Docket #1370 Date Filed: 03/02/2020

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHER DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	)	CHAPTER 11
	)	
CLAYTON GENERAL, INC., f/k/a Southern Regional Health System, Inc., d/b/a Southern Regional Medical Center, *et al.*,	)	Jointly Administered Under CASE NO. 15-64266-wlh
Debtors.	)	

UNITED STATES TRUSTEE'S SUPPLEMENTAL OBJECTION TO DEBTORS' MOTION TO DETERMINE FEES PAYABLE TO THE UNITED STATES TRUSTEE PROGRAM

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Nancy J. Gargula, United States Trustee for Region 21 (the "United States Trustee"), through undersigned counsel, files this Supplemental Objection to the Liquidating Trustee's *Application for Final Decree Final Report of Substantial Consummation, Request for Final Decree, and Motion to Determine Fees Payable to the United States Trustee Program* [Dkt. No. 1360] (the "Motion"). In support of this objection, the United States Trustee respectfully states as follows:

INTRODUCTION

1. Debtors' Motion seeking to hold unconstitutional Congress's 2017 amendment to 28 U.S.C. § 1930(a)(6) is grounded on three fundamentally flawed premises: (1) that an otherwise valid act of Congress can later be rendered invalid because of inconsistent application by non-congressional actors; (2) that Congress did not intend the 2017 amendment to apply to cases filed before its enactment, contrary to both its plain language and Congress's practice for over 30 years of applying quarterly fee changes to all open chapter 11 cases, regardless of filing date; and (3) that Congress acted so arbitrarily and irrationally that it violated due process by prospectively increasing chapter 11 fees to avoid imposing costs of the bankruptcy system on taxpayers.

2. As discussed below, Debtors' Motion fails for other reasons as well.

3. Accordingly, this Court should deny the Motion.

BACKGROUND

A. Congress Established Chapter 11 Quarterly Fees So That the Cost of the Bankruptcy System Is Not Borne by Taxpayers.

1. No fewer than 12 times, Congress has carefully recalibrated quarterly fees and other court fees to meet the funding needs of the bankruptcy system.

4. In 1978, Congress overhauled the bankruptcy system to free bankruptcy courts from case-specific administrative duties by transferring them to "United States trustees" in the Justice Department.[1] *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978); H.R. Rep. No. 95-595, at 3, 4, 100 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5965. *See also In re Prines*, 867 F.2d 478, 480 (8th Cir. 1989). United States Trustees "were given responsibility for many administrative functions, such as appointing private trustees and monitoring their performance, and monitoring cases for signs of fraud or abuse." *Prines*, 867 F.2d at 480. Thus, as envisioned by Congress, the United States Trustee Program was integral to the new bankruptcy system. H.R. Rep. No. 95-595, at 88-109.

5. For the purpose of recovering the cost of the services of the United States Trustee System, 28 U.S.C. § 589a(b), Congress imposed a variety of "bankruptcy fees," including the quarterly fees required by 28 U.S.C. § 1930(a)(6). Quarterly fees under section 1930(a)(6) and a portion of the filing fees collected by the clerk of the bankruptcy court under other provisions of

[1] The United States Trustee Program was established as a pilot program in 1978 and was nationalized in 1986. *See* Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549, (1978); Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. 99-554, 100 Stat. 3088 (1986).

section 1930[2] are deposited into the United States Trustee System Fund established in the U.S. Treasury (the "Fund"), and are used to offset congressional appropriations made to fund the cost of the Program.[3] *See* 28 U.S.C. § 589a(a) & (b); H.R. Rep. No. 115-130, at 7 (2017), *reprinted in* 2017 U.S.C.C.A.N. 154, 159-160.

6. If the amounts collected exceed the appropriations by Congress for a particular year, the excess remains in the Fund at Treasury to offset appropriations in subsequent years. *See* 28 U.S.C. § 589a(c). Conversely, if the costs of operating the Program in a particular year exceed the amounts available in the Fund, monies collected from taxpayers might be required to fund part of the appropriation to the Program. *See* 28 U.S.C. § 589a(e).

7. Congress intended that the United States Trustee Program would be "self-funded by the users of the bankruptcy system—at no cost to the taxpayer." H.R. Rep. No. 99-764 at 25 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5227, 5237-38 (emphasis added); *see also id*. at 22.

