No. 21-441

In the Supreme Court of the United States

ALFRED H. SIEGEL, TRUSTEE OF THE CIRCUIT CITY STORES, INC. LIQUIDATING TRUST, PETITIONER

v.

JOHN P. FITZGERALD, III, ACTING UNITED STATES TRUSTEE FOR REGION 4

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether Section 1004(a) of the Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, Div. B, 131 Stat. 1232 (28 U.S.C. 1930(a)(6)(B) (2018)), which amended the schedule of quarterly fees payable to the United States Trustee in certain pending bankruptcy cases, contravened Congress's constitutional authority to "establish * * * uniform Laws on the subject of Bankruptcies," U.S. Const. Art. I, § 8, Cl. 4, because it was initially applied only in the 88 federal judicial districts that have United States Trustees but not in the 6 districts that have Bankruptcy Administrators.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 996 F.3d 156. The opinion of the bankruptcy court (Pet. App. 38a-55a) is reported at 606 B.R. 260.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 2021. By orders dated March 19, 2020, and July 19, 2021, this Court extended the time within which to file any petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing, as long as that judgment or order was issued before July 19, 2021. The petition for a writ of certiorari was filed on Septem-

ber 20, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The United States Trustee (UST) Program, a component of the U.S. Department of Justice, performs numerous administrative, regulatory, and enforcement functions that promote the integrity and efficiency of the bankruptcy system, such as appointing and monitoring the private trustees who administer debtors' estates, monitoring the progress of bankruptcy cases, and monitoring cases for signs of fraud. See 28 U.S.C. 586 (2018 & Supp. I 2019). The program permits bankruptcy judges to focus on judicial matters, while the U.S. Trustees serve as "bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena." H.R. Rep. No. 595, 95th Cong., 1st Sess. 88, 101 (1977).

The UST Program began as a pilot program in 18 judicial districts in 1978. Act of Nov. 6, 1978, Pub. L. No. 95-598, Tit. IV, § 408, 92 Stat. 2686-2687. Congress expanded it to 88 of the 94 federal judicial districts in 1986. See Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (1986 Act), Pub. L. No. 99-554, §§ 111-115, 100 Stat. 3090-3095. The other six districts—in Alabama and North Carolina—were permitted to use Bankruptcy Administrators for those purposes. See 1986 Act § 302(d)(3), 100 Stat. 3121-3123 (28 U.S.C. 581 note). The Bankruptcy Administrators are appointed under regulations issued by the Judicial Conference of the United States, which oversees the Bankruptcy Administrator (BA) program.[1]

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[1] Congress originally provided that those six districts would join the UST Program no later than 1992. See 1986 Act § 302(d)(3)(A),

Although they perform similar functions in practice, the UST and BA programs have different structures and distinct funding sources. See Pet. App. 6a. The Judiciary's "general budget" funds the BA program. *Ibid.* But Congress designed the UST Program to be "self-funding" and "paid for by the users of the bankruptcy system—not by the taxpayer." H.R. Rep. No. 764, 99th Cong., 2d Sess. 22 (1986). To that end, Congress's annual appropriations for the UST Program are offset by user fees paid into the United States Trustee System Fund (UST Fund), 28 U.S.C. 589a (2018 & Supp. II 2020). The UST Fund derives revenue from various sources, including, most significantly, the quarterly fees paid by some debtors in cases filed under Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101 *et seq.* See 28 U.S.C. 589a(b)(5). Specifically, Congress has directed that 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." 28 U.S.C. 1930(a)(6)(A) (Supp. I 2019).

In each case, the quarterly fees required by Section 1930(a)(6) are graduated according to the amount of "disbursements"—payments to creditors, suppliers, and others—made by or on behalf of the debtor. See, *e.g.*, *Walton* v. *Jamko, Inc. (In re Jamko, Inc.)*, 240 F.3d 1312, 1313 (11th Cir. 2001). For example, under the fee schedule in effect before 2018, the quarterly fee "for each quarter in which disbursements total less than

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110 Stat. 3121-3122 (28 U.S.C. 581 note). But it later postponed that deadline and then eliminated it altogether. See Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, Tit. III, § 317, 104 Stat. 5115; Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 501, 114 Stat. 2421-2422.

