SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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ALFRED H. SIEGEL, TRUSTEE OF THE)
CIRCUIT CITY STORES, INC.)
LIQUIDATING TRUST,)
Petitioner,)
v.) No. 21-441
JOHN P. FITZGERALD, III, ACTING)
UNITED STATES TRUSTEE FOR REGION 4,)
Respondent.)

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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.)

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13 Washington, D.C.

14 Monday, April 18, 2022

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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.

23 CURTIS E. GANNON, Deputy Solicitor General, Department

24 of Justice, Washington, D.C.; on behalf of the

25 Respondent.

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear

4 argument next in Case 21-441, Siegel versus

5 Fitzgerald.

6 Mr. Geyser.

7 ORAL ARGUMENT OF DANIEL L. GEYSER

8 ON BEHALF OF THE PETITIONER

9 MR. GEYSER: Thank you, Mr. Chief

10 Justice, and may it please the Court:

11 The 2017 Act's quarterly fee increase

12 presents a clear and obvious violation of the

13 Bankruptcy Clause's uniformity requirement.

14 Congress arbitrarily divided the country into

15 two different groups and then authorized

16 different fees for identically situated debtors

17 because their bankruptcies happened to arise in

18 different states.

19 There are no regional differences,

20 distinct local conditions, or industry-specific

21 problems justifying this non-uniform treatment.

22 The division is entirely artificial. There's

23 nothing unique about North Carolina or Alabama

24 that justifies a separate bankruptcy system with

25 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. Geyser, 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 -- the fact that --
6 if -- if you say that the division is
7 legitimate, then it would seem to follow that
8 the differential fees would be based on
9 geography?
10 MR. GEYSER: Well, no, Your Honor,
11 because, again, the -- the original division is,
12 in fact, based on geography. And Section 581
13 makes this clear. The trustee system is divided
14 into 48 states, and then there are two holdout
15 districts and -- for Alabama and North Carolina.
16 And there -- there's really no way to cut it
17 other than a geographic distinction.
18 There's no reason that Congress would
19 treat debtors who look exactly the same, who are
20 electronic retailers, any differently because
21 their bankruptcy is in Virginia as opposed to
22 somewhere else. And I think the --
23 CHIEF JUSTICE ROBERTS: Well, but I --
24 I think it -- one answer, ready answer, is,
25 well, they're treating them differently because

1 they're different systems. Now that only makes
2 sense if there's a reason that they're different
3 systems, and I have not been able to figure out
4 what that reason is. What's the reason? Why
5 are there two different systems?
6 MR. GEYSER: There -- there is no
7 reason, Your Honor. It's entirely arbitrary.
8 CHIEF JUSTICE ROBERTS: I know, but
9 some -- there must be some reason it happened.
10 I mean, they just didn't pull out the map and
11 suddenly say let's pick out two states and have
12 them a whole separate system.
13 And if there's a reason for it, then I
14 think it's a very strong case on the other side
15 that, well, the fees in one can be one and the
16 fees in the other can be different, and it's
17 because there's a reason to have two different
18 systems.
19 MR. GEYSER: Your --
20 CHIEF JUSTICE ROBERTS: So what is it?
21 MR. GEYSER: The -- the only reason
22 that we've seen, Your Honor, is politics and
23 local preferences.
24 CHIEF JUSTICE ROBERTS: What do you
25 mean --

1 MR. GEYSER: It's regionalism.
2 CHIEF JUSTICE ROBERTS: -- what do you
3 mean, politics?
4 MR. GEYSER: The -- the bankruptcy
5 judges and the bankruptcy bar in North Carolina
6 and Alabama liked the system the way it was, so
7 they lobbied their -- their Congressmen, who
8 included exceptions in the statute for those two
9 states.
10 The -- the General Accounting Office
11 looked at this in 1992 and said there is no
12 reason to have two different systems. In fact,
13 the -- and the government has conceded in the
14 lower courts there's nothing unique about the
15 bankruptcy system in North Carolina or Alabama
16 that justifies having different bankruptcy laws
17 for those two states alone. It's, in fact --
18 CHIEF JUSTICE ROBERTS: So it's just
19 because the bankruptcy judges didn't want to
20 change?
21 MR. GEYSER: The -- the bankruptcy
22 judges in that case, I guess, liked it the way
23 it was, and they didn't want to be part of the
24 U.S. Trustee system. But that -- that, of
25 course, is not a legitimate, relevant, material

1 distinction.
2 Every time this Court is asked is
3 there a relevant basis for drawing lines based
4 on geography -- which, by the way, is exactly
5 what the Bankruptcy Clause says that Congress
6 can't do. It says it has to be uniform laws
7 throughout the United States. And this is
8 clearly not uniform throughout the United
9 States.
10 JUSTICE BREYER: With the procedural
11 matters, suppose that -- you know, that some --
12 some states or bankruptcy judge somewhere say,
13 you know, we want to start court at 11. We want
14 to start at 11. We think it works better that
15 way. We're refreshed. Okay? So other states
16 say no, 9. And Congress passes a law saying 10,
17 but we'll keep 11 for the two states.
18 All right. I mean, is it -- why can't
19 they try out different things? They like it the
20 way they're doing it. I mean, it works. It's
21 not a substantive law. It's just the way we
22 work it.
23 Now can't we give -- isn't it uniform
24 to give, in certain matters, states and
25 districts their choice?

1 MR. GEYSER: Well, Your Honor, no,
2 it's not. First, it -- there is a way to do
3 that in a uniform manner, but it is not uniform
4 to say that two states get the choice to start
5 at 11, but the other 48 states get no choice.
6 They have to start at 9 or they have to start at
7 some other time.
8 If Congress said that any state has
9 the option to decide when court starts, that's a
10 uniform law.
11 JUSTICE BREYER: So it's against the
12 law of the Constitution to -- to say on
13 procedural matters states get their choice?
14 MR. GEYSER: It -- it -- it's --
15 JUSTICE BREYER: And it is against the
16 law to say some states get their choice, but
17 others don't, and the reason is because the
18 states that get their choice have a system which
19 has led them to ask us, because they feel very
20 strongly, about using it one way or the other?
21 That's not a valid reason? I don't know. Maybe
22 it is. Maybe it isn't. What do you think?
23 MR. GEYSER: I -- I don't think it is
24 a valid reason, Your Honor, precisely because
25 the Constitution constrains the top-down choices

1 that Congress makes in that they have to be
2 uniform choices.
3 CHIEF JUSTICE ROBERTS: Well, surely
4 --
5 MR. GEYSER: They --
6 CHIEF JUSTICE ROBERTS: -- they can
7 make different choices on something, right? You
8 know, one district decides they're going to buy,
9 you know, computers from Computer Company A, and
10 another says no, we're going to buy them from B,
11 right? So they can have differences to some
12 respect.
13 MR. GEYSER: Well, again, Your Honor,
14 I think it depends on where are those
15 differences being introduced. Are they being
16 introduced by Congress, where Congress is saying
17 that some states have to buy from Company A as
18 opposed to Company B, or if Congress says any
19 district can buy computers wherever they'd like?
20 JUSTICE BREYER: Yeah, but is there
21 any state --
22 CHIEF JUSTICE ROBERTS: Yeah, but --
23 but wait. I don't know. I'm sorry. Which one
24 is good and which one is bad?
25 MR. GEYSER: The -- the one where

1 Congress is -- is setting the same rule,
2 standard, choice, framework for every district
3 in every state in the country. That avoids the
4 concerns of regionalism. Then any regional
5 differences introduced at a local level are --
6 JUSTICE KAVANAUGH: But then, even
7 under the Chief Justice's hypothetical in the
8 computer-buying program, if it's in the statute
9 itself, that would be a violation of the
10 Uniformity Clause?
11 MR. GEYSER: Well, that -- that may
12 not be a -- a law on the subject of
13 bankruptcies, Your Honor, so it may be exempt on
14 --
15 JUSTICE KAVANAUGH: Okay.
16 MR. GEYSER: -- on that basis.
17 JUSTICE KAVANAUGH: And that gets to
18 the point, how do you define the subject of
19 bankruptcies, which goes to, I think, Justice
20 Breyer's question as well?
21 MR. GEYSER: Well, I -- I think it
22 does, but I think -- here, we have something
23 that is very clearly on the subject of
24 bankruptcies. Now this Court has said it's very
25 hard to define, but the Court has also said that

1 Congress's power extends to the entire subject
2 of bankruptcies.
3 And, here, we're talking about a
4 statute that is called bankruptcy fees. It
5 applies in bankruptcy cases. It's for the
6 bankruptcy trustee to do bankruptcy tasks. It
7 specifically allocates the debtor's resources in
8 the bankruptcy estate to trustee fees as opposed
9 to creditors or back to the debtor itself. So
10 --
11 CHIEF JUSTICE ROBERTS: But it's not
12 about -- but it's not about bankruptcies. It's
13 not like you have a different rule of priority
14 in discharging debts, right?
15 I mean, could they have a rule -- I
16 mean, things are more expensive in New York than
17 they are in North Carolina, so they say you can
18 charge fees up to $200,000 a quarter in New York
19 but only $50,000 a quarter in North Carolina?
20 MR. GEYSER: Well, Your Honor, I think
21 what they can do is say you can charge market
22 rates. And then -- and that's legitimate for
23 two reasons.
24 First, it's a uniform law. Every
25 state can charge a market rate. That's the same

1 standard -- there's no danger there that the
2 framers would have been concerned about, about
3 Congress favoring certain states or certain
4 regions over others --
5 JUSTICE KAVANAUGH: But the --
6 MR. GEYSER: -- because everyone has
7 the same -- the same framework.
8 JUSTICE KAVANAUGH: -- but the -- the
9 debtor in that example would be paying -- the
10 debtors would be paying different rates
11 depending on where they were --
12 MR. GEYSER: Exactly.
13 JUSTICE KAVANAUGH: -- just as now.
14 So why is that better?
15 MR. GEYSER: Well, it's -- it's
16 different, and it's different for -- in a very
17 profound and important way. It's different
18 because those are different effects.
19 Now the Constitution and its text says
20 there have to be uniform laws. It doesn't say
21 the effects have to be the same. And that's why
22 this Court in -- in the Moyses decision said
23 there's no problem with saying states can create
24 their own exemptions.
25 Every state can craft whatever

