

IN THE SUPREME COURT OF THE UNITED STATES

No. 22A885

OFFICE OF THE UNITED STATES TRUSTEE,
APPLICANT

v.

JOHN Q. HAMMONS FALL 2006, LLC; ACLOST, LLC; BRICKTOWN RESIDENCE CATERING CO., INC.; CHATEAU CATERING CO., INC.; CHATEAU LAKE, LLC; CITY CENTRE HOTEL CORP.; CIVIC CENTER REDEVELOPMENT CORP.; CONCORD GOLF CATERING CO., INC.; CONCORD HOTEL CATERING CO., INC.; EAST PEORIA CATERING CO., INC.; FORT SMITH CATERING CO., INC.; FRANKLIN/CRESCENT CATERING CO., INC.; GLENDALE COYOTES CATERING CO., INC.; GLENDALE COYOTES HOTEL CATERING CO., INC.; HAMMONS OF ARKANSAS, LLC; HAMMONS OF COLORADO, LLC; HAMMONS OF FRANKLIN, LLC; HAMMONS OF FRISCO, LLC; HAMMONS OF HUNTSVILLE, LLC; HAMMONS OF LINCOLN, LLC; HAMMONS OF NEW MEXICO, LLC; HAMMONS OF OKLAHOMA CITY, LLC; HAMMONS OF RICHARDSON, LLC; HAMMONS OF ROGERS, INC.; HAMMONS OF SIOUX FALLS, LLC; HAMMONS OF SOUTH CAROLINA, LLC; HAMMONS OF TULSA, LLC; HAMMONS, INC.; HAMPTON CATERING CO., INC.; HOT SPRINGS CATERING CO., INC.; HUNTSVILLE CATERING, LLC; INTERNATIONAL CATERING CO., INC.; JQH - ALLEN DEVELOPMENT, LLC; JQH - CONCORD DEVELOPMENT, LLC; JQH - EAST PEORIA DEVELOPMENT, LLC; JQH - FT. SMITH DEVELOPMENT, LLC; JQH - GLENDALE AZ DEVELOPMENT, LLC; JQH - KANSAS CITY DEVELOPMENT, LLC; JQH - LA VISTA CY DEVELOPMENT, LLC; JQH - LA VISTA CONFERENCE CENTER DEVELOPMENT, LLC; JQH - LA VISTA III DEVELOPMENT, LLC; JQH - LAKE OF THE OZARKS DEVELOPMENT, LLC; JQH - MURFREESBORO DEVELOPMENT, LLC; JQH - NORMAL DEVELOPMENT, LLC; JQH - NORMAN DEVELOPMENT, LLC; JQH - OKLAHOMA CITY BRICKTOWN DEVELOPMENT, LLC; JQH - OLATHE DEVELOPMENT, LLC; JQH - PLEASANT GROVE DEVELOPMENT, LLC; JQH - ROGERS CONVENTION CENTER DEVELOPMENT, LLC; JQH - SAN MARCOS DEVELOPMENT, LLC; JOHN Q. HAMMONS 2015 LOAN HOLDINGS, LLC; JOHN Q. HAMMONS CENTER, LLC; JOHN Q. HAMMONS HOTELS DEVELOPMENT, LLC; JOHN Q. HAMMONS HOTELS MANAGEMENT I CORPORATION; JOHN Q. HAMMONS HOTELS MANAGEMENT II, LP; JOHN Q. HAMMONS HOTELS MANAGEMENT, LLC; JOPLIN RESIDENCE CATERING CO., INC.; JUNCTION CITY CATERING CO., INC.; KC RESIDENCE CATERING CO., INC.; LA VISTA CY CATERING CO., INC.; LA VISTA ES CATERING CO., INC.; LINCOLN P STREET CATERING CO., INC.; LOVELAND CATERING CO., INC.; MANZANO CATERING CO., INC.; MURFREESBORO CATERING CO., INC.; NORMAL CATERING CO., INC.; OKC COURTYARD CATERING CO., INC.; R-2 OPERATING CO., INC.; REVOCABLE TRUST OF JOHN Q.

HAMMONS DATED DECEMBER 28, 1989 AS AMENDED AND RESTATED; RICHARDSON HAMMONS, LP; ROGERS ES CATERING CO., INC.; SGF - COURTYARD CATERING CO., INC.; SIOUX FALLS CONVENTION/ARENA CATERING CO., INC.; ST. CHARLES CATERING CO., INC.; TULSA/169 CATERING CO., INC.; U.P. CATERING CO., INC.

APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Pursuant to Rules 13.5 and 30.2 of the Rules of this Court, the Solicitor General, on behalf of the Office of the United States Trustee, respectfully requests a further, 28-day extension of time, to and including June 23, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case. The court of appeals entered its judgment on August 15, 2022, and denied a petition for rehearing on January 26, 2023. By order dated April 11, 2023, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to May 26, 2023. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1). The appendix to this application includes the order of the court of appeals (after this Court's earlier remand), which is not reported in the Federal Reporter but is available at 2022 WL 3354682; the prior opinion of the court of appeals, which is re-

ported at 15 F.4th 1011; and the order of the court of appeals denying rehearing. App., infra, 1a-25a.

1. Federal bankruptcy cases require substantial oversight and administrative support. In 88 federal judicial districts, the United States Trustee (UST) Program performs those functions; in 6 other districts, the Bankruptcy Administrator (BA) Program, which relies on judicially appointed bankruptcy administrators, plays that role.

Congress has required Chapter 11 debtors to pay quarterly fees in UST districts. 28 U.S.C. 1930(a)(6). An adjoining statutory provision had long provided that "the Judicial Conference of the United States may require the debtor in a case under chapter 11 [filed in a BA district] to pay fees equal to those imposed" in U.S. Trustee districts under section 1930(a)(6). 28 U.S.C. 1930(a)(7) (2018). In 2001, the Judicial Conference directed the BA districts to impose quarterly fees "in the amounts specified in 28 U.S.C. § 1930, as those amounts may be amended from time to time." Judicial Conference of the United States, Report of the Proceedings of the Judicial Conference of the United States 46 (Sept./Oct. 2001) (2001 JCUS Report), https://www.uscourts.gov/sites/default/files/2001-09_0.pdf.

In 2017, following a sharp reduction in collections, the existing fee structure proved inadequate to fund the UST Program. Congress therefore mandated a temporary increase, beginning in

January 2018, in quarterly fees in the largest Chapter 11 cases. Bankruptcy Judgeship Act of 2017 (2017 Act), Pub. L. No. 115-72, Div. B, § 1004(a), 131 Stat. 1232 (28 U.S.C. 1930(a)(6)(B) (2018)). Despite the Judicial Conference's 2001 order imposing quarterly fees in BA districts "in the amounts specified in 28 U.S.C. § 1930, as those amounts may be amended from time to time," 2001 JCUS Report 46, the six BA districts did not implement the amended fee schedule in January 2018. In response, the Executive Committee of the Judicial Conference, acting on an expedited basis, ordered the BA districts to implement the amended fee schedule, but only for "cases filed on or after" October 1, 2018. Judicial Conference of the United States, Report of the Proceedings of the Judicial Conference of the United States 11-12 (Sept. 13, 2018), https://www.uscourts.gov/sites/default/files/2018-09_proceedings.pdf.

After some courts held that the 2017 Act was unconstitutionally non-uniform based on their view that Congress had authorized different fees in BA and UST districts, see, e.g., In re Buffets, LLC, 597 B.R. 588, 594 (Bankr. W.D. Tex. 2019), rev'd and remanded, 979 F.3d 366 (5th Cir. 2020), Congress enacted clarifying legislation that struck the word "may" from Section 1930(a)(7) and replaced it with "shall." Bankruptcy Administration Improvement Act of 2020 (2020 Act), Pub. L. No. 116-325, § 3(d)(2), 134 Stat. 5088. As amended, the text of Section 1930(a)(7) now provides that, for BA districts, the "Judicial Conference of the United

States shall require the debtor in a case under chapter 11 * * * to pay fees equal to those imposed by paragraph (6) of this subsection.” 28 U.S.C. 1930(a)(7) (Supp. II 2020) (emphasis added). An express legislative finding explained that the change was intended to “confirm the longstanding intention of Congress that quarterly fee requirements remain consistent across all Federal judicial districts.” 2020 Act § 2(a)(4)(B), 134 Stat. 5086.

Last year, in Siegel v. Fitzgerald, 142 S. Ct. 1770 (2022), this Court held that the 2017 Act violated the uniformity requirement of the Bankruptcy Clause because the statutory scheme permitted unequal fees in the UST and BA districts, and different fees were in fact imposed. Id. at 1782-1783. In reaching that conclusion, the Court recognized that there was “ample evidence that Congress likely understood, when it passed the 2017 Act, that the Judicial Conference would impose the same fee increase [in the BA districts].” Id. at 1782 n.2. The Court expressly left open the question of “the appropriate remedy” for the violation that resulted when the BA districts did not in fact impose the fee increase, recognizing the government’s arguments “that any remedy should apply only prospectively, or should result in a fee increase for debtors who paid less in the [BA] districts.” Id. at 1783. The Court remanded for the Fourth Circuit “to consider these questions in the first instance.” Ibid.

2. This separate case arose in 2016, when 76 entities associated with John Q. Hammons Hotels and Resorts sought relief under Chapter 11 of the Bankruptcy Code in the District of Kansas, a UST district. Initially, the debtors paid quarterly fees under the amended schedule that took effect in January 2018. But in 2020, the debtors filed a motion in bankruptcy court seeking a partial refund of quarterly fees on the ground that the 2017 Act was unconstitutionally non-uniform because the statutory fee increase was implemented differently in the UST and the BA districts.

a. The bankruptcy court rejected the debtors' claim, ruling that the 2017 Act survives constitutional scrutiny. The court of appeals reversed in relevant part. App., infra, 7a-23a. It concluded that the 2017 Act was unconstitutionally non-uniform. Id. at 12a; id. at 17a-21a; but see id. at 22a-23a (Bacharach, J., dissenting).

