No.

In the Supreme Court of the United States

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

v.

CLINTON NURSERIES, INC., ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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)), amended the schedule of quarterly fees payable to the United States Trustee in certain pending bankruptcy cases. In *Siegel* v. *Fitzgerald*, 142 S. Ct. 1770 (2022), this Court held that that provision 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. This Court left open the question of "the appropriate remedy" for the violation. *Siegel*, 142 S. Ct. at 1783. The question presented in this case is:

Whether the appropriate remedy for the constitutional uniformity violation found by this Court in *Siegel*, *supra*, is to require the United States Trustee to grant retrospective refunds of the increased fees paid by debtors in United States Trustee districts during the period of disuniformity, or is instead either to deem sufficient the prospective remedy adopted by Congress or to require the collection of additional fees from a much smaller number of debtors in Bankruptcy Administrator districts.

PARTIES TO THE PROCEEDING

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

RELATED PROCEEDINGS

United States Bankruptcy Court (D. Conn.):

In re: Clinton Nurseries, Inc., et al., Nos. 17-31897, 17-31898, 17-31899, 17-31900 (Aug. 28, 2019)

United States Court of Appeals (2d Cir.):

In re: Clinton Nurseries, Inc., et al., No. 20-1209 (May 24, 2021) (original panel opinion)

In re: Clinton Nurseries, Inc., et al., No. 20-1209 (Sept. 17, 2021) (en banc denial order)

In re: Clinton Nurseries, Inc., et al., No. 20-1209 (Nov. 10, 2022) (reinstated panel opinion)

In re: Clinton Nurseries, Inc., et al., No. 20-1209 (Feb. 17, 2023) (en banc denial order)

Supreme Court of the United States:

Harrington v. *Clinton Nurseries, Inc., et al.*, 143 S. Ct. 297 (Oct. 11, 2022) (No. 21-1123) (granting, vacating, and remanding)

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of William K. Harrington, United States Trustee, Region 2, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 53 F.4th 15. A prior opinion of the court of appeals is reported at 998 F.3d 56. The opinion of the bankruptcy court (App., *infra*, 28a-78a) is reported at 608 B.R. 96.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 2022. A petition for rehearing was denied on February 17, 2023 (App., *infra*, 79a-80a). On May 3,

2023, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including June 16, 2023. On June 7, 2023, Justice Sotomayor further extended the time to and including July 17, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1004(a) of the Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, Div. B, 131 Stat. 1232, provided:

> AMENDMENTS TO TITLE 28 OF THE UNITED STATES CODE.—Section 1930(a)(6) of title 28, United States Code, is amended—
>
> (1) by striking "(6) In" and inserting "(6)(A) Except as provided in subparagraph (B), in"; and
>
> (2) by adding at the end the following:
>
> "(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.".

Sections 2 and 3 of the Bankruptcy Administration Improvement Act of 2020, Pub. L. No. 116-325, 134 Stat. 5086-5087, provide in pertinent part:

> [(2)](a) FINDINGS.—Congress finds the following:
>
> (1) Because of the importance of the goal that the bankruptcy system is self-funded, at no cost to the taxpayer, Congress has closely monitored the funding needs of the bankruptcy system, including by re-

quiring periodic reporting by the Attorney General regarding the United States Trustee System Fund.

(2) Congress has amended the various bankruptcy fees as necessary to ensure that the bankruptcy system remains self-supporting, while also fairly allocating the costs of the system among those who use the system.

(3) Because the bankruptcy system is interconnected, the result has been a system of fees, including filing fees, quarterly fees in chapter 11 cases, and other fees, that together fund the courts, judges, United States trustees, and chapter 7 case trustees necessary for the bankruptcy system to function.

(4) This Act and the amendments made by this Act—

(A) ensure adequate funding of the United States trustees, supports the preservation of existing bankruptcy judgeships that are urgently needed to handle existing and anticipated increases in business and consumer caseloads, and provides long-overdue additional compensation for chapter 7 case trustees whose caseloads include chapter 11 reorganization cases that were converted to chapter 7 liquidation cases; and

(B) confirm the longstanding intention of Congress that quarterly fee requirements remain consistent across all Federal judicial districts.

(b) PURPOSE.—The purpose of this Act and the amendments made by this Act is to further the longstanding goal of Congress of ensuring that the bankruptcy system is self-funded, at no cost to the taxpayer.

* * * * *

[(3)](d) BANKRUPTCY FEES.—Section 1930(a) of title 28, United States Code, is amended—

(1) by striking paragraph (6)(B) and inserting the following:

"(B)(i) During the 5-year period beginning on January 1, 2021, in addition to the filing fee paid to the clerk, a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury, in each open and reopened case under chapter 11 of title 11, other than under subchapter V, for each quarter (including any fraction thereof) until the case is closed, converted, or dismissed, whichever occurs first.

"(ii) The fee shall be the greater of—

"(I) 0.4 percent of disbursements or $250 for each quarter in which disbursements total less than $1,000,000; and

"(II) 0.8 percent of disbursements but not more than $250,000 for each quarter in which disbursements total at least $1,000,000.

"(iii) The fee shall be payable on the last day of the calendar month following the calendar quarter for which the fee is owed."; and

(2) in paragraph (7), in the first sentence, by striking "may" and inserting "shall".

STATEMENT

1. a. Federal bankruptcy cases require substantial oversight and administrative support. In 88 federal judicial districts, the United States Trustee (UST) Program, a component of the U.S. Department of Justice, performs those functions; in 6 other districts, the Bank-

ruptcy Administrator (BA) Program, which relies on judicially appointed bankruptcy administrators, plays that role. See generally *Siegel* v. *Fitzgerald*, 142 S. Ct. 1770, 1776 (2022).

The UST Program began in 1978 as a congressionally created pilot program in 18 of the 94 federal judicial districts. See *Siegel*, 142 S. Ct. at 1776. In 1986, when Congress made the UST Program permanent, it permitted the 6 judicial districts in North Carolina and Alabama to opt out and use the BA Program, which operates under the supervision of the Judicial Conference. See *ibid.*; Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 (1986 Act), Pub. L. No. 99-554, §§ 111-115, 302(d)(3), 100 Stat. 3090-3095, 3121-3123 (28 U.S.C. 581 note). The BA Program was initially scheduled to phase out in 1992 and then in 2002, but it remains in place in those 6 districts. See *Siegel*, 142 S. Ct. at 1776.

b. Although the UST Program is housed in the Department of Justice, "Congress requires that the [UST] Program be funded in its entirety by user fees paid to the United States Trustee System Fund * * *, the bulk of which are paid by debtors who file cases under Chapter 11 of the Bankruptcy Code." *Siegel*, 142 S. Ct. at 1776; see 28 U.S.C. 589a(b)(5). Specifically, Congress has directed that in those cases a "quarterly fee shall be paid to the United States trustee * * * 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).

The 1986 Act imposed Chapter 11 quarterly fees in the 88 UST districts but not in the 6 BA districts, which are funded by the Judiciary's general budget. See § 302(e), 100 Stat. 3123; *Siegel*, 142 S. Ct. at 1776. In

the mid-1990s, a panel of the Ninth Circuit opined that having two distinct programs for supervising the administration of bankruptcy cases with different fees violated the uniformity requirement of the Bankruptcy Clause; on that basis, the court prospectively invalidated the provision of the statute that extended the deadline for the BA districts to join the UST Program, effectively requiring those districts to join the UST Program. See *St. Angelo* v. *Victoria Farms, Inc.*, 38 F.3d 1525, 1532-1533 (1994), amended, 46 F.3d 969 (1995).

After *Victoria Farms*, Congress amended the statutory framework but did not eliminate the BA program as the Ninth Circuit had essentially provided. Congress instead 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)). 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 (2000). And, believing that it had solved any uniformity problem, Congress "permanently exempted the six [BA] districts from the requirement to transition to the Trustee Program." *Siegel*, 142 S. Ct. at 1776; see 2000 Act § 501, 114 Stat. 2421-2422.

In 2001, the Judicial Conference directed the BA districts to impose quarterly fees "in the amounts specified in 28 U.S.C. § 1930, as those amounts may be amended from time to time." Judicial Conference of the United

States, *Report of the Proceedings of the Judicial Conference of the United States* 46 (Sept./Oct. 2001) (*2001 JCUS Report*), https://www.uscourts.gov/sites/default/files/2001-09_0.pdf. "[F]or the next 17 years, the Judicial Conference matched all [UST] Program fee increases with equivalent [BA] Program fee increases, meaning that all districts nationwide charged similarly situated debtors uniform fees." *Siegel*, 142 S. Ct. at 1777.

c. In 2017, following a sharp reduction in collections, the existing fee structure proved inadequate to fund the UST Program, and Congress temporarily increased quarterly fees in larger Chapter 11 cases. See *Siegel*, 142 S. Ct. at 1777. Specifically, the Bankruptcy Judgeship Act of 2017 (2017 Act), Pub. L. No. 115-72, Div. B, 131 Stat. 1229, 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.

§ 1004(a), 131 Stat. 1232 (28 U.S.C. 1930(a)(6)(B) (2018)). The increased fees took effect in the first quarter of 2018. See § 1004(c), 131 Stat. 1232.

Despite the Judicial Conference's 2001 standing 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 BA districts did not implement the amended fee schedule by the beginning of 2018. In response, the Executive Committee of the Judicial Conference, acting on an expedited basis, ordered the BA districts to imple-

ment 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 (Sept. 13, 2018), https://www.uscourts.gov/sites/default/files/2018-09_proceedings.pdf; see *id.* at 11-12.

d. After some courts held that the 2017 Act was unconstitutionally non-uniform based on their view that Congress had not compelled the same fees in BA and UST districts, see, *e.g.*, *In re Buffets, LLC*, 597 B.R. 588, 594 (Bankr. W.D. Tex. 2019), rev'd and remanded, 979 F.3d 366 (5th Cir. 2020), Congress enacted clarifying legislation that struck the word "may" from Section 1930(a)(7) and replaced it with "shall." Bankruptcy Administration Improvement Act of 2020 (2020 Act), Pub. L. No. 116-325, § 3(d)(2), 134 Stat. 5088. As amended, the text of Section 1930(a)(7) now provides that, for BA districts, the "Judicial Conference of the United States *shall* require the debtor in a case under chapter 11 * * * to pay fees equal to those imposed by paragraph (6) of this subsection." 28 U.S.C. 1930(a)(7) (Supp. II 2020) (emphasis added). An express legislative finding explains that the change "confirm[s] 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.

The 2020 Act also amended the fee schedule, retaining the $250,000 maximum quarterly fee while slightly reducing the fees payable by large debtors that do not hit that ceiling. 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).

e. Last year, this Court held in *Siegel*, *supra*, that the 2017 Act violated the uniformity requirement of the Bankruptcy Clause because the statutory scheme permitted unequal fees in the UST and BA districts and different fees were in fact imposed. 142 S. Ct. at 1782-1783. In reaching that conclusion, the Court recognized that there is "ample evidence that Congress likely understood, when it passed the 2017 Act, that the Judicial Conference would impose the same fee increase [in the BA districts]." *Id.* at 1782 n.2. The Court explained that the uniformity violation was nonetheless attributable to Congress because it was Congress's decision to rely on its expectation about the Judicial Conference's actions rather than to "*require* the Judicial Conference to impose an equivalent fee increase" that "led to the disparities at issue." *Ibid.* The Court expressly left open "the appropriate remedy" for the uniformity violation in light of the government's arguments "that any remedy should apply only prospectively, or should result in a fee increase for debtors who paid less in the [BA] districts." *Id.* at 1783. The Court remanded for the Fourth Circuit "to consider these questions in the first instance." *Ibid.*

2. This separate case arose in 2017 when debtors Clinton Nurseries Inc., et al., sought relief under Chapter 11 of the Bankruptcy Code in the District of Connecticut, a UST district. See App., *infra*, 7a. Initially, the debtors paid quarterly fees under the amended schedule that took effect in January 2018. *Ibid.* But the debtors subsequently filed a motion in bankruptcy court seeking a partial refund of quarterly fees and a reduction in future fee payments on the ground that the 2017

Act was unconstitutionally non-uniform because the statutory fee increase was implemented differently in the UST and the BA districts. See *id.* at 8a, 32a-33a, 47a.

a. The bankruptcy court rejected the debtors' claim, holding that the 2017 Act survived constitutional scrutiny. App., *infra*, 60a. The court also concluded that, to the extent the Judicial Conference's implementation of the fee increase in BA districts was flawed, reducing debtors' quarterly fees would not be appropriate relief. See *id.* at 67a-68a. The court of appeals reversed. See 998 F.3d 56. It concluded that the 2017 Act was unconstitutionally non-uniform. *Id.* at 65-69; accord App., *infra*, 15a-25a.

As relevant here, the court of appeals held that debtors are "entitled to a refund of the amount in excess of the fees [they] would have paid in a BA District during the same time period." 998 F.3d at 70. The court did not address the government's argument that "even if Debtors had identified a constitutional uniformity defect, Debtors would nonetheless not be entitled to any exemption from payment of statutorily required fees." Gov't C.A. Br. 35. The court then denied the government's petition for rehearing. See Order (Sept. 17, 2021).

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

After this Court issued its decision in *Siegel*—which agreed with the court of appeals that the 2017 Act was unconstitutional but left open the question of the appropriate remedy for that violation—the Court granted

certiorari in this case, vacated the court of appeals' judgment, and remanded to the court of appeals "for further consideration in light of *Siegel*." App., *infra*, 27a.

c. Thirty days after this Court's order vacating the original opinion of the court of appeals (and before this Court had issued and sent its judgment), the court of appeals—without inviting supplemental briefing on the remedial question that this Court had identified in *Siegel*—"[a]mended and [r]einstated" its previous opinion. App., *infra*, 1a; see *id.* at 3a n.1, 9a. The court discussed the remedial issue in a single new paragraph, stating that "[it] see[s] nothing in *Siegel* that calls into doubt [its] earlier holding" and therefore "reaffirm[ing] that, to the extent that [the debtors] ha[ve] already paid the unconstitutional fee increase, [they are] entitled to a refund of the amount in excess of the fees [they] would have paid in a BA District during the same time period." *Id.* at 25a.

d. The court of appeals subsequently denied a petition for rehearing. App., *infra*, 79a.

REASONS FOR GRANTING THE PETITION

This case presents the question of the appropriate remedy for the constitutional violation that this Court found in *Siegel* v. *Fitzgerald*, 142 S. Ct. 1770 (2022). The court of appeals erred by reinstating its pre-*Siegel* opinion ordering a refund remedy, which is demonstrably contrary to Congress's intent. As the government explained in its petition for a writ of certiorari in *Office of the United States Trustee* v. *John Q. Hammons Fall 2006, LLC*, No. 22-1238 (filed June 23, 2023) (*John Q. Hammons* Pet.), that conclusion is mistaken and the question warrants this Court's review. See *John Q. Hammons* Pet. at 11-27.

A. The Court Should Hold The Petition In This Case Pending Its Disposition Of The Government's Petition In *John Q. Hammons*

This case presents the same question as *John Q. Hammons*. Accordingly, the government respectfully requests that the Court hold this petition pending the Court's disposition of that case, and then dispose of this petition as appropriate.

Two recent developments are worthy of note: First, on the same day that the government filed its petition for certiorari in *John Q. Hammons*, the Eleventh Circuit issued its decision addressing the same question and reaching the same result as did the court of appeals in this case and the Tenth Circuit in *John Q. Hammons*. See *United States Trustee Region 21* v. *Bast Amron LLP (In re Mosaic Mgmt. Grp., Inc.)*, No. 20-12547, 2023 WL 4144557 (11th Cir. June 23, 2023) (*Mosaic*). Although the Eleventh Circuit's decision did not create a circuit conflict as to the question presented, it further illustrates that this Court's review of the question is warranted, as discussed below.