1 exemptions it wants. That's fine. Any
2 deviation is introduced at the local level.
3 It's not introduced, again, top down, where
4 Congress is dictating a specific rule for some
5 regions but not others.
6 JUSTICE BARRETT: Mr. Geyser, but --
7 JUSTICE BREYER: But, in this case,
8 did they have -- before I -- I'm just finishing
9 up with the Chief.
10 Was there any evidence that any of the
11 48 states that have the trustee system said to
12 Congress in any way, we want to have the other
13 system? We want the freedom to choose?
14 I think the answer is going to be no.
15 MR. GEYSER: I -- I don't -- I don't
16 --
17 JUSTICE BREYER: And I think it's
18 pretty tough to say -- so my thought was, if the
19 answer is no -- I'm giving you time to think
20 whether the answer is no. But, if the answer is
21 no, there isn't really much difference between
22 -- I can't see it -- between a system which says
23 you two states get this old system because
24 you're the only ones who asked for it.
25 That seems logical, but you now can

1 answer yes or no if you remember the question.
2 MR. GEYSER: Well, I -- I do remember
3 the question. I'm not aware of any evidence
4 either way, Justice Breyer, but I think the
5 important thing is, if Congress is concerned
6 that some states may want to opt out or opt in,
7 then Congress can say any state can choose. The
8 districts in any state can decide to opt in or
9 out of the trustee system, and then they'd have
10 a uniform law. Any variation comes at the local
11 level, and --
12 JUSTICE KAGAN: Can I -- can I take
13 you back to Justice Thomas's first question?
14 Because Justice Thomas said let's just presume
15 that the original act here, the separation of
16 these two states, is constitutional.
17 And I realize you have arguments that
18 it's not. But let's just presume it is. At
19 that point, doesn't this have to be
20 constitutional as well because isn't -- isn't
21 this second differentiation, if you will, just
22 really responding in a sensible way to the
23 effects of the first differentiation?
24 In other words, it's -- at that point,
25 it's not arbitrary and it's not solely

1 geographic. It's saying, you know what, these
2 two -- these two states are not in the same
3 financial position as the other 48 states are.
4 They don't need -- they aren't self-financing,
5 so they don't need these higher fees.
6 Wouldn't that be a completely
7 rational, appropriate thing for Congress to do
8 if the original differentiation was okay?
9 MR. GEYSER: I don't think so, Your
10 Honor, and I think for a few different reasons.
11 One is that even if the underlying
12 system is somehow legitimate, it's perfectly
13 fine for Congress to have these different
14 systems for different states, there's still no
15 reason that Congress has to impose fees and make
16 the U.S. Trustee program alone self-funding.
17 There's nothing inherent about the trustee
18 program that requires self-funding. That's a
19 separate and subsequent policy choice.
20 So Congress took the identically
21 situated debtors who happened to be in that
22 program and said, you pay for your bankruptcies
23 while the favored debtors over here in these two
24 states, the taxpayers will fund the identical
25 tasks. So I think that that --

1 JUSTICE KAGAN: But -- but I -- I
2 thought that the -- the question of whether it
3 was self-funding, that that's part of the
4 initial separation of the 48 and the two, that
5 the two were essentially walking into a system
6 where there was an appropriation, and the 48
7 were -- were walking into a system where there
8 wasn't an appropriation and that they needed to
9 be self-funding. So that's part of the original
10 differentiation.
11 And now, as part of the sort of second
12 level, it's like, oh, gosh, this self-funding
13 thing didn't work out so well, not enough money
14 is walking in the door, we have to increase the
15 fees.
16 MR. GEYSER: Well, Your Honor, again,
17 I -- that might have been part of an original
18 calculus, but that is its own policy decision at
19 the congressional level to treat identically
20 situated debtors who look exactly the same, I'm
21 going to arbitrarily assign you to this group,
22 other debtors to this group, and depending
23 solely on geography where they happen to file
24 for bankruptcy, some are better off than others.
25 This Court has never approved that in

1 any case. It's always looked for a material
2 relevancy --
3 JUSTICE KAGAN: But then you're saying
4 we really have to address the first question of
5 whether the differ -- the original 48/2
6 differentiation was permissible because it was
7 in that original differentiation that the --
8 that the two separate funding systems were set
9 up, wasn't it?
10 MR. GEYSER: Well, it -- it was, Your
11 Honor, but I think it was also then struck down
12 or at least the Ninth Circuit purported to
13 strike it down precisely because it's not the
14 same.
15 And just to be very clear, and my
16 friend might correct me soon, but, in the
17 government's brief, the only justification they
18 offer for the dual system to say why this is
19 possibly legitimate is it is effectively a
20 single system that has different labels. It
21 performs the same tasks. It's doing the same
22 things. The debtors can't tell the difference.
23 But the problem is, once Congress
24 layers on top of that system differential fees,
25 then there is a material distinction and debtors

1 then are worse off based entirely on geography.
2 So I don't think even if the
3 underlying system is somehow legitimate in some
4 world where there's a uniformity provision in
5 the Bankruptcy Clause that says Congress can't
6 have different bankruptcy laws for different
7 parts of the country, the -- I think the
8 government's own defense breaks down immediately
9 once they attach different fees to the different
10 districts.
11 JUSTICE BARRETT: Mr. Geyser, I'd like
12 to take you back to Justice Kavanaugh's point
13 about the scope of the Bankruptcy Clause because
14 I think it's important to the scope of your
15 argument.
16 You know, if -- the Bankruptcy Clause
17 itself, augmented by the Necessary and Proper
18 Clause, could be pretty broad and I understand
19 your argument to be you -- the more specific
20 controls and so Congress can't circumvent the
21 uniformity limitation on its bankruptcy power by
22 relying on, say, the commerce power, its power
23 over inferior tribunals.
24 If that's pretty broad, doesn't this
25 uniformity restriction become pretty

1 significant? You know, think of the Chief's
2 hypothetical about different computer
3 purchasing.
4 MR. GEYSER: Well, it -- it -- it does
5 and it doesn't, Your Honor. First, it's not
6 just our distinction. This is the Gibbons
7 decision, makes the -- the argument for us and
8 says that Congress can't look to a different
9 power in order to override the affirmative
10 restriction in the Bankruptcy Clause.
11 But I -- I don't think this is putting
12 that much of a restriction on what Congress can
13 or can't do. And I think the proof of it is the
14 government can't identify a single law other
15 than the 2017 fee increase and the -- the
16 creation of a dual system in the first place
17 that falls under our understanding of the
18 Bankruptcy Clause.
19 Congress just has to legislate
20 uniformly. It just has to give every district
21 the same rights. It has to have the same
22 standards and framework and choices. And once
23 Congress does that, then there's no danger of
24 regionalism, which is what prompted the
25 uniformity provision in the Constitution in the

1 first place.
2 The states were ceding power to the
3 federal government, and they didn't want a
4 situation where the federal government would
5 turn around and favor certain regions over
6 others.
7 If Congress simply passes a uniform
8 law and gives every state the same choice and
9 the same options, there's no danger of
10 favoritism.
11 JUSTICE BREYER: Well, Congress passes
12 a law and it says in States 1 through 10 the
13 bankruptcy judges will meet in the same
14 courthouse as the federal district judges. In
15 10 other states, it says they're going to meet
16 in different courthouses. And in -- and in
17 several other states, it says it's up to the --
18 it's up to the chief judge of the federal
19 district court.
20 Okay? Non-uniform. It can't do that?
21 MR. GEYSER: Again, Your Honor, I
22 think, if Congress wanted to do that, it could
23 very easily rewrite the law to say that every
24 state gets the option. Now --
25 JUSTICE BREYER: They don't want to

1 give every state the option. In certain places,
2 Congress decides that it's a very helpful thing
3 to the likely litigants to meet in the same
4 courthouse.
5 MR. GEYSER: And --
6 JUSTICE BREYER: And I just want to
7 know, that's their decision, and they think, in
8 other states, the opposite is true. I -- I
9 understand that. And in some states, they think
10 it doesn't matter. So that's what they enact.
11 In other words, they give a choice, and it seems
12 it doesn't -- well, there we are. What do you
13 think of that?
14 MR. GEYSER: I -- I think it's a
15 non-uniform choice.
16 JUSTICE BREYER: Non-uniform. Okay.
17 MR. GEYSER: I mean --
18 JUSTICE BREYER: So now we're going to
19 have to go street by street? They can have -- I
20 mean, what -- I don't know the implications of
21 your argument.
22 MR. GEYSER: It will --
23 JUSTICE BREYER: What's the furthest
24 you've ever found in any case which says this is
25 too non-uniform, it violates the clause?

1 MR. GEYSER: Well, first, Your Honor,
2 I just want to be very clear that the -- the law
3 that you're talking about may or may not be the
4 law on the subject of bankruptcies if it's just
5 simply saying that where judges happen to meet,
6 whether it involves bankruptcy or not or
7 something like that.
8 JUSTICE BREYER: I'm not -- I'm not --
9 I understand my example is not perfect. What
10 I'd like to know is, what case have you found
11 that in your opinion goes the farthest in saying
12 something is non-uniform in the bankruptcy area
13 and, therefore, unconstitutional?
14 MR. GEYSER: Well, the -- this Court
15 has only -- and admittedly struck down one law
16 for being in violation of the uniformity
17 provision. That's because Congress normally
18 doesn't create different bankruptcy systems for
19 different parts of the country.
20 JUSTICE BREYER: The law in which we
21 struck it down, the non-uniformity was what?
22 MR. GEYSER: It was a law that singled
23 out a certain railroad for special treatment.
24 Now -- but the -- the important thing is the
25 Court's rationale in doing that, unlike what my

1 friend says, was not that it was like a bill of
2 attainder. Congress looked and said that there
3 are similarly situated debtors that looked the
4 same in every relevant respect who are not
5 covered by this exception for this single
6 railroad and said Congress can't do that.
7 And if you look to that case and the
8 Gibbons case and then Ptasynski, which is in the
9 tax context, but this Court has said that you
10 look at the uniformity provisions in a similar
11 way. This Court always asks, is there a
12 material, relevant distinction that justifies
13 Congress dividing lines between debtors?
14 And we're not saying there aren't hard
15 cases and there aren't going to be some
16 questions that -- that push the edges of what
17 falls within the subject of bankruptcy or what
18 might be uniform or not. But this is a very
19 easy one.
20 This is, again, a bankruptcy fee.
21 It's dividing up the bankruptcy estate. Money
22 is going to the trustee instead of creditors
23 based on an act of Congress that is saying
24 debtors who file bankruptcy in two states and
25 only two states must pay this fee while the