As relevant here, the court of appeals initially held that the debtors are entitled to "a refund of the amount of quarterly fees paid exceeding the amount that Debtors would have owed in a Bankruptcy Administrator district during the same period," and remanded for the bankruptcy court to determine that amount. App., infra, 22a. The court did not dispute that "courts can remedy unequal treatment either by expanding or withdrawing benefits, depending on legislative intent" or that "here, Congress intended to increase quarterly fees nationwide." Id. at 21a. But it

reasoned that it “lack[s] authority over quarterly fees assessed in districts outside our circuit, and thus in Alabama or North Carolina,” and that debtors “are entitled to relief.” Id. at 22a.

b. The Office of the United States Trustee filed a petition for certiorari, asking the Court to hold the petition pending its decision in Siegel, supra. See Pet. 13, Office of the United States Trustee v. John Q. Hammons Fall 2006 LLC, No. 21-1078 (filed Feb. 2, 2022).

After this Court issued its decision in Siegel -- which agreed with the court of appeals that the 2017 Act was unconstitutional but left open the question of the appropriate remedy for that violation -- the Court granted certiorari in this case, vacated the court of appeals’ judgment, and remanded to the court of appeals “for further consideration in light of Siegel.” 142 S. Ct. 2810 (2022).

c. On remand, the court of appeals issued an unpublished order stating that it would “reinstate [its] original opinion,” which had determined that a refund to the UST debtors was the appropriate remedy. App., infra, 6a. The court noted that it had “careful[ly] consider[ed]” this Court’s opinion in Siegel and the supplemental briefs it received after remand, but it did not otherwise explain its reasoning. See ibid.

d. The court of appeals subsequently denied a petition for rehearing. App., infra, 24a-25a.

3. The Solicitor General has not yet determined whether to file a petition for a writ of certiorari in this case on behalf of the Office of the United States Trustee. The question of the appropriate remedy for the bankruptcy uniformity violation found in Siegel, supra, is currently pending before the Eleventh Circuit in United States Trustee Region 21 v. Bast Amron LLP, No. 20-12547-JJ (oral argument held on February 13, 2023), and before the Ninth Circuit in USA Sales, Inc. v. Office of the United States Trustee, No. 21-55642 (oral argument scheduled for June 7, 2023). If the Eleventh Circuit issues its decision soon, its resolution may inform the Solicitor General's decision as to seeking further review in this case or in In re Clinton Nurseries, Inc., 53 F.4th 15 (2d Cir. 2022), which also presents the same question and in which Justice Sotomayor has extended the time to file a petition for a writ of certiorari to June 16, 2023, see Harrington v. Clinton Nurseries, Inc., No. 22A960 (May 3, 2023). Additional time is also needed for further consultation within the Department of Justice to make a final determination about the potential legal and practical ramifications of the court of appeals' decision. And additional time is needed for preparing and printing a petition in the event that one is authorized to be filed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

MAY 2023

APPENDIX

Court of appeals order reinstating opinion after this
Court's vacatur and remand (Aug. 15, 2022).....1a

Court of appeals opinion (Oct. 5, 2021).....7a

Court of appeals order denying rehearing (Jan. 26, 2023).....24a

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

August 15, 2022

Christopher M. Wolpert
Clerk of Court

In re: JOHN Q. HAMMONS FALL 2006, LLC; ACLOST, LLC; BRICKTOWN RESIDENCE CATERING CO., INC.; CHATEAU CATERING CO., INC.; CHATEAU LAKE, LLC; CITY CENTRE HOTEL CORP.; CIVIC CENTER REDEVELOPMENT CORP.; CONCORD GOLF CATERING CO., INC.; CONCORD HOTEL CATERING CO., INC.; EAST PEORIA CATERING CO., INC.; FORT SMITH CATERING CO., INC.; FRANKLIN/CRESCENT CATERING CO., INC.; GLENDALE COYOTES CATERING CO., INC.; GLENDALE COYOTES HOTEL CATERING CO., INC.; HAMMONS OF ARKANSAS, LLC; HAMMONS OF COLORADO, LLC; HAMMONS OF FRANKLIN, LLC; HAMMONS OF FRISCO, LLC; HAMMONS OF HUNTSVILLE, LLC; HAMMONS OF LINCOLN, LLC; HAMMONS OF NEW MEXICO, LLC; HAMMONS OF OKLAHOMA CITY, LLC; HAMMONS OF RICHARDSON, LLC; HAMMONS OF ROGERS, INC.; HAMMONS OF SIOUX FALLS, LLC; HAMMONS OF SOUTH CAROLINA, LLC; HAMMONS OF TULSA, LLC; HAMMONS, INC.; HAMPTON CATERING CO., INC.; HOT SPRINGS CATERING CO., INC.; HUNTSVILLE CATERING, LLC; INTERNATIONAL CATERING CO., INC.; JQH - ALLEN DEVELOPMENT, LLC; JQH - CONCORD DEVELOPMENT, LLC; JQH - EAST PEORIA DEVELOPMENT, LLC; JQH - FT. SMITH DEVELOPMENT, LLC; JQH

No. 20-3203
(16-21142)
(United States Bankruptcy Court for the
District of Kansas)

- GLENDALE AZ DEVELOPMENT, LLC; JQH - KANSAS CITY DEVELOPMENT, LLC; JQH - LA VISTA CY DEVELOPMENT, LLC; JQH - LA VISTA CONFERENCE CENTER DEVELOPMENT, LLC; JQH - LA VISTA III DEVELOPMENT, LLC; JQH - LAKE OF THE OZARKS DEVELOPMENT, LLC; JQH - MURFREESBORO DEVELOPMENT, LLC; JQH - NORMAL DEVELOPMENT, LLC; JQH - NORMAN DEVELOPMENT, LLC; JQH - OKLAHOMA CITY BRICKTOWN DEVELOPMENT, LLC; JQH - OLATHE DEVELOPMENT, LLC; JQH - PLEASANT GROVE DEVELOPMENT, LLC; JQH - ROGERS CONVENTION CENTER DEVELOPMENT, LLC; JQH - SAN MARCOS DEVELOPMENT, LLC; JOHN Q. HAMMONS 2015 LOAN HOLDINGS, LLC; JOHN Q. HAMMONS CENTER, LLC; JOHN Q. HAMMONS HOTELS DEVELOPMENT, LLC; JOHN Q. HAMMONS HOTELS MANAGEMENT I CORPORATION; JOHN Q. HAMMONS HOTELS MANAGEMENT II, LP; JOHN Q. HAMMONS HOTELS MANAGEMENT, LLC; JOPLIN RESIDENCE CATERING CO., INC.; JUNCTION CITY CATERING CO., INC.; KC RESIDENCE CATERING CO., INC.; LA VISTA CY CATERING CO., INC.; LA VISTA ES CATERING CO., INC.; LINCOLN P STREET CATERING CO., INC.; LOVELAND CATERING CO., INC.; MANZANO CATERING CO., INC.; MURFREESBORO CATERING CO., INC.; NORMAL CATERING CO., INC.; OKC COURTYARD CATERING CO., INC.; R-2 OPERATING CO., INC.; REVOCABLE TRUST OF JOHN Q. HAMMONS DATED DECEMBER 28,

1989 AS AMENDED AND RESTATED;
 RICHARDSON HAMMONS, LP;
 ROGERS ES CATERING CO., INC.; SGF
 - COURTYARD CATERING CO., INC.;
 SIOUX FALLS CONVENTION/ARENA
 CATERING CO., INC.; ST. CHARLES
 CATERING CO., INC.; TULSA/169
 CATERING CO., INC.; U.P. CATERING
 CO., INC.,

Debtors.

JOHN Q. HAMMONS FALL 2006, LLC;
 ACLOST, LLC; BRICKTOWN
 RESIDENCE CATERING CO., INC.;
 CHATEAU CATERING CO., INC.;
 CHATEAU LAKE, LLC; CITY CENTRE
 HOTEL CORP.; CIVIC CENTER
 REDEVELOPMENT CORP.; CONCORD
 GOLF CATERING CO., INC.;
 CONCORD HOTEL CATERING CO.,
 INC.; EAST PEORIA CATERING CO.,
 INC.; FORT SMITH CATERING CO.,
 INC.; FRANKLIN/CRESCENT
 CATERING CO., INC.; GLENDALE
 COYOTES CATERING CO., INC.;
 GLENDALE COYOTES HOTEL
 CATERING CO., INC.; HAMMONS OF
 ARKANSAS, LLC; HAMMONS OF
 COLORADO, LLC; HAMMONS OF
 FRANKLIN, LLC; HAMMONS OF
 FRISCO, LLC; HAMMONS OF
 HUNTSVILLE, LLC; HAMMONS OF
 LINCOLN, LLC; HAMMONS OF NEW
 MEXICO, LLC; HAMMONS OF
 OKLAHOMA CITY, LLC; HAMMONS
 OF RICHARDSON, LLC; HAMMONS
 OF ROGERS, INC.; HAMMONS OF
 SIOUX FALLS, LLC; HAMMONS OF
 SOUTH CAROLINA, LLC; HAMMONS
 OF TULSA, LLC; HAMMONS, INC.;

HAMPTON CATERING CO., INC.; HOT SPRINGS CATERING CO., INC.; HUNTSVILLE CATERING, LLC; INTERNATIONAL CATERING CO., INC.; JQH - ALLEN DEVELOPMENT, LLC; JQH - CONCORD DEVELOPMENT, LLC; JQH - EAST PEORIA DEVELOPMENT, LLC; JQH - FT. SMITH DEVELOPMENT, LLC; JQH - GLENDALE AZ DEVELOPMENT, LLC; JQH - KANSAS CITY DEVELOPMENT, LLC; JQH - LA VISTA CY DEVELOPMENT, LLC; JQH - LA VISTA CONFERENCE CENTER DEVELOPMENT, LLC; JQH - LA VISTA III DEVELOPMENT, LLC; JQH - LAKE OF THE OZARKS DEVELOPMENT, LLC; JQH - MURFREESBORO DEVELOPMENT, LLC; JQH - NORMAL DEVELOPMENT, LLC; JQH - NORMAN DEVELOPMENT, LLC; JQH - OKLAHOMA CITY BRICKTOWN DEVELOPMENT, LLC; JQH - OLATHE DEVELOPMENT, LLC; JQH - PLEASANT GROVE DEVELOPMENT, LLC; JQH - ROGERS CONVENTION CENTER DEVELOPMENT, LLC; JQH - SAN MARCOS DEVELOPMENT, LLC; JOHN Q. HAMMONS 2015 LOAN HOLDINGS, LLC; JOHN Q. HAMMONS CENTER, LLC; JOHN Q. HAMMONS HOTELS DEVELOPMENT, LLC; JOHN Q. HAMMONS HOTELS MANAGEMENT I CORPORATION; JOHN Q. HAMMONS HOTELS MANAGEMENT II, LP; JOHN Q. HAMMONS HOTELS MANAGEMENT, LLC; JOPLIN RESIDENCE CATERING CO., INC.; JUNCTION CITY CATERING CO., INC.; KC RESIDENCE CATERING CO., INC.; LA VISTA CY CATERING CO., INC.; LA VISTA ES CATERING CO., INC.; LINCOLN P STREET

