No. 23-47

IN THE
Supreme Court of the United States

WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE, REGION 2, PETITIONER,
Petitioner,

v.

CLINTON NURSERIES, INC., ET AL.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (2022), the Court concluded that the disparate fees collected in Chapter 11 cases in different administrative districts within the bankruptcy system violated the uniformity requirement of the Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4. The question presented is whether the proper remedy for this unconstitutional disparity is (1) to require the refund of fees Respondents paid that they would not have been required to pay in the non-uniform districts in North Carolina or Alabama (as every Court of Appeals to have addressed the issue has held) or, alternatively, (2) to either (a) do nothing or (b) require estates in the non-uniform districts of North Carolina and Alabama to retroactively pay more than they were required to pay.

PARTIES TO THE PROCEEDING

Petitioner (appellee in the Court of Appeals) is William K. Harrington, United States Trustee, Region 2. Respondents (appellants in the Court of Appeals) are Clinton Nurseries, Inc.; Clinton Nurseries of Maryland, Inc.; and Clinton Nurseries of Florida, Inc.

RULE 29.6 STATEMENT

Clinton Nurseries, Inc., is the parent corporation of Clinton Nurseries of Florida, Inc., and Clinton Nurseries of Maryland, Inc. No publicly held company owns 10% or more of the stock of Clinton Nurseries, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Other Authorities:

OPINIONS BELOW

This matter follows on this Court's prior decision in *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (2022). The opinion of the Court of Appeals for the Second Circuit addressing the proper remedy for the constitutional infirmity announced in *Siegel*, Pet. App. 1a-26a, is reported at 53 F.4th 15. The order of the Court of Appeals denying rehearing, Pet. App. 79a-80a, is not reported. A prior opinion of the Court of Appeals is reported at 998 F.3d 56. This Court's prior order, Pet. App. 27a, vacating and remanding the prior opinion of the Court of Appeals is reported at 143 S. Ct. 297. The relevant opinion of the bankruptcy court, Pet. App. 28a-78a, is reported at 608 B.R. 96.

JURISDICTION

The Court of Appeals entered its judgment on November 10, 2022. The Court of Appeals denied Petitioner's rehearing on February 17, 2023. On May 3, 2023, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including June 16, 2023. On June 7, 2023, Justice Sotomayor further extended the time to and including July 17, 2023. Petitioner filed its petition on July 14, 2023. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Bankruptcy Clause of the United States Constitution provides in pertinent part that "The Congress shall have Power * * * [t]o establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4.

The Fifth Amendment to the United States Constitution provides in pertinent part that "No person shall be * * * deprived of life, liberty, or property, without due process of law."

From January 1, 2018 until amendments made in 2020, 28 U.S.C. 1930(a) provided in pertinent parts as follows:

> (a) The parties commencing a case under title 11 shall pay to the clerk of the district court or the clerk of the bankruptcy court, if one has been certified pursuant to section 156(b) of this title, the following filing fees:
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> * * *
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> (6)(A) Except as provided in subparagraph (B), in addition to the filing fee paid to the clerk, a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury, 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. * * *

> (B) 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.
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> (7) 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. * * *

In 2020, Congress amended Section 7 of 28 U.S.C. 1930 through Section 3 of the Bankruptcy Administration Improvement Act of 2020, Pub. L. No. 116-325, 134 Stat. 5086-5087, which provides in pertinent part as follows:

> [(3)](d) BANKRUPTCY FEES.— Section 1930(a) of title 28, United States Code, is amended— (2) in paragraph (7), in the first sentence, by striking "may" and inserting "shall".
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> * * *

PRELIMINARY STATEMENT

This matter arises out of the Chapter 11 bankruptcy cases of Clinton Nurseries, Inc.; Clinton Nurseries of Maryland, Inc.; and Clinton Nurseries of Florida, Inc. ("Clinton"). Petitioner is William K. Harrington, the United States Trustee for Region 2 (the "U.S. Trustee"), an official with oversight responsibilities in bankruptcy matters.

In *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (2022), this Court concluded that the disparate fees collected in Chapter 11 cases in different administrative districts within the bankruptcy system violated the uniformity requirement of the Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4. The question presented involves the selection of the proper remedy for this violation: a refund of fees overcharged in districts outside of Alabama and North Carolina (the "Trustee Program Districts"), or the imposition of additional fees in the districts within Alabama and North Carolina (the "Administrator Program Districts"). The U.S. Trustee also advocates a third option: do nothing, claiming this as the "remedy Congress would have selected in this case" under the guise of some congressional preference for "prospective-only" relief. Pet. at 13.