1 debtors in 48 -- or, I'm sorry, in the 48 states
2 must pay it, while the debtors in two have the
3 option of paying it or not.
4 CHIEF JUSTICE ROBERTS: What -- what
5 exactly was the concern at the time of the
6 framing that led the framers to put this clause
7 in the Constitution?
8 MR. GEYSER: The -- the Court in
9 Gibbons noted that there was very meager
10 discussion of why this was placed in there. But
11 the Court in -- in Gibbons and in Ptasynski,
12 looking, again, at both the tax context and at
13 the bankruptcy context and comparing the two,
14 said one concern is regionalism. It's the
15 concern that Congress can treat different
16 regions of the country in different ways and can
17 give favorable treatment to some states and not
18 others. And that's exactly the type of concern
19 that could arise with a law like this.
20 CHIEF JUSTICE ROBERTS: But, I mean,
21 was there an actual, I don't know, a particular
22 episode or was there a particular concern? Was
23 one region of the country more likely to have a
24 bunch of people going bankrupt as opposed to
25 another or --

1 MR. GEYSER: No, Your Honor, and,
2 again, this is -- the Bankruptcy Clause sort of
3 stands out for the lack of discussion. The --
4 the way the Fifth Circuit framed it is it's sort
5 of ironic that something that was so
6 uncontroversial at the time now has produced
7 great controversy because there's so little
8 commentary about what it meant.
9 But I do think the clause is clear on
10 its face. A uniform law throughout the United
11 States can't possibly mean a system where two
12 states have differential treatment and 48 states
13 have a different rule.
14 JUSTICE SOTOMAYOR: Counsel, I -- I --
15 I'm having a difficulty because you're trying to
16 establish a broad rule in a situation that I
17 don't think lends itself to it given our case
18 law.
19 So we know regional differences can
20 exist, and you accept that. You -- you accept
21 that if Congress permits the 50 states to set
22 their own fees based on their own needs, that's
23 okay, correct?
24 MR. GEYSER: That's correct if it's --
25 JUSTICE SOTOMAYOR: And we've also

1 said that where Congress enacts geographically
2 limited laws when responding to a geographically
3 limited problem, that's okay too. That was the
4 Railroad Reorganization Act, correct?
5 MR. GEYSER: That -- that's right.
6 JUSTICE SOTOMAYOR: So we don't want
7 to announce a rule that says your laws have to
8 be uniform all the time because there may be
9 some rational basis to create a difference,
10 correct?
11 MR. GEYSER: That -- that's right,
12 Your Honor. But --
13 JUSTICE SOTOMAYOR: All right. Now
14 let me stop. I think where the problem is
15 here -- and I understand the gut feeling, okay?
16 The gut feeling is what you shouldn't be able to
17 do is to say this state is going to let the
18 taxpayers pay for something, and the other 48
19 states don't have that choice. That's your
20 problem, isn't it?
21 MR. GEYSER: The -- it's that problem
22 plus the arbitrariness of the initial division.
23 It --
24 JUSTICE SOTOMAYOR: I -- I understand,
25 but you see what my problem with that is, that I

1 don't see why Congress can't say you can have
2 different systems in some places with respect to
3 others where it's not the taxpayers paying. If
4 this system stands and we just strike down the
5 fee difference, then I don't see why we couldn't
6 keep this going on forever?
7 MR. GEYSER: Well, I -- and I think
8 you debatably could. And just to be very clear,
9 we do think that the original division is
10 unconstitutional because it is non-uniform.
11 Now I don't -- I'm not sure the
12 original division, absent fees, creates any
13 Article III injury for any debtor because the
14 programs are so similar. But, once you attach
15 the fee on top of it, now you have identically
16 situated debtors that look exactly the same who
17 are being prejudiced because they filed
18 bankruptcy in one of 48 states.
19 JUSTICE SOTOMAYOR: You see, I just
20 don't want to write a decision that says
21 Congress couldn't do what it did here, which is
22 to have eight states experiment with this
23 different system to see if it worked or not and
24 then decide it's a better system than we have
25 and create it generally and let some people keep

1 the old system.
2 What I have a problem with is creating
3 a system permanently that lets the taxpayers
4 assume costs for two states but don't give the
5 other 48 a choice.
6 MR. GEYSER: And I think you could
7 write a narrow decision that addresses the
8 current situation that leaves aside whether
9 Congress does have any freedom to experiment --
10 JUSTICE SOTOMAYOR: All right.
11 MR. GEYSER: -- in this area.
12 JUSTICE SOTOMAYOR: May I ask you one
13 final question, which is you assume that we have
14 to level up and give you the choice of paying
15 less money, but I don't know what
16 constitutionally in our case law requires us to
17 give you that remedy, meaning we've also said
18 that if Congress -- if we think Congress wants
19 us to level down, we should. And, here,
20 Congress has given us a clear indication it
21 wants leveling down. It told the -- the court
22 system you have to level down. You have to
23 raise the fee. Correct?
24 MR. GEYSER: No. No, Your Honor. And
25 -- and -- and just to be very clear about this,

1 I think Congress has indicated the opposite.
2 When Congress changed the word "may" to "shall"
3 to --
4 JUSTICE SOTOMAYOR: Yes.
5 MR. GEYSER: -- to ensure going
6 forward that there will be uniform treatment,
7 which shows how easy it is for Congress to have
8 not done this in the first place, Congress made
9 that change prospective only. Congress was
10 aware of the constitutional challenges. There
11 were courts that had already struck down the
12 2017 Act as unconstitutional. Congress could
13 have said: Ah, this always should --
14 JUSTICE KAVANAUGH: But --
15 MR. GEYSER: -- have been that way.
16 Everyone who hasn't paid now needs to pay. They
17 made the opposite determination and let the --
18 JUSTICE SOTOMAYOR: Please answer --
19 JUSTICE KAVANAUGH: Congress --
20 MR. GEYSER: Oh, I'm sorry.
21 JUSTICE KAVANAUGH: I want to make
22 sure you're finished. But Congress was
23 operating at that point under the understanding
24 of what the Judicial Conference had done,
25 though, which was to raise the fees in those

1 other districts.
2 MR. GEYSER: Raise the fees but
3 prospectively only, which -- which actually --
4 JUSTICE KAVANAUGH: Starting in the
5 third quarter of 2018, right? And Congress then
6 acts in 2020 and accepts those raised fees and
7 says, in the text of the statute, right, that
8 this "confirms the longstanding intention of
9 Congress that the quarterly fee requirements
10 remain consistent." And that's at the time when
11 the Judicial Conference has already acted,
12 correct?
13 MR. GEYSER: Already acted but, again,
14 just to be very clear, and said that any case
15 going forward that's filed after the Judicial
16 Conference act. So any -- any debtor in the two
17 states that filed in September of 2018, they
18 didn't have to pay increased fees for that
19 entire period.
20 JUSTICE KAVANAUGH: Just on this
21 remedy point more generally, what are we to make
22 of that this seems to have been a mistake,
23 right? So starting when the standing order went
24 into place, the fees were the same, right? And
25 then the new Act in 2017 elevates the fees in

1 the districts that are subject to the standing
2 order of the Judicial Conference kind of late to
3 the game. And then they -- that's corrected,
4 what, nine months later. And then Congress
5 comes in and -- and says, yeah, that's right.
6 I mean, that seems a strange situation
7 if we take our case law on looking for what
8 Congress would have intended -- if we take that,
9 it seems a strange case to order refunds rather
10 than to require additional payments.
11 MR. GEYSER: Well, I -- I don't think
12 so, Your Honor. And to be very clear, it wasn't
13 a mistake. Congress chose the word "may" when
14 it added (a)(7).
15 May I finish?
16 CHIEF JUSTICE ROBERTS: Sure.
17 MR. GEYSER: Congress chose the word
18 "may." This is directed to the Judicial
19 Conference. That was the audience of (a)(7).
20 And the Judicial Conference understood from the
21 start it had discretionary authority to act or
22 not. It reminded Congress of this periodically,
23 including in 2007 when Congress tinkered with
24 the fees. It said we will likely match the
25 fees.

1 JUSTICE KAVANAUGH: But -- maybe I'm
2 cutting into my next time. Sorry. After the
3 Ninth Circuit decision, though, then this all
4 gets fixed through a combination of actions.
5 Fixed you might dispute. But it becomes even,
6 the fees that are going to be paid in the -- the
7 various districts, no?
8 MR. GEYSER: No, and just to be very
9 clear, when the Ninth Circuit acted, there were
10 no fees in the bankruptcy administrator
11 districts.
12 JUSTICE KAVANAUGH: Right.
13 MR. GEYSER: The Congress's so-called
14 fix was to create a non-uniform system again
15 that said that, in the 48 states, the fees are
16 mandatory; in the two states, it's entirely
17 discretionary.
18 And it's unclear why Congress did
19 that. They shouldn't have. But the word "may"
20 doesn't mean "shall," especially in a statute
21 that contrasts the two.
22 JUSTICE KAVANAUGH: Well, just in --
23 am I correct, in 2001, the Judicial Conference
24 issued a standing order saying the fees shall be
25 the same?