Second, the Fourth Circuit has granted a petition for direct appeal to address the appropriate remedy in *Siegel* itself. See *Siegel* v. *United States Trustee Program*, No. 23-1678 (petition for direct appeal granted June 27, 2023). The question presented is now pending in two circuits (the Fourth and the Ninth) and has recently been addressed by three circuits (the Second, the Tenth, and the Eleventh), further illustrating the issue's national importance. See *Siegel* v. *United States Trustee Program*, No. 23-1678 (4th Cir.); *USA Sales, Inc.* v. *Office of the United States Trustee*, No. 21-55643 (9th Cir. argued June 7, 2023); App., *infra*, 1a-26a (2d Cir.); *John Q. Hammons Fall 2006, LLC* v. *Office of the*

United States Trustee (In re John Q. Hammons Fall 2006, LLC), No. 20-3203, 2022 WL 3354682 (10th Cir. Aug. 15, 2022); *Mosaic*, *supra* (11th Cir. June 23, 2023).

B. The Eleventh Circuit's Intervening Decision Further Illustrates The Need For This Court's Review

1. On June 23, the Eleventh Circuit issued its decision in *Mosaic*, holding that the debtors in that case are entitled to refunds of the increased fees that they paid in a UST district relative to those they would have paid in a BA district during the same period. 2023 WL 4144557, at *9; see *id.* at *1-*9.

The *Mosaic* majority recognized that "in formulating the remedy for constitutional violations like this one, courts should be guided by congressional intent." 2023 WL 4144557, at *3. And it "acknowledge[d] the strong evidence of congressional intention preferring the maintenance of the increased level of fees." *Id.* at *7. The majority nonetheless interpreted this Court's precedents as forbidding the application of the remedy that Congress would have selected in this case. See *id.* at *3-*9.

In rejecting a prospective-only remedy, the *Mosaic* majority relied heavily on this Court's decisions in *Reich* v. *Collins*, 513 U.S. 106 (1994), and *Newsweek, Inc.* v. *Florida Department of Revenue*, 522 U.S. 442 (1998) (per curiam), which it viewed as "squarely reject[ing]" the principle set out in *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), that "'[t]he availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause.'" 2023 WL 4144557, at *5 (quoting *McKesson*, 496 U.S. at 38 n.21). The majority read *Reich* and *Newsweek* to establish a substantive due pro-

cess right to a refund whenever "the relevant law and available procedures permitted both predeprivation and postdeprivation process." *Id.* at *6; see *id.* at *5-*7. The majority was unable to discern a principle to reconcile its reading of *Reich* and *Newsweek* with this Court's recent decisions in *Sessions* v. *Morales-Santana*, 582 U.S. 47 (2017), and *Barr* v. *American Association of Political Consultants*, 140 S. Ct. 2335 (2020) (*AAPC*), but it declined to rely on the latter two cases because, in its view, those decisions did not "expla[in] * * * a governing principle of law" and because it viewed their factual context as less analogous to the facts here. 2023 WL 4144557, at *8; see *id.* at *8 n.11.

The *Mosaic* majority also rejected the government's alternative argument that a leveling-down remedy (of collecting additional fees from the extremely small minority of BA debtors) would be appropriate because neither the Judicial Conference—which the court acknowledged "would have the authority to order such 'clawbacks'"—nor the BA administrators and BA district debtors were "part[ies]" in the case before the court. 2023 WL 4144557, at *4. And it emphasized that "some of the BA districts are located outside the Eleventh Circuit." *Ibid.*

2. Judge Brasher concurred, agreeing with the *Mosaic* majority's "bottom-line result," although he "c[ould] not agree with all of its reasoning." 2023 WL 4144557, at *9. Judge Brasher reiterated his previous conclusion that "it is obvious that Congress's intent supports the conclusion that we must level down." *Ibid.* "The favorable treatment" that debtors in BA districts had received, Judge Brasher explained, "was a tiny exception to an otherwise comprehensive scheme, and it was an accidental exception at that." *Ibid.* And Judge

Brasher recognized that "[a]s a matter of equal treatment law, that is where the inquiry ends." *Ibid.* For that reason, Judge Brasher rejected the majority's effort to distinguish this Court's decision in *Morales-Santana*, *supra*. *Ibid.*

Nonetheless, Judge Brasher concluded that a backward-looking, leveling-up remedy of providing refunds was required by what he saw as "commands of the Due Process Clause." *Mosaic*, 2023 WL 4144557, at *10 (citation omitted). He relied on two considerations: First, the government "provided an opportunity to challenge the legality of the fee" and the debtors here "took advantage of" that opportunity. *Ibid.* Judge Brasher took the view that the availability of a predeprivation hearing itself meant that, as a matter of due process, a refund remedy must be available. *Ibid.* Second, Judge Brasher explained that a leveling-up remedy is the court's "only option" because, although "only a small number of bankruptcy cases would be affected by a retroactive fee," he believed that "too much time has passed to increase the fees [for BA debtors] consistent with due process." *Ibid.*

3. The majority and concurring opinions in *Mosaic* misinterpreted this Court's decisions in reaching a result that contravenes congressional intent and the normal operation of this Court's remedial inquiry. As the government explained in its *John Q. Hammons* petition (at 11-13), and as all three members of the *Mosaic* court acknowledged, see 2023 WL 4144557, at *3; *id.* at *9 (Brasher, J., concurring), the touchstone of the remedial inquiry is congressional intent. And—again as the majority and Judge Brasher readily recognized—a refund remedy is not the remedy Congress would have chosen here. See *id.* at *7; *id.* at *9 (Brasher, J., con-

curring). In nonetheless imposing that remedy, they relied on a mistaken understanding of this Court's older precedents and failed to give effect to its recent decisions.

a. In *McKesson*, this Court explained that even in the case of unconstitutional tax collection—a context inherently more coercive than charging user fees applicable to those who choose to avail themselves of the services of the bankruptcy system, see 496 U.S. at 36—due process demands a refund remedy only if a taxpayer lacked a meaningful opportunity to challenge the tax assessments at a *pre*deprivation hearing. *Id.* at 36-37. The *Mosaic* majority read this Court's decisions in *Reich* and *Newsweek* as abrogating that principle. That was incorrect: *Reich* and *Newsweek* dealt with a narrow circumstance of a "bait and switch" where a State, by statute, set up a procedure that promised that a refund *would* be available in a postdeprivation proceeding, but then "reconfigure[d] its scheme, unfairly, in midcourse" after a taxpayer reasonably relied on the apparent availability of a postdeprivation remedy in forgoing a predeprivation challenge. *Reich*, 513 U.S. at 111 (emphasis omitted); see *Newsweek*, 522 U.S. at 444-445. Those circumstances have no bearing here. Nor do *Reich* and *Newsweek* reflect an implicit rejection of *McKesson*, which both decisions repeatedly cited as the governing case in this area, *Reich*, 513 U.S. at 110, 114; *Newsweek*, 522 U.S. at 443-444, and which this Court has continued to apply. See, *e.g.*, *Comptroller of Treasury* v. *Wynne*, 575 U.S. 542, 569 (2015).

Nor was the *Mosaic* majority correct in finding support in the "normal rule of retroactive application of Supreme Court decisions." 2023 WL 4144557, at *8 (citation and internal quotation marks omitted). As this

Court has recognized, the fact that a decision applies retroactively does not answer the separate question of what remedy is appropriate in light of past illegality. See *American Trucking Ass'ns* v. *Smith*, 496 U.S. 167, 178 (1990) (plurality opinion) (emphasizing the need to "distinguish the question of retroactivity * * * from the distinct remedial question"); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 100 (1993) (determining that a prior decision "applies retroactively" but explaining that that conclusion does not resolve the remedial question whether the challengers are "entitle[d] * * * to a refund"); *id.* at 131-132 (O'Connor, J., dissenting) (reiterating that questions of retroactivity and of remedy "are analytically distinct," and that the remedial inquiry "is not whether to apply new law or old law, but what relief should be afforded once the prevailing party has been determined under applicable law").

The *Mosaic* majority also erred in rejecting the government's alternative argument that, if backward-looking relief is required, that relief should take the form of collecting additional fees from the BA debtors who paid less than the equivalent UST debtors paid. 2023 WL 4144557, at *4. The majority emphasized that the Judicial Conference—which "would have the authority to order" additional fees—is not a party to this suit and that "some of the BA districts are located outside the Eleventh Circuit." *Ibid.* But the answer to the remedial question turns on congressional intent, not on the particulars of the relief requested, the parties joined, or the forum chosen by the refund-seeking challengers. See *Morales-Santana*, 582 U.S. at 77 n.29. Moreover, the Eleventh Circuit's concerns about its limited authority over BA districts further illustrate the need for this

Court's review in light of its ability to select a nationwide solution to the remedial problem.

b. Judge Brasher's reliance on due process concerns was likewise mistaken. Absent the kind of bait-and-switch at issue in *Newsweek* and *Reich*, due process does not demand an individually effective remedy for every individual taking advantage of a predeprivation procedure. "How equality is accomplished is a matter on which the Constitution is silent." *Morales-Santana*, 582 U.S. at 73 (citation and ellipsis omitted). Put otherwise, as long as adequate procedures are available, the outcome of the remedial inquiry turns on congressional intent. For the same reason, there was no due process impediment to the Court's resolutions in *Morales-Santana* and in *AAPC*—itself a predeprivation challenge, 140 S. Ct. at 2345—which left the challengers with no individually effective relief. Similarly, there were no due process problems in run-of-the-mill cases where monetary recovery was otherwise foreclosed. See, *e.g.*, *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-35 (1992); *Egbert* v. *Boule*, 142 S. Ct. 1793, 1800 (2022); see also *Ex parte Young*, 209 U.S. 123, 159-160 (1908).

Finally, Judge Brasher's additional concern that, in light of the passage of time, imposing fees in BA districts would violate the due process rights of BA debtors, see *Mosaic*, 2023 WL 4144557, at *10 (Brasher, J., concurring), is also incorrect. From the outset, the BA debtors were on notice that they were underpaying fees because the governing statute provided that, if the Judicial Conference elected to impose fees in the BA districts (which it had), those fees were supposed to be "equal to those imposed" in UST districts. 28 U.S.C. 1930(a)(7) (2018); see also pp. 6-7, *supra* (discussing the

Judicial Conference's 2001 standing order about fees). Moreover, it is well established that even "[t]he retroactive assessment of a tax increase does not necessarily deny due process to those whose taxes are increased." *McKesson*, 496 U.S. at 40 n.23; see, *e.g.*, *Welch* v. *Henry*, 305 U.S. 134, 147 (1938). Given the inherently less coercive context of bankruptcy fees and the notice provided by the statute and the Judicial Conference's 2001 standing order, the belated collection of additional user fees from BA debtors would not be "so harsh and oppressive as to transgress the constitutional limitation." *McKesson*, 496 U.S. at 40 n.23 (citation omitted).

In any event, even if some individual BA debtors might successfully assert a due process defense to additional collections, that does not defeat the leveling-down remedy because a "good-faith effort to administer and enforce * * * a retroactive assessment likely would constitute adequate relief." *McKesson*, 496 U.S. at 41 n.23. That is particularly so here because the lower fees paid by the BA debtors were a "tiny exception," *Mosaic*, 2023 WL 4144557, at *9 (Brasher, J., concurring), to the regime that applied to more than 97% of debtors during the brief period of the unconstitutional disparity. See *John Q. Hammons* Pet. 23. No sound reasons foreclose a leveling-down remedy here.

4. Although the Eleventh Circuit's decision did not create a circuit conflict, it underscores the need for this Court's review.

Most fundamentally, the reasoning of the *Mosaic* majority and of Judge Brasher is badly mistaken. As Judge Brasher recognized, "[a]s a matter of equal treatment law," this case is an easy one: a refund is not warranted. *Mosaic*, 2023 WL 4144557, at *9 (Brasher, J., concurring). But both the majority and Judge Brasher

went astray in viewing due process as compelling a contrary result. Those errors led the Eleventh Circuit to contravene congressional intent, usurping Congress's primary authority in this sphere after Congress had specifically intervened to provide a prospective remedy and enshrining a result that effectively eliminates the very fee increase that Congress specifically and undisputedly sought to impose in the 2017 Act. This Court's intervention is needed to correct that mistaken understanding of its precedents and to restore Congress's legitimate remedial preference. Cf. *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988) (deferring to congressional choice to provide "what it considers adequate remedial mechanisms for constitutional violations").

Moreover, the two opinions associated with the Eleventh Circuit's decision have provided better ventilation of the arguments in favor of a refund remedy, diminishing the value of further percolation. And the particulars of the Eleventh Circuit's reasoning, including its concern about its perceived lack of authority over BA districts "located outside the Eleventh Circuit," *Mosaic*, 2023 WL 4144557, at *4, further illustrate the need for this Court's consideration of the remedial question in light of its unique ability to prescribe a remedy that will be controlling in every judicial district.

In short, this Court's review is warranted before a remedy that is acknowledged to contravene congressional intent takes effect based either on decisions like the one in this case, which have effectively no analysis, or the one issued by the Eleventh Circuit, which has seriously flawed analysis. And as explained in the government's certiorari petition in *John Q. Hammons* (at 26-27), review is warranted in that case as the first case to have reached the Court. Other cases raising the ques-

tion, including this one, should be held pending the resolution of *John Q. Hammons*, which will allow the Court to provide a nationwide remedy for the uniformity violation that the Court recognized in *Siegel*.

If the Court, however, prefers to await the potential development of a circuit split, it should, at a minimum, hold this petition, as well as those in other cases presenting the same question, for as long as that question remains pending before other courts of appeals (as it currently is in the Fourth and Ninth Circuits, see p. 12, *supra*). That would preserve the Court's ability to effectuate a nationwide remedy if it later grants review. The petition in *John Q. Hammons* notes (at 26) that there are approximately 69 other bankruptcy cases within the Tenth Circuit in which refunds could be sought if the judgment in that case becomes final. Similarly, there are approximately 345 other cases (encompassing potential total claims of approximately $81 million) that could be controlled by the Second Circuit's decision in this case if the judgment below is permitted to become final.

CONCLUSION

The Court should hold the petition for a writ of certiorari pending disposition of *Office of the United States Trustee* v. *John Q. Hammons Fall 2006, LLC*, *supra* (No. 22-1238), and then dispose of the petition as appropriate in light of the Court's disposition in that case.

Respectfully submitted.

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JULY 2023

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 20-1209-bk
Aug. Term, 2020

IN RE: CLINTON NURSERIES, INC.; CLINTON NURSERIES OF MARYLAND, INC.; CLINTON NURSERIES OF FLORIDA, INC.; TRIEM LLC, DEBTORS

CLINTON NURSERIES, INC.; CLINTON NURSERIES OF MARYLAND, INC.; CLINTON NURSERIES OF FLORIDA, INC.; DEBTORS-APPELLANTS

TRIEM LLC, DEBTOR

v.

WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE, REGION 2, TRUSTEE-APPELLEE

Argued: Oct. 23, 2020
Decided: May 24, 2021
Vacated: Oct. 11, 2022
Amended and Reinstated: Nov. 10, 2022

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

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

WILLIAM J. NARDINI, Circuit Judge:

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

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

Clinton appeals from an order of the Bankruptcy Court (James J. Tancredi, *J.*) entered on August 29, 2018, rejecting Clinton's constitutional challenge to the 2017 Amendment. Specifically, the Bankruptcy Court rejected Clinton's argument that, under the version of § 1930 in effect prior to the 2020 Act, the 2017 Amend-

ment violated the Bankruptcy Clause of the United States Constitution, which empowers Congress to enact "*uniform* Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4 (emphasis added).