Following *Siegel*, every court of appeals to have addressed the issue, including the court below, has concluded that the proper remedy is a refund. Although the U.S. Trustee seeks review of that determination, there is no occasion for this Court's intervention for four essential reasons: (1) there is no conflict among the Courts of Appeals on the question

presented, (2) the decision below does not conflict with any authority of this Court, (3) the issue is neither important nor recurring, and (4) the alternative "remedies" the U.S. Trustee suggests—either to do nothing or retroactively charge more to Chapter 11 estates in the Administrator Program Districts in Alabama and North Carolina—are so fraught with constitutional and other infirmities that they are not worthy of the Court's consideration.

The first "remedy" the U.S. Trustee prefers—requiring Chapter 11 estates in the Administrator Program Districts to pay more—is, in reality, no remedy all. To begin with, if the remedy for the constitutional violation at issue were for bankruptcy administrators in the Administrator Program Districts to collect more from others rather than the U.S. Trustee pay a refund, no litigant (like Clinton) that overpaid would ever challenge a disparate fee arrangement under the Bankruptcy Clause for the simple reason that doing so successfully would provide the litigant with no tangible benefit. It would simply result in the imposition of a pecuniary burden on others (*e.g.*, Chapter 11 estates that underpaid in Administrator Program Districts in Alabama and North Carolina). Conversely, no litigant that underpaid (*e.g.*, in Alabama and North Carolina) would ever pursue such a challenge for the simple reason that doing so successfully would only *increase* its fee liabilities. The U.S. Trustee's proposed "remedy" is thus an artifice because, going forward, it would *not* ensure an actual remedy for the constitutional violation, but rather that no constitutional claim would ever be pursued in cases of this kind.

For these same reasons, the U.S. Trustee's proposed "remedy" is also constitutionally dubious. If a litigant such as Clinton cannot obtain a remedy that provides it with any tangible benefit, it is difficult to see how its constitutional challenge would ever be justiciable. Conversely, imposing an added liability on parties that underpaid would effectively increase the pecuniary burdens of parties not before the court in the litigation challenging the disparate fee structure, raising due process concerns.

The U.S. Trustee's alternative do-nothing approach suffers from the same difficulties. True enough, a prospective remedy for a past constitutional violation may conceivably suffice in some arcane instances, but Congress has not directed such relief here; it merely assisted in fixing the disparate fee problem by amending the pertinent statute. For these reasons, the "remedies" the U.S. Trustee prefers are not worthy of consideration and, accordingly, the Petition should be denied.

STATEMENT

Clinton filed for bankruptcy under Chapter 11 on December 18, 2017 in the United States Bankruptcy Court for the District of Connecticut (the "Bankruptcy Court"). Clinton timely paid the U.S. Trustee a total of $299,799.19 in quarterly fees for the fourth quarter of 2017 and the four quarters in 2018, with amounts paid for 2018 based on the fee schedule that became effective on January 1, 2018 under an amendment to 28 U.S.C. § 1930(a)(6) that became effective on October 27, 2017. Pub. L. 115-72, Div. B, 131 Stat. 1229 (the "2017 Act").

As explained in *Siegel*, under the 2017 Act, "Congress enacted a temporary, but significant, increase in the fee rates applicable to large Chapter 11 cases." *Siegel*, 142 S. Ct. at 1777. As the Court further explained, the relevant constitutional problem arose because, at the same time:

> the six districts in the two States participating in the Administrator Program [*i.e.*, districts in Alabama and North Carolina] did not immediately adopt the 2017 fee increase. Only in September 2018 did the Judicial Conference order the Administrator Program districts to implement the amended fee schedule. Even then, however, two key differences remained between the fee increase faced by debtors in Trustee Program districts as opposed to those faced by debtors in Administrator Program districts. First, the fee increase took effect for the six Administrator Program districts as of October 1, 2018, while the increase took effect for the Trustee Program districts as of the first quarter of 2018. Second, in Administrator Program districts, the fee increase applied only to newly filed cases, while in Trustee Program districts, the increase applied to all pending cases.

Id.