1 MR. GEYSER: They -- they did, and it
2 was also clear --
3 JUSTICE KAVANAUGH: Okay. From 2001
4 to 2018, they're the same?
5 MR. GEYSER: They -- they were the
6 same. But, again, it could --
7 JUSTICE KAVANAUGH: And then, in 2017,
8 Congress had passed a new law raising them, but
9 those other districts were kind of, like I said
10 before, behind, and it didn't get changed until
11 the third quarter of 2018?
12 MR. GEYSER: Well, I -- I think two
13 key points, though.
14 The first is that in 2007, the
15 Judicial Conference told Congress when Congress
16 was tinkering with the fees a little bit that it
17 would likely match them. So Congress knew and
18 the Judicial Conference told Congress that they
19 have discretion and they may or may not act
20 consistent with the way they've acted in the
21 past.
22 And in 2017, this was such a drastic
23 increase in fees, this is the first time the
24 Judicial Conference would say: Wait a minute,
25 maybe we should exercise our discretion and

1 depart from past practice in making the fees
2 equal.
3 Congress in 2020 had to take away that
4 discretion to ensure uniformity going forward,
5 which is what they should have done in 2017 but
6 didn't.
7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.
9 Justice Thomas?
10 Justice Breyer, anything further?
11 JUSTICE ALITO: What legal standard do
12 you think governs this issue of leveling up or
13 leveling down, as Justice Sotomayor put it?
14 MR. GEYSER: I think that there are --
15 there are two ways to look at it. One is that
16 you first have to ask, are you equalizing the
17 treatment in the relevant period? And so you
18 have to find a viable option that could
19 actually, looking backward, make sure that the
20 same debtors were paying the same fees as their
21 counterparts in other districts.
22 Then, from that point, if you've
23 identified a viable option, then it is what
24 would Congress likely want to do. The problem
25 here is that Congress looking back has to say we

1 need to unscramble the egg of, you know,
2 three-plus years of possibly closed bankruptcies
3 and track down the creditors and professionals
4 and administrators, you know, in -- in hundreds
5 of bankruptcies to figure out a way to claw back
6 the funds, assuming that's even constitutionally
7 permissible.
8 So, if Congress doesn't have that as a
9 viable option, then the only choice is to
10 actually give the favored treatment to the
11 people who were charged too much.
12 JUSTICE ALITO: Okay. So that is your
13 argument. You think it's what Congress would
14 likely do. There -- there's another argument.
15 There's the argument that -- excuse me -- you
16 challenged the fee that was assessed against
17 you, and, therefore, if that's unconstitutional,
18 you win, end of the game. You don't have to get
19 into what Congress intended.
20 But that's not your argument?
21 MR. GEYSER: I -- I -- I would -- I
22 wish that could be our argument. We would love
23 just to have the automatic right to fees, but I
24 do think, consistent with this Court's cases, if
25 there is a way to equalize the treatment --

1 because our constitutional injury isn't
2 necessarily that we paid -- just that we paid a
3 high fee. It's that we paid a non-uniform fee.
4 So the -- the remedy just has to correct the
5 uniformity.
6 The problem is the government doesn't
7 have a viable option that's anything other than
8 giving us back the money.
9 CHIEF JUSTICE ROBERTS: Justice
10 Sotomayor, anything further?
11 JUSTICE SOTOMAYOR: No, thank you.
12 CHIEF JUSTICE ROBERTS: Justice Kagan?
13 JUSTICE KAGAN: Well, this idea that
14 Congress doesn't have a viable option, do we
15 have to think about that through Congress's
16 eyes, or is that a question for us? In other
17 words, is there a viable option? If there's not
18 a viable option, we can't tell anybody to claw
19 back the fees because it's not going to happen,
20 and then the inequality won't be remedied.
21 So is that a "what would Congress have
22 done" question, or is that a question at what
23 you described as the first stage of the
24 analysis?
25 MR. GEYSER: I -- I -- I think -- I

1 think they overlap a little bit in the sense
2 that this Court first has to ask, is this
3 something that can actually be done? Is this a
4 permissible choice from a legal standpoint?
5 Because, if this would create, for
6 example, a due process problem by -- by having
7 these drastic impositions on absolutely
8 completed conduct, where everyone relied on not
9 having to pay these fees in deciding how to
10 structure a basic bankruptcy plan, then that's
11 not even a choice that Congress can make.
12 And that's a determination this Court
13 can do. It -- assuming the Court thinks it is a
14 viable option, the Court can still take into --
15 JUSTICE KAGAN: A viable option
16 legally?
17 MR. GEYSER: Legally, exactly. Then
18 -- then the Court can take into account, though,
19 is this such a mess that it's just implausible
20 that any rational legislator would choose this?
21 But, again, I think this is easy here
22 for the Court because Congress looked at this
23 problem in 2020 and decided to impose the
24 increase prospectively.
25 JUSTICE KAGAN: And -- and -- and as I

1 understand some of our tax cases and some of our
2 tax cases where we've had this kind of "shall we
3 level up, shall we level down" question, we've
4 basically just said let the government decide
5 which one it wants to do. So why isn't that an
6 appropriate analogue?
7 MR. GEYSER: I -- I think in -- in
8 the -- most of this Court's tax cases involved
9 state taxes, and so there was an element of
10 federalism in not having the federal court
11 dictate for the state government what it would
12 do or wouldn't do.
13 Here, we actually have -- we're --
14 we're in the federal system itself, so I think
15 the Court can be a -- a little more assertive in
16 looking and saying what would Congress do and
17 what's permissible to -- to do.
18 But even in the state context, the
19 Court does ask, is there a viable option to
20 equalize treatment looking backwards? And if
21 there isn't, then the state doesn't have the
22 choice. They simply have to refund the fees.
23 And the presumption, by the way, is
24 that the successful plaintiff does get their
25 money back, not that they ruin someone else's

1 day by forcing the state government to kind of
2 track down other people to -- to impose
3 disfavored treatment.
4 CHIEF JUSTICE ROBERTS: Justice
5 Kavanaugh?
6 JUSTICE KAVANAUGH: And the total
7 amount, though, that you're saying Congress
8 would want to sacrifice for this is 324 million,
9 and you think that's what Congress would want to
10 do?
11 MR. GEYSER: The -- the government has
12 said there's $324 million at stake. We actually
13 don't know. We haven't seen the citation
14 that -- that supports that.
15 What I -- we do know is that the --
16 the balance in the U.S. Trustee fund right now,
17 I think, could probably cover the full refunds,
18 which just means that the money would go back to
19 the people who were wrongly told to pay it, in
20 which case I -- I do think that that's a pretty
21 fair solution for this problem.
22 JUSTICE KAVANAUGH: And then picking
23 up on Justice Kagan's question, the government
24 in its last footnote, Footnote 7, says basically
25 punt this the -- to the Judicial Conference and

1 let them sort out trying to, in essence, claw
2 back some of the fees where that's still
3 possible.
4 Suppose that is possible in some cases
5 but not all cases. Then what?
6 MR. GEYSER: I -- this Court has said
7 that the remedy doesn't have to be strictly
8 perfect. You can't have a situation where they
9 earnestly try and they do a really good job and
10 collect 98 percent of the fees, but the
11 2 percent that's remaining then ends up blowing
12 up the whole system.
13 But I think you would have to look and
14 say, is this a -- could through a good faith
15 effort of truly trying to claw back all the
16 fees, is that something the government could
17 realistically do.
18 And I think it's notable that the
19 government sort of tepidly suggests this is even
20 a possible solution. Their main arguments are
21 that it's perfectly fine to correct problems
22 going forward and to leave the non-uniform
23 treatment in place in the past.
24 And I think that's a pretty telling
25 indication of the government speaking out of its

1 own self-interest and not in a manner that
2 actually remedies a constitutional wrong.
3 JUSTICE KAVANAUGH: Last quick
4 question. You accept Morales-Santana as the
5 appropriate inquiry?
6 MR. GEYSER: Yes and no, Your Honor.
7 Yes in the sense that you do ask how would
8 Congress want to fix unequal treatment. No in
9 that Morales-Santana was looking for prospective
10 relief only.
11 JUSTICE KAVANAUGH: Got it.
12 MR. GEYSER: So it's a much easier
13 case.
14 JUSTICE KAVANAUGH: Got it.
15 MR. GEYSER: We're -- we're only
16 talking about retrospective backward-looking
17 relief.
18 JUSTICE KAVANAUGH: Thank you.
19 JUSTICE SOTOMAYOR: Counsel --
20 CHIEF JUSTICE ROBERTS: Just --
21 JUSTICE SOTOMAYOR: -- may I, just one
22 question?
23 CHIEF JUSTICE ROBERTS: Sure.
24 JUSTICE SOTOMAYOR: Counsel, on this
25 issue, does the point at which you object make

1 any difference? Meaning you paid this fee for a
2 year. You then went in and objected and asked
3 the court below to stay your pay.
4 I don't know how many other debtors
5 did that? Does that enter into this calculus of
6 the 324 million? I mean, I'm assuming some
7 debtors' cases have been closed and they've paid
8 the fee. Why should they now -- why should we
9 upset that apple cart?
10 MR. GEYSER: And -- and the Court may
11 not have to. I mean, we're -- we're not a class
12 action. We're an individual debtor action. We
13 objected. And we -- we'd like the -- the money
14 back that we shouldn't pay.
15 We're not saying the government can't
16 assert waiver and forfeiture and oppose opening
17 cases. Those are questions for those other
18 debtors in those other cases, and they really
19 don't affect the -- the proper inquiry here.
20 JUSTICE SOTOMAYOR: So, if we said
21 claw back, if we left it open for the court
22 below to decide each case individually, why is
23 that wrong?
24 MR. GEYSER: I -- I think the Court
25 could try that. Now I -- I -- just full candor,

1 I do think that in terms of structuring the
2 remedy of what would the legislature want,
3 that's a question that debatably applies more on
4 a global level.
5 JUSTICE SOTOMAYOR: I agree.
6 MR. GEYSER: But -- but, yeah, I don't
7 think there's anything that prevents this Court
8 from saying we objected, we have fees that we
9 would like back, we have an open case.
10 And the proper constitutional remedy
11 is to equalize the treatment by having us pay
12 the lower fees. And any other debtor has to
13 litigate on -- on their own terms based on their
14 own procedural posture.
15 JUSTICE SOTOMAYOR: Thank you.
16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?
18 JUSTICE BARRETT: Just a very small
19 clarification to an answer you gave Justice
20 Kagan. When she asked you about the analogy to
21 the tax context, you said, well, because of
22 federalism, you know, the Court is more
23 deferential, but we can be more assertive here
24 because we're in the federal system.
25 Do we have to be more assertive here?

1 It seems attractive and a lot of the questions
2 have assumed that maybe it's best to let --
3 if -- if -- assuming we agree with you on the
4 merits, that it would be best to let either the
5 lower courts or the Judicial Conference sort
6 this out.
7 MR. GEYSER: Well, we -- we hope you
8 do agree with us on the merits. I think, if the
9 Court would like to remand to the lower courts
10 to sort out the remedy question, that's
11 certainly an option.
12 But I -- what I was really trying to
13 say and just not as artfully as I should have is
14 that you don't have the added dynamic of a
15 federal court instructing a state government
16 about a state policy question.
17 So that -- that is at least removed
18 and off the table. And I do think this Court
19 can look and apply the same framework it's
20 applied in the other cases and say, is this
21 something that a rational legislative body would
22 try to do, again, especially in light of the
23 congressional determination in 2020 not to do
24 this, and not impose retroactive fees when they
25 easily could have.

