

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.,

Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Tenth Circuit

BRIEF OF USA SALES, INC. AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS*¹

Amicus USA Sales, Inc. is a California corporation which currently has litigation pending against the Office of the United States Trustee (“OUST”) in which *Amicus* is seeking a refund of \$595,849.00 in excessive quarterly fees paid to the OUST under the same unconstitutional statutory scheme at issue in the present case.

Amicus prevailed against the OUST in a suit brought in the U.S. District Court for the Central District of California. The District Court (Judge Holcomb) granted summary judgment in favor of *Amicus* and entered judgment against the OUST on April 19, 2021. Judge Holcomb’s opinion is reported at 532 F. Supp. 3d 921 (C.D. Ca. 2021). The OUST appealed to the Ninth Circuit Court of Appeals, which affirmed in an opinion reported at 76 F.4th 1248 (9th Cir. 2023). The OUST timely filed a Petition for Certiorari, which is currently pending before this Court, Case No. 23-489.

Amicus is filing this brief in support of Respondent to explain how the improper increase in quarterly fees paid by *Amicus* to the OUST nearly caused the complete destruction of *Amicus*’ business operations and to further explain why this Court should rule in favor of Respondent.

¹ No person other than the named *Amicus* or their counsel authored this Brief or provided financial support for this Brief.

Many Chapter 11 debtors whose bankruptcy cases were pending in U.S. Trustee Districts as of January 1, 2018, when the OUST began charging the increased quarterly fees in response to the 2017 Act, ended up paying more in quarterly fees. The 2017 Act was interpreted by the OUST as applying to all Chapter 11 cases pending as of that date, not just to cases filed on or after that date.

What makes *Amicus*' case different from most, if not all, of the reported cases involving this issue is that the quarterly fee increase at issue literally forced *Amicus* out of Chapter 11 bankruptcy. As a result of the increase in the quarterly fees charged to *Amicus* (which went from \$13,000 per quarter to roughly \$85,000 per quarter), *Amicus* went from a profitable business to an unprofitable business. This lack of profitability, caused directly by the increase in quarterly fees charged by the OUST, meant that *Amicus* could no longer remain in Chapter 11.

Amicus thus faced one of two possibilities. Either *Amicus*' bankruptcy would be converted to a chapter 7 liquidation, ensuring the demise of *Amicus*, or, if all of *Amicus*' creditors agreed on how their claims would be dealt with outside of bankruptcy, *Amicus*' bankruptcy could be dismissed in a so-called "structured dismissal." Thus, the increase in the quarterly fees deprived *Amicus* of the opportunity to press forward with an attempted reorganization within the protective confines of Chapter 11.

Amicus was fortunate. Because it was able to remain in Chapter 11 and pay the increased quarterly

fees by “cannibalizing” its inventory while it negotiated successfully with its creditors over a period of roughly 12 months, *Amicus* “lived to see another day,” despite the monstrous increase in quarterly fees. Other Chapter 11 Debtors in U.S. Trustee Districts may not have been so fortunate. By way of contrast, other Chapter 11 Debtors in Bankruptcy Administrator Districts which were similarly situated to *Amicus* faced no increase at all in their quarterly fees and thus did not suffer any adverse consequences as the result of the increase in quarterly fees imposed by the 2017 Act.

This Court determined last term that this disparity violated the Bankruptcy Uniformity Clause of the Constitution, Article I, section 8, clause 4. *Siegel v. Fitzgerald*, 596 U.S. 464 (2022). This Court must now determine whether the lower courts properly (and unanimously) ordered petitioner to refund the funds that were unconstitutionally taken from respondent, from *Amicus*, and from other Chapter 11 debtors. The lower courts got it right – Petitioner should be required to refund all amounts collected by Petitioner in violation of the Constitution.

To hold in favor of Petitioner would ensure that Congress could run roughshod over the constitutional rights of Chapter 11 debtors (and others) in the future. Parties required to pay an unconstitutional exaction would have no economic incentive to bring suit. Thus, no future suits would ever be brought.

SUMMARY OF ARGUMENT

Amicus suffered serious adverse consequences as the result of increased quarterly fees charged to *Amicus* by the OUST following the Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, Div. B, § 1004(a), 131 Stat. 1232 (“2017 Act”). *Amicus* went from being a profitable company to an unprofitable company, solely by reason of the increase in quarterly fees.

