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 FOR *AMICUS CURIAE* MF GLOBAL HOLDINGS LTD., AS PLAN ADMINISTRATOR, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae MF Global Holdings Ltd. is the Plan Administrator ("MF Global") in the jointly administered chapter 11 cases of MF Global Holdings Ltd. and certain affiliates under a Plan of Liquidation confirmed in April 2013. MF Global has been winding down its assets under a plan confirmed years before the 2017 amendments to the chapter 11 quarterly fee statute were passed. *See* Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, § 1001, § 1004, 131 Stat. 1224, 1232 (October 26, 2017) (the "2017 Act"). Yet it was subjected to a substantially higher quarterly fee regime under the 2017 Act than if its cases were pending in BA districts.[2] Since 2018, MF Global has incurred over $1 million more in quarterly fees than a similarly situated debtor in a judicial district where the increased fees did not apply.

MF Global paid $423,785 of these increased fees from Q1 2018 through Q2 2019 when it commenced its Adversary Proceeding challenging the 2017 Act. Beginning in Q3 2019, however, MF Global took the position that it was not required to pay the unconstitutional excess fees, and instead began withholding all fees as a set-off to reduce the refund that would be owed if it won its case. By 2023, MF Global had fully refunded all overpaid excess fees, and began to make full payments in accordance with the

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[1] No counsel for any party authored this brief in any part, and no person or entity other than *amicus* or *amicus's* counsel made a monetary contribution to fund its preparation or submission.

[2] Capitalized terms not defined herein have the meaning set forth in the Brief for the Respondents ("Resp. Br.").

increased fee schedule under the 2020 Act (while reserving all rights). Many other UST debtors similarly used a set-off or escrowed unpaid fees rather than pay the unconstitutional fees.

MF Global's challenge to the 2017 Act is currently pending in the Bankruptcy Court for the Southern District of New York, having been remanded to that Court by the Second Circuit following the favorable decision in *In re Clinton Nurseries, Inc.*, 998 F.3d 56 (2d Cir. 2021), *amended and reinstated*, *In re Clinton Nurseries, Inc.*, 53 F.4th 15, 29 (2d Cir. 2022). *See In re MF Glob. Holdings Ltd.*, 615 B.R. 415 (Bankr. S.D.N.Y. 2020), *vacated and remanded*, ECF No. 100, No. 20-3863 (2d Cir. Sept. 23, 2020). The Second Circuit also (like all other Circuits to have considered the question) held in *Clinton Nurseries* that a refund of overpaid fees was the appropriate remedy to redress the constitutional violation for the period the 2017 Act was in effect (January 1, 2018 through March 31, 2021). 998 F.3d at 70; 53 F.4th at 29.

Here, the Government advocates for a prospective-only remedy, but the Government is not clear how that remedy would apply to debtors like MF Global who withheld fees and therefore do not need a refund. MF Global therefore files this brief to explain why (1) debtors who withheld the unconstitutional fees should not be required to pay them now; (2) a refund is, in any event, the only appropriate remedy for all debtors who were subjected to the higher fees; and (3) if the Court rules that a refund is not the appropriate remedy, the result will likely be additional litigation under the Takings Clause.

INTRODUCTION & SUMMARY OF ARGUMENT

In *Siegel*, this Court held that the 2017 amendments to 28 U.S.C. § 1930(a)(6)—which dramatically increased the fees payable by chapter 11 debtors in some, but not all, federal judicial districts—violated the Bankruptcy Clause of the Constitution. *Siegel v. Fitzgerald*, 596 U.S. 464, 480 (2022). The Court, however, left open the question of the proper remedy. *Id.* at 480-81.

Following *Siegel*, several Courts of Appeals have examined the remedy question. All of them, including the Tenth Circuit here, concluded that "a refund of overpayment" was the proper remedy. *See In re John Q. Hammons Fall 2006, LLC*, No. 20-3203, 2022 WL 3354682, at *1 (10th Cir. Aug. 15, 2022); *see also* Resp. Br. at 9–10 (collecting cases holding the same).