$15,000," was $325; "for each quarter in which disbursements total $15,000 or more but less than $75,000," the fee was $650; and so on. 28 U.S.C. 1930(a)(6)(A) (2012). Before 2018, the maximum possible quarterly fee was $30,000, which applied to Chapter 11 cases with quarterly disbursements of more than $30 million. *Ibid.*

Under the 1986 Act, Chapter 11 quarterly fees were made applicable in the 88 UST districts but not in the 6 BA districts. See 1986 Act § 302(e), 100 Stat. 3123. In the mid-1990s, a divided panel of the Ninth Circuit opined that having two distinct programs for administering bankruptcy cases with different fees violated the uniformity requirement of the Bankruptcy Clause; on that basis, the court purported to invalidate the provision of the statute that allowed the six BA districts to remain outside the UST Program. See *St. Angelo* v. *Victoria Farms, Inc.*, 38 F.3d 1525, 1532-1533 (1994), amended, 46 F.3d 969 (9th Cir. 1995).

After the *Victoria Farms* decision, Congress again amended the statutory framework, but it did not eliminate the BA program as the Ninth Circuit had essentially provided. The Judicial Conference had opposed proposals to expand the UST Program to the BA districts. See, *e.g.*, U.S. Gen. Accounting Office, *Bankruptcy Administration: Justification Lacking for Continuing Two Parallel Programs* 39-43 (Sept. 1992), https://go.usa.gov/xFFq7. And, rather than eliminate the BA program, Congress adopted a proposal made by the Judicial Conference in March 1996. See Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States* 45 (Sept./Oct. 2001) (*2001 JCUS Report*), https://www.uscourts.gov/sites/default/files/2001-09_0.pdf. Congress amended Section 1930(a) by adding a new paragraph

(7), which provided that "[i]n districts that are not part of a United States trustee region * * * the Judicial Conference of the United States may require the debtor in a case under chapter 11 * * * to pay fees equal to those imposed by paragraph (6) of this subsection." Federal Courts Improvement Act of 2000 (2000 Act), Pub. L. No. 106-518, § 105, 114 Stat. 2412 (enacting 28 U.S.C. 1930(a)(7) (2000)); see *Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999 and Federal Courts Improvement Act of 1999: Hearing on H.R. 2112 and H.R. 1752 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong., 1st Sess. 26 (1999) (*1999 House Hearing*) (noting the Judicial Conference's determination that "implementing the establishment of chapter 11 quarterly fees in the bankruptcy administrator districts would eliminate any *Victoria Farms* problem"). Congress directed that the quarterly fees collected in BA districts be deposited in a fund that offsets appropriations to the Judicial Branch, from which the BA program is also funded. See 28 U.S.C. 1930(a)(7), 1931.

Acting under Section 1930(a)(7), 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." *2001 JCUS Report* 46. Having avoided the potential uniformity problem in that way, Congress authorized the indefinite continuation of the BA program in the six judicial districts that employed it. See 2000 Act § 501, 114 Stat. 2421-2422.

b. For several decades, Congress's appropriations to the UST Program were fully offset by fees deposited in the UST Fund, and the Program's costs were borne

by bankruptcy users and not taxpayers. In the mid-2010s, however, those deposits substantially decreased, and by Fiscal Year 2017, the balance in the UST Fund had fallen to the point that the Program's costs would no longer be fully met by user fees, thus requiring reliance on appropriated taxpayer funds. See H.R. Rep. No. 130, 115th Cong., 1st Sess. 7 (2017); Pet. App. 7a.

Concerned about the impending burden on taxpayers, Congress bolstered the Fund by temporarily increasing quarterly fees in larger Chapter 11 cases. Accordingly, the Bankruptcy Judgeship Act of 2017 amended the quarterly-fee statute by adding the following subparagraph to Section 1930(a)(6):

> (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.

Pub. L. No. 115-72, Div. B, § 1004(a), 131 Stat. 1232 (28 U.S.C. 1930(a)(6)(B) (2018)). Congress specified that the amendment "shall apply to quarterly fees payable under section 1930(a)(6)" for disbursements made in any calendar quarter beginning after the amendment's October 26, 2017 enactment. § 1004(c), 131 Stat. 1232. The increased fees therefore applied to the UST districts in the first quarter of 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 by the beginning of 2018. In response, the Ex-

ecutive Committee of the Judicial Conference, acting on an expedited basis, ordered the BA districts to implement the amended fee schedule, but it did so 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.

c. After some courts held that the 2017 amendment was unconstitutional based on their view that Congress had authorized different fees in BA and Trustee 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.

