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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

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In urging this Court to award them a partial refund of quarterly-fee payments, respondents do not defend the court of appeals' reasoning. Nor do they dispute "the intensity of [Congress's] commitment" to the fee increase imposed by the 2017 Act or the magnitude of the "disruption" associated with their preferred remedy. *Heckler* v. *Mathews*, 465 U.S. 728, 739 n.5 (1984) (citation omitted). Respondents concede that legislative intent is "[t]he touchstone" when selecting between permissible remedial options, Br. 14 (citation omitted), and they acknowledge that Congress addressed "this very issue" in the 2020 Act "by mandating equal fees *prospectively only*," Br. 31. Instead, respondents principally contend (Br. 9-28) that this Court lacks any constitutional option for directing prospective-only relief. But there is no doctrinal impediment to prospective-

only relief, which is manifestly the remedy Congress would have chosen.

Moreover, even if backward-looking relief to eliminate the historical disparity were required, the appropriate remedy would be retrospective collections rather than windfall refunds to the largest users of the bankruptcy system. Respondents raise a slew of abstract challenges to implementing a collection-based remedy. Yet, as additional data about the relevant universe of cases illustrate, the historical disparity is far more likely to be substantially reduced by a good-faith collection effort, which would target total underpayments of about $4 million in a few dozen cases in Bankruptcy Administrator (BA) districts. In contrast, a refund effort would need to be much wider ranging, involving $326 million (or more) in about 2100 cases in U.S. Trustee (UST) districts—and transferring to taxpayers substantial costs that Congress clearly intended to be borne instead by the bankruptcy system's largest users.

A. Prospective Uniformity Is The Appropriate Remedy In This Case

As respondents readily concede (Br. 31), a prospective-only remedy is the option that best effectuates congressional intent. It also avoids practical and administrative difficulties inherent in any effort to achieve retrospective equality. A prospective approach is particularly appropriate because just 2% of debtors underpaid the fee amounts associated with the 2017 Act, and a prospective remedy will leave in place only a minimal historical disparity for the period between January 2018 and March 2021. The real question is whether the Constitution permits prospective-only relief in this case. This Court's decisions make resoundingly clear that it does.

1. Respondents mischaracterize this Court's decisions in McKesson *and* Harper *and misconstrue those cases' interaction with* Reich *and* Newsweek

a. Respondents assert that the Due Process Clause dictates a per se rule that the government is always obligated to rectify a constitutional violation in the collection of funds by providing "meaningful *backward-looking* relief." Br. 10 (quoting *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990)); see Br. 11. But that skips the inquiry's first question: whether the challenger had an opportunity for a meaningful predeprivation hearing. This Court has been unequivocal that an obligation to provide backward-looking relief arises only when the answer to that question is "no." In *McKesson*, the Court explained that, although the typical way to satisfy due process is "to provide a form of 'predeprivation process,'" a State may choose to foreclose predeprivation hearings about the validity of a tax so long as it provides meaningful backward-looking relief in its postdeprivation procedures. 496 U.S. at 36. By contrast, if the State allows a predeprivation hearing, that "constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause," and "recovery of th[e] payment [collected under an unconstitutional scheme] may be denied." *Id.* at 38 n.21 (citation omitted); see *id.* at 22, 31; accord *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 100-102 (1993); see also Gov't Br. 28-32.

Respondents contend (Br. 13) that the government "mischaracterizes" *McKesson* and *Harper*. But they are the ones who omit key language. Respondents quote *McKesson* as giving a negative answer to the question whether "prospective relief, by itself, exhausts

the requirements of federal law." Br. 13 (quoting *McKesson*, 496 U.S. at 31). Their quotation omits the reasoning the Court gave for its negative answer, "The answer is no: *If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality*, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *McKesson*, 496 U.S. at 31 (emphasis added; footnote omitted). Similarly, respondents assert that "prospective-only relief was not one of the[]" options the Court left open for remand in *Harper*. Br. 14 n.1 (citation and internal quotation marks omitted). But *Harper* stated unequivocally that the "availability of a predeprivation hearing constitutes a procedural safeguard sufficient by itself to satisfy the Due Process Clause," and then explained that "[t]he constitutional sufficiency of any remedy thus turns (at least initially) on whether [state] law provides an adequate form of predeprivation process," leaving resolution of that question to state courts on remand, which could permit purely prospective relief. 509 U.S. at 101 (brackets, citations, ellipsis, and internal quotation marks omitted).

Even beyond the clear language of *McKesson* and *Harper*, respondents cannot reconcile their categorical view that retrospective relief is required with the reality that prospective relief is often the only relief available, see Gov't Br. 21-22, or with this Court's decisions awarding prospective-only relief as a matter of remedial discretion, see Gov't Br. 22-24. Outside the tax context the quintessential remedy for unconstitutional discriminatory treatment is "remed[ying] [it] by an end to pref-

erential treatment for others." *Heckler*, 465 U.S. at 740 n.8 (citing cases).

b. Respondents eventually acknowledge that, under *McKesson* and *Harper*, backward-looking relief is required only in the absence of a meaningful opportunity for a predeprivation hearing, but they cast those conclusions about prospective relief as "dicta." Br. 22; see Br. 26 n.9. In fact, the statements about prospective relief were necessary to holdings in both cases. In *McKesson*, the absence of a predeprivation remedy was why the Court rejected the State's argument that purely prospective relief would suffice. See 496 U.S. at 31. In *Harper*, the fact that the sufficiency of prospective-only relief turned on the availability of a predeprivation hearing was the basis for leaving that question open on remand. See 509 U.S. at 101-102. Similarly, a third case relied on the principle that a meaningful predeprivation procedure "is itself sufficient to satisfy constitutional concerns" in the course of leaving the resolution of a remedial question to state courts on remand. *Associated Indus. of Missouri* v. *Lohman*, 511 U.S. 641, 656 (1994).

