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,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF USA SALES, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[1]

Amicus USA Sales, Inc. is a California corporation which currently has litigation pending against the Office of the United States Trustee ("OUST") in which *Amicus* is seeking a refund of $595,849.00 in excessive quarterly fees paid to the OUST under the same statutory scheme being challenged on constitutional grounds by the Petitioner in this case.

Amicus prevailed against the OUST in a suit brought in the U.S. District Court for the Central District of California. The Court (Judge Holcomb) granted summary judgment in favor of *Amicus* and entered judgment against the OUST on April 19, 2021. Judge Holcomb's opinion is reported at 532 F.Supp. 3d 921 (C.D. Ca. 2021). The OUST timely filed a Notice of Appeal to the Court of Appeals for the Ninth Circuit. The briefing in that appeal is currently being held in abeyance pending the outcome in the present case.

Amicus is filing this brief in support of Petitioner to explain how the improper increase in quarterly fees paid by *Amicus* to the OUST nearly caused the complete destruction of *Amicus'* business operations and to further explain why the facts of

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[1] No person other than the named *Amicus* or their counsel authored this Brief or provided financial support for this Brief. Counsel for both parties have consented to the filing of this Brief.

Amicus' case support a ruling for Petitioner in the present case.

Many Chapter 11 debtors whose bankruptcy cases were pending in U.S. Trustee Districts as of January 1, 2018, when the OUST began charging the increased quarterly fees in response to the 2017 Act, ended up paying more in quarterly fees. The 2017 Act was interpreted by the OUST as applying to all Chapter 11 cases pending as of that date, not just to cased filed on or after that date.

What makes *Amicus'* case different from most, if not all, of the reported cases involving this issue is that the quarterly fee increase at issue literally forced *Amicus* out of Chapter 11 bankruptcy. As a result of the increase in the quarterly fees charged to *Amicus* (which went from $13,000 per quarter to roughly $85,000 per quarter), *Amicus* went from a profitable business to an unprofitable business. This lack of profitability, caused directly by the increase in quarterly fees charged by the OUST, meant that *Amicus* could no longer remain in Chapter 11.

Amicus thus faced one of two possibilities. Either *Amicus'* bankruptcy would be converted to a chapter 7 liquidation, ensuring the demise of *Amicus,* or, if all of *Amicus'* creditors agreed on how their claims would be dealt with outside of bankruptcy, *Amicus'* bankruptcy could be dismissed in a so-called "structured dismissal." Thus, the increase in the quarterly fees deprived *Amicus* of the opportunity to press forward with an attempted reorganization

within the protective confines of Chapter 11. The increase also nearly caused the demise of *Amicus*.

Amicus was fortunate. Because it was able to remain in Chapter 11 and pay the increased quarterly fees by "cannibalizing" its inventory while it negotiated successfully with its creditors over a period of roughly 12 months, *Amicus* "lived to see another day," despite the monstrous increase in quarterly fees. Other Chapter 11 Debtors in U.S. Trustee Districts may not have been so fortunate. By way of contrast, other Chapter 11 Debtors in Bankruptcy Administrator Districts which were similarly situated to *Amicus* faced no increase at all in their quarterly fees and thus did not suffer any adverse consequences as the result of the increase in quarterly fees imposed by the 2017 Act. This violated the Bankruptcy Uniformity Clause of the Constitution.

SUMMARY OF ARGUMENT

What happened to *Amicus* in its Chapter 11 bankruptcy following the enactment of the Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, Div. B, § 1004(a), 131 Stat. 1232 ("2017 Act"), which modified the quarterly fees charged pursuant to 28 U.S.C. § 1930(a)(6), demonstrates graphically that the law increasing the quarterly fees charged to *Amicus* resulted in Chapter 11 debtors in U.S. Trustee Districts being treated dramatically different from Chapter 11 debtors in Bankruptcy Administrator Districts. This violated the uniformity requirement of the Bankruptcy Clause of the

Constitution, Article I, section 8, clause 4 ("Bankruptcy Uniformity Clause").

Amicus filed its Chapter 11 bankruptcy petition on May 20, 2016, well before the enactment of the 2017 Act and well before the 2017 Act's quarterly fee increase took effect on January 1, 2018. At the time *Amicus* filed its Chapter 11 petition, the maximum quarterly fees that could be charged to *Amicus* annually (based on historical "disbursements" by *Amicus*) was $52,000. After the 2017 statutory increase in quarterly fees, the total annual quarterly fees charged by the OUST to *Amicus* was approximately $340,000.