CATERING CO., INC.; LOVELAND
CATERING CO., INC.; MANZANO
CATERING CO., INC.;
MURFREESBORO CATERING CO.,
INC.; NORMAL CATERING CO., INC.;
OKC COURTYARD CATERING CO.,
INC.; R-2 OPERATING CO., INC.;
REVOCABLE TRUST OF JOHN Q.
HAMMONS DATED DECEMBER 28,
1989 AS AMENDED AND RESTATED;
RICHARDSON HAMMONS, LP;
ROGERS ES CATERING CO., INC.; SGF
- COURTYARD CATERING CO., INC.;
SIOUX FALLS CONVENTION/ARENA
CATERING CO., INC.; ST. CHARLES
CATERING CO., INC.; TULSA/169
CATERING CO., INC.; U.P. CATERING
CO., INC.,

Appellants,

v.

OFFICE OF THE UNITED STATES
TRUSTEE,

Appellee,

ACADIANA MANAGEMENT GROUP,
LLC; ALBUQUERQUE-AMG
SPECIALTY HOSPITAL, LLC;
CENTRAL INDIANA-AMG SPECIALTY
HOSPITAL, LLC; LTAC HOSPITAL OF
EDMOND, LLC; HOUMA-AMG
SPECIALTY HOSPITAL, LLC; LTAC OF
LOUISIANA, LLC; LAS VEGAS-AMG
SPECIALTY HOSPITAL, LLC;
WARREN BOEGEL; BOEGEL FARMS,
LLC and THREE BO'S, INC.

Amici Curiae.

ORDER AND JUDGMENT*

Before **BACHARACH, EBEL, and PHILLIPS**, Circuit Judges.

This matter is before the court following our receipt of the United States Supreme Court's order granting certiorari, vacating our judgment, and remanding for further consideration in light of *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (2022). See *Office of the United States Trustee v. John Q. Hammons Fall 2006, LLC*, 142 S. Ct. 2810 (2022). The Supreme Court's judgment issued on July 15, 2022. That same day, we recalled our mandate and ordered the parties to file supplemental briefs regarding the impact of *Siegel* on this appeal.

Upon careful consideration of the parties' supplemental briefs and the Supreme Court's *Siegel* opinion, we reinstate our original opinion, *In re: John Q. Hammons Fall 2006, LLC*, 15 F.4th 1011 (10th Cir. 2021). We reverse and remand for determination of Appellants' quarterly Chapter 11 fees and a refund of overpayment consistent with our original opinion.

Entered for the Court,

Gregory A. Phillips
Circuit Judge

* This order and judgment is not binding precedent, except under the doctrines of law of the case, *res judicata*, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

IN RE JOHN Q. HAMMONS FALL 2006, LLC

1011

Cite as 15 F.4th 1011 (10th Cir. 2021)

III.

We hold that the district court's order requiring the Secretary to disclose the identities of informant witnesses and their unredacted witness statements by April 2, 2021, is not "clearly erroneous as a matter of law." *Bauman*, 557 F.2d at 654. The petition for writ of mandamus is accordingly DENIED.



IN RE: JOHN Q. HAMMONS FALL 2006, LLC; ACLOST, LLC; Bricktown Residence Catering Co., Inc.; Chateau Catering Co., Inc.; Chateau Lake, LLC; City Centre Hotel Corp.; Civic Center Redevelopment Corp.; Concord Golf Catering Co., Inc.; Concord Hotel Catering Co., Inc.; East Peoria Catering Co., Inc.; Fort Smith Catering Co., Inc.; Franklin/Crescent Catering Co., Inc.; Glendale Coyotes Catering Co., Inc.; Glendale Coyotes Hotel Catering Co., Inc.; Hammons of Arkansas, LLC; Hammons of Colorado, LLC; Hammons of Franklin, LLC; Hammons of Frisco, LLC; Hammons of Huntsville, LLC; Hammons of Lincoln, LLC; Hammons of New Mexico, LLC; Hammons of Oklahoma City, LLC; Hammons of Richardson, LLC; Hammons of Rogers, Inc.; Hammons of Sioux Falls, LLC; Hammons of South Carolina, LLC; Hammons of Tulsa, LLC; Hammons, Inc.; Hampton Catering Co., Inc.; Hot Springs Catering Co., Inc.; Huntsville Catering, LLC; International Catering Co., Inc.; JQH - Allen Development, LLC; JQH - Concord Development, LLC; JQH - East Peoria Development, LLC; JQH - Ft. Smith Development, LLC; JQH - Glendale AZ Development, LLC;

JQH - Kansas City Development, LLC; JQH - La Vista CY Development, LLC; JQH - La Vista Conference Center Development, LLC; JQH - La Vista III Development, LLC; JQH - Lake of the Ozarks Development, LLC; JQH - Murfreesboro Development, LLC; JQH - Normal Development, LLC; JQH - Norman Development, LLC; JQH - Oklahoma City Bricktown Development, LLC; JQH - Olathe Development, LLC; JQH - Pleasant Grove Development, LLC; JQH - Rogers Convention Center Development, LLC; JQH - San Marcos Development, LLC; John Q. Hammons 2015 Loan Holdings, LLC; John Q. Hammons Center, LLC; John Q. Hammons Hotels Development, LLC; John Q. Hammons Hotels Management I Corporation; John Q. Hammons Hotels Management II, LP; John Q. Hammons Hotels Management, LLC; Joplin Residence Catering Co., Inc.; Junction City Catering Co., Inc.; KC Residence Catering Co., Inc.; La Vista CY Catering Co., Inc.; La Vista ES Catering Co., Inc.; Lincoln P Street Catering Co., Inc.; Loveland Catering Co., Inc.; Manzano Catering Co., Inc.; Murfreesboro Catering Co., Inc.; Normal Catering Co., Inc.; OKC Courtyard Catering Co., Inc.; R-2 Operating Co., Inc.; Revocable Trust of John Q. Hammons Dated December 28, 1989 as Amended and Restated; Richardson Hammons, LP; Rogers ES Catering Co., Inc.; SGF - Courtyard Catering Co., Inc.; Sioux Falls Convention/Arena Catering Co., Inc.; St. Charles Catering Co., Inc.; Tulsa/169 Catering Co., Inc.; U.P. Catering Co., Inc., Debtors.

John Q. Hammons Fall 2006, LLC; ACLOST, LLC; Bricktown Residence Catering Co., Inc.; Chateau Catering Co., Inc.; Chateau Lake, LLC; City

Centre Hotel Corp.; Civic Center Re-development Corp.; Concord Golf Catering Co., Inc.; Concord Hotel Catering Co., Inc.; East Peoria Catering Co., Inc.; Fort Smith Catering Co., Inc.; Franklin/Crescent Catering Co., Inc.; Glendale Coyotes Catering Co., Inc.; Glendale Coyotes Hotel Catering Co., Inc.; Hammons of Arkansas, LLC; Hammons of Colorado, LLC; Hammons of Franklin, LLC; Hammons of Frisco, LLC; Hammons of Huntsville, LLC; Hammons of Lincoln, LLC; Hammons of New Mexico, LLC; Hammons of Oklahoma City, LLC; Hammons of Richardson, LLC; Hammons of Rogers, Inc.; Hammons of Sioux Falls, LLC; Hammons of South Carolina, LLC; Hammons of Tulsa, LLC; Hammons, Inc.; Hampton Catering Co., Inc.; Hot Springs Catering Co., Inc.; Huntsville Catering, LLC; International Catering Co., Inc.; JQH - Allen Development, LLC; JQH - Concord Development, LLC; JQH - East Peoria Development, LLC; JQH - Ft. Smith Development, LLC; JQH - Glendale AZ Development, LLC; JQH - Kansas City Development, LLC; JQH - La Vista CY Development, LLC; JQH - La Vista Conference Center Development, LLC; JQH - La Vista III Development, LLC; JQH - Lake of the Ozarks Development, LLC; JQH - Murfreesboro Development, LLC; JQH - Normal Development, LLC; JQH - Norman Development, LLC; JQH - Oklahoma City Bricktown Development, LLC; JQH - Olathe Development, LLC; JQH - Pleasant Grove Development, LLC; JQH - Rogers Convention Center Development, LLC; JQH - San Marcos Development, LLC; John Q. Hammons 2015

Loan Holdings, LLC; John Q. Hammons Center, LLC; John Q. Hammons Hotels Development, LLC; John Q. Hammons Hotels Management I Corporation; John Q. Hammons Hotels Management II, LP; John Q. Hammons Hotels Management, LLC; Joplin Residence Catering Co., Inc.; Junction City Catering Co., Inc.; KC Residence Catering Co., Inc.; La Vista CY Catering Co., Inc.; La Vista ES Catering Co., Inc.; Lincoln P Street Catering Co., Inc.; Loveland Catering Co., Inc.; Manzano Catering Co., Inc.; Murfreesboro Catering Co., Inc.; Normal Catering Co., Inc.; OKC Courtyard Catering Co., Inc.; R-2 Operating Co., Inc.; Revocable Trust of John Q. Hammons Dated December 28, 1989 as Amended and Restated; Richardson Hammons, LP; Rogers ES Catering Co., Inc.; SGF - Courtyard Catering Co., Inc.; Sioux Falls Convention/arena Catering Co., Inc.; St. Charles Catering Co., Inc.; Tulsa/169 Catering Co., Inc.; U.P. Catering Co., Inc., Appellants,

v.