On April 17, 2019, Clinton commenced a proceeding in the Bankruptcy Court seeking an order (1) determining, among other things, that based on the fee disparity between the Trustee Program

Districts and the Administrator Program Districts, the 2017 Act created a non-uniform bankruptcy law and was unconstitutional, and that U.S. Trustee fees payable by Clinton should be calculated based on the pre-amendment 28 U.S.C. § 1930(a)(6) fee schedule, and (2) directing the U.S. Trustee to refund to Clinton payments made in excess of the fees calculated on the foregoing basis. Motion to Determine Amount of United States Trustee Fees at ¶ 29, *In re Clinton Nurseries, Inc.*, No. 17-31897 (Bankr. D. Conn. Apr. 17, 2019), ECF 672; Complaint at ¶ 29, *Clinton Nurseries, Inc. v. Harrington (In re Clinton Nurseries, Inc.)*, No. 19-304 (Bankr. D. Conn. Aug. 28, 2019), ECF 1 (the "Complaint"). On May 30, 2019, the Bankruptcy Court entered a scheduling order that provided: "The Debtors and [the U.S. Trustee], each through their respective counsel, hav[e] agreed that the [U.S. Trustee] would not file a motion to dismiss or convert the Debtors' cases based on non-payment of [U.S. Trustee] fees, or otherwise seek to compel the Debtors [to] pay any [U.S. Trustee] fees, during the pendency of the Debtors' [Complaint] . . . ." *In re Clinton Nurseries, Inc.*, No. 17-31897 (Bankr. D. Conn. Apr. 17, 2019), ECF 711 at 1. Clinton did not pay to the U.S. Trustee quarterly fees for the four quarters in 2019 and the first quarter of 2020.

On August 28, 2019, the Bankruptcy Court entered an order holding, among other things, that the 2017 Act was constitutional and dismissing the uniformity count of the Complaint. *Clinton Nurseries, Inc. v. Harrington (In re Clinton Nurseries, Inc.)*, 608 B.R. 96 (Bankr. D. Conn. 2019) (the "Bankruptcy Court Judgment"). The Bankruptcy Court, however,

did not (as the U.S. Trustee contends) conclude "that, to the extent the Judicial Conference's implementation of the fee increase in B[ankruptcy] A[dministrator Program] districts was flawed, reducing debtors' quarterly fees would not be appropriate relief." Pet. at 10. Rather, the Bankruptcy Court held that Clinton lacked *standing* to challenge the fee increase because:

> the Judicial Conference's delay in implementing the fee increases and decision not to apply the increases to pending cases has had no effect on the fees assessed in this case; the Debtors' quarterly fees would be the same as they are now. Therefore, there is no injury traceable to the [U.S. Trustee's] actions.

608 B.R. at 120. Subsequently, the Court of Appeals held that Clinton indeed had "standing to raise this constitutional challenge and to seek reimbursement." *Clinton Nurseries of Maryland, Inc. v. Harrington (In re Clinton Nurseries, Inc.)*, 998 F.3d 56, 64 (2d Cir. 2021).

On October 10, 2019, Clinton filed its First Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code. *In re Clinton Nurseries, Inc.*, No. 17-31897 (Bankr. D. Conn. Oct. 10, 2019), ECF 911-1 (the "First Amended Plan"). On October 18, 2019, the U.S. Trustee filed his initial objection to confirmation of the First Amended Plan, arguing, among other things, that the First Amended Plan was not confirmable because it did not comply with section 1129(a)(12) of the Bankruptcy Code

requiring that all U.S. Trustee fees be paid as of the effective date of the plan. Rather, the plan provided that U.S. Trustee fees would not be paid pending the outcome of Clinton's appeal of the Bankruptcy Court Judgment. As noted, Clinton did not pay U.S. Trustee fees for the four quarters of 2019.

On December 12, 2019, Clinton filed its Motion for Stay Pending Appeal. *Clinton Nurseries, Inc. v. Harrington (In re Clinton Nurseries, Inc.)*, No. 19-304 (Bankr. D. Conn. Dec. 12, 2019), ECF 14 (the "Stay Motion"). Clinton requested that the Bankruptcy Court enter a stay of the Bankruptcy Court Judgment and that it not be required to pay to the U.S. Trustee any unpaid quarterly fees in connection with confirmation of their plan pending a decision on the appeal of the Bankruptcy Court Judgment. The U.S. Trustee objected to the Stay Motion, arguing, among other things, that the "Debtors misunderstand the law. If the Debtors are ultimately successful on appeal and review has been exhausted, a refund would not require additional litigation. Instead, the government *would make a refund at the end of the appellate process from the United States Trustee System Fund and the Program's appropriation*." Objection Of United States Trustee to Debtors' Motion for Stay Pending Appeal at ¶ 4, *Clinton Nurseries, Inc. v. Harrington (In re Clinton Nurseries, Inc.)*, No. 19-304 (Bankr. D. Conn. Dec. 27, 2019), ECF 18 (emphasis added).

