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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: JOHN Q. HAMMONS FALL 2006, LLC; ACLOST, LLC; BRICKTOWN RESIDENCE CATERING CO., INC.; CHATEAU CATERING CO., INC.; CHATEAU LAKE, LLC; CITY CENTRE HOTEL CORP.; CIVIC CENTER REDEVELOPMENT CORP.; CONCORD GOLF CATERING CO., INC.; CONCORD HOTEL CATERING CO., INC.; EAST PEORIA CATERING CO., INC.; FORT SMITH CATERING CO., INC.; FRANKLIN/CRESCENT CATERING CO., INC.; GLENDALE COYOTES CATERING CO., INC.; GLENDALE COYOTES HOTEL CATERING CO., INC.; HAMMONS OF ARKANSAS, LLC; HAMMONS OF COLORADO, LLC; HAMMONS OF FRANKLIN, LLC; HAMMONS OF FRISCO, LLC; HAMMONS OF HUNTSVILLE, LLC; HAMMONS OF LINCOLN, LLC; HAMMONS OF NEW MEXICO, LLC; HAMMONS OF OKLAHOMA CITY, LLC; HAMMONS OF RICHARDSON, LLC; HAMMONS OF ROGERS, INC.; HAMMONS OF SIOUX FALLS, LLC; HAMMONS OF SOUTH CAROLINA, LLC; HAMMONS OF TULSA, LLC; HAMMONS, INC.; HAMPTON CATERING CO., INC.; HOT SPRINGS CATERING CO., INC.; HUNTSVILLE CATERING, LLC; INTERNATIONAL CATERING CO., INC.; JQH - ALLEN DEVELOPMENT, LLC; JQH - CONCORD DEVELOPMENT, LLC; JQH - EAST

No. 20-3203

PEORIA DEVELOPMENT, LLC; JQH - FT. SMITH DEVELOPMENT, LLC; JQH - GLENDALE AZ DEVELOPMENT, LLC; JQH - KANSAS CITY DEVELOPMENT, LLC; JQH - LA VISTA CY DEVELOPMENT, LLC; JQH - LA VISTA CONFERENCE CENTER DEVELOPMENT, LLC; JQH - LA VISTA III DEVELOPMENT, LLC; JQH - LAKE OF THE OZARKS DEVELOPMENT, LLC; JQH - MURFREESBORO DEVELOPMENT, LLC; JQH - NORMAL DEVELOPMENT, LLC; JQH - NORMAN DEVELOPMENT, LLC; JQH - OKLAHOMA CITY BRICKTOWN DEVELOPMENT, LLC; JQH - OLATHE DEVELOPMENT, LLC; JQH - PLEASANT GROVE DEVELOPMENT, LLC; JQH - ROGERS CONVENTION CENTER DEVELOPMENT, LLC; JQH - SAN MARCOS DEVELOPMENT, LLC; JOHN Q. HAMMONS 2015 LOAN HOLDINGS, LLC; JOHN Q. HAMMONS CENTER, LLC; JOHN Q. HAMMONS HOTELS DEVELOPMENT, LLC; JOHN Q. HAMMONS HOTELS MANAGEMENT I CORPORATION; JOHN Q. HAMMONS HOTELS MANAGEMENT II, LP; JOHN Q. HAMMONS HOTELS MANAGEMENT, LLC; JOPLIN RESIDENCE CATERING CO., INC.; JUNCTION CITY CATERING CO., INC.; KC RESIDENCE CATERING CO., INC.; LA VISTA CY CATERING CO., INC.; LA VISTA ES CATERING CO., INC.; LINCOLN P STREET CATERING CO., INC.; LOVELAND CATERING CO., INC.; MANZANO CATERING CO., INC.; MURFREESBORO CATERING CO., INC.; NORMAL CATERING CO., INC.; OKC COURTYARD CATERING CO., INC.; R-2 OPERATING CO., INC.;

REVOCABLE TRUST OF JOHN Q. HAMMONS DATED DECEMBER 28, 1989 AS AMENDED AND RESTATED; RICHARDSON HAMMONS, LP; ROGERS ES CATERING CO., INC.; SGF - COURTYARD CATERING CO., INC.; SIOUX FALLS CONVENTION/ARENA CATERING CO., INC.; ST. CHARLES CATERING CO., INC.; TULSA/169 CATERING CO., INC.; U.P. CATERING CO., INC.,

Debtors.

JOHN Q. HAMMONS FALL 2006, LLC; ACLOST, LLC; BRICKTOWN RESIDENCE CATERING CO., INC.; CHATEAU CATERING CO., INC.; CHATEAU LAKE, LLC; CITY CENTRE HOTEL CORP.; CIVIC CENTER REDEVELOPMENT CORP.; CONCORD GOLF CATERING CO., INC.; CONCORD HOTEL CATERING CO., INC.; EAST PEORIA CATERING CO., INC.; FORT SMITH CATERING CO., INC.; FRANKLIN/CRESCENT CATERING CO., INC.; GLENDALE COYOTES CATERING CO., INC.; GLENDALE COYOTES HOTEL CATERING CO., INC.; HAMMONS OF ARKANSAS, LLC; HAMMONS OF COLORADO, LLC; HAMMONS OF FRANKLIN, LLC; HAMMONS OF FRISCO, LLC; HAMMONS OF HUNTSVILLE, LLC; HAMMONS OF LINCOLN, LLC; HAMMONS OF NEW MEXICO, LLC; HAMMONS OF OKLAHOMA CITY, LLC; HAMMONS OF RICHARDSON, LLC; HAMMONS OF ROGERS, INC.; HAMMONS OF SIOUX FALLS, LLC; HAMMONS OF