Nor are respondents correct to suggest (Br. 22) that those holdings were "supplanted" by the subsequent decisions in *Reich* v. *Collins*, 513 U.S. 106 (1994), and *Newsweek, Inc.* v. *Florida Department of Revenue*, 522 U.S. 442 (1998) (per curiam). As the government explained in its opening brief (at 33), *Reich* and *Newsweek* addressed a situation that was not considered in either *McKesson* or *Harper*: one where a state statute guaranteed a refund in the event of a successful challenge to a tax at a postdeprivation hearing, the taxpayer forwent predeprivation process in reliance on that promise, and the State then changed its scheme, "declar[ing], only after the disputed taxes ha[d] been paid," that refunds

were unavailable. *Reich*, 513 U.S. at 108. The Court determined that a maneuver that so "reconfigure[s]" the rules "unfairly, in *mid-course*," *id.* at 111, itself violates the Due Process Clause. But that additional way of violating the Due Process Clause has no bearing here. The state statute in *Reich* provided that "[a] taxpayer *shall be refunded* any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him under the laws of this state, *whether paid voluntarily or involuntarily.*" *Id.* at 109 (quoting Ga. Code Ann. § 48-2-35(a) (Supp. 1994)) (emphasis added); accord *Newsweek*, 522 U.S. at 443 (relying on Fla. Stat. § 215.26(1) (Supp. 1998)). But respondents have not identified any federal statute that promised a refund in the event that the quarterly-fee statute was held unconstitutionally nonuniform.

Rather than supplanting *McKesson* and *Harper*, the Court in *Reich* acknowledged the "flexibility" available to the government "under *McKesson*," 513 U.S. at 110, and remanded for a determination about backward-looking relief "consistent with * * * [the] *McKesson* line of cases," *id.* at 114; see Gov't Br. 34. Two years later, the Court again invoked *McKesson*'s principle that a meaningful predeprivation hearing "is itself sufficient to satisfy constitutional concerns." *Fulton Corp.* v. *Faulkner*, 516 U.S. 325, 347 n.11 (1996) (citation omitted).

Trying another tack, respondents contend (Br. 25) that a predeprivation remedy satisfies due process only where that is the "*exclusive*" option. But the relevant question is whether predeprivation procedures are "adequate," not whether they are exclusive. *Harper*, 509 U.S. at 101 (citation omitted). *Reich* itself recognizes that due process allows "a hybrid regime." 513 U.S. at

111. The "*mid-course*" withdrawal of a post-payment refund created constitutional problems in *Reich* and *Newsweek* because inducing taxpayers to pay disputed taxes with the false promise of potential refunds is a form of "compulsion" that itself "contraven[es] * * * the Fourteenth Amendment." *Id.* at 109, 111 (citation omitted); accord *Newsweek*, 522 U.S. at 444-445. Respondents offer no explanation as to why, outside the context of a reliance-inducing bait-and-switch, providing options *in addition* to an adequate predeprivation procedure would render the predeprivation mechanism constitutionally inadequate. And respondents' view would have sweeping implications. The opportunity for either a pre- or a post-deprivation challenge is the default in most contexts. See, *e.g.*, 5 U.S.C. 702; 28 U.S.C. 2201(a); 42 U.S.C. 1983; see also, *e.g.*, *Sessions* v. *Morales-Santana*, 582 U.S. 47, 72 (2017) (addressing a postdeprivation challenge to a statute that did not grant plaintiff citizenship from birth). Respondents' arguments would eliminate courts' ability to order prospective-only relief in nearly all cases.

c. In another misguided attempt to turn *Reich* and *Newsweek* in their favor, respondents suggest (Br. 25-26) that they have been subject to a bait-and-switch because the government is "suddenly limiting refunds to predeprivation challenges."[1] Respondents misappre-

[1] Some amici—but not respondents themselves—contend that the government engaged in a bait-and-switch because it represented in some cases that injunctive relief was unnecessary because the government would pay in the event that a debtor "obtains a final and unappealable judgment establishing its right to a refund." Acadiana Amicus Br. 8 (citation omitted). That representation remains accurate: Although the government does not believe a refund is the appropriate remedy, if it is subject to a judgment directing it to pay a refund, it will of course comply. But that is distinct from a statutory

hend the government's argument. Because—as they acknowledge—a predeprivation procedure was "open and available" to respondents before payment, Br. 25, the Due Process Clause does not impose a substantive requirement that trumps the operation of normal remedial principles. Here, the appropriate relief is requiring all debtors to pay the uniformly *higher* fees that Congress intended, not effectively repealing the fee increase. See Gov't Br. 19-28. For that reason, refunds are not warranted for any debtors, whether they challenged the quarterly fees before payment or chose to wait to bring their challenges. If legislative intent supported a retrospective refund, then that would be the appropriate remedy for *all* debtors, including those, like respondents, pursuing postdeprivation challenges. In other words, respondents are not losing out on a refund because there is a procedural impediment to providing refunds in a postdeprivation hearing; rather, they cannot obtain a refund because that is not the solution Congress would have chosen had it known from the outset that the 2017 Act would be constitutionally infirm in implementation.

