

IN THE SUPREME COURT OF THE UNITED STATES

No. 22A960

WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE, REGION 2,
APPLICANT

v.

CLINTON NURSERIES, INC.; CLINTON NURSERIES OF MARYLAND, INC.;
CLINTON NURSERIES OF FLORIDA, INC.; TRIEM LLC

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

Pursuant to Rules 13.5 and 30.2 of the Rules of this Court, the Solicitor General, on behalf of William K. Harrington, United States Trustee for Region 2, respectfully requests a 31-day extension of time, to and including July 17, 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 Second Circuit in this case. The court of appeals entered its judgment on November 10, 2022, and denied a petition for rehearing on February 17, 2023. By order dated May 3, 2023, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to June 16, 2023. The jurisdiction of this Court would be invoked under

28 U.S.C. 1254(1). The opinion of the court of appeals (App., infra, 1a-15a) is reported at 53 F.4th 15. The court's order denying rehearing (App., infra, 16a) is unreported.

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 UST 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 2017, when debtors Clinton Nurseries Inc., et al., sought relief under Chapter 11 of the Bankruptcy Code in the District of Connecticut, a UST district. Initially, the debtors paid quarterly fees under the amended schedule that took effect in January 2018. But the debtors subsequently filed a motion in bankruptcy court seeking a partial refund of quarterly fees and a reduction in future fee payments 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 survived constitutional scrutiny. 608 B.R. 96, 117. The court also concluded that, to the extent the Judicial Conference's implementation of the fee increase in BA districts was flawed, reducing debtors' quarterly fees would not be appropriate relief. See id. at 120. The court of appeals reversed. See 998 F.3d 56. It concluded that the 2017 Act was unconstitutionally non-uniform. Id. at 65-69.

As relevant here, the court of appeals held that debtors are "entitled to a refund of the amount in excess of the fees [they] would have paid in a BA District during the same time period." 998 F.3d at 70. The court did not address the government's argument that "even if Debtors had identified a constitutional uniformity defect, Debtors would nonetheless not be entitled to any

exemption from payment of statutorily required fees.” Gov’t C.A. Br. 35. The court then denied the government’s petition for rehearing. See Order (2d Cir. Sept. 17, 2021).

b. Applicant, the United States Trustee for Region 2, filed a petition for certiorari, asking the Court to hold the petition pending its decision in Siegel, *supra*. See Pet. 12, Harrington v. Clinton Nurseries, Inc., No. 21-1123 (filed Feb. 14, 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.” 143 S. Ct. 297 (2022).

c. Thirty days after this Court’s order vacating the original opinion of the court of appeals (and before this Court had issued and sent its judgment), the court of appeals -- without inviting supplemental briefing on the remedial question that this Court had identified in Siegel -- “[a]mended and [r]einstated” its previous opinion. See App., *infra*, 1a, 4a n.1, 7a. The court discussed the remedial issue in a single new paragraph, stating that “[it] see[s] nothing in Siegel that calls into doubt [its] earlier holding,” and it “reaffirm[ed] that, to the extent that [the debtors] ha[ve] already paid the unconstitutional fee in-

crease, [they are] entitled to a refund of the amount in excess of the fees [they] would have paid in a BA District during the same time period.” Id. at 15a.

d. The court of appeals subsequently denied a petition for rehearing. App., infra, 16a.

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 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 John Q. Hammons Fall 2006, LLC, No. 20-3203, 2022 WL 3354682 (10th Cir. Aug. 15, 2022), which also presents the same question and in which Justice Gorsuch has extended the time to file a petition for a writ of certiorari to June 23, 2023, see Office of the United States Trustee v. John Q. Hammons Fall 2006, LLC, No. 22A885 (May 10, 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 ram-

ifications 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

JUNE 2023

APPENDIX

Court of appeals opinion, amended and reinstated,
(Nov. 10, 2022).....1a

Court of appeals order denying rehearing (Feb. 17, 2023).....16a

echo the concern voiced by Justice Douglas in Garrison, a concern as valid today as it was nearly sixty years ago: “It is disquieting to know that one of [seditious libel’s] instruments of destruction is abroad in the land today.” 379 U.S. at 80-83, 85 S.Ct. 209 (Douglas, J., concurring).



IN RE: CLINTON NURSERIES, INC.;
Clinton Nurseries of Maryland, Inc.;
Clinton Nurseries of Florida, Inc.;
Triem LLC, Debtors.

Clinton Nurseries, Inc.; Clinton Nurseries of Maryland, Inc.; Clinton Nurseries of Florida, Inc., Debtors-Appellants,

Triem LLC, Debtor,

v.

William K. Harrington, United States Trustee, Region 2, Trustee-Appellee.

**No. 20-1209-bk
 August Term, 2020**

United States Court of Appeals,
 Second Circuit.

Argued: October 23, 2020

Decided: May 24, 2021

Vacated: October 11, 2022

Amended and Reinstated:
 November 10, 2022

Background: Related Chapter 11 debtors filed motion to determine amount of United States Trustee (UST) fees, arguing that statutory amendments which increased UST quarterly fees created non-uniform

bankruptcy law in violation of the Bankruptcy Clause of the United States Constitution. The United States Trustee objected. The United States Bankruptcy Court for the District of Connecticut, No. 17-31897, James J. Tancredi, J., concluded that there was no uniformity problem, and debtors appealed.

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

- (1) debtor had Article III standing to challenge fee legislation as violative of uniformity provision of the Bankruptcy Clause;
- (2) fee legislation was a law on the subject of bankruptcy, and thus was subject to uniformity requirement of the Bankruptcy Clause; and
- (3) fee legislation was unconstitutional as violating uniformity provision of the Bankruptcy Clause; abrogating *In re MF Glob. Holdings Ltd.*, 615 B.R. 415.

Reversed.

Opinion, 998 F.3d 56, amended and superseded.

1. Bankruptcy ⇄3782

On direct appeal from order of bankruptcy court, the Court of Appeals reviews a bankruptcy court’s legal conclusions de novo and accepts a bankruptcy court’s factual findings unless they are clearly erroneous. Fed. R. Bankr. P. 8013.

2. Federal Civil Procedure ⇄103.2

Federal Courts ⇄2101

Standing is an essential and unchanging part of the “case or controversy” requirement of Article III of the United States Constitution. U.S. Const. art. 3, § 2.

subtly but selectively to speakers that the Gov-

ernment does not like.”).

3. Federal Civil Procedure ⇌103.2

Constitutional standing implicates the subject matter jurisdiction of court, and court may raise standing issues sua sponte. U.S. Const. art. 3, § 2.

4. Federal Civil Procedure ⇌103.2, 103.3

To establish Article III standing, plaintiff must allege, and ultimately prove, that plaintiff has suffered an injury-in-fact which is fairly traceable to the challenged action of defendant, and which is likely to be redressed by the requested relief. U.S. Const. art. 3, § 2.

