

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 ALFRED H. SIEGEL, TRUSTEE OF THE)
4 CIRCUIT CITY STORES, INC.)
5 LIQUIDATING TRUST,)
6 Petitioner,)
7 v.) No. 21-441
8 JOHN P. FITZGERALD, III, ACTING)
9 UNITED STATES TRUSTEE FOR REGION 4,))
10 Respondent.)
11 - - - - -

12
13 Washington, D.C.
14 Monday, April 18, 2022

15
16 The above-entitled matter came on for
17 oral argument before the Supreme Court of the
18 United States at 11:05 a.m.

19
20 APPEARANCES:
21 DANIEL L. GEYSER, ESQUIRE, Dallas, Texas; on behalf of
22 the Petitioner.
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25 Respondent.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 21-441, Siegel versus Fitzgerald.

Mr. Geysler.

ORAL ARGUMENT OF DANIEL L. GEYSER

ON BEHALF OF THE PETITIONER

MR. GEYSER: Thank you, Mr. Chief Justice, and may it please the Court:

The 2017 Act's quarterly fee increase presents a clear and obvious violation of the Bankruptcy Clause's uniformity requirement. Congress arbitrarily divided the country into two different groups and then authorized different fees for identically situated debtors because their bankruptcies happened to arise in different states.

There are no regional differences, distinct local conditions, or industry-specific problems justifying this non-uniform treatment. The division is entirely artificial. There's nothing unique about North Carolina or Alabama that justifies a separate bankruptcy system with its own special lower fees. Congress has simply

1 decided to treat the same class of debtors
2 differently because their bankruptcies arose in,
3 say, Virginia instead of North Carolina.

4 The Constitution requires uniform
5 bankruptcy laws. And a bifurcated system that
6 imposes different charges on indistinguishable
7 debtors is not uniform under any ordinary
8 definition. Because the 2017 law is not uniform
9 on its face, it violates the Constitution, and
10 this Court should reverse.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Mr. Geysler, is the
13 real problem here as to lack of uniformity the
14 fees, the differential fees, or the original
15 division of the country into two different types
16 of districts?

17 MR. GEYSER: I think it's both, Your
18 Honor. I think that Congress has artificially
19 bifurcated the country into two different
20 systems, and now it's charging debtors different
21 fees based on that original bifurcation.

22 Either way, though, Congress is
23 treating an identically situated debtor class,
24 debtors that look alike in every material
25 respect, there's nothing about them that

1 justifies different treatment, and yet they're
2 paying more for their bankruptcies based
3 entirely on where they happen to file.

4 JUSTICE THOMAS: But wouldn't you have
5 a problem if you accept the fact that -- if --
6 if you say that the division is legitimate, then
7 it would seem to follow that the differential
8 fees would not be based on geography?

9 MR. GEYSER: Well, no, Your Honor,
10 because, again, the original division is, in
11 fact, based on geography. And Section 581 makes
12 this clear. The trustee system is divided into
13 48 states, and then there are two holdout
14 districts and -- for Alabama and North Carolina.
15 And there -- there's really no way to cut it
16 other than a geographic distinction.

17 There's no reason that Congress would
18 treat debtors who look exactly the same, who are
19 electronic retailers, any differently because
20 their bankruptcy is in Virginia as opposed to
21 somewhere else. And I think the --

22 CHIEF JUSTICE ROBERTS: Well, but I --
23 I think it -- one answer, ready answer, is,
24 well, they're treating them differently because
25 they're different systems. Now that only makes

1 sense if there's a reason that they're different
2 systems, and I have not been able to figure out
3 what that reason is. What's the reason? Why
4 are there two different systems?

5 MR. GEYSER: There -- there is no
6 reason, Your Honor. It's entirely arbitrary.

7 CHIEF JUSTICE ROBERTS: I know, but
8 some -- there must be some reason it happened.
9 I mean, they just didn't pull out the map and
10 suddenly say let's pick out two states and have
11 them a whole separate system.

12 And if there's a reason for it, then I
13 think it's a very strong case on the other side
14 that, well, the fees in one can be one and the
15 fees in the other can be different, and it's
16 because there's a reason to have two different
17 systems.

18 MR. GEYSER: Your --

19 CHIEF JUSTICE ROBERTS: So what is it?

20 MR. GEYSER: The -- the only reason
21 that we've seen, Your Honor, is politics and
22 local preferences.

23 CHIEF JUSTICE ROBERTS: What do you
24 mean --

25 MR. GEYSER: It's regionalism.

1 CHIEF JUSTICE ROBERTS: -- what do you
2 mean, politics?

3 MR. GEYSER: The -- the bankruptcy
4 judges and the bankruptcy bar in North Carolina
5 and Alabama liked the system the way it was, so
6 they lobbied their -- their Congressmen, who
7 included exceptions in the statute for those two
8 states.

9 The -- the General Accounting Office
10 looked at this in 1992 and said there is no
11 reason to have two different systems. In fact,
12 the -- and the government has conceded in the
13 lower courts there's nothing unique about the
14 bankruptcy system in North Carolina or Alabama
15 that justifies having different bankruptcy laws
16 for those two states alone. It's, in fact --

17 CHIEF JUSTICE ROBERTS: So it's just
18 because the bankruptcy judges didn't want to
19 change?

20 MR. GEYSER: The -- the bankruptcy
21 judges in that case, I guess, liked it the way
22 it was, and they didn't want to be part of the
23 U.S. Trustee system. But that -- that, of
24 course, is not a legitimate, relevant, material
25 distinction.

1 Every time this Court has asked is
2 there a relevant basis for drawing lines based
3 on geography -- which, by the way, is exactly
4 what the Bankruptcy Clause says that Congress
5 can't do. It says it has to be uniform laws
6 throughout the United States. And this is
7 clearly not uniform throughout the United
8 States.

9 JUSTICE BREYER: As a procedural
10 matter, suppose that -- you know, that some --
11 some states or bankruptcy judges somewhere say,
12 you know, we want to start court at 11. We want
13 to start at 11. We think it works better that
14 way. We're refreshed. Okay? So other states
15 say no, 9. And Congress passes a law saying 10,
16 but we'll keep 11 for the two states.

17 All right. I mean, is it -- why can't
18 they try out different things? They like it the
19 way they're doing it. I mean, it works. It's
20 not a substantive law. It's just the way we
21 work it.

22 Now can't we give -- isn't it uniform
23 to give, in certain matters, states and
24 districts their choice?

25 MR. GEYSER: Well, Your Honor, no,

1 it's not. First, there is a way to do that in a
2 uniform manner, but it is not uniform to say
3 that two states get the choice to start at 11,
4 but the other 48 states get no choice. They
5 have to start at 9 or they have to start at some
6 other time.

7 If Congress said that any state has
8 the option to decide when court starts, that's a
9 uniform law.

10 JUSTICE BREYER: So it's against the
11 law of the Constitution to -- to say on
12 procedural matters states get their choice?

13 MR. GEYSER: It -- it -- it's --

14 JUSTICE BREYER: And it is against the
15 law to say some states get their choice, but
16 others don't, and the reason is because the
17 states that get their choice have a system which
18 has led them to ask us, because they feel very
19 strongly, about using it one way or the other?
20 That's not a valid reason? I don't know. Maybe
21 it is. Maybe it isn't. What do you think?

22 MR. GEYSER: I -- I don't think it is
23 a valid reason, Your Honor, precisely because
24 the Constitution constrains the top-down choices
25 that Congress makes in that they have to be

1 uniform choices.

2 CHIEF JUSTICE ROBERTS: Well, surely

3 --

4 MR. GEYSER: They --

5 CHIEF JUSTICE ROBERTS: -- they can
6 make different choices on something, right? You
7 know, one district decides they're going to buy,
8 you know, computers from Computer Company A, and
9 another says no, we're going to buy them from B,
10 right? So they can have differences to some
11 respect.

12 MR. GEYSER: Well, again, Your Honor,
13 I think it depends on where are those
14 differences being introduced. Are they being
15 introduced by Congress, where Congress is saying
16 that some states have to buy from Company A as
17 opposed to Company B, or if Congress says any
18 district can buy computers wherever they'd like?

19 JUSTICE BREYER: Yeah, but is there
20 any state --

21 CHIEF JUSTICE ROBERTS: Yeah, but --
22 but wait. I don't know. I'm sorry. Which one
23 is good and which one is bad?

24 MR. GEYSER: The one where Congress is
25 -- is setting the same rule, standard, choice,

1 framework for every district in every state in
2 the country. That avoids the concerns of
3 regionalism. Then any regional differences
4 introduced at a local level --

5 JUSTICE KAVANAUGH: But then, even
6 under the Chief Justice's hypothetical in the
7 computer-buying program, if it's in the statute
8 itself, that would be a violation of the
9 Uniformity Clause?

10 MR. GEYSER: Well, that -- that may
11 not be a law on the subject of bankruptcies,
12 Your Honor, so it may be exempt --

13 JUSTICE KAVANAUGH: Okay.

14 MR. GEYSER: -- on that basis.

15 JUSTICE KAVANAUGH: And that gets to
16 the point, how do you define the subject of
17 bankruptcies, which goes to, I think, Justice
18 Breyer's question as well?

19 MR. GEYSER: Well, I -- I think it
20 does, but I think -- here, we have something
21 that is very clearly on the subject of
22 bankruptcies. Now this Court has said it's very
23 hard to define, but the Court has also said that
24 Congress's power extends to the entire subject
25 of bankruptcies.

1 And, here, we're talking about a
2 statute that is called bankruptcy fees. It
3 applies in bankruptcy cases. It's for the
4 bankruptcy trustee to do bankruptcy tasks. It
5 specifically allocates the debtor's resources in
6 the bankruptcy estate to trustee fees as opposed
7 to creditors or back to the debtor itself. So
8 --

9 CHIEF JUSTICE ROBERTS: But it's not
10 about -- but it's not about bankruptcies. It's
11 not like you have a different rule of priority
12 in discharging debts, right?

13 I mean, could they have a rule -- I
14 mean, things are more expensive in New York than
15 they are in North Carolina, so they say you can
16 charge fees up to \$200,000 a quarter in New York
17 but only \$50,000 a quarter in North Carolina?

18 MR. GEYSER: Well, Your Honor, I think
19 what they can do is say you can charge market
20 rates. And then -- and that's legitimate for
21 two reasons.