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

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

I. Background

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

The U.S. Trustee Program, which is part of the U.S. Department of Justice, oversees bankruptcy administration in 88 of the 94 federal districts. *See* 28 U.S.C. § 581(a); *Buffets*, 979 F.3d at 370. Judicially appointed bankruptcy administrators, with the oversight of the Judicial Conference, perform the same role in the remaining six districts, which are located in North Carolina and Alabama. *See* Federal Courts Improvements Act of 2000, Pub. L. No. 106-518 § 501, 114 Stat. 2410, 2421

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[1] After we issued our original opinion in this case, the Supreme Court vacated our judgment and remanded for further consideration in light of *Siegel v. Fitzgerald*, ––– U.S. ––––, 142 S. Ct. 1770, 213 L. Ed. 2d 39 (2022). *See Harrington v. Clinton Nurseries, Inc.*, No. 21-1123, ––– U.S. ––––, ––– S. Ct. ––––, ––– L. Ed. 2d ––––, 2022 WL 6571659 (U.S. Oct. 11, 2022). We now issue this amended opinion.

(2000); *Buffets*, 979 F.3d at 370; *USA Sales, Inc. v. Off. of the United States Tr.*, 532 F. Supp. 3d 921, 929-30 (C.D. Cal. 2021).

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

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

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

Initially, only debtors in UST Districts paid quarterly fees. *See Buffets*, 979 F.3d at 371. In 1994, however, the Ninth Circuit held that the absence of quarterly fees in BA Districts was unconstitutionally nonuniform. *See St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1535 (9th Cir. 1994). Congress thereafter enacted § 1930(a)(7) to provide for corresponding quarterly fees in BA Districts, stating in relevant part:

> In districts that are not part of a United States trustee region [i.e. BA Districts] . . . , the Judicial Confer-

> ence of the United States may require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection.

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

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

B. The 2017 Amendment

Section 1930(a)(6) ties the amount of a debtor's fee in a UST District to the size of "disbursements"—*i.e.*, the debtor's payments to third parties. 28 U.S.C. § 1930(a)(6)(A). The larger the disbursements, the larger the quarterly fee.[2] Prior to the 2018 effective

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

> The fee shall be $325 for each quarter in which disbursements total less than $15,000; $650 for each quarter in which disbursements total $15,000 or more but less than $75,000; $975 for each quarter in which disbursements total $75,000 or more but less than $150,000; $1,625 for each quarter in which disbursements total $150,000 or more but less than $225,000; $1,950 for each quarter in which disbursements total $225,000 or more but less than $300,000; $4,875 for each quarter in which disbursements total $300,000 or more but less than $1,000,000; $6,500 for each quarter in which disbursements total $1,000,000 or more but less than $2,000,000;

date of the 2017 Amendment, the maximum fee under § 1930(a)(6) was "$30,000 for each quarter in which disbursements total more than $30,000,000." 28 U.S.C. § 1930(a)(6) (2008).

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

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

Id. § 1930(a)(6)(B) (2017). Congress enacted the 2017 Amendment after observing a decreasing balance in the United States Trustee System Fund, due to a nationwide decline in bankruptcy filings. *See Buffets*, 979 F.3d at 371; *USA Sales, Inc.*, 532 F. Supp. 3d at 930-31.

As a result of the enactment of the 2017 Amendment, the parity of fees between UST Districts and BA Districts came to an end at the start of 2018. While UST

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

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

Districts began implementing the fee increase in the first quarter of 2018, the BA Districts did not do so immediately. *See Buffets*, 979 F.3d at 372. Rather, it was not until September 2018 that the Judicial Conference adopted an equivalent fee increase in BA Districts. *See Report of the Proceedings of the Judicial Conference of the United States* 11-12 (Sept. 13, 2018), https://www.uscourts.gov/sites/default/files/2018-09_proceedings.pdf. Even then, the Judicial Conference instructed that the fee increase would not take effect until October 1, 2018, and would apply only to cases filed after that date. *Id.* Thus, a debtor in a BA District who filed for bankruptcy prior to October 1, 2018, would never be charged the fee increase "no matter how long the case remain[ed] pending." *Buffets*, 979 F.3d at 372. By contrast, "all qualifying Chapter 11 debtors in UST Districts were assessed the increased fees—even debtors in cases commenced before the 2017 Amendment was enacted." *USA Sales, Inc.*, 532 F. Supp. 3d at 930-31.

C. Clinton's quarterly fee challenge

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

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

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

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

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[3] By the same order, the Bankruptcy Court determined that another debtor, Triem, LC ("Triem"), did not have standing to challenge the 2017 Amendment because Triem's fees under the 2017 Amendment were identical to the fees Triem would have paid absent the amendment. Triem has not appealed, and Clinton expressly declines to challenge the standing determination.

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

D. The 2020 Act

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

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

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

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

After we issued our original opinion in this case, the Supreme Court decided *Siegel v. Fitzgerald*, ––– U.S. ––––, 142 S. Ct. 1770, 213 L. Ed. 2d 39 (2022), holding that the 2017 Amendment violated the Bankruptcy Clause's uniformity requirement. On October 11, 2022, the Court granted the Trustee's petition for certiorari in this case, vacated our judgment, and remanded for further consideration in light of *Siegel*. *See Harrington v. Clinton Nurseries, Inc.*, No. 21-1123, ––– U.S. ––––, ––– S. Ct. ––––, ––– L. Ed. 2d ––––, 2022 WL 6571659 (U.S. Oct. 11, 2022). Because the Supreme Court's opinion in *Siegel* accords with our own, we now issue this amended opinion reinstating our judgment.

II. Discussion

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

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

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

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

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

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

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

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

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

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

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date of the 2020 Act (as the Judicial Council did with the 2017 Amendment), then the constitutional non-uniformity problem will persist."). We need not, and do not, decide this issue because before us is only the constitutionality of the 2017 Amendment prior to the 2020 Act.

ports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit."). Because constitutional standing implicates the subject matter jurisdiction of the Court, we may raise the issue *nostra sponte*. *Cent. States,* 433 F.3d at 198.

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

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

Turning to the merits of the constitutional challenge, we must first consider whether the 2017 Amendment is

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

The Trustee's argument has been repeatedly rejected by other courts. *See In re MF Glob. Holdings Ltd.*, 615 B.R. 415, 446 (Bankr. S.D.N.Y. 2020) (collecting cases and observing that "every bankruptcy court that has addressed the constitutionality of the 2017 Amendment under the Bankruptcy Clause" has "concluded that the 2017 Amendment is 'on the subject of Bankruptcies'").[7] And for good reason: The subject of the 2017 Amendment plainly fits within the Supreme Court's broad definition of "bankruptcy" as "the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief." *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 466, 102 S. Ct. 1169, 71 L. Ed. 2d 335 (1982) (internal quotation marks omitted). The 2017 Amendment amends a statute, § 1930, that is literally entitled: "Bankruptcy fees." *See SCI Direct*, 2020 WL 5929612,

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

at *9.[8] Under § 1930(a)(6), a debtor must "pay pre-confirmation UST fees as an administrative priority expense before it pays its commercial creditors, bondholders, and shareholders." *In re MF Glob. Holdings Ltd.*, 615 B.R. at 445 (internal quotation marks omitted). Accordingly, any change in fees imposed pursuant to § 1930 "affects the amount of funds available for distribution to lower-priority creditors." *SCI Direct*, 2020 WL 5929612, at *9 (internal quotation marks omitted).[9]

As the Ninth Circuit reasoned in addressing § 1930 before the 2017 Amendment, the quarterly fee statute "clearly governs the relationship between creditor and debtor and, accordingly, falls within the scope of" the uniformity requirement set forth in the Bankruptcy

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[8] Congress created § 1930 as part of a 1978 law entitled "An act to establish *a uniform Law on the Subject of Bankruptcies*." *In re MF Glob. Holdings Ltd.*, 615 B.R. at 446 (emphasis added) (internal quotation marks omitted). Decades later, "Congress stated that it was enacting the 2017 Amendment under the Bankruptcy Clause," with "the sponsor of the bill containing the 2017 Amendment . . . inform[ing] Congress that it had the power to enact the 2017 Amendment pursuant to Article 1, Section 8, Clause 4 of the Constitution. . . ." *Id.*

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

Clause. *St. Angelo*, 38 F.3d at 1530. We reach the same conclusion here. We hold that, because the 2017 Amendment similarly governs debtor-creditor relations and impacts the relief available, it is a bankruptcy law subject to the Bankruptcy Clause and is constitutional only if "uniform." U.S. Const. art. I, § 8, cl. 4.

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

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

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

The Trustee makes two arguments as to why, notwithstanding the geographic discrepancy, the 2017 Amendment was uniform on its face. First, the Trustee contends that, under the text of § 1930 prior to the 2020 Act, Congress mandated equal implementation of the 2017 Amendment's fee increase in UST and BA Districts, and the delayed and inconsistent implementation of the fee increase in the BA Districts actually *contravened* statutory language that was facially uniform. Second, the Trustee suggests that a narrowly defined exception to the uniformity requirement—the "geographically isolated problem" exception—justified the

fee discrepancy. We find neither argument persuasive.

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

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

The Trustee asks us to ignore the distinction between the "shall" used in § 1930(a)(6) and the "may" used in § 1930(a)(7), urging us to view both provisions as imposing, uniformly, a mandatory obligation. He emphasizes that § 1930(a)(7) was enacted to eliminate the uniformity problem identified by the Ninth Circuit in *St. Angelo*, supporting Congress's intent to harmonize fees. Through this lens, the Trustee reasons, the Judicial

Conference's delayed implementation in the BA Districts would appear an unauthorized act which would not render the statute itself non-uniform. *See* Appellee's Br. at 28-29 ("Nothing in Congress's 2017 amendment authorized, much less directed, the Judicial Conference to implement the amendment on a different effective date. . . . The failure to implement a fee statute consistently across all judicial districts does not render the statute itself unconstitutional. . . .").

We cannot, however, simply overlook Congress's decision to use the permissive term "may" in § 1930(a)(7). To be sure, the Supreme Court has acknowledged that, in some limited scenarios, the word "may" can impose a mandatory directive: Although "[t]he word 'may,' when used in a statute, usually implies some degree of discretion[,] . . . [t]his common-sense principle of statutory construction is by no means invariable . . . and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute." *United States v. Rodgers*, 461 U.S. 677, 706, 103 S. Ct. 2132, 76 L. Ed. 2d 236 (1983) (footnote and citations omitted). Here, however, the choice of the permissive term appears particularly intentional given that Congress used "shall" in numerous other places in § 1930—and even in § 1930(a)(7) itself, which, in its pre-2020 Act form, read in full:

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

> tion 1931 of this title and *shall* remain available until expended.

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

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[10] We note that, in amending § 1930(a)(7) to replace "may" with "shall," the 2020 Act purports to "confirm the longstanding intention of Congress that quarterly fee requirements remain consistent across all Federal judicial districts." Pub. L. No. 116-325, § 2(a)(4)(B). While we certainly may consider a later Congress's statements regarding the intention of the Congress that originally drafted § 1930(a)(7), we are not constrained to view such statements as dispositive. *See Fed. Hous. Admin. v. Darlington, Inc.*, 358 U.S. 84, 90, 79 S. Ct. 141, 3 L. Ed. 2d 132 (1958) (explaining that "[s]ubsequent legislation which declares the intent of an earlier law" is "entitled to weight" but is not "conclusive in determining what the previous Congress meant"); *see also Haynes v. United States*, 390 U.S. 85, 87 n.4, 88 S. Ct. 722, 19 L. Ed. 2d 923 (1968) ("The view of a subsequent Congress of course provide no *controlling* basis from which to infer the purposes of an earlier Congress." (emphasis added)); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 244 (2d Cir. 1996) (observing both that "subsequently enacted legislation might not be a reliable guide to the intent of a prior Congress" and also that "subsequent Congressional actions should not be rejected out of hand as a source that a court may consider in the search for legislative intent" (internal quotation marks omitted)). Ultimately, we cannot ignore the fact that, in analyzing the motivations behind the earlier Congress's choice of the word "may," the Congress that passed the 2020 Act inevitably looked through the lens of the constitutional quagmire that resulted. *Cf. Consumer Prod. Safety Comm'n v. GTE Sylva-*

Additionally, in recently rejecting the Trustee's proposed textual interpretation, the Fifth Circuit explained that "[t]he Judicial Conference's delayed implementation of the fee increase highlights the difference between 'may' and 'shall.'" *Matter of Buffets, L.L.C.*, 979 F.3d at 378 n.10.[11] It is, indeed, telling that the Judicial Conference itself apparently understood the 2017 Amendment as authorizing, but not requiring, it to impose a fee increase in BA Districts. Although "courts should, if possible, interpret ambiguous statutes to avoid rendering them unconstitutional," *United States v. Davis*, —– U.S. ——–, 139 S. Ct. 2319, 2332 n.6, 204 L. Ed. 2d 757 (2019), for the reasons we have already

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nia, Inc., 447 U.S. 102, 117, 100 S. Ct. 2051, 64 L. Ed. 2d 766 (1980) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."). We conclude that the ordinary meaning of "may" as permissive rather than mandatory (which, apparently, is how the Judicial Conference understood the word) outweighs Congress's subsequent statement regarding its earlier meaning (which, we note, it oddly purported to confirm in a statute where it decided to amend that very language).

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

discussed, we find no ambiguity in the statute's grant of permissive authority to the Judicial Conference to adjust fees and thus are obliged to identify unconstitutionality.

2. The "geographically isolated problem" exception does not apply.

The Trustee suggests that we can nonetheless salvage the constitutionality of the 2017 Amendment through application of the "geographically isolated problem" exception to the uniformity requirement—an exception recognized by the Supreme Court in *Blanchette v. Connecticut General Insurance Corp.*, 419 U.S. 102, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974). In *Blanchette*, the Supreme Court addressed the constitutionality of the Rail Act, which set special laws for bankrupt railroads and expressly applied only to a particular geographic region. The Supreme Court concluded that the Rail Act did not contravene the Bankruptcy Clause's uniformity requirement because all of the country's bankrupt railroads at that time were located in the designated region and therefore, in targeting the national rail transportation crisis, the statute addressed a geographically isolated problem. *Id.* at 159-160, 95 S. Ct. 335. *Blanchette* explained, "The problem dealt with (under the Bankruptcy Clause) may present significant variations in different parts of the country. . . . [T]he uniformity clause was not intended to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for remedy only in certain regions." *Id.* at 159, 95 S. Ct. 335 (internal quotation marks, alterations, and citations omitted).

Several bankruptcy courts across the country have applied the "geographically isolated problem" exception

in upholding the constitutionality of the 2017 Amendment.[12] The Fifth Circuit's majority opinion in *Buffets* ultimately took the same approach, reasoning that the exception applied because the 2017 Amendment aimed to ensure proper funding of the UST System—a system that exists only in an isolated geographic region. *See Buffets*, 979 F.3d at 378 ("Just as it did in addressing the failure of railroads in the industrial heartland, Congress confronted the problem of an underfunded Trustee Program where it found it: in the Trustee districts.").[13] The Fourth Circuit's majority opinion in *In re Circuit City Stores, Inc.*, agreed with the Fifth Circuit's reasoning and similarly applied the "geographically isolated

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

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

problem" exception. *See* 996 F.3d at 165-67 ("Because only those debtors in Trustee districts use the U.S. Trustees, Congress reasonably solved the shortfall problem with fee increases in the underfunded districts.").

