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

REPLY BRIEF FOR THE PETITIONER

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Notwithstanding the government's efforts to add complexity, this case presents a straightforward violation of the Bankruptcy Clause's uniformity provision.

Congress has arbitrarily divided identical debtors into different groups and then charged them different fees; nothing distinguishes the debtors in one group from the other—aside from the unequal treatment. The 2017 Act is unquestionably a "Law[] on the subject of Bankruptcies"—as a bankruptcy fee imposed in bankruptcy cases for a bankruptcy trustee via a direct allocation of a portion of the bankruptcy estate. The law is non-uniform on its face: the Act *mandated* increased fees for debtors in Trustee districts while merely *permitting* those same fees for indistinguishable debtors in Alabama and North Carolina; nor does the statutory term "may" suddenly mean "shall," which is why Congress later had to amend the statute to correct that mistake. Nor should there be any genuine doubt about the permissible remedy: the 2017 Act directed the payment of unequal fees, and the only plausible way to erase that past violation is to refund the improper charge.

The government resists at each step of this straightforward analysis, but it cannot overcome the obvious: the Constitution requires *uniform* bankruptcy laws, and a bifurcated system that imposes different charges on indistinguishable debtors is not "uniform" under any ordinary definition. Because the 2017 Act violates the Constitution, the Court should reverse.

ARGUMENT

I. THE 2017 ACT'S QUARTERLY FEE INCREASE VIOLATES THE BANKRUPTCY CLAUSE'S UNIFORMITY REQUIREMENT

A. The 2017 Act Is Deficient Under Any Plausible Definition Of "Uniformity"—And The Government Cannot Excuse Its Disparate Treatment As Addressing A Geographically Isolated Problem

Contrary to the government's contention, there is no constitutional theory of uniformity that authorizes different fees for identically situated debtors based solely on where they happened to file for bankruptcy. "To survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors." *Ry. Labor Execs.' Ass'n* v. *Gibbons*, 455 U.S. 457, 473 (1982). Yet Congress here divided indistinguishable debtors into different categories and then charged them different fees—the very opposite of treating the same class "alike * * * throughout the country regardless of the State" where they are found. *Vanston Bondholders Protective Comm.*

v. *Green*, 329 U.S. 156, 172 (1946) (Frankfurter, J., concurring); see also *United States* v. *Ptasynski*, 462 U.S. 74, 82 (1983).

The 2017 Act mandated this disparate treatment on its face, and it therefore violated the uniformity requirement. See, *e.g.*, *In re John Q. Hammons Fall 2006, LLC*, 15 F.4th 1011, 1024 (10th Cir. 2021).

1. a. In response, the government insists that petitioner's theory of uniformity would invalidate a multitude of historic and modern practices. U.S. Br. 12-13. It starts by invoking two fee statutes from 1800 and 1841, and it continues by tracing modern procedures (like local rules and bankruptcy appellate panels) that vary by district. *Id.* at 20-24. As the government sees it, taking the Bankruptcy Clause to mean what it plainly says—"uniform means not different" (Pet. App. 36a-37a (Quattlebaum, J., dissenting))—would upend these traditional bankruptcy mainstays.

The government badly misunderstands the uniformity requirement. The Bankruptcy Clause says that the "*Law[]*" has to be uniform, not that its *effects* have to be uniform. U.S. Const. Art. I, § 8, Cl. 4 (emphasis added). It is a requirement to impose uniform *standards*, not to root out local variations wherever Congress finds them. *E.g.*, *Hanover Nat'l Bank* v. *Moyses*, 186 U.S. 181, 189-190 (1902). If the words of the "Law[]" are uniform, it can have disparate effects (or be implemented in different ways) without running afoul of the Constitution's mandate. *E.g.*, *St. Angelo* v. *Victoria Farms, Inc.*, 38 F.3d 1525, 1529 (9th Cir. 1994).