22 First, it's a uniform law. Every
23 state can charge a market rate. That's the same
24 standard -- there's no danger there that the
25 framers would have been concerned about, about

1 Congress favoring certain states or certain
2 regions over others --

3 JUSTICE KAVANAUGH: But the --

4 MR. GEYSER: -- because everyone has
5 the same -- the same framework.

6 JUSTICE KAVANAUGH: -- but the -- the
7 debtor in that example would be paying -- the
8 debtors would be paying different rates
9 depending on where they were --

10 MR. GEYSER: Exactly.

11 JUSTICE KAVANAUGH: -- just as now.
12 So why is that better?

13 MR. GEYSER: Well, it's -- it's
14 different, and it's different for -- in a very
15 profound and important way. It's different
16 because those are different effects.

17 Now the Constitution and its text says
18 there have to be uniform laws. It doesn't say
19 the effects have to be the same. And that's why
20 this Court in -- in the Moyses decision said
21 there's no problem with saying states can create
22 their own exemptions.

23 Every state can craft whatever
24 exemptions it wants. That's fine. Any
25 deviation is introduced at the local level.

1 It's not introduced, again, top down, where
2 Congress is dictating a specific role for some
3 regions but not others.

4 JUSTICE BARRETT: Mr. Geysler --

5 JUSTICE BREYER: But, in this case,
6 did they have -- before I -- I'm just finishing
7 up with the Chief.

8 Was there any evidence that any of the
9 48 states that have the trustee system said to
10 Congress in any way, we want to have the other
11 system? We want the freedom to choose?

12 I think the answer is going to be no.

13 MR. GEYSER: I -- I don't --

14 JUSTICE BREYER: And I think it's
15 pretty tough to say -- so my thought was, if the
16 answer is no -- I'm giving you time to think
17 whether the answer is no. But, if the answer is
18 no, there isn't really much difference between
19 -- I can't see it -- between a system which says
20 you two states get this old system because
21 you're the only ones who asked for it.

22 That seems logical, but you now can
23 answer yes or no if you remember the question.

24 MR. GEYSER: Well, I -- I do remember
25 the question. I'm not aware of any evidence

1 either way, Justice Breyer, but I think the
2 important thing is, if Congress is concerned
3 that some states may want to opt out or opt in,
4 then Congress can say any state can choose. The
5 districts in any state can decide to opt in or
6 out of the trustee system, and then they'd have
7 a uniform law. Any variation comes at the local
8 level, and --

9 JUSTICE KAGAN: Can I -- can I take
10 you back to Justice Thomas's first question?
11 Because Justice Thomas said let's just presume
12 that the original act here, the separation of
13 these two states, is constitutional.

14 And I realize you have arguments that
15 it's not. But let's just presume it is. At
16 that point, doesn't this have to be
17 constitutional as well because isn't -- isn't
18 the second differentiation, if you will, just
19 really responding in a sensible way to the
20 effects of the first differentiation?

21 In other words, it's -- at that point,
22 it's not arbitrary and it's not solely
23 geographic. It's saying, you know what, these
24 two -- these two states are not in the same
25 financial position as the other 48 states are.

1 They don't need -- they aren't self-financing,
2 so they don't need these higher fees.

3 Wouldn't that be a completely
4 rational, appropriate thing for Congress to do
5 if the original differentiation was okay?

6 MR. GEYSER: I don't think so, Your
7 Honor, and I think for a few different reasons.

8 One is that even if the underlying
9 system is somehow legitimate, it's perfectly
10 fine for Congress to have these different
11 systems for different states, there's still no
12 reason that Congress has to impose fees and make
13 the U.S. Trustee program alone self-funding.
14 There's nothing inherent about the trustee
15 program that requires self-funding. That's a
16 separate and subsequent policy choice.

17 So Congress took the identically
18 situated debtors who happened to be in that
19 program and said, you pay for your bankruptcies
20 while the favored debtors over here in these two
21 states, the taxpayers will fund the identical
22 tasks. So I think that that --

23 JUSTICE KAGAN: But I -- I thought
24 that the -- the question of whether it was
25 self-funding, that that's part of the initial

1 separation of the 48 and the two, that the two
2 were essentially walking into a system where
3 there was an appropriation, and the 48 were --
4 were walking into a system where there wasn't an
5 appropriation and that they needed to be
6 self-funding. So that's part of the original
7 differentiation.

8 And now, as part of the sort of second
9 level, it's like, oh, gosh, this self-funding
10 thing didn't work out so well, not enough money
11 is walking in the door, we have to increase the
12 fees.

13 MR. GEYSER: Well, Your Honor, again,
14 I -- that might have been part of an original
15 calculus, but that is its own policy decision at
16 the congressional level to treat identically
17 situated debtors who look exactly the same, I'm
18 going to arbitrarily assign you to this group,
19 other debtors to this group, and depending
20 solely on geography where they happen to file
21 for bankruptcy, some are better off than others.

22 This Court has never approved that in
23 any case. It's always looked for a material
24 relevancy --

25 JUSTICE KAGAN: But then you're saying

1 we really have to address the first question of
2 whether the differ -- the original 48/2
3 differentiation was permissible because it was
4 in that original differentiation that the --
5 that the two separate funding systems were set
6 up, wasn't it?

7 MR. GEYSER: Well, it -- it was, Your
8 Honor, but I think it was also then struck down
9 or at least the Ninth Circuit purported to
10 strike it down precisely because it's not the
11 same.

12 And just to be very clear, and my
13 friend might correct me soon, but, in the
14 government's brief, the only justification they
15 offer for the dual system to say why this is
16 possibly legitimate is it is effectively a
17 single system that has different labels. It
18 performs the same tasks. It's doing the same
19 things. The debtors can't tell the difference.

20 But the problem is, once Congress
21 layers on top of that system differential fees,
22 then there is a material distinction and debtors
23 then are worse off based entirely on geography.

24 So I don't think even if the
25 underlying system is somehow legitimate in some

1 world where there's a uniformity provision in
2 the Bankruptcy Clause that says Congress can't
3 have different bankruptcy laws for different
4 parts of the country, the -- I think the
5 government's own defense breaks down immediately
6 once they attach different fees to the different
7 districts.

8 JUSTICE BARRETT: Mr. Geysler, I'd like
9 to take you back to Justice Kavanaugh's point
10 about the scope of the Bankruptcy Clause because
11 I think it's important to the scope of your
12 argument.

13 You know, if -- the Bankruptcy Clause
14 itself, augmented by the Necessary and Proper
15 Clause, could be pretty broad and I understand
16 your argument to be the more specific controls
17 and so Congress can't circumvent the uniformity
18 limitation on its bankruptcy power by relying
19 on, say, the commerce power, its power over
20 inferior tribunals.

21 If that's pretty broad, doesn't this
22 uniformity restriction become pretty
23 significant? You know, think of the Chief's
24 hypothetical about different computer
25 purchasing.

1 MR. GEYSER: Well, it -- it -- it does
2 and it doesn't, Your Honor. First, it's not
3 just our distinction. This is the Gibbons
4 decision, makes the argument for us and says
5 that Congress can't look to a different power in
6 order to override the affirmative restriction in
7 the Bankruptcy Clause.

8 But I -- I don't think this is putting
9 that much of a restriction on what Congress can
10 or can't do. And I think the proof of it is the
11 government can't identify a single law other
12 than the 2017 fee increase and the creation of a
13 dual system in the first place that falls under
14 our understanding of the Bankruptcy Clause.

15 Congress just has to legislate
16 uniformly. It just has to give every district
17 the same rights. It has to have the same
18 standards and framework and choices. And once
19 Congress does that, then there's no danger of
20 regionalism, which is what prompted the
21 uniformity provision in the Constitution in the
22 first place.

23 The states were ceding power to the
24 federal government, and they didn't want a
25 situation where the federal government would

1 turn around and favor certain regions over
2 others.

3 If Congress simply passes a uniform
4 law and gives every state the same choice and
5 the same options, there's no danger of
6 favoritism.

7 JUSTICE BREYER: Well, Congress passes
8 a law and it says in States 1 through 10 the
9 bankruptcy judges will meet in the same
10 courthouse as the federal district judges. In
11 10 other states, it says they're going to meet
12 in different courthouses. And in -- and in
13 several other states, it says it's up to the --
14 it's up to the chief judge of the federal
15 district court.

16 Okay? Non-uniform. They can't do
17 that?

18 MR. GEYSER: Again, Your Honor, I
19 think, if Congress wanted to do that, it could
20 very easily rewrite the law to say that every
21 state gets the option. Now --

22 JUSTICE BREYER: They don't want to
23 give every state the option. In certain places,
24 Congress decides that it's a very helpful thing
25 to the likely litigants to meet in the same

1 courthouse.

2 MR. GEYSER: And --

3 JUSTICE BREYER: And I just want to
4 know, that's their decision, and they think, in
5 other states, the opposite is true. I
6 understand that. And in some states, they think
7 it doesn't matter. So that's what they enact.
8 In other words, they give a choice, and it seems
9 it doesn't -- well, there we are. What do you
10 think of that?

11 MR. GEYSER: I -- I think it's a
12 non-uniform choice.

13 JUSTICE BREYER: Non-uniform. Okay.

14 MR. GEYSER: I mean --

15 JUSTICE BREYER: So now we're going to
16 have to go street by street? They can have -- I
17 mean, I don't know the implications of your
18 argument.

19 MR. GEYSER: It will --

20 JUSTICE BREYER: What's the furthest
21 you've ever found in any case which says this is
22 too non-uniform, it violates the clause?

23 MR. GEYSER: Well, first, Your Honor,
24 I just want to be very clear that the -- the law
25 that you're talking about may or may not be the

1 law on the subject of bankruptcies if it's just
2 simply saying that where judges happen to meet,
3 whether it involves bankruptcy or not or
4 something like that.

5 JUSTICE BREYER: I'm not -- I'm not --
6 I understand my example is not perfect. What
7 I'd like to know is, what case have you found
8 that in your opinion goes the farthest in saying
9 something is non-uniform in the bankruptcy area
10 and, therefore, unconstitutional?

11 MR. GEYSER: Well, this Court has
12 only -- and admittedly struck down one law for
13 being in violation of the uniformity provision.
14 That's because Congress normally doesn't create
15 different bankruptcy systems for different parts
16 of the country.

17 JUSTICE BREYER: The law in which we
18 struck it down, the non-uniformity was what?

19 MR. GEYSER: It was a law that singled
20 out a certain railroad for special treatment.
21 Now -- but the important thing is the Court's
22 rationale in doing that, unlike what my friend
23 says, was not that it was like a bill of
24 attainder. Congress looked and said that there
25 are similarly situated debtors that looked the

1 same in every relevant respect who are not
2 covered by this exception for this single
3 railroad and said Congress can't do that.