Amicus thereafter faced a dilemma. *Amicus* could not continue operating in Chapter 11 because the quarterly fee increase turned *Amicus* from a profitable company to an unprofitable company. Had *Amicus* remained in bankruptcy, it would have had to convert its case to a Chapter 7 liquidation, resulting in the demise of *Amicus*.

Amicus could not unilaterally dismiss its Chapter 11 bankruptcy, however. *Amicus* had to reach an agreement with all of its creditors regarding the amounts and payment terms of creditor claims prior to any dismissal, to avoid being forced out of business by its creditors after the dismissal.

A consequence of *Amicus* not being able to pursue the Chapter 11 reorganization was that *Amicus* was required to agree to pay \$1 million in California excise taxes to resolve a claim that, prior to the agreement, had been hotly contested by the debtor, in order to effectuate a global settlement agreement with its creditors, a so-called “structured dismissal” of *Amicus*’ Chapter 11 bankruptcy.

These circumstances support the remedy of Petitioner issuing refunds of the unconstitutional portion of the quarterly fees collected from Petitioner and other similarly situated Chapter 11 debtors.

The only appropriate relief for the constitutional violation in this case is the issuance of a refund to Respondent and other parties similarly situated, such as *Amicus*. Chapter 11 bankruptcy cases are qualitatively different from bilateral disputes between a state taxing agency and individual taxpayers. Bankruptcy is a “free for all” typically involving multiple creditors, sometimes hundreds or thousands of creditors, all of them competing for a “piece of the pie.” Chaos would follow if there was an effort to retroactively impose an increase in quarterly fees in Bankruptcy Administrator Districts, as advocated by Petitioner.

In the absence of the possibility of a monetary recovery by Chapter 11 debtors for a constitutional violation, no future Chapter 11 debtor is ever going to bring suit to challenge an unconstitutional exaction imposed by Congress. Without an economic incentive to pursue constitutional challenges to unconstitutional monetary exactions, Congress will be at liberty to pass legislation that violates the Constitution.

The OUST’s argument that Chapter 11 Debtors are barred from seeking refunds of unconstitutionally collected OUST because they were required to seek pre-payment relief is not supported by case law. This argument is contrary to their own

policy and practice in the course of their supervision of Chapter 11 cases and is against their own pecuniary interests. Furthermore, practically there is “compulsion” to seek post-payment relief of quarterly fees imposed by the OUST as a practical matter. The potential consequences of a Chapter 11 debtor not paying the OUST’s quarterly fees in full and on a timely basis are severe, including possible conversion of their case to Chapter 7, resulting in the liquidation of their business.

Respondent is entitled to a refund of the unconstitutional quarterly fees imposed by the OUST under the 2017 Act.

ARGUMENT

A. There Were Serious Adverse Consequences to *Amicus* Resulting from the 2017 Increase in Quarterly Fees Which Almost Resulted in the Demise of *Amicus*

The present case involves the question of whether the U.S. Trustee’s Office should be required to refund excessive, unconstitutionally collected quarterly fees that it improperly imposed on Chapter 11 bankruptcy debtors following the 2017 amendments to 28 U.S.C. 1930(a)(6). Given that *Amicus* suffered serious adverse consequences as the result of the increased quarterly fees charged by Petitioner, the only appropriate remedy is the issuance of refunds to the affected Chapter 11 Debtors.

Amicus sells cigarettes and other tobacco products in bulk to retailers, selling at a very high volume with small margins. On May 20, 2016, *Amicus* filed a voluntary Chapter 11 bankruptcy petition. As of that date, the State of California had, as the result of an audit, asserted that *Amicus* owed additional excise taxes on the sale of tobacco products. *Amicus* disputed the asserted additional taxes, in part on constitutional grounds, and was pursuing administrative remedies under state law to challenge the asserted taxes.

On August 4, 2016, the California tax authorities filed a proof of claim asserting an 11 U.S.C. § 507(a)(8) priority claim for unpaid tobacco excise taxes totaling \$1,505,638.57. *Amicus* filed a complaint to determine amount of taxes owed and later filed a separate objection to the priority status of the excise tax claim. *Amicus*' objection to the priority status of the excise tax claim was sustained in a published opinion. See *In re USA Sales*, 580 B.R. 852 (Bankr. C.D. Cal. 2018).