And for good reason: uniform laws do not raise concerns about "regionalism" because every region has the identical opportunity to operate within the same uniform framework. See, *e.g.*, *Blanchette* v. *Connecticut Gen. Ins. Corp.*, 419 U.S. 102, 160 (1974). No State or geographical area is favored by a standard that applies identically "throughout the United States." U.S. Const. Art. I, § 8, Cl. 4.

This shows precisely why the government's argument is wrong. Every single example the government found is the same: it identified a *uniform* federal standard implemented differently at the local level. Each provision offered a uniform choice across the board—each district or region had the identical right to make the same choices (within the same framework), and any variations were the result of differing local conditions or local preferences.

Take the government's two examples of (so-called) "early congressional practice." U.S. Br. 13.[1] In the government's own telling, "Congress specified '[t]hat the district judges, in each district respectively, shall fix a rate of allowance to be made to the commissioners of bankruptcy.'" U.S. Br. 21 (quoting 1800 Act, § 47, 2 Stat. 33). Yet that law is wholly uniform on its face; it instructs judges in each district to "fix" a rate—without any directive to apply a *different* rate in any given district. The

[1] It is a stretch for the government to suggest these two laws reflect any strong "historical practice." U.S. Br. 20. From the founding until 1898, there were only *16 years* in which federal laws governing bankruptcies even existed. See Rhett Frimet, *The Birth of Bankruptcy in the United States*, 96 Commercial L.J. 160, 164-165 (Summer 1991). And the two Acts the government identifies were short-lived. The 1800 Act was set to expire after 5 years, but it was so widely criticized that it was repealed after just 3 years. Even at its inception, the Act had passed the House by a vote of 49-48, and the Senate by a vote of 16-12. That hardly demonstrates a clear consensus. See *id.* at 169. Likewise, the 1841 Act went into effect February 1842, but was repealed just over one year later, in 1843. See *id.* at 179. The government's support thus consists of 4-5 tumultuous years of two bankruptcy laws that were quickly repealed. That provides a meager foundation for drawing any conclusions about what the Founders were thinking—especially without any evidence that anyone was focused particularly on these issues.

same is true for the 1841 Act: "requiring the district courts 'from time to time, [to] prescribe a tariff or table of fees and charges to be taxed by the officers of the court or other persons, for services under this act.'" U.S. Br. 21 (quoting 1841 Act, § 6, 5 Stat. 446). This again does not compel any different treatment at the congressional level; the "Law[]" is facially uniform. See U.S. Br. 32 (admitting the uniformity provision's "'limited constraint [is] on *congressional* power") (emphasis in original).

Thus, unlike the 2017 Act, neither law itself mandated disparate treatment of identically situated debtors based on geography alone; it did not compel certain "fees" in some districts (but not others), nor did it selectively grant some districts (but not others) the *choice* to impose different fees. The congressional command (and thus the "Law[] on the subject of Bankruptcies") was entirely uniform.

And, again, the same is also true for each "modern" practice the government flags: each provision is *uniform on its face*. Each court has the same right to implement local rules (Fed. R. Bankr. P. 8026(a), 9029(a)(1)); each circuit has the same choice to create a bankruptcy appellate panel (28 U.S.C. 158(b)); each judge has the same option to withdraw a bankruptcy reference (28 U.S.C. 157(d)); and so on. The government could not identify a *single* relevant example where the variation in treatment (read: the resulting effects) was facially compelled by the "Law[]" itself. And this Court has already adopted this very distinction in authorizing state exemptions: "The general operation of the law is uniform although it may result in certain particulars differently in different states." *Moyses*, 186 U.S. at 190.