On January 9, 2020, the Bankruptcy Court entered an order confirming the Debtors' Second Modified First Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code, dated

December 18, 2019. *See In re Clinton Nurseries, Inc.*, No. 17-31897 (Bankr. D. Conn. Dec. 18, 2019), ECF 1045 (the "Plan"); *In re Clinton Nurseries, Inc.*, No. 17-31897 (Bankr. D. Conn. Jan. 9, 2020), ECF 1094. On January 9, 2020, the Bankruptcy Court also entered an order granting the Stay Motion "for the lesser period of 18 months (subject to extension) or the issuance of a dispositive decision from the Second Circuit Court of Appeals . . . ." *Clinton Nurseries, Inc. v. Harrington (In re Clinton Nurseries, Inc.)*, No. 19-304 (Bankr. D. Conn. Jan 9, 2020), ECF 28 at 8 (the "Stay Order"). The Stay Order provides that Clinton was to escrow the disputed fees under an escrow agreement to be approved by the court. On January 24, 2020, the Bankruptcy Court entered its Order Approving Escrow Agreement, *Clinton Nurseries, Inc. v. Harrington (In re Clinton Nurseries, Inc.)*, No. 19-304 (Bankr. D. Conn. Jan 24, 2020), ECF 38 (the "Escrow Order"), authorizing the escrow agreement annexed as Exhibit A (the "Escrow Agreement"). Pursuant to the Stay Order, the Escrow Order, and the Escrow Agreement, Clinton deposited $329,810.45 with an escrow agent, representing the quarterly fees that Clinton and the U.S. Trustee agreed would be due under the 2017 Act fee schedule for the four quarters in 2019.

On May 24, 2021, the Court of Appeals entered its opinion and order reversing the Bankruptcy Court Judgment and holding that the 2017 Act "was unconstitutionally nonuniform on its face because it *mandated* a fee increase in [Trustee Program Districts] but only *permitted* a fee increase in [Administrator Program Districts]." *In re Clinton*

Nurseries, Inc., 998 F.3d at 70 (the "Original Second Circuit Decision"), *vacated and remanded*, *Harrington v. Clinton Nurseries, Inc.*, 143 S. Ct. 297 (2022). The Court of Appeals directed the Bankruptcy Court to "provide Clinton with a refund of the amount of quarterly fees paid in in excess of the amount Clinton would have paid in a[n] [Administrator Program District] during the same time period." *Id.* On September 17, 2021, the Court of Appeals entered an order denying the U.S. Trustee's petition for panel rehearing, or, in the alternative, for rehearing *en banc*. *Clinton Nurseries , Inc. v. Harrington (In re Clinton Nurseries, Inc.)*, No. 20-1209 (2d Cir. Sept. 17, 2021), ECF 141.

On February 14, 2022, the U.S. Trustee filed a Petition for a Writ of Certiorari from the Original Second Circuit Decision (the "Original Petition"). On June 6, 2022, this Court issued its decision in *Siegel*, reversing a decision of the Court of Appeals for the Fourth Circuit and concluding that the non-uniform fee increase under the 2017 Act violated the uniformity requirement of the Bankruptcy Clause. *Siegel*, 142 S. Ct. at 1780-83. Although the question whether a refund is the appropriate remedy was raised in *Siegel*, the Court did not decide that issue and remanded to the Fourth Circuit for consideration of the appropriate remedy. *Id*. at 1783. On October 11, 2022, consistent with the *Siegel* decision, this Court granted the Original Petition, vacated the Original Second Circuit Decision, and remanded to the Court of Appeals for further consideration of the remedy question.

On November 10, 2022, the Court of Appeals issued its opinion amending and reinstating the Original Second Circuit Decision. *Clinton Nurseries, Inc. v. Harrington (In re Clinton Nurseries, Inc.)*, 53 F. 4th 15 (2d Cir. 2022) (the "Amended Decision"). In the Amended Decision, the Court of Appeals held:

> 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[n] [Administrator Program District] during the same time period.

Id. at 29.

On February 17, 2023, the Court of Appeals entered an order denying the Trustee's petition for rehearing or, in the alternative, for rehearing *en banc*. Second Circuit Court of Appeals Case No. 20-1209, Doc. No. 199, Pet. App. 79a-80a.