SOUTH CAROLINA, LLC; HAMMONS OF TULSA, LLC; HAMMONS, INC.; HAMPTON CATERING CO., INC.; HOT SPRINGS CATERING CO., INC.; HUNTSVILLE CATERING, LLC; INTERNATIONAL CATERING CO., INC.; JQH - ALLEN DEVELOPMENT, LLC; JQH - CONCORD DEVELOPMENT, LLC; JQH - EAST PEORIA DEVELOPMENT, LLC; JQH - FT. SMITH DEVELOPMENT, LLC; JQH - GLENDALE AZ DEVELOPMENT, LLC; JQH - KANSAS CITY DEVELOPMENT, LLC; JQH - LA VISTA CY DEVELOPMENT, LLC; JQH - LA VISTA CONFERENCE CENTER DEVELOPMENT, LLC; JQH - LA VISTA III DEVELOPMENT, LLC; JQH - LAKE OF THE OZARKS DEVELOPMENT, LLC; JQH - MURFREESBORO DEVELOPMENT, LLC; JQH - NORMAL DEVELOPMENT, LLC; JQH - NORMAN DEVELOPMENT, LLC; JQH - OKLAHOMA CITY BRICKTOWN DEVELOPMENT, LLC; JQH - OLATHE DEVELOPMENT, LLC; JQH - PLEASANT GROVE DEVELOPMENT, LLC; JQH - ROGERS CONVENTION CENTER DEVELOPMENT, LLC; JQH - SAN MARCOS DEVELOPMENT, LLC; JOHN Q. HAMMONS 2015 LOAN HOLDINGS, LLC; JOHN Q. HAMMONS CENTER, LLC; JOHN Q. HAMMONS HOTELS DEVELOPMENT, LLC; JOHN Q. HAMMONS HOTELS MANAGEMENT I CORPORATION; JOHN Q. HAMMONS HOTELS MANAGEMENT II, LP; JOHN Q. HAMMONS HOTELS MANAGEMENT, LLC; JOPLIN RESIDENCE CATERING CO., INC.; JUNCTION CITY CATERING CO., INC.; KC RESIDENCE CATERING CO., INC.; LA VISTA CY CATERING

CO., INC.; LA VISTA ES CATERING CO., INC.; LINCOLN P STREET CATERING CO., INC.; LOVELAND CATERING CO., INC.; MANZANO CATERING CO., INC.; MURFREESBORO CATERING CO., INC.; NORMAL CATERING CO., INC.; OKC COURTYARD CATERING CO., INC.; R-2 OPERATING CO., INC.; REVOCABLE TRUST OF JOHN Q. HAMMONS DATED DECEMBER 28, 1989 AS AMENDED AND RESTATED; RICHARDSON HAMMONS, LP; ROGERS ES CATERING CO., INC.; SGF - COURTYARD CATERING CO., INC.; SIOUX FALLS CONVENTION/ARENA CATERING CO., INC.; ST. CHARLES CATERING CO., INC.; TULSA/169 CATERING CO., INC.; U.P. CATERING CO., INC.,

Appellants,

v.

OFFICE OF THE UNITED STATES TRUSTEE,

Appellee,

ACADIANA MANAGEMENT GROUP, LLC; ALBUQUERQUE-AMG SPECIALTY HOSPITAL, LLC; CENTRAL INDIANA-AMG SPECIALTY HOSPITAL, LLC; LTAC HOSPITAL OF EDMOND, LLC; HOUMA-AMG SPECIALTY HOSPITAL, LLC; LTAC OF LOUISIANA, LLC; LAS VEGAS-AMG SPECIALTY HOSPITAL, LLC; WARREN BOEGEL; BOEGEL FARMS, LLC and THREE BO'S, INC.

Amici Curiae.

Appeal from the United States Bankruptcy Court
for the District of Kansas
(16-21142)

Nicholas Zluticky (with Zachary H. Hemenway, Michael P. Pappas, and J. Nicci Warr on the briefs) of Stinson LLP, Kansas City and Clayton, Missouri, for Debtors-Appellants.

Jeffrey E. Sandberg (with Mark B. Stern, Ramona D. Elliott, P. Matthew Sutko, Andrew W. Beyer, and Brian M. Boynton on the brief) of the U.S. Department of Justice, Washington, District of Columbia, for Appellee.

Bradley L. Drell and Heather M. Mathews of Gold, Weems, Bruser, Sues & Rundell, Alexandria, Louisiana, on the brief for Amici Curiae.

Before **BACHARACH**, **EBEL**, and **PHILLIPS**, Circuit Judges.

PHILLIPS, Circuit Judge.

Appellants, seventy-six Chapter 11 debtors associated with John Q. Hammons Hotels & Resorts (Debtors), argue that they incurred more than $2.5 million of quarterly Chapter 11 disbursement fees from January 2018 through December 2020. First, Debtors fault the bankruptcy court's statutory interpretation, arguing that it applied the quarterly fees retroactively to pending cases against Congress's intent. We conclude that the presumption against retroactivity doesn't apply here, because Congress increased the quarterly bankruptcy fees prospectively. Second, and alternatively, Debtors fault Congress, arguing that charging different Chapter 11 disbursement fees depending on the location of the bankruptcy filing violates the uniformity requirement of the Bankruptcy Clause, U.S. Const. art I, § 8, cl. 4. On this point, we conclude that Debtors must prevail.

Accordingly, we reverse and remand for recalculation of the quarterly Chapter 11 disbursement fees and a refund of overpayments.

BACKGROUND

I. Historical Background

The federal judiciary is divided into ninety-four judicial districts. Nearly all judicial districts have a bankruptcy court. The Department of Justice, through its Trustee Program, administers bankruptcy proceedings for eighty-eight judicial districts.[1] *E.g.*, *In re Cir. City Stores, Inc.*, 996 F.3d 156, 160 (4th Cir. 2021). The Judicial Conference, through its Bankruptcy Administrator Program, administers bankruptcy proceedings in the remaining six districts, located in Alabama and North Carolina. *Id.* (footnote omitted).