In the 2020 Act, Congress also amended the quarterly-fee schedule, slightly reducing the fees payable by the largest debtors. As of April 2021, the quarterly fee for Chapter 11 debtors with quarterly disbursements of $1 million or more was "0.8 percent of disbursements but not more than $250,000." 28 U.S.C.

1930(a)(6)(B)(ii)(II) (Supp. II 2020); see 2020 Act § 3(e)(2)(B)(ii), 134 Stat. 5089 (effective date).

2. a. Circuit City Stores, Inc. and its affiliates (collectively Circuit City) operated a chain of stores retailing consumer electronics. Pet. App. 9a. In 2008, Circuit City filed for Chapter 11 bankruptcy protection in the Eastern District of Virginia, a district within the UST Program. *Ibid.* In 2010, the bankruptcy court confirmed Circuit City's plan of liquidation, under which petitioner (the private trustee responsible for administering the liquidating trust formed under Circuit City's plan) was authorized to collect, administer, distribute, and liquidate the estate's remaining assets. *Id.* at 29a-30a. The confirmed plan requires petitioner to pay quarterly fees to the U.S. Trustee "until the Chapter 11 Cases are closed or converted and/or the entry of final decrees." *Id.* at 30a (quoting C.A. App. 110).

Circuit City's bankruptcy case remained pending as of January 2018, when the 2017 amendment to the quarterly-fee schedule took effect. Pet. App. 9a. Thereafter, in each quarter in which Circuit City reported quarterly disbursements over $1 million, petitioner was required to pay an increased quarterly fee. See *ibid.*

b. Petitioner initially paid the increased fees. Pet. App. 9a. In March 2019, however, petitioner filed a motion in bankruptcy court asserting that the amended statute was unconstitutionally non-uniform because the statutory fee increase was implemented differently in BA districts than in UST districts. *Id.* at 10a. Petitioner also argued that applying the amended schedule to this case would be impermissibly retroactive. *Ibid.* With the parties' consent, the bankruptcy court treated petitioner's motion as a complaint initiating an adversary proceeding. See *id.* at 46a-47a & n.19.

The bankruptcy court granted petitioner's motion in part and denied it in part. Pet. App. 38a-55a. The court rejected petitioner's retroactivity argument, concluding that the fee increase was "substantively prospective." *Id.* at 51a. But it agreed with petitioner's constitutional challenge, ruling that the 2017 amendment to Section 1930(a)(6) was "unconstitutionally non-uniform." *Id.* at 53a. The court reasoned that the 2017 amendment must have been constitutionally defective because, beginning in January 2018, the BA districts ceased to apply the same fee schedule that applied in UST districts, and the Judicial Conference did not eliminate that divergence for all cases. See *id.* at 52a, 54a. As a remedy, the court directed that the quarterly fees petitioner owed "since January 1, 2018" be determined using "the prior version of the statute." *Id.* at 54a.

3. Both parties appealed and jointly certified that the order met the standards for direct appeal from the bankruptcy court to the court of appeals under 28 U.S.C. 158(d)(2). See Pet. App. 58a-61a. The court of appeals authorized direct appeal and consolidated the appeals. See *id.* at 4a, 56a-57a.

a. A divided panel of the court of appeals affirmed in part and reversed in part. Pet. App. 1a-23a. The court agreed with the bankruptcy court's determination that the 2017 amendment was not retroactive, much less impermissibly so, when applied to previously pending bankruptcy cases. See *id.* at 19a-23a. Petitioner does not seek review of that aspect of the decision. See Pet. I, 13 n.4.

As relevant here, the court of appeals held that the 2017 amendment was constitutional. Pet. App. 13a-18a. The court concluded that even a statutorily authorized divergence in fees across the UST and BA programs

would not present a problem because the Bankruptcy Clause's "uniformity requirement does not deny Congress the power to enact legislation that resolves regionally isolated problems." *Id.* at 17a. The court noted that where "the only railroads facing [a particular] problem" were in a specific geographic region, this Court had "allowed Congress to establish a special court and enact statutes to benefit bankrupt rail carriers in [that region]." *Ibid.* (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 159-161 (1974)). Here, Congress confronted "a U.S. Trustee problem," *ibid.*, and it "reasonably solved" that problem "with fee increases in the underfunded districts," *id.* at 18a.