MF Global agrees with Respondents that these cases correctly held that a refund is the only constitutionally appropriate remedy. But even beyond Respondents' arguments, there are several other reasons why debtors like MF Global cannot be subjected to the unconstitutional fees.

First, unlike Respondents—who were unable to withhold fees because they had not yet achieved confirmation of their chapter 11 plan—MF Global did withhold payment of the unconstitutional fees after commencing its challenge to the 2017 Act, and also set-off legitimate fees to recover the invalid excess fees previously paid. As a result, MF Global does not need any further relief from this Court. Although the Government is not at all clear how its proposed "prospective-only remedy" would apply to debtors who do not need a refund, there are several reasons why it

is inappropriate for the Government to prospectively enforce the unconstitutional fees against debtors who have not paid them. Indeed, to the extent the Government insists on enforcing the invalid fees going forward, that only shows that its proposed "remedy" is actually a license to violate the Constitution.

Second, MF Global agrees with Respondents that due process requires "meaningful backward-looking relief" in the form of a refund of unconstitutional fees. *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990). And the Government's response that due process does not require a refund because debtors could have pursued a predeprivation remedy is misplaced. In MF Global's case, the Government actively opposed MF Global's attempt to pursue a predeprivation remedy (withholding and set-off). The Government's "bait and switch" cannot deprive debtors of the meaningful relief due process requires. Moreover, because many debtors (like MF Global) have already withheld the unconstitutional fees, the practical impact of a ruling requiring refunds is far less than the Government assumes. And Respondents persuasively show that there is no legal or practical way to remedy the harm by imposing retroactive fees on BA debtors. *See* Resp. Br. 28-43.

Finally, if the Court rules that no refund is available to remedy the nonuniformity concerns, it will likely mean the resumption of additional constitutional challenges to the 2017 Act. Because some of those challenges are based in the Takings Clause—which requires "just compensation" in the form of a monetary remedy—a decision here that the uniformity problems do not require a refund will not

resolve the litigation, but simply refocus it on different challenges to the 2017 Act.

ARGUMENT

I. THE GOVERNMENT'S "PROSPECTIVE-ONLY" REMEDY SHOULD NOT PERMIT THE GOVERNMENT TO PROSPECTIVELY ENFORCE PAYMENT OF INVALID FEES

A. Many Debtors—Like MF Global—Have Already Obtained Full or Partial Relief By Withholding the Unconstitutional Fees

MF Global filed its chapter 11 case in October 2011. It emerged from bankruptcy two years later when its chapter 11 plan of liquidation was confirmed in April 2013. But because MF Global's plan of liquidation required it to make distributions during the subsequent years, it continued to incur U.S. Trustee quarterly fees even after plan confirmation.

When the new quarterly fee regime was imposed in Q1 2018, MF Global began paying the higher fees, and it paid the increased fees until Q2 2019. In these five quarters, MF Global paid $423,785 in unconstitutional quarterly fees above what it would have paid if it were a debtor in a BA District.

In October 2019, however, MF Global filed a complaint challenging the new quarterly fee regime as unconstitutional, including because it violated the uniformity requirement of the Bankruptcy Clause. *See In re MF Glob. Holdings Ltd.*, No. 19-01379-MG (Bankr. S.D.N.Y. Oct. 22, 2019), ECF No. 1. At that point, MF Global decided—over the Government's

objection—to begin withholding all quarterly fees owed and setting legitimately owed fees off against the $423,785 in excess fees it had already paid. Eventually, by 2023, MF Global was able to recoup all of the excess fees it had previously paid to the Government. MF Global has thus already effectively received a refund of all overpaid fees, and will not require any additional remedy from the U.S. Trustee System Fund, or anywhere else.