These provisions all run in sharp contrast to the 2017 Act. Unlike each of the government's examples, the 2017 Act is non-uniform on its face. It did not confer the same authority on each district nationwide to opt in or out of the increased fees; on the contrary, the 2017 Act *mandated* automatic fees in Trustee districts, while permitting different treatment in North Carolina and Alabama. That same choice was not offered uniformly on a nationwide basis, and the disparity was reflected directly on the face of the 2017 Act itself. That constitutes a quintessential violation of the Bankruptcy Clause's uniformity requirement.

b. To be sure, constitutional uniformity does not require Congress to treat *unlike* things alike; Congress can account for regional differences, distinct local conditions, industry-specific problems, and differently situated "classes." *Gibbons*, 455 U.S. at 469; *Blanchette*, 419 U.S. at 159. A law, however, '"must *at least* apply uniformly to a defined class of debtors."' *In re Mosaic Mgmt. Grp., Inc.*, 22 F.4th 1291, 1328 (11th Cir. 2022) (Brasher, J., concurring in the judgment).

Yet the 2017 Act did not legislate uniformly as to an indivisible class. The Act instead *compelled* increased fees for debtors in Trustee districts while merely *permitting* those same fees for indistinguishable debtors in Alabama and North Carolina. See, *e.g.*, *In re Clinton Nurseries, Inc.*, 998 F.3d 56, 69-70 (2d Cir. 2021). Those debtors were similarly situated in every material respect—no rational line could be drawn based on regional differences, industry issues, or any other natural distinction. The only difference was Congress's *earlier* "Law[]" artificially dividing identical debtors into a non-uniform BA/UST scheme.

While the government insists there is no rule preventing Congress from artificially splitting up a class (U.S. Br. 40-41), it failed to cite a single decision saying that Congress can treat classes differently—merely because Congress had already chosen to treat those classes differently. See *Clinton Nurseries*, 998 F.3d at 69. Each example this Court has used in the uniformity context focused on *real-world* distinctions justifying different treatment. See, *e.g.*, *Ptasynski*, 462 U.S. at 85-86 (describing differences "unique" to Alaska industry); *Blanchette*, 419 U.S. at 159 n.44 (describing distinct problems facing "railroads"). In other words, when this Court has recognized a geographically isolated problem, it was dealing with debtors who in fact were *not* the same. That cannot be said of the debtors artificially divided into Trustee and Administrator groups.[2]

c. Nor does the government have any real answer for this simple point: Had Congress imposed these non-uniform fees in the same legislation that split the nation into a dual scheme, it would not plausibly survive. There is no reason to think Congress can accomplish in two seriatim laws what it could not accomplish in one. The collective effect of these "Laws" is that debtors in 48 States are forced to pay drastically higher fees than indistinguishable debtors for no reason other than Congress assigned them to a non-uniform program.

It thus follows that even if the underlying dual system can survive, the non-uniform fees cannot. Once Congress assigned concrete differences to the participants in each program, it created substantive variations for identically

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[2] The government's limited examples are inapposite. For example, this Court did find that Congress was previously justified in excluding women from the draft because "another statute restrict[ed] women's participation in combat." U.S. Br. 40 (citing *Rostker* v. *Goldberg*, 453 U.S. 57, 76, 79 (1981)). But that was back at a time when the Court found a *genuine, real-world, gender-based distinction* in the combat arena. This case is more along the lines of a hypothetical law where Congress limits combat participants to anyone whose last name falls in the first half of the alphabet—and then tries to justify a corresponding limitation on the draft. It is assuredly the case that a potential draftee would be able to challenge the arbitrary distinction on the draft with or without challenging the underlying restriction.

situated debtors. There is no coherent theory of uniformity that permits different fees for identically situated debtors only in two States.[3]

2. The government separately argues that the uniformity provision only constrains bankruptcy laws that draw geographical distinctions on their face—and since the 2017 Act draws lines based on the Trustee program (not geography), it necessarily presents no uniformity issues. U.S. Br. 15.

This is baseless. The question is not whether "geography" appears on the face of the law, but whether *non-uniformity* appears there. And a law mandating higher fees solely for debtors in one program (but not identically situated debtors in another) flunks the uniformity requirement.