In reaching that conclusion, the court of appeals agreed with the Fifth Circuit's decision in *Hobbs* v. *Buffets, L.L.C. (In re Buffets, L.L.C.)*, 979 F.3d 366 (2020), which sustained the constitutionality of the 2017 amendment, emphasizing that a "program-specific distinction that only indirectly has a geographic impact" does not run afoul of the Bankruptcy Clause's uniformity requirement. Pet. App. 17a-18a. The decision below further observed that, even if Congress had failed to give an adequate justification for its decision to allow separate UST and BA districts to persist after the pilot program was expanded in 1986, the 2017 amendment "does not suffer from any such shortcoming" because it is supported by "a solid fiscal justification." *Id.* at 18a.[2]

In light of the court of appeals' conclusion that any uniformity requirement would be satisfied, the court did not resolve the U.S. Trustee's threshold argument

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[2] The court of appeals also held that the 2017 amendment does not implicate the uniformity requirement of the Taxing and Spending Clause (U.S. Const. Art. I, § 8, Cl. 1). See Pet. App. 14a. Petitioner does not challenge that determination in this Court. See Pet. I.

that the 2017 amendment does not implicate the Bankruptcy Clause because it is not a substantive bankruptcy law. See Pet. App. 14a. In addition, while the court observed that petitioner had not contested the proposition that the 2020 Act "confirms that Congress never gave the Judicial Conference discretion to charge unequal fees," the court did not "further address" the U.S. Trustee's argument that "the combined application of § 1930(a)(6)(B) and 1930(a)(7) of Title 28 ensure[s] that any quarterly fee increase would apply equally to all judicial districts," and that "any discrepancy in impact" was "a byproduct of implementation efforts, rather than unlawful congressional action." *Id.* at 18a-19a n.10. Finally, having sustained the statute's constitutionality, the court had no occasion to address the U.S. Trustee's argument about what remedies would be available in the event of a constitutional violation.

b. Judge Quattlebaum concurred in part and dissented in part as to the majority's uniformity holding. Pet. App. 23a-37a. He rejected the U.S. Trustee's argument that "the Constitution's uniformity requirement only applies to substantive bankruptcy laws," *id.* at 31a-32a, and concluded that the amended fee statute was not uniform because Section 1930(a)(7) at relevant times provided that the Judicial Conference "'may'" require payment in BA districts of "fees equal to those imposed" in UST districts, *id.* at 33a-35a. In his view, "this would be an entirely different case" if Section 1930(a)(7) had "used the word 'shall'" at the relevant time. *Id.* at 33a. He also disagreed with the majority's conclusion that different fee collections in the UST and BA districts could be justified by the "unique budgetary challenges" facing each program, expressing the view that Congress's decision to allow judicial districts in Alabama

and North Carolina to operate with bankruptcy administrators instead of U.S. Trustees "in the first place" was itself arbitrary. *Id.* at 35a; see *id.* at 35a-37a.

DISCUSSION

The court of appeals correctly determined that the quarterly-fee statute as amended in 2017 did not exceed Congress's constitutional authority, even though that fee increase was not immediately applied in the six districts with Bankruptcy Administrators rather than United States Trustees. The question presented, however, is the subject of a circuit conflict. This Court's review is warranted to resolve that conflict, and this case would be an appropriate vehicle for that review.

A. The Court Of Appeals' Decision Is Correct

The court of appeals sustained the constitutionality of the 2017 amendment increasing quarterly fees for the largest Chapter 11 debtors on the ground that Congress's power under the Bankruptcy Clause would allow it to impose unequal fees to address the specific funding problem it faced in the districts that participate in the UST Program. The court's judgment is correct for the reason addressed by the court and for additional reasons that the court had no need to reach.

In 2017, Congress amended 28 U.S.C. 1930(a)(6) to increase certain administrative fees charged debtors in UST districts. Since 2001, Congress had provided that "the Judicial Conference of the United States may require" Chapter 11 debtors in non-Trustee Districts "to pay fees equal to those imposed by [28 U.S.C. 1930(a)(6)]." 2000 Act § 105, 114 Stat. 2412; 28 U.S.C. 1930(a)(7) (2018). At the time of the 2017 amendment, the Judicial Conference had ordered the BA districts to impose fees "in the amounts specified in 28 U.S.C. § 1930, as those amounts may be amended from time to

time." *2001 JCUS Report* 46. But the BA districts did not implement a parallel fee increase on the effective date of the 2017 amendment, and when the Judicial Conference (acting via its Executive Committee on an expedited basis) ultimately ordered them to do so, it applied the fee increase to a slightly different set of cases than were subject to the 2017 amendment in the UST districts. That series of events, however, did not render the 2017 amendment unconstitutional.