Office of the United States
Trustee, Appellee,

Acadiana Management Group, LLC; Albuquerque-AMG Specialty Hospital, LLC; Central Indiana-AMG Specialty Hospital, LLC; LTAC Hospital of Edmond, LLC; Houma-AMG Specialty Hospital, LLC; LTAC of Louisiana, LLC; Las Vegas-AMG Specialty Hospital, LLC; Warren Boegel; Boegel Farms, LLC and Three Bo's, Inc., Amici Curiae.

No. 20-3203

United States Court of Appeals,
Tenth Circuit.

FILED October 5, 2021

Background: Chapter 11 debtors moved for determination of extent of their liability

IN RE JOHN Q. HAMMONS FALL 2006, LLC
 Cite as 15 F.4th 1011 (10th Cir. 2021)

1013

for United States Trustee (UST) quarterly fees, contending that amendment to statute governing Chapter 11 disbursement fees was unconstitutional. The United States Bankruptcy Court for the District of Kansas, Robert D. Berger, J., 618 B.R. 519, denied motion, and debtors appealed.

Holdings: The Court of Appeals, Phillips, Circuit Judge, held that:

- (1) the presumption against retroactivity did not apply to statutory amendment mandating increased quarterly Chapter 11 disbursement fees for large debtors in Trustee districts, because Congress increased the quarterly fees prospectively;
- (2) as a matter of apparent first impression for the court, the amendment violated the uniformity requirement of the Bankruptcy Clause by allowing higher quarterly disbursement fees on Chapter 11 debtors in Trustee districts than charged to equivalent debtors in Bankruptcy Administrator districts; and
- (3) to remedy debtors' harms from the unconstitutional treatment, they were entitled to monetary relief in the form of a refund of the "excess" quarterly fees they paid.

Reversed and remanded.

Bacharach, Circuit Judge, filed dissenting opinion.

1. Bankruptcy ⇌3152

Bankruptcy courts calculate and collect Chapter 11 debtors' quarterly fees based on the size of quarterly "disbursements" paid creditors. 28 U.S.C.A. § 1930(a)(6).

2. Bankruptcy ⇌3152

By amending statute governing bankruptcy fees to substantially increase the quarterly Chapter 11 disbursement fees for large debtors in Trustee Program dis-

tricts, Congress sought to secure funding levels in those districts, whose declining bankruptcy filings had reduced fees that contributed to overall funding. 28 U.S.C.A. § 1930(a)(6).

3. Bankruptcy ⇌3782

Court of Appeals reviews legal issues arising in bankruptcy proceedings de novo.

4. Bankruptcy ⇌2023, 3152

Presumption against retroactivity did not apply to statutory amendment mandating increased quarterly Chapter 11 disbursement fees for large debtors in Trustee districts, even though the amendment increased fees in pending cases, because Congress increased the quarterly fees prospectively; under the statute, debtors owe quarterly fees "in each case" and "for each quarter" regardless of case filing date, the amendment increased quarterly fees for all disbursements paid on or after its effective date, and even if the amendment's language were ambiguous, it did not operate retroactively, as it imposed no new legal consequences on disbursement fees before the amendment's effective date, but merely triggered prospective assessment of fees thereafter, akin to a property-tax increase after a home purchase. 28 U.S.C.A. § 1930(a)(6).

5. Statutes ⇌1557

Because, if Congress applies a new law to earlier events, this raises notice issues and could upset settled expectations, courts apply a presumption against retroactivity when interpreting statutes.

6. Statutes ⇌1557

Under canon of construction providing presumption against retroactivity, courts presume that Congress did not intend a statute to have a "genuinely retroactive effect."

7. Statutes ⇨1556(1), 1560

Court employs two-step analysis in assessing whether presumption against retroactivity applies: first, court employs ordinary statutory-interpretation tools to determine whether Congress has expressly prescribed statute's proper reach; if so, court's analysis stops there, but if not, court must determine whether new statute would have "retroactive effect," that is, whether it would impair rights party possessed when he acted, increase party's liability for past conduct, or impose new duties with respect to transactions already completed.

See publication Words and Phrases for other judicial constructions and definitions.

8. Statutes ⇨1556(1), 1557

If a statute would operate retroactively, the traditional presumption against retroactivity teaches that it does not govern absent clear congressional intent favoring such a result.

9. Statutes ⇨1557

Presumption against retroactivity applies only when new provision attaches new legal consequences to events completed before its enactment.

10. Statutes ⇨1403

Legislation is not unlawful solely because it upsets otherwise settled expectations.

11. Bankruptcy ⇨2014

Bankruptcy Clause of the United States Constitution authorizes Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States," thus requiring geographic uniformity. U.S. Const. art. 1, § 8, cl. 4.

12. Bankruptcy ⇨2014, 3152

Statutory amendment mandating increased quarterly Chapter 11 disbursement fees for large debtors in Trustee

districts was a substantive law "on the subject of bankruptcies" and, thus, was subject to the uniformity requirement of the Bankruptcy Clause; amendment, which concerned a statute imposing fees that a debtor had to pay before paying creditors, and so had a direct effect on what creditors would receive, fit within the Supreme Court's broad definition of "bankruptcy" as the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief. U.S. Const. art. 1, § 8, cl. 4; 28 U.S.C.A. § 1930(a)(6).

See publication Words and Phrases for other judicial constructions and definitions.

13. Statutes ⇨1407

Mere use of "may" in a statute is not necessarily conclusive of congressional intent to provide for permissive or discretionary authority.

14. Statutes ⇨1387

For purposes of statutory interpretation, the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.

15. Constitutional Law ⇨994

Courts should, if possible, interpret ambiguous statutes to avoid rendering them unconstitutional.

16. Bankruptcy ⇨2014, 3152

Statutory amendment mandating increased quarterly Chapter 11 disbursement fees for large debtors in Trustee districts, which allowed higher quarterly disbursement fees on Chapter 11 debtors in Trustee districts than charged to equivalent debtors in Bankruptcy Administrator districts, violated the uniformity requirement of the Bankruptcy Clause; the amendment neither applied uniformly to a class of debtors nor addressed a geographically isolated problem but, instead, sub-

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stantially increased fees, potentially by millions of dollars, for one debtor but not another identical in all respects save the geographic locations in which they filed for bankruptcy. U.S. Const. art. 1, § 8, cl. 4; 28 U.S.C.A. § 1930(a)(6).

17. Bankruptcy ⇌2014

Bankruptcy Clause does not require perfect uniformity. U.S. Const. art. 1, § 8, cl. 4.

18. Bankruptcy ⇌2534

State property laws may affect what property is available for distribution in a bankruptcy case, without running afoul of the Bankruptcy Clause. U.S. Const. art. 1, § 8, cl. 4.

19. Bankruptcy ⇌2014

Although the Bankruptcy Clause does not require perfect uniformity, the flexibility inherent in the constitutional provision has limits. U.S. Const. art. 1, § 8, cl. 4.

20. Bankruptcy ⇌2014

Uniformity requirement of the Bankruptcy Clause extends past private bills, even though the Supreme Court has struck down a bankruptcy law for lack of uniformity only once, where the stricken legislation amounted to nothing more than a private bill governing only one regional debtor. U.S. Const. art. 1, § 8, cl. 4.

21. Bankruptcy ⇌2014

In the context of the Bankruptcy Clause, “uniformity” requires that a law must at least apply uniformly to a defined class of debtors. U.S. Const. art. 1, § 8, cl. 4.

See publication Words and Phrases for other judicial constructions and definitions.

22. Bankruptcy ⇌2014

Bankruptcy Clause’s uniformity requirement bars Congress from assessing disparate fees on debtors simply on

grounds that it has chosen to treat them differently. U.S. Const. art. 1, § 8, cl. 4.

23. Bankruptcy ⇌2014, 3152

Bankruptcy Clause precludes increasing trustee fees based just on the location of the bankruptcy court. U.S. Const. art. 1, § 8, cl. 4.

24. Bankruptcy ⇌2014, 3152

Upon determination that statutory amendment mandating increased quarterly Chapter 11 disbursement fees for large debtors in Trustee districts violated the uniformity requirement of the Bankruptcy Clause by allowing higher quarterly disbursement fees on Chapter 11 debtors in Trustee districts than charged to equivalent debtors in Bankruptcy Administrator districts, the Chapter 11 debtors that challenged the amendment were entitled to monetary relief to remedy their harms from the unconstitutional treatment, namely, a refund of the amount of quarterly fees paid exceeding the amount that debtors would have owed in a Bankruptcy Administrator district during the same period. U.S. Const. art. 1, § 8, cl. 4; 28 U.S.C.A. § 1930(a)(6).

25. Courts ⇌96(5)

Tenth Circuit Court of Appeals lacks authority over quarterly Chapter 11 disbursement fees assessed in districts outside its circuit, and thus in Alabama or North Carolina. 28 U.S.C.A. § 1930(a)(6).

Appeal from the United States Bankruptcy Court for the District of Kansas (16-21142)

Nicholas Zluticky (with Zachary H. Hemenway, Michael P. Pappas, and J. Nicci Warr on the briefs) of Stinson LLP, Kansas City and Clayton, Missouri, for Debtors-Appellants.

Jeffrey E. Sandberg (with Mark B. Stern, Ramona D. Elliott, P. Matthew Sutko, Andrew W. Beyer, and Brian M. Boynton on the brief) of the U.S. Department of Justice, Washington, District of Columbia, for Appellee.

Bradley L. Drell and Heather M. Mathews of Gold, Weems, Bruser, Sues & Rundell, Alexandria, Louisiana, on the brief for Amici Curiae.

Before BACHARACH, EBEL, and PHILLIPS, Circuit Judges.

PHILLIPS, Circuit Judge.