Respondents' argument that prospective-only relief raises difficult questions "as a practical matter," Br. 17, is unavailing for the same reason. Prospective-only relief here means that the requirement that all debtors pay fees at the higher levels applies in cases presenting this question that have not become final as of the date of this Court's decision; prior payments that are now understood to have been too low need not be corrected.

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promise, made before the payment is tendered, that a refund will be the appropriate remedy in the event of any overpayment, which induces a debtor to forgo the available predeprivation challenge and pay first. See *Reich*, 513 U.S. at 108.

A UST debtor with a pending challenge that escrowed or withheld quarterly-fee payments while disputing the amount owed needs to pay the higher fees under the 2017 Act. To the extent that any fees were "already returned to debtors as relief" under final judgments based on the premise that refunds were the appropriate remedy for the uniformity violation, Resp. Br. 17, then those erroneously returned fees would remain with the debtors. But the government is unaware of any such cases. See Pet. 12 (urging this Court to grant review in this case to ensure that no cases presenting the question become final).

d. Respondents briefly contend (Br. 23 n.7) that they lacked a meaningful opportunity for predeprivation relief without putting their restructuring "at risk." See Br. 26-28. That is incorrect, as respondents appear to concede elsewhere. See Br. 25 (acknowledging that "the same bankruptcy procedures are open and available before or after paying an invalid fee"). A predeprivation remedy is adequate if it allows challengers either to "bring suit to enjoin imposition of a [quarterly-fee increase] prior to [the] payment," or "to withhold payment and then interpose their objections as defenses in [an] enforcement proceeding." *McKesson*, 496 U.S. at 36-37. Of course, avenues for challenging taxes are often more limited, in light of the government's need for financial stability in the collection of revenues. See *id.* at 37. Because a taxpayer generally "cannot interfere by injunction with the State's collection of its revenues," the only "alternative left" may be "an action at law to recover back what he has paid." *Atchison, Topeka & S.F. Ry. Co.* v. *O'Connor*, 223 U.S. 280, 285 (1912); see 26 U.S.C. 7421; 28 U.S.C. 1341; 28 U.S.C. 2201(a).

There is, however, no equivalent limitation in bankruptcy proceedings. A challenger may seek to enjoin a newly enacted bankruptcy statute as unconstitutionally nonuniform. See *Railway Labor Execs.' Ass'n* v. *Gibbons*, 455 U.S. 457, 463-465 (1982). Where, as here, the dispute involves quarterly fees, additional procedures for challenging their validity are available. See Gov't Br. 5-6. And the Bankruptcy Code provides the government with no "summary remedy, such as distress," for exacting payment of quarterly fees before a hearing on their validity can be had. *Atchison*, 223 U.S. at 285-286; cf. *Ward* v. *Board of County Comm'rs*, 253 U.S. 17, 23 (1920) (documenting the "compulsion" that led to tax payment under "protest[]," including threats by state officials to sell the lands and impose an 18% penalty despite pending challenges).

Respondents contend (Br. 26-27) that a Chapter 11 case can be dismissed for nonpayment of quarterly fees, attempting to equate that consequence with the summary remedies available to States for securing pre-challenge payments in the tax context. That analogy fails. Although an *unjustified* failure to pay quarterly fees can trigger conversion or dismissal of a Chapter 11 case, 11 U.S.C. 1112(b), that is no obstacle to raising a good-faith challenge to the fees' validity before payment. Conversion or dismissal would follow "notice and a hearing," 11 U.S.C. 1112(b)(1), at which the court may find that "there exists a reasonable justification" for the nonpayment and that the nonpayment "will be cured within a reasonable period of time" after any subsequent determination that the challenged fees are in fact valid. 11 U.S.C. 1112(b)(2)(B). Accordingly, debtors routinely challenge quarterly fees before paying them, see Gov't Br. 30, and many did so in challenging the 2017

Act. See, *e.g.*, Resp. Br. 5 (acknowledging that some UST debtors put the disputed fees "in escrow or refused to pay"); U.S. Br. at 47, *Siegel* v. *Fitzgerald*, 596 U.S. 464 (2022) (No. 21-441) (explaining that the liquidating trustee stopped paying quarterly fees for a two-year period while the fee challenge was pending); see also, *e.g.*, *St. Angelo* v. *Victoria Farms, Inc.*, 38 F.3d 1525, 1528 (9th Cir. 1994), amended, 46 F.3d 969 (9th Cir. 1995); *In re Maruko, Inc.*, 219 B.R. 567, 569, 573 (S.D. Cal. 1998). Respondents have not identified a single case where a bankruptcy court converted or dismissed a Chapter 11 case (or imposed any other penalty) based on the nonpayment of quarterly fees in the face of a motion to redetermine them or some other good-faith dispute about their validity.