8. Before settling on quarterly fees based on disbursements to recoup the cost of the Program, Congress "considered many different possible mechanisms . . . including fees based on a debtor's assets, fees based on a debtor's liabilities, and a flat fee for all debtors." H.R. Rep. No. 99-764 at 26. Congress decided to charge graduated quarterly fees based on the size of a chapter

[2] The filing fees paid to the clerk of the bankruptcy court under section 1930(a)(1) through (a)(5) are shared by the United States Trustee Program and the judiciary, among others. 28 U.S.C. § 589a(b); 28 U.S.C. § 1931 (text and notes).

[3] Prior to the 2017 amendment, 100% of quarterly fees collected were deposited into the Fund. The 2017 amendment temporarily reduced that to 98%, with the remaining 2% to be deposited in the general fund of the Treasury for use in funding 18 additional judgeships. *See* Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, div. B, § 1004(b), 131 Stat. 1224, 1232 (2017); H.R. Rep. No. 115-130, at 7-9.

11 case's disbursements because it determined that "[s]maller chapter 11 debtors should pay smaller additional fees than larger debtors; [and] the funding mechanism [in section 1930(a)(6)] ensures that this will be the case." *Id*.

9. Congress also specifically delineated the purposes for which monies in the Fund could be used and required the Attorney General periodically to report on the use of amounts in the Fund. *See* 28 U.S.C. § 589a. This regime allows Congress easily to increase or reduce the fees paid under section 1930, so that the amount collected for deposit in the Fund will never be unacceptably small or unreasonably large. And Congress regularly does so. On no fewer than twelve occasions, Congress has amended section 1930(a) or section 589a of title 28, to adjust the amount or allocation, or both, of filing fees and quarterly fees to be deposited into the Fund.[4]

[4] *See* Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, tit. II, § 406, 103 Stat. 988, 1016 (1989) (increasing filing fee); Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, tit. I, § 111, 105 Stat. 782, 795 (1991) (increasing filing fee and quarterly fees, and directing deposit of a percentage of fees into Fund); Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-121, tit. I, § 111, 107 Stat. 1153, 1164-65 (1993) (increasing filing fees, changing percentage of fees allocated to Fund, and requiring Judicial Conference to report on bankruptcy fee system and possible impact of using graduated fee system based on assets, liabilities, or both, of debtor); National Marine Fisheries Laboratories Act of 1996, P.L. 104-91, § 101, 110 Stat. 7 (Jan. 6, 1996) & Balanced Budget Downpayment Act, Pub. L. No. 104-99, § 211, 110 Stat. 26, 37-39 (Jan. 26, 1996) (together enacting into law provisions of H.R. Conf. Rep. No. 104-378 (1995), including section 111(a), which extended quarterly fee payments into post-confirmation period); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, tit. I, § 109, 110 Stat. 3009, 3009-18–3009-19 (1996) (increasing quarterly fees and clarifying that prior quarterly fees amendment applies regardless of confirmation status of debtor's reorganization plan); Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, §§ 102-105, 114 Stat. 2410, 2411 (2000) (increasing filing fee and conversion fee, and providing for fees under subsection (a)(7)); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, tit. III, § 325, 119 Stat. 23, 98-99 (2005), as amended by Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, § 6058, 119 Stat. 297 (2005)

2. Any quarterly fees charged in judicial districts in Alabama and North Carolina must "equal" those charged in the rest of the country.

10. All federal districts participate in the Program except those in North Carolina and Alabama. *See* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. 99-554, § 302(d)(3), 100 Stat. 3088 (1986); Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, §501, 114 Stat. 2410, 2411 (2000). In those states, Judicial Branch employees known as bankruptcy administrators oversee bankruptcy cases.

11. Although bankruptcy administrators initially could not charge quarterly fees, at the request of the Judicial Conference of the United States, Congress fixed that by enacting 28 U.S.C. § 1930(a)(7). *See* Federal Courts Improvements Act of 2000, Pub. L. No. 106-518, § 105, 114 Stat. 2410 (2000).