Thereafter, California asserted a separate administrative expense claim for post-bankruptcy excise taxes which totaled \$1,424,583.88. This claim was also disputed by *Amicus*, mainly on constitutional grounds. In late 2018, the parties began a mediation process in an effort to globally resolve all disputes regarding the asserted excise tax claims.

Prior to January 1, 2018, *Amicus* had been paying \$13,000 per quarter to the OUST, or \$52,000

annually, because *Amicus*' total quarterly "disbursements" ranged between \$5,000,000 and \$14,999,999. However, the quarterly fees demanded from *Amicus* by the OUST increased dramatically as of January 1, 2018 as the result of the 2017 Act, even though *Amicus*' total "disbursements" did not materially change.

Prior to the enactment of the 2017 Act, the quarterly fees charged to Chapter 11 debtors making quarterly disbursements of at least \$1 million were as follows:

<u>Disbursement Range</u>	<u>Quarterly Fees</u>
\$1,000,000-\$1,999,999	\$6,500
\$2,000,000-2,999,999	\$9,750
\$3,000,000-4,999,999	\$10,400
\$5,000,000-14,999,999	\$13,000
\$15,000,000-29,999,999	\$20,000
\$30,000,000 and up	\$30,000

As the result of the 2017 Act, all quarterly fees for Chapter 11 debtors in U.S. Trustee Districts making disbursements of at least \$1 million per quarter were charged the lesser of 1 percent of such disbursement or \$250,000. Thus, for Chapter 11 debtors in U.S. Trustee Districts who disbursed between \$5,000,000 and \$14,999,999 per quarter (which is the range in which *Amicus* fell each

quarter), starting January 1, 2018, quarterly fees ranged from \$50,000 to \$149,999, as opposed to \$13,000.

Amicus paid the following increased quarterly fees assessed by the OUST starting January 1, 2018:

<u>Quarter</u>	<u>Fees Assessed by OUST</u>
1Q2018	\$84,343.00
2Q2018	\$81,680.00
3Q2018	\$68,578.00
4Q2018	<u>\$111,755.00</u>
Annual Total	\$346,356.00
1Q2019	\$82,912.00
2Q2019	\$89,335.00
3Q2019	\$123,819.00
4Q2019	<u>\$57,427.00</u>
Annual Total	\$353,493.00

Amicus paid an additional \$595,849.00 in quarterly fees to the OUST over this time period that it would not have had to pay if the quarterly fees had remained at \$13,000. Had *Amicus* been able to remain in Chapter 11 and to confirm a chapter 11 Plan of reorganization calling for payments to

creditors over 5 years, the additional quarterly fees paid by *Amicus* would have exceeded \$1.9 million, based on *Amicus*' historical disbursements.

The financial difficulties that these increased quarterly fees imposed on *Amicus* were considerable. Prior to the increase in quarterly fees, *Amicus* had net income of approximately \$193,049 during 2017 and the last three quarters of 2016 combined. However, after paying the increased quarterly fees, *Amicus* had a net loss of approximately (\$504,811) during 2018 and 2019.

Amicus' losses in 2018 and 2019 coincided with a reduction in the company's inventory from \$2,501,159 as of December 31, 2017 to \$1,993,807 as of November 30, 2019. In essence, *Amicus* cannibalized its inventory to pay the increased quarterly fees so that it could remain in business temporarily. This technique obviously can only be pursued for a limited period of time before a business fails.

Had *Amicus* remained in Chapter 11, the increase in quarterly fees demanded by the OUST would have eventually resulted in *Amicus* going out of business and a conversion of the bankruptcy case to a liquidation under Chapter 7. Dismissal of the bankruptcy petition was the only course of action available to *Amicus* if the company was to remain in business.

But a dismissal without a pre-existing agreement between *Amicus* and all of its creditors on

how those creditors would be treated after the dismissal would have left *Amicus* at the mercy of its creditors. In particular, because California law precludes a constitutional challenge to any asserted state tax deficiency unless the taxpayer pays all of the disputed tax liability and sues for a refund, *See* California Constitution, Article XIII, section 32, dismissal of the Chapter 11 case without an agreement in place with the California tax authorities would have led to the demise of *Amicus*' business.