5. Bankruptcy ⇌2159.1

Chapter 11 debtor in a judicial district subject to the United States Trustee (UST) Program, which, due to amount of disbursements in its Chapter 11 case, was required to pay an increased quarterly UST fee as result of geographically disparate legislation that required increased fees only in UST districts and not in judicial districts with Bankruptcy Administrators, had Article III standing to challenge the legislation as violative of uniformity provision of the Bankruptcy Clause; debtor had sustained a concrete injury-in-fact that was traceable to the geographically discrepant fee increase, and that was capable of redress through a partial refund of quarterly fees that it paid before Congress amended statute to make this quarterly fee increase applicable in all judicial districts. U.S. Const. art. 1, § 8, cl. 4, art. 3, § 2; 28 U.S.C.A. § 1930(a)(6, 7).

6. Bankruptcy ⇌2014

Legislation which amended federal statute that was literally titled “Bankruptcy fees,” to require debtors in large Chapter 11 cases in which there were significant distributions to pay, as administrative priority expense, increased quarterly United States Trustee (UST) fees in all judicial districts subject to the UST Program, and which thereby affected amount of funds

available for distribution to lower priority creditors during administration of Chapter 11 case, was a law on subject of bankruptcy, and thus was subject to uniformity requirement of the Bankruptcy Clause. U.S. Const. art. 1, § 8, cl. 4; 28 U.S.C.A. § 1930(a)(6).

7. Bankruptcy ⇌2014

Legislation which required debtors in large Chapter 11 cases to pay, as administrative priority expense, increased quarterly United States Trustee (UST) fees in all judicial districts subject to the UST Program, but which, in specifying that these increased fees “m[ight]” also be collected in Bankruptcy Administrator districts, merely permitted the collection of increased fees in judicial districts not subject to the UST Program, was geographically disparate bankruptcy legislation, that raised concerns under uniformity provision of the Bankruptcy Clause; Congress’ use of the mandatory word “shall” in fee provision applicable in UST Program districts and of the permissive word “may” in fee provision applicable in Bankruptcy Administrator districts required different interpretations. U.S. Const. art. 1, § 8, cl. 4; 28 U.S.C.A. § 1930(a)(6, 7).

8. Statutes ⇌1407

While use of the word “may” in legislation usually implies some degree of discretion, this common-sense principle of statutory construction is by no means invariable and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of statute.

9. Constitutional Law ⇌994

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

IN RE CLINTON NURSERIES, INC.

Cite as 53 F.4th 15 (2nd Cir. 2022)

17

10. Bankruptcy ⇌2014

Legislation which required debtors in large Chapter 11 cases to pay, as administrative priority expense, increased quarterly United States Trustee (UST) fees in all judicial districts subject to the UST Program, but which merely permitted, and did not require, the payment of such increased fees in judicial districts with Bankruptcy Administrators, was nonuniform law on subject of bankruptcy, which did not attempt to permissibly deal with a geographically isolated problem, and thus was unconstitutional as violating uniformity provision of the Bankruptcy Clause; abrogating *In re MF Glob. Holdings Ltd.*, 615 B.R. 415. U.S. Const. art. 1, § 8, cl. 4; 28 U.S.C.A. § 1930(a)(6, 7).

11. Bankruptcy ⇌2014

To survive scrutiny under uniformity provision of the Bankruptcy Clause, a law must apply uniformly to a defined class of debtors. U.S. Const. art. 1, § 8, cl. 4.

12. Bankruptcy ⇌2014, 3152

Appropriate remedy where, due to geographically non-uniform bankruptcy law that subjected only Chapter 11 debtors in judicial districts subject to the United States Trustee (UST) Program to obligation to pay increased quarterly fees based on amount of disbursements in their cases until legislation was amended to make this fee increase applicable in both UST and Bankruptcy Administrator districts, was entry of order directing a refund to debtor of amounts in excess of the fees that it would have paid in a Bankruptcy Administrator district during this same time period. U.S. Const. art. 1, § 8, cl. 4; 28 U.S.C.A. § 1930(a)(6, 7).

West Codenotes

Prior Version Held Unconstitutional

28 U.S.C.A. § 1930(a)(6)(B)

Prior Version Held Unconstitutional

28 U.S.C.A. § 1930(a)(7)

Appeal from the United States Bankruptcy Court for the District of Connecticut. No. 17-31897 — James J. Tancredi, *Judge*.

Eric A. Henzy (Christopher H. Blau, on the brief), Zeisler & Zeisler, P.C., Bridgeport, Connecticut, for Debtors-Appellants.

Jeffrey B. Clark (Ethan P. Davis, Mark B. Stern, Jeffrey E. Sandberg, Ramona D. Elliott, P. Matthew Sutko, and Beth A. Levene, on the brief), U.S. Department of Justice, Washington, D.C., for Trustee-Appellee.

Before: RAGGI, SULLIVAN, and NARDINI, Circuit Judges.

WILLIAM J. NARDINI, Circuit Judge:

Judicial districts in the United States fall into two categories: those in which the United States Trustee Program oversees bankruptcy administration (“UST Districts”) and those in which judicially appointed bankruptcy administrators perform the same function (“BA Districts”). See *Matter of Buffets, L.L.C.*, 979 F.3d 366, 370 (5th Cir. 2020). In 2017, Congress passed an amendment (the “2017 Amendment”) to 28 U.S.C. § 1930, the statute setting forth quarterly fees in bankruptcy cases. *Id.* at 371. The 2017 Amendment increased quarterly fees in UST Districts, but the Judicial Conference of the United States (“Judicial Conference”) did not immediately impose a parallel increase in the BA Districts. *Id.* at 372. Congress later passed the Bankruptcy Administration Improvement Act of 2020, Pub. L. No. 116-325 (the “2020 Act”), which modified § 1930 to clearly mandate that UST Districts and BA Districts charge equal fees.

Debtors-Appellants Clinton Nurseries, Inc., Clinton Nurseries of Maryland, Inc., and Clinton Nurseries of Florida, Inc. (collectively, “Clinton”) filed for bankruptcy in December 2017 in the District of Connecticut, which is a UST District. Clinton incurred fees in accordance with the increase set forth in the 2017 Amendment during the period after the 2017 Amendment but before the effective date of the 2020 Act, *i.e.*, while the BA Districts were charging lower fees.

Clinton appeals from an order of the Bankruptcy Court (James J. Tancredi, *J.*) entered on August 29, 2018, rejecting Clinton’s constitutional challenge to the 2017 Amendment. Specifically, the Bankruptcy Court rejected Clinton’s argument that, under the version of § 1930 in effect prior to the 2020 Act, the 2017 Amendment violated the Bankruptcy Clause of the United States Constitution, which empowers Congress to enact “*uniform* Laws on the subject of Bankruptcies throughout the United States.” U.S. Const. art. I, § 8, cl. 4 (emphasis added).