12. Congress adopted section 1930(a)(7) specifically to resolve perceived uniformity issues between the United States Trustee and bankruptcy administrator districts. *See* Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 1999 and Federal Courts Improvement Act of 1999: Hearing before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the

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(increasing filing fees and changing percentage of fees allocated to Fund); Deficit Reduction Act of 2005, Pub. L. No. 109-171, tit. X, § 10101, 120 Stat. 4, 184 (2006) (increasing filing fees); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. B, tit. II, §§ 212, 213, 121 Stat. 1844, 1914 (2007) (adjusting quarterly fees and directing deposit of fines into Fund); Temporary Bankruptcy Judgeships Extension Act of 2012, Pub. L. No. 112-121, § 3, 126 Stat. 346, 348-349 (2012) (increasing filing fee and decreasing allocation of fees into Fund); and Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, div. B, § 1004, 131 Stat. 1224, 1232 (2017) (increasing quarterly fees for largest chapter 11 debtors); Department of Justice Appropriations Act, 2020, Pub. L. No. 116-93, div. B, tit. II, § 219, 133 Stat. 2317, 2415 (2019) (adjusting Fund threshold for application of the 2017 amendment's temporary quarterly fee increase).

Judiciary on H.R. 2112 and H.R. 1752,[5] 106 Cong. 26-27 (1999) ("1999 H. Subcomm. Hearing") (statement of Harvey F. Schlesinger, Judge, U.S. District Court for the Middle District of Florida), https://babel.hathitrust.org/cgi/pt?id=pur1.32754071547271&view=1up&seq=1.[6] In his testimony in support of the bill, Judge Schlesinger explained that "the Judicial Conference determined that implementing the establishment of chapter 11 quarterly fees in the bankruptcy administrator districts would eliminate" any uniformity problem. *Id*. at 26.

13. As the Judicial Conference requested, section 1930(a)(7) provides that in the bankruptcy administrator districts "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." 28 U.S.C. § 1930(a)(7) (emphasis added).[7]

14. Promptly upon section 1930(a)(7)'s enactment, the Judicial Conference mandated the imposition of quarterly fees in bankruptcy administrator districts "in the amounts specified in 28 U.S.C. § 1930, *as those amounts may be amended from time to time.*" Report of the Proceedings of the Judicial Conference of the United States, at 45-46 (Sept./Oct. 2001) (emphasis added), http://www.uscourts.gov/sites/default/files/2001-09_0.pdf ("2001 Directive"). Bankruptcy administrators were required by statute to comply with the 2001 Directive. 28 U.S.C. § 331 ("All

[5] H.R. 1752 is the House of Representative's companion bill to the enacted Senate bill, S.2915, which became Pub. L. No. 106-518. In that same legislation, Congress also removed the deadline for Alabama and North Carolina to merge into the United States Trustee system. S*ee* Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 501, 114 Stat. 2410, 2411 (2000).

[6] Each website cited in this brief was last viewed on February 28, 2020.

[7] Similar to the quarterly fees paid under section 1930(a)(6), quarterly fees collected in the bankruptcy administrator districts are deposited into a special fund to offset congressional appropriations for federal courts. *See* 28 U.S.C. §§ 1930(a)(7) & 1931.

judicial officers and employees of the United States shall promptly carry into effect all orders of the Judicial Conference . . . .").

15. Through its 2001 Directive, the Judicial Conference thus guaranteed that bankruptcy administrator districts would always be in compliance with section 1930(a)(7) by increasing or decreasing fees to "equal" those required by section 1930(a)(6), as it is amended from time to time.

3. Congress temporarily increased fees in 2017 to protect taxpayers from having to subsidize the Program and to fund additional judgeships.

16. In October 2017, Congress amended section 1930(a)(6) to temporarily increase the quarterly fees when disbursements in a case equal or exceed $1 million in a quarter during fiscal years 2018 through 2022 and the Fund balance is below $200 million in the most recent fiscal year. *See* H.R. Rep. No. 115-130, at 7-8. The new subparagraph (B) provides:

> (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.

28 U.S.C. § 1930(a)(6)(B).[8]

17. The 2017 amendment provides that it "shall apply to quarterly fees payable under section 1930(a)(6) . . . for disbursements made in any calendar quarter that begins on or after the date of enactment" of the amendment. Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72,

[8] Pursuant to a recent appropriations statute, for fiscal years 2020 and 2021, the applicable reserve threshold is $300 million. *See* Department of Justice Appropriations Act, 2020, Pub. L. No. 116-93, div. B, tit. II, § 219, 133 Stat. 2317, 2415 (2019).

§ 1004(c) (uncodified).[9] The first quarter in which the amendment applied began on January 1, 2018, more than two months after its enactment.