This system of dual bankruptcy programs began in 1978. *See* Pub. L. No. 95-598, §§ 224–32, 92 Stat. 2549, 2662–65 (1978). Before then, bankruptcy judges in all judicial districts supervised and administered their own bankruptcy proceedings. H.R. Rep. No. 95-595, at 4 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 5965–66. In 1978, Congress launched a pilot trustee program (1) to alleviate the administrative burdens on bankruptcy judges, (2) to remove any appearance of bias arising from judges'

[1] The Eastern and Western Districts of Arkansas share a bankruptcy court. *See* United States Courts, https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links (last visited August 10, 2021). And the judicial districts for the Virgin Islands, Northern Mariana Islands, and Guam don't have bankruptcy courts. *See* Boston College Law Library, Bankruptcy Courts, https://lawguides.bc.edu/c.php?g=350874&p=2367777 (last visited August 10, 2021). But the Trustee Program still covers bankruptcy proceedings in these districts. *See* Judicial Districts Covered by USTP Regions, Department of Justice, https://www.justice.gov/ust/judicial-districts-covered-ustp-regions (last visited August 10, 2021).

administering cases, and (3) to establish bankruptcy-court "watchdogs." *Id.*; Pub. L. No. 95-598, §§ 224–32, 92 Stat. at 2662–65.

In 1986, Congress made the program permanent in all judicial districts, but allowed Alabama and North Carolina until 1992 to join. Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, §§ 111–17, 302(d), 100 Stat. 3088, 3090–96, 3119–23 (1986).

But in 1990, Congress extended the temporary delay until 2002. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 317(a), 104 Stat. 5089, 5115 (1990). Then in 2000, Congress granted Alabama and North Carolina a permanent exemption from joining the Trustee Program. Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 501, 114 Stat. 2410, 2421–22 (2000).

This left the country with two different bankruptcy-administration programs. Each has a separate funding source. The general judicial budget funds Bankruptcy Administrators in Alabama and North Carolina. *Matter of Buffets, L.L.C.*, 979 F.3d 366, 383 (5th Cir. 2020); *cf.* 28 U.S.C. § 1930(a)(7). Debtors' fees fund the Trustee Program everywhere else.[2] H.R. Rep. No. 99-764, at 22 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5227, 5234.

Chapter 11 debtors pay quarterly disbursement fees. 28 U.S.C. § 1930(a)(6). Bankruptcy courts calculate and collect these fees based on the size of quarterly

[2] Though Congress annually appropriates funds to the Trustee Program, it offsets appropriations with the bankruptcy fees collected. H.R. Rep. No. 115-130, at 6–7 (2017), *as reprinted in* 2017 U.S.C.C.A.N. 154, 159.

"disbursements" paid creditors. *Id.* At first, Congress imposed these fees only in Trustee districts. *See Buffets*, 979 F.3d at 371. But in 1994, the Ninth Circuit ruled that imposing a "different, more costly system" on debtors everywhere except Alabama and North Carolina violated the Bankruptcy Clause's requirement that bankruptcy laws be uniform. *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1531–33 (9th Cir. 1994). The next year, Congress enacted § 1930(a)(7), which allowed the Judicial Conference to require debtors "to pay fees equal to those imposed" in Trustee districts.[3] Federal Courts Improvement Act of 2000 § 105. A year later, the Judicial Conference set fees in Bankruptcy Administrator districts "in the amounts specified [for Trustee districts], as those amounts may be amended from time to time." *Report of the Proceedings of the Judicial Conference of the United States* 45–46 (2001), https://www.uscourts.gov/sites/default/files/2001-09_0.pdf.

For the next seventeen years or so, Trustee and Bankruptcy Administrator districts charged the same quarterly fees. That changed with Congress's 2017 Amendment to § 1930(a)(6), which mandated increased quarterly Chapter 11 disbursement fees for large debtors in Trustee districts. Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2017, Pub. L. No. 115-72, § 1004(a)(2), 131 Stat. 1224, 1232 (2017).

[3] In a 2020 amendment effective on January 12, 2021, Congress amended "may" to "shall." Bankruptcy Administration Improvement Act of 2020, Pub. L. No. 116-325, § 3(d)(2), 134 Stat. 5086, 5088 (2020); *see* 28 U.S.C. § 1930(a)(7) (2021) (providing that "the Judicial Conference of the United States shall require [Chapter 11 debtors] to pay fees equal to those imposed" in Trustee districts). For quarters in 2021 and afterward, Congress has restored equilibrium for fees charged in Bankruptcy Administrator and Trustee districts.

With this Amendment, Congress sought to secure funding levels in the Trustee Program districts, whose declining bankruptcy filings had reduced fees that contributed to overall funding. H.R. Rep. No. 115-130, at 6–7 (2017), *as reprinted in* 2017 U.S.C.C.A.N. 154, 159; *see also Cir. City Stores*, 996 F.3d at 161. Under the 2017 Amendment, each year from 2018 through 2022, fees would increase for debtors with at least $1 million quarterly disbursements if "as of September 30 of the most recent full fiscal year," Trustee Program funds were below $200 million.[4] § 1004(a)(2). This substantially raised fees for these Trustee Program debtors, from a maximum of $30,000 to the lesser of either $250,000 or one percent of the quarterly disbursement.[5] *Id.*; 28 U.S.C. § 1930(a)(6) (2008).

For quarters beginning on and after January 1, 2018, quarterly Chapter 11 disbursement fees increased on all large debtors in Trustee districts, even debtors whose bankruptcy cases were pending before that date. *See, e.g.*, *Buffets*, 979 F.3d at 372. Bankruptcy Administrator debtors got a better deal. The Judicial Conference didn't increase quarterly fees for those debtors until October 2018, and then, the increase didn't

[4] Congress also intended to finance eighteen new bankruptcy judgeships. *See* H.R. Rep. No. 115-130, at 7. To that end, Congress allocated 98% percent of the fees to the Trustee Program fund and 2% percent to the general Treasury fund. *See* § 1004.