1 JUSTICE BARRETT: Thank you.
2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.
4 MR. GEYSER: Thank you.
5 CHIEF JUSTICE ROBERTS: Mr. Gannon.
6 ORAL ARGUMENT OF CURTIS E. GANNON
7 ON BEHALF OF THE RESPONDENT
8 MR. GANNON: Mr. Chief Justice, and
9 may it please the Court:
10 Over the past 35 years, quarterly fees
11 paid by Chapter 11 debtors have sometimes
12 differed across districts, but those differences
13 did not violate the uniformity requirement of
14 the Bankruptcy Clause, as illustrated by the
15 wide variations in fees that were permitted
16 under the first two bankruptcy acts enacted by
17 Congress in 1800 and 1841.
18 Such fees are either not subject to
19 the uniformity requirement or their variation
20 comports with what this Court has called the
21 flexibility inherent in the constitutional
22 provision.
23 In any event, Congress acted to avoid
24 any potential non-uniformity in 2000 by adopting
25 the recommendation of the Judicial Conference to

1 allow the six bankruptcy administrator districts
2 to charge quarterly fees "equal to those
3 imposed" in the 88 U.S. Trustee districts.
4 As Justice Kavanaugh noted, in 2001,
5 the Judicial Conference adopted a standing order
6 directing payment of the quarterly fees in the
7 statutory amounts "as those amounts may be
8 amended from time to time."
9 When Congress amended those amounts in
10 2017, the failure of the bankruptcy
11 administrator districts to implement them in
12 time did not violate the uniformity requirement
13 enclosed on -- imposed on Congress, which asked
14 for equal, not unequal fees.
15 But even if Congress had not requested
16 equal fees, Congress was entitled to respond to
17 a shortfall of funding in the U.S. Trustee
18 program by adopting a trustee-specific solution,
19 and even if there were a constitutional
20 violation because of different fees, the
21 appropriate outcome would not be refunding the
22 increased fees that Congress had required for
23 the districts that accounted for 97 percent of
24 the Chapter 11 filings but an invalidation of
25 the narrow exception for the bankruptcy

1 administrator districts, which Congress has
2 already enacted.
3 That's consistent with this Court's
4 cases about federal remedies in this context.
5 I welcome the Court's questions.
6 JUSTICE THOMAS: Mr. Gannon, would
7 you -- do you think the system is uniform to the
8 extent that you have two different -- you have
9 the trustee system and the administrator system
10 that are quite different? Without getting into
11 the fee structure.
12 MR. GANNON: Well, the only -- as
13 Petitioner's counsel noted, the only difference
14 that anyone has asserted that made a difference
15 to any debtor or creditor is the fees. There
16 are two different programs. There have been two
17 different programs in a sense since 1978 when
18 the pilot program was initiated.
19 And then the -- the U.S. Trustee
20 program went almost nationwide in 1986 with the
21 six-district carveout. And so, since then,
22 there have been two programs. And my friend
23 says that that's on the basis of politics and
24 regionalism. But, with respect, I would say
25 that in the 1990s, when the Judicial Conference

1 was asking to preserve the bankruptcy
2 administrator system in the six districts where
3 it existed and the National Bankruptcy Review
4 Commission recommended not to abolish that
5 separate program, that there was a recognition
6 that there were still these two established ways
7 of going about administering those aspects of
8 bankruptcy procedure.
9 And so they are different programs,
10 but we don't think that that difference in
11 administrative assistance to the way the
12 bankruptcy system operates is covered by the
13 uniformity requirements because it is
14 essentially procedural.
15 JUSTICE THOMAS: So what would you
16 consider a subject of bankruptcies that is not
17 procedural?
18 MR. GANNON: Well, as my friend said,
19 the Court has acknowledged that it's -- this --
20 this clause is incapable of final definition,
21 but it has always focused on the relations
22 between the debtor and creditors and things like
23 laws that allow -- that cause the debtor's
24 property to be distributed among creditors as --
25 we call -- we call these the substantive --

1 JUSTICE THOMAS: But --
2 MR. GANNON: -- rules of bankruptcy.
3 JUSTICE THOMAS: Well, let's just take
4 that. I think the argument would be that, in
5 this case, the fees -- the amounts that are now
6 going to pay fees would have been distributed,
7 to the extent there were distributions, to
8 creditors.
9 MR. GANNON: Not every law that will
10 have an effect on how much money is left in the
11 pot at the end of the bankruptcy for
12 distribution to creditors can be a law on the
13 subject of bankruptcies.
14 JUSTICE THOMAS: Well, what --
15 MR. GANNON: And we know that because
16 there are other procedural things that would
17 affect how much money is there.
18 If Congress made changes to federal
19 tax law or employee benefit programs, that would
20 affect priority of claims, the order that claims
21 would get paid. If a bankruptcy court withdraws
22 the reference in an individual case so that it
23 doesn't -- a district court withdraws the
24 reference in an individual case so it doesn't
25 start in bankruptcy court, there's one less set

1 of appellate filing fees that will have to get
2 paid. If somebody wants to appeal to the court
3 of appeals, they won't have to go through the
4 bankruptcy -- from the bankruptcy court to the
5 district court or through a bankruptcy appellate
6 panel before they get to the court of appeals.
7 There are other ways. The state
8 exemption law that the Court upheld in Moyses
9 varies state by state. That affects how much
10 money is going to be available in the pot.
11 Nobody thinks that those are laws on the subject
12 of bankruptcies that can't be changed in a way
13 that -- that is covered by -- the -- you know,
14 those aren't covered by the uniformity
15 requirement.
16 JUSTICE KAGAN: But this is a top-down
17 imposition of a fee structure that predictably
18 can't help but disadvantage both debtors and
19 creditors in two states -- in 48 states as
20 compared to two states.
21 Now, you know, why -- bankruptcies are
22 going to be different in those 48 states, and
23 they're going to be different by virtue of a
24 congressional decision that's directly related
25 to bankruptcy.

1 MR. GANNON: And I think the same
2 thing was true under the 1800 and 1841 Acts
3 where every district was authorized to --
4 JUSTICE KAGAN: Yeah, I don't think
5 so, Mr. Gannon.
6 MR. GANNON: -- set fees at whatever
7 it wanted to set.
8 JUSTICE KAGAN: I mean, at first, your
9 brief -- I read your brief and I thought, oh,
10 that's pretty convincing. And then it turns out
11 it's not so convincing just because, you know,
12 everybody had that choice and they made a
13 choice. So -- so this is Congress making the --
14 making a choice for 48 states and only giving
15 the choice to two states.
16 MR. GANNON: Well, I -- we also think
17 that Congress then told the Judicial Conference
18 it could authorize equal fees. And the Judicial
19 Conference, which had asked for that authority
20 and received that authority, had implemented
21 that authority. And Congress was acting against
22 that backdrop when it enacted this fee increase
23 after the Judicial Conference had said it would
24 stay in tune and had indeed done so in 2007.
25 And so -- and with respect to this

1 question of the equal choice, my friend keeps
2 saying that as long as the rule gives everyone
3 equal choice, that's uniform. That -- I don't
4 think that makes sense for three reasons.
5 First, dealer's choice is a really
6 peculiar definition of uniformity, and it
7 violates his lead premise, which --
8 JUSTICE KAGAN: It's not peculiar if
9 what you're worried about is regional bias.
10 MR. GANNON: Except his -- it -- it is
11 inconsistent with his premise that
12 indistinguishable debtors should not pay
13 different fees because their bankruptcies arise
14 in different states.
15 And, second, letting each district
16 choose can't be the standard that we would be
17 using for substantive rules of bankruptcy. We
18 wouldn't use that for who can be a debtor, what
19 is the estate, what is the scope of a discharge.
20 And those are all different from the procedural
21 questions that Petitioner is trying to pick off
22 with this particular argument.
23 And, third, I would say that this rule
24 is just upside down, that it makes no sense to
25 say that tolerating greater variations in every

1 district and among every district would be more
2 constitutionally uniform.
3 JUSTICE KAGAN: Well, again, I -- I
4 guess I don't see the -- that point if you're --
5 what you're worried about is regional bias. If
6 what you're worried about is regional bias, then
7 the idea of Congress picking select states for
8 any purpose becomes, you know, something that's
9 right in the heartland of what you're worried
10 about.
11 MR. GANNON: Well, it -- it would if
12 you thought that the uniformity requirement
13 applied to this particular type of rule. And we
14 -- we do have the argument that says that we
15 don't think that this is a substantive rule of
16 bankruptcy even though it can have an effect on
17 how much money is left in the pot and a
18 predictable effect.
19 And that's true for lots of other laws
20 that nobody thinks are substantive laws of
21 bankruptcy or laws on the subject of
22 bankruptcies, as I said, like what are your
23 federal tax obligations, what are your -- you
24 know, what -- what is an employee benefit that
25 you have.

1 And those all have predictable effects
2 on what's going to happen in the bankruptcy, but
3 nobody thinks Congress is legislating about
4 bankruptcy when it amends ERISA.
5 And so -- and then we also have two
6 other arguments. One is that there -- this was
7 still equal and, third, that the -- that there's
8 a -- a separate clause, the Inferior Courts
9 Clause, that would be applicable here.
10 And, finally, that to the extent that
11 you take as the background that there are two
12 programs that had been in existence for 31 years
13 at the request of the Judicial Conference and
14 Congress was entitled to legislate against that
15 backdrop, then it's appropriate, as you and
16 others said during my friend's argument,
17 assuming that Congress can rationally solve the
18 shortfall.
19 And that is solving a geographically
20 isolated problem, which this Court recognized in
21 Gibbons and in the Regional Railroad
22 Reorganization cases is something that the
23 Uniformity Clause allows it to do.
24 JUSTICE BARRETT: But, Mr. Gannon --
25 JUSTICE KAVANAUGH: What --

1 JUSTICE BARRETT: -- those examples
2 that you give of, say, ERISA, or what are your
3 federal tax obligations, those aren't plausible
4 exercises of the bankruptcy power, right?
5 MR. GANNON: They are not. I mean,
6 they could be to the extent that they have
7 predictable effects on bankruptcy. If I -- if I
8 understand my friend to say that if this is
9 going to affect how much money there is here,
10 that's a law on the subject of bankruptcy.
11 And our argument is that there are
12 things that Congress legislates with respect to
13 the bankruptcy system that are definitely laws
14 on the subject of bankruptcies, the substantive
15 rules of bankruptcy. Those are all subject to
16 the uniformity requirement.
17 There are other things Congress has
18 the power to do either as necessary and proper
19 to that or as necessary and proper to saying
20 we've decided we're going to run bankruptcy
21 through inferior courts. We're not going to
22 have it go through an -- an independent agency
23 or some part of the executive branch. And --
24 JUSTICE BARRETT: So facial
25 uniformity, just to be sure I'm -- I'm following