REASONS FOR DENYING THE PETITION

Certiorari should be denied for each of four reasons. First, there is no conflict among the Courts of Appeals on the question presented. Second, the decision below does not conflict with any authority of this Court, but rather is fully consistent with it. Third, the issue is neither important nor recurring. Fourth, the "remedies" the U.S. Trustee prefers—either to do nothing or retroactively charge more to estates in the Administrator Program Districts in Alabama and North Carolina—are so fraught with constitutional and other difficulties that they are not worthy of the Court's review.

I. THE QUESTION PRESENTED DOES NOT INVOLVE A SPLIT OF AUTHORITY AMONG THE COURTS OF APPEALS.

The decision below does not conflict with any decision of another Court of Appeals on the question presented, or with any other court for that matter. Every court to have addressed the issue has held that a refund is the appropriate remedy. In addition to the decision below, the Courts of Appeals for the Ninth, Tenth, and Eleventh Circuits, and the Bankruptcy Courts for the Eastern District of Virginia and the District of Delaware, have held that a refund is the appropriate remedy. *See USA Sales, Inc. v. Off. of the United States Tr.*, 76 F.4th 1248, 1251 (9th Cir. 2023) ("As has every other court to address this issue, we hold that debtors are entitled to a refund of excess fees paid during the nonuniform period of statutory rates."); *United States Tr. Region 21 v. Bast Amron LLP (In re Mosaic Mgmt. Grp., Inc.)*, 71 F. 4th 1341,

1353-54 (11th Cir. 2023) ("[W]e conclude that *Reich, Newsweek, Bennett, McKesson*, and the long line of similar state tax cases are closely analogous to the instant case and provide strong precedent supporting the refund remedy urged upon us by the Debtors. Accordingly, we hold that the appropriate remedy in this case for the constitutional violation identified in *Siegel* is the refunds that the Debtors in this case seek."); *In re John Q. Hammons Fall 2006, LLC*, 15 F. 4th 1011, 1026 (10th Cir. 2021) ("We lack authority over quarterly fees assessed in districts outside of our circuit, and thus in Alabama or North Carolina. But Debtors are entitled to relief. . . . Thus, we remand to the bankruptcy court for a refund of the amount of the quarterly fees paid exceeding the amount that Debtors would have owed in a Bankruptcy Administrator district during the same period." (internal citations and quotation marks omitted)), *vacated sub nom. Off. of the United States Tr. v. John Q. Hammons Fall 2006, LLC*, 142 S. Ct. 2810 (2022), *remanded to In re John Q. Hammons Fall 2006, LLC*, No. 20-3203, 2022 U.S. App. LEXIS 22859 (10th Cir. Aug. 15, 2022) (reinstating original opinion after remand by Supreme Court); *Pitta v. Vara (In re VG Liquidation, Inc.)*, 2023 Bankr. LEXIS 1320 (Bankr. D. Del. May 18, 2023); *Siegel v. United States Tr. Program (In re Circuit City Stores, Inc.)*, Nos. 08-35653-KRH, 19-03091-KRH, 2022 Bankr. LEXIS 3544, at *18-19 (Bankr. E.D. Va. Dec. 15, 2022) ("It is a core duty of the federal courts to provide remedies for legal injuries. The [liquidating] [t]rustee has suffered such an injury through the overpayment of fees under an unconstitutional statute. Under applicable non-bankruptcy as well as under

bankruptcy law, the [liquidating] [t]rustee is entitled to be made whole. As such, the Courts hold that [he] may recover the amount of the [u]nconstitutional [o]verpayment."). As the U.S. Trustee effectively concedes, there is no actual conflict among the Courts of Appeals on the question presented.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS, BUT RATHER IS FULLY CONSISTENT WITH THEM.

The U.S. Trustee contends that Clinton should not receive a refund on the theory that Congress, by amending the pertinent statute, has somehow prescribed a prospective remedy, which is all that is required. However, "[s]imply put, promising not to take the money again is not the same as giving the money back." *USA Sales*, 76 F.4th at 1253.