Appellants, seventy-six Chapter 11 debtors associated with John Q. Hammons Hotels & Resorts (Debtors), argue that they incurred more than \$2.5 million of quarterly Chapter 11 disbursement fees from January 2018 through December 2020. First, Debtors fault the bankruptcy court's statutory interpretation, arguing that it applied the quarterly fees retroactively to pending cases against Congress's intent. We conclude that the presumption against retroactivity doesn't apply here, because Congress increased the quarterly bankruptcy fees prospectively. Second, and alternatively, Debtors fault Congress, arguing that charging different Chapter 11 disbursement fees depending on the location of the bankruptcy filing violates the uniformity requirement of the Bankruptcy Clause, U.S. Const. art I, § 8, cl. 4. On this point, we conclude that Debtors must prevail. Accordingly, we reverse and remand for recalculation of the quarterly Chapter 11

disbursement fees and a refund of overpayments.

BACKGROUND

I. Historical Background

The federal judiciary is divided into ninety-four judicial districts. Nearly all judicial districts have a bankruptcy court. The Department of Justice, through its Trustee Program, administers bankruptcy proceedings for eighty-eight judicial districts.¹ *E.g.*, *In re Cir. City Stores, Inc.*, 996 F.3d 156, 160 (4th Cir. 2021). The Judicial Conference, through its Bankruptcy Administrator Program, administers bankruptcy proceedings in the remaining six districts, located in Alabama and North Carolina. *Id.* (footnote omitted).

This system of dual bankruptcy programs began in 1978. *See* Pub. L. No. 95-598, §§ 224-32, 92 Stat. 2549, 2662-65 (1978). Before then, bankruptcy judges in all judicial districts supervised and administered their own bankruptcy proceedings. H.R. Rep. No. 95-595, at 4 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 5965-66. In 1978, Congress launched a pilot trustee program (1) to alleviate the administrative burdens on bankruptcy judges, (2) to remove any appearance of bias arising from judges' administering cases, and (3) to establish bankruptcy-court "watchdogs." *Id.*; Pub. L. No. 95-598, §§ 224-32, 92 Stat. at 2662-65.

In 1986, Congress made the program permanent in all judicial districts, but allowed Alabama and North Carolina until

1. The Eastern and Western Districts of Arkansas share a bankruptcy court. *See* United States Courts, <https://www.uscourts.gov/about-federal-courts/federal-courtspublic/court-website-links> (last visited August 10, 2021). And the judicial districts for the Virgin Islands, Northern Mariana Islands, and Guam don't have bankruptcy courts. *See* Boston College Law Library, Bankruptcy Courts,

<https://lawguides.bc.edu/c.php?g=350874&p=2367777> (last visited August 10, 2021). But the Trustee Program still covers bankruptcy proceedings in these districts. *See* Judicial Districts Covered by USTP Regions, Department of Justice, <https://www.justice.gov/ust/judicial-districts-covered-ustp-regions> (last visited August 10, 2021).

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1992 to join. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, §§ 111–17, 302(d), 100 Stat. 3088, 3090–96, 3119–23 (1986).

But in 1990, Congress extended the temporary delay until 2002. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 317(a), 104 Stat. 5089, 5115 (1990). Then in 2000, Congress granted Alabama and North Carolina a permanent exemption from joining the Trustee Program. Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 501, 114 Stat. 2410, 2421–22 (2000).

This left the country with two different bankruptcy-administration programs. Each has a separate funding source. The general judicial budget funds Bankruptcy Administrators in Alabama and North Carolina. *Matter of Buffets, L.L.C.*, 979 F.3d 366, 383 (5th Cir. 2020); *cf.* 28 U.S.C. § 1930(a)(7). Debtors’ fees fund the Trustee Program everywhere else.² H.R. Rep. No. 99-764, at 22 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5227, 5234.

[1] Chapter 11 debtors pay quarterly disbursement fees. 28 U.S.C. § 1930(a)(6). Bankruptcy courts calculate and collect these fees based on the size of quarterly “disbursements” paid creditors. *Id.* At first, Congress imposed these fees only in Trustee districts. *See Buffets*, 979 F.3d at 371. But in 1994, the Ninth Circuit ruled that imposing a “different, more costly system” on debtors everywhere except Alabama and North Carolina violated the

Bankruptcy Clause’s requirement that bankruptcy laws be uniform. *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1531–33 (9th Cir. 1994). The next year, Congress enacted § 1930(a)(7), which allowed the Judicial Conference to require debtors “to pay fees equal to those imposed” in Trustee districts.³ Federal Courts Improvement Act of 2000 § 105. A year later, the Judicial Conference set fees in Bankruptcy Administrator districts “in the amounts specified [for Trustee districts], as those amounts may be amended from time to time.” *Report of the Proceedings of the Judicial Conference of the United States* 45–46 (2001), https://www.uscourts.gov/sites/default/files/2001-09_0.pdf.

[2] For the next seventeen years or so, Trustee and Bankruptcy Administrator districts charged the same quarterly fees. That changed with Congress’s 2017 Amendment to § 1930(a)(6), which mandated increased quarterly Chapter 11 disbursement fees for large debtors in Trustee districts. Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. No. 115-72, § 1004(a)(2), 131 Stat. 1224, 1232 (2017). With this Amendment, Congress sought to secure funding levels in the Trustee Program districts, whose declining bankruptcy filings had reduced fees that contributed to overall funding. H.R. Rep. No. 115-130, at 6–7 (2017), *as reprinted in* 2017 U.S.C.C.A.N. 154, 159; *see also Cir. City Stores*, 996 F.3d at 161. Under the 2017 Amendment, each

2. Though Congress annually appropriates funds to the Trustee Program, it offsets appropriations with the bankruptcy fees collected. H.R. Rep. No. 115-130, at 6–7 (2017), *as reprinted in* 2017 U.S.C.C.A.N. 154, 159.

3. In a 2020 amendment effective on January 12, 2021, Congress amended “may” to “shall.” Bankruptcy Administration Improvement Act of 2020, Pub. L. No. 116-325,

§ 3(d)(2), 134 Stat. 5086, 5088 (2020); *see* 28 U.S.C. § 1930(a)(7) (2021) (providing that “the Judicial Conference of the United States shall require [Chapter 11 debtors] to pay fees equal to those imposed” in Trustee districts). For quarters in 2021 and afterward, Congress has restored equilibrium for fees charged in Bankruptcy Administrator and Trustee districts.

year from 2018 through 2022, fees would increase for debtors with at least \$1 million quarterly disbursements if “as of September 30 of the most recent full fiscal year,” Trustee Program funds were below \$200 million.⁴ § 1004(a)(2). This substantially raised fees for these Trustee Program debtors, from a maximum of \$30,000 to the lesser of either \$250,000 or one percent of the quarterly disbursement.⁵ *Id.*; 28 U.S.C. § 1930(a)(6) (2008).

For quarters beginning on and after January 1, 2018, quarterly Chapter 11 disbursement fees increased on all large debtors in Trustee districts, even debtors whose bankruptcy cases were pending before that date. *See, e.g., Buffets*, 979 F.3d at 372. Bankruptcy Administrator debtors got a better deal. The Judicial Conference didn’t increase quarterly fees for those debtors until October 2018, and then, the increase didn’t apply prospectively to pending cases.⁶ Thus, in Bankruptcy Administrator districts, unlike in Trustee districts, large debtors with cases pending before October 2018 incurred no increased fees however long their cases remained pending. *E.g., Buffets*, 979 F.3d at 372.

II. Procedural Background

In June 2016, Debtors filed Chapter 11 bankruptcy cases in the District of Kansas, a Trustee district.⁷ Their cases remained pending in January 2018 when the 2017 Amendment took effect. After that, their

quarterly fees markedly increased. As of December 31, 2019, Debtors had paid over \$2.5 million more in quarterly fees than they would have paid had they filed in a Bankruptcy Administrator district.

In the bankruptcy court, Debtors challenged the quarterly Chapter 11 disbursement-fee increase. They argued that the 2017 Amendment was unconstitutional “because it was unequally applied during the first three quarters of 2018 and because it was applied retroactively both without clear Congressional intent and only in states where the United States Trustee Program operates—excluding bankruptcy petitions filed in North Carolina and Alabama.” Debtors/Appellants’ App. vol. 71 at 9871. The bankruptcy court rejected both arguments and declined to redetermine Debtors’ quarterly disbursement fees. We review under 28 U.S.C. § 158(d)(2).

DISCUSSION

[3] On appeal, Debtors maintain (1) that the bankruptcy court erred in interpreting the 2017 Amendment to require increased fees retroactively, and (2) that the 2017 Amendment violates the Constitution’s Bankruptcy Clause by applying a bankruptcy law nonuniformly. We review these legal issues de novo, beginning with the retroactivity challenge.⁸ *See In re Herd*, 840 F.2d 757, 759 (10th Cir. 1988) (citation omitted).

4. Congress also intended to finance eighteen new bankruptcy judgeships. *See* H.R. Rep. No. 115-130, at 7. To that end, Congress allocated 98% percent of the fees to the Trustee Program fund and 2% percent to the general Treasury fund. *See* § 1004.

5. In the 2020 Amendment, Congress reduced fees to the lesser of 0.8% of the disbursement or \$250,000. § 3(d)(1).

6. *Report of the Proceedings of the Judicial Conference of the United States* 11–12 (2018),

https://www.uscourts.gov/sites/default/files/2018-09_proceedings.pdf.

7. Because of their many business locations, Debtors had the flexibility to have filed in the Bankruptcy Administrator districts instead.

8. We address the retroactivity challenge first, because if Debtors prevailed on this issue we wouldn’t need to decide the constitutionality of the 2017 Amendment under the Bankruptcy Clause.

I. Retroactivity

[4] Debtors argue that applying the 2017 Amendment to their bankruptcy cases, which were pending in January 2018, is “impermissibly retroactive.” Opening Br. at 42. Specifically, they contend that the Amendment’s fee increases apply only to bankruptcy cases *filed* after January 1, 2018, not to cases *pending* then. The Fourth and Fifth Circuits have rejected this argument. *Cir. City Stores*, 996 F.3d at 168–69; *Buffets*, 979 F.3d at 374–76. We do too.