1 this, the facial uniformity requirement applies,
2 in your view, only to what you're describing as
3 substantive bankruptcy regulations like priority
4 for creditors?
5 MR. GANNON: The -- the rules that
6 govern relations between creditors and --
7 creditors and debtors and things like
8 distribution of the property of the estate, yes.
9 Those are -- those are the substantive rules of
10 bankruptcy and not procedural aspects that --
11 that there have been lots of variations.
12 And the idea that you can't have a
13 pilot program in some districts to test out some
14 procedure, now I don't think that somebody would
15 say we're going to try out a new version of
16 Chapter 11.5 on a trial run --
17 JUSTICE BARRETT: Well, I understand.
18 MR. GANNON: -- in a handful of
19 districts.
20 JUSTICE BARRETT: But that means that
21 your argument really is -- it's -- it's much
22 more important to your argument to distinguish
23 between core bankruptcy power, the substantive
24 law of bankruptcy and bankruptcy administration
25 than, you know, in -- in response to Justice

1 Kagan, you were talking about what I take to be
2 the differences between formal and functional
3 uniformity, saying that your friend on the other
4 side, insofar as he emphasizes the formality of
5 a law that gives all regions a choice, you say,
6 well, that's -- that's undermines the point of
7 bankruptcy, that's a funny view of uniformity
8 because it would allow for a lot of
9 disuniformity.
10 But that functional view really
11 doesn't matter if the uniformity requirement
12 doesn't apply to so-called bankruptcy
13 administration.
14 MR. GANNON: Well, it would matter, I
15 think, to -- to my friend's attempt to
16 distinguish the 1840 and 18 -- 1800 and 1841
17 Acts and other procedural requirement -- other
18 procedural variations that happen under the
19 Bankruptcy Code today, that there can be
20 bankruptcy appellate panels, there can be
21 referrals to district -- from district courts to
22 bankruptcy judges. There are all sorts of
23 different variations that occur.
24 And those have all been understood, I
25 think, as being not the substantive rules of

1 bankruptcy and, therefore, not covered by the
2 uniformity requirement.
3 And I'm saying that this -- this
4 attempt to say, well, it's a uniform standard
5 because everyone gets equal choice, I don't
6 think, can be the rule that the Court would use
7 as the uniformity standard for everything in
8 bankruptcy because you would not tolerate that
9 for something like who can the debtor -- who can
10 be a debtor who files for bankruptcy.
11 JUSTICE BREYER: Anything --
12 MR. GANNON: Well, let every district
13 decide not -- not in an individual court in an
14 individual case, but let each district decide
15 what its rule for who can be a debtor who files
16 a bankruptcy petition can be.
17 JUSTICE BREYER: Well, there are a lot
18 of things. I -- I mean, I'm probably agreeing
19 with you, but, I mean, in Congress, there are
20 dozens of things. Come on, this is going to be
21 National Pork Week, you know, and every state
22 has their choice, but you write it, it's
23 National Pork Week for everybody. Anyone want
24 an exception? Anyone who wants an exception
25 comes in, then give them an exception.

1 Okay. I don't really see the
2 difference between saying "may," at least as
3 applied to an awful lot of things that I've had
4 experience with, and saying don't worry,
5 everyone has to do it unless you want an
6 exception as long as there's knowledge.
7 Now what worries me about applying
8 that, what I'd think is how things work to this
9 is, well, maybe this was done by the Judicial
10 Conference and maybe that makes it different.
11 MR. GANNON: Well, we do think here
12 that it matters that we're dealing with multiple
13 statutes. Congress initially created the -- the
14 two different programs.
15 JUSTICE BREYER: I understand. But, I
16 mean, would the Judicial Conference -- I mean,
17 I've been in a number of bodies which do decide
18 things that way. Sure, I'll skip the name, what
19 they were, but does the Judicial Conference
20 sometimes work that way?
21 We want a rule here. Oh, anybody
22 wants an exception? It's a procedural rule, you
23 want an exception, say so. If not, you're going
24 to be stuck with the general rule. Now, if it's
25 well represented, they'll say so.

1 MR. GANNON: Well, and, Justice
2 Breyer --
3 JUSTICE BREYER: But I don't know if
4 that works that way in the Judicial Conference
5 or not.
6 MR. GANNON: Well, I mean, I think,
7 here, my friend points out that the choice here
8 was Congress's. But I think you're making the
9 point that at the time when the pilot program
10 finished, Congress was looking at the evidence
11 that it had about how successful the pilot
12 program was and it heard from representatives
13 from two states, one of which had participated
14 in the pilot program and didn't like it.
15 The bench and the bar said that we --
16 we prefer not to be subject to the U.S.
17 Trustees, and Congress deferred to that choice,
18 at least for a temporary period, and also did
19 that for another district.
20 My friend says, as long as Congress
21 would have left that option open for every
22 district in perpetuity, that would be fine.
23 I think, effectively, what -- what
24 Congress did was said, well, you know, we've
25 looked. Who -- who doesn't want to join now?

1 And we've concluded that there can be these two
2 different programs and that will be fine.
3 And by the time the Ninth Circuit
4 ruled in the mid-1990s that there was a -- a
5 potential uniformity problem with that, the
6 Judicial Conference was defending the existence
7 of the two programs.
8 JUSTICE KAGAN: So, Mr. Gannon --
9 MR. GANNON: And Congress --
10 JUSTICE KAGAN: -- I mean, suppose --
11 let me give you a hypothetical, and it's just
12 going to be a single statute, so you'll have to
13 save your two-statute argument.
14 But it's a -- a single statute, and it
15 says we're going to pick four states and they
16 just so happen to be the states of, you know,
17 the chair and the ranking member of the relevant
18 committees in the House and the Senate. We're
19 going to pick those four states and we're going
20 to give them a system in which, you know, fees
21 are a tenth of what they are everywhere else.
22 So, if you're a debtor, if you're a
23 creditor in those four states, it's a magnet --
24 you know, it's a very, very large difference in
25 terms of how the bankruptcy estate comes out and

1 how it gets divided up.
2 Would that be appropriate?
3 MR. GANNON: Well, I -- I think that
4 to the extent that fees aren't included in the
5 uniformity requirement, it wouldn't be a
6 uniformity violation. If it's an irrational
7 change --
8 JUSTICE KAGAN: Well, I just -- I gave
9 --
10 MR. GANNON: -- then maybe it's
11 subject to some sort --
12 JUSTICE KAGAN: -- I just gave you the
13 hypothetical.
14 MR. GANNON: Yes.
15 JUSTICE KAGAN: They -- they pick
16 these four states for political reasons, nothing
17 to do with any geographical conditions on the
18 ground.
19 MR. GANNON: Understood. And our --
20 our first argument is that to the extent that
21 it's just about fees, that that is not subject
22 to the uniformity requirement. That is a
23 procedural thing that isn't covered by the
24 uniformity requirement. Congress can make
25 distinctions.

1 JUSTICE KAGAN: Even though every
2 creditor --
3 MR. GANNON: To the extent that this
4 is --
5 JUSTICE KAGAN: -- and every debtor --
6 MR. GANNON: To the extent that this
7 is --
8 JUSTICE KAGAN: -- would rather be in
9 these four states?
10 MR. GANNON: To the extent that this
11 is a geographic distinction that you think would
12 be covered by the Uniformity Clause, then we
13 think the question would be whether that is a
14 rational geographic -- geographical distinction.
15 And that's -- that's what the Court allowed in
16 Gibbons and the Regional Railroad Reorganization
17 Act cases and --
18 JUSTICE KAGAN: Well, so far, you
19 haven't really given a reason why this is
20 rational.
21 MR. GANNON: This is rational if you
22 take as given that there are two programs
23 because they had existed for three decades at
24 the time the fee increase was enacted.
25 And I don't think that Congress

1 couldn't rely --

2 JUSTICE KAGAN: So that's the

3 two-statute argument.

4 MR. GANNON: That's -- understood.

5 JUSTICE KAGAN: But the two-statute

6 argument is -- that seems peculiar, that you

7 couldn't do it in one statute, but you can kind

8 of divide it up --

9 MR. GANNON: It would be -- it would

10 be --

11 JUSTICE KAGAN: -- so that you can

12 circumvent any uniformity limitation.

13 MR. GANNON: If -- if Petitioner

14 had -- would -- had preserved the challenge to

15 the underlying system, the two programs, and

16 they were done at the same time and there was

17 therefore no other justification Congress would

18 have other than the fact that -- that it -- it

19 wanted to exempt six districts, then I think it

20 would be susceptible to that -- that argument.

21 JUSTICE BARRETT: What if there were

22 no Article III injury to -- to test that?

23 Remember, he said it wasn't clear that anybody

24 could have challenged the initial division

25 because it's not clear that any --

1 MR. GANNON: Well, actually, that's --
2 that's not true because there was a challenge
3 because there were no fees in the bankruptcy
4 administrator districts until 2002. Congress
5 had to authorize the bankruptcy administrator
6 districts to charge fees, and it did so
7 precisely to avoid this potential constitutional
8 challenge.
9 The Ninth Circuit had --
10 JUSTICE GORSUCH: Mr. Gannon --
11 MR. GANNON: -- sustained a challenge
12 --
13 JUSTICE GORSUCH: -- I -- I thought
14 you --
15 MR. GANNON: -- in 19 --
16 JUSTICE GORSUCH: -- I thought earlier
17 you said that -- that there was no
18 constitutional injury between the two systems
19 but for the difference in fees.
20 MR. GANNON: That's correct.
21 JUSTICE GORSUCH: Okay.
22 MR. GANNON: And I'm saying in
23 response to Justice Barrett that there was a
24 difference in fees with the --
25 JUSTICE GORSUCH: But it's the

1 difference in fees that creates the injury here.
2 MR. GANNON: Between 1986 and 2001.
3 JUSTICE GORSUCH: Okay.
4 MR. GANNON: And then again for the
5 13-quarter period that got stranded --
6 JUSTICE GORSUCH: Yeah. Okay.
7 MR. GANNON: -- by the delay in
8 implementation after the 2017 Act.
9 JUSTICE GORSUCH: I've got a -- I've
10 got a different question for you on remedies,
11 okay? We have -- we have two options here
12 remedially for backward-looking relief, and
13 let's confine ourselves to that discussion for a
14 moment, clawback or refunds.
15 On the clawback argument, your friend
16 on the other side says, well, there are really
17 two problems. One is maybe a legal problem, a
18 constitutional problem, retroactive --
19 retroactive lawmaking, which is subject to
20 heightened scrutiny in this Court, and second is
21 just a -- a practical problem that a lot of
22 these cases are closed.
23 And then, on the other side, he says,
24 for purposes of refunds, it's just going to be
25 limited to the people who've actually made a

1 complaint. As Justice Sotomayor pointed out,
2 you've got to -- you've got to file a complaint
3 to get your money.
4 And so it may not be that much.
5 And -- and we don't know where your figure of
6 300-some-odd million dollars comes from.
7 Would you care to address those
8 points?
9 MR. GANNON: Sure. I -- I -- I do
10 think, to the extent that he acknowledges that
11 somebody -- some people might not be able to
12 claim their refund or might not claim their
13 refund at this point, that proves that that's
14 not going to be a complete equalization remedy
15 retrospectively by their --
16 JUSTICE GORSUCH: Well, it is for
17 those who complain. I mean, it's --
18 MR. GANNON: That's true. But to the
19 extent that the argument here --
20 JUSTICE GORSUCH: There's always
21 somebody who doesn't complain, I mean --
22 MR. GANNON: Yes, but --
23 JUSTICE GORSUCH: -- and who doesn't
24 file a lawsuit for an injury. So that -- that
25 doesn't work, okay, so let's move on from that.