Amicus thereafter faced a dilemma. *Amicus* could not continue operating in Chapter 11 because the quarterly fee increase turned *Amicus* from a profitable company into an unprofitable company. Had *Amicus* remained in bankruptcy, it would have had to convert its case to a Chapter 7 liquidation, resulting in the demise of *Amicus*. *Amicus* could not unilaterally dismiss its Chapter 11 bankruptcy – it had to seek approval from the Court through a motion served on all creditors. Furthermore, *Amicus* had to reach an agreement with all of its creditors regarding payment of their claims outside of bankruptcy prior to any dismissal to avoid being forced out of business by its creditors after the dismissal.

Amicus cannibalized its inventory to temporarily remain viable as a business, while negotiating with its creditors regarding the potential terms of a "structured dismissal." *Amicus* was

eventually able to negotiate a "structured dismissal" with all of its creditors. *Amicus'* Chapter 11 bankruptcy was thus dismissed on terms that provided *Amicus* with the opportunity to remain in business.

Similarly situated Debtors in Bankruptcy Administrator Districts did not face the obstacles faced by *Amicus* as the result of the increase in quarterly fees because these similarly situated debtors did not have to pay increased quarterly fees. This graphically demonstrates why the increase in quarterly fees imposed by 28 U.S.C. § 1930(a)(6) pursuant to the 2017 Act resulted in a violation of the Bankruptcy Uniformity Clause of the Constitution.

Amicus, unlike Petitioner, raised other issues in its challenge to the 2017 Act. The adverse effects of the 2017 Act on *Amicus* also gave rise to a colorable challenge to the 2017 Act, as applied to *Amicus,* under the Due Process Clause, Article V of the Constitution ("Due Process Clause").

Similarly, the stark differences between the treatment of Chapter 11 debtors in U.S. Trustee Districts and Chapter 11 debtors in Bankruptcy Administrator Districts, with no explanation for this difference other than raw politics, also gave rise to a colorable challenge to the 2017 Act based on the equal protection component of the Due Process Clause. A ruling for Petitioner in the present case will obviate the need for courts to consider these, and other, issues raised by *Amicus* in its case.

Finally, *Amicus* supports all of the arguments made by Petitioner. *Amicus* will not repeat those arguments here, except to note that the facts of *Amicus'* case strongly demonstrate that 28 U.S.C. § 1930(a)(6) is a law on the subject of bankruptcy for purposes of the Bankruptcy Uniformity Clause.

ARGUMENT

A. The Serious Consequences to *Amicus* Resulting from the 2017 Increase in Quarterly Fees, When Contrasted With the Absence of Any Increase in the Quarterly Fees in Bankruptcy Administrator Districts, Demonstrates That The 2017 Increase in the Quarterly Fees Violated the Bankruptcy Uniformity Clause

The present case involves the question of whether the 2017 Act, which amended 28 U.S.C. § 1930(a)(6) to require the U.S Trustee's Office to charge increased quarterly fees to Chapter 11 debtors in the U.S. Trustee Districts, violated the Bankruptcy Uniformity Clause.

The facts of *Amicus'* case graphically demonstrate the disparate treatment of similarly situated Chapter 11 debtors in the U.S. Trustee Districts and in the Bankruptcy Administrator Districts. The adverse effects of the increase in the quarterly fees on *Amicus* support the Petitioner's argument that the quarterly fee increase in U.S. Trustee Districts, coupled with the absence of any

such increase in the Bankruptcy Administrator Districts, resulted in a violation of the Bankruptcy Uniformity Clause.

Amicus sells cigarettes and other tobacco products in bulk to retailers, selling at a very high volume with small margins. On May 20, 2016, *Amicus* filed a voluntary Chapter 11 bankruptcy petition. As of that date, the State of California had, as the result of an audit, asserted that *Amicus* owed additional excise taxes on the sale of tobacco products. *Amicus* disputed the asserted additional taxes, in part on constitutional grounds, and was pursuing administrative remedies under state law to challenge the asserted taxes.

On August 4, 2016, the California tax authorities filed a proof of claim asserting an 11 U.S.C. § 507(a)(8) priority claim for unpaid tobacco excise taxes totaling $1,505,638.57. *Amicus* filed a complaint to determine amount of taxes owed and later filed a separate objection to the priority status of the excise tax claim. *Amicus'* objection to the priority status of the excise tax claim was sustained in a published opinion. *See In re USA Sales*, 580 B.R. 852 (Bankr. C.D. Cal. 2018).

Thereafter, California asserted a separate administrative expense claim for post-bankruptcy excise taxes which totaled $1,424,583.88. This claim was also disputed by *Amicus,* mainly on constitutional grounds. In late 2018, the parties begam a mediation process in an effort to globally

resolve all disputes regarding the asserted excise tax claims.