2. Respondents' other arguments against prospective-only relief fall short

a. Respondents suggest in passing (*e.g.*, Br. 10) that prospective relief is not appropriate in cases of monetary injury. That is incorrect. For instance, this Court specifically held that backward-looking relief was not required—despite a statutory presumption in favor of such relief—in light of the practical difficulties and costs associated with awarding restitution for past overpayments where an employer illegally required women to make larger pension-plan contributions than men did. *City of Los Angeles* v. *Manhart*, 435 U.S. 702, 719-723 (1978); see *Barr* v. *American Ass'n of Political Consultants*, 140 S. Ct. 2335, 2354-2355 (2020) (*AAPC*) (plurality opinion) (declining to negate financial liability for previous violations of an unconstitutional prohibition); *id.* at 2363 (Breyer, J., concurring in the judgment with respect to severability). In a similar vein, this Court's tax decisions provide that prospective relief *is* sufficient

where a tax payment is exacted pursuant to an unconstitutional scheme as long as a meaningful predeprivation remedy was available. See pp. 3-5, *supra*. In *Ward*, a decision respondents themselves invoke (Br. 21), the Court considered a tax the State lacked authority to impose because the Indian Tribe challengers "were absolutely immune from the tax." *McKesson*, 496 U.S. at 39 (citing *Ward*, 253 U.S. at 24). Even then, the Court observed that "if the payment was voluntary, the moneys could not be recovered back," and it ordered a refund only after documenting that "compulsion" had induced the payment. *Ward*, 253 U.S. at 22-23.

Nor is it clear that respondents' own injury is fairly characterized as monetary rather than dignitary. Respondents describe their fee payments as money obtained "without authority" in an amount "already declared *unconstitutional*." Br. 10, 18 (citation omitted). But Congress undisputedly had the *authority* to impose quarterly fees in the full amount that respondents paid. See *Siegel*, 596 U.S. at 476. Congress's only error consisted in failing to ensure a corresponding fee increase for other debtors. See *id.* at 480 n.2; Gov't Br. 17-18. The BA districts' temporary delay in implementing the fee increase did not inflict any tangible harm on respondents. They suffered discriminatory treatment, but they paid what they were supposed to and were not in competition with the handful of underpaying debtors in the BA districts. Cf., *e.g.*, *McKesson*, 496 U.S. at 43 (addressing the challenger's "comparative economic disadvantage" relative to its "competitors" as a result of discriminatory tax). In reality, respondents are seeking a financial windfall from a constitutional violation that imposed no pocketbook harm.

b. Respondents attempt (Br. 18-20) to distinguish two recent cases in which this Court determined that prospective-only relief was the appropriate remedy for constitutional violations. But they identify no differences that matter.

Respondents first suggest (Br. 18) that the relief sought in *Morales-Santana* was "not retrospective" because the challenger was hoping to rely on an award of citizenship to avoid *future* deportation. But he would not have benefited from prospective-only application of the statute as interpreted in the manner he sought—that is, a declaration that children of unwed fathers born after the date of the Court's decision would henceforth receive the favorable citizenship treatment previously afforded only to children of unwed mothers. Instead, the challenger sought retrospective relief: the recognition of his citizenship as of the date of his birth. *Morales-Santana*, 582 U.S. at 72; see Gov't Br. 22. Such relief would carry future benefits for the challenger, but that is always the case. Here, too, respondents seek a retrospective reduction of fees because receiving monetary compensation for their past constitutional injury would make them better off in the future.

Respondents note (Br. 18-19) that *Morales-Santana* involved citizenship laws. The citizenship context may well present unique considerations, and the concurrence would have invoked courts' limited authority over citizenship decisions in resolving the remedial question. See *Morales-Santana*, 582 U.S. at 78 (Thomas, J., concurring in the judgment in part). But the Court did not rely on those considerations, instead resting on traditional remedial principles that decline to fix a disparity by transforming "an exception" into "the general rule." *Id.* at 77 (majority opinion); see *id.* at 72-76.

As to *AAPC*, respondents would distinguish that case as resting on "principles of severability," Br. 19 (emphasis omitted), but severability is often intertwined with the ultimate remedial question. The remedial inquiry asks both how a statute that is unconstitutional as drafted should be modified (often framed as the severability question), and what, if any, individualized remedy is therefore due to the challenger and others subject to the statute. See *AAPC*, 140 S. Ct. at 2350 (plurality opinion) (discussing the Court's longstanding "remedial preference" for "surgical severance"). Respondents observe (Br. 19) that there is no way to travel back in time and un-dial the robocalls proscribed by the unconstitutional statute in *AAPC*. But a backward-looking remedy can never unring the bell of past acts; instead, it provides compensation for past injuries. And even though robocallers could have been compensated for the financial liabilities arising from conduct that was proscribed under an unconstitutionally discriminatory scheme, the Court specifically barred that relief. *AAPC*, 140 S. Ct. at 2355 n.12.

c. Finally, respondents are mistaken in contending (Br. 15) that any decision rejecting backward-looking relief would itself create a bankruptcy-uniformity violation. In light of the clear congressional intent to impose uniformly *higher* fees, see Gov't Br. 14-19, the 2017 Act is properly construed—as of its effective date, see *Harper*, 509 U.S. at 100—to require its fee increase to apply in every district. That resolves the uniformity violation by effectively "str[iking] an exception and appl[ying] the general rule equally to all." *Morales-Santana*, 582 U.S. at 75. But it leaves the "analytically distinct" question whether to afford relief to those whose past payments were incorrect under the corrected construction

of the Act. *Harper*, 509 U.S. at 131 (O'Connor, J., dissenting); see Gov't Br. 20-21. Because a prospective-only remedy is appropriate, the answer to that separate remedial question is "no."