[5] In the 2020 Amendment, Congress reduced fees to the lesser of 0.8% of the disbursement or $250,000. § 3(d)(1).

apply prospectively to pending cases.[6] Thus, in Bankruptcy Administrator districts, unlike in Trustee districts, large debtors with cases pending before October 2018 incurred no increased fees however long their cases remained pending. *E.g.*, *Buffets*, 979 F.3d at 372.

II. Procedural Background

In June 2016, Debtors filed Chapter 11 bankruptcy cases in the District of Kansas, a Trustee district.[7] Their cases remained pending in January 2018 when the 2017 Amendment took effect. After that, their quarterly fees markedly increased. As of December 31, 2019, Debtors had paid over $2.5 million more in quarterly fees than they would have paid had they filed in a Bankruptcy Administrator district.

In the bankruptcy court, Debtors challenged the quarterly Chapter 11 disbursement-fee increase. They argued that the 2017 Amendment was unconstitutional "because it was unequally applied during the first three quarters of 2018 and because it was applied retroactively both without clear Congressional intent and only in states where the United States Trustee Program operates—excluding bankruptcy petitions filed in North Carolina and Alabama." Debtors/Appellants' App. vol. 71 at 9871. The bankruptcy court rejected both arguments and declined to redetermine Debtors' quarterly disbursement fees. We review under 28 U.S.C. § 158(d)(2).

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[6] *Report of the Proceedings of the Judicial Conference of the United States* 11–12 (2018), https://www.uscourts.gov/sites/default/files/2018-09_proceedings.pdf.

[7] Because of their many business locations, Debtors had the flexibility to have filed in the Bankruptcy Administrator districts instead.

DISCUSSION

On appeal, Debtors maintain (1) that the bankruptcy court erred in interpreting the 2017 Amendment to require increased fees retroactively, and (2) that the 2017 Amendment violates the Constitution's Bankruptcy Clause by applying a bankruptcy law nonuniformly. We review these legal issues de novo, beginning with the retroactivity challenge.[8] *See In re Herd*, 840 F.2d 757, 759 (10th Cir. 1988) (citation omitted).

I. Retroactivity

Debtors argue that applying the 2017 Amendment to their bankruptcy cases, which were pending in January 2018, is "impermissibly retroactive." Opening Br. at 42. Specifically, they contend that the Amendment's fee increases apply only to bankruptcy cases *filed* after January 1, 2018, not to cases *pending* then. The Fourth and Fifth Circuits have rejected this argument. *Cir. City Stores*, 996 F.3d at 168–69; *Buffets*, 979 F.3d at 374–76. We do too.

Obviously, if Congress applies a new law to earlier events, this raises notice issues and could upset "settled expectations." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994) (footnote omitted). So courts apply a presumption against retroactivity when interpreting statutes. *See id.* at 277. Under this canon of construction, we presume that Congress didn't intend a statute to have a "genuinely 'retroactive' effect." *Id.* We employ a two-step analysis in assessing whether the presumption applies. *Id.* at 280. First, we

[8] We address the retroactivity challenge first, because if Debtors prevailed on this issue we wouldn't need to decide the constitutionality of the 2017 Amendment under the Bankruptcy Clause.

employ ordinary statutory-interpretation tools "to determine whether Congress has expressly prescribed the statute's proper reach." *Id.* If so, our analysis stops there. *Id.* If not, second, we "must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* "If the statute would operate retroactively, our traditional presumption [against retroactivity] teaches that it does not govern absent clear congressional intent favoring such a result." *Id.*

Debtors contend that we should apply the presumption against retroactivity to the 2017 Amendment; that is, they argue that the 2017 Amendment's text is ambiguous about whether it applies to already-pending cases and that it would have an impermissible retroactive effect if applied in such cases. We interpret the 2017 Amendment as increasing fees in pending cases. *Accord Cir. City Stores*, 996 F.3d at 168–69; *Buffets*, 979 F.3d at 374–75. Under § 1930(a)(6), debtors owe quarterly fees "in *each* case" and "for *each* quarter," regardless of case filing date. *Id.* (emphasis added). And the 2017 Amendment shows that Congress intended to increase quarterly fees for all disbursements paid on or after January 1, 2018. The 2017 Amendment ties the quarterly-fee increase to the disbursement date, no matter when the bankruptcy case was filed. The increase applies to "quarterly fees payable . . . for *disbursements* made in any calendar quarter that begins on or after the date of enactment." § 1004 (emphasis added). The legislative history contains similar language. *See* H.R. Rep. No. 115-130, at 10 (providing

that the fee increase "applies to quarterly fees payable for any quarter that begins on or after the effective date of this legislation").

Even so, Debtors argue that we should draw a negative inference from the 2017 Amendment's not more specifically applying its fee increases to pending cases. Debtors contend that whether the 2017 Amendment applies to those cases is ambiguous. Debtors contrast the 2017 Amendment's language to Congress's language in a clarifying amendment for a 1996 fee increase, which specified that it applied to pending cases. Debtors also point to amendments to Chapter 12 of the Bankruptcy Code contained in the same act as the 2017 Amendment, which did so also.

We decline to draw a negative inference. Debtors haven't overcome the 2017 Amendment's language increasing quarterly fees for all postenactment disbursements. Additionally, Debtors' legislative examples differ. Congress intended the 1996 clarifying amendment to resolve judicial disagreement about whether a 1996 fee increase applied in pending cases. *Cir. City Stores*, 996 F.3d at 168 (citation omitted). By contrast, the 2017 Amendment increases all quarterly fees for disbursements made after its effective date. And when enacting the 2017 Amendment, "Congress operated under [a] widespread understanding that fee increases apply to postenactment disbursements in pending cases." *Buffets*, 979 F.3d at 374 (citation omitted).