We hold that the 2017 Amendment is a “Law[] on the subject of Bankruptcies,” *id.*, implicating the uniformity requirement of the Bankruptcy Clause. We also hold that, under the version of § 1930 in effect prior to the 2020 Act, the 2017 Amendment violated the uniformity requirement.¹

We therefore **REVERSE** the decision of the Bankruptcy Court.

I. Background

A. Quarterly fees in UST and BA Districts prior to the 2017 Amendment

The U.S. Trustee Program, which is part of the U.S. Department of Justice,

oversees bankruptcy administration in 88 of the 94 federal districts. *See* 28 U.S.C. § 581(a); *Buffets*, 979 F.3d at 370. Judicially appointed bankruptcy administrators, with the oversight of the Judicial Conference, perform the same role in the remaining six districts, which are located in North Carolina and Alabama. *See* Federal Courts Improvements Act of 2000, Pub. L. No. 106-518 § 501, 114 Stat. 2410, 2421 (2000); *Buffets*, 979 F.3d at 370; *USA Sales, Inc. v. Off. of the United States Tr.*, 532 F.Supp.3d 921, 929–30 (C.D. Cal. 2021).

Congress funds the U.S. Trustee Program through annual appropriations, offset by money in an account known as the United States Trustee System Fund. *See* 28 U.S.C. § 589a; *In re Prines*, 867 F.2d 478, 480 (8th Cir. 1989). Most of the money in the United States Trustee System Fund comes from quarterly fees paid by debtors in UST Districts pursuant to 28 U.S.C. § 1930(a)(6). Section 1930(a)(6)(A) provides in relevant part:

[A] quarterly fee shall be paid to the United States trustee . . . in each case under chapter 11 of title 11 . . . for each quarter (including any fraction thereof) until the case is converted or dismissed, whichever occurs first.

In creating the United States Trustee System Fund and mandating quarterly fees, Congress sought to ensure the trustee program would be paid for “by the users of the bankruptcy system—not by the taxpayer.” H.R. Rep. No. 99-764 at 22.

Initially, only debtors in UST Districts paid quarterly fees. *See Buffets*, 979 F.3d

1. After we issued our original opinion in this case, the Supreme Court vacated our judgment and remanded for further consideration in light of *Siegel v. Fitzgerald*, — U.S. —, 142 S. Ct. 1770, 213 L.Ed.2d 39 (2022). *See*

Harrington v. Clinton Nurseries, Inc., No. 21-1123, — U.S. —, 143 S.Ct. 297, 214 L.Ed.2d 129 (U.S. Oct. 11, 2022). We now issue this amended opinion.

IN RE CLINTON NURSERIES, INC.

19

Cite as 53 F.4th 15 (2nd Cir. 2022)

at 371. In 1994, however, the Ninth Circuit held that the absence of quarterly fees in BA Districts was unconstitutionally non-uniform. *See St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1535 (9th Cir. 1994). Congress thereafter enacted § 1930(a)(7) to provide for corresponding quarterly fees in BA Districts, stating in relevant part:

In districts that are not part of a United States trustee region [i.e. BA Districts]. . . , the Judicial Conference of the United States may require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection.

28 U.S.C. § 1930(a)(7) (2000). BA Districts deposit these quarterly fees into a fund that offsets judicial branch appropriations. *See id.*

Following the passage of § 1930(a)(7), the Judicial Conference harmonized fees in UST and BA Districts by directing that quarterly fees be imposed in BA Districts “in the amounts specified in 28 U.S.C. § 1930.” *Report of the Proceedings of the Judicial Conference of the United States* 45–46 (Sept./Oct. 2001), <https://go.usa.gov/xf2vr>. This parity remained in place until the first quarter of 2018, when the 2017 Amendment took effect in the UST Districts.

2. Specifically, the statute, both before and after the 2017 amendment, provides in relevant part:

The fee shall be \$325 for each quarter in which disbursements total less than \$15,000; \$650 for each quarter in which disbursements total \$15,000 or more but less than \$75,000; \$975 for each quarter in which disbursements total \$75,000 or more but less than \$150,000; \$1,625 for each quarter in which disbursements total \$150,000 or more but less than \$225,000; \$1,950 for each quarter in which disbursements total \$225,000 or more but less than \$300,000; \$4,875 for each quarter in which disbursements total \$300,000 or more but less than \$1,000,000; \$6,500 for each quar-

B. The 2017 Amendment

Section 1930(a)(6) ties the amount of a debtor’s fee in a UST District to the size of “disbursements”—i.e., the debtor’s payments to third parties. 28 U.S.C. § 1930(a)(6)(A). The larger the disbursements, the larger the quarterly fee.² Prior to the 2018 effective date of the 2017 Amendment, the maximum fee under § 1930(a)(6) was “\$30,000 for each quarter in which disbursements total more than \$30,000,000.” 28 U.S.C. § 1930(a)(6) (2008).

In 2017, Congress amended § 1930(a)(6) to temporarily add to the existing fee schedule an even higher fee where disbursements equaled or exceeded \$ 1 million. The 2017 Amendment states as follows:

During each of fiscal years 2018 through 2022, if the balance in the United States Trustee System Fund as of September 30 of the most recent full fiscal year is less than \$200,000,000, the quarterly fee payable for a quarter in which disbursements equal or exceed \$1,000,000 shall be the lesser of 1 percent of such disbursements or \$250,000.

Id. § 1930(a)(6)(B) (2017). Congress enacted the 2017 Amendment after observing a decreasing balance in the United States Trustee System Fund, due to a nationwide

ter in which disbursements total \$1,000,000 or more but less than \$2,000,000; \$9,750 for each quarter in which disbursements total \$2,000,000 or more but less than \$3,000,000; \$10,400 for each quarter in which disbursements total \$3,000,000 or more but less than \$5,000,000; \$13,000 for each quarter in which disbursements total \$5,000,000 or more but less than \$15,000,000; \$20,000 for each quarter in which disbursements total \$15,000,000 or more but less than \$30,000,000; \$30,000 for each quarter in which disbursements total more than \$30,000,000.

28 U.S.C. § 1930(a)(6)(A) (2017); 28 U.S.C. § 1930(a)(6) (2008).

decline in bankruptcy filings. *See Buffets*, 979 F.3d at 371; *USA Sales, Inc.*, 532 F.Supp.3d at 930–31.