1. As an initial matter, the Bankruptcy Clause's uniformity requirement did not restrict Congress's authority to amend quarterly fees in UST Districts. The Bankruptcy Clause authorizes Congress "[t]o establish * * * uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. Art. I, § 8, Cl. 4. The Bankruptcy Clause empowers Congress to legislate on "the subject of Bankruptcies," *ibid.*, which this Court has defined as laws regulating "relations between an insolvent or nonpaying or fraudulent debtor and his creditors." *Railway Lab. Execs.' Ass'n* v. *Gibbons*, 455 U.S. 457, 466 (1982) (citation omitted). In particular, the Bankruptcy Clause gives Congress the power to "adjust[]" "a failing debtor's obligations," and therefore "involves the power to impair the obligation of contracts," a power that the Constitution withheld from the States. *Ibid.* (citations omitted).

The statute at issue here, Section 1930(a)(6), does not regulate or alter the debtor-creditor relationship, and thus does not hinge on Congress's bankruptcy power. Rather, it is a user-fee provision that funds the administrative machinery erected by Congress to aid the exercise of its enumerated Section 8 powers, including its power to constitute inferior tribunals. See U.S. Const. Art. I, § 8, Cl. 9; see *Wellness Int'l Network, Ltd.*

v. *Sharif*, 575 U.S. 665, 668 (2015) (explaining that Congress has authorized the appointment of bankruptcy judges "to assist Article III courts in their work" and that without that assistance "the work of the federal court system would grind nearly to a halt"). Congress's authority to fund that administrative framework—like its authority to impose user fees that fund agencies that assist in implementing Congress's other enumerated Section 8 powers—rests on its auxiliary power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. Const. Art. I, § 8, Cl. 18; see *Wright* v. *Union Cent. Life Ins. Co.*, 304 U.S. 502, 513 (1938). Accordingly, the bounds of Congress's substantive bankruptcy power to enact "uniform Laws on the subject of Bankruptcies," U.S. Const. Art. I, § 8, Cl. 4, do not limit Congress's authority to enact the 2017 amendment.

Congressional practice further illustrates that the statutes governing bankruptcy court administration, set forth in Title 28 of the United States Code, do not implicate any uniformity requirement. Many of those laws authorize or contemplate significant variations in deference to local judicial preference. A district court may (but need not) refer cases to a bankruptcy court, 28 U.S.C. 157(a); it may (but need not) withdraw that reference at any time, 28 U.S.C. 157(d); it may (but need not) participate in the bankruptcy appellate panel for its circuit, assuming the court of appeals itself has exercised the option to create one, 28 U.S.C. 158(b)(1) and (6); and it may promulgate local rules that differ from those of other courts, see Fed. R. Bankr. P. 8026(a), 9029(a)(1). As particularly relevant here, Congress has also accommodated the Judicial Conference's support for the continued use of Bankruptcy Administrators in

six judicial districts in lieu of having those districts participate in the UST Program. See pp. 4-5, *supra*. There is no basis for concluding that any of those administrative variations are unconstitutional.

2. In any event, the statutory regime for quarterly fees was at all relevant times facially uniform throughout the United States. Both before and after the 2017 amendment, Section 1930(a)(6) mandated a graduated fee schedule that applies in all UST districts, and Section 1930(a)(7) in turn provided—from the 2000 Act until the 2020 Act—that the Judicial Conference "may require the debtor" in BA districts "to *pay fees equal to those imposed* by paragraph (6) of this subsection." 28 U.S.C. 1930(a)(7) (2018) (emphasis added). The 2017 amendment at issue here did not amend Section 1930(a)(7) and thus did nothing to change that basic structure.

The fact that Section 1930(a)(7) contained the auxiliary verb "may" (until it was replaced with "shall" by a clarifying amendment in the 2020 Act) does not evince any impermissible disuniformity. The statute did not empower the Judicial Conference to charge fees in any amount it wished; rather, it specifically required that fees collected in BA districts be "equal to those imposed" in UST districts. 28 U.S.C. 1930(a)(7) (2018). Section 1930(a)(7) thus cannot be read to authorize the state of affairs about which petitioner complains: the post-January 1, 2018 collection of fees in BA districts that were not "equal to those imposed" in UST districts. Even if the word "may" conferred discretion as to whether to impose fees in the BA districts in the first place, the Judicial Conference had chosen to impose such fees, and nothing in Section 1930(a)(7) authorized the imposition of fees in amounts that were not "equal."