We are concerned, however, that the bankruptcy courts and the *Buffets* and *Circuit City* opinions have overlooked a critical distinction. The Supreme Court did hold in *Blanchette* that Congress may "take into account differences that exist between different parts of the country, and . . . fashion legislation to resolve geographically isolated problems." 419 U.S. at 159, 95 S. Ct. 335. But the Supreme Court later clarified in *Gibbons* that, "[t]o survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors." *Gibbons*, 455 U.S. at 473, 102 S. Ct. 1169. In *Blanchette*, all members of the class of debtors impacted by the statute were confined to a sole geographic area: The statute applied only to bankrupt railroad companies, and there were no bankrupt railroad companies located outside the statutorily designated region. *See Blanchette*, 419 U.S. at 159-60, 95 S. Ct. 335.[14] Here, by contrast, the 2017 Amendment's fee increase applies to the class of debtors whose dis-

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

bursements exceed $ 1 million, and there has been no suggestion that members of that broad class are absent in the BA Districts. This case therefore presents the exact problem avoided in *Blanchette*: Two debtors, identical in all respects save the geographic locations in which they filed for bankruptcy, are charged dramatically different fees.[15]

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

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[15] *Cf. In re Circuit City Stores, Inc.*, 606 B.R. 260, 270 (Bankr. E.D. Va. 2019), *aff'd in part, rev'd in part and remanded*, 996 F.3d 156 (4th Cir. 2021) ("Had the Debtors filed their chapter 11 bankruptcy petitions a mere 140 miles south in Raleigh, North Carolina, the Debtors would be paying substantially lower quarterly fees than they are paying now. This is the type of regionalism the Uniformity Clause was intended to prevent." (footnote and internal quotation marks omitted)).

programs)." *Id.*[16] Put another way: Application of the "geographically isolated problem" exception here would yield the following inexplicable rule: Congress must enact uniform laws on the subject of bankruptcy . . . except when Congress elects to treat debtors non-uniformly. Such reasoning would render the uniformity requirement of the Bankruptcy Clause of the Constitution effectively meaningless.

In sum, we cannot evade a finding of non-uniformity through either a contortion of the statutory text or an application of the "geographically isolated problem" exception. We conclude that the 2017 Amendment, prior to the 2020 Act, was unconstitutional on its face insofar as it charged higher fees to debtors in UST Districts.[17]

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

[17] As noted, *see supra* at n.5, we conclude only that the pre-2020 Act version of the 2017 Amendment, 28 U.S.C. § 1930(a)(6)(B), was facially unconstitutional. We do not address the constitutionality of the current version, or of any other portion of § 1930, or of any other aspect of the UST/BA District system. Clinton raises only a narrow challenge to the pre-2020 Act version of the 2017 Amendment, and we confine our ruling to that provision. *Cf. St. Angelo*, 38 F.3d at 1532 ("In determining whether the statutory scheme

That conclusion accords with the Supreme Court's decision in *Siegel*, in which the Court determined that the 2017 Amendment violated the Bankruptcy Clause's uniformity requirement by "treat[ing] identical debtors differently based on an artificial funding distinction that Congress itself created." *Siegel*, 142 S. Ct. at 1782.

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

III. Conclusion

In sum, we hold as follows:

1. Clinton has standing to bring its constitutional challenge and to seek reimbursement because it filed for bankruptcy in a UST District prior to October 1, 2018; qualified for and paid a fee increase pursuant to the 2017 Amendment due to the size of its disbursements; and paid more than a similarly situated debtor (with the

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governing the U.S. Trustee system in general, and the fee structure outlined in 28 U.S.C. § 1930 in particular, are unconstitutional, we must adhere to the principle of judicial restraint. . . . [C]ourts must cautiously exercise their power to declare a statute constitutionally void and narrowly confine their holdings when possible.").

same filing date and disbursement size) would owe in a BA District, where the increased fee schedule had not yet been implemented by the Judicial Conference.

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

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

We therefore **REVERSE** the judgment of the Bankruptcy Court and direct that the Bankruptcy Court provide Clinton with a refund of the amount of quarterly fees paid in in excess of the amount Clinton would have paid in a BA District during the same time period.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. 21-1123

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

v.

CLINTON NURSERIES, INC., ET AL.

Filed: Oct. 11, 2022

OPINION

Case below, 998 F.3d 56.

On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Siegel* v. *Fitzgerald*, 596 U.S. ——–, 142 S. Ct. 1770, 213 L. Ed. 2d 39 (2022).

APPENDIX C

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT COURT OF CONNECTICUT
HARTFORD DIVISION

Case Nos. 17-31897 (JJT), 17-31898 (JJT), 17-31899 (JJT), 17-31900 (JJT) (Jointly Administered under Case No. 17-31897 (JJT))

IN RE: CLINTON NURSERIES, INC.; CLINTON NURSERIES OF MARYLAND, INC.; CLINTON NURSERIES OF FLORIDA, INC.; AND TRIEM LLC, DEBTORS

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

v.

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

Signed: Aug. 28, 2019

RULING AND ORDER CONVERTING CONTESTED MOTION TO ADVERSARY PROCEEDING AND MEMORANDUM OF DECISION DISMISSING ADVERSARY PROCEEDING FOR FAILURE TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED

JAMES J. TANCREDI, United States Bankruptcy Judge

I. INTRODUCTION

In his famous *Lochner* dissent, Justice Holmes wrote:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. . . . Some . . . laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory. . . . It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

Lochner v. New York, 198 U.S. 45, 75-76, 25 S. Ct. 539, 49 L. Ed. 937 (1905) (Holmes, J., dissenting).[1] Although those words concerned a different law passed in a different era that was struck down under a different part of the Constitution, they are apt here.

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[1] Privately, Justice Holmes wrote to a friend that he and his fellow justices were loath to strike down a particular statute "unless it makes us puke." Letter from Justice Oliver Wendell Holmes to Harold J. Laski (Oct. 23, 1926), *in* 2 Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 888 (Mark DeWolfe Howe ed., 1953).

The related debtors, Clinton Nurseries, Inc.; Clinton Nurseries of Maryland, Inc.; Clinton Nurseries of Florida, Inc.; and Triem LLC (collectively, "Debtors") filed a Motion to Determine Amount of United States Trustee Fees Pursuant to 28 U.S.C. § 1930(a)(6) ("Motion," ECF No. 672), making two principal arguments: (1) that the 2017 amendments to 28 U.S.C. § 1930(a)(6), made through the Bankruptcy Judgeship Act of 2017, Pub. L. 115-72, Div. B, § 1004(a); 131 Stat. 1232 ("2017 Amendments"), created non-uniform bankruptcy law, in violation of Article 1, Section 8, Clause 4 of the United States Constitution ("Bankruptcy Clause"), and (2) that the 2017 Amendments transformed the Debtors' Chapter 11 quarterly fees into an unconstitutional user fee.

The United States Trustee for Region 2, William K. Harrington ("UST"), filed two objections, one procedural ("Procedural Objection," ECF No. 725) and one substantive ("Substantive Objection," ECF No. 726). In the Procedural Objection, the UST argues that the claims raised in the Motion must be brought in an adversary proceeding, and so the Motion should be denied. In the Substantive Objection, the UST argues that the 2017 Amendments do not violate either the Bankruptcy Clause or the Fifth Amendment to the United States Constitution.

The Court has studied the Motion, the Objections, and the parties' reply briefs ("Reply," ECF No. 743; "Sur-Reply," ECF No. 773). After a scrupulous review of the statute in question, along with governing precedent, and the record of the hearing, the Court determines that: (1) Triem LLC, as alleged, has no standing to pursue these matters; (2) the Court will convert the Motion to an Adversary Proceeding and treat the UST's

Substantive Objection as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure; (3) the 2017 Amendments do not violate the Bankruptcy Clause and are otherwise being faithfully executed by the UST; and (4) the Debtors' allegations, as pleaded, are insufficient to establish a takings claim under the Fifth Amendment. The Court, therefore, DISMISSES the Adversary Proceeding upon the terms further stated within the Discussion.

II. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b)[2] and derives its authority to hear and determine this matter on reference from the District Court pursuant to 28 U.S.C. § 157(a) and (b)(1). Venue is proper under 28 U.S.C. §§ 1408 and 1409.

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[2] Section 1334(b) grants the district court original jurisdiction over all civil proceedings "arising under title 11, or arising in or related to cases under title 11." This grant of jurisdiction is made "notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts[.]" *Id.* The Court finds this statute sufficient to allow the Court to address the Debtors' user fee claims, which under 28 U.S.C. §§ 1346 and 1491 would, outside of bankruptcy, need to be addressed in the Court of Federal Claims, at least in part. *See Plum Run Serv. Corp. v. U.S. Dept. of Navy (In re Plum Run Serv. Corp.)*, 167 B.R. 460, 464-65 (Bankr. S.D. Ohio 1994). In considering whether this Court should abstain from hearing the matter under 28 U.S.C. § 1334(c)(1), *see Marah Wood Prods., LLC v. Jones*, 534 B.R. 465, 477-79 (D. Conn. 2015), this Court will not do so because of the predominance of bankruptcy issues in determining whether the user fee is a taking, not some specialized knowledge exclusively within the expertise of the Court of Federal Claims, which does not have exclusive jurisdiction over all takings claims.

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

III. DISCUSSION

A. Triem LLC Does Not Have Standing; Clinton Nurseries of Maryland, Inc., Has Limited Standing; No Debtor Has Standing Concerning 2019 Fees

The Court must first address the threshold issue of standing. Among other things, standing requires that a party seeking relief have an "injury in fact" that is "concrete and particularized[.]" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (citations and internal quotation marks omitted). While pointing out that the Debtors combined pay substantially increased fees, the Debtors' allegations in the Motion make clear that not every Debtor was affected every quarter. As alleged, Triem LLC paid the exact same fees in each quarter of 2018 as it would have paid under the prior version of 28 U.S.C. § 1930(a)(6). Clinton Nurseries of Maryland, Inc., meanwhile, was only affected by the 2017 Amendments in two of the four quarters. And, although the Debtors posit that their 2019 quarterly fees would be similar, the Debtors have not supplemented their pleadings to include what harm, if any, the Debtors have thus far experienced in 2019.[3]

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[3] In a joint scheduling order laying out the briefing schedule on this matter, the Debtors and the UST agreed that the UST would not compel the payment of quarterly fees during the pendency of this matter (ECF No. 681), which the Debtors note in their proposed Chapter 11 plan of reorganization (ECF No. 718). Because the Debtors have not identified those fees in any regard, the Court need

The Debtors' prayer for relief in the Motion seeks "an order determining that US Trustee fees payable by the Debtors in these cases will be calculated based on the pre-amendment 28 U.S.C. § 1930(a)(6) fee schedule[.]" Implicit in this request is a concession that the Debtors would not consider themselves harmed by the former fee schedule. Therefore, the Court finds that the Debtors only have standing to challenge those fees that they allege are different from those they would have paid under the former fee schedule, which means that Triem LLC does not have standing to pursue this Motion,[4] Clinton Nurseries of Maryland, Inc., only has standing to challenge the second and third quarters of 2018, and no debtor has standing to challenge its 2019 fees under the facts alleged.

B. The Court Converts This Matter to an Adversary Proceeding

The Court next addresses the UST's Procedural Objection, which also poses threshold issues, but, as will be discussed, not jurisdictional issues. The UST argues that under Federal Rule of Bankruptcy Procedure ("FRBP") 7001, the Debtors can only seek relief in an Adversary Proceeding. The Debtors maintain that FRBP 3012, rather than FRBP 7001, governs the issues and that, even if this matter should have been filed as an Adversary Proceeding, the UST has not been prejudiced, the Court could apply Part VII rules, or the Court could convert the matter to an Adversary Proceeding.

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not surmise whether the Debtors' claims regarding the 2019 fees are ripe.

[4] From this point forward in this Memorandum, "Debtors" will only refer to Clinton Nurseries, Inc.; Clinton Nurseries of Maryland, Inc.; and Clinton Nurseries of Florida, Inc.

The Court agrees with the UST that the issues raised in the Motion require an Adversary Proceeding, but the Court uses its powers under 11 U.S.C. § 105(a) to *sua sponte* convert the matter to an Adversary Proceeding.

1. *FRBP 7001 Applies to This Matter*

The parties principally disagree about which FRBP has been invoked by the issues raised in the Motion.[5] The UST argues that FRBP 7001 applies because the Debtors seek "to determine the validity . . . [of an] interest in property" and seek "to obtain a declaratory judgment relating to any of the foregoing[.]" Fed. R. Bankr. P. 7001(2) and (9). The UST also argues that FRBP 2020[6] does not apply because the Debtors are not challenging the UST's actions, but an act of Congress. Even if FRBP 2020 applies, the UST argues that FRBP 9014 itself requires the Debtors to seek relief through an Adversary Proceeding. The Debtors, meanwhile, assert that under FRBP 3012, the amount of a priority claim is determined as a contested matter and that the Debtors are challenging the UST's actions, through

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[5] As a preliminary matter, the Court notes that the Debtors stated that they would withdraw their request for a refund of fees already paid during a status conference on the Motion (ECF No. 796), which the Debtors stated they would pursue pending the outcome of these proceedings. This proposed withdrawal, reiterated at the hearing, would obviate the UST's concern about the applicability of FRBP 7001(1), but, given the Court's decision to convert the matter to an Adversary Proceeding, the Court will allow the Debtors to reassert their request for such relief in an amended complaint.

[6] FRBP 2020 provides that "[a] proceeding to contest any act or failure to act by the United States trustee is governed by Rule 9014[,]" referring to the rule on contested matters.

FRBP 2020, in issuing invoices seeking payment of quarterly fees. The Court agrees with the UST.

The UST is correct that the Debtors seek "to determine the validity . . . [of an] interest in property," Fed. R. Bankr. P. 7001(2), namely, money that is otherwise property of the Debtors' estates. FRBP 7001(2) does exempt from its definition "proceeding[s] under Rule 3012." FRBP 3012 states, in relevant part, that "the court may determine . . . the amount of a claim entitled to priority under § 507 of the Code[,]" and that such "may be made by motion[.]" Fed. R. Bankr. P. 3012. The advisory committee notes make clear, however, that "[a]n adversary proceeding is commenced when the validity, priority, or extent of a lien is at issue as prescribed by Rule 7001. That proceeding is relevant to the basis of the lien itself" while FRBP 3012 is meant for valuation purposes.[7] *Id.*

The Debtors here do not merely seek to value what is owed to the UST. Their allegations make clear that they know how much they would owe for 2018 under the current and former versions of 28 U.S.C. § 1930(a)(6). Instead, the Debtors seek a determination that any amount paid beyond what the former fee schedule prescribed is invalid. Such must be sought in an Adversary Proceeding. *See* Fed. R. Bankr. P. 7001(9).