Notably, the Government opposed this practice when MF Global initially stated its intention. Specifically, in its complaint challenging the unconstitutional fees, MF Global sought a declaration and injunction that it was entitled to take a set-off of overpaid fees against future fees until it obtained a full refund. *See* Complaint at *16–19, *In re MF Glob. Holdings Ltd.*, No. 19-01379-MG (Bankr. S.D.N.Y. Oct. 22, 2019), ECF No. 1. The Government sought summary judgment on these counts on the ground that "[u]nder federal law, the government does not pay judgments until they are final and unappealable." U.S. Trustee's Memorandum of Law in Support of Motion for Summary Judgment at *44, *In re MF Glob. Holdings Ltd.*, No. 19-01379-MG (Bankr. S.D.N.Y. Nov. 21, 2019), ECF No. 13 ¶ 96; *see also id.* at ¶¶ 11, 96-114. And it said that "[t]he US Trustee will voluntarily pay MF Global through the U.S. Trustee Program's standard refund procedure if MF Global obtains a final and unappealable judgment establishing its right to a refund." *Id.* at ¶ 96.[3]

[3] The Government did argue—consistent with its position here—that the appropriate remedy for the nonuniformity would be to require debtors in BA districts to pay the increased fees,

In particular, the Government argued and advised the court that:

> "MF Global does not need setoff or injunctive relief in any event because the statute appropriating funds to the United States Trustee Program addresses refunds. *See* Consolidated Appropriations Act, 2019, Pub. L. 116-6, 133 Stat. 13, 103-04 . . . That statute permits refunds from the U.S. Trustee System Fund at Treasury according to standard procedures . . . Should MF Global prevail on its claim that the quarterly fees were unlawful and that it is entitled to a monetary remedy through all levels of review, the government will refund any overpayments to MF Global. 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.* . . . The US Trustee does not anticipate any dispute about the amount MF Global might recover if the quarterly fees were held to be unlawful and if a monetary remedy were ultimately ordered."

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and thus no refund is appropriate. *See In re MF Glob. Holdings Ltd.*, No. 19-01379-MG (Bankr. S.D.N.Y. Nov. 21, 2019), ECF No. 13 ¶¶ 54-55. MF Global's response to that argument is below. The Government did not suggest, however, that if requiring BA districts to impose fees was an unacceptable remedy, a refund would not be available.

Id. ¶¶ 111-12.

Many other debtors who challenged the unconstitutional fee regime also withheld fees after challenging them. *See, e.g.*, *In re MF Global Holdings Ltd.*, 615 B.R. at 423 (noting that SunEdison also withheld quarterly fees that were "in dispute"); *Siegel*, 596 U.S. at 472, (noting bankruptcy court's direction that excess fees be withheld and that "from January 1, 2018, onward, the trustee pay the rate in effect prior to the 2017 Act"); Order Directing Escrow Agent to Disburse Escrow Funds and Directing United States Trustee to Issue Refund of Quarterly Fees Paid by Debtors, *In re Clinton Nurseries, Inc.*, No. 19-03014-JJT (Bankr. D. Conn. Mar. 28, 2023), ECF No. 91.

Respondents apparently were not among these debtors because (unlike MF Global) they had not yet obtained confirmation of their plan, and such confirmation would have been impossible without paying *all* fees charged by the US Trustee. *See* Resp. Br. 6, 26-28. Indeed, Respondents' payment of the unconstitutional fees rather than risking dismissal of their bankruptcy case makes particular sense in light of the Government's well-stated position at the time that a refund was available after final judgment.

B. The Government's "Prospective-Only" Remedy Cannot Require Enforcement of Unconstitutional Fees That Have Not Yet Been Paid

The Government now argues that a refund is not required. It advocates for "prospective-only relief" in the form of "declaring that the disuniform fees were unlawful (as this Court did in *Siegel*) and that fees

must be uniform going forward (as Congress has already provided in the 2020 Act)." Govt. Br. 20.