As this Court has held, "[b]oth the common law and our own decisions have recognized a general rule of retrospective effect for the constitutional decisions of this Court. Nothing in the Constitution alters the fundamental rule of retrospective operation that has governed judicial decisions . . . for near a thousand years." *Harper v. Virginia Dep't of Tax'n*, 509 U.S. 86, 94 (1993) (internal citations and quotation marks omitted). In other words, the typical consequence in cases of this kind is not merely the prospective admonition "don't do this again." Rather, the proper remedy is a refund. *E.g.*, *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dept. of Bus. Regul. of Fla.*, 496 U.S. 18, 22, 35 (1990) ("Our precedents establish that if a State penalizes taxpayers for failure

to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for the taxes already paid pursuant to a tax scheme ultimately found unconstitutional. . . . *Montana National Bank* thus held that one forced to pay a discriminatorily high tax in violation of federal law is entitled, in addition to prospective relief, to a refund of the excess tax paid—at least unless the disparity is removed in some other manner."); *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n of Webster Cnty.*, 488 U.S. 336, 345-46 (1989) (taxpayers subjected to higher taxes based on state tax assessments that violated the equal protection entitled to refunds); *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931) (petitioner entitled to "refund of the excess of taxes exacted from them" because "it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid," and the taxpayer may not be "remitted to the necessity of awaiting such action by the state officials upon their own initiative."); *Montana Nat'l Bank v. Yellowstone Cnty.*, 276 U.S. 499, 504-05 (1928) (the plaintiff "cannot be deprived of its legal right to recover the amount of the tax unlawfully exacted of it by the later decision which, while repudiating the construction under which the unlawful exaction was made, leaves the monies thus exacted in the public treasury").

The U.S. Trustee "attempts to distinguish the tax cases by limiting their holding to circumstances in which the plaintiff had no meaningful opportunity to challenge the tax before paying it. However, the Supreme Court has explained that due process requires post-payment relief unless a 'reasonable taxpayer would have thought that [the pre-payment remedy] represented . . . the *exclusive* remedy for unlawful taxes.'" *USA Sales*, 76 F.4th at 1254 (quoting *Reich v. Collins*, 513 U.S. 106, 111 (1994)); *see Reich*, 513 U.S. at 111-12 ("[T]he Georgia Supreme Court's reliance on Georgia's predeprivation procedures was entirely beside the point (and thus error), because even assuming the constitutional adequacy of those procedures—an issue on which we express no view—no reasonable taxpayer would have thought that they represented, in light of the apparent applicability of the refund statute, the *exclusive* remedy for unlawful taxes."); *Newsweek, Inc. v. Florida Dept. of Revenue*, 522 U.S. 442, 444 (1998) ("[A] State has the flexibility to maintain an exclusively predeprivation remedial scheme, so long as that scheme is clear and certain."). In this matter, of course, there is simply no reason for Clinton to have believed that its sole remedy was limited to challenging the relevant fees before paying them.

As the Eleventh Circuit has reasoned, "*Reich, Newsweek, Bennett, McKesson*, and the long line of similar state tax cases are closely analogous to the instant case and provide strong precedent supporting the refund remedy urged upon us by the Debtors." *In re Mosaic Mgmt. Grp.*, 71 F. 4th at 1350-53.

> As here, the tax cases involved a monetary injury inflicted by the government pursuant to an unconstitutionally discriminatory statute and a decision by a court or legislature to extend the tax burden prospectively (here, the higher quarterly fees) to those who had been exempt (here, debtors in B[ankruptcy] A[dministrator] districts who had lower fees). Each of these cases held that the state owed a taxpayer retrospective relief even though it had already fixed the constitutional problem going forward.
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> Here, just as the Florida Office of the Comptroller collected an illegal tax under 'duress,' the [U.S. Trustee] collected illegal excess quarterly fees from [the debtor], paid to avoid the 'serious disadvantage' of liquidation or dismissal of the bankruptcy proceeding. The Due Process Clause therefore 'obligates the [U.S. Trustee] to provide meaningful backward-looking relief.'

USA Sales, 76 F.4th at 1253-54 (quoting *McKesson Corp.*, 496 U.S. at 31). *See also In re Mosaic Mgmt. Grp.*, 71 F. 4th at 1350 ("[E]xcept in the unusual context of a clear, exclusive predeprivation remedy, the past inequality must be accounted for and the disfavored taxpayer is entitled to appropriate refunds. . . . Debtors here could have challenged the increased fee before paying same in early 2018 (predeprivation) and those same routine procedures were available

postdeprivation. . . . [I]t certainly was not clear that the available predeprivation process was exclusive. Thus, *Reich* and *Newsweek* squarely reject the U.S. Trustee's primary support for prospective relief only—i.e. that *McKesson*-based distinction of the . . . state tax cases requiring refunds in a similar context."); 11 U.S.C. § 1112(b)(4)(K) (defining "cause" for dismissal or conversion of Chapter 11 case to include failure to pay any fees or charges required under chapter 123 of title 28).