FRBP 2020 is also inapplicable to this matter. Although the Rule applies to "proceeding[s] to contest any act or failure to act by the [UST,]" according to the

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[7] The Court acknowledges that the advisory committee notes reference "lien[s]" but not "other interest[s] in property"; however, the logic behind the note extends equally to "other interest[s] in property."

advisory committee notes, it "does not provide for advisory opinions in advance of the act." Fed. R. Bankr. P. 2020. Because the Debtors seek determinations both for the fees already assessed and those to be assessed in the future, FRBP 2020 does not help the Debtors.[8]

2. *The Court Can Convert the Motion to an Adversary Proceeding*

Having determined that FRBP 2020 and FRBP 3012 do not apply to this matter, the Court is left with only FRBP 7001. That, however, does not mean that the Court must deny the Motion and have the Debtors start over by filing an Adversary Proceeding. As the Debtors noted, this Court may convert the matter to an Adversary Proceeding. Unlike other cases where this Court has ordered that the Debtor file an Adversary Proceeding, the parties in this matter have fully briefed what they both consider, at this point at least, purely legal issues. In the interests of efficiency and judicial economy, the Court finds that the parties have had their full and fair opportunity to address the merits of these issues,[9] so denying the Motion and forcing the Debtors

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[8] The Court understands the contradiction in this statement, considering the Court has already held that the Debtors do not have standing to challenge those fees that were not detailed in the Motion; however, were the Court to rule in the Debtors' favor on the uniformity challenge, such would, as a matter of preclusion, preemptively decide any future challenge by the Debtors to any UST actions regarding quarterly fees, as well.

[9] After filing the Motion, the Debtors, jointly with the UST, agreed to allow the UST 61 days to file an objection (ECF No. 681), which exceeds the amount of time the UST would have had to answer an adversary complaint by *26 days*. Fed. R. Bankr. P. 7012(a). And yet, the UST did not file the Procedural Objection until the very last day available. This particular circumstance, coupled with the

to start over and file an Adversary Proceeding would severely elevate form over substance.[10]

Instead of doing that, the Court will instead exercise its prerogative to *sua sponte* convert the contested matter to an Adversary Proceeding. The Bankruptcy Code allows this Court "to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code. 11 U.S.C. § 105(a). This power is broad enough to permit a court to "convert a contested matter to an adversary proceeding on its own motion." *Wilborn v. Wells Fargo Bank, N.A. (In re Wilborn)*, 401 B.R. 872, 892 (Bankr. S.D. Tex. 2009) (citing *Costa v. Marotta, Gund, Budd & Dzera, LLC*, 281 F. App'x 5, 6 (1st Cir. 2008) (per curiam); *Johnson v. Stemple (In re Stemple)*, 361 B.R. 778, 784 (Bankr. E.D. Va. 2007)). Accordingly, the Court OVERRULES the Procedural Objection and CONVERTS this matter to an Adversary Proceeding.

UST not having claimed or demonstrated any prejudice here, leads this Court to conclude that converting the Motion to an Adversary Proceeding without denying the Motion is the better course than forcing the Debtors—who *would* be prejudiced by such—to file an Adversary Proceeding from scratch.

[10] Regardless of whether the Court maintains this matter as a contested matter or converts it to an Adversary Proceeding, the Court is not deprived of jurisdiction, even if—as the UST claims—such were error. *See Hamer v. Neighborhood Hous. Servs.*, —– U.S. —–, 138 S. Ct. 13, 17-18, 199 L. Ed. 2d 249 (2017) ("Only Congress may determine a lower federal court's subject-matter jurisdiction[,]" and "mandatory claim-processing rules [not prescribed by Congress] must be enforced, *but they may be waived or forfeited*." [emphasis added; citations and internal quotation marks omitted]).

3. *The Court Treats the Substantive Objection as a Motion to Dismiss*

This procedure of converting a contested matter to an Adversary Proceeding was used in the face of this precise argument made by the UST in *In re Circuit City Stores, Inc.*, No. 08-35653, 606 B.R. 260, 265-66, 2019 WL 3202203, at *3-4 (Bankr. E.D. Va. July 15, 2019), and this Court readily acknowledges using the same authorities and logic to convert this matter as well. The *Circuit City* court decided that because "there were no material facts in dispute and that the matters raised in the pleadings were purely dispositive questions of law, the Court entertained the pleadings as cross-motions for summary judgment under Bankruptcy Rule 7056 and proceeded thereon." *Id.* at 267, at *4 n.19.

This Court is wary of proceeding under FRBP 7056. Although the parties do not seem to have any factual disputes at this point, this Court, unlike the *Circuit City* court, is faced with the argument that the Debtors' quarterly fees are takings, violating the Fifth Amendment. That claim, for reasons discussed in part III.D of this Memorandum, is ordinarily a fact-intensive exercise, and the Debtors have requested that the Court rule first on the legal cognizability of the claim before any discovery on it proceeds. Therefore, the Court will instead entertain the Debtors' Motion as a complaint; the UST's Substantive Objection as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, as applied by FRBP 7012; the Debtors' Reply as an objection to the motion to dismiss; and the UST's Sur-Reply as a reply to the objection. To avoid confusion, the Court will continue to refer to the pleadings as they have been labeled by the parties, as already abbreviated by the

Court (i.e., the Court will still refer to the Debtors' complaint as the "Motion," the UST's motion to dismiss as the "Substantive Objection," etc.). From this point forward in the Memorandum, the Court has not considered any attachment to any pleading to the extent that any would be considered evidence unless pleaded by the Debtors. Further, the Court has not considered any factual allegation by the UST that contradicts or supplements the allegations made in the Debtors' Motion.

The Court turns to the following applicable legal standard.

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in [*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)], the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.*, at 555, 127 S. Ct. 1955 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U.S. at 555, 127 S. Ct. 1955. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.*, at 557, 127 S. Ct. 1955.
>
> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.*, at 570, 127 S. Ct. 1955. A claim has facial plausibility when the plaintiff pleads factual content that

allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556, 127 S. Ct. 1955. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557, 127 S. Ct. 1955 (brackets omitted).

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.*, at 555, 127 S. Ct. 1955 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*, at 556, 127 S. Ct. 1955. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possi-

> bility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).
>
> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 677-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citation omitted). Having reached this point, the Court finally considers the merits.[11]

C. The 2017 Amendments Do Not Violate the Bankruptcy Clause

Article I, Section 8, Clause 4 of the United States Constitution vests Congress with the power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States[.]" "To this specific grant, there must be added the powers of the general

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[11] In considering the Motion as a complaint, the Court assumes the parties' familiarity with the factual and legal allegations within it and will address pertinent facts as necessary. That consideration requires construing the Debtors' arguments as liberally as possible, but within the confines of the two counts alleged; however, it also requires the Court to consider the iceberg of precedent below the arguments and authorities discussed by the UST. These issues are serious, and the Court cannot decide the constitutionality of a statute only based on what has been expressed.

grant of clause eighteen. 'To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . [.]'" *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513, 58 S. Ct. 1025, 82 L. Ed. 1490 (1938). "The laws passed on the subject [of bankruptcy] must, however, be uniform throughout the United States, but that uniformity is geographical and not personal[.]" *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 188, 22 S. Ct. 857, 46 L. Ed. 1113 (1902). "The uniformity requirement is not a straitjacket that forbids Congress to distinguish among classes of debtors, nor does it prohibit Congress from recognizing that state laws do not treat commercial transactions in a uniform manner. A bankruptcy law may be uniform and yet may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States." *Ry. Labor Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 469, 102 S. Ct. 1169, 71 L. Ed. 2d 335 (1982) (citation and internal quotation marks omitted). In certain circumstances, Congress may "take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Id.* (citation and internal quotation marks omitted). "To survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors." *Id.* at 473, 102 S. Ct. 1169. Thus, if a bankruptcy law applies with geographic uniformity to a particular class of debtors, it will pass muster.

The UST Program, a division of the Department of Justice, was established as a pilot program in conjunction with the adoption of the Bankruptcy Code in 1978. *See* Pub. L. 95-598, Title II, § 224(a), 92 Stat. 2662. The program became permanent in 1986 and now serves

every district except those in Alabama and North Carolina. *See* Pub. L. 99-554, Title I, § 111(a)-(c), 100 Stat. 3090, 3091. The six districts in those two states are served by Bankruptcy Administrators ("BAs"), who operate under the purview of the Judicial Branch. The duties of BAs, in essence, match those of USTs.

Under 28 U.S.C. § 1930(a)(6), debtors in Chapter 11 cases are responsible for paying quarterly fees, the amount of which depends upon a number of factors. Initially, Chapter 11 debtors in BA districts did not have to pay any quarterly fees. In 1994, the Ninth Circuit, in *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1531 (9th Cir. 1994), *as amended by* 46 F.3d 969 (9th Cir. 1995), found this arrangement unconstitutional because Congress "provided no indication that the exemption [from the fees] in question was intended to deal with a problem specific to North Carolina and Alabama[.]" The Ninth Circuit, however, refused to find the dual system of USTs and BAs unconstitutional on its own, *id.* at 1532-33, and that dual system has persisted to this day.[12]

In response to *Victoria Farms*, the Judicial Conference asked Congress for permission to charge fees in BA districts "comparable" to those in UST districts. Report of the Proceedings of the Judicial Conference of the United States 10 (Mar. 1996). In 2000, Congress added subsection (7) to 28 U.S.C. § 1930(a). Pub. L. 106-518, Title I, § 105, 114 Stat. 2411. Shortly thereafter, the Judicial Conference began imposing quarterly fees in BA districts "in the amounts specified" in 28 U.S.C. § 1930(a)(6). Report of the Proceedings of the Judicial Conference of the United States 45-46

[12] The Debtors have not claimed that the dual system of USTs and BAs is unconstitutional.

(Sept./Oct. 2001). In 2017, Congress amended 28 U.S.C. § 1930(a)(6), increasing quarterly fees, ostensibly to provide more money to the UST Program, which is self-funded, and to endow additional bankruptcy judgeships.[13] Bankruptcy Judgeship Act of 2017, Pub. L. 115-72, Div. B, § 1004(a), 131 Stat. 1232. Beginning January 1, 2018, quarterly fees increased in all Chapter 11 cases in all UST districts, whether new or pending; however, the Judicial Conference did not immediately implement the fee increase in BA districts. Instead, the Judicial Conference adopted those fees beginning October 1, 2018, and only in cases filed on or after that date. Report of the Proceedings of the Judicial Conference of the United States 11-12 (Sept./Oct. 2018).[14]

The constitutionality of the 2017 Amendments was first addressed in *In re Buffets, LLC*, 597 B.R. 588 (Bankr. W.D. Tex. 2019), *appeal docketed*, No. 19-90020 (5th Cir. Aug. 16, 2019). In *Buffets*, the court held that the Judicial Conference's late implementation of quar-

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[13] Prior to the 2017 Amendments, 100% of the quarterly fees collected were deposited into the UST System Fund. Currently, 2% of quarterly fees are deposited into the general treasury fund to fund additional bankruptcy judgeships. *See* Pub. L. 115-72, Div. B, § 1004(b); 131 Stat. 1232; *see also* H.R. Rep. No. 115-130, at 8, *reprinted in* 2017 U.S.C.C.A.N. 154, 160.

[14] The Judicial Conference Committee on the Administration of the Bankruptcy System noted issues with quarterly fees generally, expressing concern that they chill large Chapter 11 case filings and preclude large Chapter 11 debtors from reorganizing successfully and that increased fees would exacerbate those problems. Report of the Judicial Conference Committee on the Administration of the Bankruptcy System 19-20 (Sept. 2018). Nevertheless, the Committee recommended that the Judicial Conference adopt the increased fees. *Id.*

terly fee increases under 28 U.S.C. § 1930(a)(6) and (7) meant that:

> The Bankruptcy Judgeship Act of 2017 violated the Constitution when it increased quarterly fees only in the UST program. "Under any standard of review, when Congress provides no justification for enacting a non-uniform law, its decision can only be considered to be irrational and arbitrary." [*Victoria Farms*], 38 F.3d at 1532. While the quarterly fees now apply in BA districts from October 1, 2018, forward, the increased fees ostensibly owed by the Reorganized Debtors during the first three quarters of 2018 violate the Uniformity Clause.

Id. at 595.[15] The Court then determined that the debtors in that case were "not required to pay the $250,000 in fees for the first three quarters of 2018, but rather the uniform quarterly fee of $30,000." *Id.* at 596.[16]

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[15] The court noted that the Judicial Conference's "decision to apply the fees to BA districts remedies the amendment's violation of the Uniformity Clause for future cases, but not in this case. Like the lack of uniformity that originally existed between the two programs, the gap in time between the imposition of the quarterly fees in UST districts and BA districts is problematic." 597 B.R. at 594-95.

[16] The *Buffets* court also considered the meaning of "disbursements" under 28 U.S.C. § 1930(a)(6) and the argument that the 2017 Amendments should not apply retroactively due to the "presumption against retroactively applying statutes." 597 B.R. at 593-97. The Debtors have not raised the disbursements issue or independently claimed that the 2017 Amendments should not apply to them because of the presumption against retroactivity, only arguing in the Motion that "the only way fee increases can be *applied uniformly* to all cases is to only apply [them] to cases filed on or after October 1, 2018." (emphasis added). Because the Debtors have not explic-

More recently, the aforementioned *Circuit City* court adopted the *Buffets* rationale when it held the 2017 Amendments unconstitutional. 606 B.R. at 269-71, 2019 WL 3202203, at *6-7.[17] The court there noted that for the first three quarters of 2018, "increased quarterly fees [were] assessed against chapter 11 debtors in only 88 of the 94 federal judicial districts throughout the country. It was not until October 1, 2018, that the [Judicial Conference] approved the imposition of quarterly fees on chapter 11 debtors in the BA Districts 'in the amounts specified in 28 U.S.C. § 1930(a)(6)(B).' . . . The Bankruptcy Judgeship Act offered no justification for excluding the BA Districts from the fee step-up." *Id.* at 269, at *6 (citation omitted). The court also observed that debtors with cases pending when the fee increases went into effect in UST districts are charged the increased fees, but those in BA districts are not. *Id.* "As the BA Districts do not apply section 1930(a)(6)(B)'s fee increase to pending cases, the fee increase cannot constitutionally be applied to pending cases outside of the BA Districts. The Court holds that section 1930(a)(6)(B) remains unconstitutionally non-uniform *as applied* to pending cases." *Id.* at 270, at *7 (emphasis added). The court further held that "[a]s the amend-

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itly asked this Court to consider retroactivity outside of the uniformity question, the Court cannot do so.

Additionally, the *Buffets* court noted that the debtors there raised a claim that "the user-fees are grossly disproportionate to the services that the UST provides to the Debtors[,]" 597 B.R. at 592, but, apparently in light of its decisions on uniformity and retroactivity, did not decide the user fee issue.

[17] The *Circuit City* court also considered the retroactivity question from *Buffets* and whether the 2017 Amendments are a non-uniform tax. 606 B.R. at 266-71, 2019 WL 3202203, at *4-7. The tax issue has also not been raised in this matter.

ment to section 1930(a)(6) does not apply uniformly both to chapter 11 debtors with pending cases in BA districts and to chapter 11 debtors with pending cases in U.S. Trustee districts, it is unconstitutional under the Bankruptcy Clause." *Id.* The court, similar to *Buffets* then determined that the debtor's fees must be based on the prior version of the statute.[18] In an opinion issued just last week, the Bankruptcy Court for the Northern District of Texas adopted the rationale of both *Buffets* and *Circuit City* on this particular issue. *In re Life Partners Holdings, Inc.*, No. 15-40289, 2019 WL 3987707, at *3-4, *7 (Bankr. N.D. Tex. Aug. 22, 2019).[19]

The Debtors here filed their cases in 2017. As Connecticut is served by the UST, the Debtors have been paying higher fees than they would have paid in BA districts, not only for the three quarters between the respective dates of implementation in UST and BA districts, but also because the BA districts have only applied the fees to debtors whose cases were filed on or after October 1, 2018. The Debtors, therefore, claim that this double non-congruence creates non-uniform bankruptcy law as each pertains to fees. The UST, on the other hand, argues that the non-uniformity stems

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[18] The Seventh Circuit was also recently asked to weigh in on the uniformity and user fee issues concerning the 2017 Amendments but declined to do so because the issues were not raised until appeal. *Cranberry Growers Coop. v. Layng (In re Cranberry Growers Coop.)*, 930 F.3d 844, 853-57 (7th Cir. 2019). The only issue decided at the bankruptcy court was the meaning of the term "disbursements" in 28 U.S.C. § 1930(a)(6), *id.* at 845-50, at *1-4, which was also considered in *Buffets*. *See* footnote 16 of this Memorandum.