There is nothing unusual about that result. Many individuals today obtained citizenship that they should not have received under the statute invalidated in *Morales-Santana*, and some entities avoided liability for making robocalls that they should not have been permitted to make under the statute invalidated in *AAPC*. The "victims of a discriminatory government program"—even one that involves monetary payment—often obtain "an end to preferential treatment" without any backward-looking relief for themselves. *Heckler*, 465 U.S. at 740 n.8; see, *e.g.*, *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U.S. 449, 456 (2017); *Norwood* v. *Harrison*, 413 U.S. 455, 470-471 (1973); *Griffin* v. *County Sch. Bd.*, 377 U.S. 218, 232 (1964). Letting such matters lie does not itself create a discriminatory or nonuniform law, any more than would the denial of relief based on a statute of limitations. In short, there is no constitutional bar nor any other impediment to prospective-only relief, which is the most appropriate remedy for the violation identified in *Siegel*.

B. If Retrospective Relief Were Necessary, The Correct Remedy Would Be Additional Collections From The Handful Of Debtors In BA Districts

1. If the Court nonetheless concludes that relief must be backward looking, the appropriate way to achieve uniformity in hindsight would be to collect additional fees from the handful of debtors in BA districts who benefited from the delayed fee increase. See Gov't Br. 34-38. Respondents do not dispute that the inadvertently favorable treatment of BA debtors was an ex-

ception to the general rule of higher fees; that Congress specifically sought to impose the fee increase that a refund remedy would undo; and that Congress was seeking to impose the costs of operating the U.S. Trustee Program (USTP) on the largest users of the bankruptcy system (such as respondents). See *ibid.* Respondents suggest (Br. 31) that congressional intent should not be considered because Congress did not intend a retrospective remedy at all. But that is a powerful reason to select a prospective-only remedy. In any event, respondents cannot establish that Congress—which acted to impose uniformly *higher* fees prospectively—would nonetheless have chosen to award approximately $326 million of taxpayer money to the largest users of the bankruptcy system, undoing the very fee increase adopted in the 2017 Act.

2. In urging that a collection remedy is not appropriate, respondents contend that it poses "insurmountable" practical challenges, Br. 28, whereas implementing a refund would "avoid[] [all] complications," Br. 17. Both assertions are mistaken.

a. A collection remedy would be able to substantially reduce the already-small volume of underpayments in BA-district cases without requiring the reopening of closed cases.

Indeed, since filing its opening brief, the government has obtained from the Administrative Office of the U.S. Courts (AO) additional case-specific information about the quarterly-fee payments that were made in 5 of the 6 BA districts during the relevant period.[2] That infor-

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[2] On December 8, 2023, the AO responded to this Office's request for the production of records for use in a legal proceeding. See 20 *Guide to Judiciary Policy* § 830 (2016), www.uscourts.gov/sites/

mation has enabled us to identify 45 cases in those 5 BA districts that paid lower fees in light of the *Siegel* disparity. The government also expanded its public-docket search in the sixth district, the Northern District of Alabama, to capture cases converted to Chapter 7, see Former Bankr. Judges Amicus Br. 8 n.4, and has confirmed its prior identification of 3 affected cases in that district. See Gov't Br. 39 n.4. Of the 48 total cases involving underpayments, 27 (*i.e.*, more than half) had an underpayment in only one quarter (out of the thirteen quarters in which the disparity existed). In 31 cases (65% of them), the underpayment was less than $25,000. The aggregate underpayment across all 48 cases was $3,777,530. The 48 BA-district cases that the government has identified are listed in the appendix to this brief. App., *infra*, 1a-6a.

Of the 48 cases, 10 are currently open, meaning that the debtors remain subject to an ongoing obligation to pay quarterly fees. See 28 U.S.C. 1930(a)(6); 11 U.S.C. 1129(a)(12). One of the open cases accounts for 24% of the nationwide aggregate underpayment: *In re Bestwall, LLC*, No. 17-31795 (Bankr. W.D.N.C. filed Nov. 2, 2017). For the most recent quarter, that debtor paid more than $8.6 million in professional fees and $224,761 in quarterly fees, and it had a cash balance of more than $26.7 million as of October 31, 2023. Doc. No. 3191, at 3-4, *Bestwall*, *supra* (Nov. 29, 2023). It is reasonable to

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default/files/vol20-ch08.pdf. We provided respondents' counsel with copies of the information that same day.

The information from the AO did not include reports for the first quarter of 2019 for the Middle District of Alabama or the third quarter of 2019 for the Middle District of North Carolina. As verified by docket searches, only one case had a quarterly-fee underpayment in the omitted quarters, and that amount is included in the totals discussed in the text.

expect that its cumulative underpayment of $895,558 could still be collected.

Of the 38 cases that have been closed, 28 involved corporate debtors that were reorganized. To implement a collection remedy in one of those cases, a Bankruptcy Administrator could issue a billing statement to the reorganized debtor for the underpayment of quarterly fees (which are, necessarily, *post*-petition debts that were not dischargeable), without reopening the case. See 28 C.F.R. 11.12(b). For example, in the closed case with the largest underpayment ($405,383), the confirmed plan specifically required the reorganized debtor to pay "all quarterly fees payable," including "after the [plan's] Effective Date." Bankr. Ct. Doc. No. 543, at 47, *In re Dynamic Int'l Airways, LLC*, No. 17-10814 (Bankr. M.D.N.C. Feb. 21, 2018). Two other cases with corporate debtors were converted to Chapter 7 before they closed. They involved underpayments of $6564 and $21,211. The other 8 closed cases involve individual debtors, who may well be able to pay. For instance, in *In re Winslow*, No. 10-6745 (Bankr. E.D.N.C. filed Aug. 23, 2010), the underpayment was $3534; but after confirmation, the bankruptcy court approved a motion by the plan trustee to return excess funds of $2227.53 to the debtors. See Bankr. Ct. Doc. 1181, *Winslow*, *supra* (July 14, 2020). Again, reopening of the cases would not be necessary: If a Bankruptcy Administrator sent a billing statement to a former debtor in such a case and the individual were unwilling or unable to pay, the outstanding fees could be referred to the Department of the Treasury, which has standard tools for collecting government debt, including passive offsets and installment payments. See 31 U.S.C. 3716; 31 C.F.R. 901.8. If collection is not possible—as with the