Dismissal of *Amicus*' Chapter 11 case under those circumstances would have precluded *Amicus* from challenging the disputed cigarette excise tax claims on constitutional grounds. That is because *Amicus* lacked the ability to pay these disputed claims in full.² Without the ability to raise constitutional challenges to the asserted excise tax deficiencies, *Amicus* would have likely lost its administrative appeals and would have had to attempt to continue doing business in the face of tax liens and continuous demands for payment from the California tax authorities. Sustaining a high-volume, low-margin business under those circumstances is not realistic.

With this reality in mind, *Amicus* negotiated a global settlement agreement with California sales tax

² *Amicus* had the ability to litigate the constitutionality of the relevant California tax provisions in Chapter 11 without paying the taxes, pursuant to section 505(a) of the Bankruptcy Code, because the California Tax authorities filed a proof of claim. *See Schulman v. California (In re Lazar)*, 237 F.3d 967 (9th Cir. 2001).

authorities which called for the dismissal of the Chapter 11 bankruptcy petition and payment of approximately \$1 million to California over time. These negotiations took approximately 8 months.

This settlement was necessarily contingent on *Amicus* reaching agreements with all of its other creditors, for purposes of entering into a “structured dismissal” of the company’s Chapter 11 bankruptcy case. A “structured dismissal” is a dismissal that “typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain third-party releases, enjoining certain conduct by creditors, and not necessarily vacating orders or unwinding transactions undertaken during the case.” *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 979 (2017).

In *Jevic Holding*, this Court held that a “structured dismissal” of a Chapter 11 bankruptcy case that does not comport with the priority scheme of the Bankruptcy Code cannot be approved by a Court if a dissenting creditor objects to the terms of the structured dismissal. *Id.* This Court’s holding in *Jevic Holding* thus required *Amicus* to reach agreements with all of its creditors as to the terms of a potential structured dismissal before asking the Court to dismiss the Chapter 11 bankruptcy.

Amicus was fortunate enough to reach agreements with all of its other creditors and thus was able to effectuate a structured dismissal. The Bankruptcy Court thereafter dismissed the bankruptcy on November 15, 2019. *Amicus*

thereafter brought suit to recover the excessive fees paid to the OUST.

The situation faced by *Amicus* following the increase in quarterly fees was unprecedented. The “rules of the road” changed in the middle of the journey. It was as if *Amicus*, by filing a Chapter 11 petition, had entered a toll road with a fixed toll (in the form of quarterly fees payable to the OUST) of \$13,000 per quarter. While *Amicus* was on the toll road, the toll unexpectedly increased to over \$85,000 per quarter. *Amicus* could not afford the increased toll, and *Amicus* could not exit the toll road without Court permission. Also, exiting the toll road without agreements with creditors in place would likely have resulted in the demise of *Amicus*.

Remaining on the toll road indefinitely would have also resulted in the demise of *Amicus*. While *Amicus* could temporarily cannibalize the car in which it was traveling to raise money to pay the increased toll, at some point the cannibalization of the car would cause the car to stop functioning.

The perilous road traveled by *Amicus* as the direct result of the increased quarterly fees charged by the OUST warrants this Court holding that the appropriate remedy in this case is the issuance of refunds to Respondent, *Amicus*, and others who were compelled to pay unconstitutional quarterly fees to Petitioner.

B. The Only Appropriate Remedy in This Case is the Issuance of Refunds Due to the Unique Nature of the Bankruptcy Process

In cases where states have imposed taxes that this Court has declared unconstitutional, this Court has allowed states to choose between two solutions: refunding the unconstitutional exaction to the plaintiff or imposing (retroactively) the same tax on similarly situated taxpayers. *See McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco*, 496 U.S. 18 (1990), *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 101 (1993), *Iowa-Des Moines Nat. Bank v. Bennett*, 284 U.S. 239, 247 (1931), *Montana Nat'l Bank v. Yellowstone County of Montana*, 276 U.S. 499 (1928).