The Government, however, does not explain how its proposed "prospective-only" remedy would apply to debtors like MF Global who have withheld fees and/or taken a set-off to recover previously paid unconstitutional fees—that is, debtors who effectively have *not yet paid* the unconstitutional fees. Perhaps the Government does not intend to enforce the unconstitutional fees against these debtors. After all, there are several reasons why it would be inappropriate and unconstitutional for the government to *now* collect the invalid fees from debtors who have not yet paid them. But to the extent the Government does intend to enforce such fees, it is simply another reason for the Court not to accept the Government's proposed "remedy."

1. First, the Government's proposed remedy—"a mandate of equal, increased fees in UST and BA districts going forward," Govt. Br. 11—does not seem to require or contemplate trying to collect past unconstitutional fees from debtors who have not paid them. That is, if the Government were correct (it is not) that constitutionally sufficient relief requires only a declaration that the fees were previously unconstitutional and a mandate that they be uniform going forward, the fact that some debtors did not actually pay the unconstitutional fees would not undermine the completeness of that relief in any way. The Government's proposed "prospective-only" remedy would be fully effective regardless of whether all UST debtors paid the higher fees.

2. Second, although the question as framed by the Government is one of remedy—"[w]hether the appropriate *remedy* for the constitutional uniformity violation found by this Court in *Siegel*, *supra*, is to require the United States to grant *retrospective refunds* of the increased fees *paid* by debtors in United States Trustee districts . . . .", Govt. Br. Question Presented (emphases added)—the same question is not presented for debtors like MF Global. MF Global does not need a "remedy" from this Court. It has already obtained full relief by refusing to pay the unconstitutional fees and obtaining a ruling by this Court that the withheld fees were unconstitutionally charged. MF Global does not need any further relief.

Rather, the question for debtors like MF Global is one of prospective *enforcement*—whether the Government can now enforce payment of a fee that has already been declared by this Court to be unconstitutional. It should be axiomatic that the Government cannot enforce an unconstitutional mandate without violating the Constitution. *See, e.g.*, *Robertson v. Baldwin*, 165 U.S. 275, 297 (1897) ("No court is bound to enforce, nor is any one legally bound to obey, an act of congress inconsistent with the constitution."). And so debtors who have not yet paid the unconstitutional fees cannot possibly be required to pay those fees *now*. Such a requirement would put the Government in the untenable position of having to enforce an invalid and unconstitutional payment requirement.

3. Third, the Government's practical concerns about the impact on taxpayers and the (supposed) unavailability of a refund from the U.S. Trustee System Fund are not present with respect to debtors

like MF Global. *See* Govt. Br. 35-37. Because MF Global does not require a refund, there will be no impact on the U.S. Trustee System Fund or the Judgment Fund if MF Global is permitted to retain the unconstitutional fees. And the Government has not suggested (nor could it suggest) that the failure to collect unconstitutional fees from MF Global and similar debtors will harm it in any material way.

4. Finally, to the extent the Government disagrees and states an intention to collect withheld unconstitutional fees, that is just one more reason its proposed remedy should not be adopted by this Court. Such an attempt would make the Government's remedy "prospective" in name only. While the Government (who created the unconstitutional law) would not be required to provide a retrospective *refund* for debtors who paid unconstitutional fees, it would be permitted to enforce a retrospective *obligation* on debtors who have not yet paid. This turns the Constitution on its head, and cannot be what due process requires.

At bottom, it is one thing to say that the Government need not provide refunds to debtors who have already paid unconstitutional fees. That is wrong for all of the reasons in Respondents' brief. But it is quite another thing to say that debtors who have *not* already paid the unconstitutional fees must do so now. For those debtors the Government's prospective-only remedy would actually become a prospective-only requirement to pay an unconstitutional fee.

II. THE ONLY PROPER REMEDY FOR PAYMENT OF UNCONSTITUTIONAL FEES IS A REFUND

Even setting aside the question whether debtors like MF Global can now be charged for payment of the unconstitutional fees, Respondents are correct that a refund is the only appropriate remedy for *all* debtors.