[19] The *Life Partners* court also addressed the retroactivity issue and likewise adopted the reasoning of the *Buffets* and *Circuit City* courts.

only from the implementation of a law that is uniform on its face. The Court readily acknowledges that nothing distinguishes the Debtors here from the debtors in *Buffets*, *Circuit City*, or *Life Partners* on this issue. Nevertheless, the Court agrees with the UST.

1. *28 U.S.C. § 1930 is a Bankruptcy Law Subject to the Bankruptcy Clause*

As a threshold matter to determining whether the 2017 Amendments to 28 U.S.C. § 1930(a)(6), as construed and applied by subsection (7), created non-uniform bankruptcy law, the Court must address the UST's argument that 28 U.S.C. § 1930(a)(6) and (7) are not laws "on the subject of Bankruptcies." U.S. Const. art. I, § 8, cl. 4. The UST cites *Gibbons* for the proposition that "bankruptcy" is the "subject of the relations between [a] . . . debtor and his creditors, extending to his and their relief." *Gibbons*, 455 U.S. at 466, 102 S. Ct. 1169 (citations and internal quotation marks omitted). The UST argues that this narrow definition of bankruptcy does not encapsulate Chapter 11 quarterly fees because such "is merely a funding mechanism for the efficient administration of bankruptcy matters . . . ; it does not alter substantive bankruptcy law." The UST also quotes a Third Circuit decision, which, agreeing with the UST there, stated that "Congress's mandate requiring payment of post-confirmation quarterly fees is not an effort to alter the terms of pre-existing debts; rather it creates a new expense that did not exist before the plan was confirmed." *U.S. Trustee v. Gryphon at Stone Mansion, Inc.*, 166 F.3d 552, 557 (3d Cir. 1999) (internal quotation marks omitted).

The UST's argument is wholly without merit. The Supreme Court has not defined bankruptcy so narrowly.

Gibbons does indeed say that bankruptcy is the "subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors extending to his and their relief[,]" but *in the very same sentence*, which the UST omits, states that "[t]he subject of bankruptcies is incapable of final definition[.]" *Gibbons*, 455 U.S. at 466, 102 S. Ct. 1169 (citations and internal quotation marks omitted). Additionally, although the UST states that this quote from *Gibbons* is sourced from *Moyses*, the quote actually is from *Wright*. In *Wright*, the Supreme Court further elaborated:

> The subject of bankruptcies is incapable of final definition. The concept changes. It has been recognized that it is not limited to the connotation of the phrase in England or the States, at the time of the formulation of the Constitution. An adjudication in bankruptcy is not essential to the jurisdiction. The subject of bankruptcies is nothing less than "the subject of the relations between an insolvent or nonpaying or fraudulent debtor, and his creditors, extending to his and their relief."

304 U.S. at 513-14, 58 S. Ct. 1025 (citations and footnotes omitted). That passage does not quote *Moyses*, as the UST states, but *In re Reiman*, 20 F. Cas. 490, 497 (S.D.N.Y. 1874),[20] although *Moyses* does cite to *Reiman* approvingly without any exposition of it. 186 U.S. at 187, 22 S. Ct. 857. *Moyses* also cites *In re Klein*, 42

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[20] Besides the line cited, *Reiman* also states: "[E]ven if a more restricted meaning be given to the expression 'subject of bankruptcies,' there is, within the scope of discretionary power possessed by [C]ongress, of choosing the means to accomplish the end, a substantial appropriation of the existing property of the debtor towards all the debts due by him." 20 F. Cas. at 497.

U.S. (1 How.) 277, 14 F. Cas. 716, 11 L. Ed. 275 (C.C.D. Mo. 1843), an opinion from the Circuit Court for the District of Missouri that was written by Justice Caton riding circuit.[21] 186 U.S. at 186, 22 S. Ct. 857. *Klein* states that Congress's bankruptcy jurisdiction "extends to all cases where the law causes to be distributed, the property of the debtor among his creditors; *this is its least limit*." 42 U.S. (1 How.) at 281, 14 F. Cas. at 718 (emphasis added). *Moyses* quotes this line verbatim. 186 U.S. at 186, 22 S. Ct. 857.

What is evident, then, is that the Bankruptcy Clause does pertain to the debtor-creditor relationship, but at *the very least*. The Supreme Court has also said that "as [Congress] is authorized 'to establish uniform laws on the subject of bankruptcies throughout the United States,' it may embrace within its legislation *whatever may be deemed important to a complete and effective bankrupt system*." *United States v. Fox*, 95 U.S. 670, 672, 24 L. Ed. 538 (1878) (emphasis added). The Supreme Court later said that "[f]rom the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power." *Cont'l Ill. Nat'l Bank & Tr. Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 294 U.S. 648, 668, 55 S. Ct. 595, 79 L. Ed. 1110 (1935).[22] Likewise, almost two

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[21] *Klein* was reprinted in a note to *Nelson v. Carland*, 42 U.S. (1 How.) 265, 11 L. Ed. 126 (1843).

[22] Although *Continental Bank* also acknowledged that the Bankruptcy Clause is not without limits, 294 U.S. at 669-70, 55 S. Ct. 595, it noted that all interpretations to that point "demonstrate[d] in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800

months after *Continental Bank* was decided, the Supreme Court refused to countenance a narrow definition of bankruptcy, stating that "[i]t is true that the original purpose of our bankruptcy acts was the equal distribution of the debtor's property among his creditors; and that the aim of the legislation was to do this promptly. But, the scope of the bankruptcy power conferred upon Congress is not necessarily limited to that which has been exercised." *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 587, 55 S. Ct. 854, 79 L. Ed. 1593 (1935) (footnote and citations omitted). Much more recently, the Supreme Court, in an opinion by the late Justice John Paul Stevens, stated: "The Framers would have understood that laws 'on the subject of Bankruptcies' included laws providing, in certain limited respects, for more than simple adjudications of rights in the res."[23] *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 370, 126 S. Ct. 990, 163 L. Ed. 2d 945 (2006).

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to the [then] present day. And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed." *Id.* at 671, 55 S. Ct. 595.

[23] Justice Stevens's pronouncement is supported by the lone mention of the Bankruptcy Clause in the Federalist Papers. "The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question." The Federalist No. 42, at 239 (James Madison) (Clinton Rossiter ed., 1961). Because Congress's powers under the Commerce Clause are expansive, *see, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421, 4 L. Ed. 579 (1819), this Court fails to see how UST's narrow definition is supportable.

Even the UST's contention that quarterly fees do not "alter substantive bankruptcy law" ignores the fact that, under 11 U.S.C.

Understanding that the Bankruptcy Clause is not as narrow as the UST would lead the Court to believe, the Court now examines the history of 28 U.S.C. § 1930. That section was first adopted as part of the very law establishing the current Bankruptcy Code in 1978, a law entitled "An act to establish a uniform Law on the Subject of Bankruptcies." Pub. L 95-598, Title II, § 246(a), 92 Stat. 2671. Congress added subsection (a)(6) to 28 U.S.C. § 1930 in 1986 in an amendment to the Bankruptcy Code and related laws under title 28. Pub. L. 99-554, Title I, § 117, 100 Stat. 3095. It, therefore, seems disingenuous for the UST—an office that only exists to administer bankruptcy cases—to claim that 28 U.S.C. § 1930(a)(6) and (7) are not "Laws on the subject of Bankruptcies." Given the Supreme Court's stated liberal interpretation of the Bankruptcy Clause and Congress's explicit invocation of the Bankruptcy Clause in passing 28 U.S.C. § 1930, the quarterly fee system, and creating the UST Program, the Court holds that 28 U.S.C. § 1930, particularly subsections (a)(6) and (7), and as amended by the 2017 Amendments, are laws on the subject of bankruptcies.

2. *28 U.S.C. § 1930 Is Uniform on Its Face*

Having established that 28 U.S.C. § 1930 is subject to the Bankruptcy Clause, the Court turns to the parties' chief disagreement: whether the 2017 Amendments to Chapter 11 quarterly fees outlined in 28 U.S.C. § 1930(a)(6) and the Judicial Conference's subsequent—but not immediate—adoption of those fees under 28 U.S.C. § 1930(a)(7) constitute a nonuniform law in violation of the Bankruptcy Clause. The Court holds that

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§ 1112(b), a party in interest can seek conversion or dismissal for cause, which includes not paying quarterly fees.

when reading subsections (a)(6) and (7) together, 28 U.S.C. § 1930 is a uniform law.

Given the flexibility of the Bankruptcy Clause, it is not so astonishing that the Supreme Court has struck down a bankruptcy law on uniformity grounds on only one occasion. In *Gibbons*, the Court considered a law that Congress adopted after a regional railroad company failed in its reorganization, a law that had certain employee protection provisions. 455 U.S. at 459-64, 102 S. Ct. 1169. After determining that the law was an exercise of Congress's bankruptcy powers, *id.* at 466, 102 S. Ct. 1169, the Court stated:

> By its terms, [the law] applies to only one regional bankrupt railroad. *Only* [the company's] creditors are affected by [the law's] employee protection provisions, and *only* employees of the [company] may take benefit of the arrangement. . . . [T]here are other railroads that are currently in reorganization proceedings, but these railroads are not affected by the employee protection provisions of [the law]. The conclusion is thus inevitable that [the law] is not a response either to the particular problems of major railroad bankruptcies or to any geographically isolated problem: it is a response to the problems caused by the bankruptcy of *one* railroad. The employee protection provisions of [the law] cover neither a defined class of debtors nor a particular type of problem, but a particular problem of one bankrupt railroad. Albeit on a rather grand scale, [the law] is nothing more than a private bill such as those Congress frequently enacts under its authority to spend money.

Id. at 470-71, 102 S. Ct. 1169 (citations and footnotes omitted). The Court determined that the law was "not within the power of Congress to enact[,]" noting that "[a] law can hardly be said to be uniform throughout the country if it applies only to one debtor and can be enforced only by the one bankruptcy court having jurisdiction over that debtor." *Id.* at 471, 102 S. Ct. 1169 (citation omitted). The Court grounded this holding in the history before the Constitution, when states enacted private bills that provided relief to specific individual debtors. *Id.* at 472, 102 S. Ct. 1169. This practice rendered uniformity impossible and was subject to abuse, leading the Court to reason that "the Bankruptcy Clause's uniformity requirement was drafted in order to prohibit Congress from enacting private bankruptcy laws." *Id.* (citation omitted). Finally, the Court held that "[t]he uniformity requirement . . . prohibits Congress from enacting a bankruptcy law that, by definition, applies only to one regional debtor. To survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors." *Id.* at 473, 102 S. Ct. 1169.

Turning now to the subsection in question here, 28 U.S.C. § 1930(a)(7) provides:

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

(emphasis added). The Debtors argue that the use of the word "may" provides the Judicial Conference with discretion to impose different fees. Congress also used the word "shall" in the same subsection, which the Debtors argue in the Reply, citing *Anderson v. Yungkau*, 329 U.S. 482, 485, 67 S. Ct. 428, 91 L. Ed. 436 (1947), is an indication "that each is used in its usual sense—the one act being permissive, the other mandatory." (citation omitted). The UST notes that the statute also says that the Judicial Conference "may require . . . fees *equal* to those imposed" in UST districts and that a 2001 directive of the Judicial Conference required it to adopt the new fees the moment they were implemented.[24] The failure to do so, the UST argues, was *ultra vires*.

"When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62, 52 S. Ct. 285, 76 L. Ed. 598 (1932) (citations omitted); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 38, 247-51 (2012) ("A statute should be interpreted in a way that avoids placing its constitutionality in doubt."); Stephen Breyer, Making Our Democracy Work: A Judge's View 102-05 (2010) ("Although this interpretive principle [of avoiding constitutional questions] may depart from an ordinary purpose-based approach, it serves the same practical function."). Therefore, if the Court can fairly read 28

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[24] Given the Court's construction of the statute, it need not address the 2001 directive cited.

U.S.C. § 1930(a)(7) to avoid the Bankruptcy Clause, it must.[25]

Although it is true that "may" ordinarily connotes discretion, while "shall" connotes something that is mandatory, this is not always true. "May" means "have permission to[,]" but it also means "shall, must—used esp[ecially] in deeds, contracts, and statutes[.]" *May*, 2 Webster's Third New International Dictionary 1396 (1966); *see also May*, Webster's New International Dictionary 1517 (2d ed. 1934) ("Where the sense, purpose, or policy of a statute requires it, *may* as used in the statute will be construed as *must* or *shall*; otherwise *may* has its ordinary permissive and discretionary force."); *May*, American Heritage Dictionary of the English Language 1086 (5th ed. 2011) (Among other things, "may" defined as: "To be obliged, as where rules of construction or legal doctrine call for a specified interpretation of a word used in a law or legal document."); *May*, Black's Law Dictionary 993 (7th ed. 1999) (At time of 28 U.S.C. § 1930(a)(7)'s adoption, then-current edition defined "may" as, among other things: "Loosely, is required to; shall; must. . . . In dozens of cases, courts have held *may* to be synonymous with *shall* or *must*, usu[ally] in an effort to effectuate legislative intent."). As for "shall," the Supreme Court has said that, "[a]s against the government, the word 'shall,' when used in statutes, is to be construed as 'may,' unless a contrary intention is manifest." *Cairo & Fulton R.R. Co. v. Hecht*, 95 U.S. 168, 170, 24 L. Ed. 423 (1877). Thus, "[w]hen drafters use *shall* and *may* correctly, the traditional rule holds—beautifully." Scalia & Garner,

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[25] Neither the *Buffets* court nor the *Circuit City* court mentioned the principle of avoiding constitutional questions.

Reading Law § 11, 112. 28 U.S.C. § 1930(a)(7). This, however, is not such a case.

Words of obligation and their various "alternative interpretations are as old as the jurisprudence of [the Supreme] Court." *Nat'l R.R. Passenger Corp. v. Bos. & Me. Corp.*, 503 U.S. 407, 419, 112 S. Ct. 1394, 118 L. Ed. 2d 52 (1992) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413, 4 L. Ed. 579 (1819)). The Court, therefore, considers each of the three constructions that the text of 28 U.S.C. § 1930(a)(7) poses. First, in line with the UST's position, is the construction that the Judicial Conference "may require" fees in BA districts, but those fees must be "equal" to those in 28 U.S.C. § 1930(a)(6). This reading naturally flows from the text and contradicts the second construction, which would allow the Judicial Conference to impose fees different from those listed in 28 U.S.C. § 1930(a)(6). Although having different fees is the consequence of the Judicial Conference's late, and only prospective, implementation of fee increases until October 1, 2018, such is contrary to the text of 28 U.S.C. § 1930(a)(7), which states that the fees imposed in BA districts must be equal to those imposed in districts under the UST Program. A reading that would allow the Judicial Conference to impose different fees would render the part of the statute "equal to those imposed by paragraph (6) of this subsection" a nullity, which would violate the canon of statutory construction that "every word and every provision is to be given effect[.]" Scalia & Garner, Reading Law § 26, 174; *see also Obduskey v. McCarthy & Holthus LLP*, —– U.S. ——–, 139 S. Ct. 1029, 1037, 203 L. Ed. 2d 390 (2019) (Courts "generally presum[e] that statutes do not contain surplusage." [citation and internal quotation marks omitted]); *United States v. But-*

ler, 297 U.S. 1, 65, 56 S. Ct. 312, 80 L. Ed. 477 (1936) ("These words cannot be meaningless, else they would not have been used."). Moreover, it would violate the *expressio unius*[26] canon because by stating that the Judicial Conference may require equal fees, Congress implied that the Judicial Conference could *not* require fees that were *not* equal. Essentially, Congress granted the Judicial Conference permission to require quarterly fees, but with a condition—equality—that, for whatever reason, the Judicial Conference did not immediately meet.