As a result of the enactment of the 2017 Amendment, the parity of fees between UST Districts and BA Districts came to an end at the start of 2018. While UST Districts began implementing the fee increase in the first quarter of 2018, the BA Districts did not do so immediately. *See Buffets*, 979 F.3d at 372. Rather, it was not until September 2018 that the Judicial Conference adopted an equivalent fee increase in BA Districts. *See 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. Even then, the Judicial Conference instructed that the fee increase would not take effect until October 1, 2018, and would apply only to cases filed after that date. *Id.* Thus, a debtor in a BA District who filed for bankruptcy prior to October 1, 2018, would never be charged the fee increase “no matter how long the case remain[ed] pending.” *Buffets*, 979 F.3d at 372. By contrast, “all qualifying Chapter 11 debtors in UST Districts were assessed the increased fees—even debtors in cases commenced before the 2017 Amendment was enacted.” *USA Sales, Inc.*, 532 F.Supp.3d at 930–31.

C. Clinton’s quarterly fee challenge

Clinton operates plant nurseries—growing trees, shrubs, flowers, and ornamental grasses—in Connecticut, Florida, and Maryland. On December 18, 2017, Clinton filed for Chapter 11 bankruptcy protection

in the District of Connecticut, which is a UST District.

In the first quarter of 2018, Clinton made disbursements of approximately \$ 3.2 million—well over the \$ 1 million threshold of the 2017 Amendment. Since then, Clinton’s disbursements have consistently exceeded the threshold. Accordingly, Clinton has been charged—and has paid—the increased quarterly fees as set forth in the 2017 Amendment.

On April 17, 2019, Clinton filed a motion with the Bankruptcy Court, seeking relief from the increased quarterly fees. Clinton argued that the 2017 Amendment violated the Bankruptcy Clause of the U.S. Constitution, which authorizes Congress to “[t]o establish . . . *uniform* Laws on the subject of Bankruptcies throughout the United States.” U.S. Const. art. I, § 8, cl. 4 (emphasis added). Trustee-Appellee William K. Harrington, United States Trustee, Region 2 (the “Trustee”) filed an objection to the motion.

On August 28, 2019, the Bankruptcy Court issued an order *sua sponte* converting the contested motion to an adversary proceeding, determining to treat the objection as a motion to dismiss, and dismissing the adversary proceeding for failure to state claims upon which relief could be granted. The Bankruptcy Court agreed with Clinton that the 2017 Amendment was a bankruptcy law subject to the uniformity requirement of the Bankruptcy Clause. But the Bankruptcy Court also agreed with the Trustee that the 2017 Amendment was uniform on its face.³ This direct appeal followed.⁴

3. By the same order, the Bankruptcy Court determined that another debtor, Triem, LC (“Triem”), did not have standing to challenge the 2017 Amendment because Triem’s fees under the 2017 Amendment were identical to the fees Triem would have paid absent the amendment. Triem has not appealed, and

Clinton expressly declines to challenge the standing determination.

4. On November 8, 2019, a district court in the District of Connecticut certified this matter for direct appeal pursuant to 28 U.S.C. § 158(d)(2)(A). On April 14, 2020, this Court

IN RE CLINTON NURSERIES, INC.

21

Cite as 53 F.4th 15 (2d Cir. 2022)

D. The 2020 Act

Shortly after the parties fully briefed and argued this appeal, Congress amended 28 U.S.C. § 1930 through the 2020 Act. The 2020 Act changed the word “may” in § 1930(a)(7) to “shall,” with the provision now stating in relevant part:

In districts that are not part of a United States trustee region [i.e. BA Districts]. . . , the Judicial Conference of the United States *shall* require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection.

28 U.S.C. § 1930(a)(7) (emphasis added).

E. The Supreme Court’s Decision in *Siegel*

After we issued our original opinion in this case, the Supreme Court decided *Siegel v. Fitzgerald*, — U.S. —, 142 S. Ct. 1770, 213 L.Ed.2d 39 (2022), holding that the 2017 Amendment violated the Bankruptcy Clause’s uniformity requirement. On October 11, 2022, the Court granted the Trustee’s petition for certiorari in this case, vacated our judgment, and remanded for further consideration in light of *Siegel*. See *Harrington v. Clinton Nurseries, Inc.*, No. 21-1123, — U.S. —, 142 S.Ct. 297, 214 L.Ed.2d 129 (U.S. Oct. 11, 2022). Because the Supreme Court’s opinion in *Siegel* accords with our own, we now issue this amended opinion reinstating our judgment.

granted Clinton’s petition for permission to appeal in this Court.

5. Clinton expressly disclaims any as-applied challenge. See Appellants’ Br. at 22 n.7 (“To be clear, the Appellants did not and do not make an as-applied challenge to the 2017 Amendment. . . . [T]he Appellants claim that the 2017 Amendment is facially unconstitutional . . .”).

II. Discussion

[1] This Court reviews a bankruptcy court’s legal conclusions *de novo* and accepts a bankruptcy court’s factual findings unless such findings are clearly erroneous. *In re Barnett*, 737 F.3d 238, 246 (2d Cir. 2013).

On appeal, Clinton argues that the Bankruptcy Court erred in rejecting its argument that the 2017 Amendment was unconstitutionally non-uniform on its face.⁵ Clinton explains that, at the time it incurred the disputed quarterly fee charges in this case, § 1930(a)(6) provided that UST Districts “shall” charge the fee increase, while § 1930(a)(7) provided that BA Districts “may” charge the fee increase. This distinction, according to Clinton, permitted the delayed and then incomplete implementation of the 2017 Amendment’s fee increase in the BA Districts, which resulted in a fee discrepancy between the UST and BA Districts and, thus, a lack of constitutionally mandated uniformity.

The 2020 Act, as explained above, has recently replaced the word “may” with “shall” in § 1930(a)(7). As amended, the fee schedule set forth in § 1930(a)(6), including the 2017 Amendment, should—at least going forward—apply uniformly in UST Districts and BA Districts. Nonetheless, we are still left with the question of whether Clinton was charged unconstitutional fees under the prior version of the statute, when the word “may” remained in place and the BA Districts had yet to fully implement the 2017 Amendment’s fee increase.⁶

6. It is by no means obvious that the 2020 Act will entirely eliminate the geographic discrepancy that Clinton argues constitutes unconstitutional non-uniformity. See *USA Sales, Inc.*, 532 F.Supp.3d at 945 n.46 (“[I]t remains unclear to which cases the Judicial Council will apply the 2020 Act. . . . [I]f the Judicial Council applies the new fees only to cases filed on or after the effective date of the 2020 Act (as the Judicial Council did with the 2017

The Trustee raises two arguments in response. First, the Trustee argues that the Bankruptcy Court erred in holding that the 2017 Amendment is even subject to the Bankruptcy Clause. Second, assuming the Bankruptcy Clause does govern the analysis, the Trustee defends the Bankruptcy Court's conclusion that the 2017 Amendment does not violate the Bankruptcy Clause.

We first consider our subject matter jurisdiction and then address each of the Trustee's arguments in turn.