[5–8] Obviously, if Congress applies a new law to earlier events, this raises notice issues and could upset “settled expectations.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (footnote omitted). So courts apply a presumption against retroactivity when interpreting statutes. *See id.* at 277, 114 S.Ct. 1483. Under this canon of construction, we presume that Congress didn’t intend a statute to have a “genuinely ‘retroactive’ effect.” *Id.* We employ a two-step analysis in assessing whether the presumption applies. *Id.* at 280, 114 S.Ct. 1483. First, we employ ordinary statutory-interpretation tools “to determine whether Congress has expressly prescribed the statute’s proper reach.” *Id.* If so, our analysis stops there. *Id.* If not, second, we “must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” *Id.* “If the statute would operate retroactively, our traditional presumption [against retroactivity] teaches that it does not govern absent clear congressional intent favoring such a result.” *Id.*

Debtors contend that we should apply the presumption against retroactivity to the 2017 Amendment; that is, they argue

that the 2017 Amendment’s text is ambiguous about whether it applies to already-pending cases and that it would have an impermissible retroactive effect if applied in such cases. We interpret the 2017 Amendment as increasing fees in pending cases. *Accord Cir. City Stores*, 996 F.3d at 168–69; *Buffets*, 979 F.3d at 374–75. Under § 1930(a)(6), debtors owe quarterly fees “in *each* case” and “for *each* quarter,” regardless of case filing date. *Id.* (emphasis added). And the 2017 Amendment shows that Congress intended to increase quarterly fees for all disbursements paid on or after January 1, 2018. The 2017 Amendment ties the quarterly-fee increase to the disbursement date, no matter when the bankruptcy case was filed. The increase applies to “quarterly fees payable . . . for *disbursements* made in any calendar quarter that begins on or after the date of enactment.” § 1004 (emphasis added). The legislative history contains similar language. *See* H.R. Rep. No. 115-130, at 10 (providing that the fee increase “applies to quarterly fees payable for any quarter that begins on or after the effective date of this legislation”).

Even so, Debtors argue that we should draw a negative inference from the 2017 Amendment’s not more specifically applying its fee increases to pending cases. Debtors contend that whether the 2017 Amendment applies to those cases is ambiguous. Debtors contrast the 2017 Amendment’s language to Congress’s language in a clarifying amendment for a 1996 fee increase, which specified that it applied to pending cases. Debtors also point to amendments to Chapter 12 of the Bankruptcy Code contained in the same act as the 2017 Amendment, which did so also.

We decline to draw a negative inference. Debtors haven’t overcome the 2017 Amendment’s language increasing quarterly fees for all postenactment disburse-

ments. Additionally, Debtors' legislative examples differ. Congress intended the 1996 clarifying amendment to resolve judicial disagreement about whether a 1996 fee increase applied in pending cases. *Cir. City Stores*, 996 F.3d at 168 (citation omitted). By contrast, the 2017 Amendment increases all quarterly fees for disbursements made after its effective date. And when enacting the 2017 Amendment, "Congress operated under [a] widespread understanding that fee increases apply to postenactment disbursements in pending cases." *Buffets*, 979 F.3d at 374 (citation omitted).

Similarly, a negative inference doesn't arise from the Chapter 12 amendment, because that amendment addresses a different subject from § 1930(a)(6)'s. *Cf. Martin v. Hadix*, 527 U.S. 343, 356, 119 S.Ct. 1998, 144 L.Ed.2d 347 (1999) (finding a proposed negative inference inapposite because it depended on legislation on a "wholly distinct subject matter[]"). That amendment enlarged the scope of Chapter 12 discharge by expanding what debts are dischargeable. *See* Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2017, § 1005; *see also Buffets*, 979 F.3d at 375 n.5 (citation omitted). To preserve existing rights in discharge, Congress clarified that the amendment didn't reach pending cases with existing discharge orders. *Buffets*, 979 F.3d at 375 n.5. Congress needn't have employed similar language when addressing the unrelated matter of Chapter 11 quarterly-fee increases, long assumed applicable to pending cases. *See id.* (citation omitted).

[9] Even if we viewed the 2017 Amendment as ambiguous, we still wouldn't apply the presumption against retroactivity. We conclude that the 2017 Amendment doesn't operate retroactively. The presumption against retroactivity applies only when

"the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269–70, 114 S.Ct. 1483. As described, to have a retroactive effect, a new provision must "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280, 114 S.Ct. 1483. We've previously ruled that an amendment increasing § 1930(a)(6)'s quarterly fees wasn't retroactive, because the amendment merely "trigger[ed] prospective assessment of fees from the amendment's effective date." *In re CF & I Fabricators of Utah, Inc.*, 150 F.3d 1233, 1237 (10th Cir. 1998) (citation omitted). Most courts have concluded that the 2017 Amendment isn't retroactive, reasoning that the fee increase applies prospectively. *See, e.g., Buffets*, 979 F.3d at 375–76. We're persuaded by the Fifth Circuit's reasoning that the fee increase resembles a property-tax increase after a home purchase. *See id.* at 376 (citation and footnote omitted). The Supreme Court has described such taxes as "uncontroversially prospective." *Landgraf*, 511 U.S. at 269 n.24, 114 S.Ct. 1483 (citation omitted).

[10] Debtors can't refute this reasoning. Instead, they argue that "[w]hen the increased fees were applied to [their] bankruptcy cases, new legal obligations . . . were retroactively applied to their decision to file" in a Trustee district, rather than a Bankruptcy Administrator district. Opening Br. at 47. Debtors miss the mark. The issue is whether the 2017 Amendment's increasing of quarterly fees is retroactive. *Cf. Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts* 264 (2012) ("[R]etroactivity is to be judged with regard to the act or event that the statute is meant to regulate[.]"). The 2017 Amendment imposes no new legal consequences on disbursement

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fees before January 2018. Thus, we reject Debtors’ retroactivity challenge to the 2017 Amendment. Even if Debtors’ expectations were unsettled, legislation isn’t “unlawful solely because it upsets otherwise settled expectations.”⁹ *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729–30, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984) (citations omitted).

II. Bankruptcy Clause Uniformity

A. The 2017 Amendment is a Law on “the Subject of Bankruptcies”

[11, 12] The Bankruptcy Clause authorizes Congress to enact “uniform Laws on the subject of Bankruptcies throughout the United States,” thus requiring geographic uniformity. U.S. Const. art I, § 8, cl. 4. The United States Trustee first contends that we needn’t determine whether the 2017 Amendment violates this limitation, because the Amendment isn’t a substantive law “on the subject of bankruptcies.” The Trustee contends that the Amendment concerns an administrative matter and is not subject to the uniformity requirement. In that regard, the Trustee likens dual-system quarterly Chapter 11 disbursement fees to statutorily optional bankruptcy appellate panels, which only some judicial circuits use, or to optional local rules among bankruptcy courts. The Trustee also notes that 28 U.S.C. § 1930(f)(3) allows bankruptcy courts to waive some fees.

Every court that has addressed the Trustee’s argument has rejected it, and for good reason. *See, e.g., In re Clinton Nurseries, Inc.*, 998 F.3d 56, 64 (2d Cir. 2021) (“The Trustee’s argument has been re-

peatedly rejected by other courts.” (collecting cases)); *cf. Buffets*, 979 F.3d at 377 (“The consensus view of bankruptcy courts that Chapter 11 fees are Bankruptcy Clause legislation is likely correct.”). The 2017 Amendment fits within the Supreme Court’s broad definition of “bankruptcy” as “the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief.” *Ry. Lab. Execs.’ Ass’n v. Gibbons*, 455 U.S. 457, 466, 102 S.Ct. 1169, 71 L.Ed.2d 335 (1982) (internal quotation marks and citations omitted). The Amendment concerns a statute (§ 1930(a)(6)) imposing fees that a debtor must pay before paying creditors. *See, e.g., Clinton Nurseries*, 998 F.3d at 64 (“Under § 1930(a)(6), a debtor must pay pre-confirmation [quarterly] fees as an administrative priority expense before it pays its commercial creditors, bondholders, and shareholders.” (internal quotation marks and citation omitted)). Any fee increase reduces what creditors receive. *Buffets*, 979 F.3d at 377 (citation omitted); *see Clinton Nurseries*, 998 F.3d at 64 (“[A]ny change in fees imposed pursuant to § 1930 affects the amount of funds available for distribution to lower-priority creditors.” (internal quotation marks and citation omitted)). Unlike the Trustee’s examples, § 1930(a)(6) requires debtors to pay potentially significant sums: by December 2019, the 2017 Amendment increased Debtors’ fees more than \$2.5 million. *Cf. Buffets*, 979 F.3d at 377 (“[U]nlike the varying procedures that only indirectly might lead to different outcomes, the fee increase has a direct effect on what creditors receive[.]” (citation omitted)).

9. And we note that the 2017 Amendment was preceded by some tremors. In 2015, the Department of Justice signaled plans to seek a fee increase soon, and the next year, the department proposed increasing fees in October 2016. U.S. Dep’t of Justice, *U.S. Trustee Pro-*

gram: FY 2017 Performance Budget Congressional Submission 9–10 (2016), <https://go.usa.gov/xpYS3>; U.S. Dep’t of Justice, *U.S. Trustee Program: FY 2016 Performance Budget Congressional Submission 7* (2015), <https://go.usa.gov/xpYJu>.

We also reject the Trustee's argument that if every law bearing on distributions to creditors qualified as "laws on the subject of bankruptcies," the Bankruptcy Clause would extend even to taxes and business regulations. The 2017 Amendment and § 1930(a)(6) in which it rests are laws on the subject of bankruptcies. It governs relations between debtors and creditors. Indeed, Congress enacted the 2017 Amendment under the authority given by the Bankruptcy Clause. *See* 163 Cong. Rec. H3003-03 (daily ed. May 1, 2017) (statement of Rep. John Conyers). And 28 U.S.C. § 1930 is entitled "Bankruptcy fees," as part of "An Act to establish a uniform Law on the Subject of Bankruptcies," Pub. L. No. 95-598, 92 Stat. 2549. *See Clinton Nurseries*, 998 F.3d at 64 (finding persuasive that "[t]he 2017 Amendment amends a statute, § 1930, that is literally entitled: 'Bankruptcy fees'" (citation and footnote omitted)). So the 2017 Amendment governs debtor-creditor relations and thus concerns "the subject of bankruptcies," leaving it subject to the Bankruptcy Clause's uniformity requirement.

B. Uniformity

To defeat Debtors' constitutional challenge, the Trustee argues two alternative theories: (1) that the pre-2020 Amendment versions of § 1930(a)(6) and (7) together in fact already require uniform quarterly disbursement fees in all judicial districts, and (2) more narrowly, that the 2017 Amendment is constitutionally uniform because it increased quarterly fees on all large debtors in Trustee districts. Again, we're unpersuaded.

1. Sections 1930(a)(6) and (7) Didn't Impose Uniform Quarterly Fees Across All Judicial Districts

Until the 2020 Amendment revised "may" to "shall" in § 1930(a)(7), Bankrupt-

cy Administration Improvement Act of 2020, Pub. L. No. 116-325, § 3(d)(2), 134 Stat. 5086, 5088 (2020), that section provided that the Judicial Conference "may require" debtors in Bankruptcy Administrator districts "to pay fees equal to those imposed" in Trustee districts. Federal Courts Improvement Act of 2000. The Trustee argues that "may require" is mandatory, requiring the Judicial Conference to impose the same quarterly fees as imposed in Trustee districts. To bolster this point, the Trustee notes that Congress enacted this "may require" term after *St. Angelo*, to resolve any conceivable uniformity problems.

[13] But the pre-2020 Amendment § 1930(a)(7)'s "may" is permissive. Granted, "the mere use of 'may' is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority." *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198–99, 120 S.Ct. 1331, 146 L.Ed.2d 171 (2000) (citations omitted). But for two reasons, we're persuaded that Congress intended to use "may" in a permissive sense. First, in the very next sentence in § 1930(a)(7), Congress used "shall." *Id.* ("Such fees shall be deposited as offsetting receipts to the fund established under section 1931 of this title and shall remain available until expended."); *see Lopez v. Davis*, 531 U.S. 230, 241, 121 S.Ct. 714, 148 L.Ed.2d 635 (2001) (finding persuasive "Congress' use of the permissive 'may'" in "contrast[] with the legislators' use of a mandatory 'shall' in the very same section"). And second, Congress also repeatedly used "shall" elsewhere in § 1930. *See, e.g.*, 28 U.S.C. § 1930(a)(6) ("[A] quarterly fee shall be paid to the United States trustee . . .").

Disregarding the plain language, the Trustee contends that the 2020 Amendment's amending "may" to "shall" shows

Congress’s longstanding intent that § 1930(a)(7) be mandatory. The Trustee emphasizes that in the “Findings and Purpose” section of the Act containing the Amendment, Congress stated that the legislation “confirm[s] the longstanding intention of Congress that quarterly fee requirements remain consistent across all Federal judicial districts.” Response Br. at 31 (alteration omitted) (quoting Bankruptcy Administration Improvement Act of 2020 § 2(a)(4)(B)).

[14] Though this finding merits some weight, it doesn’t control our interpretation of the earlier Congress’s intent in enacting § 1930(a)(7). See *Haynes v. United States*, 390 U.S. 85, 87 n.4, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968) (“The view of a subsequent Congress . . . provide[s] no controlling basis from which to infer the purposes of an earlier Congress.” (citations omitted)). Indeed, “the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.” *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980) (citation and footnote omitted). The clear ordinary meaning of “may” outweighs Congress’s 2020 view of any purportedly longstanding intention.¹⁰ *Accord Clinton Nurseries*, 998 F.3d at 66 n.9 (“[T]he Congress that passed the 2020 Act inevitably looked through the lens of the constitutional quagmire that resulted [from use of the word ‘may’] We conclude that the ordinary meaning of ‘may’ as permissive rather than mandatory . . . outweighs Congress’s subsequent statement regarding its earlier meaning[.]” (citation omitted)).

10. Cf. *GTE Sylvania, Inc.*, 447 U.S. at 108, 100 S.Ct. 2051 (“[T]he starting point for interpreting a statute is the language of the statute itself.”).

[15] Additionally, as the Second and Fifth Circuits reasoned in rejecting the Trustee’s position, “[it] is . . . telling that the Judicial Conference itself apparently understood the 2017 Amendment as authorizing, but not requiring, it to impose a fee increase in [Bankruptcy Administrator] Districts.” *Id.* at 67; see *Buffets*, 979 F.3d at 378 n.10 (citation omitted). Thus, § 1930(a)(7) merely permitted the Judicial Conference to impose the same quarterly fees on Bankruptcy Administrator debtors as Congress did on Trustee debtors. So at least before the 2020 Amendment, § 1930 didn’t require that quarterly fees be consistent nationwide.¹¹ *Accord Clinton Nurseries*, 998 F.3d at 67–68; *Buffets*, 979 F.3d at 378 n.10. So we now assess the 2017 Amendment for unconstitutional nonuniformity.

2. The 2017 Amendment is Unconstitutionally Nonuniform

[16] We hold that the 2017 Amendment is unconstitutionally nonuniform, because it allows higher quarterly disbursement fees on Chapter 11 debtors in Trustee districts than charged to equivalent debtors in Bankruptcy Administrator districts. We acknowledge that the Fourth and Fifth Circuits have upheld the Amendment against a Bankruptcy Clause challenge. *Cir. City Stores*, 996 F.3d at 165; *Buffets*, 979 F.3d at 378–79. But we agree with the Second Circuit’s well reasoned and unanimous ruling to the contrary. See *Clinton Nurseries*, 998 F.3d at 69–70.

11. Though, as the Trustee contends, “courts should, if possible, interpret ambiguous statutes to avoid rendering them unconstitutional,” *United States v. Davis*, — U.S. —, 139 S. Ct. 2319, 2332 n.6, 204 L.Ed.2d 757 (2019), § 1930(a)(7) is unambiguous.

In upholding the Chapter 11 quarterly disbursement-fee increase, the Fourth and Fifth Circuits relied on *Blanchette v. Connecticut General Insurance*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974), which ruled that in enacting bankruptcy laws, Congress may “take into account differences that exist between different parts of the country, and . . . fashion legislation to resolve geographically isolated problems.” 419 U.S. at 159, 95 S.Ct. 335; see *Cir. City Stores*, 996 F.3d at 166 (comparing the quarterly-fees issue to *Blanchette*); *Buffets*, 979 F.3d at 378 (same). In *Blanchette*, the Supreme Court upheld legislation creating a special court and laws for bankrupt railroads in the northeast and midwest regions of the country. 419 U.S. at 108, 159–61, 95 S.Ct. 335. At the time of enactment, all the bankrupt railroads were operating there. *Id.* at 160, 95 S.Ct. 335. The Fourth and Fifth Circuits likened the geography-specific legislation in *Blanchette* to the 2017 Amendment’s geographic distinction between the eighty-eight Trustee districts and the six Administrator districts in Alabama and North Carolina. *Cir. City Stores*, 996 F.3d at 166; *Buffets*, 979 F.3d at 378. The Trustee would have us adopt this reasoning.

[17–19] But the Second Circuit rejected the analogy to *Blanchette* and we’re more persuaded by that court’s reasoning than by the Fourth and Fifth Circuit’s. *Cf. Clinton Nurseries, Inc.*, 998 F.3d at 68–69. As the Second Circuit reasoned, though *Blanchette* permitted geography-specific legislation, the challenged Act there still satisfied the Bankruptcy Clause’s require-

ment that a law “apply uniformly to a defined class of debtors.”¹² *Gibbons*, 455 U.S. at 473, 102 S.Ct. 1169; see *Blanchette*, 419 U.S. at 159–61, 95 S.Ct. 335; see also *Clinton Nurseries, Inc.*, 998 F.3d at 68. The Act applied uniformly to all bankrupt railroads. *Blanchette*, 419 U.S. at 159–61, 95 S.Ct. 335; see *Clinton Nurseries, Inc.*, 998 F.3d at 68. And so the Act also addressed a geographically isolated problem: no members of the class of debtors existed outside the defined region, see *Blanchette*, 419 U.S. at 159–60, 95 S.Ct. 335; that is, “all members of the class of debtors impacted by the statute were confined to a sole geographic area,” *Clinton Nurseries*, 998 F.3d at 68. By contrast, the 2017 Amendment increased fees for all large Chapter 11 bankruptcy debtors in Trustee Program districts, with no showing that “members of that broad class are absent in [Bankruptcy Administrator] districts.” *Id.* at 68–69. Common sense tells us that in 2018 through 2020, debtors like those here had bankruptcy cases pending in Alabama and North Carolina. So unlike the Act challenged in *Blanchette*, the 2017 Amendment neither applies uniformly to a class of debtors nor addresses a geographically isolated problem. As the Second Circuit reasoned, the 2017 Amendment “presents the exact problem avoided in *Blanchette*.” It substantially increased fees, potentially by millions, for one debtor but not another “identical in all respects save the geographic locations in which they filed for bankruptcy.” *Clinton Nurseries*, 998 F.3d at 69 (footnote omitted).

12. We acknowledge that the Bankruptcy Clause doesn’t require perfect uniformity. See *In re Reese*, 91 F.3d 37, 39 (7th Cir. 1996) (Posner, C.J.). For instance, state property laws may affect what property is available for distribution. *Stellwagen v. Clum*, 245 U.S. 605, 613, 38 S.Ct. 215, 62 L.Ed. 507 (1918) (citation omitted). But the “flexibility inherent

in the constitutional provision,” that the Trustee relies on, Br. of Appellee at 33 (quoting *Buffets*, 979 F.3d at 378), has limits, see, e.g., *Gibbons*, 455 U.S. at 473, 102 S.Ct. 1169 (requiring bankruptcy laws to apply uniformly to classes of debtors). For the reasons discussed, Congress has encountered the bounds of this flexibility with the 2017 Amendment.

[20–22] In so holding, we reject the Trustee’s arguments that the relevant class of debtors is exclusively Trustee-district debtors and that the Trustee Program underfunding is a geographically isolated problem warranting geographic-specific legislation.¹³ No one disputes that political maneuvering, not bankruptcy-policy considerations, led to the dual bankruptcy-administration system (which we’re not criticizing, but simply noting in analyzing uniformity). *See id.* at 69 (citation omitted); *Buffets (Buffets Concurrence)*, 979 F.3d at 383 (Clement, J., concurring in part and dissenting in part). Nothing distinguishes Alabama and North Carolina from the forty-eight other states in bankruptcy-administration matters. *Buffets Concurrence*, 979 F.3d at 383. The Bankruptcy Clause’s uniformity requirement bars Congress from assessing disparate fees on debtors simply on grounds that it “has chosen to treat them differently.” *Id.*; *Clinton Nurseries*, 998 F.3d at 69 (declining to create “the following inexplicable rule: Congress must enact uniform laws on the subject of bankruptcy . . . except when Congress elects to treat debtors nonuniformly”).

[23] The Bankruptcy Clause precludes increasing fees based just on the location

13. We acknowledge that, as the Trustee argues, the Supreme Court has struck down a bankruptcy law for lack of uniformity only once, and the stricken legislation amounted to “nothing more than a private bill” governing “only . . . one regional debtor.” *Gibbons*, 455 U.S. at 471, 473, 102 S.Ct. 1169 (footnote omitted). But the Bankruptcy Clause’s uniformity requirement extends past private bills. We acknowledge that in *Gibbons*, the Court didn’t “impair Congress’ ability under the Bankruptcy Clause to define classes of debtors and to structure relief accordingly.” *Id.* at 473, 102 S.Ct. 1169. But uniformity requires that “a law must at least apply uniformly to a defined class of debtors.” *Id.*

14. On appeal, Debtors argue that the dual bankruptcy-program system itself is unconsti-

tutional, even if quarterly fees are consistent across all judicial districts. Debtors didn’t preserve this argument in the bankruptcy court, raising it, if at all, in their reply brief, and the bankruptcy court didn’t decide the question. *See Rosewood Servs., Inc. v. Sunflower Diversified Servs., Inc.*, 413 F.3d 1163, 1167 (10th Cir. 2005) (“Because this . . . argument was not made below, it is waived on appeal.” (citation omitted)); *Hungry Horse LLC v. E Light Elec. Servs., Inc.*, 569 F. App’x 566, 572 (10th Cir. 2014) (unpublished) (explaining that we needn’t consider issues not raised until the reply brief below and not addressed by the district court (citation omitted)).

C. We Remand for Determination of Debtors’ Quarterly Fees

Debtors request monetary relief for “the excess fees they paid.” Opening Br. at 50. The Trustee argues that we shouldn’t grant that requested relief. The Trustee reasons that courts can remedy unequal treatment either by expanding or withdrawing benefits, depending on legislative intent, and that, here, Congress intended to increase quarterly fees nationwide. Though raising fees in Alabama and North Carolina might solve this problem, the Trustee recognizes that we lack authority to do that. So he asks that we declare the 2017 Amendment unconstitutional without granting further relief.

tutional, even if quarterly fees are consistent across all judicial districts. Debtors didn’t preserve this argument in the bankruptcy court, raising it, if at all, in their reply brief, and the bankruptcy court didn’t decide the question. *See Rosewood Servs., Inc. v. Sunflower Diversified Servs., Inc.*, 413 F.3d 1163, 1167 (10th Cir. 2005) (“Because this . . . argument was not made below, it is waived on appeal.” (citation omitted)); *Hungry Horse LLC v. E Light Elec. Servs., Inc.*, 569 F. App’x 566, 572 (10th Cir. 2014) (unpublished) (explaining that we needn’t consider issues not raised until the reply brief below and not addressed by the district court (citation omitted)).

[24, 25] We lack authority over quarterly fees assessed in districts outside our circuit, and thus in Alabama or North Carolina. *Cf. Buffets Concurrence*, 979 F.3d at 384 (“The *St. Angelo* court had no power to force Alabama and North Carolina into the [Trustee] system, which is why the constitutional infirmity persists and we are having this debate today. We have no greater authority than our colleagues on the Ninth Circuit to remake the bankruptcy system.”). But Debtors are entitled to relief. *Cf. id.* (proposing reducing debtors’ fees as a remedy: “What we can do is ameliorate the harm of unconstitutional treatment. So, we should.”). The Second Circuit awarded monetary relief to remedy debtors’ harms from the 2017 Amendment. *See Clinton Nurseries*, 998 F.3d at 69–70 (“To the extent that [debtor] has already paid the unconstitutional fee increase, it is entitled to a refund of the amount in excess of the fees it would have paid in a [Bankruptcy Administrator] District during the same time period.”). We do so as well. Thus, we remand to the bankruptcy court for a refund of the amount of quarterly fees paid exceeding the amount that Debtors would have owed in a Bankruptcy Administrator district during the same period. This ruling is limited to Debtors in the instant appeal, who have standing to seek this refund.

CONCLUSION

We reverse and remand for determination of Debtors’ quarterly Chapter 11 fees and a refund of overpayment consistent with this opinion.

BACHARACH, Circuit Judge,
dissenting.

I agree with much of the majority’s excellent opinion. In my view, however, the 2017 amendment does not violate the Bankruptcy Clause. So I respectfully dissent.

The majority points out that our nation has two separate bankruptcy systems. One system uses U.S. trustees in the bankruptcy courts in 48 states, 4 territories, and the District of Columbia. *See* Judicial Districts Covered by USTP Regions, Department of Justice, <https://www.justice.gov/ust/judicial-districts-covered-ustp-regions> (last visited September 3, 2021). By contrast, the bankruptcy courts in 2 states use bankruptcy administrators rather than U.S. trustees. Why the difference in systems? Politics. So we might reasonably question the need for separate bankruptcy systems in different states. But as the majority points out, the debtors didn’t preserve their challenge to the dual systems. *Maj. Op.* at 1025 n.14.

Given the failure to preserve that challenge, we must consider the constitutionality of the 2017 amendment rather than the dual system of U.S. trustees and bankruptcy administrators. Because of the dual system, districts varied in their funding needs. This difference led to a budget shortfall in districts using U.S. trustees. *See* H.R. Rep. No. 115-130, at 8–9 (2017).

Congress responded to the budget shortfall. To do so, Congress “define[d] classes of debtors” based on the system in place. *Ry. Lab. Execs.’ Ass’n v. Gibbons*, 455 U.S. 457, 473, 102 S.Ct. 1169, 71 L.Ed.2d 335 (1982). Based on this classification, Congress “structure[d] relief” through separate funding processes in districts using U.S. trustees and bankruptcy administrators. *Id.*; *see Blanchette v. Connecticut Gen. Ins. Corps. (Regional Rail Reorganization Cases)*, 419 U.S. 102, 159, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974) (Congress may “take into account differences that exist between different parts of the country”). This approach allowed Congress to recoup the additional funds by targeting districts using U.S. trustees. By tailoring the financial solution to the need itself,

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Congress didn't run afoul of the Bankruptcy Clause. *In re Circuit City Stores, Inc.*, 996 F.3d 156, 166 (4th Cir. 2021); *Matter of Buffets, L.L.C.*, 979 F.3d 366, 378–80 (5th Cir. 2020).

Perhaps there shouldn't be two separate systems, but the debtors forfeited their challenge to the existence of two separate systems. If we put aside that forfeited challenge, we have little reason to question Congress's approach. The dual systems created different financial needs, and Congress decided to raise fees in the jurisdictions creating the budget shortfall. That approach wasn't arbitrary and didn't violate the Bankruptcy Clause.



UNITED STATES of America,
Plaintiff - Appellee,

v.

Adam HEMMELGARN, Defendant -
Appellant.

No. 20-4109

United States Court of Appeals,
Tenth Circuit.

FILED October 8, 2021

Background: Defendant moved for compassionate release. The United States District Court for the District of Utah, Robert J. Shelby, Chief Judge, 2020 WL 5645316, denied motion and defendant's motion for reconsideration. Defendant appealed.

Holdings: The Court of Appeals, Tymkovich, Chief Judge, held that:

(1) district court did not abuse its discretion in denying defendant's motion for compassionate release, and

(2) district court did not abuse its discretion in denying defendant's motion for reconsideration.

Affirmed.

1. Sentencing and Punishment ⇌2229

Once term of imprisonment has been imposed, courts are generally forbidden from modifying that term of imprisonment.

2. Sentencing and Punishment ⇌665, 2263

Prisoner may move for compassionate release only if: (1) district court finds that extraordinary and compelling reasons warrant such reduction; (2) district court finds that such reduction is consistent with applicable policy statements issued by Sentencing Commission; and (3) district court considers statutory sentencing factors to extent that they are applicable. 18 U.S.C.A. §§ 3553(a), 3582(c)(1)(A).

3. Federal Courts ⇌2031

"Jurisdictional rules" go to courts' authority to hear case, whereas "mandatory claim-processing rules" do not implicate courts' adjudicatory authority, but rather promote orderly progress of litigation by requiring that parties take certain procedural steps at certain specified times.

See publication Words and Phrases for other judicial constructions and definitions.

4. Federal Courts ⇌2031

If legislature clearly states that prescription counts as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue; but when Congress does not rank prescription as jurisdictional, courts should treat restriction as nonjurisdictional in character.

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

January 26, 2023

Christopher M. Wolpert
Clerk of Court

In re: JOHN Q. HAMMONS FALL 2006,
LLC, et al.,

Debtors.

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

Appellants,

v.

OFFICE OF THE UNITED STATES
TRUSTEE,

Appellee.

ACADIANA MANAGEMENT GROUP,
LLC, et al.,

Amici Curiae.

No. 20-3203
(16-21142)
(United States Bankruptcy Court for the
District of Kansas)

ORDER

Before **BACHARACH, EBEL, and PHILLIPS**, Circuit Judges.

Appellee’s petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

A handwritten signature in black ink, appearing to read 'C. M. Wolpert', with a long horizontal flourish extending to the right.

CHRISTOPHER M. WOLPERT, Clerk