Prior to January 1, 2018, *Amicus* had been paying $13,000 per quarter to the OUST, or $52,000 annually, because *Amicus*' total quarterly "disbursements" ranged between $5,000,000 and $14,999,999. However, the quarterly fees demanded from *Amicus* by the OUST increased dramatically as of January 1, 2018 as the result of the 2017 Act, even though *Amicus'* total "disbursements" did not materially change.

Prior to the enactment of the 2017 Act, the quarterly fees charged to Chapter 11 debtors making quarterly disbursements of at least $1 million were as follows:

Disbursement Range	Quarterly Fees
$1,000,000-$1,999,999	$6,500
$2,000,000-2,999,999	$9,750
$3,000,000-4,999,999	$10,400
$5,000,000-14,999,999	$13,000
$15,000,000-29,999,999	$20,000
$30,000,000 and up	$30,000

As the result of the 2017 Act, all quarterly fees for Chapter 11 debtors in U.S. Trustee Districts making disbursements of at least $1 million per

quarter were charged the lesser of 1 percent of such disbursements or $250,000. Thus, for Chapter 11 debtors in U.S. Trustee Districts who disbursed between $5,000,000 and $14,999,999 per quarter (which is the range in which *Amicus* fell each quarter), starting January 1, 2018, quarterly fees ranged from $50,000 to $149,999, as opposed to $13,000.

Amicus paid the following increased quarterly fees assessed by the OUST starting January 1, 2018:

Quarter	Fees Assessed by OUST
1Q2018	$84,343.00
2Q2018	$81,680.00
3Q2018	$68,578.00
4Q2018	$111,755.00
Annual Total	$346,356.00
1Q2019	$82,912.00
2Q2019	$89,335.00
3Q2019	$123,819.00
4Q2019	$57,427.00
Annual Total	$353,493.00

Amicus paid an additional $595,849 in quarterly fees to the OUST over this time period that it would not have had to pay if the quarterly fees had remained at $13,000. Had *Amicus* been able to remain in Chapter 11 and to confirm a chapter 11 Plan of reorganization calling for payments to creditors over 5 years, the additional quarterly fees paid by *Amicus* would have exceeded $1.9 million, based on *Amicus'* historical disbursements.

The financial difficulties that these increased quarterly fees imposed on *Amicus* were considerable. Prior to the increase in quarterly fees, *Amicus* had net income of approximately $193,049 during 2017 and the last three quarters of 2016 combined. However, after paying the increased quarterly fees, *Amicus* had a net loss of approximately ($504,811) during 2018 and 2019.

Amicus' losses in 2018 and 2019 coincided with a reduction in the company's inventory from $2,501,159 as of December 31, 2017 to $1,993,807 as of November 30, 2019. In essence *Amicus* cannibalized its inventory to pay the increased quarterly fees so that it could remain in business temporarily. This stop-gap measure obviously could only be pursued for a limited period of time before the business failed.

Had *Amicus* remained in Chapter 11, the increase in quarterly fees demanded by the OUST would have eventually resulted in *Amicus* going out of business and a conversion of the bankruptcy case to a liquidation under Chapter 7. Dismissal of the

bankruptcy petition was the only course of action available to *Amicus* if the company was to remain in business.

But a dismissal without a pre-existing agreement between *Amicus* and all of its creditors on how the those creditors would be treated after the dismissal would have left *Amicus* at the mercy of its creditors. In particular, because California law precludes a constitutional challenge to any asserted state tax deficiency unless the taxpayer pays all of the disputed tax liability and sues for a refund, see *See* California Constitution, Article XIII, section 32, dismissal of the Chapter 11 case without an agreement in place with the California tax authorities would have led to the demise of *Amicus'* business.

Dismissal of *Amicus'* Chapter 11 case under those circumstances would have precluded *Amicus* from challenging the disputed cigarette excise tax claims on constitutional grounds. That is because *Amicus* lacked the ability to pay these disputed claims in full.[2] Without the ability to raise constitutional challenges to the asserted excise tax deficiencies, *Amicus* would have likely lost its administrative appeals and would have had to attempt to continue

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[2] *Amicus* had the ability to litigate the constitutionality of the relevant California tax provisions in Chapter 11 without paying the taxes, pursuant to section 505(a) of the Bankruptcy Code, because the California Tax authorities filed a proof of claim. *See Schulman v. California (In re Lazar)*, 237 F.3d 967 (9th Cir. 2001).

doing business in the face of tax liens and continuous demands for payment from the California tax authorities. Sustaining a high-volume, low-margin business under those circumstances is not realistic.