In any event, the government is also wrong in its premise: the law establishing the Trustee program is *explicitly* tied to geography. It identifies, on its face, "the States" and "judicial districts" where the Trustee program operates. See, *e.g.*, 28 U.S.C. 581(a). The 2017 Act did not have to reiterate those distinctions to be geographically-based any more than any statute has to reiterate a separate definitions section for those definitions to apply. The reference to the Trustee program necessarily

[3] Nor has the government even tried to explain why debtors in UST districts should self-fund the program while debtors in BA districts should have expenses covered by taxpayers. Aside from all the other defects in the government's theory, it might be one thing if the Trustee program were more expensive to operate—and Congress was trying to target that higher expense. But the alleged need for additional fees in UST districts (and the alleged lack of need for fees in BA districts) was solely a product of Congress's decision for the Trustee program to pay for itself. That is not a "geographically isolated problem"; there is nothing inherent in the system that means UST debtors alone should face higher fees. It was simply a non-uniform policy choice imposed directly by Congress.

incorporated the regional divisions at its core—thus establishing that Congress was indeed drawing artificial lines based on "'regionalism.'" *Blanchette*, 419 U.S. at 160; see also 28 U.S.C. 1930(a)(7) (the statute itself flagging fees imposed "[i]n districts that are not part of a United States trustee *region*") (emphasis added).

3. According to the government, "[t]his Court has only once held a statute invalid based on the bankruptcy uniformity requirement—and it did so on the ground that the statute was a 'private bill' * * * ." U.S. Br. 36 (citing *Gibbons*, 455 U.S. at 471, 473). The government is confused.

The fact that a "private bill" violates the Bankruptcy Clause does not mean that *only* private bills violate the Bankruptcy Clause. And *Gibbons*'s rationale swept beyond the government's wishful thinking: indeed, the Court specifically asked whether there were any similarly situated debtors (which would show lack of uniformity), and concluded that "a law must at least apply uniformly to a defined class of debtors." 455 U.S. at 472-473. While a private bill might be a particularly egregious example of non-uniformity, it does not define the outer bounds of the uniformity provision.

Nor is it telling that this Court has only once struck down a law on uniformity grounds. Congress's usual ability to stay within constitutional lines does not mean that Congress *always* stays within constitutional lines. The question is whether *this* Act draws non-uniform distinctions, and it plainly does—as multiple lower courts have found. Congress's past record sheds little light on that question.

B. The Government's Attempt To Excuse The Act's Obvious Lack Of Uniformity Is Unavailing

As previously established (Opening Br. 23-32), the government admits that the 2017 Act's fee increase was not uniformly imposed on a nationwide basis. The government still fails to identify any justification for that non-uniform treatment.

1. Contrary to the government's contention, the 2017 Act is a "Law[] on the subject of Bankruptcies"

Petitioner previously explained why the 2017 Act is an obvious "Law[] on the subject of Bankruptcies." Opening Br. 23-27. The government's responses are meritless, which is again why "every" court to have "addressed similar arguments from the government" has "rejected" its contentions. *Mosaic Mgmt.*, 22 F.4th at 1308.

1. According to the government, the 2017 Act "is not part of the 'subject of Bankruptcies' because it does not alter the substance of debtor-creditor relations." U.S. Br. 25. The government offers no textual basis for its cramped reading of the Bankruptcy Clause. And the Clause's plain text refutes it: the Founders could have limited the Clause's reach to the subset of "debtor-creditor relations," but they instead spoke more broadly, granting power "over the whole subject of 'bankruptcies.'" *Moyses*, 186 U.S. at 187. That broad provision is "incapable of final definition." *Wright* v. *Union Cent. Life Ins. Co.*, 304 U.S. 502, 513-514 (1938). And the fact that it *does* cover debtor-creditor relations does not mean that area is its exclusive reach.