18. Congress passed the 2017 amendment following a seven-year decline in bankruptcy filings. *See* Dep't of Justice U.S. Tr. Program FY 2018 Performance Budget Cong. Submission at 9, https://www.justice.gov/file/968761/download ("UST FY 2018 Submission").

19. In February 2015, because of this decrease in bankruptcy filings, the Justice Department suggested an increase in fees would be necessary. *See* Dep't of Justice U.S. Tr. Program FY 2016 Performance Budget Cong. Submission at 7, https://www.justice.gov/sites/default/files/jmd/pages/attachments/2015/02/01/18._u.s._trustee_program_ustp.pdf ("To address the offsetting collection shortfall, the USTP plans to propose a temporary increase to the quarterly fee structure for chapter 11 cases . . . ."); 28 U.S.C. § 589a(d) (requiring the Attorney General to report on the amounts in and expenditures from the Fund no later than 120 days after the end of each fiscal year). The following year, the Department proposed a temporary fee increase similar to what Congress enacted in October 2017 in its congressional submissions for each of the next two fiscal years. *See* Dep't of Justice U.S. Tr. Program FY 2017 Performance Budget Cong. Submission, at 9, https://www.justice.gov/jmd/file/821021/download; UST FY 2018 Submission at 9.

[9] Section 1004 of the amendment provides in relevant part:

> (c) APPLICATION OF AMENDMENTS.—The amendments made by this section shall apply to quarterly fees payable under section 1930(a)(6) of title 28, United States Code, as amended by this section, for disbursements made in any calendar quarter that begins on or after the date of enactment of this Act.

20. In February 2016, the President published his proposed budget for fiscal year 2017, which included the fee increase challenged here: "The quarterly fees for these large cases would be assessed at 1% of the disbursements with a $250,000 per quarter cap." *See* Analytical Perspectives, Budget of the U.S. Gov't Fiscal Year 2017, at 217, https://www.govinfo.gov/content/pkg/BUDGET-2017-PER/pdf/BUDGET-2017-PER.pdf; *see also* https://www.govinfo.gov/app/collection/budget/2017 (showing Feb. 9, 2016 as the date). Congress did not enact the fee increase at that time, however.

21. By 2017, the Fund's unrestricted balance was projected to be exhausted during fiscal year 2017. *See* UST FY 2018 Submission at 9. The Fund was thus predicted to fall $92 million short of offsetting the Program's appropriation for fiscal year 2017. *Id*. In other words, without a fee increase, taxpayers would have to fund the projected $92 million shortfall.

22. Congress passed the 2017 amendment on October 26, 2017, to avoid imposing these costs on taxpayers, and to fund additional bankruptcy judgeships. A May 17, 2017 House Report explains that the increase in quarterly fees for large chapter 11 cases was to provide needed funds for the operations of the United States Trustee Program, as well as to cover the costs of converting 14 temporary bankruptcy judgeships to permanent judgeships and adding four new bankruptcy judgeships.[10] H.R. Rep. No. 115-130, at 7-8.

23. The House Report states that the Judiciary Committee expected "based on informal estimates by [the Congressional Budget Office]" that the increased quarterly fees would increase

[10] H.R. 2266 was later amended to extend the temporary judgeships rather than converting them to permanent judgeships. The House Report noted that Congress had previously introduced a similar bill that did not include funding for the judgeships, which was not enacted. H.R. Rep. No. 115-130, at 7.

revenues "by an amount sufficient to fully offset the increases in direct spending caused by the bill." *Id*. at 9.

24. The day after the House Report was issued, the Congressional Budget Office issued a Cost Estimate, which reflects that when it made its calculations it understood that the increased fees would apply to cases pending on the amendment's effective date. For example, the Cost Estimate states that the amendment would increase fees paid "by entities that are *currently* in Chapter 11 bankruptcy and that have disbursements of more than $1 million per quarter." *See* Cong. Budget Office Cost Estimate, H.R. 2266, Bankruptcy Judgeship Act of 2017, at 1 (May 18, 2017), https://www.cbo.gov/system/files/2018-07/52739-hr2266.pdf; *see also id*. ("The act also would adjust the formula used to set certain quarterly fees paid by businesses involved in *ongoing* Chapter 11 bankruptcy cases . . . ."); *id*. at 5 ("H.R. 2266 would . . . increase[e] the amount of fees paid to the DOJ by entities *that are already in bankruptcy* and that have disbursements . . . of more than $1 million per quarter.") (emphasis added); *id*. at 6 ("Some portion of those [increased quarterly fee] collections would be from entities *already in bankruptcy* . . .") (emphasis added). *See also* Cong. Budget Office Estimate for H.R. 2266, with an Amendment—the Additional Supplemental Appropriations for Disaster Relief Requirements Act of 2017, at 2 (Oct. 12, 2017), https://www.cbo.gov/system/files?file=115th-congress-2017-2018/costestimate/hr2266amend.pdf (reiterating that the Bankruptcy Judgeship Act of 2017 would "adjust the formula used to set certain quarterly fees paid by businesses involved in *ongoing* Chapter 11 bankruptcy cases").