4 And if you look to that case and the
5 Gibbons case and then Ptasynski, which is in the
6 tax context, but this Court has said that you
7 look at the uniformity provisions in a similar
8 way. This Court always asks, is there a
9 material, relevant distinction that justifies
10 Congress dividing lines between debtors?

11 And we're not saying there aren't hard
12 cases and there aren't going to be some
13 questions that push the edges of what falls
14 within the subject of bankruptcy or what might
15 be uniform or not. But this is a very easy one.

16 This is, again, a bankruptcy fee.
17 It's dividing up the bankruptcy estate. Money
18 is going to the trustee instead of creditors
19 based on an act of Congress that is saying
20 debtors who file bankruptcy in two states and
21 only two states must pay this fee while the
22 debtors in 48 -- or, I'm sorry, in the 48 states
23 must pay it, while the debtors in two have the
24 option of paying it or not.

25 CHIEF JUSTICE ROBERTS: What -- what

1 exactly was the concern at the time of the
2 framing that led the framers to put this clause
3 in the Constitution?

4 MR. GEYSER: The -- the Court in
5 Gibbons noted that there was very meager
6 discussion of why this was placed in there. But
7 the Court in -- in Gibbons and in *Ptasynski*,
8 looking, again, at both the tax context and at
9 the bankruptcy context and comparing the two,
10 said one concern is regionalism. It's the
11 concern that Congress can treat different
12 regions of the country in different ways and can
13 give favorable treatment to some states and not
14 others. And that's exactly the type of concern
15 that could arise with a law like this.

16 CHIEF JUSTICE ROBERTS: But, I mean,
17 was there an actual, I don't know, a particular
18 episode or was there a particular concern? Was
19 one region of the country more likely to have a
20 bunch of people going bankrupt as opposed to
21 another or --

22 MR. GEYSER: No, Your Honor, and,
23 again, this is -- the Bankruptcy Clause sort of
24 stands out for the lack of discussion. The way
25 the Fifth Circuit framed it is it's sort of

1 ironic that something that was so
2 uncontroversial at the time now is a pretty
3 great controversy because there's so little
4 commentary about what it meant.

5 But I do think the clause is clear on
6 its face. A uniform law throughout the United
7 States can't possibly mean a system where two
8 states have differential treatment and 48 states
9 have a different rule.

10 JUSTICE SOTOMAYOR: Counsel, I -- I --
11 I'm having a difficulty because you're trying to
12 establish a broad rule in a situation that I
13 don't think lends itself to it given our case
14 law.

15 So we know regional differences can
16 exist, and you accept that. You -- you accept
17 that if Congress permits the 50 states to set
18 their own fees based on their own needs, that's
19 okay, correct?

20 MR. GEYSER: That's correct if it's --

21 JUSTICE SOTOMAYOR: And we've also
22 said that where Congress enacts geographically
23 limited laws when responding to a geographically
24 limited problem, that's okay too. That was the
25 Railroad Reorganization Act, correct?

1 MR. GEYSER: That -- that's right.

2 JUSTICE SOTOMAYOR: So we don't want
3 to announce a rule that says your laws have to
4 be uniform all the time because there may be
5 some rational basis to create a difference,
6 correct?

7 MR. GEYSER: That -- that's right,
8 Your Honor. But --

9 JUSTICE SOTOMAYOR: All right. Now
10 let me stop. I think where the problem is
11 here -- and I understand the gut feeling, okay?
12 The gut feeling is what you shouldn't be able to
13 do is to say this state is going to let the
14 taxpayers pay for something, and the other 48
15 states don't have that choice. That's your
16 problem, isn't it?

17 MR. GEYSER: It's that problem plus
18 the arbitrariness of the initial division.

19 JUSTICE SOTOMAYOR: I -- I understand,
20 but you see what my problem with that is, that I
21 don't see why Congress can't say you can have
22 different systems in some places with respect to
23 others where it's not the taxpayers paying. If
24 this system stands and we just strike down the
25 fee difference, then I don't see why we couldn't

1 keep this going on forever?

2 MR. GEYSER: Well, I -- and I think
3 you debatably could. And just to be very clear,
4 we do think that the original division is
5 unconstitutional because it is non-uniform.

6 Now I don't -- I'm not sure the
7 original division, absent fees, creates any
8 Article III injury for any debtor because the
9 programs are so similar. But, once you attach
10 the fee on top of it, now you have identically
11 situated debtors that look exactly the same who
12 are being prejudiced because they filed
13 bankruptcy in one of 48 states.

14 JUSTICE SOTOMAYOR: You see, I just
15 don't want to write a decision that says
16 Congress couldn't do what it did here, which is
17 to have eight states experiment with this
18 different system to see if it worked or not and
19 then decide it's a better system than we have
20 and create it generally and let some people keep
21 the old system.

22 What I have a problem with is creating
23 a system permanently that lets the taxpayers
24 assume costs for two states but don't give the
25 other 48 a choice.

1 MR. GEYSER: And I think you could
2 write a narrow decision that addresses the
3 current situation that leaves aside whether
4 Congress does have any freedom to experiment --

5 JUSTICE SOTOMAYOR: All right.

6 MR. GEYSER: -- in this area.

7 JUSTICE SOTOMAYOR: May I ask you one
8 final question, which is you assume that we have
9 to level up and give you the choice of paying
10 less money, but I don't know what
11 constitutionally in our case law requires us to
12 give you that remedy, meaning we've also said
13 that if Congress -- if we think Congress wants
14 us to level down, we should. And, here,
15 Congress has given us a clear indication it
16 wants leveling down. It told the -- the court
17 system you have to level down. You have to
18 raise the fee. Correct?

19 MR. GEYSER: No. No, Your Honor. And
20 -- and just to be very clear about this, I think
21 Congress has indicated the opposite. When
22 Congress changed the word "may" to "shall" to --

23 JUSTICE SOTOMAYOR: Yes.

24 MR. GEYSER: -- to ensure going
25 forward that there will be uniform treatment,

1 which shows how easy it is for Congress to have
2 not done this in the first place, Congress made
3 that change prospective only. Congress was
4 aware of the constitutional challenges. There
5 were courts that had already struck down the
6 2017 Act as unconstitutional. Congress could
7 have said: Ah, this always should --

8 JUSTICE KAVANAUGH: But --

9 MR. GEYSER: -- have been that way.
10 Everyone who hasn't paid now needs to pay.

11 JUSTICE KAVANAUGH: -- Con- --

12 MR. GEYSER: They made the opposite
13 determination and let the --

14 JUSTICE SOTOMAYOR: Please answer --

15 JUSTICE KAVANAUGH: Congress --

16 JUSTICE SOTOMAYOR: Oh, I'm sorry.

17 JUSTICE KAVANAUGH: I want to make
18 sure you're finished. But Congress was
19 operating at that point under the understanding
20 of what the Judicial Conference had done,
21 though, which was to raise the fees in those
22 other districts.

23 MR. GEYSER: Raise the fees but
24 prospectively only, which -- which actually --

25 JUSTICE KAVANAUGH: Starting in the

1 third quarter of 2018, right? And Congress then
2 acts in 2020 and accepts those raised fees and
3 says, in the text of the statute, right, that
4 this confirms the long-standing intention of
5 Congress that the quarterly fee requirements
6 remain consistent. And that's at the time when
7 the Judicial Conference has already acted,
8 correct?

9 MR. GEYSER: Already acted but, again,
10 just to be very clear, and said that any case
11 going forward that's filed after the Judicial
12 Conference act. So any -- any debtor in the two
13 states that filed in September of 2018, they
14 didn't have to pay increased fees for that
15 entire period.

16 JUSTICE KAVANAUGH: Just on this
17 remedy point more generally, what are we to make
18 of that this seems to have been a mistake,
19 right? So starting when the standing order went
20 into place, the fees were the same, right? And
21 then the new Act in 2017 elevates the fees in
22 the districts that are subject to the standing
23 order of the Judicial Conference kind of late to
24 the game. And then they -- that's corrected,
25 what, nine months later. And then Congress

1 comes in and -- and says, yeah, that's right.

2 I mean, that seems a strange situation
3 if we take our case law on looking for what
4 Congress would have intended -- if we take that,
5 it seems a strange case to order refunds rather
6 than to require additional payments.

7 MR. GEYSER: Well, I -- I don't think
8 so, Your Honor. And to be very clear, it wasn't
9 a mistake. Congress chose the word "may" when
10 it added (a)(7).

11 May I finish?

12 CHIEF JUSTICE ROBERTS: Sure.

13 MR. GEYSER: Congress chose the word
14 "may." This is directed to the Judicial
15 Conference. That was the audience of (a)(7).
16 And the Judicial Conference understood from the
17 start it had discretionary authority to act or
18 not. It reminded Congress of this periodically,
19 including in 2007 when Congress tinkered with
20 the fees. It said we will likely match the
21 fees.

22 JUSTICE KAVANAUGH: But -- maybe I'm
23 cutting into my next time. Sorry. After the
24 Ninth Circuit decision, though, then this all
25 gets fixed through a combination of actions.

1 Fixed you might dispute. But it becomes even,
2 the fees that are going to be paid in the -- the
3 various districts, no?

4 MR. GEYSER: No, and just to be very
5 clear, when the Ninth Circuit acted, there were
6 no fees in the bankruptcy administrator
7 districts.

8 JUSTICE KAVANAUGH: Right.

9 MR. GEYSER: But Congress's so-called
10 fix was to create a non-uniform system again
11 that said that, in the 48 states, the fees are
12 mandatory; in the two states, it's entirely
13 discretionary.

14 And it's unclear why Congress did
15 that. They shouldn't have. But the word "may"
16 doesn't mean "shall," especially in a statute
17 that contrasts the two.

18 JUSTICE KAVANAUGH: Well, just in --
19 am I correct, in 2001, the Judicial Conference
20 issued a standing order saying that the fees
21 shall be the same?

22 MR. GEYSER: They -- they did, and it
23 was also clear --

24 JUSTICE KAVANAUGH: Okay. From 2001
25 to 2018, they're the same?

1 MR. GEYSER: They -- they were the
2 same. But, again, it could be --

3 JUSTICE KAVANAUGH: And then, in 2017,
4 Congress had passed a new law raising them, but
5 those other districts were kind of, like I said
6 before, behind, and it didn't get changed until
7 the third quarter of 2018?