Similarly, a negative inference doesn't arise from the Chapter 12 amendment, because that amendment addresses a different subject from § 1930(a)(6)'s. *Cf. Martin v. Hadix*, 527 U.S. 343, 356 (1999) (finding a proposed negative inference inapposite because it depended on legislation on a "wholly distinct subject matter[]"). That

amendment enlarged the scope of Chapter 12 discharge by expanding what debts are dischargeable. *See* Additional Supplemental Appropriations for Disaster Relief Requirements Act, 2017, § 1005; *see also Buffets*, 979 F.3d at 375 n.5 (citation omitted). To preserve existing rights in discharge, Congress clarified that the amendment didn't reach pending cases with existing discharge orders. *Buffets*, 979 F.3d at 375 n.5. Congress needn't have employed similar language when addressing the unrelated matter of Chapter 11 quarterly-fee increases, long assumed applicable to pending cases. *See id.* (citation omitted).

Even if we viewed the 2017 Amendment as ambiguous, we still wouldn't apply the presumption against retroactivity. We conclude that the 2017 Amendment doesn't operate retroactively. The presumption against retroactivity applies only when "the new provision attaches new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 269–70. As described, to have a retroactive effect, a new provision must "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. We've previously ruled that an amendment increasing § 1930(a)(6)'s quarterly fees wasn't retroactive, because the amendment merely "trigger[ed] prospective assessment of fees from the amendment's effective date." *In re CF & I Fabricators of Utah, Inc.*, 150 F.3d 1233, 1237 (10th Cir. 1998) (citation omitted). Most courts have concluded that the 2017 Amendment isn't retroactive, reasoning that the fee increase applies prospectively. *See, e.g., Buffets*, 979 F.3d at 375–76. We're persuaded by the Fifth Circuit's reasoning that the fee increase resembles a property-tax increase after a home purchase. *See id.* at

376 (citation and footnote omitted). The Supreme Court has described such taxes as "uncontroversially prospective." *Landgraf*, 511 U.S. at 269 n.24 (citation omitted).

Debtors can't refute this reasoning. Instead, they argue that "[w]hen the increased fees were applied to [their] bankruptcy cases, new legal obligations . . . were retroactively applied to their decision to file" in a Trustee district, rather than a Bankruptcy Administrator district. Opening Br. at 47. Debtors miss the mark. The issue is whether the 2017 Amendment's increasing of quarterly fees is retroactive. *Cf.* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 264 (2012) ("[R]etroactivity is to be judged with regard to the act or event that the statute is meant to regulate[.]"). The 2017 Amendment imposes no new legal consequences on disbursement fees before January 2018. Thus, we reject Debtors' retroactivity challenge to the 2017 Amendment. Even if Debtors' expectations were unsettled, legislation isn't "unlawful solely because it upsets otherwise settled expectations."[9] *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729–30 (1984) (citations omitted).

II. Bankruptcy Clause Uniformity

A. The 2017 Amendment is a Law on "the Subject of Bankruptcies"

The Bankruptcy Clause authorizes Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States," thus requiring geographic

[9]And we note that the 2017 Amendment was preceded by some tremors. In 2015, the Department of Justice signaled plans to seek a fee increase soon, and the next year, the department proposed increasing fees in October 2016. U.S. Dep't of Justice, *U.S. Trustee Program: FY 2017 Performance Budget Congressional Submission* 9–10 (2016), https://go.usa.gov/xpYS3; U.S. Dep't of Justice, *U.S. Trustee Program: FY 2016 Performance Budget Congressional Submission* 7 (2015), https://go.usa.gov/xpYJu.

uniformity. U.S. Const. art I, § 8, cl. 4. The United States Trustee first contends that we needn't determine whether the 2017 Amendment violates this limitation, because the Amendment isn't a substantive law "on the subject of bankruptcies." The Trustee contends that the Amendment concerns an administrative matter and is not subject to the uniformity requirement. In that regard, the Trustee likens dual-system quarterly Chapter 11 disbursement fees to statutorily optional bankruptcy appellate panels, which only some judicial circuits use, or to optional local rules among bankruptcy courts. The Trustee also notes that 28 U.S.C. § 1930(f)(3) allows bankruptcy courts to waive some fees.

Every court that has addressed the Trustee's argument has rejected it, and for good reason. *See, e.g.*, *In re Clinton Nurseries, Inc.*, 998 F.3d 56, 64 (2d Cir. 2021) ("The Trustee's argument has been repeatedly rejected by other courts." (collecting cases)); *cf. Buffets*, 979 F.3d at 377 ("The consensus view of bankruptcy courts that Chapter 11 fees are Bankruptcy Clause legislation is likely correct."). The 2017 Amendment fits within the Supreme Court's broad definition of "bankruptcy" as "the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief." *Ry. Lab. Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 466 (1982) (internal quotation marks and citations omitted). The Amendment concerns a statute (§ 1930(a)(6)) imposing fees that a debtor must pay before paying creditors. *See, e.g.*, *Clinton Nurseries*, 998 F.3d at 64 ("Under § 1930(a)(6), a debtor must pay pre-confirmation [quarterly] fees as an administrative priority expense before it pays its commercial creditors, bondholders, and shareholders." (internal quotation marks and

citation omitted)). Any fee increase reduces what creditors receive. *Buffets*, 979 F.3d at 377 (citation omitted); *see Clinton Nurseries*, 998 F.3d at 64 ("[A]ny change in fees imposed pursuant to § 1930 affects the amount of funds available for distribution to lower-priority creditors." (internal quotation marks and citation omitted)). Unlike the Trustee's examples, § 1930(a)(6) requires debtors to pay potentially significant sums: by December 2019, the 2017 Amendment increased Debtors' fees more than $2.5 million. *Cf. Buffets*, 979 F.3d at 377 ("[U]nlike the varying procedures that only indirectly might lead to different outcomes, the fee increase has a direct effect on what creditors receive[.]" (citation omitted)).