Here, not only was it not clear that the available pre-deprivation remedy was exclusive, the U.S. Trustee in his objection to the Stay Motion *expressly stated* that the government would provide a refund at the end of the appellate process if Clinton were successful. Thus, it is doubly true that there was no reason for Clinton to have believed that challenging the fees before paying them was its sole remedy—in fact, the opposite pertains from the government's own admission below.

The U.S. Trustee's alternative suggestion that the appropriate remedy is to require Chapter 11 bankruptcy estates in Alabama and North Carolina to pay higher fees is equally unsupported. Although *Siegel* did not decide the question, the U.S. Trustee's proposition garnered well-deserved skepticism. *See* Tr. Oral Arg. at 70:21-23, *Siegel v. Fitzgerald*, 142 S. Ct. 1770 (2022) (No. 21-441) (Gorsuch, J.) ("There are two problems with the clawback that your colleague has identified. One is legal and the other is practical."), 74:18-21 (Roberts, C.J.) ("I'd be surprised if the government thought it could go and claw back

from all the other debtors the fees that—claw back rather than equalize by giving back the—the fees."). Likewise, the government acknowledged at least some due process concerns, *see id.* at 71:1-6 (Gannon) ("[T]he legal problem, he says there might be some due process-type concerns that would prevent someone from being charged—from—from having to pay this fee after the fact. And I would say perhaps that is true."), which the lower courts have shared, *see USA Sales*, 76 F.4th at 1256 n.4 ("The [U.S. Trustee's] suggestion also may violate the due process rights of debtors in the [Bankruptcy Administrator] districts."); *In re Mosaic Mgmt. Grp.*, 71 F. 4th at 1355 (Brasher, J., concurring) ("The creditors and debtors in the favored class of bankruptcy cases have their own due process rights that prevent us from retroactively assessing the higher fees in those cases. Although the imposition of a retroactive tax 'does not necessarily deny due process to those whose taxes are increased,' there is 'some temporal point' beyond which 'the retroactive imposition of a significant tax burden may be so harsh and opposed as to transgress the constitutional limitation.' I think we have reached that point. Even though only a small number of bankruptcy cases would be affected by a retroactive fee, too much time has passed to increase the fees consistent with due process. This is especially true of bankruptcy cases that have already been closed and the estate's assets distributed or reorganized." (quoting *McKesson Corp.*, 496 U.S. at 40 n.23)). That should likewise end the matter: in selecting the appropriate remedy, surely the preference should be for one that does not raise constitutional obstacles.

From a bankruptcy perspective, the U.S. Trustee's claw-back remedy would also violate "one of the core tenets of the bankruptcy code—finality. . . . The [U.S. Trustee's] proposed solution—creating a regime in which the government potentially could track down bankrupt and dissolved entities after more than a half a decade to seek much larger fees (and presumably interest)—runs counter to this primary purpose." *USA Sales*, 76 F.4th at 1256; *see also In re John Q. Hammons Fall 2006, LLC*, 15 F. 4th at 1025-26 ("Though raising fees in Alabama and North Carolina might solve this problem, the Trustee recognizes that we lack authority to do that. . . . We lack authority over quarterly fees assessed in districts outside of our circuit, and thus in Alabama or North Carolina. . . . But Debtors are entitled to relief.").

The U.S. Trustee's argument that Congress would have intended prospective relief, relying on *Sessions v. Morales*, 137 S. Ct. 1678 (2017), and *Barr v. American Assn. of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020) [hereinafter *AAPC*], is likewise unavailing. As the Eleventh Circuit has reasoned, "legislative intent cannot overcome the requirements of due process. . . . [I]n the instant case, our result—requiring refunds, but recognizing future application of the fee increase, as mandated by Congress in the 2020 Act—implements as much of the congressional intent as due process permits." *In re Mosaic Mgmt. Grp.*, 71 F. 4th at 1352; *id.* at 1351-52 ("[W]e note that the legislative intention in *Reich* and *Newsweek* was the same. . . . Notwithstanding this legislative intent, the Supreme Court held that due process required refunds."); *see also USA Sales*, 76 F.4th at 1256

("[A]lthough congressional intent is normally the touchstone for determining the remedy for this type of constitutional violation, our choice of remedy is constrained by USA Sales' due process rights, . . . as well as by our own jurisdictional limitations. So even if the 2020 Act granting prospective relief reflects congressional intent that such relief should be exclusive or that Congress would prefer clawbacks, that intent does not control our analysis."). Further, *Morales-Santana* and *AAPC* did not involve monetary injury. As the Eleventh Circuit continued, "[t]he right to citizenship issue in *Morales-Santana* is very different from the inequality in trustee fees at issue in this case." *In re Mosaic Mgmt. Grp.*, 71 F. 4th at 1352.