A. The Government Must Provide Meaningful Backward-Looking Relief Because It Actively Opposed Predeprivation Remedies

As Respondents persuasively argue, due process requires "meaningful backward-looking relief" when the Government imposes an unconstitutional monetary exaction. Resp. Br. 22-28. And such relief must remain available unless a predeprivation remedy was the *exclusive* means for protecting against the unconstitutional charge. *Id.*

Yet the Government argues that due process does not require it to provide such meaningful backward-looking relief because debtors could have pursued a predeprivation remedy. That argument fails as a legal matter for all the reasons in Respondents' brief. *See* Resp. Br. 22-28. But the Government's argument is also misplaced for an additional reason: The Government actively opposed predeprivation remedies when debtors like MF Global attempted to pursue them, and instead insisted that a postdeprivation refund was available if the nonuniformity persisted through a final judgment.

Specifically, in MF Global's case, the Government expressly opposed MF Global's request for authorization to withhold allegedly unconstitutional

fees while the litigation was pending. *Supra* at 6-7. It instead expressly represented that "[t]he US Trustee *will refund* any overpaid fees due in accordance with U.S. Trustees Program's standard refund procedures," if MF Global succeeded in its challenge to the 2017 Act and convinced the court that charging higher fees in BA districts was not appropriate. U.S. Trustee's Memorandum of Law in Support of Motion for Summary Judgment at ¶ 11, *In re MF Glob. Holdings Ltd.*, No. 19-01379-MG (Bankr. S.D.N.Y. Nov. 21, 2019), ECF No. 13 (emphasis added). And it further stated that "notwithstanding any other provision of law, deposits 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[.]" *Id.* at ¶ 111 (quoting Consolidated Appropriations Act, 2019, Pub. L. 116-6, 133 Stat. 13, 103-04)).

In other words, the Government told MF Global that a refund would be available if it succeeded in its challenge to the nonuniform fees (at least as long as charging higher fees in BA districts was not appropriate). *Supra* at 6-7. And it did so while *opposing* efforts to pursue a predeprivation remedy (withholding of fees). Yet now the Government's lead argument is that no refund is necessary (or even possible from the U.S. Trustee System Fund) because prospective-only relief will suffice. And it criticizes Respondents for failing to protect themselves through predeprivation remedies. Govt. Br. 28-34.

As Respondents explain, however, the Government's position is at odds with this Court's decisions in *Newsweek* and *Reich* that parties may pursue a "postdeprivation remedy, regardless of the

[Government's] predeprivation remedies," unless the law makes a predeprivation remedy "the *exclusive* remedy" for a claim. *Reich v. Collins*, 513 U.S. 106, 113 (1994); *see also Newsweek, Inc. v. Florida Dep't of Revenue*, 522 U.S. 442, 444 (1998); Resp. Br. 24.

The Government's positions in this case are precisely the sort of "'bait and switch'" that even the Government says is prohibited by this Court's precedents. Govt. Br. 33 (citing *Newsweek*, 522 U.S. at 444–45, and *Reich*, 513 U.S. at 110–11); *see also* Resp. Br. 25–26. The Government cannot now argue that it does not need to provide "meaningful backward-looking relief" because debtors should have pursued a predeprivation remedy that it actively opposed at the time debtors were paying the fees.

Indeed, the Government's opposition to MF Global's effort to withhold and set-off fees meant that withholding fees was not without risk; MF Global had no assurance that the Government would not seek to impose penalties for late payment if its challenge to the 2017 Act was unsuccessful. And, indeed, withholding the unconstitutional fees was simply not an option for some debtors, including Respondents, who could not risk their entire reorganization on nonpayment of quarterly fees before plan confirmation. *See* Resp. Br. 26-28.

Thus, as Respondents persuasively show, this is not a situation where a predeprivation remedy was "'clear and certain.'" Resp. Br. 22 (quoting *Newsweek*, 522 U.S. at 443-44). Rather, the Government's opposition made such remedies risky and inherently uncertain. Due process therefore requires meaningful backward looking relief in the form of a refund.