To be sure, this Court has not allowed the states to avoid providing refunds to the plaintiffs when the taxing agencies did not promptly take steps to impose the same tax on similarly situated taxpayers; rather, this Court has ordered that refunds be paid. *See McKesson, supra*, 496 U.S. at 35 (quoting *Montana Nat'l Bank*, 276 U.S., at 504). But this Court at least offered the states the chance to raise taxes on other similar situated taxpayers. Generally speaking, however, the states responded to this choice by resorting to gamesmanship, to which this Court promptly put an end. *See Reich v. Collins*, 513 U.S. 106 (1993).

Allowing the states that imposed unconstitutional taxes such a choice of remedies is understandable. The fight between a state tax agency and each taxpayer over the amount of taxes owed is a

simple tug of war, with only two parties involved, one at each end of the rope.

The Chapter 11 bankruptcy process is qualitatively different from the “tug of war” between a government taxing agency and each taxpayer. The Chapter 11 bankruptcy process is a “free for all” typically involving multiple creditors and other parties in interest (including the Chapter 11 debtor and equity holders), sometimes involving hundreds or thousands of creditors, all of which are competing for a “piece of the pie.”

The competing creditors seek to be paid a portion of what they are owed out of a limited universe of assets. *See, e.g., Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457 (1982), *In re ICL Holding Co.*, 802 F.3d 547, 553 (3d Cir. 2015).

Dollars are precious, because rarely do creditors get paid in full. When the OUST unconstitutionally exacts money from a Chapter 11 debtor, the OUST deprives the debtor of the ability to use those funds to negotiate with and pay other creditors. This effectively deprives all creditors of money and deprives the debtor of negotiating leverage.

What happened in the Chapter 11 case of *Amicus*, which was a relatively “simple” Chapter 11 in terms of the structure of its body of creditors, illustrates the problems caused when the OUST imposed the increase in quarterly fees on January 1,

2018. *Amicus* escaped a complete liquidation of its business by the skin of its teeth.

Imagine, then, what would happen if there was an effort to impose a similar dramatic increase in quarterly fees in the Bankruptcy Administrator Districts *on a retroactive basis*, as urged by Petitioner. Respondent's Brief, at pp. 36-41 does a good job of discussing in legal terms the chaos that would ensue.

In the opinion of *Amicus*, however, Respondent's description understates the cataclysmic chaos that would result from such an event. It would be an utter nightmare for all creditors and professionals who have received funds pursuant to Chapter 11 plans confirmed by final court orders and who are targeted in actions seeking the disgorgement of funds that they received. Businesses and other parties in interest who are faced with the choice of either spending their hard-earned dollars paying attorneys to defend against such litigation or coughing up large amounts of money that they can't afford to pay might file their own Chapter 11 cases. They may even be forced out of business.

Because of the chaos that would follow if there was an effort to retroactively impose an increase in quarterly fees in Bankruptcy Administrator Districts, as advocated by Petitioner, *Amicus* urges the Court to categorically hold that the only appropriate remedy is the issuance of refunds of the unconstitutionally collected quarterly fees. Given the complicated dynamics of the Chapter 11 process, this is only feasible alternative. *See USA Sales, Inc. v. Off. of the*

United States Tr., supra, 76 F.4th at 1255 (“Federal courts have repeatedly stressed the particular need for finality in bankruptcy”).

C. Unless This Court Requires Petitioner to Issue a Refund to Affected Chapter 11 Debtors, Future Chapter 11 Debtors Will Have No Effective Remedy Against Future Unconstitutional Exactions by Congress, Leaving Congress Free to Violate the Constitution

In a Chapter 11 bankruptcy case, creditors are fighting for a piece of a diminished financial pie. Dollars are precious. Litigation in a Chapter 11 bankruptcy, when undertaken, is normally undertaken for financial reasons, *i.e.*, in an effort by the Chapter 11 debtor to either recover money from third parties or to minimize recoveries by third parties against the debtor.

Lawsuits that don't benefit the Chapter 11 debtor economically in some way are not brought because a) Chapter 11 debtors don't want to waste precious resources on lawsuits that will not produce any benefit to the Chapter 11 debtor and b) the lawyers who bring such litigation may not get their fees approved or paid by the Court, due to litigation's lack of benefit to the bankruptcy estate. *See, e.g., In re Bove*, 365 B.R. 585, 588 (Bankr. D. Md. 2007) (citing Collier on Bankruptcy § 330.04[b][v] (15th ed. Rev. 2006)), *In re Mondie Forge Co.*, 154 B.R. 232, 237 (Bankr. N.D. Ohio 1993).