8 MR. GEYSER: Well, I -- I think two
9 key points, though.

10 The first is that in 2007, the
11 Judicial Conference told Congress when Congress
12 was tinkering with the fees a little bit that it
13 would likely match them. So Congress knew and
14 the Judicial Conference told Congress that they
15 have discretion and they may or may not act
16 consistent with the way they've acted in the
17 past.

18 And in 2017, this was such a drastic
19 increase in fees, this is the first time that
20 the Judicial Conference would say: Wait a
21 minute, maybe we should exercise our discretion
22 and depart from past practice in making the fees
23 equal.

24 Congress in 2020 had to take away that
25 discretion to ensure uniformity going forward,

1 which is what they should have done in 2017 but
2 didn't.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas?

6 Justice Breyer, anything further?

7 JUSTICE ALITO: What legal standard do
8 you think governs this issue of leveling up or
9 leveling down, as Justice Sotomayor put it?

10 MR. GEYSER: I think that there are --
11 there are two ways to look at it. One is that
12 you first have to ask, are you equalizing the
13 treatment in the relevant period? And so you
14 have to find a viable option that could
15 actually, looking backward, make sure that the
16 same debtors were paying the same fees as their
17 counterparts in other districts.

18 Then, from that point, if you've
19 identified a viable option, then it is what
20 would Congress likely want to do. The problem
21 here is that Congress looking back has to say we
22 need to unscramble the egg of, you know,
23 three-plus years of possibly closed bankruptcies
24 and track down the creditors and professionals
25 and administrators, you know, in -- in hundreds

1 of bankruptcies to figure out a way to claw back
2 the funds, assuming that's even constitutionally
3 permissible.

4 So, if Congress doesn't have that as a
5 viable option, then the only choice is to
6 actually give the favored treatment to the
7 people who were charged too much.

8 JUSTICE ALITO: Okay. So that is your
9 argument. You think it's what Congress would
10 likely do. There's another argument. There's
11 the argument that -- excuse me -- you challenged
12 the fee that was assessed against you, and,
13 therefore, if that's unconstitutional, you win,
14 end of the game. You don't have to get into
15 what Congress intended.

16 But that's not your argument?

17 MR. GEYSER: I -- I -- I would -- I
18 wish that could be our argument. We would love
19 just to have the automatic right to fees, but I
20 do think, consistent with this Court's cases, if
21 there is a way to equalize the treatment --
22 because our constitutional injury isn't
23 necessarily that we paid -- just that we paid a
24 high fee. It's that we paid a non-uniform fee.
25 So the remedy just has to correct the

1 uniformity.

2 The problem is the government doesn't
3 have a viable option that's anything other than
4 giving us back the money.

5 CHIEF JUSTICE ROBERTS: Justice
6 Sotomayor, anything further?

7 JUSTICE SOTOMAYOR: No, thank you.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

9 JUSTICE KAGAN: Well, this idea that
10 Congress doesn't have a viable option, do we
11 have to think about that through Congress's
12 eyes, or is that a question for us? In other
13 words, is there a viable option? If there's not
14 a viable option, we can't tell anybody to claw
15 back the fees because it's not going to happen,
16 and then the inequality won't be remedied.

17 So is that a "what would Congress have
18 done" question, or is that a question at what
19 you described as the first stage of the
20 analysis?

21 MR. GEYSER: I -- I -- I think -- I
22 think they overlap a little bit in the sense
23 that this Court first has to ask, is this
24 something that can actually be done? Is this a
25 permissible choice from a legal standpoint?

1 Because, if this would create, for
2 example, a due process problem by -- by having
3 these drastic impositions on absolutely
4 completed conduct, where everyone relied on not
5 having to pay these fees in deciding how to
6 structure a basic bankruptcy plan, then that's
7 not even a choice that Congress can make.

8 And that's a determination this Court
9 can do. It -- assuming the Court thinks it is a
10 viable option, the Court can still --

11 JUSTICE KAGAN: A viable option
12 legally?

13 MR. GEYSER: Legally, exactly. Then
14 -- then the Court can take into account, though,
15 is this such a mess that it's implausible that
16 any rational legislator would choose this?

17 But, again, I think this is easy here
18 for the Court because Congress looked at this
19 problem in 2020 and decided to impose the
20 increase prospectively.

21 JUSTICE KAGAN: And -- and -- and as I
22 understand some of our tax cases and some of our
23 tax cases where we've had this kind of "shall we
24 level up, shall we level down" question, we've
25 basically just said let the government decide

1 which one it wants to do. So why isn't that an
2 appropriate analogue?

3 MR. GEYSER: I -- I think in -- in --
4 most of this Court's tax cases involved state
5 taxes, and so there was an element of federalism
6 in not having the federal court dictate for the
7 state government what it would do or wouldn't
8 do.

9 Here, we actually have -- we're --
10 we're in the federal system itself, so I think
11 the Court can be a -- a little more assertive in
12 looking and saying what would Congress do and
13 what's permissible to -- to do.

14 But even in the state context, the
15 Court does ask, is there a viable option to
16 equalize treatment looking backwards? And if
17 there isn't, then the state doesn't have the
18 choice. They simply have to refund the fees.

19 And the presumption, by the way, is
20 that the successful plaintiff does get their
21 money back, not that they ruin someone else's
22 day by forcing the state government to kind of
23 track down other people to -- to impose
24 disfavored treatment.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

2 JUSTICE KAVANAUGH: And the total
3 amount, though, that you're saying Congress
4 would want to sacrifice for this is 324 million,
5 and you think that's what Congress would want to
6 do?

7 MR. GEYSER: The -- the government has
8 said there's \$324 million at stake. We actually
9 don't know. We haven't seen the citation
10 that -- that supports that.

11 What we do know is that the -- the
12 balance in the U.S. Trustee fund right now, I
13 think, could probably cover the full refunds,
14 which just means that the money would go back to
15 the people who were wrongly told to pay it, in
16 which case I -- I do think that that's a pretty
17 fair solution for this problem.

18 JUSTICE KAVANAUGH: And then picking
19 up on Justice Kagan's question, the government
20 in its last footnote, Footnote 7, says basically
21 punt this to the -- to the Judicial Conference
22 and let them sort out trying to, in essence,
23 claw back some of the fees where that's still
24 possible.

25 Suppose that is possible in some cases

1 but not all cases. Then what?

2 MR. GEYSER: This Court has said that
3 the remedy doesn't have to be strictly perfect.
4 You can't have a situation where they earnestly
5 try and they do a really good job and collect
6 98 percent of the fees, but the 2 percent that's
7 remaining then ends up blowing up the whole
8 system.

9 But I think you would have to look and
10 say, is this a good -- could through a good
11 faith effort of truly trying to claw back all
12 the fees, is that something the government could
13 realistically do.

14 And I think it's notable that the
15 government sort of tepidly suggests this is even
16 a possible solution. Their main arguments are
17 that it's perfectly fine to correct problems
18 going forward and to leave the non-uniform
19 treatment in place in the past.

20 And I think that's a pretty telling
21 indication of the government speaking out of its
22 own self-interest and not in a manner that
23 actually remedies a constitutional wrong.

24 JUSTICE KAVANAUGH: Last quick
25 question. Do you accept Morales-Santana as the

1 appropriate inquiry?

2 MR. GEYSER: Yes and no, Your Honor.
3 Yes in the sense that you do ask how would
4 Congress want to fix unequal treatment. No in
5 that Morales-Santana was looking for prospective
6 relief only.

7 JUSTICE KAVANAUGH: Got it.

8 MR. GEYSER: So it's a much easier
9 case.

10 JUSTICE KAVANAUGH: Got it.

11 MR. GEYSER: We're -- we're only
12 talking about retrospective backward-looking
13 relief.

14 JUSTICE KAVANAUGH: Thank you.

15 JUSTICE SOTOMAYOR: Counsel --

16 CHIEF JUSTICE ROBERTS: Just --

17 JUSTICE SOTOMAYOR: -- may I, just one
18 question?

19 CHIEF JUSTICE ROBERTS: Sure.

20 JUSTICE SOTOMAYOR: Counsel, on this
21 issue, does the point at which you object make
22 any difference? Meaning you paid this fee for a
23 year. You then went in and objected and asked
24 the court below to stay your pay.

25 I don't know how many other debtors

1 did that? Does that enter into this calculus of
2 the 324 million? I mean, I'm assuming some
3 debtors' cases have been closed and they've paid
4 the fee. Why should they now -- why should we
5 upset that apple cart?

6 MR. GEYSER: And -- and the Court may
7 not have to. I mean, we're -- we're not a class
8 action. We're an individual debtor action. We
9 objected. And we -- we'd like the -- the money
10 back that we shouldn't pay.

11 We're not saying the government can't
12 assert waiver and forfeiture and oppose opening
13 cases. Those are questions for those other
14 debtors in those other cases, and they really
15 don't affect the proper inquiry here.

16 JUSTICE SOTOMAYOR: So, if we said
17 claw back, if we left it open for the court
18 below to decide each case individually, why is
19 that wrong?

20 MR. GEYSER: I -- I think the Court
21 could try that. Now I -- I -- just full candor,
22 I do think that in terms of structuring the
23 remedy of what would the legislature want,
24 that's a question that debatably applies more on
25 a global level.

1 JUSTICE SOTOMAYOR: I agree.

2 MR. GEYSER: But -- but, yeah, I don't
3 think there's anything that prevents this Court
4 from saying we objected, we have fees that we
5 would like back, we have an open case.

6 And the proper constitutional remedy
7 is to equalize the treatment by having us pay
8 the lower fees. And any other debtor has to
9 litigate on -- on their own terms based on their
10 own procedural posture.

11 JUSTICE SOTOMAYOR: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett?

14 JUSTICE BARRETT: Just a very small
15 clarification to an answer you gave Justice
16 Kagan. When she asked you about the analogy to
17 the tax context, you said, well, because of
18 federalism, you know, the Court is more
19 deferential, but we can be more assertive here
20 because we're in the federal system.

21 Do we have to be more assertive here?
22 It seems attractive and a lot of the questions
23 have assumed that maybe it's best to let --
24 if -- if -- assuming we agree with you on the
25 merits, that it would be best to let either the

1 lower courts, the Judicial Conference sort this
2 out.

3 MR. GEYSER: Well, we -- we hope you
4 do agree with us on the merits. I think, if the
5 Court would like to remand to the lower courts
6 to sort out the remedy question, that's
7 certainly an option.

8 But I -- what I was really trying to
9 say and just not as artfully as I should have is
10 that you don't have the added dynamic of a
11 federal court instructing a state government
12 about a state policy question.