We also reject the Trustee's argument that if every law bearing on distributions to creditors qualified as "laws on the subject of bankruptcies," the Bankruptcy Clause would extend even to taxes and business regulations. The 2017 Amendment and § 1930(a)(6) in which it rests are laws on the subject of bankruptcies. It governs relations between debtors and creditors. Indeed, Congress enacted the 2017 Amendment under the authority given by the Bankruptcy Clause. *See* 163 Cong. Rec. H3003-03 (daily ed. May 1, 2017) (statement of Rep. John Conyers). And 28 U.S.C. § 1930 is entitled "Bankruptcy fees," as part of "An Act to establish a uniform Law on the Subject of Bankruptcies," Pub. L. No. 95-598, 92 Stat. 2549. *See Clinton Nurseries*, 998 F.3d at 64 (finding persuasive that "[t]he 2017 Amendment amends a statute, § 1930, that is literally entitled: 'Bankruptcy fees'" (citation and footnote omitted)). So the 2017 Amendment governs debtor-creditor relations and thus concerns "the subject of bankruptcies," leaving it subject to the Bankruptcy Clause's uniformity requirement.

B. Uniformity

To defeat Debtors' constitutional challenge, the Trustee argues two alternative theories: (1) that the pre-2020 Amendment versions of § 1930(a)(6) and (7) together in fact already require uniform quarterly disbursement fees in all judicial districts, and (2) more narrowly, that the 2017 Amendment is constitutionally uniform because it increased quarterly fees on all large debtors in Trustee districts. Again, we're unpersuaded.

1. Sections 1930(a)(6) and (7) Didn't Impose Uniform Quarterly Fees Across All Judicial Districts

Until the 2020 Amendment revised "may" to "shall" in § 1930(a)(7), Bankruptcy Administration Improvement Act of 2020, Pub. L. No. 116-325, § 3(d)(2), 134 Stat. 5086, 5088 (2020), that section provided that the Judicial Conference "may require" debtors in Bankruptcy Administrator districts "to pay fees equal to those imposed" in Trustee districts. Federal Courts Improvement Act of 2000. The Trustee argues that "may require" is mandatory, requiring the Judicial Conference to impose the same quarterly fees as imposed in Trustee districts. To bolster this point, the Trustee notes that Congress enacted this "may require" term after *St. Angelo*, to resolve any conceivable uniformity problems.

But the pre-2020 Amendment § 1930(a)(7)'s "may" is permissive. Granted, "the mere use of 'may' is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority." *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198–99 (2000) (citations omitted). But for two reasons, we're persuaded that Congress intended to use "may" in a permissive sense.

First, in the very next sentence in § 1930(a)(7), Congress used "shall." *Id.* ("Such fees shall be deposited as offsetting receipts to the fund established under section 1931 of this title and shall remain available until expended."); *see Lopez v. Davis*, 531 U.S. 230, 241 (2001) (finding persuasive "Congress' use of the permissive 'may'" in "contrast[] with the legislators' use of a mandatory 'shall' in the very same section"). And second, Congress also repeatedly used "shall" elsewhere in § 1930. *See*, *e.g.*, 28 U.S.C. § 1930(a)(6) ("[A] quarterly fee shall be paid to the United States trustee . . . .").

Disregarding the plain language, the Trustee contends that the 2020 Amendment's amending "may" to "shall" shows Congress's longstanding intent that § 1930(a)(7) be mandatory. The Trustee emphasizes that in the "Findings and Purpose" section of the Act containing the Amendment, Congress stated that the legislation "confirm[s] the longstanding intention of Congress that quarterly fee requirements remain consistent across all Federal judicial districts." Response Br. at 31 (alteration omitted) (quoting Bankruptcy Administration Improvement Act of 2020 § 2(a)(4)(B)).

Though this finding merits some weight, it doesn't control our interpretation of the earlier Congress's intent in enacting § 1930(a)(7). *See Haynes v. United States*, 390 U.S. 85, 87 n.4 (1968) ("The view of a subsequent Congress . . . provide[s] no controlling basis from which to infer the purposes of an earlier Congress." (citations omitted)). Indeed, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n v. GTE*

Sylvania, Inc., 447 U.S. 102, 117 (1980) (citation and footnote omitted). The clear ordinary meaning of "may" outweighs Congress's 2020 view of any purportedly longstanding intention.[10] *Accord Clinton Nurseries*, 998 F.3d at 66 n.9 ("[T]he Congress that passed the 2020 Act inevitably looked through the lens of the constitutional quagmire that resulted [from use of the word 'may'] . . . . We conclude that the ordinary meaning of 'may' as permissive rather than mandatory . . . outweighs Congress's subsequent statement regarding its earlier meaning[.]" (citation omitted)).

Additionally, as the Second and Fifth Circuits reasoned in rejecting the Trustee's position, "[it] is . . . telling that the Judicial Conference itself apparently understood the 2017 Amendment as authorizing, but not requiring, it to impose a fee increase in [Bankruptcy Administrator] Districts." *Id.* at 67; *see Buffets*, 979 F.3d at 378 n.10 (citation omitted). Thus, § 1930(a)(7) merely permitted the Judicial Conference to impose the same quarterly fees on Bankruptcy Administrator debtors as Congress did on Trustee debtors. So at least before the 2020 Amendment, § 1930 didn't require that quarterly fees be consistent nationwide.[11] *Accord Clinton*

[10] *Cf. GTE Sylvania, Inc.*, 447 U.S. at 108 ("[T]he starting point for interpreting a statute is the language of the statute itself.").

[11] Though, as the Trustee contends, "courts should, if possible, interpret ambiguous statutes to avoid rendering them unconstitutional," *United States v. Davis*, 139 S. Ct. 2319, 2332 n.6 (2019), § 1930(a)(7) is unambiguous.

Nurseries, 998 F.3d at 67–68; *Buffets*, 979 F.3d at 378 n.10. So we now assess the 2017 Amendment for unconstitutional nonuniformity.