$27,775 underpaid in the two converted cases where corporate debtors no longer exist—Treasury would be able to determine on behalf of the government that the debt is uncollectible.

Nor would there be anything extraordinary about allowing a post-confirmation increase in quarterly fees. When a 1996 fee amendment permitted the imposition of additional quarterly fees in cases with confirmed plans, the "overwhelming majority of courts" upheld the increase, noting that it supported Congress's "policies of oversight and self-funding." *In re Munford, Inc.*, 216 B.R. 913, 916 (Bankr. N.D. Ga. 1997); see *id.* at 917 (applying the quarterly-fee increase to a case in which the plan was confirmed "more than two years before the amendment to § 1930(a)(6) became effective").

Accordingly, a closer look at the practical realities confirms that a good-faith effort to collect about $4 million from approximately 48 cases would substantially reduce the historical fee disparity. See Gov't Br. 39-40.[3]

b. On the other side of the ledger, respondents have not refuted the practical problems that would be associated with administering refunds of $326 million (or more) in 2100 cases that paid increased fees in the UST districts. To obtain a payment from the Judgment

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[3] Respondents describe (Br. 17) the government's plans for a collection-based remedy as "half-baked." But the government's primary submission is that no collection remedy is required, and developing and implementing a specific plan is accordingly premature. Moreover, the BA districts are under the control of the Judicial Branch rather than the Executive, limiting the government's ability to access information and make plans in the absence of a judicial decision providing that the government should undertake a collection effort. If the Court concludes that collecting previously underpaid fees is appropriate, the government will work with the Judicial Conference and officials in BA districts to implement that remedy.

Fund, see Gov't Br. 36 n.3, a final judgment or compromise settlement is required. See 31 U.S.C. 1304. Because the fee-collection system in UST districts operates on a rolling, first-in-first-out basis, with payments applied to the earliest outstanding fees and interest due, identifying the payment transactions for the relevant quarters will be a substantial administrative undertaking in many cases. Thus, as a practical matter, an entity seeking a refund would need to come forward with evidence about the amount of overpayments in relevant quarters. Even when the amount is determined, about 85% of the 2100 UST cases that paid the higher fees have been closed. Some plans may not have anticipated, or clearly resolved how to handle, the availability of additional funds. Cases may need to be reopened to allow a trustee to pursue payment, and additional litigation may be required to resolve whether a refund may be retained by the reorganized debtor or should be distributed to creditors of the bankruptcy estate (such as secured creditors whose financing was used to pay increased fees under the 2017 Act).

3. Aside from the practical challenges of administering refunds on such a wide scale, the fiscal burdens would fall on taxpayers, whom Congress "plainly meant to protect." *Califano* v. *Westcott*, 443 U.S. 76, 90 (1979). Respondents do not and cannot dispute that, particularly in light of the pending class action, the burden is likely to be hundreds of millions of dollars, Gov't Br. 36. And if courts adopt a broader theory that is being pressed in at least one case, the costs could substantially exceed $326 million. See Gov't Br. 37. Although respondents dismiss that as a "modest practical effect," Br. 21, it flouts Congress's consistent efforts to prevent

taxpayers from shouldering the costs of administering the bankruptcy system. See Gov't Br. 37.

Respondents assert (Br. 21) that the UST System Fund can "cover a refund in this case"—*i.e.*, the $2.5 million that they seek. But the UST System Fund—which serves the important programmatic purpose of offsetting the USTP's appropriations—could not cover the entire universe of refunds associated with *Siegel* violations, which the Court must consider if it is seeking a rule that will restore historical uniformity when applied to other cases. In any event, as respondents acknowledge (Br. 21), using *any* money from the UST System Fund would require congressional action to enable that "reallocati[on]."

Respondents have no answer to the problem that a refund remedy would read the 2017 Act to accomplish precisely the opposite of its intended effect, requiring taxpayers to fund a windfall for the bankruptcy system's largest users. It is not enough to say (Br. 21) that Congress "sat on its hands for over three years before passing the 2020 Act." In selecting the appropriate remedy, courts "must adopt the remedial course" that Congress itself would have chosen. *Morales-Santana*, 582 U.S. at 77; see Gov't Br. 14.

4. Respondents next suggest (Br. 35-36 & n.11) that a collection-based remedy would require separate statutory authorization. But the statutory authorization for collection would come from the 2017 Act as interpreted by this Court to eliminate the uniformity violation—an interpretation that, under basic retroactivity principles, applies nunc pro tunc to the date of the law's enactment. See p. 14, *supra*. And respondents cannot seriously contend that the 2017 Act failed to authorize the imposition of higher fees in BA districts—after all, the Judicial

Conference ordered the BA districts to increase fees under the 2017 Act (albeit belatedly), and the BA districts complied with that order well before this Court's decision in *Siegel*. See Gov't Br. 5. Having identified unconstitutional discrimination in quarterly fees, the Court may now recognize that the constitutional problem would be adequately remedied by making additional collections to reduce the underpayments made by a few dozen debtors in the BA districts. See *McKesson*, 496 U.S. at 39-40.