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[26] *Expressio unius est exclusio alterius*, which is Latin for "the expression of one thing is the exclusion of others." The Supreme Court has noted that "the soundness of that premise is a function of timing." *United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 836, 121 S. Ct. 1934, 150 L. Ed. 2d 45 (2001). The Court has also said that the canon's "fallibility can be shown by contrary indications that adopting a particular . . . statute was probably not meant to signal any exclusion of its common relatives." *United States v. Vonn*, 535 U.S. 55, 65, 122 S. Ct. 1043, 152 L. Ed. 2d 90 (2002) (citations omitted).

If Congress wanted to give the Judicial Conference discretion to charge any fee, it could have done so explicitly. Whether that would be constitutional is another matter. By stating that the Judicial Conference may charge fees *equal* to those in § 1930(a)(6), however, Congress seemingly limited the bounds of what the Judicial Conference may impose in quarterly fees by delineating but one option. What leads this Court to conclude that Congress necessarily did so was that the Judicial Conference asked Congress to allow the Judicial Conference to impose "comparable" fees, *see* Report of the Proceedings of the Judicial Conference 10 (Mar. 1996), but Congress passed a law that says "equal," *see* 28 U.S.C. § 1930(a)(7), thereby undercutting any argument that Congress did not intend to limit the Judicial Conference's discretion as to the amount of quarterly fees it could impose.

The third possible construction, which would allow the Judicial Conference to charge either equal fees or no fees, fails for the same reasons as the second: a fee of $0 is not equal. This construction also contradicts the very reason why 28 U.S.C. § 1930(a)(7) was enacted in the first place: to avoid the constitutional issue identified in *Victoria Farms*. It would be perverse to say that the Judicial Conference retained the discretion not to require any quarterly fees in BA districts when the purpose and policy—the manifest intent—for enacting the law was to fix an identified constitutional issue.

Therefore, the only plausible construction of 28 U.S.C. § 1930(a)(7) is the first one: the Judicial Conference may impose fees in BA districts equal to those in 28 U.S.C. § 1930(a)(6). Because no other option is plausible, it matters not that Congress used the word "may" to describe the Judicial Conference's power. Congress's grant of discretion only allows one option; therefore, the statute is mandatory, not permissive.[27]

"The [Supreme] Court's charitable interpretation of 'uniformity' encouraged Congress to pass laws that were uniform in name only." Kenneth N. Klee, Bankruptcy and the Supreme Court 126 (2008) (citation and

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[27] The *Circuit City* court highlighted the "may require" language of 28 U.S.C. § 1930(a)(7), but did not attempt to construe that phrase as modified by the phrase "fees equal to those imposed by [28 U.S.C. § 1930(a)(6)]." 606 B.R. at 264, 2019 WL 3202203, at *2. The *Life Partners* and *Buffets* courts likewise did not attempt to construe 28 U.S.C. § 1930(a)(7) with reference to the latter phrase. The *Cranberry Growers* court, in dicta that emphasized the word "may" but not the word "equal," stated that "[t]he plain language of § 1930(a)(7) is permissive, not mandatory[.]" 930 F.3d at 856 n.51. This Court disagrees with this assessment, both as a matter of plain language and the statute's policy and purpose.

footnote omitted). That said, this Court must observe that 28 U.S.C. § 1930(a)(7) suffers none of the flaws inherent in *Gibbons* or *Victoria Farms*, which both struck down laws that were non-uniform on their very faces by their express or implied terms. Such is simply not true here. On its face, 28 U.S.C. § 1930(a)(7) is constitutionally uniform.[28]

3. *The Debtors "As-Applied" Challenge Must Fail*

Having determined that 28 U.S.C. § 1930(a)(6) and (7) are constitutional on their face, the question shifts to whether the alleged non-uniform implementation of 28 U.S.C. § 1930(a)(6) in UST and BA districts renders the Debtors' quarterly fees unconstitutional as applied. The Court holds that such a challenge is not cognizable under the circumstances.

a. The UST Cannot Violate the Bankruptcy Clause Itself

The Court first addresses an issue not raised by either party, but which could be dispositive over whether the Debtors may challenge the application of 28 U.S.C. § 1930 as to them. Because the Bankruptcy Clause is a power of Congress and not the President, the Debtors may not be able to challenge statutes validly enacted under it.

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[28] It is in this manner that this Court chiefly disagrees with *Buffets* and *Circuit City*. The 2017 Amendments did not increase quarterly fees in the UST districts only and intentionally, purposely, or even accidentally omit BA districts. As soon as the higher fees imposed by the 2017 Amendments went into effect in UST districts, 28 U.S.C. § 1930(a)(7) *automatically* operated to mandate higher fees in BA districts.

In *Gonzales v. Raich*, 545 U.S. 1, 23-33, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005), the Supreme Court upheld Congress's ability to regulate cannabis grown for personal use that would never enter interstate commerce. Relevant here, the plaintiffs in *Raich* framed their challenge to the statute in question as unconstitutional as applied to them, but the Court analyzed whether the statute was a valid exercise of Congress's commerce powers on its face. *Id.* at 8, 15-33, 125 S. Ct. 2195. The Court noted that it has "often reiterated that [w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Id.* at 23, 125 S. Ct. 2195 (citations and internal quotation marks omitted).

At least one commentator has suggested that the effect of *Raich* is that "a Commerce Clause challenge cannot be 'as-applied.'" Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209, 1279 (2010). Rosenkranz reasoned that because Congress and not the President is the subject of the Commerce Clause, the President cannot violate it, *id.* at 1277-78, and that, if Congress did violate the Constitution, it did so when it made the law. *Id.* at 1279. Rosenkranz then extended this reasoning to all of Congress's enumerated powers because they all have the same subject: Congress. *Id.* at 1281.

There is some logic to Rosenkranz's position, and Courts of Appeals have applied *Raich* in a manner similar to Rosenkranz's position. *See, e.g., United States v. Nascimento*, 491 F.3d 25, 40-43 (1st Cir. 2007) ("Refined to bare essence, *Raich* teaches that when Congress is addressing a problem that is legitimately within its pur-

view, an inquiring court should be slow to interfere. . . . [T]he class of activity is the relevant unit of analysis and, within wide limits, it is Congress—not the courts—that decides how to define a class of activity.").

This Court does not go so far as to say that all "as-applied" challenges to statutes under Congress's enumerated powers are noncognizable. The Court reiterates, however, that both *Gibbons* and *Victoria Farms* were both decided on facial grounds. But, as Rosenkranz himself acknowledged, what makes a challenge "facial" versus "as-applied" is "muddled." 62 Stan. L. Rev. at 1273. Unlike Rosenkranz, this Court will not be so bold as to say that the executive (or the judiciary) cannot violate the Constitution by failing to enforce validly enacted laws, but the Court does understand the barest point that Rosenkranz makes as applied to this case: the UST cannot violate the Bankruptcy Clause; only Congress can. That said, the Court holds that to the extent that the Debtors have argued that the UST has violated the Bankruptcy Clause, such is not cognizable because that Clause is a part of Article I, which only applies to Congress.

b. The Non-Uniform Application of 28 U.S.C. § 1930(a)(6) Is Not Unlawful as to the Debtors

The Judicial Conference is comprised of the Chief Justice of the United States, the Chief Judges of the thirteen circuit Courts of Appeals, the Chief Judge of the Court of International Trade, and judges from District Courts of each geographic circuit. 28 U.S.C. § 331. The Judicial Conference has been called an "auxiliary" of the Judicial Branch. *Lifetime Cmties., Inc. v. Admin. Office of U.S. Courts (In re Fidelity Mortg. Inv'rs)*, 690 F.2d 35, 38-39 (2d Cir. 1982); *see also Mistretta v.*

United States, 488 U.S. 361, 388-89, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). In this respect, Congress has delegated nonadjudicatory tasks to the Judicial Branch, much as Congress has done with administrative agencies.[29]

Most bankruptcy administration work, however, has been delegated to the UST Program, which is under the purview of the Department of Justice, which in turn is a part of the Executive Branch. In light of this dichotomy, which the Debtors do not challenge, the Court must consider whether the UST has properly applied the statute. Because the Court has already held that 28 U.S.C. § 1930(a)(6) and (7) are properly understood as laws enacted under Congress's bankruptcy powers, the Court must consider the two classic as-applied challenges: (1) whether the statutes cover the class of cases presented here, and (2) whether the law, as written, is being misapplied unconstitutionally.

i. 28 U.S.C. § 1930 Covers This Case

The first as-applied challenge is dealt with easily. In this type of challenge, the statute in question is facially valid, but a literal interpretation would include examples that would intrude on the powers of other entities, like the states. *See, e.g., Bond v. United States*, 572 U.S. 844, 856-66, 134 S. Ct. 2077, 189 L. Ed. 2d 1 (2014). In this case, however, the Debtors sought protection under Chapter 11 of the Bankruptcy Code. With Chapter 11 cases come quarterly fees. There is no reading of 28 U.S.C. § 1930 that would invade the exclusive prerogatives of other entities, so the Court must

[29] The Judicial Conference is not an agency subject to the Administrative Procedure Act. *Fidelity Mortg. Inv'rs*, 690 F.2d at 38-39.

reject any argument that the Debtors are somehow outside the constitutional limits of 28 U.S.C. § 1930's reach.[30]

ii. The UST Is Not Misapplying the Law

The Debtors' argument that the application of 28 U.S.C. § 1930(a)(6) is non-uniform can also be understood to contend that either the UST or the Judicial Conference is misapplying the law. Given the text of 28 U.S.C. § 1930(a)(6) and the fact that—crucially important here—the Debtors have not raised the separate claim that the increased fees should only apply to cases filed on or after January 1, 2018, it is clear that the Debtors have not alleged that the UST is misapplying the law as written. What can be inferred from all of this is that the Debtors allege that the Judicial Conference has misapplied the law. Given that the UST Program and the BA program exist in different branches with different constitutional responsibilities, there is nothing the Court can do to lower the quarterly fees the Debtors must pay.

A. The Court Cannot Order the UST to Violate the Law

Under the United States Constitution, the President must "take Care that the Laws be faithfully executed[.]" U.S. Const. art. II, § 3, cl. 5. This requirement applies to agencies under the purview of the President, including the UST. Under this scheme, once Congress has enacted a valid statute empowering the Executive Branch, the Executive Branch must enforce it faithfully.

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[30] This argument was not explicitly made, but for the Court to address what the Debtors' arguments are, it must figure out what they are not.

Because, as the Court has already held, 28 U.S.C. § 1930 is a facially constitutional statute, the UST must enforce the quarterly fee provisions within, lest they be accused of not faithfully executing Congress's valid legislation. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37, 72 S. Ct. 863, 96 L. Ed. 1153 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum," but "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb[.]" [citations omitted]).

Likewise, this Court, like all justices and judges of the United States, must take an oath to "faithfully and impartially discharge and perform all the duties incumbent upon [it] . . . under the Constitution and laws of the United States." 28 U.S.C. § 453. To order the UST to charge or accept lesser fees than those prescribed in 28 U.S.C. § 1930(a)(6) essentially would be for this Court to order the UST to disregard the Take Care Clause and the law as written. This Court cannot do so.[31] "Why otherwise does [the Constitution] direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support?"

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[31] There is one exception to this. Under 28 U.S.C. § 1930(f)(3), this Court may "waiv[e], in accordance with Judicial Conference policy, fees prescribed under this section for[, among others, Chapter 11] debtors and creditors." To the Court's knowledge, no such policy exists.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180, 2 L. Ed. 60 (1803).

B. Even If the UST Were Violating 28 U.S.C. § 1930, Such Is Not Unconstitutional

Even if this Court assumed that the UST violated the statute, the Court could not then conclude that its actions were unconstitutional. The Supreme Court has said that its "cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is *ipso facto* in violation of the Constitution. On the contrary, we have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority. . . . If all executive actions in excess of statutory authority were *ipso facto* unconstitutional, . . . there would have been little need . . . for our specifying unconstitutional and ultra vires conduct as separate categories." *Dalton v. Specter*, 511 U.S. 462, 472, 114 S. Ct. 1719, 128 L. Ed. 2d 497 (1994) (citations omitted). In *Dalton*, the plaintiffs sought to enjoin the Secretary of Defense and President from closing a military base pursuant to statute. *Id.* at 464, 114 S. Ct. 1719. That statute, Pub. L. 101-510, Div. B, Title XXIX, § 2901 *et seq.*, 104 Stat. 1808, was passed pursuant to Congress's powers to raise and maintain the armed forces, U.S. Const. art. I, § 8, cls. 11-14, which, like the Bankruptcy Clause, are among Congress's enumerated powers.

The Court fails to see how *Dalton*'s logic does not extend to this case. Therefore, if the UST has misapplied the law—which the Debtors have not claimed, in any regard—such might warrant relief as unlawful, but

would not render 28 U.S.C. § 1930(a)(6), as applied, unconstitutional.

c. The Debtors Have No Standing to Challenge Any Misapplication of the 2017 Amendments by the Judicial Conference

Because the Court has held that the UST has not misapplied the law, that can only mean that the Debtors believe that the Judicial Conference has. The problem with any assertion to this effect is that the Court possesses no power to order the Judicial Conference to do anything in this case. The Debtors filed this Motion against the UST; the Judicial Conference is not a party to it. In order to rope the Judicial Conference into this case, however, the Debtors need to have standing to do so. They do not. As noted above, standing requires that a plaintiff have an "injury in fact." *Lujan*, 504 U.S. at 560, 112 S. Ct. 2130 (citations and internal quotation marks omitted). It also required that "the injury has to be fairly . . . trace[able] to the challenged actions of the defendant, and not . . . th[e] result [of] the independent action of some third party *not before the court*." *Id.* (emphasis added; citation and internal quotation marks omitted).

The Judicial Conference is not before this Court. Any claim of injury is not rooted in the UST's actions, but rather the Judicial Conference's actions. Moreover, had the Judicial Conference implemented the quarterly fees in BA districts without any change in the UST's actions, the Debtors would have nothing to complain of under the facts alleged. In other words, the Judicial Conference's delay in implementing the fee increases and decision not to apply the increases to pending cases has had no effect on the fees assessed in this

case; the Debtors' quarterly fees would be the same as they are now. Therefore, there is no injury traceable to the UST's actions.[32]

In *Marbury*, Chief Justice Marshall, quoting Blackstone's Commentaries, stated that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." 5 U.S. (1 Cranch) at 163 (citation and internal quotation marks omitted). Having found that William Marbury had a remedy through mandamus, *id.* at 168, the Court still could not enforce it because the statute providing the Court with original jurisdiction to issue a mandamus was unconstitutional. *Id.* at 173-80. The Court invalidated the law despite the fact that James Madison did not appear or argue the case at all. *See id.* at 153-54; *cf.* footnote 11 of this Memorandum.

In an 1893 article, Harvard law professor James Bradley Thayer contended that courts "can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question." James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv.