Finally, as one bankruptcy court has reasoned:

> [C]ongressional intent provides little guidance here. Whatever the goals of Congress may have been in enacting the 2017 Act, when Congress became aware of the 2017 Act's constitutional infirmity it amended the statute. Congress could have chosen at that time to command the [Administrator Program] Districts to implement a retroactive fee increase—but it chose not to. Congress may well have made this decision out of a commitment to its carefully enacted Chapter 11 regime and the harm a retroactive fee assessment in [Administrator Program] Districts could cause. By the same token, Congress could have chosen to command the [Trustee Program] Districts to issue a refund—it chose not to. This could be due to Congress's commitment to its determination

> that the [Trustee Program] Districts should be user rather than taxpayer funded. Only Congress knows which of these alternative objectives it values the most. Congress had the opportunity to choose between them. It declined to do so. Congressional intent is, at best, a wash.

In re Circuit City Stores, 2022 Bankr. LEXIS 3544, at *13-14.

For these reasons, the decision below does not conflict with prior decisions of this Court—far from it. Rather, the decision below is perfectly consistent with this Court's precedents, as explained by the various courts that have addressed the relevant issues. Accordingly, certiorari review is not warranted.

III. THE DECISION BELOW DOES NOT INVOLVE AN IMPORTANT OR RECURRING PROBLEM.

Given Congress's amendment to the pertinent statute mandating the same fees in Trustee Program Districts and Administrator Program Districts (as explained above), the issue is unlikely to recur. Nor is it of manifest public importance. For these reasons as well, review is not warranted.

IV. THE REMEDY THE U.S. TRUSTEE PROPOSES IS BOTH UNWORKABLE AND CONSTITUTIONALLY INFIRM.

Finally, certiorari should be denied because the "remedies" the U.S. Trustee prefers are, in reality, no

remedies at all, and are otherwise beset with constitutional infirmities. The U.S. Trustee's preferred "remedies" are fundamentally inadequate because they would provide Clinton with no meaningful relief *of benefit to Clinton*. At best, they would result in either (1) nothing being done or (2) burdening others with pecuniary loss. Neither prospect is constitutionally sound.

In order for a federal court to adjudicate a claim consistent with the requirements of Article III, there must be some prospect that the outcome of the litigation will be of some tangible benefit *to that litigant*. This derives from the overarching principle that a federal court has no authority "to declare principles or rules of law which cannot affect the matter at issue in the case before it." *Mills v. Green*, 159 U.S. 651, 653 (1895); *see Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). Notably, the "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis*, 494 U.S. at 477-78; *see also Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90-91 (2013); *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71-72 (2013); *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 67 (1997). Thus, for example, if while an appeal is pending "an event occurs which renders it impossible for" a court to grant "any effectual relief whatever" to the prevailing party, the case must be dismissed as moot. *Mills*, 159 U.S. at 653; *see also Lewis*, 494 U.S. at 477-78. Likewise, "[a] case becomes moot . . . when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *See Already*, 568 U.S. at 91 (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)).

Relatedly, to establish standing to assert a claim under Article III, a party must demonstrate, *inter alia*, that it "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). Under this standard, if a favorable decision on the merits would provide the litigant with *no* tangible benefit whatsoever, the redressability requirement is not satisfied.

Quite clearly, the prospect of a refund as the appropriate remedy is sufficient to satisfy both the redressability prong of the Court's standing jurisprudence *and* ensure the availability of an effective form of relief necessary to demonstrate a live case or controversy throughout the course of the litigation. Conversely, the ersatz "remedies" the U.S. Trustee advocates would satisfy neither.

As the lower courts have further recognized, the U.S. Trustee's proposed "remedy" of imposing additional fees on estates in the Administrator Program Districts also raises due process concerns. In particular, doing so would impose a pecuniary loss on parties not before the court and who had no meaningful opportunity to participate in the relevant litigation challenging the disparate fee structure at issue. Given the constitutional difficulties associated with the U.S. Trustee's preferred remedies, they simply do not merit the Court's consideration.

CONCLUSION

For the foregoing reasons, Clinton respectfully requests that the Court deny certiorari in this matter.

Respectfully submitted,

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