In any event, the best reading of Section 1930(a)(7) is that it did not confer discretion to impose different fees. As this Court has explained, the ordinary inference that "[t]he word 'may' * * * usually implies some degree of discretion" 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 (1983); see *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000) ("[T]he mere use of 'may' is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority."). Here, those indications support a mandatory reading.

Section 1930(a)(7) was enacted to avoid any uniformity concerns about the imposition of quarterly fees in only the UST districts. The provision responded to the Ninth Circuit's decision in *St. Angelo* v. *Victoria Farms, Inc.*, 38 F.3d 1525, 1532-1533 (1994), amended, 46 F.3d 969 (9th Cir. 1995), which found unconstitutional the authorization of two programs with divergent fee requirements. The Judicial Conference proposed that, rather than discontinue the BA program, Congress should resolve any potential constitutional problem by enacting Section 1930(a)(7). See *1999 House Hearing* 26; *2001 JCUS Report* 45. After that enactment, the Judicial Conference ordered the collection of 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," reflecting the Judicial Conference's contemporaneous understanding that permanent, nationwide uniformity of fees was intended. *2001 JCUS Report* 46.[3]

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[3] After some courts interpreted "may" to confer discretion on the Judicial Conference as to the BA increase, Congress unanimously

For those reasons, interpreting the 2018 version of Section 1930(a)(7) to mandate equal fees in the BA districts is the best reading of that provision. At the very least, any court that would otherwise find the statute to be unconstitutional would instead be obliged to adopt that permissible reading, because "courts should, if possible, interpret ambiguous statutes to avoid rendering them unconstitutional." *United States* v. *Davis*, 139 S. Ct. 2319, 2332 n.6 (2019).

3. Nevertheless, even assuming that the Bankruptcy Clause's uniformity requirement is applicable and that Section 1930(a)(6) and (7) authorized different fees in UST and BA districts after the 2017 amendment (and before the 2020 Act), the disparity in fees did not violate the uniformity requirement. The Bankruptcy Clause leaves Congress substantial "flexibility" that allows it to "take into account differences that exist between different parts of the country." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 158-159 (1974). In fact, this Court has only once held a statute invalid on bankruptcy uniformity grounds, and that statute was a "private bill" designed to alter the preexisting legal obligations of a single debtor to certain classes of its creditors. *Gibbons*, 455 U.S. at 471. In finding that law unconstitutional, the Court emphasized that "the Bankruptcy Clause's uniformity requirement was drafted in order to prohibit Congress from enacting private bank-

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enacted technical legislation striking the word "may" from Section 1930(a)(7) and replacing it with "shall," thus further indicating that it did not intend to grant the Judicial Conference discretion to impose unequal fees. See 2020 Act § 3(d)(2), 134 Stat. 5088. An express legislative finding explained that the purpose of that change was to "confirm the longstanding intention of Congress that quarterly fee requirements remain consistent across all Federal judicial districts." § 2(a)(4)(B), 134 Stat. 5086.

ruptcy laws," but explained that that requirement "does not impair Congress' ability under the Bankruptcy Clause to define classes of debtors and to structure relief accordingly," including by enacting "bankruptcy laws that apply to a particular industry in a particular region." *Id.* at 472-473. Accordingly, when enacting substantive bankruptcy laws, Congress may "solve 'the evil to be remedied'" with legislation that is tailored to the scope of the problem that Congress has encountered. *Regional Rail Reorganization Act Cases*, 419 U.S. at 161.

Here, the problem that Congress was addressing was a funding shortfall in the UST Program. Imposing fees on the participants in that program addressed "the evil to be remedied." *Regional Rail Reorganization Act Cases*, 419 U.S at 161. Put another way, the fee increase "appl[ied] uniformly to a defined class of debtors," namely those that participated in the UST Program. *Gibbons*, 455 U.S. at 473. As the court of appeals observed, that is a "program-specific distinction that only indirectly has a geographic impact." Pet. App. 17a-18a; accord *Hobbs* v. *Buffets, L.L.C. (In re Buffets, L.L.C.)*, 979 F.3d 366, 378-379 (5th Cir. 2020). Treating participants in that program as a class therefore had "a solid fiscal justification" that corresponded to the relevant problem, Pet. App. 18a, and fell within the broad flexibility the Constitution grants Congress.