1 MR. GANNON: But the $324 million
2 figure is calculated by figuring out which
3 debtors in the U.S. Trustee program districts
4 paid the heightened fee that was associated with
5 at least a million dollars of disbursements in a
6 quarter for any of the 13 quarters --
7 JUSTICE GORSUCH: Right.
8 MR. GANNON: -- in which there was a
9 disparity.
10 JUSTICE GORSUCH: It's the whole
11 universe. It could be up to 300 and odd million
12 dollars, but --
13 MR. GANNON: It -- it would be up to
14 324 million. And states --
15 JUSTICE GORSUCH: But do we have any
16 sense of what it actually would be based on the
17 number of complaints?
18 MR. GANNON: Well, I think there
19 are -- there is a case pending in the Federal
20 Circuit that was -- that was filed as a class
21 action. It wasn't certified as a class. That
22 would be an opt-in class.
23 I don't know. I don't have an actual
24 number on what it would be. But, to go back to
25 your opening assumption here that if you look

1 retrospectively, there are only two remedies, a
2 refund or a clawback, I'd say two other things.
3 JUSTICE GORSUCH: Well, first, could
4 you address the problems with the clawback
5 approach that your colleague has addressed, the
6 legal and the practical ones?
7 MR. GANNON: Yeah, I would say that
8 the -- that there could be a -- a -- a clawback
9 remedy in the sense that if this Court were to
10 say -- and we think the order of operations is
11 the opposite of what -- of what Petitioner's
12 counsel says.
13 We think that the first question the
14 Court needs to be asking here is, what would
15 Congress have wanted to do here?
16 JUSTICE GORSUCH: Can you just answer
17 my -- my -- my questions, though, Mr. Gannon?
18 You know, what's -- what -- you -- there are two
19 problems with the clawback -- I'm going to keep
20 repeating it until you answer it, okay? There
21 are two problems with the clawback that your
22 colleague has identified. One is legal and the
23 other is practical.
24 Could you address those? And then you
25 can say whatever the heck else you want to say.

1 MR. GANNON: And -- I mean, the legal
2 problem, he says there might be some due
3 process-type concerns that would prevent
4 somebody from being charged -- from -- from
5 having to pay this fee after the fact. And I
6 would say perhaps that is true. And that was
7 also true in the other federal cases where we
8 think that there was effectively no
9 retrospective remedy in a circumstance that is
10 like this. And, therefore, that's not obviously
11 a legal problem that would prevent the Court
12 from rejecting clawback as a remedy.
13 And then -- so, practically speaking,
14 I don't know -- we think that McKesson shows us
15 that there doesn't have to be a perfect effort,
16 as does even Petitioner's proposed refund
17 remedy. And we also think that, here,
18 Petitioner had a pre-deprivation remedy. He
19 challenged this rule.
20 JUSTICE GORSUCH: Can I just
21 interrupt, though? On -- on the legal point, as
22 I understand it, you say yes, there probably --
23 or there might well be a due process problem
24 here with retroactive legislation, but that
25 doesn't eliminate clawback as a potential

1 remedy. Is that -- is that the gist of the
2 argument?
3 MR. GANNON: The gist of the argument
4 is, Justice Gorsuch, that the three most
5 analogous cases I have are instances where there
6 was effectively no retrospective equalization
7 when the Court was fixing an -- a mistake like
8 this, a disparate treatment problem, when it
9 recognized that the remedy, the proper remedy,
10 was to eliminate the exception that had given a
11 minority of beneficiaries greater benefits.
12 And so one example is
13 Morales-Santana --
14 JUSTICE GORSUCH: What -- what
15 incentive does a litigant have to bring a
16 constitutional complaint if there's no -- no
17 possibility of retrospective relief?
18 MR. GANNON: Well, that happens every
19 time somebody brings a disparate treatment
20 claim, and the Court concludes that the way
21 we're going to equalize the disparate treatment
22 is by eliminating the exception where somebody
23 else was getting a benefit that the plaintiff is
24 seeking and doesn't get.
25 That's what happened in

1 Morales-Santana, where the petitioner was
2 saying, I should be made a U.S. citizen because
3 my father was discriminated against. And the
4 Court said no, you don't get citizenship even
5 though you are a prevailing party in an equal
6 protection case. You proved that the statute
7 was unconstitutional. And the Court invalidated
8 the more generous exception there, and -- and --
9 rather than the more restrictive rule, but it
10 then did not do anything to operationalize that
11 retrospectively. It did not go back and say
12 everybody who had benefitted from the exception
13 has to give their citizenship back.
14 Similarly, in the American Association
15 of Political Consultants case, the Court's
16 remedy there was to invalidate the exception for
17 government debt collection, robo calls, and --
18 but the plurality's opinion specified in
19 Footnote 12 that those who had violated the
20 general prohibition that was in place on robo
21 calls would still remain liable and also
22 acknowledged that notice concerns would prevent
23 those who had been complying with the government
24 debt collection exception, which was now
25 invalidated, they would not be on the hook

1 because of notice concerns.
2 CHIEF JUSTICE ROBERTS: Well, but one
3 thing we --
4 MR. GANNON: But that didn't cause the
5 plurality to say that the -- that the remedy
6 would be to say that that means we have to let
7 everyone else off the hook under the majority
8 rule.
9 CHIEF JUSTICE ROBERTS: Well, one
10 thing we didn't say is, because of that, because
11 of the prospect that you might not actually get
12 anything, that you don't have a case and that we
13 don't go and reach the merits of your case. It
14 just leaves you the option of deciding how you
15 want to go about equalizing the violation that
16 the other side has shown.
17 And you'd say what you -- I -- I don't
18 mean to -- I'd be surprised if the government
19 thought it could go and claw back from all the
20 other debtors the fees that -- claw back rather
21 than equalize by giving back the -- the fees.
22 But, in any event, a lot of the
23 examples you gave of things that you could have
24 disuniformity -- I don't mean to beg the
25 question, but disparate treatment between a

1 particular thing and that's not a violation, or
2 my example about the, you know, computer
3 purchases, that's not a violation.
4 It seems to me that what might make
5 this case different is that you're dealing with
6 cold, hard cash, and that is a big deal in
7 bankruptcy. It doesn't matter what kind of
8 computers you're using. But that's a
9 significant factor.
10 And if you have a choice as a debtor,
11 you know, where do you want to file for
12 bankruptcy, you'd want to file in a place that
13 you're not going to lose a lot of your -- a lot
14 of what is at stake paying fees that are how
15 many times greater in -- in -- in the 48 than in
16 the two?
17 MR. GANNON: For -- for -- this only
18 covered the debtors who are paying more than a
19 million dollars in disbursements. It could be
20 up to seven times greater, seven-plus times
21 greater.
22 CHIEF JUSTICE ROBERTS: All right.
23 MR. GANNON: But it -- then it --
24 CHIEF JUSTICE ROBERTS: Well, that
25 makes a big difference if you're running out of

1 money, right?
2 MR. GANNON: Yes, it could --
3 CHIEF JUSTICE ROBERTS: And that's
4 different than the sort of procedural examples,
5 I think, that you gave. With the -- the
6 differences in those situations, I don't think
7 somebody would care whether they're, you know,
8 one type of computer or -- you know, that was my
9 example, which may not be a very good one -- one
10 type of computer or another.
11 But, as you were going through
12 examples, you could have this, you know,
13 disuniform -- disparate treatment, it struck me
14 that that really wouldn't make a difference to
15 the debtor or creditor, but this example might.
16 MR. GANNON: Well, the -- the truth is
17 that for most of the time the fees were actually
18 equal and Congress expected them to be equal
19 here. But I think, to the extent -- I'm not
20 sure whether you mean this question to be part
21 of the remedial questioning. I -- we --
22 CHIEF JUSTICE ROBERTS: No.
23 MR. GANNON: I was -- I was not trying
24 to contest that somebody would lack standing to
25 bring such a challenge if the remedy at the end

1 of the case ends up being that the other guy
2 loses the benefit that I'm claiming --
3 CHIEF JUSTICE ROBERTS: No, not as
4 part of --
5 MR. GANNON: -- that I should be able
6 to get here.
7 CHIEF JUSTICE ROBERTS: -- not as part
8 of the remedy but as part of whether or not it
9 violates the constitutional provision if what is
10 not treated the same way really makes a
11 difference to people in bankruptcy.
12 MR. GANNON: I -- I take the point
13 that it -- that it -- it may make a difference
14 and that -- that -- that money matters in a
15 bankruptcy proceeding, but I mentioned that
16 there are lots of other provisions of law that
17 will affect how much money is available for
18 distribution in the bankruptcy at the end, and
19 we don't think that those are covered by the
20 uniformity requirement.
21 And also, to the extent that there are
22 the two different programs and Congress decided
23 that one of them should be self-funded, then
24 it's -- that is itself another rule that
25 deserves respect here.