13 So that -- that is at least removed
14 and off the table. And I do think this Court
15 can look and apply the same framework it's
16 applied in the other cases and say, is this
17 something that a rational legislative body would
18 try to do, again, especially in light of the
19 congressional determination in 2020 not to do
20 this, and not impose retroactive fees when they
21 easily could have.

22 JUSTICE BARRETT: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 MR. GEYSER: Thank you.

1 CHIEF JUSTICE ROBERTS: Mr. Gannon.

2 ORAL ARGUMENT OF CURTIS E. GANNON

3 ON BEHALF OF THE RESPONDENT

4 MR. GANNON: Mr. Chief Justice, and
5 may it please the Court:

6 Over the past 35 years, quarterly fees
7 paid by Chapter 11 debtors have sometimes
8 differed across districts, but those differences
9 did not violate the uniformity requirement of
10 the Bankruptcy Clause, as illustrated by the
11 wide variations in fees that were permitted
12 under the first two bankruptcy acts enacted by
13 Congress in 1800 and 1841.

14 Such fees are either not subject to
15 the uniformity requirement or their variation
16 comports with what this Court has called the
17 flexibility inherent in the constitutional
18 provision.

19 In any event, Congress acted to avoid
20 any potential non-uniformity in 2000 by adopting
21 the recommendation of the Judicial Conference to
22 allow the six bankruptcy administrator districts
23 to charge quarterly fees "equal to those
24 imposed" in the 88 U.S. Trustee districts.

25 As Justice Kavanaugh noted, in 2001,

1 the Judicial Conference adopted a standing order
2 directing payment of the quarterly fees in the
3 statutory amounts "as those amounts may be
4 amended from time to time."

5 When Congress amended those amounts in
6 2017, the failure of the bankruptcy
7 administrator districts to implement them in
8 time did not violate the uniformity requirement
9 enclosed on -- imposed on Congress, which asked
10 for equal, not unequal fees.

11 But even if Congress had not requested
12 equal fees, Congress was entitled to respond to
13 a shortfall of funding in the U.S. Trustee
14 program by adopting a trustee-specific solution,
15 and even if there were a constitutional
16 violation because of different fees, the
17 appropriate outcome would not be refunding the
18 increased fees that Congress had required for
19 the districts that accounted for 97 percent of
20 the Chapter 11 filings but an invalidation of
21 the narrow exception for the bankruptcy
22 administrator districts, which Congress has
23 already enacted.

24 That's consistent with this Court's
25 cases about federal remedies in this context.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Mr. Gannon, would
3 you -- do you think the system is uniform to the
4 extent that you have two different -- you have
5 the trustee system and the administrator system
6 that are quite different? Without getting into
7 the fee structure.

8 MR. GANNON: Well, the only -- as
9 Petitioner's counsel noted, the only difference
10 that anyone has asserted that made a difference
11 to any debtor or creditor is the fees. There
12 are two different programs. There have been two
13 different programs in a sense since 1978 when
14 the pilot program was initiated.

15 And then the -- the U.S. Trustee
16 program went almost nationwide in 1986 with the
17 six-district carveout. And so, since then,
18 there have been two programs. And my friend
19 says that that's on the basis of politics and
20 regionalism. But, with respect, I would say
21 that in the 1990s, when the Judicial Conference
22 was asking to preserve the bankruptcy
23 administrator system in the six districts where
24 it existed and the National Bankruptcy Review
25 Commission recommended not to abolish that

1 separate program, that there was a recognition
2 that there were still these two established ways
3 of going about administering those aspects of
4 bankruptcy procedure.

5 And so they are different programs,
6 but we don't think that that difference in
7 administrative assistance to the way the
8 bankruptcy system operates is covered by the
9 uniformity requirements because it is
10 essentially procedural.

11 JUSTICE THOMAS: So what would you
12 consider subject of bankruptcies that is not
13 procedural?

14 MR. GANNON: Well, as my friend said,
15 the Court has acknowledged that it's -- this --
16 this clause is incapable of final definition,
17 but it has always focused on the relations
18 between the debtor and creditors and things like
19 laws that allow -- that cause the debtor's
20 property to be distributed among creditors as --
21 we call -- we call these the substantive --

22 JUSTICE THOMAS: But --

23 MR. GANNON: -- rules of bankruptcy.

24 JUSTICE THOMAS: Well, let's just take
25 that. I think the argument would be that, in

1 this case, the fees -- the amounts that are now
2 going to pay fees would have been distributed,
3 to the extent there were distributions, to
4 creditors.

5 MR. GANNON: Not every law that will
6 have an effect on how much money is left in the
7 pot at the end of the bankruptcy for
8 distribution to creditors can be a law on the
9 subject of bankruptcies.

10 JUSTICE THOMAS: Well, what --

11 MR. GANNON: And we know that because
12 there are other procedural things that would
13 affect how much money is there.

14 If Congress made changes to federal
15 tax law or employee benefit programs, that would
16 affect priority of claims, the order that claims
17 would get paid. If a bankruptcy court withdraws
18 the reference in an individual case so that it
19 doesn't -- a district court withdraws the
20 reference in an individual case so it doesn't
21 start in bankruptcy court, there's one less set
22 of appellate filing fees that will have to get
23 paid. If somebody wants to appeal to the court
24 of appeals, they won't have to go through the
25 bankruptcy -- from the bankruptcy court to the

1 district court or through a bankruptcy appellate
2 panel before they get to the court of appeals.

3 There are other ways. The state
4 exemption law that the Court upheld in *Moyses*
5 varies state by state. That affects how much
6 money is going to be available in the pot.
7 Nobody thinks that those are laws on the subject
8 of bankruptcies that can't be changed in a way
9 that -- that is covered by -- you know, that
10 those aren't covered by the uniformity
11 requirement.

12 JUSTICE KAGAN: But this is a top-down
13 imposition of a fee structure that predictably
14 can't help but disadvantage both debtors and
15 creditors in two states -- in 48 states as
16 compared to two states.

17 Now, you know, why -- bankruptcies are
18 going to be different in those 48 states, and
19 they're going to be different by virtue of a
20 congressional decision that's directly related
21 to bankruptcy.

22 MR. GANNON: And I think the same
23 thing was true under the 1800 and 1841 Acts
24 where every district was authorized to --

25 JUSTICE KAGAN: Yeah, I don't think

1 so, Mr. Gannon.

2 MR. GANNON: -- set fees at whatever
3 it wanted to set.

4 JUSTICE KAGAN: I mean, at first, your
5 brief -- I read your brief and I thought, oh,
6 that's pretty convincing. And then it turns out
7 it's not so convincing just because, you know,
8 everybody had that choice and they made a
9 choice. So -- so this is Congress making the --
10 making a choice for 48 states and only giving
11 the choice to two states.

12 MR. GANNON: Well, I -- we also think
13 that Congress then told the Judicial Conference
14 it could authorize equal fees. And the Judicial
15 Conference, which had asked for that authority
16 and received that authority, had implemented
17 that authority. And Congress was acting against
18 that backdrop when it enacted this fee increase
19 after the Judicial Conference had said it would
20 stay in tune and had indeed done so in 2007.

21 And so -- and with respect to this
22 question of the equal choice, my friend keeps
23 saying that as long as the rule gives everyone
24 equal choice, that's uniform. That -- I don't
25 think that makes sense for three reasons.

1 First, dealer's choice is a really
2 peculiar definition of uniformity, and it
3 violates his lead premise, which --

4 JUSTICE KAGAN: It's not peculiar if
5 what you're worried about is regional bias.

6 MR. GANNON: Except his -- it -- it is
7 inconsistent with his premise that
8 indistinguishable debtors should not pay
9 different fees because their bankruptcies arise
10 in different states.

11 And, second, letting each district
12 choose can't be the standard that we would be
13 using for substantive rules of bankruptcy. We
14 wouldn't use that for who can be a debtor, what
15 is the estate, what is the scope of a discharge.
16 And those are all different from the procedural
17 questions that Petitioner is trying to pick off
18 with this particular argument.

19 And, third, I would say that this rule
20 is just upside down, that it makes no sense to
21 say that tolerating greater variations in every
22 district and among every district would be more
23 constitutionally uniform.

24 JUSTICE KAGAN: Well, again, I -- I
25 guess I don't see the -- that point if what

1 you're worried about is regional bias. If what
2 you're worried about is regional bias, then the
3 idea of Congress picking select states for any
4 purpose becomes, you know, something that's
5 right in the heartland of what you're worried
6 about.

7 MR. GANNON: Well, it -- it would if
8 you thought that the uniformity requirement
9 applied to this particular type of rule. And we
10 -- we do have the argument that says that we
11 don't think that this is a substantive rule of
12 bankruptcy even though it can have an effect on
13 how much money is left in the pot and a
14 predictable effect.

15 And that's true for lots of other laws
16 that nobody thinks are substantive laws of
17 bankruptcy or laws on the subject of
18 bankruptcies, as I said, like what are your
19 federal tax obligations, what are your -- you
20 know, what -- what is an employee benefit that
21 you have.

22 And those all have predictable effects
23 on what's going to happen in the bankruptcy, but
24 nobody thinks Congress is legislating about
25 bankruptcy when it amends ERISA.

1 And so -- and then we also have two
2 other arguments. One is that there -- this was
3 still equal and, third, that the -- that there's
4 a separate clause, the Inferior Courts Clause,
5 that would be applicable here.

6 And, finally, that to the extent that
7 you take as the background that there are two
8 programs that had been in existence for 31 years
9 at the request of the Judicial Conference and
10 Congress was entitled to legislate against that
11 backdrop, then it's appropriate, as you and
12 others said during my friend's argument,
13 assuming that Congress can rationally solve the
14 shortfall.

15 And that is solving a geographically
16 isolated problem, which this Court recognized in
17 Gibbons and in the Regional Railroad
18 Reorganization cases is something that the
19 Uniformity Clause allows it to do.

20 JUSTICE BARRETT: But, Mr. Gannon --

21 JUSTICE KAVANAUGH: What --

22 JUSTICE BARRETT: -- those examples
23 that you give of, say, ERISA, what are your
24 federal tax obligations, those aren't plausible
25 exercises of the bankruptcy power, right?

1 MR. GANNON: They are not. I mean,
2 they could be to the extent that they have
3 predictable effects on bankruptcy. If I -- if I
4 understand my friend to say that if this is
5 going to affect how much money there is here,
6 that's a law on the subject of bankruptcy.

7 And our argument is that there are
8 things that Congress legislates with respect to
9 the bankruptcy system that are definitely laws
10 on the subject of bankruptcies, the substantive
11 rules of bankruptcy. Those are all subject to
12 the uniformity requirement.