2. The 2017 Amendment is Unconstitutionally Nonuniform

We hold that the 2017 Amendment is unconstitutionally nonuniform, because it allows higher quarterly disbursement fees on Chapter 11 debtors in Trustee districts than charged to equivalent debtors in Bankruptcy Administrator districts. We acknowledge that the Fourth and Fifth Circuits have upheld the Amendment against a Bankruptcy Clause challenge. *Cir. City Stores*, 996 F.3d at 165; *Buffets*, 979 F.3d at 378–79. But we agree with the Second Circuit's well reasoned and unanimous ruling to the contrary. *See Clinton Nurseries*, 998 F.3d at 69–70.

In upholding the Chapter 11 quarterly disbursement-fee increase, the Fourth and Fifth Circuits relied on *Blanchette v. Connecticut General Insurance*, 419 U.S. 102 (1974), which ruled that in enacting bankruptcy laws, Congress may "take into account differences that exist between different parts of the country, and . . . fashion legislation to resolve geographically isolated problems." 419 U.S. at 159; *see Cir. City Stores*, 996 F.3d at 166 (comparing the quarterly-fees issue to *Blanchette*); *Buffets*, 979 F.3d at 378 (same). In *Blanchette*, the Supreme Court upheld legislation creating a special court and laws for bankrupt railroads in the northeast and midwest regions of the country. 419 U.S. at 108, 159–61. At the time of enactment, all the bankrupt railroads were operating there. *Id.* at 160. The Fourth and Fifth Circuits likened the geography-specific legislation in *Blanchette* to the 2017 Amendment's geographic distinction between the eighty-eight Trustee districts and the six Administrator districts in Alabama and North Carolina. *Cir.*

City Stores, 996 F.3d at 166; *Buffets*, 979 F.3d at 378. The Trustee would have us adopt this reasoning.

But the Second Circuit rejected the analogy to *Blanchette* and we're more persuaded by that court's reasoning than by the Fourth and Fifth Circuit's. *Cf. Clinton Nurseries, Inc.*, 998 F.3d at 68–69. As the Second Circuit reasoned, though *Blanchette* permitted geography-specific legislation, the challenged Act there still satisfied the Bankruptcy Clause's requirement that a law "apply uniformly to a defined class of debtors."[12] *Gibbons*, 455 U.S. at 473; *see Blanchette*, 419 U.S. at 159–61; *see also Clinton Nurseries, Inc.*, 998 F.3d at 68. The Act applied uniformly to all bankrupt railroads. *Blanchette*, 419 U.S. at 159–61; *see Clinton Nurseries, Inc.*, 998 F.3d at 68. And so the Act also addressed a geographically isolated problem: no members of the class of debtors existed outside the defined region, *see Blanchette*, 419 U.S. at 159–60; that is, "all members of the class of debtors impacted by the statute were confined to a sole geographic area," *Clinton Nurseries*, 998 F.3d at 68. By contrast, the 2017 Amendment increased fees for all large Chapter 11 bankruptcy debtors in Trustee Program districts, with no showing that "members of that broad class are absent in

[12] We acknowledge that the Bankruptcy Clause doesn't require perfect uniformity. *See In re Reese*, 91 F.3d 37, 39 (7th Cir. 1996) (Posner, C.J.). For instance, state property laws may affect what property is available for distribution. *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918) (citation omitted). But the "flexibility inherent in the constitutional provision," that the Trustee relies on, Br. of Appellee at 33 (quoting *Buffets*, 979 F.3d at 378), has limits, *see, e.g.*, *Gibbons*, 455 U.S. at 473 (requiring bankruptcy laws to apply uniformly to classes of debtors). For the reasons discussed, Congress has encountered the bounds of this flexibility with the 2017 Amendment.

[Bankruptcy Administrator] districts." *Id.* at 68–69. Common sense tells us that in 2018 through 2020, debtors like those here had bankruptcy cases pending in Alabama and North Carolina. So unlike the Act challenged in *Blanchette*, the 2017 Amendment neither applies uniformly to a class of debtors nor addresses a geographically isolated problem. As the Second Circuit reasoned, the 2017 Amendment "presents the exact problem avoided in *Blanchette*:" it substantially increased fees, potentially by millions, for one debtor but not another "identical in all respects save the geographic locations in which they filed for bankruptcy." *Clinton Nurseries*, 998 F.3d at 69 (footnote omitted).

In so holding, we reject the Trustee's arguments that the relevant class of debtors is exclusively Trustee-district debtors and that the Trustee Program underfunding is a geographically isolated problem warranting geographic-specific legislation.[13] No one disputes that political maneuvering, not bankruptcy-policy considerations, led to the dual bankruptcy-administration system (which we're not criticizing, but simply noting in analyzing uniformity). *See id.* at 69 (citation omitted); *Buffets* (*Buffets Concurrence*), 979 F.3d at 383 (Clement, J., concurring in part and dissenting in part). Nothing distinguishes Alabama and North Carolina from the forty-eight other states in bankruptcy-

[13] We acknowledge that, as the Trustee argues, the Supreme Court has struck down a bankruptcy law for lack of uniformity only once, and the stricken legislation amounted to "nothing more than a private bill" governing "only . . . one regional debtor." *Gibbons*, 455 U.S. at 471, 473 (footnote omitted). But the Bankruptcy Clause's uniformity requirement extends past private bills. We acknowledge that in *Gibbons*, the Court didn't "impair Congress' ability under the Bankruptcy Clause to define classes of debtors and to structure relief accordingly." *Id.* at 473. But uniformity requires that "a law must at least apply uniformly to a defined class of debtors." *Id.*

administration matters. *Buffets Concurrence*, 979 F.3d at 383. The Bankruptcy Clause's uniformity requirement bars Congress from assessing disparate fees on debtors simply on grounds that it "has chosen to treat them differently." *Id.*; *Clinton Nurseries*, 998 F.3d at 69 (declining to create "the following inexplicable rule: Congress must enact uniform laws on the subject of bankruptcy . . . except when Congress elects to treat debtors non-uniformly").