1 And I would also observe with respect
2 to the self-funding point that the bankruptcy
3 administrator program fees, when they are being
4 collected, also offset congressional
5 appropriations. So this isn't an instance where
6 one program is completely self-funding, the
7 other one is completely taxpayer-supported, but
8 it's one where, because the judiciary and the
9 bankruptcy administrator program have additional
10 funding streams, Congress didn't have to worry
11 about the shortfall when it was enacting this
12 particular fee increase in 2017.
13 But, if -- if I could go back and just
14 add one other case to my answer for Justice
15 Gorsuch about the -- the remedial situations,
16 one of them did involve money and it involved
17 this issue. When the Ninth Circuit invalidated
18 the two programs in the 1990s, it said the
19 reason they were -- that it was unconstitutional
20 is because of the fee disparity.
21 And they said, so you are right, you
22 are complaining that you should not have to pay
23 this fee because some people in some other state
24 wouldn't have to pay the fee. And the Ninth
25 Circuit said that's a violation of the

1 uniformity requirement. The fix is to carve out
2 the exception.
3 We know Congress would actually want
4 to have the U.S. Trustee program. We're not
5 going to flip everything upside down and
6 substitute the 3 percent for the 97 percent.
7 We're just going to take the 97 percent and --
8 and -- and pull it across. And at that point
9 then, the Ninth Circuit's remedy was to say:
10 Pay the fee. You have to pay the entire fee
11 because we severed the exception.
12 And so we think that those are the
13 cases that are the analogous remedy here, which
14 is why, if the Court were to -- to conclude that
15 there is disparate treatment here that violates
16 the Uniformity Clause, that the judgment should
17 be that the statute's unconstitutional to that
18 extent, but it's the exception that is invalid.
19 The 2020 statute does not disagree with that at
20 all because Congress did not order refunds.
21 My friend says Congress only had a
22 prospective remedy. But Congress pointedly did
23 not give refunds to everyone who had overpaid
24 under their theory.
25 And then the effective remedy here is

1 going to be effectively only prospective.
2 Unless you insist that there needs to be some
3 sort of collection, then we think that the
4 Judicial Conference would do what it says on its
5 notices, which is refer a claim -- may I --
6 CHIEF JUSTICE ROBERTS: You can finish
7 your sentence.
8 MR. GANNON: We -- we may refer a
9 claim for a debt to the United States to the
10 Treasury for collection. And so there could
11 well be a practical way in which those could be
12 collected.
13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.
15 Just one more question on the remedy.
16 The question on which we granted cert was
17 whether the Bankruptcy Judgeship Act violates
18 the uniformity requirement of the Bankruptcy
19 Clause by increasing quarterly fees solely in
20 U.S. Trustee districts.
21 Now we could answer that question yes
22 or no without dealing with any remedy question
23 at all, right?
24 MR. GANNON: I think you could.
25 CHIEF JUSTICE ROBERTS: Okay. Thank

1 you.
2 Justice Thomas, anything?
3 Justice Breyer?
4 Justice Sotomayor, anything further?
5 Justice Kagan? No?
6 JUSTICE KAVANAUGH: A couple
7 questions. You had mentioned in your brief the
8 Wynne case as well, the Maryland case. How is
9 that relevant to the remedy question?
10 MR. GANNON: We cited it for the
11 proposition that there the Court recognized that
12 it was another one of these cases where there is
13 disparate treatment, and the plaintiff, even
14 though he has established that the law in
15 question was unconstitutional, it doesn't mean
16 that the plaintiff may get any practical relief
17 at the end of the day in the terms of getting
18 the money back.
19 Instead, the fix might be that there
20 is no longer going to be discriminatory
21 treatment because the other guy is going to no
22 longer get the benefit.
23 JUSTICE KAVANAUGH: The next -- we've
24 been acting as if the 2017 legislation was a
25 deliberate congressional choice to further a

1 pilot program that involved disparate treatment.
2 At least that's been the supposition.
3 But that's actually wrong. Congress
4 in 2017 was operating on an assumption that we
5 raise the fees in the one, they'll be raised in
6 the other. And that turns out not to pass for
7 several months, right, which creates the issue
8 in this case.
9 So, when we rely on -- when you say in
10 response to Justice Kagan Congress was
11 experimenting -- not in 2017, they weren't doing
12 that. They thought it had to be uniform, I
13 think, or thought it should be uniform, and that
14 raises my question.
15 In 2020, they then say in the text of
16 the statute, "longstanding intention of Congress
17 that the fee requirements remain consistent
18 across all federal judicial districts."
19 My questions there: One, how
20 longstanding do you think that was? And, two,
21 do you think that's a constitutionally informed
22 statement that Congress made or a policy
23 statement or both?
24 MR. GANNON: I -- I think it's both.
25 We agree with you this is -- this is a separate

1 argument that doesn't require the Court to get
2 into the question of what are the scope of the
3 Uniformity Clause, whether this is a
4 geographically isolated problem that's being
5 legitimately dealt with. It's a completely
6 separate argument that we think that the 2017
7 statute required equal fees.
8 And it's not an argument that says
9 "may" equals "shall." It's an argument that
10 says, if you look at everything Congress has
11 done in this space going back to the 2000 law,
12 when Congress first said "may," it was
13 responding to a request from the Judicial
14 Conference because it was solving the problem
15 identified in the Ninth Circuit case from the
16 1990s, a potential Uniformity Clause violation
17 -- uniformity requirement violation based on the
18 fee differential.
19 The Judicial Conference said, well,
20 let us charge the same fees and there won't be a
21 uniformity problem. Congress enacted a statute
22 that said the Judicial Conference may impose
23 equal fees -- that was the word that it used --
24 equal fees.
25 The Judicial Conference adopted a

1 standing order that said we will charge the fees
2 in the statute as it is amended from time to
3 time. A fee increase happened in 2007, and it
4 was ported across to the six districts in the
5 bankruptcy administrator districts without
6 incident.
7 And so, in 2017, when Congress amended
8 (a)(6) again, it had every expectation that the
9 Judicial Conference would indeed have its
10 standing order take effect and, therefore --
11 JUSTICE KAVANAUGH: And that leads to
12 the question, what do we make of all that for
13 the constitutional issue? Is that -- I mean,
14 it's not a deliberate congressional choice in
15 2017. It's kind of a foul-up, right? And I
16 don't know what -- which way that cuts. Do you
17 want to give me --
18 MR. GANNON: Yeah, I --
19 JUSTICE KAVANAUGH: -- 30 seconds on
20 which way you think that cuts?
21 MR. GANNON: I mean, I think that it
22 means that Congress thought that the statute
23 would have equal fees across all 50 states.
24 That was its intention. And in 2020, when it
25 says this has always been our intention, we know

1 that because the only reason it authorized these
2 fees was to avoid the uniformity problem if
3 there would be one. And, therefore, it wouldn't
4 have done that if it allowed unequal fees.
5 And so all along the purpose of (a)(7)
6 was to allow -- was to allow the judiciary to
7 take steps to avoid the uniformity problem. And
8 I think that that's constitutionally significant
9 because it means that Congress was not
10 legislating a non-uniform outcome here. It
11 fully expected that, as in 2007, the 2017 fee
12 increase would be implemented without a delay.
13 JUSTICE KAVANAUGH: Thank you.
14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett? No?
16 Thank you, counsel.
17 Mr. Geyser, rebuttal?
18 REBUTTAL ARGUMENT OF DANIEL L. GEYSER
19 ON BEHALF OF THE PETITIONER
20 MR. GEYSER: Thank you, Mr. Chief
21 Justice.
22 My friend talks a lot about what
23 Congress intended and expected and might have
24 hoped, but this Court normally looks at what
25 Congress actually wrote in the statute.

1 And my friend says that "may" doesn't
2 mean "shall." It doesn't. And, in fact,
3 Congress used the word "may" in contrast to the
4 word "shall" in the very interlocking provision
5 that they were dealing with and then followed it
6 up in (a)(7) with the next sentence that uses
7 the word "shall" twice.
8 This Court doesn't presume that
9 Congress uses different words in the same
10 statute because it thinks they mean the same
11 thing. So I think it's very clear and
12 especially when the Judicial Conference is
13 telling Congress, we have discretion to
14 implement this or not.
15 That means that if Congress wants to
16 eliminate that discretion and secure uniformity,
17 they have to do it on the face of the statute.
18 My friend suggests that this is not a
19 law on the subject of bankruptcy because the
20 Constitution draws a distinction between
21 substantive rules and procedural rules.
22 I don't see that anywhere in the text
23 of the Bankruptcy Clause itself. It talks about
24 uniform laws on the subject of bankruptcies, not
25 on substantive bankruptcy law or procedural

1 bankruptcy law.
2 The -- the distinction too between
3 substance and procedure is notoriously difficult
4 to draw. I think the Court normally tries not
5 to get into that thicket unless it's
6 unavoidable. I think it's odd to suggest that
7 as a constitutional matter, the restraint on
8 Congress's power should be invited through this
9 incredibly difficult line to police.
10 My friend suggests that we're wrong
11 that the Constitution requires uniform laws on
12 the subject of bankruptcy, and it's strange to
13 think that that -- that Congress or the
14 Constitution would tolerate deviations at the
15 local level. This Court has already explained
16 why the government is wrong in Moyses.
17 Congress -- the Court said that
18 Congress can adopt varying state exemptions
19 without running afoul of the uniformity context
20 as long as the choice to the states is the same.
21 It can have disparate local effects that has no
22 difference on the constitutional question
23 because it's a uniform federal standard.
24 My friend suggests that -- that the
25 Court, in looking at the exemptions for the dual

1 system, the Court should take into account the
2 sort of shadow lawmaking that goes on behind the
3 scenes of what states asked for exemptions from
4 the -- from the program and which states didn't.
5 That's not the way this Court
6 construes statutes. You look at the law that
7 Congress passed, not what -- what political
8 forces went into the law to sort of rewrite the
9 terms that Congress actually chose.
10 For clawback as a remedy, I think that
11 the Chief Justice is exactly right that it would
12 be surprising for Congress to say let's go and
13 find every creditor, professional, administrator
14 that was involved in any of these closed cases,
15 track them down and try to get them to pay their
16 pro rata share of the fee, which is what
17 Congress would have to do to actually equalize
18 the treatment.
19 I think that, as Justice Gorsuch
20 pointed out, there is a serious due process
21 problem, which my friend -- which my friend
22 acknowledges. And I think instead of resolving
23 one series of constitutional litigation, that's
24 a remedy that just invites a whole nother series
25 of constitutional questions and brand-new

1 litigation over a fee statute that was plainly
2 non-uniform on its face.
3 Unless the Court has further
4 questions.
5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.
7 MR. GEYSER: Thank you.
8 CHIEF JUSTICE ROBERTS: The case is
9 submitted.
10 (Whereupon, at 12:21 p.m., the case
11 was submitted.)
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