4. Finally, even if petitioner's constitutional argument had merit, refunding a portion of the quarterly fees paid on behalf of the Circuit City estate would not be the proper remedy. The bankruptcy court determined that the fees petitioner owes "must be determined based on the [pre-2017] version of the statute." Pet. App. 54a. In determining the proper remedy for a

constitutional violation, however, a court must "seek to determine what 'Congress would have intended' in light of the Court's constitutional holding." *United States* v. *Booker*, 543 U.S. 220, 246 (2005) (citation omitted); see *Levin* v. *Commerce Energy, Inc.*, 560 U.S. 413, 427 (2010). That predictive inquiry is particularly important here, where the relevant constitutional provision prohibits differential treatment. "Whenever government impermissibly treats like cases differently, it can cure the violation by either 'leveling up' or 'leveling down.'" *Comptroller of the Treas.* v. *Wynne*, 575 U.S. 542, 569 (2015); see *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1700 (2017) (after finding equal-protection violation, inquiring into the "intensity of [Congress's] commitment to the residual policy" and "the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation") (quoting *Heckler* v. *Mathews*, 465 U.S. 728, 739 n.5 (1984)).

Here, the appropriate remedy for any uniformity violation would be declaratory relief, not a refund of quarterly fees paid by bankruptcy debtors in the 88 UST districts.[4] Congress enacted the 2017 amendment because of a looming shortfall in the UST Fund that threatened to impose substantial financial impacts upon taxpayers. The increased fees were necessary to ensure adequate user funding for the UST Program that operated in the vast majority of the Nation and of the bankruptcy system more broadly. Congress would not have chosen to

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[4] Prospective injunctive relief may in some instances be needed to put "an end to preferential treatment for others," *Heckler*, 465 U.S. at 740 n.8, but such prospective relief is unnecessary here. The 2020 Act provides prospective nationwide uniformity in fees between the UST and BA districts, and applies to both pending and newly filed cases. See 28 U.S.C. 1930(a)(6) and (7) (Supp. II 2020).

remedy any constitutional flaw arising from the short-lived and more-favorable fee regime in the 6 BA districts by granting massive refunds of fees previously paid by debtors in the 88 UST districts. Indeed, when Congress later learned of the divergent implementation in the BA districts, it did not revoke the amended fee schedule in Section 1930(a)(6), nor did it direct refunds to debtors in UST districts. Instead, it enacted clarifying legislation that specifically reaffirmed what an express congressional finding called "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. Moreover, it did so while imposing fees for the largest debtors that remained substantially above the levels in place before the 2017 amendment, see § 3(d)(1), 134 Stat. 5088. Adopting a remedy that requires refunds in 88 districts would contravene what Congress would have intended.[5]

B. The Question Presented Warrants This Court's Review

1. Although the court of appeals' decision is correct, the question presented warrants this Court's review. The question has divided the courts of appeals. Two courts of appeals—the Fifth Circuit and, in the decision below, the Fourth Circuit—have upheld the statute, in both instances by concluding that even a statutorily authorized difference in fees across UST and BA districts would satisfy the Bankruptcy Clause. See Pet. App.

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[5] As noted above, see pp. 4-5, *supra*, Section 1930(a)(7) was first enacted in 2000 on the understanding that the provision would be sufficient to address the uniformity problem perceived by the Ninth Circuit in *Victoria Farms*. There is no sound reason to believe that the 106th Congress would have intended that the UST Program—and ultimately, federal taxpayers—bear a significant financial burden if that understanding were later found to have been incorrect.

14a-18a; *Buffets*, 979 F.3d at 377-380. In contrast, a panel of the Second Circuit and a divided panel of the Tenth Circuit (in a decision rendered after the filing of the petition for a writ of certiorari in this case) have held that the 2017 amendment was unconstitutionally non-uniform and have ordered monetary relief to debtors who paid higher fees than they would have paid in a BA district. See *Clinton Nurseries of Md., Inc.* v. *Harrington (In re Clinton Nurseries, Inc.)*, 998 F.3d 56, 64-70 (2d Cir. 2021); *John Q Hammons Fall 2006, LLC* v. *Office of the U.S. Tr. (In re John Q. Hammons Fall 2006, LLC)*, 15 F.4th 1011, 1021-1026 (10th Cir. 2021).