13 There are other things Congress has
14 the power to do either as necessary and proper
15 to that or as necessary and proper to saying
16 we've decided we're going to run bankruptcy
17 through inferior courts. We're not going to
18 have it go through an independent agency or some
19 part of the executive branch. And --

20 JUSTICE BARRETT: So facial
21 uniformity, just to be sure I'm -- I'm following
22 this, the facial uniformity requirement applies,
23 in your view, only to what you're describing as
24 substantive bankruptcy regulations like priority
25 for creditors?

1 MR. GANNON: The -- the rules that
2 govern relations between creditors and debtors
3 -- creditors and debtors and things like
4 distribution of the property of the estate, yes.
5 Those are -- those are the substantive rules of
6 bankruptcy and not procedural aspects that --
7 that there have been lots of variations.

8 And the idea that you can't have a
9 pilot program in some districts to test out some
10 procedure, now I don't think that somebody would
11 say we're going to try out a new version of
12 Chapter 11.5 on a trial run --

13 JUSTICE BARRETT: Well, I understand.

14 MR. GANNON: -- in a handful of
15 districts.

16 JUSTICE BARRETT: But that means that
17 your argument really is -- it's -- it's much
18 more important to your argument to distinguish
19 between core bankruptcy power, the substantive
20 law of bankruptcy and bankruptcy administration
21 than, you know, in response to Justice Kagan,
22 you were talking about what I take to be the
23 differences between formal and functional
24 uniformity, saying that your friend on the other
25 side, insofar as he emphasizes the formality of

1 a law that gives all regions a choice, you say,
2 well, that's -- that undermines the point of
3 bankruptcy, that's a funny view of uniformity
4 because it would allow for a lot of
5 disuniformity.

6 But that functional view really
7 doesn't matter if the uniformity requirement
8 doesn't apply to so-called bankruptcy
9 administration.

10 MR. GANNON: Well, it would matter, I
11 think, to -- to my friend's attempt to
12 distinguish the 1840 and 18 -- 1800 and 1841
13 Acts and other procedural requirement -- other
14 procedural variations that happen under the
15 Bankruptcy Code today, that there can be
16 bankruptcy appellate panels, there can be
17 referrals to district -- from district courts to
18 bankruptcy judges. There are all sorts of
19 different variations that occur.

20 And those have all been understood, I
21 think, as being not the substantive rules of
22 bankruptcy and, therefore, not covered by the
23 uniformity requirement.

24 And I'm saying that this -- this
25 attempts to say, well, it's a uniform standard

1 because everyone gets equal choice, I don't
2 think, can be the rule that the Court would use
3 as the uniformity standard for everything in
4 bankruptcy because you would not tolerate that
5 for something like who can the debtor -- who can
6 be a debtor who files for bankruptcy.

7 CHIEF JUSTICE ROBERTS: And --

8 MR. GANNON: Well, let every district
9 decide not -- not in an individual court in an
10 individual case, but let each district decide
11 what its rule for who can be a debtor who files
12 a bankruptcy petition can be.

13 JUSTICE BREYER: Well, there are a lot
14 of things. I -- I mean, I'm probably agreeing
15 with you, but, I mean, in Congress, there are
16 dozens of things. Come on, this is going to be
17 National Pork Week, you know, and every state
18 has their choice, but you write it, it's
19 National Pork Week for everybody. Anyone want
20 an exception? Anyone who wants an exception
21 comes in, you give them an exception.

22 Okay. I don't really see the
23 difference between saying "may," at least as
24 applied to an awful lot of things that I've had
25 experience with, and saying don't worry,

1 everyone has to do it unless you want an
2 exception as long as there's knowledge.

3 Now what worries me about applying
4 that, what I think is how things work to this
5 is, well, maybe this was done by the Judicial
6 Conference and maybe that makes it different.

7 MR. GANNON: Well, we do think here
8 that it matters that we're dealing with multiple
9 statutes. Congress initially created the -- the
10 two different programs.

11 JUSTICE BREYER: I understand. But, I
12 mean, would the Judicial Conference -- I mean,
13 I've been in a number of bodies which do decide
14 things that way. Sure, I'll skip the name, what
15 they were, but does the Judicial Conference
16 sometimes work that way?

17 We want a rule here. Oh, anybody
18 wants an exception to a procedural rule, if you
19 want an exception, say so. If not, you're going
20 to be stuck with the general rule. Now, if it's
21 well represented, they'll say so.

22 MR. GANNON: Well, and, Justice
23 Breyer --

24 JUSTICE BREYER: But I don't know if
25 that works that way in the Judicial Conference

1 or not.

2 MR. GANNON: Well, I mean, I think,
3 here, my friend points out that the choice here
4 was Congress's. But I think you're making the
5 point that at the time when the pilot program
6 finished, Congress was looking at the evidence
7 that it had about how successful the pilot
8 program was and it heard from representatives
9 from two states, one of which had participated
10 in the pilot program and didn't like it.

11 The bench and the bar said that we --
12 we prefer not to be subject to the U.S.
13 Trustees, and Congress deferred to that choice,
14 at least for a temporary period, and also did
15 that for another district.

16 My friend says, as long as Congress
17 would have left that option open for every
18 district in perpetuity, that would be fine.

19 I think, effectively, what -- what
20 Congress did was said, well, you know, we've
21 looked. Who -- who doesn't want to join now?
22 And we've concluded that there can be these two
23 different programs and that will be fine.

24 And by the time the Ninth Circuit
25 ruled in the mid-1990s that there was a

1 potential uniformity problem with that, the
2 Judicial Conference was defending the existence
3 of the two programs.

4 JUSTICE KAGAN: So, Mr. Gannon --

5 MR. GANNON: And Congress --

6 JUSTICE KAGAN: -- I mean, suppose --
7 let me give you a hypothetical, and it's just
8 going to be a single statute, so you'll have to
9 save your two-statute argument.

10 But it's a single statute, and it says
11 we're going to pick four states and they just so
12 happen to be the states of, you know, the chair
13 and the ranking member of the relevant
14 committees in the House and the Senate. We're
15 going to pick those four states and we're going
16 to give them a system in which, you know, fees
17 are a tenth of what they are everywhere else.

18 So, if you're a debtor, if you're a
19 creditor in those four states, it's a magnet --
20 you know, it's a very, very large difference in
21 terms of how the bankruptcy estate comes out and
22 how it gets divided up.

23 Would that be appropriate?

24 MR. GANNON: Well, I -- I think that
25 to the extent that fees aren't included in the

1 uniformity requirement, it wouldn't be a
2 uniformity violation. If it's an irrational
3 change --

4 JUSTICE KAGAN: Well, I just -- I gave
5 --

6 MR. GANNON: -- then maybe it's
7 subject to some sort --

8 JUSTICE KAGAN: -- I just gave you the
9 hypothetical.

10 MR. GANNON: Yes.

11 JUSTICE KAGAN: They -- they pick
12 these four states for political reasons, nothing
13 to do with any geographical conditions on the
14 ground.

15 MR. GANNON: Understood. And our --
16 our first argument is that to the extent that
17 it's just about fees, that that is not subject
18 to the uniformity requirement. That is a
19 procedural thing that isn't covered by the
20 uniformity requirement. Congress can make
21 distinctions.

22 JUSTICE KAGAN: Even though every
23 creditor --

24 MR. GANNON: To the extent that this
25 is --

1 JUSTICE KAGAN: -- and every debtor --

2 MR. GANNON: To the extent that this
3 is --

4 JUSTICE KAGAN: -- would rather be in
5 these four states?

6 MR. GANNON: To the extent that this
7 is a geographic distinction that you think would
8 be covered by the Uniformity Clause, then we
9 think the question would be whether that is a
10 rational geographic -- geographical distinction.
11 And that's -- that's what the Court allowed in
12 Gibbons and the Regional Railroad Reorganization
13 Act cases and --

14 JUSTICE KAGAN: Well, so far, you
15 haven't really given a reason why this is
16 rational.

17 MR. GANNON: This is rational if you
18 take as given that there are two programs
19 because they had existed for three decades at
20 the time the fee increase was enacted.

21 And I don't think that Congress
22 couldn't rely --

23 JUSTICE KAGAN: So that's the
24 two-statute argument.

25 MR. GANNON: Understood.

1 JUSTICE KAGAN: But the two-statute
2 argument is -- that seems peculiar, that you
3 couldn't do it in one statute, but you can kind
4 of divide it up --

5 MR. GANNON: It would be -- it would
6 be --

7 JUSTICE KAGAN: -- so that you can
8 circumvent any uniformity limitation.

9 MR. GANNON: If -- if Petitioner
10 had -- would -- had preserved the challenge to
11 the underlying system, the two programs, and
12 they were done at the same time and there was
13 therefore no other justification Congress would
14 have other than the fact that -- that it -- it
15 wanted to exempt six districts, then I think it
16 would be susceptible to that -- that argument.

17 JUSTICE BARRETT: What if there were
18 no Article III injury to -- to test that?
19 Remember, he said it wasn't clear that anybody
20 could have challenged the initial division
21 because it's not clear that any --

22 MR. GANNON: Well, actually, that's --
23 that's not true because there was a challenge
24 because there were no fees in the bankruptcy
25 administrator districts until 2002. Congress

1 had to authorize the bankruptcy administrator
2 districts to charge fees, and it did so
3 precisely to avoid this potential constitutional
4 challenge.

5 The Ninth Circuit had --

6 JUSTICE GORSUCH: Mr. Gannon --

7 MR. GANNON: -- sustained a challenge

8 --

9 JUSTICE GORSUCH: -- I thought you --

10 MR. GANNON: -- in 19 --

11 JUSTICE GORSUCH: -- I thought earlier

12 you said that -- that there was no

13 constitutional injury between the two systems

14 but for the difference in fees.

15 MR. GANNON: That's correct. And I'm

16 saying in response to Justice Barrett that there

17 was a difference in fees with the --

18 JUSTICE GORSUCH: It's the difference

19 in fees that creates the injury there.

20 MR. GANNON: Between 1986 and 2001.

21 JUSTICE GORSUCH: Okay.

22 MR. GANNON: And then again for the

23 13-quarter period that got stranded --

24 JUSTICE GORSUCH: Yeah. Okay.

25 MR. GANNON: -- by the delay in

1 implementation after the 2017 Act.

2 JUSTICE GORSUCH: Then I've got a
3 different question for you on remedies, okay?
4 We have -- we have two options here remedially
5 for backward-looking relief, and let's confine
6 ourselves to that discussion for a moment, claw
7 back or refunds.