Why did all of the plaintiffs, including Petitioner in the present case, file lawsuits against the OUST? To either recover money previously paid to the OUST or to avoid paying money to the OUST, in order redress a constitutional violation. Not one of these plaintiffs sued for the opportunity to sit back and watch the destructive chaos that would follow if there is an effort to retroactively impose a draconian quarterly fee increase in Bankruptcy Administrator Districts, as urged by Petitioner.

If this Court were to hold that these plaintiffs are not entitled to monetary recoveries in a case involving a clear violation of the Constitution, no suits by Chapter 11 debtors challenging future unconstitutional exactions by Congress will ever be filed. Without an economic incentive to pursue constitutional challenges to unconstitutional monetary exactions, Congress will be at liberty to pass legislation that violates the Constitution, because no one will have an economic incentive to challenge the constitutionality of the legislation.

It is important for this Court to rule in a manner that provides an economic incentive to those parties who are deprived of funds as the result of unconstitutional Congressional legislation to redress those constitutional violations. *See, e.g., See Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018) (courts generally choose remedies that create incentives to raise constitutional challenges). Otherwise, Congress will be able to violate the Constitution with impunity.

D. Chapter 11 Debtors Seeking Refunds of Unconstitutionally Collected OUST Fees Were Not Required to Seek Pre-Payment Relief From the Imposition of Unconstitutionally Collected OUST Fees

The OUST argues at pp. 29-32 of Petitioner’s Opening Brief that Chapter 11 Debtors that failed to seek pre-payment relief from the imposition of unconstitutional quarterly fees imposed by the OUST may not rely on a due process claim to seek post-payment refunds of these unconstitutional quarterly fees, citing cases such as *McKesson, supra*. This argument is pure gamesmanship and should be rejected out of hand.

First, the argument by the OUST that Chapter 11 debtors were required to take actions that were against the economic interests of the OUST is an obvious (and unwise) litigation tactic; it does not represent the actual policy of the OUST in their day-to-day supervision of Chapter 11 cases. It makes no sense for the OUST to discourage Chapter 11 debtors from paying their quarterly fees whenever those Chapter 11 debtors believe that those fees are unconstitutional or are otherwise excessive.

The “pay now—fight later” approach is much more fiscally sound than encouraging debtors to withhold payment of quarterly fees whenever they believe those fees are excessive. One can imagine the chaos that would ensue if the IRS were to adopt the same approach and tell taxpayers that they don’t need to pay their taxes if they believe that their taxes are

legally excessive and that they can litigate the validity of their tax liabilities at a later date.

In reality, the OUST strongly encourages all Chapter 11 Debtors to pay their quarterly fees in full and on a timely basis. How do we know this? The OUST national website page dealing with quarterly fees, located at <https://www.justice.gov/ust/chapter-11-quarterly-fees> (last visited December 13, 2023), states as follows:

Quarterly fees are due no later than one month following the end of each calendar quarter. Failure to pay quarterly fees may result in the conversion or dismissal of the case. Payment of that quarter's fees and any past due fees and interest, if applicable, must be made before the effective date of a confirmed plan of reorganization and quarterly fees will continue to accrue until entry of the final decree, or until the case is converted or dismissed. Failure to pay these fees may result in a motion by the United States Trustee to dismiss or convert the case to a chapter 7 case.

Each quarterly fee must be timely paid. Failure to receive a bill from

the Executive Office for United States Trustees does not excuse timely payment. Failure to pay the quarterly fee is cause for conversion or dismissal of the chapter 11 case pursuant to 11 U.S.C. § 1112(b)(4)(K) (for cases filed on or after October 17, 2005) or 11 U.S.C. § 1112(b)(10) (for cases filed before October 17, 2005).

The OUST has never, ever provided a warning to Chapter 11 debtors as a whole that they should carefully determine that the amount of Quarterly Fees they are going to pay to the OUST is correct before making payment to the OUST, at the risk of not being able to recover quarterly fees that are excessive. Nor has the OUST ever advised Chapter 11 Debtors as a whole that they will (supposedly) not be able to obtain a refund of any overpayment of those Quarterly Fees once the fees have been paid.