With this reality in mind, *Amicus* negotiated a global settlement agreement with California sales tax authorities which called for the dismissal of the Chapter 11 bankruptcy petition and payment of approximately $1 million to California over time. These negotiations took approximately 8 months.

This settlement was necessarily contingent on *Amicus* reaching agreements with all of its other creditors, for purposes of entering into a "structured dismissal" of the company's Chapter 11 bankruptcy case. A "structured dismissal" is a dismissal that "typically dismisses the case while, among other things, approving certain distributions to creditors, granting certain third-party releases, enjoining certain conduct by creditors, and not necessarily vacating orders or unwinding transactions undertaken during the case." *Czyzewski v. Jevic Holding Corp.,* -- U.S. ---, 137 S. Ct. 973, 979 (2017).

In *Jevic Holding*, this Court held that a "structured dismissal" of a Chapter 11 bankruptcy case that does not comport with the priority scheme of the Bankruptcy Code cannot be approved by a Court if a dissenting creditor objects to the terms of the structured dismissal. *Id.* This Court's holding in *Jevic Holding* thus required *Amicus* to reach agreements with all of its creditors as to the terms of

a potential structured dismissal before asking the Court to dismiss the Chapter 11 bankruptcy.

Amicus was fortunate enough to reach agreements with all of its other creditors and thus was able to effectuate a structured dismissal. The Bankruptcy Court thereafter dismissed the bankruptcy on November 15, 2019. *Amicus* thereafter brought suit to recover the excessive fees paid to the OUST.

The situation faced by *Amicus* following the increase in quarterly fees was unprecedented. The "rules of the road" changed in the middle of the journey.

It was as if *Amicus*, by filing a Chapter 11 petition, had entered a toll road with a fixed toll (in the form of quarterly fees payable to the OUST) of $13,000 per quarter. While *Amicus* was on the toll road, the toll unexpectedly increased to over $85,000 per quarter. *Amicus* could not afford the increased toll, and *Amicus* could not exit the toll road without Court permission. Also, exiting the toll road without agreements with creditors in place would likely have resulted in the demise of *Amicus*.

Remaining on the toll road indefinitely would have also resulted in the demise of *Amicus*. While *Amicus* could temporarily cannibalize the car in which it was traveling to raise money to pay the increased toll, at some point the cannibalization of the car would cause the car to stop functioning.

Similarly situated Chapter 11 debtors in Bankruptcy Administrator Districts did not face these problems as the result of an increase in quarterly fees. There was no such increase for Chapter 11 debtors in Bankruptcy Administrator Districts. Such obviously disparate treatment of Chapter 11 debtors illustrates that charging *Amicus* the significantly increased quarterly fees violated the Bankruptcy Uniformity Clause.

B. A Holding That the Increase in Quarterly Fees Violates the Bankruptcy Uniformity Clause Will Permit the Courts to Avoid Deciding an "As Applied" Challenge to This Same Law on Due Process Grounds and on Equal Protection Grounds

Amicus challenged the excessive quarterly fees charged by the OUST on multiple grounds. *Amicus* contended that the increased quarterly fees i) violated the Bankruptcy Uniformity Clause of the Constitution, ii) violated the Due Process Clause of the Constitution (as applied to *Amicus*), iii) violated the equal protection component of the Due Process Clause of the Constitution, and iv) were not authorized by the 2017 Act for Chapter 11 debtors whose cases were pending as of the date of the enactment of the 2017 Act. The impetus for *Amicus* to raise all of these arguments was, of course, the dramatic adverse effect that the increase in the quarterly fees had on *Amicus*.

The unfortunate scenario which was faced by *Amicus* as the result of the increase in quarterly fees imposed by the 2017 Act raises questions as to whether the dramatic increase in quarterly fees under the 2017 Act, as applied to *Amicus*, violated the Due Process Clause of the Constitution. *See United States v. Carlton*, 512 U.S. 26, 35-39 (1994)(O'Connor, J. concurring).

In *Carlton*, this Court noted that "[s]ome of its decisions have stated that the validity of a retroactive tax provision under the Due Process Clause depends upon whether 'retroactive application is so harsh and oppressive as to transgress the constitutional limitation,'" citing *Welch v. Henry*, 305 U.S. 134 (1938), quoted in *United States v. Hemme*, 476 U.S. 558 (1986). This Court then explained that "[t]he 'harsh and oppressive' formulation, however, 'does not differ from the prohibition against arbitrary and irrational legislation' that applies generally to enactments in the sphere of economic policy. *Pension Benefit Guaranty Corporation* v. *R. A. Gray & Co.*, 467 U.S. 717, 733, 81 L. Ed. 2d 601, 104 S. Ct. 2709 (1984)." *Id.*, 512 U.S.at 26, 30.

