims it's owed in any given case, if anything at all.

Moreover, the only concrete reason the government identifies for why refunds may not be awarded in every case is that "some debtors have ceased to exist." Pet. Br. 39. That complication applies equally to retrospective attempts to collect and to refunds. But it is a problem only for the former. When it comes to refunds, since those additional funds can be distributed under the same auspices of any plan of reorganization, the reorganized debtor or the entities acquiring the debtor's assets under the plan can obtain the refund. See 11 U.S.C. § 347(b).

There is no reason the government identifies that Chapter 11 debtors that seek refunds would be unable to obtain the full amount of the refund they are owed. And, to the extent the government argues that eligible debtors will simply sit back and forgo their rights, those debtors have a self-interested reason to seek out refunds for the benefit of themselves and their estate. Accordingly, providing refunds to U.S. Trustee district

Chapter 11 debtors is far more likely to result in uniformity than the government's half-baked proposal.

CONCLUSION

The judgment of the Tenth Circuit should be affirmed.

Respectfully submitted.

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