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[32] It is in this respect that this Court also disagrees with *Buffets* and *Circuit City*, namely, that the actions of the UST and Judicial Conference can transform a facially valid statute into an unconstitutional one. What is telling is that both courts found the statute uniform as applied *now*. *See Circuit City*, 606 B.R. at 269-70, 2019 WL 3202203, at *6; *Buffets*, 597 B.R. at 594. But these findings assume their conclusions. Only Congress can violate the Bankruptcy Clause, and it can only do so at the time of a statute's adoption; the UST and Judicial Conference might violate the law, but that does not invalidate the law.

L. Rev. 129, 144 (1893). Thayer's point, highlighted eloquently by Justice Holmes in his *Lochner* dissent and less so in his letter to Harold Laski, is taken here. Perhaps maintaining the dual system of USTs and BAs is a mistake. There certainly have been consequences of that dual system that seem unfair to the Debtors in this case, who are paying the fees they are, while their carbon copies in Alabama and North Carolina would not. But that concern is not properly before this Court and, moreover, the remedy does not lie in striking down the law or forcing the UST to disregard the law as written. Whatever mistake was made is not inherent in the text of the statute. But, whatever errors the Judicial Conference may have committed, this Court, for jurisdictional reasons, cannot fix them.

In sum, the Court holds that 28 U.S.C. § 1930(a)(6) and (7) are facially valid "uniform laws on the subject of Bankruptcies." The Court also holds that any "as-applied" challenge fails as a matter of law. Therefore, the Debtors have failed to state a claim for which relief may be granted, and the Court DISMISSES the uniformity count with prejudice. *See Iqbal*, 556 U.S. at 677-79, 129 S. Ct. 1937.

D. The Debtors' User Fee Claim Fails to Allege Legally Sufficient Facts That the Increase in Chapter 11 Quarterly Fees Is an Unconstitutional Taking

The Debtors' second claim is that the increase in Chapter 11 fees are an unconstitutional user fee.[33] Specifically, the Debtors allege in the Motion that their

[33] The Court assumes for purposes of this Memorandum that Chapter 11 quarterly fees are user fees.

quarterly fees would total an amount that "may be not much less than, if not more than, the attorneys' fees for the Debtors in these sometimes very active cases." To illustrate this, the Debtors show the discrepancy between what they actually paid in quarterly fees and what they would have paid under the old scheme.[34] The UST argues that the user fees imposed are not takings.[35] The Court holds that under the facts alleged, the Debtors are not entitled to relief as a matter of law.

The Supreme Court "has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. Nor does the Government need to record invoices and billable hours to justify the cost of its services. All that we have required is that the user fee be a 'fair approximation of the cost of benefits supplied.'" *United States v. Sperry*, 493 U.S. 52, 60, 110 S. Ct. 387, 107 L .Ed. 2d 290 (1989) (citation omitted); *cf. FCC v. Fla. Power Corp.*, 480 U.S. 245, 253, 107 S. Ct. 1107, 94 L. Ed. 2d 282 (1987) ("So long as the rates set are not confiscatory, the Fifth Amendment [Takings Clause] does not bar their imposition." [citations omitted]). The Court has also upheld a flat user fee "without regard to the actual use . . . , so long as the fee is not excessive." *Evansville-Vandenburgh Airport Auth. Dist. v. Delta Airlines,*

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[34] *But see* part III.A of this Memorandum.

[35] The UST argues in his papers that the Debtors fail to specify what portion of the Constitution the statute violates, but as the Debtors articulated at the hearing, they only make a claim under the Takings Clause. Indeed, the Debtors' citations in their Motion only relate to the Takings Clause. Therefore, the Court only addresses the Debtors' allegation of an unconstitutional user fee as one invoking the Takings Clause.

Inc., 405 U.S. 707, 715, 92 S. Ct. 1349, 31 L. Ed. 2d 620 (1972) (citations omitted).[36]

"It is beyond dispute that . . . user fees . . . are not takings." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013) (citation and internal quotation marks omitted). This, of course, presumes that the user fee is *reasonable*.[37] *Sperry*, 493 U.S. at 63, 110 S. Ct. 387. "[T]he challenger has the burden of proving that the fee is 'unreasonable in amount for the privilege granted.'" [38] *N.H. Motor Transp. Ass'n v. Flynn*, 751 F.2d 43, 47 (1st Cir. 1984) (Breyer, J.) (citing *Evansville-Vandenburgh*,

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[36] Besides considering whether a fee charged "is based on some fair approximation of the use of the facilities" and "is not excessive relation to the benefits conferred," courts analyze whether the fee "discriminate[s] against interstate commerce." *Nw. Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 369, 114 S. Ct. 855, 127 L. Ed. 2d 183 (1994) (citing *Evansville-Vandenburgh*, 405 U.S. at 716-17, 92 S. Ct. 1349). The final consideration—interstate commerce—is not relevant here. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994).

[37] In *Koontz*, Justice Alito, writing for the Court, quoted parts of the previous sentence from Justice Scalia's dissent in *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 243 n.2, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003) (Scalia, J., dissenting). Justice Scalia's footnote, in turn, cites *Sperry*, 493 U.S. at 63, 110 S. Ct. 387, which qualifies that user fees are, by definition, reasonable. Takings, it follows, are unreasonable. The UST may not escape liability simply because of the label "user fee." *Cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980) (The government, "by *ipse dixit*, may not transform private property into public property without compensation[.]").

[38] Even if the Court presumed that the shifting burdens applicable to objections to claims applies here, the Debtors' allegations are insufficient to shift the burden to the UST for the same reasons they fail to state a claim for relief.

405 U.S. at 716, 92 S. Ct. 1349); *see also Sperry*, 493 U.S. at 60, 110 S. Ct. 387.

The determination of reasonableness is a fact-intensive exercise. *See Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 98 (2d Cir. 2009) (*Selevan I*); *see also Connolly v. Pension Ben. Guar. Corp.*, 475 U.S. 211, 224, 106 S. Ct. 1018, 89 L. Ed. 2d 166 (1986) (The Supreme Court has "eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case." [citations omitted]). The disparities the Debtors allege might support arguments that the quarterly fees are not a "fair approximation" of the benefits and are excessive.

In determining whether a fee "is based on some fair approximation of the use of the facilities," the Second Circuit has directed a court "to consider whether the . . . policy at issue reflects rational distinctions among different classes . . . , so that each user, on the whole, pays *some* approximation of [its] fair share[.]" *Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 259 (2d Cir. 2013) (*Selevan II*) (citations and internal quotation marks omitted). As for excessiveness, the Second Circuit has upheld a District Court's conclusion that user fees were not excessive "based on evidence regarding . . . costs and expenditures," and that "any revenues collected did not exceed proper margins[.]" *Id.* at 260 (citations omitted).

The Second Circuit, in *Selevan I*, has also admonished courts that "whether [a] fee represents a fair approximation of [a party's] use . . . [is] an inquiry that is too fact-dependent to be decided upon examination of the pleadings." *Selevan I*, 584 F.3d at 98 (citing *Nw.*

Airlines, 510 U.S. at 369, 114 S. Ct. 855). Despite this admonition, this Court holds that the Debtors' legal theories underlying their claim of harm, as alleged in the Motion, are not cognizable on their own.

First, the Debtors' allegations concerning the overall percentage of Chapter 11 cases nationwide and the contributions made by Chapter 11 debtors to the UST System cannot, without more, form the basis for the Debtors' takings claim.[39] *See Connolly*, 475 U.S. at 224, 106 S. Ct. 1018; *cf. Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540-45, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (An inquiry into whether a law "substantially advances" government interests "is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose[,]" but is "untenable as a takings test" because it could "demand heightened means-ends review of virtually any regulation of private property.").

Second, the Debtor's contention that there is no correlation between the quarterly fees charged and the presumed amount of time the UST has spent working on the main case cannot, even read with the national statistics, form the basis for the Debtors' takings claim. Specifically, the Debtors, who also lay out the amount of quarterly fees that have been and would have been charged in 2018, allege the following:

> In these cases, . . . assuming the Debtors are able to close their cases by the end of the third quarter of 2019, US Trustee fees under the amended fee sched-

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[39] Because the Court must ignore the facts posited by the UST, their similar arguments are unavailing for the same reasons.

> ule would total approximately $560,000, which may be not much less than, if not more than, the attorneys' fees for the Debtors in these sometimes very active cases. At a blended rate of $350 (assuming 50% of time spent by a trial attorney at $475 per hour, which is [the Debtors' lead counsel's] rate, and 50% of time spent by an analyst at $225 per hour), that would translate to 1,600 hours. Given the volume of cases that the US Trustee oversees and the level of activity of the US Trustee in these cases, it is impossible that the US Trustee has spent even fifty percent of that time on these cases. While the fit between the fee and the benefit conferred or cost of services used need not be perfect, "the discrepancy here exceeds permissible bounds." *See* [*Bridgeport & Port Jefferson Steamboat Co. v. Bridgeport Port Auth.*, 567 F.3d 79, 86 (2d Cir. 2009)]. The fees charged to these Debtors under the amended fee structure are a "forced contribution to general government revenues . . . not reasonably related to the costs of using the courts," *Webb's Fabulous Pharmacies,* 449 U.S. at 163, 101 S. Ct. 446, an "exaction for public purposes" rather than compensation for private benefit or for services used.

The Debtors' references to *Bridgeport Steamboat* do not help them on the facts alleged. In that case, the Second Circuit held that the fees the Bridgeport Port Authority charged ferry passengers were not a fair approximation of the services provided. 567 F.3d at 88. The Court held this because "the passenger fees were supporting the entirety of the [Bridgeport Port Authority's] operating budget and that this budget was supporting some [of their] activities of no benefit to the ferry passengers[.]" *Id.* at 87. The Court, however,

did not hold the fees excessive. *Id.* at 88. It merely upheld the District Court's finding of modest damages for the passengers, nominal damages for the ferry company, and an injunction prohibiting the collection of a fee "that exceeded what was necessary to pay for benefits to the ferry passengers." *Id.* at 81, 85, 88.

What differentiates this case from *Bridgeport Steamboat* is that the fees in that case clearly went beyond what was necessary because the fees *necessarily* were covering other services. To reach this, the District Court had "to make particularized inquiries as to the various [Bridgeport Port Authority] expenditures" to determine what did and did not benefit passengers. *Id.* at 87. Here, the Debtors' more concrete allegations regarding the amount of time the trial attorneys and analysts have spent on the main case, however, are too narrow because they fly in the face of the Supreme Court's statement that the government does not "need to record invoices and billable hours to justify the cost of its services." *Sperry*, 493 U.S. at 60, 110 S. Ct. 387.[40] The UST, even as it relates to this case, consists of more than the trial attorneys and analysts.

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[40] *Webb's Fabulous Pharmacies*, which the Debtors cite, is also inapposite. There, the Supreme Court held "that under the narrow circumstances of this case—where there is a separate and distinct . . . statute authorizing a . . . fee 'for services rendered' . . . —[the government's] taking unto itself, under [other statutes], the interest earned on [an] interpleader fund while it was in the registry of the court was a taking violative of the Fifth . . . Amendment[ ]. *We express no view as to the constitutionality of a statute that prescribes [the] retention of interest earned, where the interest would be the only return . . . for services [the government] renders.*" 449 U.S. at 164-65, 101 S. Ct. 446 (emphasis added; citations omitted). Such simply does not comport with the facts of this matter.

The Court does not mean to say that neither national statistics concerning the UST nor analyses of the UST's time expended are not pertinent to this issue; both certainly are highly relevant. The Court only means to say that the user fee analysis is too fact-intensive to consider anything less than a totality of the circumstances, which needs to be alleged, and the Supreme Court has foreclosed the extremes alleged from being cognizable on their own. Nevertheless, given the authorities the Court has reviewed and discussed, the Court can, in its experience and common sense, see a plausible set of facts between—and possibly including—those extremes upon which the Debtors could ground their takings claim. *See Iqbal*, 556 U.S. at 677-79, 129 S. Ct. 1937. Those hypothetical facts could include analyses related to, but better tailored than the facts posed here, without running afoul of *Sperry*, *Connolly*, and *Lingle*; however, those authorities could also provide the UST with relevant defenses.[41] Absent the extremes alleged, which on their own are foreclosed by law, the allegations are no more than "naked assertion[s] devoid of further factual enhancement." *Id.* at 678, 129 S. Ct. 1937 (citation and internal quotation marks omitted).

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[41] The Court reiterates that "a party challenging governmental action as an unconstitutional taking bears a substantial burden." *E. Enters. v. Apfel*, 524 U.S. 498, 523, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998) (citing *Sperry*, 493 U.S. at 60, 110 S. Ct. 387); *cf. Crowell*, 285 U.S. at 62, 52 S. Ct. 285 (a statute is presumptively valid and where its construction can be fairly and plausibly interpreted, courts will spare the question of its constitutionality).

The Court, therefore, DISMISSES the user fee claim, but without prejudice[42] to the Debtors filing an amended complaint that meets the standards laid out in Rule 8 of the Federal Rules of Civil Procedure.[43]

IV. CONCLUSIONS AND ORDER

The Court having considered the pleadings and related arguments at the hearing on August 14, 2019, it is hereby **ORDERED**:

(1) That the Triem LLC claim is **DISMISSED** from this action for its lack of standing;

(2) That the UST's Procedural Objection (ECF No. 725) is **OVERRULED**;

(3) That the Debtors' Motion to Determine (ECF No. 672) be deemed an Adversary Proceeding complaint;

(4) That the Clerk is **DIRECTED** to promptly open an Adversary Proceeding docket, placing ECF Nos. 672, 725, 726, 743, 773, and this Memorandum within that docket;

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[42] The decision to dismiss without prejudice to replead is supported by the admonition from the Second Circuit noted above. *See Selevan I*, 584 F.3d at 98.

[43] The Court would entertain severing the two counts to allow the Debtors to appeal the uniformity claim under FRBP 8004 and 28 U.S.C. § 158(a)(3). The Court would also entertain certifying a direct appeal of the uniformity claim to the Second Circuit under FRBP 8006 and 28 U.S.C. § 158(d)(2).

Furthermore, should the Debtors wish to plead additional counts in an amended complaint, the Debtors must seek leave of this Court to do so. Fed. R. Bankr. P. 7015; Fed. R. Civ. P. 15(a)(2).

(5) That the Debtors are **DIRECTED** to pay the requisite Adversary Proceeding filing fee within seven (7) days of this Memorandum issuing;

(6) That the UST's Motion to Dismiss (ECF No. 726) is **GRANTED** with prejudice as to the uniformity claim and without prejudice as to the user fee claim;

(7) That the Debtors may replead the user fee claim in an Amended Complaint filed within twenty-one (21) days, which may include a claim of Triem LLC should it allege cognizable damages to support its standing; and

(8) That the Debtors may seek to add any new claims as additional counts to an Amended Complaint by filing a motion under Rule 15 of the Federal Rules of Civil Procedure within twenty-one (21) days.

IT IS SO ORDERED at Hartford, Connecticut this 28th day of August 2019.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 20-1209

IN RE: CLINTON NURSERIES, INC., CLINTON NURSERIES OF MARYLAND, INC., CLINTON NURSERIES OF FLORIDA, INC., TRIEM LLC, DEBTORS

CLINTON NURSERIES, INC., CLINTON NURSERIES OF MARYLAND, INC., CLINTON NURSERIES OF FLORIDA, INC., DEBTORS-APPELLANTS

TRIEM LLC, DEBTOR

v.

WILLIAM K. HARRINGTON, UNITED STATES TRUSTEE, REGION 2, TRUSTEE-APPELLEE

Filed: Feb. 17, 2023

ORDER

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

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk