No. 23-278

In the Supreme Court of the United States

UNITED STATES TRUSTEE, REGION 21,
PETITIONER

v.

BAST AMRON LLP

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1004(a) of the Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, Div. B, 131 Stat. 1232 (28 U.S.C. 1930(a)(6)(B) (2018)), amended the schedule of quarterly fees payable to the United States Trustee in certain pending bankruptcy cases. In *Siegel* v. *Fitzgerald*, 142 S. Ct. 1770 (2022), this Court held that that provision contravened Congress's constitutional authority to "establish * * * uniform Laws on the subject of Bankruptcies," U.S. Const. Art. I, § 8, Cl. 4, because it was initially applied only in the 88 federal judicial districts that have United States Trustees but not in the 6 districts that have Bankruptcy Administrators. This Court left open the question of "the appropriate remedy" for the violation. *Siegel*, 142 S. Ct. at 1783. The question presented in this case is:

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

PARTIES TO THE PROCEEDING

Petitioner (appellee and cross-appellant in the court of appeals) is the United States Trustee, Region 21. Respondent (appellant and cross-appellee in the court of appeals) is Bast Amron LLP.

RELATED PROCEEDINGS

United States Bankruptcy Court (S.D. Fla.):

In re: Mosaic Management Group, Inc., No. 16-20833 (Apr. 9, 2020)

United States Court of Appeals (11th Cir.):

United States Region 21 v. *Bast Amron LLP*, No. 20-12547 (Jan. 14, 2022) (original panel opinion)

United States Region 21 v. *Bast Amron LLP*, No. 20-12547 (June 23, 2023) (panel opinion on remand)

Supreme Court of the United States:

Bast Amron LLP v. *United States Trustee Region 21*, 142 S. Ct. 2862 (June 27, 2022) (No. 21-1354) (granting, vacating, and remanding)

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In the Supreme Court of the United States

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BAST AMRON LLP

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

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Trustee, Region 21, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 71 F.4th 1341. A prior opinion of the court of appeals is reported at 22 F.4th 1291. The opinion of the bankruptcy court (App., *infra*, 28a-45a) is reported at 614 B.R. 615.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

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

> AMENDMENTS TO TITLE 28 OF THE UNITED STATES CODE.—Section 1930(a)(6) of title 28, United States Code, is amended—
>
> (1) by striking "(6) In" and inserting "(6)(A) Except as provided in subparagraph (B), in"; and
>
> (2) by adding at the end the following:
>
> "(B) During each of fiscal years 2018 through 2022, if the balance in the United States Trustee System Fund as of September 30 of the most recent full fiscal year is less than $200,000,000, the quarterly fee payable for a quarter in which disbursements equal or exceed $1,000,000 shall be the lesser of 1 percent of such disbursements or $250,000.".

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

> [(2)](a) FINDINGS.—Congress finds the following:
>
> (1) Because of the importance of the goal that the bankruptcy system is self-funded, at no cost to the taxpayer, Congress has closely monitored the funding needs of the bankruptcy system, including by requiring periodic reporting by the Attorney General regarding the United States Trustee System Fund.
>
> (2) Congress has amended the various bankruptcy fees as necessary to ensure that the bankruptcy system remains self-supporting, while also

fairly allocating the costs of the system among those who use the system.

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

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

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

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

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

* * * * *

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

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

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

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

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

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

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

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

STATEMENT

1. a. Federal bankruptcy cases require substantial oversight and administrative support. In 88 federal judicial districts, the United States Trustee (UST) Program, a component of the U.S. Department of Justice,

performs those functions; in 6 other districts, the Bankruptcy Administrator (BA) Program, which relies on judicially appointed bankruptcy administrators, plays that role. See generally *Siegel* v. *Fitzgerald*, 142 S. Ct. 1770, 1776 (2022).

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

b. Although the UST Program is housed in the Department of Justice, "Congress requires that the [UST] Program be funded in its entirety by user fees paid to the United States Trustee System Fund * * * , the bulk of which are paid by debtors who file cases under Chapter 11 of the Bankruptcy Code." *Siegel*, 142 S. Ct. at 1776; see 28 U.S.C. 589a(b)(5). Specifically, Congress has directed that in those cases a "quarterly fee shall be paid to the United States trustee * * * for each quarter (including any fraction thereof) until the case is converted or dismissed, whichever occurs first." 28 U.S.C. 1930(a)(6)(A) (Supp. III 2021).

The 1986 Act imposed Chapter 11 quarterly fees in the 88 UST districts but not in the 6 BA districts, which are funded by the Judiciary's general budget. See

§ 302(e), 100 Stat. 3123; *Siegel*, 142 S. Ct. at 1776. In the mid-1990s, a panel of the Ninth Circuit opined that having two distinct programs for supervising the administration of bankruptcy cases with different fees violated the uniformity requirement of the Bankruptcy Clause; on that basis, the court prospectively invalidated the provision of the statute that extended the deadline for the BA districts to join the UST Program, effectively requiring those districts to join the UST Program. See *St. Angelo* v. *Victoria Farms, Inc.*, 38 F.3d 1525, 1532-1533 (1994), amended, 46 F.3d 969 (1995).

After *Victoria Farms*, Congress amended the statutory framework but did not eliminate the BA program as the Ninth Circuit had essentially provided. Congress instead amended Section 1930(a) by adding a new paragraph (7), which provided that "[i]n districts that are not part of a United States trustee region * * * the Judicial Conference of the United States may require the debtor in a case under chapter 11 * * * to pay fees equal to those imposed by paragraph (6) of this subsection." Federal Courts Improvement Act of 2000 (2000 Act), Pub. L. No. 106-518, § 105, 114 Stat. 2412 (enacting 28 U.S.C. 1930(a)(7) (2000)). Congress directed that the quarterly fees collected in BA districts be deposited in a fund that offsets appropriations to the Judicial Branch, from which the BA Program is also funded. See 28 U.S.C. 1930(a)(7), 1931 (2000). And, believing that it had solved any uniformity problem, Congress "permanently exempted the six [BA] districts from the requirement to transition to the Trustee Program." *Siegel*, 142 S. Ct. at 1776; see 2000 Act § 501, 114 Stat. 2421-2422.

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

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

c. In 2017, following a sharp reduction in collections, the existing fee structure proved inadequate to fund the UST Program, and Congress temporarily increased quarterly fees in larger Chapter 11 cases. See *Siegel*, 142 S. Ct. at 1777. Specifically, the Bankruptcy Judgeship Act of 2017 (2017 Act), Pub. L. No. 115-72, Div. B, 131 Stat. 1229, amended the quarterly-fee statute by adding the following subparagraph to Section 1930(a)(6):

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

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

Despite the Judicial Conference's 2001 standing order imposing quarterly fees in BA districts "in the amounts specified in 28 U.S.C. § 1930, as those amounts may be amended from time to time," *2001 JCUS Report* 46, the BA districts did not implement the amended fee schedule by the beginning of 2018. In response, the Executive Committee of the Judicial Conference, acting on

an expedited basis, ordered the BA districts to implement the amended fee schedule, but it did so only for "cases filed on or after" October 1, 2018. Judicial Conference of the United States, *Report of the Proceedings of the Judicial Conference of the United States* 11 (Sept. 13, 2018), https://www.uscourts.gov/sites/default/files/2018-09_proceedings.pdf; see *id.* at 11-12.

d. After some courts held that the 2017 Act was unconstitutionally non-uniform based on their view that Congress had not compelled the same fees in BA and UST districts, see, *e.g.*, *In re Buffets, LLC*, 597 B.R. 588, 594 (Bankr. W.D. Tex. 2019), rev'd and remanded, 979 F.3d 366 (5th Cir. 2020), Congress enacted clarifying legislation that struck the word "may" from Section 1930(a)(7) and replaced it with "shall." Bankruptcy Administration Improvement Act of 2020 (2020 Act), Pub. L. No. 116-325, § 3(d)(2), 134 Stat. 5088. As amended, the text of Section 1930(a)(7) now provides that, for BA districts, the "Judicial Conference of the United States *shall* require the debtor in a case under chapter 11 * * * to pay fees equal to those imposed by paragraph (6) of this subsection." 28 U.S.C. 1930(a)(7) (Supp. III 2021) (emphasis added). An express legislative finding explains that the change "confirm[s] the longstanding intention of Congress that quarterly fee requirements remain consistent across all Federal judicial districts." 2020 Act § 2(a)(4)(B), 134 Stat. 5086.

The 2020 Act also amended the fee schedule, retaining the $250,000 maximum quarterly fee while slightly reducing the fees payable by large debtors that do not hit that ceiling. As of April 2021, the quarterly fee for Chapter 11 debtors with quarterly disbursements of $1 million or more was "0.8 percent of disbursements but not more than $250,000." 28 U.S.C. 1930(a)(6)(B)(ii)(II)

(Supp. III 2021); see 2020 Act § 3(e)(2)(B)(ii), 134 Stat. 5089 (effective date).

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

2. In this separate case, debtors Mosaic Management Group, Inc., Mosaic Alternative Assets, Ltd., and Paladin Settlements, Inc. sought relief under Chapter 11 of the Bankruptcy Code in the Southern District of Florida, a UST district. See App., *infra*, 1a-2a. When the amended schedule took effect in January 2018, the debtors initially paid the increased quarterly fees. See *id.* at 2a. But the investment trustee representing the debtors subsequently filed a motion in bankruptcy court

seeking a partial refund of quarterly fees and a reduction in future fee payments on the ground that the 2017 Act was unconstitutionally non-uniform because the statutory fee increase was implemented differently in the UST and the BA districts. See *ibid.* The law firm Bast Amron, respondent here, was subsequently assigned the fee claim and substituted for the investment trustee. See *id.* at 3a n.1; see also Bankr. Ct. Doc. 1376, at 1, 3 (Sept. 15, 2021).

a. The bankruptcy court rejected most of the investment trustee's motion. App., *infra*, 28a-45a. But the court held that the 2017 Act created a partial uniformity problem to the extent that 2% of the fees collected in UST districts were paid into the general U.S. Treasury fund and therefore could not be considered a user fee associated with debtors' use of the bankruptcy system. *Id.* at 40a-43a. The court ordered the investment trustee to keep paying 98% of the quarterly fees, but it also ordered the United States Trustee to credit the investment trustee with a sum equal to 2% of the quarterly fees it had paid since January 1, 2018. *Id.* at 43a-45a.

The court of appeals affirmed in part, reversed in part, and remanded, holding that the 2017 Act did not violate the bankruptcy uniformity clause. See 22 F.4th 1291, 1294-1327. Judge Brasher concurred in the result. See *id.* at 1327-1330. He believed that the 2017 Act was unconstitutionally non-uniform, but he concluded that the "requested remedy—a refund of the higher fees, which were imposed in 94% of the districts—is inappropriate because it is demonstrably at odds with Congress's intent." *Id.* at 1328 (Brasher, J., concurring in the result). Allowing a refund, Judge Brasher reasoned, would inappropriately "extend the special treatment Congress inadvertently afforded to creditors in the

[BA] districts, despite its manifest intent to raise the fees in all districts." *Id.* at 1330.

b. Bast Amron filed a petition for a writ of certiorari, asking this Court to hold the petition pending its decision in *Siegel*, *supra*. See Pet. at 11, *Bast Amron LLP* v. *United States Trustee Region 21*, 142 S. Ct. 2862 (2022) (No. 21-1354).

After this Court issued its decision in *Siegel*—which held that the 2017 Act was unconstitutional but left open the question of the appropriate remedy for that violation—the Court granted certiorari in this case, vacated the court of appeals' judgment, and remanded to the court of appeals "for further consideration in light of *Siegel*." App., *infra*, 27a.

c. On remand from this Court, the court of appeals held that respondent is entitled to a refund of the increased fees that debtors paid in a UST district relative to those they would have paid in a BA district during the same period. App., *infra*, 22a; see *id.* at 1a-22a.

The court of appeals majority recognized that "in formulating the remedy for constitutional violations like this one, courts should be guided by congressional intent." App., *infra*, 6a. And it "acknowledge[d] the strong evidence of congressional intention preferring the maintenance of the increased level of fees." *Id.* at 18a. The majority nonetheless interpreted this Court's precedents as forbidding the application of the remedy that Congress would have intended in this case. See *id.* at 8a-22a.

In rejecting a prospective-only remedy, the majority relied heavily on this Court's decisions in *Reich* v. *Collins*, 513 U.S. 106 (1994), and *Newsweek, Inc.* v. *Florida Department of Revenue*, 522 U.S. 442 (1998) (per curiam), which it viewed as "squarely reject[ing]" the

principle set out in *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), that "'[t]he availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause.'" App., *infra*, 12a-13a (quoting *McKesson*, 496 U.S. at 38 n.21). The majority read *Reich* and *Newsweek* to establish a substantive due process right to a refund whenever "the relevant law and available procedures permitted both predeprivation and postdeprivation process." *Id.* at 15a; see *id.* at 13a-16a. The majority was unable to discern a principle to reconcile its reading of *Reich* and *Newsweek* with this Court's recent decisions in *Sessions* v. *Morales-Santana*, 582 U.S. 47 (2017), and *Barr* v. *American Association of Political Consultants*, 140 S. Ct. 2335 (2020), but it declined to rely on the latter two cases because, in its view, those decisions did not "expla[in] * * * a governing principle of law" and because it viewed their factual context as less analogous to the facts here. App., *infra*, 20a; see *id.* at 19a n.11.

The majority also rejected the government's alternative argument that a leveling-down remedy (of collecting additional fees from the extremely small minority of BA debtors) would be appropriate because neither the Judicial Conference—which the court acknowledged "would have the authority to order such 'clawbacks'"—nor the Bankruptcy Administrators and BA-district debtors were "parties" in the case. App., *infra*, 10a-11a. And it emphasized that "some of the BA districts are located outside the Eleventh Circuit." *Id.* at 11a.

d. Judge Brasher concurred, agreeing with the majority's "bottom-line result," although he "c[ould]not agree with all of its reasoning." App., *infra*, 23a. Judge

Brasher reiterated his previous conclusion that "it is obvious that Congress's intent supports the conclusion that we must level down." *Id.* at 24a. "The favorable treatment" that debtors in BA districts had received, he explained, "was a tiny exception to an otherwise comprehensive scheme, and it was an accidental exception at that." *Ibid.* And he recognized that, "[a]s a matter of equal treatment law, that is where the inquiry ends." *Ibid.* For that reason, he rejected the majority's effort to distinguish this Court's decision in *Morales-Santana*, *supra*. *Ibid.*

Nonetheless, Judge Brasher concluded that a backward-looking, leveling-up remedy of providing refunds was required by what he saw as "commands of the Due Process Clause." App., *infra*, 24a (citation omitted). He relied on two considerations: First, the government "provided an opportunity to challenge the legality of the fee" and the debtors here "took advantage of" that opportunity. *Id.* at 25a. In his view, the availability of a predeprivation hearing itself meant that, as a matter of due process, a refund remedy must be available. *Ibid.* Second, he explained that a leveling-up remedy that refunded the increased fees that had been paid in UST districts would be the court's "only option" because, although "only a small number of bankruptcy cases would be affected by a retroactive fee," he believed that "too much time has passed to increase the fees [for debtors in BA districts] consistent with due process." *Id.* at 25a-26a.

REASONS FOR GRANTING THE PETITION

This case presents the question of the appropriate remedy for the constitutional violation that this Court found in *Siegel* v. *Fitzgerald*, 142 S. Ct. 1770 (2022). The court of appeals erred by ordering a refund remedy,

which is demonstrably contrary to Congress's intent. As the government explained in its petition for a writ of certiorari in *Office of the United States Trustee* v. *John Q. Hammons Fall 2006, LLC*, No. 22-1238 (filed June 23, 2023) (*John Q. Hammons* Pet.), and further explained in its petition for a writ of certiorari in *Harrington* v. *Clinton Nurseries, Inc.*, No. 23-47 (filed July 14, 2023) (*Clinton Nurseries* Pet.), that conclusion is mistaken and the question warrants this Court's review. See *John Q. Hammons* Pet. at 11-27; see also *Clinton Nurseries* Pet. at 13-20 (discussing the court of appeals' decision in this case).

This case presents the same question as *John Q. Hammons*. The Court's review is warranted in *John Q. Hammons* as the first case implicating the question to have reached the Court. Other cases raising the question, including this one, should be held pending the resolution of *John Q. Hammons*, which will allow the Court to provide a nationwide remedy for the uniformity violation that the Court recognized in *Siegel*. Accordingly, the government respectfully requests that the Court hold this petition pending the Court's disposition of *John Q. Hammons*, and then dispose of this petition as appropriate.

CONCLUSION

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

Respectfully submitted.

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SEPTEMBER 2023

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12547

IN RE: MOSAIC MANAGEMENT GROUP, INC.,
DEBTOR
UNITED STATES TRUSTEE REGION 21,
PLAINTIFF-APPELLEE CROSS-APPELLANT

v.

BAST AMRON, LLP, DEFENDANT-APPELLANT,
CROSS-APPELLEE

Filed: June 23, 2023

OPINION

Before: JORDAN, BRASHER, and ANDERSON, *Circuit Judges.*

ANDERSON, *Circuit Judge*:

In this appeal after remand from the Supreme Court, we address the appropriate remedy for the constitutional violation identified in *Siegel v. Fitzgerald*, 596 U.S. —, 142 S. Ct. 1770, 213 L. Ed. 2d 39 (2022). We received supplemental briefing and held another oral argument on the remedy issues.

I.

In 2008, Debtors Mosaic Management Group, Inc., Mosaic Alternative Assets, Ltd., and Paladin Settle-

ments, Inc. filed for Chapter 11 bankruptcy in the Southern District of Florida, a "UST district" in which the U.S. Trustee program operates. In June 2017, the bankruptcy court confirmed a joint Chapter 11 plan, under which most of the Debtors' assets were transferred to an Investment Trust managed by an Investment Trustee.

In September 2019, the Investment Trustee filed a motion requesting a determination of the Investment Trust's quarterly fee liability and seeking a reimbursement of its overpayment of those fees. Among other arguments, the Investment Trustee argued that Congress violated constitutional tax and bankruptcy uniformity requirements when it passed the Bankruptcy Judgeship Act of 2017 (the "2017 Amendment"), which temporarily increased fees for the largest debtors in Chapter 11 cases in UST districts. The purpose of the 2017 Amendment was to address a dwindling U.S. Trustee program budget resulting from declining bankruptcy filings and to fund bankruptcy judgeships. Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, sec. 1004(a), § 1930(a)(6), 131 Stat. 1224, 1232; H.R. Rep. No. 115-130, at 7-9 (2017), *as reprinted in* 2017 U.S.C.C.A.N. 154, 159. From 2018 through 2022, if the U.S. Trustee System Fund had a balance of less than $200 million in the prior fiscal year, the 2017 Amendment provided that the "quarterly fee payable for a quarter in which disbursements equal or exceed $1,000,000 shall be the lesser of 1 percent of such disbursements or $250,000." Pub. L. No. 115-72, sec. 1004(a), § 1930(a)(6), 131 Stat. at 1232. Otherwise, the existing fee schedule remained. In contrast to this amendment to 11 U.S.C. § 1930(a)(6) governing fees in the UST districts, the 2017 Amendment did not explic-

itly amend 11 U.S.C. § 1930(a)(7) which governs fees in the six Bankruptcy Administrator ("BA districts") in Alabama and North Carolina. Section 1930(a)(7) provided that "the Judicial Conference of the United States may require the debtor in a case under chapter 11 of title 11 to pay fees equal to those imposed by paragraph (6) of this subsection." 11 U.S.C. § 1930(a)(7). Thus, the Act did not explicitly require a comparable increase of the fees in the six BA districts that are not part of the U.S. Trustee program. The Judicial Conference, which oversees the BA districts, did not impose in the BA districts the increased quarterly fee provision until September 2018 and then only for cases filed on or after October 1, 2018.

Although the bankruptcy court denied most of the motion, it held that the 2017 Amendment created a partial uniformity problem because 2% of the fees collected in the UST districts were to be paid to the general U.S. Treasury fund, which would offset the cost of a temporary bankruptcy judgeship in a BA district. The court ordered the U.S. Trustee to credit the Investment Trustee a sum equal to 2% of the quarterly fees paid since January 1, 2018. The court rejected the Investment Trustee's other challenges to the increased quarterly fees.

The parties[1] received authorization to file a direct appeal to this Court and we issued an opinion affirming

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[1] The law firm *Bast Amron* was substituted for the Investment Trustee before we issued our first opinion in this case. *Bast Amron* thus stands in the shoes of the Investment Trustee, who in turn stood in the shoes of the Debtors in this bankruptcy case. To avoid confusion with the U.S. Trustee, the appellee in this case, we will here-

in part and reversing in part. *In re: Mosaic Mgmt. Grp., Inc.*, 22 F.4th 1291 (11th Cir. 2022), *vacated sub nom. Bast Amron LLP v. United States Trustee Region 21*, — U.S. —, 142 S. Ct. 2862, 213 L. Ed. 2d 1086 (2022). We held that the 2017 Amendment properly applied to a case that was pending and confirmed prior to the Act's enactment because Congress clearly expressed its intent to this effect. We also held that the 2017 Amendment does not violate substantive due process and is not a tax subject to the Tax Uniformity Clause. Finally, we held that the 2017 Amendment presents no violation of the Bankruptcy Uniformity Clause.

Subsequently, the Supreme Court addressed the Amendment and held that it violated the uniformity requirement of the Bankruptcy Clause, abrogating our opinion to the extent it held that there had been no violation of the Bankruptcy Uniformity Clause. *Siegel v. Fitzgerald*, 596 U.S. —, 142 S. Ct. 1770, 213 L. Ed. 2d 39 (2022). However, the Court reserved decision on the issue of the appropriate remedy, commenting that the parties raised "a host of legal and administrative concerns with each of the remedies proposed, including the practicality, feasibility, and equities of each proposal; their costs; and potential waivers by nonobjecting debtors." 142 S. Ct. at 1783. Several days later, the Supreme Court granted the Debtors' petition for writ of certiorari in this case, vacated our judgment, and remanded for further consideration in light of *Siegel*. *Bast Amron LLP v. U.S. Tr. Region 21*, — U.S. —, 142 S. Ct. 2862, 213 L. Ed. 2d 1086 (2022).

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after refer to the appellant parties to this appeal as the Debtors, which also better describes their capacity in this bankruptcy case.

II.

The issue before us is the appropriate remedy for the constitutional violation the Supreme Court found in *Siegel*. The Debtors in this case—being debtors in a U.S. Trustee district—have been required to pay higher fees than a comparable debtor in one of the six BA districts in Alabama or North Carolina. We now know, from the Supreme Court decision in *Siegel*, that the differential treatment of comparable debtors constituted a violation of the uniformity requirement of the Bankruptcy Clause. Debtors in this case seek a refund of the differential between what they have paid and the lesser amount that a comparable debtor in one of the BA districts paid. That differential persisted during 2018 and thereafter until Congress, becoming aware of the problem, enacted the 2020 Act[2] which presumably ended the different treatment. Thus, the issue before us is whether the Debtors are entitled to such a refund, and if not, what remedy is appropriate.[3]

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[2] The Bankruptcy Administration Improvement Act of 2020 ("2020 Act") was enacted by Congress, effective January 12, 2021. Pub. L. 116-325, 134 Stat. 5086. It effectively mandated that the fee increases that had been enacted in the 2017 Amendment shall apply not only in the U.S. Trustee districts, but also in the BA districts. *Id.* sec. 3(d)(2).

[3] At oral argument the government expressly disavowed sovereign immunity, so we need not address that matter.

III.

When a statute unconstitutionally confers a benefit on one class over another, courts have two options. First, they can declare the statute "a nullity and order that its benefits not extend to the class that the legislature intended to benefit" *Sessions v. Morales-Santana*, 582 U.S. 47, 72, 137 S. Ct. 1678, 198 L. Ed. 2d 150 (2017) (quoting *Califano v. Westcott*, 443 U.S. 76, 89, 99 S. Ct. 2655, 61 L. Ed. 2d 382 (1979)). As a second option, the court "may extend the coverage of the statute to include those who are aggrieved by exclusion." *Id.* Generally, extension of the benefit, rather than its nullification, is the proper course. *Id.* at 74, 137 S. Ct. 1678. Because the statute at issue in this case imposes a burden instead of providing a benefit, the two options in this case are: 1) nullify the burden (the fee increase); or 2) extend the burden (the fee increase) to those initially excluded (the BA districts). Although the right for equal treatment is rooted in the Constitution, the remedy for its violation is not found there. *Id.* at 73, 137 S. Ct. 1678.

It is well established that in formulating the remedy for constitutional violations like this one, courts should be guided by congressional intent. *Id.* at 73, 137 S. Ct. 1678 ("The choice between these outcomes is governed by the legislature's intent . . . "); *Levin v. Com. Energy, Inc.*, 560 U.S. 413, 426-427, 130 S. Ct. 2323, 176 L. Ed. 2d 1131 (2010) ("On finding unlawful discrimination, . . . courts may attempt, within the bounds of their institutional competence, to implement what the legislature would have willed had it been apprised of the constitutional infirmity."); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330, 126 S. Ct. 961, 163 L. Ed.

2d 812 (2006) ("the touchstone for any decision about remedy is legislative intent"); *United States v. Booker*, 543 U.S. 220, 246, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005) ("We answer the remedial question by looking to legislative intent."); *Heckler v. Mathews*, 465 U.S. 728, 739 n.5, 104 S. Ct. 1387, 79 L. Ed. 2d 646 (1984) ("the court should not, of course, 'use its remedial powers to circumvent the intent of the legislature'") (quoting *Westcott*, 443 U.S. at 94, 99 S. Ct. 2655 (Powell, J., concurring in part)); *Welsh v. United States*, 398 U.S. 333, 366, 90 S. Ct. 1792, 26 L. Ed. 2d 308 (1970) (Harlan, J., concurring) (observing that there is good reason for courts to make necessary statutory repairs without impairing the legislative goals).[4]

When determining which remedy the legislature would have chosen, courts are to make two additional assessments. *Morales-Santana*, 582 U.S. at 75, 137 S. Ct. 1678 (citing *Welsh*, 398 U.S. at 365, 90 S. Ct. 1792). The first is the court should "measure the intensity of commitment" to the "main rule, not the exception." *Id.* The second is that they should "consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abroga-

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[4] This analysis has been applied to guide the remedy whether the underlying infringement was a violation of the Equal Protection clause (*Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 52 S. Ct. 133, 76 L. Ed. 265 (1931), and *Mathews*); a violation of the uniformity of tax treatment as between local and interstate commerce, as implied in the Commerce Clause (*McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990)); a violation of the First Amendment (*Barr v. Am. Ass'n of Pol. Consultants*, — U.S. —, 140 S. Ct. 2335, 207 L. Ed. 2d 784 (2020)); or a violation of the Sixth Amendment right to a jury trial (*Booker*).

tion." *Id.* In *Morales-Santana*, the Court was faced with a statute's disparate treatment of the residency requirements of unwed mother and unwed fathers when passing citizenship to their children born abroad. Unwed citizen mothers were only required to have one year of residence in the United States while all other parents were required to have five. In deciding whether to extend the benefit of a shorter residency period required of unwed citizen mothers to unwed citizen fathers, the Court examined other portions of the citizenship law, and noted the congressional recognition of the longstanding importance of physical presence in citizenship law as the indicator of attachment to a country. *Id.* The Court also stated that the "potential for 'disruption of the statutory scheme' is large." *Id.* Because both factors pointed against extending the shorter residency exception, the Court nullified the favorable treatment for unwed mothers.

IV.

Debtors in this case argue that they are entitled to a refund of the increased portion of the trustee fees—i.e. the difference between the fees charged to them and the fees charged to comparable debtors in the BA districts—that they have been required to pay throughout 2018 and thereafter until Congress equalized the fees in the 2020 Act. They argue that strong Supreme Court precedent supports such refunds as the appropriate remedy. For this proposition, Debtors rely upon *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 52 S. Ct. 133, 76 L.Ed. 265 (1931), as representative of a long line of Supreme Court cases holding that a state's unequal taxation of comparable and competing taxpayers violates the Equal Protection Clause, and holding

that the taxpayer who was required to pay the higher, discriminatory tax is entitled to a refund. Although acknowledging a state court could have removed the discrimination "by collecting the additional taxes from the favored competitors," *id.* at 247, 52 S. Ct. 133, the *Bennett* Court held that the taxpayer who paid the higher taxes was entitled to a refund. The Court held:

> But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative.

Id. at 247, 52 S. Ct. 133 (citations omitted).

Disagreeing with the Debtors, the U.S. Trustee's primary argument is that refunds are not the appropriate remedy in this case because Congress has already provided prospective relief in the 2020 Act. The U.S. Trustee argues that Congress, in the 2020 Act, has already chosen the remedy option of extending the burden (the fee increase) to the previously excluded BA districts, thus rejecting the other option which would have nullified the burden (the fee increase) and warranted the refunds which Debtors seek.[5] The U.S.

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[5] The U.S. Trustee thus relies on the above-described framework that the Supreme Court has established for the determination of the appropriate remedy for constitutional violations like this. As noted above, a reviewing court should choose between two options: nullify the burden (the fee increase) or extend the burden (the fee increase) to those previously excluded (the BA districts), the choice to be guided by congressional intent.

Trustee asserts that this remedial option is the one which will implement the very clear congressional intention all along that the 2017 fee increase was intended to apply to all federal judicial districts, including the BA districts.[6]

Recognizing that its primary argument—i.e. prospective relief only—fails to remedy the inequality that would remain during the time between 2018 and January 12, 2021 (the effective date of the 2020 Act, which cured the inequality prospectively), the U.S. Trustee makes a secondary, alternative argument, as follows. The alternative argument: even if retroactive relief were appropriate, the remedy should not be refunds to comparable debtors in the U.S. Trustee districts like the Debtors here, but rather should be retroactive collections from comparable debtors in the BA districts who failed to pay the increased fees during 2018-2021 (i.e. what the parties here refer to as the "clawback").

We address first the U.S. Trustee's alternative argument because it is readily rejected. This Court does not have the authority to "claw back" additional fees from comparable debtors in the BA districts. Neither those debtors nor the BA Administrators who would prosecute the "clawback" are parties before this Court; thus we have no jurisdiction over them. Nor is the Ju-

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[6] In support of this congressional intention, the U.S. Trustee refers to the evidence of this congressional intention as recited in this Court's first opinion in this case, *In re: Mosaic*, 22 F.4th at 1310-19, as well as the 2020 Act itself which chose to extend the fee increase to the BA districts, *see* Pub. L. 116-325, sec. 3(d)(2), § 1930, 134 Stat. 5086, 5088, and its legislative finding, *see id.* at 5086 (Congress explicitly "confirm[ed] the longstanding intention of Congress that quarterly fee requirements remain consistent across all federal judicial districts.").

dicial Conference—which would have the authority to order such "clawbacks"—a party before this Court. And some of the BA districts are located outside the Eleventh Circuit. Thus, the simple fact is that we cannot implement this alternative resolution suggested by the U.S. Trustee. And, as noted above, the Supreme Court in *Bennett* and several other cases have made it clear that the party "who has been subjected to [discrimination] through favoring others in violation of federal law cannot be required himself to assume the burden of seeking an increase of the taxes which other should have paid." 284 U.S. at 247, 52 S. Ct. 133. Of course, Congress or the Judicial Conference might have authority to order such "clawbacks," but there is no suggestion that either has moved to do so, or intends to do so. Indeed, as noted, Congress in the 2020 Act was aware of the constitutional violations and did choose the remedy of extending the burden (the increased fee) to the BA districts. However, Congress remedied the problem only prospectively and did not order such "clawbacks." And, in *Bennett*, we are instructed that parties like the Debtors here "may [not] be remitted to the necessity of awaiting such action by the state officials upon their own initiative." *Id.* Moreover, it is altogether unclear whether, or to what extent, even Congress or the Judicial Conference could effect such "clawbacks" in light of the fact that, by now, the relevant bankruptcy estates have probably made substantial distributions or undergone other substantial change, or even closed.

Having rejected the U.S. Trustee's alternative argument, we turn to address its primary argument—i.e. that prospective-only relief is appropriate. The U.S. Trustee attempts to distinguish the *Bennett* decision

and the other state tax cases upon which Debtors rely. The U.S. Trustee argues that in those cases, the taxpayers seeking refunds had been forced to pay the tax initially; they had no "meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity." *McKesson Corp.*, 496 U.S. at 38, 110 S. Ct. 2238. The U.S. Trustee argues that this case is in sharp contrast: here the debtors could have challenged the constitutionality of the increase—employing either routine motion or adversary proceeding—before the first installment became due in the first quarter of 2018. They rely upon the dicta in *McKesson* suggesting that the refunds ordered in that case and the long line of Supreme Court cases upon which *McKesson* (and the Debtors here) rely were dependent upon the fact that no meaningful predeprivation remedy was available. *See id.* at 38 n.21 110 S. Ct. 2238 ("In contrast, if a State chooses not to secure payments under duress and instead offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing, payments tendered may be deemed 'voluntary.' The availability of a predeprivation hearing constitutes a procedural safeguard against unlawful deprivations sufficient by itself to satisfy the Due Process Clause, and taxpayers cannot complain if they fail to avail themselves of this procedure. Where voluntary payment of a tax is knowingly made pursuant to an illegal demand, recovery of that payment may be denied") (citation and quotation marks omitted).

Thus, the U.S. Trustee argues that the appropriate remedy in this case is a prospective-only remedy, which remedy Congress has already provided in the 2020 Act. It argues that there is precedent for such a prospective-

only remedy, citing *Morales-Santana*, 582 U.S. at 77, 137 S. Ct. 1678, and that this is the remedy that would implement congressional intent.

The U.S. Trustee's argument based on the *McKesson* dicta and the availability of a predeprivation remedy has been squarely rejected by the Supreme Court. In *Reich v. Collins*, 513 U.S. 106, 115 S. Ct. 547, 130 L. Ed. 2d 454 (1994), the State of Georgia had exempted from the state income tax retirement benefits paid by the state but not retirement benefits paid by the federal government or any other employer. After the Supreme Court in *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989), held that such a tax scheme violated the constitutional intergovernmental tax immunity doctrine, Georgia repealed its exemption for state retirees, but did not allow refunds for federal retirees for the open years before *Davis* during which the differential in tax had existed. A federal retiree challenged that unequal tax treatment, relying on the same cases on which the Debtors here rely, including *McKesson* and *Bennett*. In rejecting the federal retiree's claim for refunds, the Georgia Supreme Court held that *McKesson*, *Bennett*, and similar cases that required refunds would not apply and refunds would not be required if Georgia law provided a meaningful opportunity to litigate the validity of the challenged tax in a predeprivation process. Concluding that Georgia provided "ample" predeprivation procedures, the Georgia Supreme Court denied the refunds sought by the federal retiree. The Supreme Court granted certiorari and reversed the Georgia Supreme Court:

> The Georgia Supreme Court is no doubt right that, under *McKesson*, Georgia has the flexibility to maintain an exclusively predeprivation remedial scheme, so long as that scheme is "clear and certain." . . . In this regard, the Georgia Supreme Court's reliance on Georgia's predeprivation procedures was entirely beside the point (and thus error), because even assuming the constitutional adequacy of these procedures—an issue on which we express no view—no reasonable taxpayer would have thought that they represented, in light of the apparent applicability of the refund statute, the *exclusive* remedy for unlawful taxes.

513 U.S. at 111-12, 115 S. Ct. 547 (emphasis in original).

In *Newsweek, Inc. v. Florida Department of Revenue*, 522 U.S. 442, 118 S. Ct. 904, 139 L. Ed. 2d 888 (1998), the Court again rejected the same argument based on the *McKesson* dicta and the availability of a predeprivation remedy. The Florida statutes exempted newspapers but not magazines from its sales tax. The Florida Supreme Court held that the differential tax treatment violated the First Amendment. However, the Department of Revenue rejected Newsweek's claim for refund, and the Florida District Court of Appeals agreed, holding that "*McKesson* is distinguishable because that holding was expressly predicated upon the fact that the taxpayer had no meaningful predeprivation remedy." *Newsweek, Inc. v. Dept. of Rev.*, 689 So. 2d 361, 363 (Fla. Dist. Ct. App. 1997). Concluding that in Florida, adequate predeprivation remedies were available to the taxpayer, the District Court of Appeals denied the refund. In vacating the judgment of the District Court of Appeals, and

granting access to the refund procedure, the Supreme Court held: "a State has the flexibility to maintain an *exclusively* predeprivation remedial scheme, so long as that scheme is clear and certain." *Id.* at 444, 118 S. Ct. 904 (quotations and citations omitted; emphasis added).

Thus, in both *Reich* and *Newsweek* the Supreme Court clarified *McKesson*, ruling that, in cases of differential tax treatment of comparable taxpayers, the state can remedy the constitutional violation by choosing to extend the burden (the tax) to the previously favored group. However, because the relevant law and available procedures permitted both predeprivation and postdeprivation process, both courts held that due process would not permit the state to insist on the predeprivation remedy to the exclusion of the postdeprivation refund remedy unless the exclusivity of the predeprivation remedy was clear such that reasonable persons would not be misled. In other words, except in the unusual context of a clear, exclusive predeprivation remedy, the past inequality must be accounted for and the disfavored taxpayer is entitled to appropriate refunds.

Thus, the Supreme Court has squarely rejected the U.S. Trustee's distinction of *McKesson*, *Bennett*, and the other state tax cases on which Debtors here rely. Just as in *Reich* and *Newsweek*, in this case also, routine bankruptcy procedures—whether simple motion or adversary proceeding—were available both predeprivation or postdeprivation. That is, Debtors here could have challenged the increased fee before paying same in early 2018 (predeprivation) and those same routine procedures were available postdeprivation, as actually utilized by Debtors in this case. In any event, it cer-

tainly was not clear that the available predeprivation process was exclusive. Thus, *Reich* and *Newsweek* squarely reject the U.S. Trustee's primary support for prospective relief only—i.e. that *McKesson*-based distinction of the Debtors state tax cases requiring refunds in a similar context.

The significance of *Reich* and *Newsweek* for the instant case is not limited to their express rejection of the U.S. Trustee's primary argument in support of prospective-only relief. These decisions also provide significant guidance for this case in that they came to the Supreme Court in precisely the same posture that this case comes to us. As both *Reich* and *Newsweek* came to the Supreme Court, the constitutional violation had previously been established.[7] In both cases, it had already been determined that the constitutional violation should be remedied by extending the burden (the tax) to the previously favored group.[8] In both cases, the

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[7] In *Reich*, the Supreme Court had already determined in *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989), that Georgia's differential treatment of state retirees and federal retirees violated the Constitution. *Reich*, 513 U.S. at 108, 115 S. Ct. 547. In *Newsweek*, the Florida Supreme Court had already held that Florida's exemption from its sales tax of newspapers but not magazines violated the Constitution. *Newsweek*, 522 U.S. at 442, 118 S. Ct. 904; *see also Dept. of Rev. v. Magazine Publishers of Am.*, 604 So.2d 459 (Fla. 1992).

[8] In *Reich*, the Georgia legislature had repealed the exemption from tax for newspapers. *See Reich*, 513 U.S. at 108, 115 S. Ct. 547; *see also Reich v. Collins*, 262 Ga. 625, 422 S.E. 2d 846, 847 (1992) (noting that after the Supreme Court in *Davis* determined that Georgia's differential treatment of state retirees and federal retirees was unconstitutional, the Georgia legislature repealed the exemption for state retirees). In the *Newsweek* case, the Florida Supreme Court held that Florida's exemption for tax for newspapers

state courts had denied the refunds that were claimed by the taxpayers who had been discriminated against and had had to pay the higher taxes during the open years before the tax scheme was equalized by extending the tax to the previously favored group.[9]

In other words, in both *Reich* and *Newsweek*, the state law had chosen to cure the constitutional violation by prospectively extending the burden (the tax) to the previously favored group, but had denied refunds to the taxpayers who had been discriminated against. In short, the state law had provided prospective-only relief. The Supreme Court reversed, and held that due process required refunds.[10]

The instant case comes to us in precisely the same posture that *Reich* and *Newsweek* had come to the Supreme Court:

- As in *Reich* and *Newsweek*, the fact of the constitutional violation in this case has been established. *See Siegel*, 142 S. Ct. at 1789.
- As in *Reich* and *Newsweek*, Congress has chosen to cure the constitutional violation by prospec-

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but not magazines was unconstitutional, and held that the proper remedy was to strike the exemption for newspapers. *See Magazine Publishers*, 604 So.2d at 463-64.

[9] *See Reich*, 513 U.S. at 108, 115 S. Ct. 547 (noting that Georgia repealed the exemption for state retirees, but denied refunds for federal retirees). *See Newsweek*, 522 U.S. at 443, 118 S. Ct. 904 (noting that the Florida court had denied refunds for the magazines).

[10] Indeed, the long line of state tax cases mentioned above involved the same posture and the same result. *See, e.g., McKesson*, 496 U.S. at 31, 110 S. Ct. 2238 ("The question before us is whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no").

tively extending the burden (the fee increase) to the previously favored group (the BA districts). *See* the 2020 Act, Pub. L. 116-325, 134 Stat. 5086.

- As in the state court stage of the *Reich* and *Newsweek* cases, the U.S. Trustee urges us to approve a prospective-only remedy and deny refunds to the Debtors in this case.

We conclude that we should follow the guidance of the Supreme Court decisions in *Reich* and *Newsweek* and *Bennett* (and the other state tax cases upon which the Debtors rely). We conclude that the prospective-only relief urged upon us by the U.S. Trustee is not appropriate in this case.

We acknowledge the strong evidence of congressional intention preferring the maintenance of the increased level of fees. However, we note that the legislative intention in *Reich* and *Newsweek* was the same. In *Reich*, the Georgia legislature had repealed the exemption for state retirees, indicating its preference for the tax over the exemption. The legislative intent was the same, but even clearer, in *Newsweek*. There, the Florida Supreme Court had already—well before the U.S. Supreme Court's *Newsweek* decision in 1998—expressly held that the legislative intent preferred the tax over the exemption. *See Magazine Publishers*, 604 So. 2d at 463 ("Section 212.21 makes it clear that as between the imposition of the tax or the granting of an exemption, the tax shall prevail."). Notwithstanding this legislative intent, the Supreme Court held that due process required refunds.

Of course the result in *Reich* and *Newsweek*—and the result in this case since we follow *Reich* and *Newsweek*—partially implements the legislative intent

in that the tax was to be maintained in the future. Although the refunds ordered by the Supreme Court in *Reich* and *Newsweek* may have been in tension with the legislative intent, such legislative intent cannot overcome the requirements of due process. *See Newsweek*, 522 U.S. at 445, 118 S. Ct. 904 ("due process prevents [the Department of Revenue] from applying this requirement to taxpayers, like Newsweek, who reasonably relied on the apparent availability of a postpayment refund"). Thus, the results in *Reich* and *Newsweek* allow implementation of as much of the legislative intent as due process would permit. Similarly, in the instant case, our result—requiring refunds, but recognizing future application of the fee increase, as mandated by Congress in the 2020 Act—implements as much of the congressional intent as due process permits.

The only other support offered by the U.S. Trustee for the prospective-only relief that it advocates is its citation to *Morales-Santana*, 582 U.S. at 77, 137 S. Ct. 1678, which did provide prospective-only relief in a very different context.[11] For several reasons, we conclude that we should be guided by *Reich*, *Newsweek*, *Bennett*, and the other analogous state tax cases, rather than by *Morales-Santana*. First, the Court in *Morales-Santana* merely concludes at the end of the opinion that its ruling "should apply, prospectively, to children born to unwed U.S.-citizen mothers." 582 U.S. at 77, 137 S. Ct.

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[11] The U.S. Trustee also cites the plurality opinion in *Barr v. American Association of Political Consultants*, 591 U.S. —, 140 S. Ct. 2335, 2355 n.12, 207 L. Ed. 2d 784 (2020), which also suggests prospective-only relief. However, like *Morales-Santana*, the plurality provides no explanation. Moreover, the prospective-only relief appears to have been supported only by the two concurring Justices, plus possibly Justice Sotomayor (i.e. a total of only four Justices).

1678. There is no explanation on the basis of which we could be sure of a governing principle of law defining when prospective application is appropriate. Second, and significantly, the instant case is closely analogous to *Reich* and *Newsweek*, for the reasons fully discussed above, but is very different from the *Morales-Santana* case. The right to citizenship issue in *Morales-Santana* is very different from the inequality in trustee fees at issue in this case. As Justice Thomas, joined by Justice Alito, said in his concurring opinion, it is far from clear whether any court, even the Supreme Court, has the power to confer or withdraw citizenship on a basis other than as prescribed by Congress. *Id.* at 78, 137 S. Ct. 1678. Moreover, retrospective application of the Court's ruling would have been extremely harsh. That is, it is virtually unthinkable for the Court to have withdrawn the citizenship from children of unwed mothers already born and who had already qualified for citizenship under the previous one-year residency rule.

A third and significant reason prompting us to follow the guidance of *Reich*, *Newsweek*, and *Bennett* is that we are also following the "normal rule of retroactive application" of Supreme Court decisions. *Harper v. Va. Dept. of Taxation*, 509 U.S. 86, 97, 113 S. Ct. 2510, 125 L. Ed. 2d 74 (1993); *see also id.* at 94, 113 S. Ct. 2510 (acknowledging "fundamental rule of retrospective operation that has governed judicial decisions for near a thousand years.")(cleaned up). This is especially true in this case because the rule identified in *Siegel* was not

even a "new" rule which might in some circumstances have warranted prospectively-only relief.[12]

Finally, in so holding we reach the same result reached by every court to have addressed this issue. The Second Circuit[13] and the Tenth Circuit[14] have ordered refunds for debtors in precisely the same context as the Debtors in this case. Although the Second Cir-

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[12] The risk of this constitutional violation of the Bankruptcy Uniformity Clause has been apparent since the Ninth Circuit so ruled. *See St. Angelo* v. *Victoria Farms, Inc.*, 38 F.3d 1525 (9th Cir. 1994), amended by 46 F.3d 969 (9th Cir. 1995). That ruling prompted the Judicial Conference and Congress to act to avoid this risk. That led to the 2000 legislation which Congress intended to ensure that uniform trustee fees would apply in all federal judicial districts—both US Trustee and BA districts. *See* discussion in our earlier opinion in this case, 22 F.4th at 1310-19; *see also* the congressional finding in the 2020 Act ("confirm[ing] the longstanding intention of Congress that quarterly fee requirements remain consistent across all federal judicial districts"). Thus, Congress has been aware of the constitutional risks of differential trustee fees in the IUS Trustee districts, as compared to the BA districts, for more than two decades. Accordingly, the Supreme Court's holding in *Siegel* did not announce a "new" rule.

The U.S. Trustee offers no analysis or briefing to explain why prospective-only relief would be appropriate in this case. See *Harper*, 509 U.S. at 94-102, 113 S. Ct. 2510; *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 111 S. Ct. 2439, 115 L. Ed. 2d 481 (1991); Richard S. Kay, *Retroactivity and Prospectivity of Judgments in American Law*, 62 AM. J. COMP. L. 37 (2014). Thus, we follow the "normal" rule and apply the *Siegel* holding retroactively, subject of course to any independent defense—e.g. statutes of limitation or sovereign immunity.

[13] *In re: Clinton Nurseries, Inc.*, 53 F.4th 15, 29 (2d Cir. 2022), *amending and reinstating* 998 F.3d 56, 69-70 (2d Cir. 2021).

[14] *In re John Q. Hammons Fall 2006, LLC*, No. 203203, 2022 WL 3354682 (10th Cir. Aug. 15, 2022), *reinstating* 15 F.4th 1011, 1025-26 (10th Cir. 2021).

cuit provided no rationale at all, and although the Tenth Circuit only noted that it lacked authority over the fees in the BA districts and that the Second Circuit had already so ruled, we suspect that our sister circuit courts probably were thinking along the lines of the analysis we set out in this opinion. The only other court that has addressed this issue is *In re Circuit City Stores, Inc.*, 2022 WL 17722849 (Bankr. E.D. Va. Dec. 15, 2022). The bankruptcy judge in that case followed the Second and Tenth Circuits and granted refunds to debtors comparable to the Debtors in this case. The bankruptcy judge distinguished the *Morales-Santana* decision and relied on the same long line of state tax cases upon which we too rely (e.g. *Bennett*, etc.).

For the foregoing reasons,[15] we conclude that *Reich*, *Newsweek*, *Bennett*, *McKesson*, and the long line of similar state tax cases are closely analogous to the instant case and provide strong precedent supporting the refund remedy urged upon us by the Debtors. Accordingly, we hold that the appropriate remedy in this case for the constitutional violation identified in *Siegel* is the refunds that the Debtors in this case seek. The judgment of the court below is vacated, and this case is remanded for further proceedings not inconsistent with this opinion.

VACATED and **REMANDED**.

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[15] The U.S. Trustee suggest no other defense or bar to the refunds that Debtors seek—e.g. statute of limitations or sovereign immunity. As noted, the U.S. Trustee at oral argument affirmatively disavowed any sovereign immunity bar.

BRASHER, *Circuit Judge*, concurring:

I respectfully concur with the bottom-line result of the majority opinion, although I cannot agree with all of its reasoning.

When this appeal was last before us, I wrote separately to make two points. First, I explained that "the substantial variance in fees as between the Trustee and Bankruptcy Administrator districts amounts to an unconstitutional lack of uniformity." *In re Mosaic Mgmt. Grp., Inc.*, 22 F.4th 1291, 1328 (11th Cir. 2022) (Brasher, J., concurring). Second, I concluded that the investment trustee's "requested remedy—a refund of the higher fees, which were imposed in 94% of the districts—is inappropriate because it is demonstrably at odds with Congress's intent." *Id.* The Supreme Court reached the same conclusion as me on the first issue and remanded for us to consider the second issue. *See Bast Amron LLP v. United States Tr. Region 21.*, — U.S. —, 142 S. Ct. 2862, 213 L. Ed. 2d 1086 (2022), and *Siegel v. Fitzgerald*, — U.S. —, 142 S. Ct. 1770, 213 L. Ed. 2d 39 (2022).

When a statute creates an unconstitutional disparity in treatment, "there exist two remedial alternatives." *Califano v. Westcott*, 443 U.S. 76, 89, 99 S. Ct. 2655, 61 L. Ed. 2d 382 (1979) (cleaned up) (quoting *Welsh v. United States*, 398 U.S. 333, 361, 90 S. Ct. 1792, 26 L. Ed. 2d 308 (1970) (Harlan, J., concurring in result)). A court can level up by extending the favorable treatment to everyone or level down by treating everyone like the disfavored class. A court's choice between the two remedies must be guided by legislative intent. *See Sessions v. Morales-Santana*, 582 U.S. 47, 137 S. Ct. 1678, 1699, 198 L. Ed. 2d 150 (2017). An intent to level

up is the default presumption, but an intent to level down may be inferred where the favorable treatment was meant to be an "exception" to the "general rule . . . applicable to a substantial majority." *Id.* at 1701.

As I explained last time, it is obvious that Congress's intent supports the conclusion that we must level down. *See Mosaic Mgmt. Grp.*, 22 F.4th at 1329-30 (Brasher, J., concurring). The favorable treatment here was a tiny exception to an otherwise comprehensive scheme, and it was an accidental exception at that. *Id.* As a matter of equal treatment law, that is where the inquiry ends. We should level down, even if such leveling down results in a prospective-only remedy or requires joining other parties. I therefore cannot agree with the majority's attempt to distinguish equal treatment cases, such as *Sessions v. Morales-Santana*, from this one.

That said, however, I have since "acquired new wisdom" or "more critically, have discarded old ignorance" that leads me to change my bottom-line conclusion. *Ring v. Arizona*, 536 U.S. 584, 611, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (Scalia, J., concurring). Specifically, the investment trustee has identified a due process problem with a prospective-only remedy, and I believe that the trustee's due process argument has merit.

When a person has been compelled by law to pay a tax or fee, then that person has been deprived of property. To justify that deprivation, the government must "satisfy the commands of the Due Process Clause." *McKesson Corporation v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 36, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990). In a case like this one, the due process clause commands that the government provide

"meaningful backward-looking relief" if it has placed a taxpayer (or, here, a feepayer) "under duress promptly to pay a tax when due" without the opportunity to fully litigate its legality. *Id.* at 31, 110 S. Ct. 2238.

Despite my views of the proper equal treatment remedy, I think the investment trustee has a due process right to a refund. This is so for two reasons.

First, the government provided an opportunity to challenge the legality of the fee, and the investment trustee took advantage of it. The investment trustee challenged the imposition of the fee at the earliest opportunity in the very bankruptcy case in which the fee was imposed—this one. Having lost that challenge in the bankruptcy court, the investment trustee was under a legal obligation to pay the fee. This fact—that the investment trustee availed itself of a process to challenge the fee—distinguishes it from someone who belatedly seeks a refund of a fee that he never contested. It would be inconsistent with due process to deny a backwards-looking remedy when the investment trustee challenged the fee at an early opportunity and then paid it under protest.

Second, a level-up refund remedy is our only option because there is no lawful way to implement a backward-looking level-down remedy. The creditors and debtors in the favored class of bankruptcy cases have their own due process rights that prevent us from retroactively assessing higher fees in those cases. Although the imposition of a retroactive tax "does not necessarily deny due process to those whose taxes are increased," there is "some temporal point" beyond which "the retroactive imposition of a significant tax burden may be 'so harsh and opposed as to transgress

the constitutional limitation.'" *Id.* at 40, 110 S. Ct. 2238 n.23 (quoting *Welch v. Henry*, 305 U.S. 134, 147, 59 S. Ct. 121, 83 L.Ed. 87 (1938)). I think we have reached that point. Even though only a small number of bankruptcy cases would be affected by a retroactive fee, too much time has passed to increase the fees consistent with due process. This is especially true of bankruptcy cases that have already been closed and the estate's assets distributed or reorganized.

For these reasons, I respectfully concur in the result.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. 21-1354

BAST AMRON LLP, PETITIONER

v.

UNITED STATES TRUSTEE REGION 21.

Filed: June 27, 2022

OPINION

Case below, 22 F.4th 1291.

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

APPENDIX C

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case Nos. 16-20833-EPK

IN RE: MOSAIC MANAGEMENT GROUP, INC., MOSAIC ALTERNATIVE ASSETS LTD., AND PALADIN SETTLEMENTS, INC., DEBTORS

Filed: Apr. 9, 2020

MEMORANDUM, OPINION, AND ORDER REGARDING UNITED STATES TRUSTEE QUARTERLY FEES

ERIC P. KIMBALL, Judge, United States Bankruptcy Court

Margaret J. Smith, as Investment Trustee (the "Investment Trustee") of Mosaic Investment Trust (the "Trust"), established pursuant to the Mosaic Investment Trust Agreement, in the jointly administered chapter 11 cases of Mosaic Management Group, Inc., Mosaic Alternative Assets, Ltd., and Paladin Settlements, Inc. (collectively, the "Debtors"), filed the *Investment Trustee's Motion for Entry of Order (A) Determining Extent of Investment Trust's Liability for Post-Confirmation Quarterly United States Trustee Fees and (B) Directing Reimbursement or Authorizing Credit for Overpaid Fees* (ECF No. 1228; the "Motion"). In her Motion, the Investment Trustee seeks (1) a dec-

laration that the Trust is not liable for post-confirmation quarterly fees payable to the United States Trustee ("UST"), to the extent such fees represent an increase as a result of a 2017 amendment to 28 U.S.C. § 1930 that applies to disbursements occurring on or after January 1, 2018 (the "Amendment"), and (2) an order directing the UST to refund to the Trust, or credit against future fees, sums already paid by the Trust to the extent arising from the Amendment.

The Court held a hearing on the Motion on February 19, 2020 and carefully considered the Motion, the related response and reply (ECF Nos. 1261 and 1262), and the arguments made at the hearing.

As discussed more fully below, the Court will grant the Investment Trustee's Motion in part, to the extent of 2% of total fees payable for disbursements made on or after January 1, 2018, during such time as the Amendment is effective.

BACKGROUND

On June 6, 2017, the Court confirmed a joint chapter 11 plan for the Debtors. ECF No. 1036. The plan became effective on June 7, 2017. Under the confirmed plan, the Debtors transferred virtually all of their assets to the Trust. The Investment Trustee manages the Trust for the benefit of investors and other creditors with allowed claims.

In 88 of the 94 federal judicial districts, the UST oversees administration of bankruptcy cases. In the six federal judicial districts in the states of Alabama and North Carolina, bankruptcy administrators undertake an essentially identical role. The Attorney General oversees the UST program, which is part of the execu-

tive branch. Bankruptcy administrators in North Carolina and Alabama report to the Administrative Office of the United States Courts and are part of the judicial branch.

In chapter 11 cases pending in a UST district, the UST collects a quarterly fee set by Congress in 28 U.S.C. § 1930(a)(6). Historically, the entirety of the UST quarterly fee was set aside in a separate fund to cover the costs of the UST system itself. The quarterly fee is calculated based on disbursements made by the bankruptcy estate. The Investment Trustee must pay this fee until the Debtors' cases are closed. The Debtors' confirmed plan contemplates an extended period of administration by the Investment Trustee, including prosecution of litigation for the benefit of the Trust.

At the time the Court confirmed the plan in these cases, chapter 11 bankruptcy estates paid a graduated fee based on disbursements, with a maximum quarterly fee of $30,000. After confirmation of the plan in these cases, Congress enacted the Amendment, effective October 26, 2017, substantially increasing the quarterly fee in cases with large distributions made on or after January 1, 2018. Where previously the fee in cases where quarterly distributions totaled $1 million or more was between $6,500 and $30,000, the Amendment instituted a fee based on disbursements of $1 million or more equal to the lesser of 1% of quarterly disbursements or $250,000. This increased fee provision is temporary, applying only in fiscal years 2018 through 2022, and only until such time as the UST fund achieves a stated reserve. The Trust likely will pay quarterly fees during the entire effective time of the Amendment.

In chapter 11 cases pending in North Carolina and Alabama, a bankruptcy administrator collects a quarterly fee set by the Judicial Conference of the United States, as authorized by 28 U.S.C. § 1930(a)(7). As in UST districts, the quarterly fee is calculated based on disbursements made by the bankruptcy estate. However, the Judicial Conference did not immediately raise fees to match those required by the Amendment, and when it did it made the increased fees applicable only in cases filed on or after October 1, 2018. Thus, if the Debtors' cases were pending in North Carolina or Alabama, the Debtors would not be asked to pay the significantly higher quarterly fees demanded by the UST.

The Amendment has a remarkable effect on the Trust. For the year 2018 and the first two quarters of 2019, the Investment Trustee paid $125,816.69 more than would have been required prior to the Amendment. Put another way, the Investment Trustee paid a total of $174,566.70 during that period, or more than 3.5 times the $48,750.01 that would have been due prior to the Amendment.

While Congress has amended section 1930 multiple times, extending UST quarterly fees to periods after confirmation of a chapter 11 plan, and several times increasing the fee, the Amendment is unique in an important way. For the first time as a result of the Amendment, the quarterly UST fee is not used exclusively to fund the UST system. During the effective period of the Amendment, 98% of the quarterly UST fee is set aside to fund the UST system (including to fund reserves), but 2% is paid to the United States treasury without restriction. While some of this 2% is intended to offset the cost of extending certain temporary bank-

ruptcy judgeships (including one in North Carolina), the important point is that 2 cents from every dollar paid as a UST quarterly fee during the effective period of the Amendment is not used to fund the UST system.

RELIEF REQUESTED

The Investment Trustee asks the Court to rule that the Investment Trust is not liable for the increase in UST quarterly fees resulting from the Amendment, but is required to pay quarterly fees as though the Amendment was not enacted. The Investment Trustee asks the Court to either direct the UST to reimburse the Trust for the claimed overage already paid, or permit the Trust a credit against future quarterly fees.

ARGUMENTS PRESENTED BY THE INVESTMENT TRUSTEE

The Investment Trustee argues that the Amendment does not apply retroactively. By this the Investment Trustee means that the Amendment does not apply to chapter 11 cases pending before its effective date of October 26, 2017.

The Investment Trustee argues that implementation of the Amendment violates either or both of the tax uniformity clause or the uniformity requirement of the bankruptcy clause of the United States Constitution. U.S. Const. art. I § 8, cl. 1 and 4. She argues that the Amendment results in substantially different fees being paid in UST districts as compared to districts overseen by bankruptcy administrators. According to the Investment Trustee, whether the quarterly fees constitute a user fee or a tax, this disparity is an impermissible non-uniformity in violation of the Constitution.

The Investment Trustee argues that, if the Court determines the Amendment was intended to apply retroactively, the Amendment violates the due process clause of the United States Constitution. U.S. Const. Amend. V. She argues that the Debtors proposed and parties in interest voted on the Debtors' plan with no notice of the significant increase in quarterly fees, which materially and negatively impacts administration of the Trust. She argues that this violates the due process rights of the Debtors and the beneficiaries for whom they acted as fiduciaries.

If the Court determines that the relief requested in the Motion may only be pursued by complaint, as the UST argues in response to the Motion, the Investment Trustee argues that the Motion presents only legal issues and asks the Court to convert this contested matter to an adversary proceeding, rule on the relief requested in the Motion, and direct the parties to adjudicate any remaining contested issues in the adversary proceeding. In the alternative, the Investment Trustee asks the Court to treat the Motion as a motion for summary judgment as there are no material facts in dispute.

ARGUMENTS PRESENTED BY THE UNITED STATES TRUSTEE

The UST argues that the Motion is procedurally defective as it seeks relief that may only be accorded in an adversary proceeding commenced by the filing of a complaint.

The UST argues that the Amendment is not retroactive as it applies only to disbursements made after its enactment. Even if considered to be a retroactive application, the UST argues that the Amendment does not

violate due process as it furthers a legitimate legislative purpose (the avoidance of a burden on taxpayers to cover shortfalls in the UST fund) by rational means (a temporary fee increase affecting only the largest chapter 11 cases).

The UST argues that the quarterly fees are user fees and not taxes and so are not governed by the tax uniformity clause. The UST argues that 28 U.S.C. § 1930(a)(6) is an administrative funding mechanism authorized by the necessary and proper clause, rather than a law "on the subject of Bankruptcies," and so is not subject to the uniformity requirement of the bankruptcy clause.

If subject to the tax uniformity clause or the uniformity requirement of the bankruptcy clause, the UST argues that the Amendment results in quarterly fees that are "uniform on their face" because, according to the UST, the quarterly fees payable in bankruptcy administrator districts are statutorily required to be the same as the quarterly fees charged in the UST districts. Even if the Amendment required quarterly fee increases only in UST districts, the UST argues that the Amendment is nonetheless sufficiently uniform because it applies only where necessary to remedy the problem of depletion of the UST system fund.

The UST argues that the appropriate remedy is not to permit this bankruptcy estate to pay a lesser quarterly fee, as though the Amendment was not enacted, but "to require nationwide adherence to the statute as written." In other words, the UST would have the Court enter an injunction requiring that bankruptcy administrators charge identical fees to those established by the Amendment in all cases without regard to filing

date. In the alternative, because the UST believes that the bankruptcy administrators were required to charge identical quarterly fees between January 1, 2018 and August 2018, the UST argues that the Trust would be entitled to only the additional fees paid in the third quarter of 2018 and the second quarter of 2019, in the amount of no more than $20,161.49.

Finally, the UST argues that even if the Court determines that the Investment Trustee is entitled to a refund or credit, the Court may not order such refund or credit until the United States has had an opportunity to exhaust all appellate rights. 28 U.S.C. § 2414.

ANALYSIS

It appears that this is the seventh bankruptcy court decision on the issues presented. *See In re Buffets, LLC*, 597 B.R. 588 (Bankr. W.D. Tex. 2019); *In re Circuit City Stores, Inc.*, 606 B.R. 260 (Bankr. E.D. Va. 2019); *In re Life Partners Holdings, Inc.*, 606 B.R. 277 (Bankr. N.D. Tex. 2019); *Clinton Nurseries, Inc. v. Harrington (In re Clinton Nurseries, Inc.)*, 608 B.R. 96 (Bankr. Conn. 2019); *In re Exide Techs.*, 611 B.R. 21 (Bankr. D. Del. 2020); and *In re Clayton Gen., Inc.*, No. 15-64266-WLH, 2020 Bankr. LEXIS 842 (Bankr. N.D. Ga. Mar. 30, 2020). Of these, half ruled that the Amendment, in its entirety, is unconstitutional, while the other half found the Amendment constitutional. *Compare In re Buffets, LLC*, 597 B.R. at 597, *In re Circuit City Stores, Inc.*, 606 B.R. at 271, and *In re Life Partners Holdings, Inc.*, 606 B.R. at 286 *with In re Clinton Nurseries, Inc.*, 608 B.R. at 121, *In re Exide Techs.*, 611 B.R. at 38, and *In re Clayton Gen., Inc.*, 2020 Bankr. LEXIS 842, at *29.

Jurisdiction

The Court has subject matter jurisdiction over this core matter as the Motion involves the administration of the bankruptcy estate. 28 U.S.C. §§ 1334(b), 157(a) and 157(b).

Procedural Concerns

The UST argues that the Motion should be denied because the Investment Trustee seeks relief requiring an adversary proceeding. While the Trust's obligation to pay a fee to the UST is not an interest in property of the Trust, and so does not implicate Fed. R. Bankr. P. 7001(2)[1], the Investment Trustee seeks both declaratory relief and recovery of money, implicating Fed. R. Bankr. P. 7001(1) and 7001(9). The relief sought in the Motion ordinarily must be pursued via complaint and not by contested matter as originally presented.

As the UST concedes, the Court has the power to convert the Motion to an adversary proceeding if necessary. *In re Clinton Nurseries, Inc.*, 608 B.R. at 106; *In re Life Partners Holdings, Inc.*, 606 B.R. at 283; *In re Circuit City Stores, Inc.*, 606 B.R. at 267. However, because there are no material issues of fact, the issues before the Court are purely matters of law, and the Court may apply the law to the undisputed facts using simple math, there is no need for the Court to direct the Clerk to open an adversary proceeding in this matter.

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[1] Contrary to at least one reported decision, the UST quarterly fee does not result in the UST having an interest in "money that is otherwise property of the estate." *In re Clinton Nurseries, Inc.*, 608 B.R. at 105. If this was the case, every administrative claim would represent an interest in property of the estate and every dispute about an administrative claim would require an adversary proceeding. The UST is a claimant like any other, without the benefit of a specific lien on or interest in property of the estate.

Retroactivity and Due Process

The Investment Trustee argues that the Amendment does not explicitly apply to cases pending on its effective date and so does not have such "retroactive" effect. In other words, the Investment Trustee interprets the Amendment as applying only to cases filed on or after its effective date of October 26, 2017. Should the Court determine that the Amendment applies in all pending cases, as the UST argues, the Investment Trustee urges the Court to determine that the Amendment violates the due process clause because it grossly increased the expenses of this bankruptcy estate without adequate warning to parties in interest.

The Investment Trustee's argument based on retroactivity suffers from a basic misunderstanding of the concept. That parties may have acted differently if they were able to look into the future and see that the Investment Trust would be required to pay increased UST fees for transactions completed after confirmation does not make the increase retroactive. An increase in real property tax is not retroactive to the owner's acquisition of the property, even if foreknowledge might have deterred the purchase. An increase in licensing fees is not retroactive to the issuance of the license, even if the holder would not have applied for the license in the first place. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 n.24, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). The Amendment does not change the treatment of claims under the confirmed plan, alter any property right a creditor may have in collateral, or directly alter any contractual rights. *In re Clayton Gen., Inc.*, 2020 Bankr. LEXIS 842, at *19-20.

It would be difficult for the Court to improve on the analysis of Judge Walrath in *Exide* on the issues of retroactivity and substantive due process, which the Court adopts in full. *In re Exide Techs.*, 611 B.R. at 25-31. In summary (a) the Amendment by its terms applies to disbursements made on or after January 1, 2018, without regard to when the underlying case was filed, and so the Amendment applies to this case, (2) the Amendment is not retroactive in the constitutional sense as it does not attach new legal consequences to the Debtors' confirmed plan but addresses only disbursements made after enactment of the Amendment, and (3) even if the Amendment is considered retroactive, it does not violate due process as it serves the legitimate legislative purpose of maintaining the self-funding nature of the UST system and that purpose is achieved by the rational means of increasing fees in the largest chapter 11 cases. *Accord In re Clayton Gen., Inc.*, 2020 Bankr. LEXIS 842. The Court also agrees with Judge Walrath's ruling that the increased quarterly fee is not excessive for its purpose. *In re Exide Techs.*, 611 B.R. at 31-33.

It is not dispositive that Congress at one time stated, in the same statute, that an amendment specifically applied to all pending cases. Prior to 1996, the UST quarterly fee was payable only until the earliest of confirmation of a plan, conversion or dismissal. Thus, in most cases the quarterly UST fees ceased at plan confirmation. In 1996, Congress removed the reference to plan confirmation from section 1930(a)(6). The effect of the 1996 amendment was that the quarterly UST fee would continue to be due after confirmation, until the case was converted or dismissed. This led to confusion on whether the 1996 amendment applied in pend-

ing cases, including those with already confirmed plans. In response, Congress further amended the statute to provide that the extension of UST quarterly fees after confirmation applied to all cases pending on the effective date of the 1996 amendment "regardless of the confirmation status of their plans." The relevant course of legislation is spelled out in more detail in *In re Life Partners Holdings, Inc.*, 606 B.R. at 284-85.

At least one court has pointed to this prior legislative activity, and the absence of any specific statement in the Amendment that it applies to pending cases, to conclude that the Amendment does not in fact apply to pending cases. *In re Life Partners Holdings, Inc.*, 606 B.R. at 285. This is faulty logic. In 1996, Congress acted to remedy uncertainty resulting not from an increase in the quarterly UST fees, but from legislation extending the circumstances when such fees would be due. It is telling that Congress has increased the UST quarterly fees several times since 1996, without specifying that the increases apply to pending cases, and it has been uniformly accepted that the increased fees apply in all chapter 11 cases including those previously filed.

The change to the UST fee payable in larger chapter 11 cases, effected by the Amendment, is entirely prospective as it applies only to disbursements made after the effective date of the Amendment. The fact that the fee increase impacts pending chapter 11 cases does not make the Amendment retroactive in the constitutional sense. But even if the Amendment is considered a retroactive statute, it is tailored to address a legitimate legislative purpose in maintaining the self-funding nature of the UST System and achieves that end by the

rational means of increasing fees in the largest and often most complex cases.

Uniformity Requirement

The Constitution requires that both taxes and bankruptcy laws be applied uniformly. The tax uniformity clause states "Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. The bankruptcy clause empowers Congress to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4.

The UST argues strenuously that the UST quarterly fee statute, including the Amendment, is not a law "on the subject of Bankruptcies" as contemplated in the Constitution and so is not subject to the related uniformity requirement. Yet the UST fee statute creates a claim that arises only in bankruptcy cases, in favor of the UST, an entity that exists solely to participate in bankruptcy cases. The amount of the fee due to the UST directly impacts distributions to other creditors. 28 U.S.C. § 1930(a)(6), both before and after enactment of the Amendment, is a law on the subject of bankruptcies that implicates the related uniformity requirement under the Constitution. *In re Clayton Gen., Inc.*, 2020 Bankr. LEXIS 842, at *20; *In re Exide Techs.*, 611 B.R. at 34-36; *In re Clinton Nurseries, Inc.*, 608 B.R. at 111-13; *In re Life Partners Holdings, Inc.*, 606 B.R. at 287-88; *see also St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1530-31 (9th Cir. 1994).

Some courts have explicitly ruled that UST quarterly fees are user fees rather than taxes. *In re Exide Techs.*, 611 B.R. at 32 (and cases cited). This conclusion is based on the fact that, historically, UST fees were used solely to defray the cost of the UST system or maintain reserves for that purpose. But for the first time as a result of the Amendment a small portion of the UST quarterly fee—2% of the total collected during the effective period of the Amendment—is paid to the United States treasury without restriction. It is hard to see how this small part of the UST quarterly fee is a user fee as it is not necessarily associated with the debtors' use of the bankruptcy system.

In the end, it does not matter whether the UST quarterly fee, during the effective period of the Amendment, is a user fee or a tax. For purposes of these cases, the requirement of uniformity is identical in both instances. *See United States v. Ptasynski*, 462 U.S. 74, 83 n.13, 103 S. Ct. 2239, 76 L. Ed. 2d 427 (1983) (citing *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 160-61, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974)); *In re Circuit City Stores, Inc.*, 606 B.R. at 269.

Uniform Application

To satisfy the uniformity requirement, a law must apply uniformly to a defined class of persons. *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 469-70, 473, 102 S. Ct. 1169, 71 L. Ed. 2d 335 (1982); *Head Money Cases,* 112 U.S. 580, 594-95, 5 S. Ct. 247, 28 L.Ed. 798 (1884). The law must also be geographically uniform. *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 160-61, 95 S. Ct. 335; *United States v. Ptasynski*, 462 U.S. 74, 83-86, 103 S. Ct. 2239, 76 L. Ed. 2d 427 (1983); *see also In re Reese*, 91 F.3d 37, 39 (7th Cir. 1996)

(The uniformity requirement of the bankruptcy clause "forbids only two things"—first, "arbitrary regional differences in the provisions of the Bankruptcy Code" and second, "bankruptcy laws limited to a single debtor—or the equivalent."). The Amendment applies uniformly to those debtors with cases pending in UST districts who make distributions during the effective period of the Amendment. The parties focus on the question of geographical uniformity.

The Amendment does not apply to cases pending in the six judicial districts in North Carolina and Alabama. While the Judicial Conference belatedly raised fees in those districts to the same level as charged in UST districts, the increased fees apply only in cases filed on or after October 1, 2018. As the UST conceded, if the Debtors' cases were pending in North Carolina or Alabama, the quarterly fees payable to the bankruptcy administrator would be substantially lower. The Investment Trustee argues that this indicates a lack of geographical uniformity and so the Amendment is not constitutional.

The Investment Trustee's argument treats section 1930(a)(6), which contains the Amendment and relates only to UST districts, along with section 1930(a)(7), which addresses fees in bankruptcy administrator districts, as a singular congressional act. The Investment Trustee then argues that identical chapter 11 debtors should not be required to pay different fees for substantially the same services based solely on the district where they file.

This ignores the fact that the Amendment is aimed almost exclusively at eliminating a funding shortfall in the UST system and developing a reasonable reserve

for the same. *In re Clayton Gen., Inc.*, 2020 Bankr. LEXIS 842, at *23-27. In light of this overarching purpose of the Amendment, the Court focuses on whether subsection 1930(a)(6), as amended by the Amendment, is uniform. Because the Amendment effected a fee increase only in districts where the UST is active, and in all of such districts, the Amendment is uniform. With one exception, the Court adopts Judge Walrath's analysis on this issue. *In re Exide Techs.*, 611 B.R. at 36-38.

There is a hole in this analysis that is not addressed in any of the prior bankruptcy court decisions. Not all of the UST quarterly fee payable during the effective period of the Amendment is used to defray the cost of the UST system or fund the related reserve. A small portion—2% of the total fee—is paid to the United States treasury without restriction, for application to any fiscal need. It appears that this 2% is intended to offset the extension of certain temporary bankruptcy judgeships (including one in North Carolina), but it does not matter why the Amendment carves out this component of the quarterly fee. The point is that, under the Amendment, debtors in larger chapter 11 cases in UST districts are required to pay a portion of their quarterly UST fee for national purposes rather than toward administration of bankruptcy cases in the geographic areas where the fee is charged. To the extent of this 2%, the fee required under the Amendment is not uniform and thus violates the Constitution.

Remedy

The Court will order that 2% of UST fees previously paid by the Investment Trustee as a result of disbursements made on or after January 1, 2018 will either be

re-paid to the Trust or the Trust will have the benefit of a credit against future UST fees. For the period addressed in the Motion, meaning the year 2018 and the first two quarters of 2019, the Trust paid UST fees aggregating $174,566.70. For those quarters, the Trust is entitled to a refund or credit in the amount of $3,491.33. The Court will order that, going forward during the effective time of the Amendment, the Investment Trustee must pay from the Trust a UST fee equal to 98% of the amount calculated as a result of the Amendment.

Under 28 U.S.C. § 2414, this Court's order directing repayment or credit of amounts previously paid will not be final, and shall not be enforceable, until such time as the Attorney General certifies that no further appeal or request for review will be taken from such order. However, the Court's ruling with regard to UST fees not yet paid shall have immediate effect.

ORDER

For the foregoing reasons, the Court ORDERS and ADJUDGES that the *Investment Trustee's Motion for Entry of Order (A) Determining Extent of Investment Trust's Liability for Post-Confirmation Quarterly United States Trustee Fees and (B) Directing Reimbursement or Authorizing Credit for Overpaid Fees* (ECF No. 1228) is GRANTED IN PART as follows:

1. During the effective period of the 2017 amendment to 28 U.S.C. § 1930(a)(6), the Mosaic Investment Trust shall be required to pay 98% of the quarterly United States Trustee fee otherwise required thereunder. This paragraph 1 is a final order and is immediately enforceable.

2. The United States shall pay to Margaret J. Smith, as Investment Trustee, for the benefit of the Mosaic Investment Trust, or shall permit as a credit against future quarterly United States Trustee fees (at the option of the Investment Trustee), a sum equal to 2% of all United States Trustee quarterly fees previously paid by the Mosaic Investment Trust based on disbursements made on or after January 1, 2018. For the year 2018 and the first two quarters of 2019, this sum is $3,491.33. If the parties are unable to agree on the appropriate sum for any other period during which such quarterly fees were paid, either party may file a brief motion asking the Court to rule. Pursuant to 28 U.S.C. § 2414, this paragraph 2 is not final and enforceable until such time as the Attorney General certifies that no further appeal or request for review will be taken from this order.

ORDERED.