8 On the clawback argument, your friend
9 on the other side says, well, there are really
10 two problems. One is maybe a legal problem, a
11 constitutional problem, retroactive --
12 retroactive lawmaking, which is subject to
13 heightened scrutiny in this Court, and second is
14 just a practical problem that a lot of these
15 cases are closed.

16 And then, on the other side, he says,
17 for purposes of refunds, it's just going to be
18 limited to the people who've actually made a
19 complaint. As Justice Sotomayor pointed out,
20 you've got to -- you've got to file a complaint
21 to get your money.

22 And so it may not be that much.
23 And -- and we don't know where your figure of
24 300-some-odd million dollars comes from.

25 Would you care to address those

1 points?

2 MR. GANNON: Sure. I -- I -- I do
3 think, to the extent that he acknowledges that
4 somebody -- some people might not be able to
5 claim their refund or might not claim their
6 refund at this point, that proves that that's
7 not going to be a complete equalization remedy
8 retrospectively by their --

9 JUSTICE GORSUCH: Well, at least for
10 those who complain. I mean --

11 MR. GANNON: That's true. But to the
12 extent that the argument here --

13 JUSTICE GORSUCH: There's always
14 somebody who doesn't complain, I mean --

15 MR. GANNON: Yes, but --

16 JUSTICE GORSUCH: -- and who doesn't
17 file a lawsuit for an injury. So that -- that
18 doesn't work, okay, so let's move on from that.

19 MR. GANNON: But the \$324 million
20 figure is calculated by figuring out which
21 debtors in the U.S. Trustee program districts
22 paid the heightened fee that was associated with
23 at least a million dollars of disbursements in a
24 quarter for any of the 13 quarters --

25 JUSTICE GORSUCH: Right.

1 MR. GANNON: -- in which there was a
2 disparity.

3 JUSTICE GORSUCH: It's the whole
4 universe. It could be up to \$324 million.

5 MR. GANNON: It -- it would be up to
6 324 million. And then --

7 JUSTICE GORSUCH: But do we have any
8 sense of what it actually would be as to the
9 number of complaints?

10 MR. GANNON: Well, I think there
11 are -- there is a case pending in the Federal
12 Circuit that was -- that was filed as a class
13 action. It wasn't certified as a class. That
14 would be an opt-in class.

15 I don't know. I don't have an actual
16 number on what it would be. But, to go back to
17 your opening assumption here that if you look
18 retrospectively, there are only two remedies, a
19 refund or a clawback, I'd say two other things.

20 JUSTICE GORSUCH: Well, first, could
21 you address the problems with the clawback
22 approach that your colleague has addressed, the
23 legal and the practical ones?

24 MR. GANNON: Yeah, I would say that
25 the -- that there could be a -- a -- a clawback

1 remedy in the sense that if this Court were to
2 say -- and we think the order of operations is
3 the opposite of what -- of what Petitioner's
4 counsel says.

5 We think that the first question the
6 Court needs to be asking here is, what would
7 Congress have wanted to do here?

8 JUSTICE GORSUCH: Can you just answer
9 my -- my -- my question, though, Mr. Gannon?
10 You know, what's -- what -- there are two
11 problems with the clawback -- I'm going to keep
12 repeating it until you answer it, okay? There
13 are two problems with the clawback that your
14 colleague has identified. One is legal and the
15 other is practical.

16 Could you address those? And then you
17 can say whatever the heck else you want to say.

18 MR. GANNON: And -- I mean, the legal
19 problem, he says there might be some due
20 process-type concerns that would prevent
21 somebody from being charged -- from -- from
22 having to pay this fee after the fact. And I
23 would say perhaps that is true. And that was
24 also true in the other federal cases where we
25 think that there was effectively no

1 retrospective remedy in a circumstance that is
2 like this. And, therefore, I'd -- that's not
3 obviously a legal problem that would prevent the
4 Court from rejecting clawback as a remedy.

5 And then -- so, practically speaking,
6 I don't know -- we think that McKesson shows us
7 that there doesn't have to be a perfect effort,
8 as does even Petitioner's proposed refund
9 remedy. And we also think that, here,
10 Petitioner had a pre-deprivation remedy. He
11 challenged this rule.

12 JUSTICE GORSUCH: Can I just
13 interrupt, though? On -- on the legal point, as
14 I understand it, you say yes, there probably --
15 or there might well be a due process problem
16 here with retroactive legislation, but that
17 doesn't eliminate clawback as a potential
18 remedy. Is that -- is that the gist of the
19 argument?

20 MR. GANNON: The gist of the argument
21 is, Justice Gorsuch, that the three most
22 analogous cases I have are instances where there
23 was effectively no retrospective equalization
24 when the Court was fixing an -- a mistake like
25 this, a disparate treatment problem, when it

1 recognized that the remedy, the proper remedy,
2 was to eliminate the exception that had given a
3 minority of beneficiaries greater benefits.

4 And so one example is
5 Morales-Santana --

6 JUSTICE GORSUCH: What -- what
7 incentive does a litigant have to bring a
8 constitutional complaint if there's no -- no
9 possibility of retrospective relief?

10 MR. GANNON: Well, that happens every
11 time somebody brings a disparate treatment
12 claim, and the Court concludes that the way
13 we're going to equalize the disparate treatment
14 is by eliminating the exception where somebody
15 else was getting a benefit that the plaintiff is
16 seeking and doesn't get.

17 That's what happened in
18 Morales-Santana, where the petitioner was
19 saying, I should be made a U.S. citizen because
20 my father was discriminated against. And the
21 Court said no, you don't get citizenship even
22 though you are a prevailing party in an equal
23 protection case. You proved that the statute
24 was unconstitutional. And the Court invalidated
25 the more generous exception there, and -- and --

1 rather than the more restrictive rule, but it
2 then did not do anything to operationalize that
3 retrospectively. It did not go back and say
4 everybody who had benefitted from the exception
5 has to give their citizenship back.

6 Similarly, in the American Association
7 of Political Consultants case, the Court's
8 remedy there was to invalidate the exception for
9 government debt collection, robo calls, and --
10 but the plurality's opinion specified in
11 Footnote 12 that those who had violated the
12 general prohibition that was in place on robo
13 calls would still remain liable and also
14 acknowledged that notice concerns would prevent
15 those who had been complying with the government
16 debt collection exception, which was now
17 invalidated, they would not be on the hook
18 because of notice concerns.

19 CHIEF JUSTICE ROBERTS: Well, but one
20 thing we --

21 MR. GANNON: But that didn't cause the
22 plurality to say that the -- that the remedy
23 would be to say that that means we have to let
24 everyone else off the hook under the majority
25 rule.

1 CHIEF JUSTICE ROBERTS: Well, one
2 thing we didn't say is, because of that, because
3 of the prospect that you might not actually get
4 anything, that you don't have a case and that we
5 don't go and reach the merits of your case. It
6 just leaves you the option of deciding how you
7 want to go about equalizing the violation that
8 the other side has shown.

9 And you'd say what you -- I don't mean
10 to -- I'd be surprised if the government thought
11 it could go and claw back from all the other
12 debtors the fees that -- claw back rather than
13 equalize by giving back the -- the fees.

14 But, in any event, a lot of the
15 examples you gave of things that you could have
16 disuniformity -- I don't mean to beg the
17 question, but disparate treatment between a
18 particular thing and that's not a violation, or
19 my example about the, you know, computer
20 purchases, that's not a violation.

21 It seems to me that what might make
22 this case different is that you're dealing with
23 cold, hard cash, and that is a big deal in
24 bankruptcy. It doesn't matter what kind of
25 computers you're using. But that's a

1 significant factor.

2 And if you have a choice as a debtor,
3 you know, where do you want to file for
4 bankruptcy, you'd want to file in a place that
5 you're not going to lose a lot of your -- a lot
6 of what is at stake paying fees that are how
7 many times greater in -- in -- in the 48 than in
8 the two?

9 MR. GANNON: For -- for -- this only
10 covered the debtors who are paying more than a
11 million dollars in disbursements. It could be
12 up to seven times greater, seven-plus times
13 greater.

14 CHIEF JUSTICE ROBERTS: All right.

15 MR. GANNON: But then --

16 CHIEF JUSTICE ROBERTS: Well, that
17 makes a big difference if you're running out of
18 money, right?

19 MR. GANNON: Yes, it could --

20 CHIEF JUSTICE ROBERTS: And that's
21 different than the sort of procedural examples,
22 I think, that you gave. The -- the differences
23 in those situations, I don't think somebody
24 would care whether they're, you know, one type
25 of computer or -- you know, that was my example,

1 which may not be a very good one -- one type of
2 computer or another.

3 But, as you were going through
4 examples, you could have this, you know,
5 disuniform -- disparate treatment, it struck me
6 that that really wouldn't make a difference to
7 the debtor or creditor, but this example might.

8 MR. GANNON: Well, the -- the truth is
9 that for most of the time the fees were actually
10 equal and Congress expected them to be equal
11 here. But I think, to the extent -- I'm not
12 sure whether you mean this question to be part
13 of the remedial questioning. I -- we --

14 CHIEF JUSTICE ROBERTS: No.

15 MR. GANNON: I was -- I was not trying
16 to contest that somebody would lack standing to
17 bring such a challenge if the remedy at the end
18 of the case ends up being that the other guy
19 loses the benefit that I'm claiming --

20 CHIEF JUSTICE ROBERTS: No, not as
21 part of --

22 MR. GANNON: -- that I should be able
23 to get here.

24 CHIEF JUSTICE ROBERTS: -- not as part
25 of the remedy but as part of whether or not it

1 violates the constitutional provision if what is
2 not treated the same way really makes a
3 difference to people in bankruptcy.

4 MR. GANNON: I -- I take the point
5 that it -- that it -- it may make a difference
6 and that -- that -- that money matters in a
7 bankruptcy proceeding, but I mentioned that
8 there are lots of other provisions of law that
9 will affect how much money is available for
10 distribution in the bankruptcy at the end, and
11 we don't think that those are covered by the
12 uniformity requirement.

13 And also, to the extent that there are
14 the two different programs and Congress decided
15 that one of them should be self-funded, then
16 it's -- that is itself another rule that
17 deserves respect here.

18 And I would also observe with respect
19 to the self-funding point that the bankruptcy
20 administrator program fees, when they are being
21 collected, also offset congressional
22 appropriations. So this isn't an instance where
23 one program is completely self-funding, the
24 other one is completely taxpayer-supported, but
25 it's one where, because the judiciary and the

1 bankruptcy administrator program have additional
2 funding streams, Congress didn't have to worry
3 about the shortfall when it was enacting this
4 particular fee increase in 2017.