Applied here, under any fair reading, the 2017 Act plainly falls within the subject of bankruptcies. The statute is entitled "Bankruptcy fees." 28 U.S.C. 1930. Those fees are imposed in bankruptcy cases. They pay for the bankruptcy trustee to administer bankruptcy tasks. The payment of fees is a mandatory component of plan confirmation. 11 U.S.C. 1129(a)(12). And the 2017 Act itself represents a legislative decision about how to allocate funds out of the bankruptcy estate, which does indeed affect "debtor-creditor relations" (U.S. Br. 25). See Opening Br. 25; U.S. Br. 2-3 (acknowledging the trustee's role "'in the bankruptcy arena'" to assist in the work of bankruptcy cases) (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 88, 101 (1977)). It is simply mystifying how the government nevertheless sees this law as outside the "subject" of bankruptcy.

2. Relatedly, the government next argues that "substantive bankruptcy law" is on the "subject of Bankruptcies," but "bankruptcy administration" is not: "The uniformity requirement of the Bankruptcy Clause limits substantive bankruptcy law, but it has no application to the fee provision at issue here, which addresses bankruptcy administration." U.S. Br. 18.

The government's theory is again profoundly atextual. The "substance-versus-administration" line appears nowhere in the text of the Clause—which, again, covers the *entire subject of bankruptcies*. Rather than grounding its view in the text, the government instead points (again) to "early historical and modern practice"—and presumes that because those "auxiliary" laws are supposedly non-uniform, similar "administrative" laws must fall outside the Bankruptcy Clause. U.S. Br. 13, 22.[4]

The government's argument suffers from an obvious logical flaw. While the government presumes that these laws must only have survived because they were not subject to any uniformity requirement, it ignores an alternative explanation: the laws *were* subject to that requirement but passed muster *because they were uniform*.

[4] In making this argument, the government brushes past the conspicuous title of the "early" fee provisions: "An Act To Establish an Uniform System of Bankruptcy Throughout the United States"—a telling indication that Congress itself understood those laws to fall within Bankruptcy Clause authority. See 1800 Act, ch. 19, 2 Stat. 19.

And, indeed, that is the better answer: as established above, those earlier acts were uniform because they were uniform on their face. Each one conferred the same discretion and imposed the same framework in every district. And that is enough to establish uniformity even if the *effects* of the law varied. See *Moyses*, 186 U.S. at 190.

3. According to the government, it ultimately makes no difference whether the 2017 Act is uniform or not, because the Act was "independently supported" by Congress's inferior-tribunals power and Necessary and Proper Clause authority. U.S. Br. 25-27. And because those provisions do not have a uniformity requirement, the government reasons, "the fee provision is constitutional regardless of its uniformity." *Ibid.*

a. This contention is flatly at odds with this Court's decisions. As *Gibbons* explained, "the Bankruptcy Clause itself contains an *affirmative limitation or restriction* upon Congress's power: bankruptcy laws must be uniform throughout the United States." 455 U.S. at 468 (emphasis added). And *Gibbons* held that this restriction applied to any law within its scope irrespective of whether it might be supported by another enumerated power (in that case, the Commerce Clause). *Id.* at 468-469. As the Court explained, "if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution" the uniformity "limitation." *Ibid.*

This Court has thus already held that Congress cannot turn to its Commerce Clause authority to evade the Bankruptcy Clause's restrictions. There is no legal or logical basis to presume that the government should have better luck trying the same tack under a different Article I provision.

The government's attempt to distinguish this Court's authority is absurd. According to the government, it is fine to override the uniformity requirement in *some* cases so long as Congress does not override it in *every* case. U.S. Br. 27 n.3 (suggesting that the non-uniform law here is permissible because other laws "relate to bankruptcy [but] do not fall within Congress's inferior-tribunal authority"). But *Gibbons*'s logic was that Congress cannot sidestep the Bankruptcy Clause's affirmative restrictions by invoking some other power. That logic holds true whether or not the Bankruptcy Clause is left with *some* work to do in other cases.[5]

b. The government also insists that it can avoid the uniformity provision by relying on the Necessary and Proper Clause. U.S. Br. 19. But if Congress cannot skirt the uniformity requirement by invoking a freestanding enumerated power (*Gibbons*, 455 U.S. at 468-469), surely it cannot skirt the requirement by (derivatively) invoking its "auxiliary" authority.