B. The Government's Practical Concerns Are Undermined By the Fact that Many Debtors Most Likely to Request A Refund Have Already Withheld Fees

In addition to the legal and factual points above, the fact that many debtors who challenged the unconstitutional fees—like MF Global—will not actually need a refund also diminishes the likely practical burden to the Government from a ruling that refunds are required.

Indeed, although the Government says that it could be facing an obligation to pay up to $326 million in refunds, *see* Govt. Br. 35, that amount appears to be overstated. Among other things, the estimate does not take account of the fact that many of the debtors who have already challenged the unconstitutional fees—and are thus most likely to ask for a refund—have already withheld fees or refunded themselves through set-offs. *Supra* at 8. Likewise, to the extent debtors who still have open cases paid the unconstitutional fees while they existed and did not take a set-off, those debtors can still do so going forward until their cases close. For these debtors also, an actual refund may never be required.

Meanwhile, debtors whose chapter 11 cases have already concluded without having challenged the fees are extremely unlikely to go through the administrative burden and cost of reopening their cases to seek a refund. The *maximum* unconstitutional fees paid by any one debtor is only $2.86 million (*i.e.*, $250,000 per quarter multiplied by the 13 quarters between Q1 2018 and Q2 2021 during which the fees were unconstitutionally nonuniform,

reduced by the $30,000 per quarter payable under the prior fee regime). The few debtors [4] who had disbursements high enough to trigger the maximum fees in more than one quarter, and whose cases have since closed, are extremely unlikely to go through the cost and administrative burden of reopening their cases to recover at most $2.86 million of fees. Indeed, the fact that it could be costly and burdensome to seek a refund and ultimately could delay MF Global's case closing was a main reason MF Global decided to take a set-off rather than seek a refund after the litigation concluded.

Respondents are among the small number of debtors who were unable to take a set-off before their cases closed but who still challenged the unconstitutional fees at the time they were in place. That a refund may be required in those few cases is not a reason to force all debtors to pay an unconstitutional fee.

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[4] The U.S. Trustee has stated that during the first year after the 2017 Act's fee increase, "[o]nly about 130 cases per quarter ha[d] been subject to the maximum amended quarterly fee rate and only about 35 cases were billed the maximum amount for each of the first four quarters after the fee increase." *United States Trustee Program: FY 2021 Performance Budget Congressional Submission* at 9 n.9, *available at* https://www.justice.gov/d9/pages/attachments/2020/02/09/ustp_narr_fy21_2-7-20_submission.pdf.

C. Retroactively Imposing Fees on BA Debtors Is Neither Constitutional Nor Workable

The Government's alternative proposal to cure the unconstitutional nonuniformity by having this Court impose the fees retroactively on BA debtors is not a serious proposal, for several reasons.

First, as Judge Brasher recognized in *In re Mosaic Mgmt. Grp., Inc.*, "there is no lawful way to implement a backward-looking level-down remedy" on BA debtors, because they "have their own due process rights that prevent us from retroactively assessing higher fees in those cases." 71 F.4th 1341, 1355 (11th Cir. 2023) (Brasher, J., concurring). Imposing such fees in bankruptcy "cases that have already been closed and the estate's assets distributed or reorganized" would be "so harsh" as "to transgress the constitutional limitation." *Id.* And because the leveling-down option is a non-starter, the only valid option remaining is that UST debtors have "a due process right to a refund." *Id.*

Second, as Respondents persuasively show, the Government's proposed remedy effectively overrides the Court's decision in *Landgraf* that because "'[r]etroactivity is not favored in the law' . . . 'congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.'" *Landgraf v. USI Film Prod.*, 511 U.S. 244, 264 (1994) (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). Here, Congress expressly declined to impose fees retroactively on BA debtors when it made those fees prospectively mandatory in the 2020 Act. Yet the

Government asks the Court to disregard this legislative choice and impose a fee of its own making on BA debtors for activities done years ago.