The Second and Tenth Circuits acknowledged the contrary decisions in the Fourth and Fifth Circuits, but found those decisions to be unpersuasive. *Clinton Nurseries*, 998 F.3d at 67-70; *John Q. Hammons*, 15 F.4th at 1023-1025. After the Second Circuit addressed the question presented, the U.S. Trustee filed a petition for rehearing en banc, but the Second Circuit denied that petition. See Order, *Clinton Nurseries*, *supra*, No. 20-1209 (Sept. 17, 2021). In light of that denial of rehearing and the Tenth Circuit's subsequent divided decision, the conflict among the courts of appeals is unlikely to be resolved without review by this Court.

Furthermore, the question presented has legal and practical importance. Although the court of appeals rejected petitioner's challenge to the 2017 amendment, two other federal appellate courts have invalidated the same statute on constitutional grounds. This Court often grants certiorari to "review the exercise of the grave power of annulling an Act of Congress." *United States* v. *Gainey*, 380 U.S. 63, 65 (1965); see, *e.g.*, *Matal* v. *Tam*, 137 S. Ct. 1744, 1755 (2017); *Zivotofsky* v. *Kerry*, 576 U.S. 1, 9 (2015); see also Stephen M. Shapiro

et al., *Supreme Court Practice* § 4.12, at 4-35 (11th ed. 2019) ("Where the decision below holds a federal statute unconstitutional * * * certiorari is usually granted because of the obvious importance of the case.").

The constitutionality of the 2017 amendment also has the potential to affect a significant number of cases. The question has been the subject of active litigation in bankruptcy and district courts throughout the United States. In addition to the four circuit court decisions discussed above, other cases challenging the statute remain pending in courts within the Sixth, Ninth, Eleventh, and Federal Circuits, in which the respective courts of appeals have not yet ruled. See, *e.g.*, *USA Sales, Inc.* v. *Office of U.S. Tr.*, 532 F. Supp. 3d 921 (C.D. Cal. 2021), appeal docketed, No. 21-55643 (9th Cir. June 21, 2021); *In re Mosaic Mgmt. Grp., Inc.*, 614 B.R. 615 (Bankr. S.D. Fla. 2020), appeal pending, No. 20-12547 (11th Cir. filed Sept. 16, 2020); *Acadiana Mgmt. Grp., LLC* v. *United States*, 151 Fed. Cl. 121 (2020), appeal pending, No. 21-1941 (Fed. Cir. filed July 12, 2021). One of those pending appeals involves a putative class action brought in the Court of Federal Claims on behalf of all Chapter 11 debtors in UST districts. See *Acadiana Mgmt. Grp.*, *supra*. If this Court granted review in this case, its decision would either dispose of that litigation or provide important guidance for its resolution. Review would also resolve the legal status of approximately $324 million in quarterly fees imposed under the 2017 amendment.[6]

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[6] In the 2020 Act, Congress prospectively eliminated the divergence in fees between UST and BA districts. Because the 2020 Act did not affect fees incurred before its enactment, it does not moot any pending litigation concerning the constitutionality of the 2017 amendment. And given the large value of fees potentially at issue,

2. This case would be an appropriate vehicle for resolving the question presented. The petition raises a single question unobstructed by threshold issues or factual complications that could prevent the Court from reaching the question presented. Each of the grounds discussed for upholding the 2017 amendment or denying monetary relief was raised below. And the Fourth Circuit's published decision and dissent, together with the published decisions and (where applicable) dissenting opinions from the Second, Fifth, and Tenth Circuits, provide a sufficiently thorough airing of the relevant issues to facilitate this Court's review of the question.[7] Finally, this is the only currently pending petition for a writ of certiorari presenting this question. Accordingly, granting review in this case would best facilitate prompt resolution of the question.

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the question retains practical significance. Thus, the 2017 amendment's temporary nature does not detract from the need to correct two circuits' mistaken rulings invalidating that federal statute.

[7] The decision below had no need to address what the appropriate remedy would be if the 2017 amendment were found to be unconstitutional. But that question was fully briefed by the government below, Gov't C.A. Br. 34-35; Gov't C.A. Reply Br. 17-18, and the remedial question is fairly included in the scope of a question about a law's constitutionality, such that this Court would be able to resolve it in this case if it were to agree with petitioner about the merits. See, *e.g.*, *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 (2018) (addressing the question of the appropriate remedy after finding a constitutional violation). For that reason, this Court need not await a petition for a writ of certiorari to the Second or Tenth Circuits, which have addressed the remedial issue after finding the statute invalid. See *Clinton Nurseries*, 998 F.3d at 69-70; *John Q. Hammons*, 15 F.4th at 1025-1026.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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