That the effect of the increase in quarterly fees, as applied to *Amicus*, was "harsh and oppressive" cannot be denied. This raises a legitimate question as to whether this increase, as applied to *Amicus*, violated the Due Process Clause.

The retroactive tax legislation upheld by this Court in *Carlton* did not come close to putting the

taxpayer out of business and did not otherwise pose an existential threat to the taxpayer. The increased quarterly fees imposed by the 2017 Act posed an existential threat to *Amicus*, however, arguably triggering the application of the Due Process Clause. *See Carlton*, *supra*, 512 U.S. at 26-30 (O'Connor, J., concurring).

Similarly, the "harsh and oppressive" effect of the quarterly fee increase, when coupled with the fact that no such quarterly fee increase went into effect in the Bankruptcy Administrator Districts for any Chapter 11 cases filed prior to October 1, 2018, *see* Petitioner's Brief at pp. 20-23, raises a legitimate question as to whether the quarterly fee increase violated the equal protection component of the Due Process Clause of the Constitution. *See, e.g., Allegheny Pittsburgh Coal Co. v. County Com.,* 488 U.S. 336 (1989).

It is worth noting that the definition of "disbursements" in 28 U.S.C. § 1930(a)(6) for purposes of computing quarterly fees owed to the OUST is such that the computation of these quarterly fees is often completely divorced from the amount of cash available to pay those fees. *See, e.g., St. Angelo v. Victoria Farms, Inc.,* 38 F.3d 1525, 1534 (9th Cir. 1994), *Robiner v. Danny's Mkts., Inc. (In re Danny's Mkts., Inc.),* 266 F.3d 523, 525 (6th Cir. 2001).

Consider a situation where a Chapter 11 debtor's business generates quarterly revenue of $40 million and the company pays operating expenses of $39,600,000, leaving a net profit of $400,000. The

"disbursements" which are used to compute quarterly fees are $39,600,000, not $400,000, resulting in a quarterly fee of $250,000 under the 2017 Act. Prior to the enactment of the 2017 Act, the quarterly fees were only $30,000. Furthermore, as the profits of the debtor go up (*i.e.*, as paid operating expenses decrease), the quarterly fees actually decrease, not increase. Gross receipts, as well as profits, are not taken into account for purposes of computing total quarterly fees owed.

Similarly, consider a situation where a Chapter 11 debtor sells a building for $10 million, generating a pre-income tax net amount of $500,000 for the debtor after payment of a $9 million note secured by a deed of trust against the property and expenses of sale of $500,000. The total "disbursements" used to compute the amount of quarterly fees is $9.5 million, resulting in a quarterly fee of $95,000. Prior to enactment of the 2017 act, the quarterly fees were only $13,000.

If this Court holds for Petitioner in the present case, courts will not need to consider the question of whether the 2017 Act, as applied to *Amicus* and as applied to similarly situated Chapter 11 Debtors in U.S. Trustee Districts, violates the Due Process Clause or violates the equal protection component of the Due Process Clause. Nor will Courts be required to consider the issue of whether the 2017 Act itself only authorizes the charging of increased quarterly fees to Chapter 11 debtors in U.S Trustee Districts whose cases were filed after the date on which the 2017 Act was enacted.

C. *Amicus* Concurs With Petitioner's Arguments and Will Not Repeat Them Here; The Facts of *Amicus*' Case Demonstrate That 28 U.S.C. § 1930(a)(6) is a Law on the Subject of Bankruptcy for Purposes of the Bankruptcy Uniformity Clause

Amicus concurs with all of the arguments made by Petitioner. Because those arguments are well articulated, *Amicus* will not repeat those arguments here. *Amicus* notes, however, that the facts of *Amicus*' case strongly support the conclusion that 28 U.S.C. § 1930(a)(6) is a law on the subject of bankruptcies for purposes of the Bankruptcy Uniformity Clause. The changes made to § 1930(a)(6) by the 2017 Act had a direct effect on *Amicus'* ability to remain in Chapter 11 bankruptcy. The argument that § 1930(a)(6) is not a law on the subject of bankruptcy is completely without merit and should be rejected.

CONCLUSION

For the reasons set forth above, *Amicus* urges this Court to reverse the holding of the Fourth Circuit.

Respectfully submitted,

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