5. Finally, respondents suggest (Br. 38) that additional collections in BA districts could raise due-process concerns. But a retrospective collection does not necessarily violate due process, and such concerns are at their lowest ebb here in light of the statutory language requiring that any BA fees be "equal to those imposed" in UST districts, 28 U.S.C. 1930(a)(7) (2012), and the standing order of the Judicial Conference referring to the statutory amounts "as those amounts may be amended from time to time"—both of which were in place at the time of the BA debtors' underpayments. See Gov't Br. 42-43. Respondents do not address those points. And their contrary arguments rest on the mistaken assumption that collections would require reopening closed bankruptcy cases. Accordingly, to the extent that backward-looking relief is required, the appropriate relief is a collection remedy, rather than a refund remedy that would "disrespect the democratic process" by burdening the third-party taxpayers that Congress "made crystal clear" it wanted to spare. *AAPC*, 140 S. Ct. at 2356 (plurality opinion).

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

DECEMBER 2023

APPENDIX

TABLE OF CONTENTS

LIST OF CASES IN BANKRUPTCY ADMINSITRATOR DISTRICTS IDENTIFIED BY THE GOVERNMENT AS UNDERPAYING QUARTERLY FEES DUE TO THE DISPARITY AT ISSUE IN *SIEGEL*

ordered by filing date, with current case status, number of quarters with an underpayment, and total underpayment*

1. *In re BFW Liquidation, LLC*, No. 09-634 (Bankr. N.D. Ala. filed Feb. 5, 2009), case open, 1 quarter, $24,421
2. *In re Colonial BancGroup Inc.*, No. 09-32303 (Bankr. M.D. Ala. filed Aug. 25, 2009), case open, 2 quarters, $23,298
3. *In re New Bern Riverfront Dev., LLC*, No. 09-10340 (Bankr. E.D.N.C. filed Nov. 30, 2009), case closed, 1 quarter, $190,558
4. *In re Garlock Sealing Techs. LLC*, No. 10-31607 (Bankr. W.D.N.C. filed June 5, 2010), case closed, 1 quarter, $230,000

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* As explained in the government's reply brief (at 16-17 & n.2, *supra*), this list was largely derived from information that the government obtained on December 8, 2023, from the Administrative Office of U.S. Courts in response to a request, pursuant to 20 *Guide to Judiciary Policy* § 830 (2016), for production of records for use in a legal proceeding. The information included reports about quarterly fees made in Chapter 11 cases in 5 of the 6 districts with Bankruptcy Administrators for the quarters between January 1, 2018 and March 31, 2021. In each of 2 districts, there was no report for one quarter during the period of the *Seigel* fee disparity. There were no reports for the Northern District of Alabama, but the list includes the three cases from that district that the government identified from public-docket information, as explained in its opening brief (at 39 n.4) and its reply brief (at 17, *supra*).

5. *In re Garrison Litig. Mgmt. Grp., Ltd.*, No. 10-31608 (Bankr. W.D.N.C. filed June 5, 2010), case closed, 1 quarter, $16,851
6. *In re Winslow*, No. 10-6745 (Bankr. E.D.N.C. filed Aug. 23, 2010), case closed, 1 quarter, $3,534
7. *In re Seltzer*, No. 11-32823 (Bankr. W.D.N.C. filed Nov. 4, 2011), case closed, 1 quarter, $8,821
8. *In re Parker*, No. 12-3128 (Bankr. E.D.N.C. filed Apr. 25, 2012), case closed, 1 quarter, $4,014
9. *In re Auman*, No. 13-10057 (Bankr. M.D.N.C. filed Jan. 16, 2013), case open, 1 quarter, $10,928
10. *In re Province Grande Olde Liberty, LLC*, No. 13-1563 (Bankr. E.D.N.C. filed Mar. 11, 2013), case closed, 1 quarter, $4,338
11. *In re DesignLine Corp.*, No. 13-31943 (Bankr. W.D.N.C. filed Aug. 15, 2013), case closed, 1 quarter, $16,605
12. *In re Craig*, No. 14-2197 (Bankr. E.D.N.C. filed Apr. 16, 2014), case closed, 1 quarter, $3,801
13. *In re Overbeck*, No. 14-3809 (Bankr. E.D.N.C. filed July 2, 2014), case closed, 1 quarter, $17,161
14. *In re Williams*, No. 14-4290 (Bankr. E.D.N.C. filed July 25, 2014), case closed, 1 quarter, $5,642