The Bankruptcy Clause precludes increasing fees based just on the location of the bankruptcy court. *Cf. Buffets*, 979 F.3d at 378 ("[T]he uniformity requirement forbids . . . 'arbitrary regional differences in the provisions of the Bankruptcy Code.'" (quoting *In re Reese*, 91 F.3d 37, 39 (7th Cir. 1996) (Posner, C.J.)). That is what the 2017 Amendment does. Thus, we hold that the 2017 Amendment's fee disparities fail under the uniformity requirement of the Bankruptcy Clause. The Amendment imposed higher quarterly fees on large debtors in Trustee districts.[14]

[14] On appeal, Debtors argue that the dual bankruptcy-program system itself is unconstitutional, even if quarterly fees are consistent across all judicial districts. Debtors didn't preserve this argument in the bankruptcy court, raising it, if at all, in their reply brief, and the bankruptcy court didn't decide the question. *See Rosewood Servs., Inc. v. Sunflower Diversified Servs., Inc.*, 413 F.3d 1163, 1167 (10th Cir. 2005) ("Because this . . . argument was not made below, it is waived on appeal." (citation omitted)); *Hungry Horse LLC v. E Light Elec. Servs., Inc.*, 569 F. App'x 566, 572 (10th Cir. 2014) (unpublished) (explaining that we needn't consider issues not raised until the reply brief below and not addressed by the district court (citation omitted)).

C. We Remand for Determination of Debtors' Quarterly Fees

Debtors request monetary relief for "the excess fees they paid." Opening Br. at 50. The Trustee argues that we shouldn't grant that requested relief. The Trustee reasons that courts can remedy unequal treatment either by expanding or withdrawing benefits, depending on legislative intent, and that, here, Congress intended to increase quarterly fees nationwide. Though raising fees in Alabama and North Carolina might solve this problem, the Trustee recognizes that we lack authority to do that. So he asks that we declare the 2017 Amendment unconstitutional without granting further relief.

We lack authority over quarterly fees assessed in districts outside our circuit, and thus in Alabama or North Carolina. *Cf. Buffets Concurrence*, 979 F.3d at 384 ("The *St. Angelo* court had no power to force Alabama and North Carolina into the [Trustee] system, which is why the constitutional infirmity persists and we are having this debate today. We have no greater authority than our colleagues on the Ninth Circuit to remake the bankruptcy system."). But Debtors are entitled to relief. *Cf. id.* (proposing reducing debtors' fees as a remedy: "What we can do is ameliorate the harm of unconstitutional treatment. So, we should."). The Second Circuit awarded monetary relief to remedy debtors' harms from the 2017 Amendment. *See Clinton Nurseries*, 998 F.3d at 69–70 ("To the extent that [debtor] has already paid the unconstitutional fee increase, it is entitled to a refund of the amount in excess of the fees it would have paid in a [Bankruptcy Administrator] District during the same time period."). We do so as well. Thus, we remand to the bankruptcy court for a refund of

the amount of quarterly fees paid exceeding the amount that Debtors would have owed in a Bankruptcy Administrator district during the same period. This ruling is limited to Debtors in the instant appeal, who have standing to seek this refund.

CONCLUSION

We reverse and remand for determination of Debtors' quarterly Chapter 11 fees and a refund of overpayment consistent with this opinion.

In re John Q. Hammons Fall, et al., 20-3203
BACHARACH, J., dissenting.

I agree with much of the majority's excellent opinion. In my view, however, the 2017 amendment does not violate the Bankruptcy Clause. So I respectfully dissent.

The majority points out that our nation has two separate bankruptcy systems. One system uses U.S. trustees in the bankruptcy courts in 48 states, 4 territories, and the District of Columbia. *See* Judicial Districts Covered by USTP Regions, Department of Justice, https://www.justice.gov/ust/judicial-districts-covered-ustp-regions (last visited September 3, 2021). By contrast, the bankruptcy courts in 2 states use bankruptcy administrators rather than U.S. trustees. Why the difference in systems? Politics. So we might reasonably question the need for separate bankruptcy systems in different states. But as the majority points out, the debtors didn't preserve their challenge to the dual systems. Maj. Op. at 25 n.14.

Given the failure to preserve that challenge, we must consider the constitutionality of the 2017 amendment rather than the dual system of U.S. trustees and bankruptcy administrators. Because of the dual system, districts varied in their funding needs. This difference led to a budget shortfall in districts using U.S. trustees. *See* H.R. Rep. No. 115-130, at 8–9 (2017).

Congress responded to the budget shortfall. To do so, Congress "define[d] classes of debtors" based on the system in place. *Ry. Lab. Execs.' Ass'n v. Gibbons*, 455 U.S. 457, 473 (1982). Based on this classification, Congress "structure[d] relief" through separate funding processes in districts using U.S. trustees and bankruptcy administrators. *Id.*; *see Blanchette v. Connecticut Gen. Ins. Corps.* (*Regional Rail Reorganization Cases*), 419 U.S. 102, 159 (1974) (Congress may "take into account differences that exist between different parts of the country"). This approach allowed Congress to recoup the additional funds by targeting districts using U.S. trustees. By tailoring the financial solution to the need itself, Congress didn't run afoul of the Bankruptcy Clause. *In re Circuit City Stores, Inc.*, 996 F.3d 156, 166 (4th Cir. 2021); *Matter of Buffets, L.L.C.*, 979 F.3d 366, 378–80 (5th Cir. 2020).

Perhaps there shouldn't be two separate systems, but the debtors forfeited their challenge to the existence of two separate systems. If we put aside that forfeited challenge, we have little reason to question Congress's approach. The dual systems created different financial needs, and Congress decided to raise fees in the jurisdictions creating the budget shortfall. That approach wasn't arbitrary and didn't violate the Bankruptcy Clause.