Nor, in any event, is a law necessary and *proper* if it attempts to evade the express textual preconditions on an enumerated power. Opening Br. 25-26. The government responds that this is not necessarily so, as Congress can invoke the Necessary and Proper Clause to reach *intrastate* activity that falls beyond its reach under the Commerce Clause. U.S. Br. 27 n.3. The government is confused: the Commerce Clause's "interstate" requirement does not impose a *restriction* on Congress's power (for example, by saying that Congress can regulate interstate commerce but is banned from regulating intrastate commerce). It simply serves as a limit to Congress's affirma-

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[5] In any event, it is far from obvious that the 2017 Act "carries into execution" Congress's power to create lower federal courts. Contra U.S. Br. 25-26. There is no indication Congress had that in mind in passing the 2017 Act. And, indeed, Congress referenced the Bankruptcy Clause as the source of its authority.

tive authority. The Bankruptcy Clause, by contrast, *restricts* congressional power—it mandates that any law on the subject of bankruptcies is uniform. Unlike the Commerce Clause, that restriction applies whether or not Congress can identify a different enumerated power for any legislation.

2. Contrary to the government's contention, Section 1930 did not impose "uniform" fees by mandating fees solely in UST districts

According to the government, "the statutory regime for quarterly fees was facially uniform throughout the United States at all relevant times," and "nothing about the 2017 Act or Section 1930 had authorized [any] disparity." U.S. Br. 31-32.

1. The government's argument blinks reality. There is an obvious reason that the government leans on "constitutional avoidance," "context and purpose," and Congress's purported "inten[t]" (U.S. Br. 33)—in other words, everything except the provision's actual text. And that is because the actual text is unambiguous.

As previously established (Opening Br. 27-29), this is not merely a case of a statute that happens to use the word "may." This statute uses the word "may" in contrast to separately "us[ing] 'shall' in numerous other places in § 1930—and even in § 1930(a)(7) itself." *Clinton Nurseries*, 998 F.3d at 65-66. Congress does not use different words in the same section (indeed, *subsection*) because it thinks they mean the same thing. *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001). The statute plainly conferred discretion on the Judicial Conference to decide whether or not to impose fees, and the Judicial Conference exercised that discretion in this very context.

While it is certainly true that Sections 1930(a)(6) and 1930(a)(7) are now "facially uniform" (U.S. Br. 31-32), it took a legislative amendment to accomplish that task. The government's theory that this Court can simply pretend the statute always said what it now does (and most certainly did not before) invites a brand-new enterprise of judicial redlining. Congress is always free to direct that a statute applies retroactively (subject to constitutional restraints), but it cannot revise statutes nunc pro tunc.[6]

2. The government further argues that the scheme was always uniform because Congress expected the Judicial Conference to impose equal fees immediately upon any amendment to Section 1930(a)(6). U.S. Br. 17. Yet the fact that the Judicial Conference had increased fees in the past does not mean that it was *required* to increase fees in the future—its actions, again, reflect an exercise of discretion. There was no guarantee that the Judicial Conference would exercise the same discretion going forward, especially not when facing a seismic shift in the fee schedule. See, *e.g.*, *Mosaic Mgmt.*, 22 F.4th at 1312.

If Congress wished to eliminate or constrain that discretion (and guarantee immediate equal fees), it should have done in 2017 what it eventually did in 2020: amend Section 1930(a)(7) to mandate equivalent fees.

3. The government's last-ditch effort—invoking constitutional avoidance—fails for the same reasons. This Court can construe *ambiguous* statutes to avoid constitutional questions; it cannot rewrite a statute's plain text to mean the opposite of what it says. See, *e.g.*, *Department of HUD* v. *Rucker*, 535 U.S. 125, 134-135 (2002).