5 But, if -- if I could go back and just
6 add one other case to my answer for Justice
7 Gorsuch about the -- the remedial situations,
8 one of them did involve money and it involved
9 this issue. When the Ninth Circuit invalidated
10 the two programs in the 1990s, it said the
11 reason they were -- that it was unconstitutional
12 is because of the fee disparity.

13 And they said, so you are right, you
14 are complaining that you should not have to pay
15 this fee because some people in some other state
16 wouldn't have to pay the fee. And the Ninth
17 Circuit said that's a violation of the
18 uniformity requirement. The fix is to carve out
19 the exception.

20 We know Congress would actually want
21 to have the U.S. Trustee program. We're not
22 going to flip everything upside down and
23 substitute the 3 percent for the 97 percent.
24 We're just going to take the 97 percent and --
25 and -- and pull it across. And at that point

1 then, the Ninth Circuit's remedy was to say:
2 Pay the fee. You have to pay the entire fee
3 because we severed the exception.

4 And so we think that those are the
5 cases that are the analogous remedy here, which
6 is why, if the Court were to -- to conclude that
7 there is disparate treatment here that violates
8 the Uniformity Clause, that the judgment should
9 be that the statute's unconstitutional to that
10 extent, but it's the exception that is invalid.
11 The 2020 statute does not disagree with that at
12 all because Congress did not order refunds.

13 My friend says Congress only had a
14 prospective remedy. But Congress pointedly did
15 not give refunds to everyone who had overpaid
16 under their theory.

17 And then the effective remedy here is
18 going to be effectively only prospective.
19 Unless you insist that there needs to be some
20 sort of collection, then we think that the
21 Judicial Conference would do what it says on its
22 notices, which is refer a claim -- may I --

23 CHIEF JUSTICE ROBERTS: You can finish
24 your sentence.

25 MR. GANNON: We -- we may refer a

1 claim for a debt to the United States to the
2 Treasury for collection. And so there could
3 well be a practical way in which those could be
4 collected.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Just one more question on the remedy.
8 The question on which we granted cert was
9 whether the Bankruptcy Judgeship Act violates
10 the uniformity requirement of the Bankruptcy
11 Clause by increasing quarterly fees solely in
12 U.S. Trustee districts.

13 Now we could answer that question yes
14 or no without dealing with any remedy question
15 at all, right?

16 MR. GANNON: I think you could.

17 CHIEF JUSTICE ROBERTS: Okay. Thank
18 you.

19 Justice Thomas, anything?

20 Justice Breyer?

21 Justice Sotomayor, anything further?

22 Justice Kagan? No?

23 JUSTICE KAVANAUGH: A couple
24 questions. You had mentioned in your brief the
25 Wynne case as well, the Maryland case. How is

1 that relevant to the remedy question?

2 MR. GANNON: We cited it for the
3 proposition that there the Court recognized that
4 it was another one of these cases where there is
5 disparate treatment, and the plaintiff, even
6 though he has established that the law in
7 question was unconstitutional, it doesn't mean
8 that the plaintiff may get any practical relief
9 at the end of the day in the terms of getting
10 the money back.

11 Instead, the fix might be that there
12 is no longer going to be discriminatory
13 treatment because the other guy is going to no
14 longer get the benefit.

15 JUSTICE KAVANAUGH: The next -- we've
16 been acting as if the 2017 legislation was a
17 deliberate congressional choice to further a
18 pilot program that involved disparate treatment.
19 At least that's been the supposition.

20 But that's actually wrong. Congress
21 in 2017 was operating on an assumption that we
22 raise the fees in the one, they'll be raised in
23 the other. And that turns out not to pass for
24 several months, right, which creates the issue
25 in this case.

1 So, when we rely on -- when you say in
2 response to Justice Kagan Congress was
3 experimenting -- not in 2017, they weren't doing
4 that. They thought it had to be uniform, I
5 think, or thought it should be uniform, and that
6 raises my question.

7 In 2020, they then say in the text of
8 the statute, long-standing intention of Congress
9 that the fee requirements remain consistent
10 across all federal judicial districts.

11 My questions there are, one, how
12 long-standing do you think that was? And, two,
13 do you think that's a constitutionally informed
14 statement that Congress made or a policy
15 statement or both?

16 MR. GANNON: I -- I think it's both.
17 We agree with you this is -- this is a separate
18 argument that doesn't require the Court to get
19 into the question of what are the scope of the
20 Uniformity Clause, whether this is a
21 geographically isolated problem is being
22 legitimately dealt with. It's a completely
23 separate argument that we think that the 2017
24 statute required equal fees.

25 And it's not an argument that says

1 "may" equals "shall." It's an argument that
2 says, if you look at everything Congress has
3 done in this space going back to the 2000 law,
4 when Congress first said "may," it was
5 responding to a request from the Judicial
6 Conference because it was solving the problem
7 identified in the Ninth Circuit case from the
8 1990s, a potential Uniformity Clause violation
9 -- uniformity requirement violation based on the
10 fee differential.

11 The Judicial Conference said, well,
12 let us charge the same fees and there won't be a
13 uniformity problem. Congress enacted a statute
14 that said the Judicial Conference may impose
15 equal fees -- that was the word that it used --
16 equal fees.

17 The Judicial Conference adopted a
18 standing order that said we will charge the fees
19 in the statute as it is amended from time to
20 time. A fee increase happened in 2007, and it
21 was ported across to the six districts in the
22 bankruptcy administrator districts without
23 incident.

24 And so, in 2017, when Congress amended
25 (a)(6) again, it had every expectation that the

1 Judicial Conference would indeed have its
2 standing order take effect and, therefore --

3 JUSTICE KAVANAUGH: And that leads to
4 the question, what do we make of all that for
5 the constitutional issue? Is that -- I mean,
6 it's not a deliberate congressional choice in
7 2017. It's kind of a foul-up, right? And I
8 don't know which way that cuts. Do you want to
9 give me --

10 MR. GANNON: Yeah, I --

11 JUSTICE KAVANAUGH: -- 30 seconds on
12 which way you think that cuts?

13 MR. GANNON: I mean, I think that it
14 means that Congress thought that the statute
15 would have equal fees across all 50 states.
16 That was its intention. And in 2020, when it
17 says this has always been our intention, we know
18 that because the only reason it authorized these
19 fees was to avoid the uniformity problem if
20 there would be one. And, therefore, it wouldn't
21 have done that if it allowed unequal fees.

22 And so all along the purpose of (a)(7)
23 was to allow -- was to allow the judiciary to
24 take steps to avoid the uniformity problem. And
25 I think that that's constitutionally significant

1 because it means that Congress was not
2 legislating a non-uniform outcome here. It
3 fully expected that, as in 2007, the 2017 fee
4 increase would be implemented without a delay.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett? No?

8 Thank you, counsel.

9 Mr. Geysler, rebuttal?

10 REBUTTAL ARGUMENT OF DANIEL L. GEYSER

11 ON BEHALF OF THE PETITIONER

12 MR. GEYSER: Thank you, Mr. Chief
13 Justice.

14 My friend talks a lot about what
15 Congress intended and expected and might have
16 hoped, but this Court normally looks at what
17 Congress actually wrote in the statute.

18 And my friend says that "may" doesn't
19 mean "shall." It doesn't. And, in fact,
20 Congress used the word "may" in contrast to the
21 word "shall" in the very interlocking provision
22 that they were dealing with and then followed it
23 up in (a)(7) with the next sentence that uses
24 the word "shall" twice.

25 This Court doesn't presume that

1 Congress uses different words in the same
2 statute because it thinks they mean the same
3 thing. So I think it's very clear and
4 especially when the Judicial Conference is
5 telling Congress, we have discretion to
6 implement this or not.

7 That means that if Congress wants to
8 eliminate that discretion and secure uniformity,
9 they have to do it on the face of the statute.

10 My friend suggests that this is not a
11 law on the subject of bankruptcy because the
12 Constitution draws a distinction between
13 substantive rules and procedural rules.

14 I don't see that anywhere in the text
15 of the Bankruptcy Clause itself. It talks about
16 uniform laws on the subject of bankruptcies, not
17 on substantive bankruptcy law or procedural
18 bankruptcy law.

19 The -- the distinction too between
20 substance and procedure is notoriously difficult
21 to draw. I think the Court normally tries not
22 to get into that thicket unless it's
23 unavoidable. I think it's odd to suggest that
24 as a constitutional matter, the restraint on
25 Congress's power should be invited through this

1 incredibly difficult line to police.

2 My friend suggests that we're wrong
3 that the Constitution requires uniform laws on
4 the subject of bankruptcy, and it's strange to
5 think that that -- that Congress or the
6 Constitution would tolerate deviations at the
7 local level. This Court has already explained
8 why the government is wrong in *Moyses*.

9 Congress -- or the Court said that
10 Congress can adopt varying state exemptions
11 without running afoul of the uniformity context
12 as long as the choice to the states is the same.
13 It can have disparate local effects that has no
14 difference on the constitutional question
15 because it's a uniform federal standard.

16 My friend suggests that -- that the
17 Court, in looking at the exemptions for the dual
18 system, the Court should take into account the
19 sort of shadow lawmaking that goes on behind the
20 scenes of what states asked for exemptions from
21 the -- from the program and which states didn't.

22 That's not the way this Court
23 construes statutes. You look at the law that
24 Congress passed, not what political forces went
25 into the law to sort of rewrite the terms that

1 Congress actually chose.

2 For clawback as a remedy, I think that
3 the Chief Justice is exactly right that it would
4 be surprising for Congress to say let's go and
5 find every creditor, professional, administrator
6 that was involved in any of these closed cases,
7 track them down and try to get them to pay their
8 pro rata share of the fee, which is what
9 Congress would have to do to actually equalize
10 the treatment.

11 I think that, as Justice Gorsuch
12 pointed out, there is a serious due process
13 problem, which my friend -- which my friend
14 acknowledges. And I think instead of resolving
15 one series of constitutional litigation, that's
16 a remedy that just invites a whole nother series
17 of constitutional questions and brand-new
18 litigation over a fee statute that was plainly
19 non-uniform on its face.

20 Unless the Court has further
21 questions.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 MR. GEYSER: Thank you.

25 CHIEF JUSTICE ROBERTS: The case is

1 submitted.

2 (Whereupon, at 12:21 p.m., the case
3 was submitted.)

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