A. This Court has subject matter jurisdiction to consider Clinton's challenge.

At the outset, we must consider whether this Court has subject matter jurisdiction over Clinton's challenge to the constitutionality of the 2017 Amendment.

[2,3] "Article III, Section 2 of the Constitution limits the subject-matter jurisdiction of the federal courts to 'Cases' and 'Controversies.'" *SM Kids, LLC v. Google LLC*, 963 F.3d 206, 211 (2d Cir. 2020). "Standing 'is an essential and unchanging part of the case-or-controversy requirement of Article III.'" *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.* ("*Cent. States*"), 433 F.3d 181, 198 (2d Cir. 2005) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)); see *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) ("In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every

federal case, determining the power of the court to entertain the suit."). Because constitutional standing implicates the subject matter jurisdiction of the Court, we may raise the issue *nostra sponte*. *Cent. States*, 433 F.3d at 198.

[4,5] "To establish Article III standing, a plaintiff must . . . allege, and ultimately prove, that [the plaintiff] has suffered an injury-in-fact that is fairly traceable to the challenged action of the defendant, and which is likely to be redressed by the requested relief." *Baur v. Veneman*, 352 F.3d 625, 632 (2d Cir. 2003). Here, Clinton filed for bankruptcy prior to October 1, 2018; was subject to a fee increase pursuant to the 2017 Amendment due to the size of its disbursements; and paid more than a similarly situated debtor (*i.e.*, one with the same filing date and disbursement size) would owe in a BA District, where the increased fee schedule had not yet been implemented by the Judicial Conference. Thus, Clinton has sustained a concrete injury-in-fact that is traceable to the geographically discrepant fee increase and that is capable of redress through a partial refund (reducing Clinton's quarterly fees to the level it would have paid had it filed for bankruptcy at the same time in a BA District rather than a UST District). We conclude, therefore, that Clinton has standing to raise this constitutional challenge and to seek reimbursement.

B. The 2017 Amendment is subject to the uniformity requirement of the Bankruptcy Clause.

[6] Turning to the merits of the constitutional challenge, we must first consider whether the 2017 Amendment is a "Law[]

Amendment), then the constitutional non-uniformity problem will persist."). We need not, and do not, decide this issue because before

us is only the constitutionality of the 2017 Amendment prior to the 2020 Act.

IN RE CLINTON NURSERIES, INC.

Cite as 53 F.4th 15 (2nd Cir. 2022)

23

on the subject of Bankruptcies” implicating the uniformity requirement of the Bankruptcy Clause. U.S. Const. art. 1, § 8, cl. 4. The Trustee argues that the Bankruptcy Clause does not apply to the 2017 Amendment “because it is an administrative funding measure, not a substantive bankruptcy law.” Appellee’s Br. at 13.

The Trustee’s argument has been repeatedly rejected by other courts. *See In re MF Glob. Holdings Ltd.*, 615 B.R. 415, 446 (Bankr. S.D.N.Y. 2020) (collecting cases and observing that “every bankruptcy court that has addressed the constitutionality of the 2017 Amendment under the Bankruptcy Clause” has “concluded that the 2017 Amendment is ‘on the subject of Bankruptcies’”).⁷ And for good reason: The subject of the 2017 Amendment plainly 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. Labor Execs.’ Ass’n v. Gibbons*, 455 U.S. 457, 466, 102 S.Ct. 1169, 71 L.Ed.2d 335 (1982) (internal quotation

marks omitted). The 2017 Amendment amends a statute, § 1930, that is literally entitled: “Bankruptcy fees.” *See SCI Direct*, 2020 WL 5929612, at *9.⁸ Under § 1930(a)(6), a debtor must “pay pre-confirmation UST fees as an administrative priority expense before it pays its commercial creditors, bondholders, and shareholders.” *In re MF Glob. Holdings Ltd.*, 615 B.R. at 445 (internal quotation marks omitted). Accordingly, any change in fees imposed pursuant to § 1930 “affects the amount of funds available for distribution to lower-priority creditors.” *SCI Direct*, 2020 WL 5929612, at *9 (internal quotation marks omitted).⁹

As the Ninth Circuit reasoned in addressing § 1930 before the 2017 Amendment, the quarterly fee statute “clearly governs the relationship between creditor and debtor and, accordingly, falls within the scope of” the uniformity requirement set forth in the Bankruptcy Clause. *St. Angelo*, 38 F.3d at 1530. We reach the same conclusion here. We hold that, because the 2017 Amendment similarly governs debtor-creditor relations and impacts

7. *See also In re SCI Direct, LLC*, 2020 WL 5929612, at *9 (Bankr. N.D. Ohio Sept. 22, 2020) (“[T]he 2017 amendment is clearly a law on the subject of bankruptcies. It appears that every court to address the constitutionality of the 2017 amendment under the Bankruptcy Clause has reached the same conclusion.”); *cf. Buffets*, 979 F.3d at 377 (“The consensus view of bankruptcy courts that Chapter 11 fees are Bankruptcy Clause legislation is likely correct. But we need not decide the question because, even assuming it is, we find no uniformity problem.”).

8. Congress created § 1930 as part of a 1978 law entitled “An act to establish a uniform Law on the Subject of Bankruptcies.” *In re MF Glob. Holdings Ltd.*, 615 B.R. at 446 (emphasis added) (internal quotation marks omitted). Decades later, “Congress stated that it was enacting the 2017 Amendment under the Bankruptcy Clause,” with “the sponsor of the bill containing the 2017 Amendment . . . inform[ing] Congress that it had the power to

enact the 2017 Amendment pursuant to Article 1, Section 8, Clause 4 of the Constitution” *Id.*

9. *Accord In re Life Partners Holdings, Inc.*, 606 B.R. 277, 287–88 (Bankr. N.D. Tex. 2019) (because “[t]he fees required by § 1930 are granted administrative claim status in bankruptcies, . . . any increase or decrease in fees payable to the U.S. Trustee affects the amount of funds available for distribution to lower-priority creditors and the debtor”), *abrogated on other grounds by Matter of Buffets, L.L.C.*, 979 F.3d 366 (5th Cir. 2020); *see also In re Mosaic Mgmt. Grp., Inc.*, 614 B.R. 615, 623 (Bankr. S.D. Fla. 2020) (because “[t]he amount of the fee due to the UST directly impacts distributions to other creditors[,] . . . § 1930(a)(6), both before and after enactment of the [2017] Amendment, is a law on the subject of bankruptcies that implicates the related uniformity requirement under the Constitution”).

the relief available, it is a bankruptcy law subject to the Bankruptcy Clause and is constitutional only if “uniform.” U.S. Const. art. I, § 8, cl. 4.

C. Prior to the 2020 Act, the 2017 Amendment was unconstitutionally non-uniform on its face.

We turn next to the question of whether, under the version of § 1930 in effect prior to the 2020 Act, the 2017 Amendment violated the uniformity requirement of the Bankruptcy Clause.

The parties do not dispute that, during the period in which Clinton paid the quarterly fees at issue in this case, there was a clear geographic discrepancy in application of the 2017 Amendment’s fee increase: debtors like Clinton who filed for bankruptcy in UST Districts were charged the increase beginning January 1, 2018; debtors who filed for bankruptcy in BA Districts before October 1, 2018, were never charged the increase.

The Trustee makes two arguments as to why, notwithstanding the geographic discrepancy, the 2017 Amendment was uniform on its face. First, the Trustee contends that, under the text of § 1930 prior to the 2020 Act, Congress mandated equal implementation of the 2017 Amendment’s fee increase in UST and BA Districts, and the delayed and inconsistent implementation of the fee increase in the BA Districts actually *contravened* statutory language that was facially uniform. Second, the Trustee suggests that a narrowly defined exception to the uniformity requirement—the “geographically isolated problem” exception—justified the fee discrepancy. We find neither argument persuasive.

1. The Trustee’s proposed textual interpretation is not persuasive.

[7] Clinton, in arguing that the pre-2020 Act version of the 2017 Amendment

was non-uniform on its face, traces the fee discrepancy to a lexical distinction between § 1930(a)(6) and § 1930(a)(7). Specifically, § 1930(a)(6) stated that designated fees—before and after the 2017 Amendment’s fee increase—“shall” be imposed on debtors in UST Districts. By contrast, before the 2020 Act, § 1930(a)(7) stated that the Judicial Conference “may” impose the same fees from § 1930(a)(6) in BA Districts. *See* 28 U.S.C. § 1930(a)(6)-(7). Thus, by the plain terms of the statute, while § 1930(a)(6) *required* application of the increase in UST Districts, § 1930(a)(7) *permitted* application of the increase in BA Districts. And it is this distinction, Clinton explains, that yielded the dissimilar application: In accordance with the discretion afforded by the permissive language of § 1930(a)(7), the Judicial Conference delayed the implementation of the fee increase in the BA Districts for nine months and, even after implementation, did not apply the increase on a going-forward basis to debtors who filed for bankruptcy prior to the implementation date.

The Trustee asks us to ignore the distinction between the “shall” used in § 1930(a)(6) and the “may” used in § 1930(a)(7), urging us to view both provisions as imposing, uniformly, a mandatory obligation. He emphasizes that § 1930(a)(7) was enacted to eliminate the uniformity problem identified by the Ninth Circuit in *St. Angelo*, supporting Congress’s intent to harmonize fees. Through this lens, the Trustee reasons, the Judicial Conference’s delayed implementation in the BA Districts would appear an unauthorized act which would not render the statute itself non-uniform. *See* Appellee’s Br. at 28–29 (“Nothing in Congress’s 2017 amendment authorized, much less directed, the Judicial Conference to implement the amendment on a different effective date. . . . The fail-

IN RE CLINTON NURSERIES, INC.

25

Cite as 53 F.4th 15 (2d Cir. 2022)

ure to implement a fee statute consistently across all judicial districts does not render the statute itself unconstitutional . . .”).

[8] We cannot, however, simply overlook Congress’s decision to use the permissive term “may” in § 1930(a)(7). To be sure, the Supreme Court has acknowledged that, in some limited scenarios, the word “may” can impose a mandatory directive: Although “[t]he word ‘may,’ when used in a statute, usually implies some degree of discretion[,] . . . [t]his commonsense principle of statutory construction is by no means invariable . . . and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute.” *United States v. Rodgers*, 461 U.S. 677, 706, 103 S.Ct. 2132, 76 L.Ed.2d 236 (1983) (footnote and citations omitted). Here, however, the choice of the permissive term appears particularly intentional given that Congress used “shall” in numerous other places in § 1930—and even in

10. We note that, in amending § 1930(a)(7) to replace “may” with “shall,” the 2020 Act purports to “confirm the longstanding intention of Congress that quarterly fee requirements remain consistent across all Federal judicial districts.” Pub. L. No. 116-325, § 2(a)(4)(B). While we certainly may consider a later Congress’s statements regarding the intention of the Congress that originally drafted § 1930(a)(7), we are not constrained to view such statements as dispositive. *See Fed. Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 90, 79 S.Ct. 141, 3 L.Ed.2d 132 (1958) (explaining that “[s]ubsequent legislation which declares the intent of an earlier law” is “entitled to weight” but is not “conclusive in determining what the previous Congress meant”); *see also 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 of course provide no *controlling* basis from which to infer the purposes of an earlier Congress.” (emphasis added)); *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 101 F.3d 239, 244 (2d Cir. 1996) (observing both that

§ 1930(a)(7) itself, which, in its pre-2020 Act form, read in full:

In districts that are not part of a United States trustee region as defined in section 581 of this title, the Judicial Conference of the United States *may* require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection. Such fees *shall* be deposited as offsetting receipts to the fund established under section 1931 of this title and *shall* remain available until expended.

28 U.S.C. § 1930(a)(7) (emphasis added). The Supreme Court cautions against ignoring contexts in which “Congress’ use of the permissive ‘may’ . . . contrasts with the legislators’ use of a mandatory ‘shall’ in the very same section,” and where “[e]lsewhere in [the same statute], Congress used ‘shall’ to impose discretionless obligations.” *Lopez v. Davis*, 531 U.S. 230, 241, 121 S.Ct. 714, 148 L.Ed.2d 635 (2001).¹⁰

be a reliable guide to the intent of a prior Congress” and also that “subsequent Congressional actions should not be rejected out of hand as a source that a court may consider in the search for legislative intent” (internal quotation marks omitted)). Ultimately, we cannot ignore the fact that, in analyzing the motivations behind the earlier Congress’s choice of the word “may,” the Congress that passed the 2020 Act inevitably looked through the lens of the constitutional quagmire that resulted. *Cf. Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980) (“[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”). We conclude that the ordinary meaning of “may” as permissive rather than mandatory (which, apparently, is how the Judicial Conference understood the word) outweighs Congress’s subsequent statement regarding its earlier meaning (which, we note, it oddly purported to confirm in a statute where it decided to amend that very language).

[9] Additionally, in recently rejecting the Trustee’s proposed textual interpretation, the Fifth Circuit explained that “[t]he Judicial Conference’s delayed implementation of the fee increase highlights the difference between ‘may’ and ‘shall.’” *Matter of Buffets, L.L.C.*, 979 F.3d at 378 n.10.¹¹ It is, indeed, telling that the Judicial Conference itself apparently understood the 2017 Amendment as authorizing, but not requiring, it to impose a fee increase in BA Districts. Although “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), for the reasons we have already discussed, we find no ambiguity in the statute’s grant of permissive authority to the Judicial Conference to adjust fees and thus are obliged to identify unconstitutionality.

2. The “geographically isolated problem” exception does not apply.

[10] The Trustee suggests that we can nonetheless salvage the constitutionality of the 2017 Amendment through application of the “geographically isolated problem” exception to the uniformity requirement—an exception recognized by the Supreme

Court in *Blanchette v. Connecticut General Insurance Corp.*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). In *Blanchette*, the Supreme Court addressed the constitutionality of the Rail Act, which set special laws for bankrupt railroads and expressly applied only to a particular geographic region. The Supreme Court concluded that the Rail Act did not contravene the Bankruptcy Clause’s uniformity requirement because all of the country’s bankrupt railroads at that time were located in the designated region and therefore, in targeting the national rail transportation crisis, the statute addressed a geographically isolated problem. *Id.* at 159–160, 95 S.Ct. 335. *Blanchette* explained, “The problem dealt with (under the Bankruptcy Clause) may present significant variations in different parts of the country. . . . [T]he uniformity clause was not intended to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for remedy only in certain regions.” *Id.* at 159, 95 S.Ct. 335 (internal quotation marks, alterations, and citations omitted).

Several bankruptcy courts across the country have applied the “geographically isolated problem” exception in upholding the constitutionality of the 2017 Amendment.¹² The Fifth Circuit’s majority opin-

11. See also *In re Circuit City Stores, Inc.*, 996 F.3d 156, 173–74 (4th Cir. 2021) (Quattlebaum, J. concurring in part and dissenting in part) (declining to read “may” in 28 U.S.C. § 1930(a)(7) as imposing a mandatory obligation); *USA Sales, Inc.*, 532 F.Supp.3d at 945–46 (“[A]lthough the term ‘may’ is sometimes used (sloppily) to signify a mandatory obligation, Congress’ use of the term ‘shall’ in 28 U.S.C. § 1930(a)(6) is unambiguously mandatory, which indicates that term ‘may’ in the following paragraph, 28 U.S.C. § 1930(a)(7), is intended to be permissive. In other words, Congress required the new fees in the UST Districts but only allowed for their possibility in the BA Districts. The decision of the Judicial Conference to delay its adoption of the 2017 Amendment further underscores the dif-

ference between the terms ‘may’ and ‘shall.’” (internal quotation marks, alterations, and citations omitted)).

12. See *SCI Direct*, 2020 WL 5929612, at *10 (“[T]he 2017 amendment . . . remedies a geographically isolated problem that is unique to UST Program Districts, i.e. the depletion of the UST System Fund.”); *MF Glob. Holdings Ltd.*, 615 B.R. at 447 (“[T]he 2017 Amendment applies uniformly to debtors in UST Districts to solve the depleting funding unique to the UST Districts.”); *Mosaic*, 614 B.R. at 624 (the 2017 Amendment is not unconstitutionally non-uniform on the whole because the “overarching purpose” of the 2017 Amendment is to “eliminat[e] a funding shortfall in the UST system and develop[] a rea-

IN RE CLINTON NURSERIES, INC.

27

Cite as 53 F.4th 15 (2nd Cir. 2022)

ion in *Buffets* ultimately took the same approach, reasoning that the exception applied because the 2017 Amendment aimed to ensure proper funding of the UST System—a system that exists only in an isolated geographic region. *See Buffets*, 979 F.3d at 378 (“Just as it did in addressing the failure of railroads in the industrial heartland, Congress confronted the problem of an underfunded Trustee Program where it found it: in the Trustee districts.”).¹³ The Fourth Circuit’s majority opinion in *In re Circuit City Stores, Inc.*, agreed with the Fifth Circuit’s reasoning and similarly applied the “geographically isolated problem” exception. *See* 996 F.3d at 165–67 (“Because only those debtors in Trustee districts use the U.S. Trustees, Congress reasonably solved the shortfall problem with fee increases in the underfunded districts.”).

[11] We are concerned, however, that the bankruptcy courts and the *Buffets* and *Circuit City* opinions have overlooked a critical distinction. The Supreme Court did hold in *Blanchette* that Congress may “take into account differences that exist between different parts of the country, and

sonable reserve for the same,” and “the Amendment effected a fee increase only in districts where the UST is active”).

13. *See also Buffets*, 979 F.3d at 378 (“[Congress] drew a program-specific distinction that only indirectly has a geographic dimension. It does make it more expensive for a debtor in Texas than a debtor in North Carolina to go through bankruptcy, but that is not an arbitrary distinction based on the residence of the debtor or creditors; it is a product of the Texas debtor’s use of the Trustee. By increasing fees for large debtors in those districts, Congress sought to remedy a shortfall in the program’s funding. Only debtors in Trustee Districts use trustees, so Congress could solve the evil to be remedied with a fee increase in just the underfunded districts.” (internal quotation marks and citation omitted)).

... fashion legislation to resolve geographically isolated problems.” 419 U.S. at 159, 95 S.Ct. 335. But the Supreme Court later clarified in *Gibbons* that, “[t]o survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors.” *Gibbons*, 455 U.S. at 473, 102 S.Ct. 1169. In *Blanchette*, all members of the class of debtors impacted by the statute were confined to a sole geographic area: The statute applied only to bankrupt railroad companies, and there were no bankrupt railroad companies located outside the statutorily designated region. *See Blanchette*, 419 U.S. at 159–60, 95 S.Ct. 335.¹⁴ Here, by contrast, the 2017 Amendment’s fee increase applies to the class of debtors whose disbursements exceed \$ 1 million, and there has been no suggestion that members of that broad class are absent in the BA Districts. This case therefore presents the exact problem avoided in *Blanchette*: Two debtors, identical in all respects save the geographic locations in which they filed for bankruptcy, are charged dramatically different fees.¹⁵

14. *See id.* (“The national rail transportation crisis that produced the Rail Act centered in the problems of the rail carriers operating in the region defined by the Act, and these were the problems Congress addressed. No railroad reorganization proceeding, within the meaning of the Rail Act, was pending outside that defined region on the effective date of the Act or during the 180-day period following the statute’s effective date. Thus the Rail Act in fact operates uniformly upon all bankrupt railroads then operating in the United States and uniformly with respect to all creditors of each of these railroads.” (footnote omitted)).

15. *Cf. In re Circuit City Stores, Inc.*, 606 B.R. 260, 270 (Bankr. E.D. Va. 2019), *aff’d in part, rev’d in part and remanded*, 996 F.3d 156 (4th Cir. 2021) (“Had the Debtors filed their chapter 11 bankruptcy petitions a mere 140 miles south in Raleigh, North Carolina, the Debtors would be paying substantially lower quarterly

Nor is the funding shortfall plaguing the UST system caused by a “geographically isolated problem” that would place the entire class of affected debtors only in those districts. Rather, the distinction between UST Districts and BA Districts appears to exist only because Congress chose—for politically expedient reasons—to create a dual bankruptcy system. *Matter of Buffets, L.L.C.*, 979 F.3d at 383 (Clement, *J.*, concurring in part and dissenting in part) (identifying distinction as an “arbitrary political relic”). Indeed, the UST program was intended to be a uniform, nationwide program, but lawmakers in Alabama and North Carolina resisted and, after receiving a number of extensions, ultimately were granted a permanent exemption from the UST program in an unrelated law. *Id.* To allow Congress to use that variation to justify charging different fees is to “rel[y] on a flawed tautology: Congress can justify treating bankrupts differently because it has chosen to treat them differently (higher fees because different programs).” *Id.*¹⁶ Put another way: Application of the “geographically isolated problem” exception

fees than they are paying now. This is the type of regionalism the Uniformity Clause was intended to prevent.” (footnote and internal quotation marks omitted)).

16. The partial dissent in *Circuit City* similarly recognized that “[j]ustifying the differences here on the fact that the Trustee Program districts face the budgetary problems . . . ignores the fact that those districts only face the budgetary problems because Congress treated them differently in the first place.” *Circuit City*, 996 F.3d at 174–75 (Quattlebaum, *J.*, concurring in part and dissenting in part); see also *USA Sales, Inc.*, 532 F.Supp.3d at 945–46 (declining to conclude “that the relevant class of debtors for the purpose of the 2017 Amendment is Chapter 11 debtors in UST districts” because this “fails to address why Chapter 11 debtors in UST Districts are required to use the UST in the first place, whereas debtors in BA Districts get to use less-expensive Admin-

istrators” (internal quotation marks, citations, and footnote omitted)).

here would yield the following inexplicable rule: Congress must enact uniform laws on the subject of bankruptcy . . . except when Congress elects to treat debtors non-uniformly. Such reasoning would render the uniformity requirement of the Bankruptcy Clause of the Constitution effectively meaningless.

[12] In sum, we cannot evade a finding of non-uniformity through either a contortion of the statutory text or an application of the “geographically isolated problem” exception. We conclude that the 2017 Amendment, prior to the 2020 Act, was unconstitutional on its face insofar as it charged higher fees to debtors in UST Districts.¹⁷ That conclusion accords with the Supreme Court’s decision in *Siegel*, in which the Court determined that the 2017 Amendment violated the Bankruptcy Clause’s uniformity requirement by “treat[ing] identical debtors differently based on an artificial funding distinction that Congress itself created.” *Siegel*, 142 S. Ct. at 1782.

17. As noted, see *supra* at n.5, we conclude only that the pre-2020 Act version of the 2017 Amendment, 28 U.S.C. § 1930(a)(6)(B), was facially unconstitutional. We do not address the constitutionality of the current version, or of any other portion of § 1930, or of any other aspect of the UST/BA District system. Clinton raises only a narrow challenge to the pre-2020 Act version of the 2017 Amendment, and we confine our ruling to that provision. *Cf. St. Angelo*, 38 F.3d at 1532 (“In determining whether the statutory scheme governing the U.S. Trustee system in general, and the fee structure outlined in 28 U.S.C. § 1930 in particular, are unconstitutional, we must adhere to the principle of judicial restraint. . . . [C]ourts must cautiously exercise their power to declare a statute constitutionally void and narrowly confine their holdings when possible.”).

M.A. v. ROCKLAND COUNTY DEPARTMENT OF HEALTH**29**

Cite as 53 F.4th 29 (2nd Cir. 2022)

The Supreme Court did not discuss the appropriate remedy in *Siegel. Id.* at 1783. But the parties had an opportunity to brief that issue when this appeal initially came before us, and we decided the question. We see nothing in *Siegel* that calls into doubt our earlier holding, and so we reaffirm that, to the extent that Clinton 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 BA District during the same time period. In directing this refund, however, we note that our ruling is limited to the particular debtors who brought this appeal, who, as discussed above, clearly have standing to seek reimbursement.

III. Conclusion

In sum, we hold as follows:

1. Clinton has standing to bring its constitutional challenge and to seek reimbursement because it filed for bankruptcy in a UST District prior to October 1, 2018; qualified for and paid a fee increase pursuant to the 2017 Amendment due to the size of its disbursements; and paid more than a similarly situated debtor (with the same filing date and disbursement size) would owe in a BA District, where the increased fee schedule had not yet been implemented by the Judicial Conference.

2. Because the 2017 Amendment governs debtor-creditor relations, it is subject to the uniformity requirement of the Bankruptcy Clause.

3. Prior to the 2020 Act, the 2017 Amendment was unconstitutionally non-uniform on its face because it *mandated* a fee increase in UST Districts but only *permitted* a fee increase in BA Districts.

We therefore **REVERSE** the judgment of the Bankruptcy Court and direct that the Bankruptcy Court provide Clinton with a refund of the amount of quarterly fees

paid in in excess of the amount Clinton would have paid in a BA District during the same time period.



M.A., ON BEHALF OF his minor children, H.R. & M., M.C., on behalf of her minor child, R.J., W.D., on behalf of his minor children, A. & J., N.D., on behalf of her minor children, L.M. & P., E.E., J., on behalf of their minor children, A. & S., J.J., on behalf of her minor child R., L.V.G., on behalf of his four minor children, P.J., on behalf of his minor child A., D. on behalf of their minor children, S. & O., R.J. on behalf of their minor children S. & O., K.K., on behalf of her minor children M. & G., L.K. on behalf of his minor child L., M.K., on behalf of his minor child, A., V.L., on behalf of their two minor children, V.M., on behalf of their minor child, I., A.M., on behalf of their minor child, I., T. on behalf of their minor children Y., N. & S., M.M., on behalf of their minor children Y., N. & S., K.M.M., on behalf of their minor children, S., K. & L., W.M., on behalf of their minor children, S., K. & L., K.M., on behalf of their minor children, R. & A., J.O., on behalf of her minor child, T., M.P., on behalf of his minor children, TR. & TE., L.P., on behalf of her minor child, M., M.R., on behalf of her minor children, R. & E., J.R., T.T., on behalf of his minor child, M., Y.T., on behalf of her minor child, Y., J.E., M.O., Plaintiffs-Appellants,

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of February, two thousand twenty-three.

In re: Clinton Nurseries, Inc., Clinton Nurseries of Maryland, Inc., Clinton Nurseries of Florida, Inc., Triem LLC,
Debtors.

ORDER

Docket No: 20-1209

Clinton Nurseries, Inc., Clinton Nurseries of Maryland, Inc., Clinton Nurseries of Florida, Inc.,

Debtors - Appellants,

Triem LLC,

Debtor,

v.

William K. Harrington, United States Trustee, Region 2,

Trustee-Appellee.

Appellee William K. Harrington, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

Catherine O'Hagan Wolfe