There was nothing ambiguous about Congress's deliberate use of the word "may"—just as there was nothing unambiguous about Congress's need to revise the statute

[6] As previously explained, Congress's post-hoc declaration of what the 2017 legislature had in mind cannot override the text or definitively establish what that law actually meant—a task that constitutionally falls to this Court. Opening Br. 29.

to swap in the word "shall." That left the Judicial Conference with discretion to postpone the fee increase in BA districts, and the government cannot avoid that textual or practical reality by pretending this was somehow all the Judicial Conference's fault.

C. The Proper Remedy Is A Full Refund Of Fees—Prospective Relief Cannot Redress A Past Constitutional Monetary Injury

According to the government, even if petitioner paid unconstitutionally non-uniform fees, it is not entitled to a refund. Instead, the government maintains, petitioner is entitled to prospective relief only—as "there can be little question that Congress would have chosen to extend the higher fees to the handful of BA districts," rather than compensate parties for the constitutional injury. U.S. Br. 44. This is wrong on every level.

1. As previously explained (Opening Br. 31-32), the government's proposal faces insurmountable legal and practical hurdles. See, *e.g.*, U.S. Chamber Amicus Br. 3-15 (systematically refuting every aspect of the government's analysis). Congress is required to equalize treatment in the relevant time period. See, *e.g.*, *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31-35, 39-40 (1990). Thus, generally, "only an *actual* refund (or other retroactive adjustment of the tax burdens borne by petitioner and/or its favored competitors during the contested tax period) can bring about the [required] *nondiscrimination*." *Id.* at 43.[7]

[7] The government says these principles apply only in cases of "'comparative economic disadvantage.'" U.S. Br. 47. That is incorrect. The comparative disadvantage might often explain the *source* of the injury; but parties can also be injured (as here) by being compelled to pay an unconstitutional fee. The relevant principle is how to *remedy* that unconstitutional imposition—not its *cause*.

Here, the only option for leveling down is imposing and collecting fees on all BA debtors who avoided the increase in the same period. There is no indication that Congress has the appetite (or constitutional authority) for that kind of extreme retroactive imposition. Many of the BA cases are now closed. Funds were distributed to creditors, professionals, and others that would have to be clawed back and recovered (assuming those funds were not spent or lost). And the government would inevitably face constitutional challenges for attempting to impose liability so long after the fact. Indeed, debtors in Trustee districts raised weighty retroactivity challenges for merely imposing the new fees in cases pending on the 2017 Act's effective date (see MF Global Amicus Br. 4-19); that constitutional harm is magnified for anyone asked to pay drastically increased fees in *past* periods.

In short, Congress has no viable means of post-hoc imposing higher fees—even if it wished to go down that path. The strong presumption is in favor of providing actual relief (see U.S. Chamber Amicus Br. 11), and that relief is warranted here.

2. In any event, the government is wrong that Congress would have opted for leveling down. Congress did not extend the increased fees retroactively when it revised Section 1930(a)(7), even though such a revision would have eliminated the non-uniform treatment. That means this is not merely a question of what Congress hypothetically might have done; we have an actual example of what Congress in fact did—and it chose a more modest solution. See Opening Br. 32.

The government responds that Congress instead "saw no need for retrospective equality." U.S. Br. 45. Perhaps Congress may often prefer not to afford any damages remedies at all. But that does not mean Congress has the option to leave unequal treatment in place—it has to choose between *permissible* means of eliminating the past discrimination. *McKesson*, 496 U.S. at 43. Its two obvious choices here are refunding the fees or pursuing the BA debtors.

3. The government finally argues that a backward-looking remedy is not required because "petitioner was not precluded from challenging the increased fees before paying them." U.S. Br. 16. This is wrong again.