Chapter 11 debtors as a class have never been given notice of any kind that the OUST takes the position that the debtors must bring a pre-payment challenge to the amount Quarterly Fees if the debtors believe that the amounts of quarterly fees being demanded by the OUST are overstated.

Likewise, there is no rule, regulation, or statute which says that Chapter 11 debtors who believe that the Quarterly Fees being charged by the OUST are excessive and unconstitutional must seek a pre-payment remedy or lose their right to contest

the amounts of Quarterly Fees through a suit for refund. Instead, Chapter 11 debtors are permitted to be suits for refund in the bankruptcy courts/district courts under their general bankruptcy jurisdiction, or alternatively in the Court of Claims under the Tucker Act, 28 U.S.C. §1491.

If the OUST were to ever attempt to create a rule requiring Chapter 11 debtors to seek prepayment relief to preserve their right to object to excessive quarterly OUST fees, due process would require a legally adequate warning from the OUST prior to implementing such a rule. The discussions of Quarterly Fees contained on the OUST's website contain no such warning. *See, e.g.*, Chapter 11 Quarterly Fees, *supra*, *see also* United States Trustee Program Policy and Practices Manual, Chapter 3, Chapter 11 Case Administration, Chapter 3-9, Quarterly Fees, at pp. 119-130, and Chapter 3-10.4.15, Failure to Pay Quarterly Fees, located at https://www.justice.gov/ust/file/volume_3_chapter_11_case_administration.pdf/download (last viewed December 14, 2023). In fact, the discussion at Chapter 3-9 suggests that Chapter 11 debtors have the right to sue for refunds of excessive Quarterly Fees.

For that reason, the cases cited at pp. 29-32 of the OUST's Opening Brief do not support the OUST's position. Cases such as *McKesson* stand for the proposition that the states must afford taxpayers a meaningful judicial opportunity to seek a refund of unconstitutionally collected taxes to comply with the Due Process Clause of the Constitution. These cases

do not stand for the proposition that, where a statutory scheme allows a both a pre-payment forum and a post-payment forum in which the challenge the constitutionality of a government exaction – which is the situation here, that the affected parties lose their ability to challenge the exaction on constitutional grounds if they do not pursue litigation in the pre-payment forum.

As noted by Respondent at p. 6 of its Responding Brief, bringing a pre-payment challenge to Quarterly Fees creates significant risks for a Chapter 11 debtor under any circumstances. The greatest risk is that the OUST will file a motion to convert or dismiss their Chapter 11 case. *See also* 11 USC § 1112(b)(4)(K), *In re Premier Golf Props., LP*, 564 B.R. 710, 727 (Bankr. S.D. Cal. 2016) (failure to pay fees to OUST for a quarter was sufficient to establish cause and the debtor becoming current after the fact is insufficient to avoid the finding of cause under 11 USC § 1112(b)(4)(K)); *In re Sanders*, 2013 Bankr. LEXIS 4681 (9th Cir. Apr. 11, 2013)(unpublished).

No sane Chapter 11 debtor would unnecessarily increase the risk the conversion of their case to Chapter 7, resulting in the liquidation of their business, by not paying Chapter 11 quarterly fees. And, as is illustrated by the discussion above regarding the events occurring in the Chapter 11 case of *Amicus* before *Amicus*' Chapter 11 case was dismissed, *Amicus* had very serious creditor issues on its plate that had to be resolved before it made sense for *Amicus* to pick a fight with the OUST regarding

the improper amount of the quarterly fees being charged to *Amicus* at a time when it was unclear whether *Amicus* would prevail in such a fight.

There is no doubt that, as a practical matter, “compulsion” to pay all of the quarterly fees demanded by the OUST existed at the time when Respondent and other Chapter 11 debtors first paid the unconstitutional quarterly fees. Thus, under any circumstances this Court should order the OUST to refund all unconstitutionally collected quarterly fees.

CONCLUSION

For the reasons set forth above, *Amicus* urges this Court to affirm the holding of the Tenth Circuit.

Respectfully submitted,

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