Finally, as Respondents demonstrate, the practical implications of the Government's alternative remedy are staggering. It is not at all clear how the Government could retroactively calculate fees owed under the Court-imposed fee schedule and then collect those fees from BA debtors whose cases have already closed. And even if the Government could in theory determine and collect all amounts owed from BA debtors, the unforeseen consequences and disputes that would arise from imposition of an unanticipated fee, years after decisions were made based on funds thought to be available, is inestimable.

The Court should decline the Government's invitation to open that can of worms, and should instead confirm that the appropriate remedy for having collected an unconstitutional fee is a return of the money taken.

III. DENYING A REMEDY FOR NONUNIFORMITY WILL REIGNITE OTHER CONSTITUTIONAL CHALLENGES TO THE 2017 ACT

Finally, the Government's effort to avoid a remedy for its unconstitutional fees, if successful, will not be the end of these disputes. This is because there are other constitutional challenges to the 2017 Act that would be reignited if a refund is not allowed.

Among these challenges is a claim—brought by MF Global and others—that the fees are an excessive user fee in violation of the Takings and Due Process Clauses of the Constitution. Specifically, as the Court

held in *United States v. Sperry Corp.*, 493 U.S. 52 (1989), although "a reasonable user fee is not a taking," an exaction is not a constitutionally *bona fide* user fee unless it is "a fair approximation of the cost of benefits supplied." *Id.* at 60, 63 (cleaned up). Here, the benefit comes nowhere near the cost.

Chapter 11 cases make up only 1.5% of the bankruptcy cases filed in a year.[5] Yet the quarterly fees charged to chapter 11 debtors account for about 80% of the U.S. Trustee's total funding. *See United States Trustee Program: FY 2021 Performance Budget Congressional Submission* at 10, *available at* https://www.justice.gov/d9/pages/attachments/2020/02/09/ustp_narr_fy21_2-7-20_submission.pdf. This funding pays for all of the U.S. Trustee's activities across chapter 11 and non-chapter 11 cases alike. *Id.* And, indeed, the U.S. Trustee spends significant amounts of its time on non-chapter 11 matters (*i.e.*, cases under chapters 7, 12, and 13). *Id.* at 3.

In fact, because the 2017 Act's new fee regime applied only to debtors with quarterly disbursements over $1 million, only about 1,000 debtors in any calendar quarter paid the increased fees (out of a total of 1.5 million debtors with cases pending in the bankruptcy system). *Id.* at 3, 9 n.9. The effect of this is that, under the 2017 Amendment, a tiny fraction of debtors (about 0.07%) supported the majority of the cost of the U.S. Trustee's operations through their

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[5] *See United States Courts Statistics and Reports*, Table F-2, Bankruptcy Filings (December 31, 2018) (noting 7,095 total chapter 11 filings and 773,418 "total all chapters"), *available at* https://www.uscourts.gov/statistics/table/f/bankruptcy-filings/2018/12/31.

quarterly fees. And these quarterly fees bear no relation to the time spent by the U.S. Trustee on these cases or the benefits received by these debtors. Put simply, the quarterly fees were not a "fair approximation of the cost of benefits supplied" and were thus unconstitutional under the Takings Clause. *Sperry*, 493 U.S. at 63.

Importantly, because this excess user fee challenge is based in the Takings Clause, which *requires* a backward-looking remedy—"just compensation"—the Government cannot plausibly argue that a refund would not be required. U.S. Const., amend V. As a result, if the nonuniformity challenges to the 2017 Act prove not to result in a refund, the effect will be that parties will simply bring Takings Clause actions against the Government, leading to continued litigation over these issues. Of course, that can (and should) be avoided by reaching the common-sense and legally required conclusion that when an unconstitutional law causes financial harm, the Constitution requires "meaningful backward-looking relief" to redress the wrong. *McKesson*, 496 U.S. at 31. That is the rule the Court should adopt here.

CONCLUSION

This Court should affirm the judgment of the Tenth Circuit.

December 18, 2023

Respectfully submitted,

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