In *McKesson*, this Court held that a State may remedy an unconstitutional discriminatory state tax in one of three ways: (1) by providing a refund to the petitioner of the difference in taxes paid; (2) by collecting back taxes from the other relevant third parties; or (3) by providing for a combination of a partial refund and a partial retroactive assessment of taxes on others. 496 U.S. at 40-41. The Court explained that, so long as the result would equalize the taxes "during the contested tax period," the "the Due Process Clause's requirement of a fully adequate postdeprivation procedure" would be satisfied. *Id.* at 41.

The government cannot avoid these options by focusing on *pre-deprivation* hearings, which the Court discussed (but did not apply) in *Harper* and *McKesson*. *Harper* v. *Virginia Dep't of Tax'n*, 509 U.S. 86, 101-102 (1993); *McKesson*, 496 U.S. at 39 n.21. Due process requires a "'clear and certain' remedy" for payments "collected in violation of federal law." *Reich* v. *Collins*, 513 U.S. 106, 108 (1994); *Atchison, T. & S.F. Ry. Co.* v. *O'Connor*, 223 U.S. 280, 285 (1912) ("It is reasonable that a man who denies the legality of a tax should have a clear and certain remedy."). Here, no "clear and certain" pre-deprivation remedy existed for petitioner, much less one that would have reasonably been understood as the "exclusive" means for seeking relief. See *Reich*, 513 U.S. at 111. The government fails to point to any pre-deprivation procedure that was readily available to petitioner or is currently available to other Chapter 11 debtors. Nor does any such safe procedure obviously exist.

On the contrary, if a debtor fails to pay required quarterly fees, the default rule is that the court "shall" convert the Chapter 11 case to a liquidation under Chapter 7 or dismiss the case altogether. 11 U.S.C. 1112(b)(1), (b)(4)(K) (listing "failure to pay any fees or charges required under chapter 123 of title 28" as grounds supporting "for cause" conversion or dismissal). The threat of having a case dismissed cannot possibly provide the sort of "pre-deprivation hearing" that would satisfy due process or avoid the customary remedy of a refund in cases involving unlawfully collected payments. See, *e.g.*, *McKesson*, 496 U.S. at 39 n.21 (this Court has "long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has *not provided a fair and meaningful predeprivation procedure*") (emphasis added).

The natural remedy for the unconstitutional non-uniform fees is a refund. The government's efforts to leave the constitutional violation unremedied should be rejected.

II. THE 2017 ACT IS ALSO IMPERMISSIBLY NON-UNIFORM BECAUSE CONGRESS'S DUAL SYSTEM ITSELF IS IMPERMISSIBLY NON-UNIFORM

As previously explained, this Court can resolve this question by striking down the dual system itself. Opening Br. 33. In response, the government argues the Court should not address this "broader question." U.S. Br. 16, 41-42. According to the government, this "claim" was "not raised or considered below" and is "outside the scope of the question presented." *Ibid.*

While the Court need not address this issue to resolve the case, the argument assuredly is properly before the

Court. First, parties waive issues, not arguments (*e.g.*, *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99-100 (1991)), and this *issue* was preserved below: whether the 2017 Act imposed non-uniform fees—a question that could be resolved by declaring the underlying system invalid.

Second, this argument falls squarely within the question presented, which is predicated on the existence of the dual system. See, *e.g.*, *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 381 (1995). That antecedent question addresses the very foundation of the 2017 Act and petitioner's constitutional injury.

Finally, the question is also ripe for the Court's consideration. Virtually all of the same arguments that illustrate why the fees are non-uniform also illustrate why the system is non-uniform. The issue has been percolating for decades. Congress has artificially divided the country into two different systems, and Congress's decision to impose different fees on those disparate systems has again created an Article III injury. The ultimate claim here is that similarly situated debtors in different States cannot be charged different fees based on their geography. The dual system is identified in the 2017 Act (by singling out debtors in one system but not the other), and the elimination of the dual system would address petitioner's constitutional challenge.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

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