15. *In re C.W. Williams Comm. Health Ctr., Inc.*, No. 14-32010 (Bankr. W.D.N.C. filed Nov. 26, 2014), case closed, 1 quarter, $5,816
16. *In re Veros Energy, LLC*, No. 15-70470 (Bankr. N.D. Ala. filed Apr. 6, 2015), case closed, 2 quarters, $24,978
17. *In re Peppertree-Atlantic Beach Assoc., Inc.*, No. 15-2700 (Bankr. E.D.N.C. filed May 13, 2015), case closed, 1 quarter, $7,750
18. *In re United Plastic Recycling, Inc.*, No. 15-32928 (Bankr. M.D. Ala. filed Oct. 16, 2015), case closed, 1 quarter, $10,798
19. *In re Kaiser Gypsum Co.*, No. 16-31602 (Bankr. W.D.N.C. filed Sept. 30, 2016), case open, 11 quarters, $167,496
20. *In re Hanson Permanente Cement, Inc.*, No. 16-31614 (Bankr. W.D.N.C. filed Sept. 30, 2016), case open, 9 quarters, $62,444
21. *In re Skin Sense, Inc.*, No. 16-5626 (Bankr. E.D.N.C. filed Oct. 28, 2016), case closed, 1 quarter, $13,704
22. *In re Madison Constr. Grp., Inc.*, No. 16-32006 (Bankr. W.D.N.C. filed Dec. 15, 2016), case closed, 1 quarter, $13,442
23. *In re Tanner Cos. LLC*, No. 17-40029 (Bankr. W.D.N.C. filed Jan. 27, 2017), case closed, 1 quarter, $21,211
24. *In re Aycock Bros., Inc.*, No. 17-1266 (Bankr. E.D.N.C. filed Mar. 15, 2017), case closed, 1 quarter, $8,502

25. *In re Morehead Mem'l Hosp.*, No. 17-10775
(Bankr. M.D.N.C. filed July 10, 2017),
case closed, 6 quarters, $213,442
26. *In re Dynamic Int'l Airways, LLC*, No. 17-10814
(Bankr. M.D.N.C. filed July 19, 2017),
case closed, 3 quarters, $405,383
27. *In re Alevo Mfg., Inc.*, No. 17-50877
(Bankr. M.D.N.C. filed Aug. 18, 2017),
case closed, 1 quarter, $6,564
28. *In re Black Sheep Food Grp., LLC*, No. 17-4372
(Bankr. E.D.N.C. filed Sept. 6, 2017),
case closed, 1 quarter, $4,232
29. *In re Horizon Shipbuilding, Inc.*, No. 17-4041
(Bankr. S.D. Ala. filed Oct. 24, 2017),
case open, 1 quarter, $20,388
30. *In re Bestwall LLC*, No. 17-31795
(Bankr. W.D.N.C. filed Nov. 2, 2017),
case open, 13 quarters, $895,558
31. *In re Randolph & Randolph LLC*, No. 17-72125
(Bankr. N.D. Ala. filed Dec. 8, 2017),
case closed, 1 quarter, $3,625
32. *In re Amidon, Inc.*, No. 17-6237
(Bankr. E.D.N.C. filed Dec. 26, 2017),
case closed, 2 quarters, $27,560
33. *In re ASCO Liquidating Co.*, No. 18-50018
(Bankr. M.D.N.C. filed Jan. 8, 2018),
case closed, 2 quarters, $164,131
34. *In re Dupree Farms, LLC*, No. 18-216
(Bankr. E.D.N.C. filed Jan. 16, 2018),
case open, 10 quarters, $89,455

35. *In re Wayne Bailey, Inc.*, No. 18-284
(Bankr. E.D.N.C. filed Jan. 21, 2018),
case closed, 3 quarters, $142,232
36. *In re Adams*, No. 18-496
(Bankr. E.D.N.C. filed Feb. 2, 2018),
case closed, 1 quarter, $13,741
37. *In re BK Racing, LLC*, No. 18-30241
(Bankr. W.D.N.C. filed Feb. 15, 2018),
case open, 3 quarters, $21,694
38. *In re Carolina Hotel Inv'rs — Crabtree, LLC*,
No. 18-30414 (Bankr. W.D.N.C. filed Mar. 14, 2018),
case closed, 3 quarters, $13,795
39. *In re Ace Motor Acceptance Corp.*, No. 18-30426
(Bankr. W.D.N.C. filed Mar. 15, 2018),
case closed, 4 quarters, $112,533
40. *In re Southern Produce Distribs., Inc.*,
No. 18-2010 (Bankr. E.D.N.C. filed Apr. 20, 2018),
case closed, 5 quarters, $390,446
41. *In re Schletter Inc.*, No. 18-40169
(Bankr. W.D.N.C. filed Apr. 24, 2018),
case open, 2 quarters, $29,091
42. *In re Godwin*, No. 18-2428
(Bankr. E.D.N.C. filed May 14, 2018),
case closed, 1 quarter, $11,704
43. *In re Robert L. Dawson Farms, LLC*, No. 18-2433
(Bankr. E.D.N.C. filed May 14, 2018),
case closed, 2 quarters, $11,780
44. *In re 315 North Acad., LLC*, No. 18-3138
(Bankr. E.D.N.C. filed June 22, 2018),
case closed, 1 quarter, $6,232

45. *In re Diverse Label Printing, LLC*, No. 18-10792 (Bankr. M.D.N.C. filed July 23, 2018), case closed, 5 quarters, $147,338
46. *In re Telescope Mgmt. Grp., LLC*, No. 18-4012 (Bankr. E.D.N.C. filed Aug. 10, 2018), case closed, 4 quarters, $44,682
47. *In re Memento Mori, LLC*, No. 18-4661 (Bankr. E.D.N.C. filed Sept. 20, 2018), case closed, 6 quarters, $82,468
48. *In re James B. Morris Farms, Inc.*, No. 18-4675 (Bankr. E.D.N.C. filed Sept. 21, 2018), case closed, 3 quarters, $23,340