25. Notably, the 2017 amendment made the percentage charged in the largest chapter 11 cases more consistent with the percentages charged in smaller cases. Both before and after the

2017 amendment, in cases with disbursements of less than $1 million, the fees range between 0.49% to more than 4% of quarterly disbursements. By contrast, before the 2017 amendment, cases with $1 million or more in disbursements paid a fee that was never *more* than 0.65%—while the fees were never *less* than 0.65% in cases with less than $300,000 in disbursements. Even after the 2017 amendment, high-disbursement cases still never pay a fee of more than 1%.

B. Debtors File Chapter 11 Cases, But Fail To Meet Their Quarterly Fee Obligations.

26. Clayton General, Inc., and certain of its affiliates filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code on July 30, 2015. Dkt. No. 1; Motion ¶ 3. At the time the petitions were filed, the Justice Department already had suggested a quarterly fee increase would be necessary. Dkt. No. 1; *supra* ¶ 19.

27. On June 7, 2018, after the October 26, 2017, enactment date of the 2017 amendment, Debtors and the Official Committee of Unsecured Creditors filed the First Amended Joint Plan of Liquidation ("Plan"). Dkt. No. 934; Motion ¶ 5.

28. On July 26, 2018, this Court confirmed the Plan. Dkt. No. 974; Motion ¶ 6.

29. The Plan required the Debtors to comply with the law imposing quarterly fees through case closure. *See* Dkt. 934 at 16 (Plan) ("After the Effective Date the Liquidating Trustee shall pay any and all such fees when due and payable."); *id*. at 37; *see also* Dkt. No. 935, at 17, 68, 89 (Disclosure Statement). The order confirming the Plan provided that Debtors were required to pay the quarterly fees due before the Plan's effective date and the Liquidating Trustee is required to pay the quarterly fees due thereafter:

> [A]ll fees due and owing under 28 U.S.C. § 1930 for periods prior to the Confirmation Date shall be paid on or before the Effective Date. Following

> confirmation of the Plan, the Liquidating Trustee shall continue to pay timely all Chapter 11 quarterly fees as required by 28 U.S.C. § 1930(a)(6), until a Final Decree is entered or the Cases are otherwise closed.

Dkt. No. 974 at 9 (Confirmation Order).

30. Clayton General had disbursements of over $1 million per quarter for the third quarter of 2018 and the first quarter of 2019. Motion ¶ 11. For those quarters, the fees amounts due under the 2017 amendment were 1% of Clayton General's disbursements, or $13,510 and $40,471, respectively. *Id.*; 28 U.S.C. § 1930(a)(6)(B).

31. The Liquidating Trustee has underpaid the quarterly fees due by approximately $37,000. Motion ¶ 11.

32. On January 1, 2020, the Liquidating Trustee filed this Motion seeking to avoid paying the unpaid quarterly fees.

OBJECTION

33. Debtors ask this Court to hold that the 2017 amendment does not apply to them, based on three bankruptcy court decisions, all currently on appeal: *In re Life Partners Holdings, Inc.*, 606 B.R. 277 (Bankr. N.D. Tex. 2019), *appeal pending sub nom. Neary v. Quilling (In re Life Partners Holdings, Inc.)*, No. 19-90041 (5th Cir.); *In re Circuit City Stores, Inc.*, 606 B.R. 260 (E.D. Va. 2019), *appeal pending sub nom. Fitzgerald v. Siegel*, No. 19-2240 (4th Cir.); and *In re Buffets, LLC*, 597 B.R. 588 (Bankr. W.D. Tex. 2019), *appeal pending sub nom. Hobbs v. Buffets, LLC*, No. 19-50765 (5th Cir.).

34. Those decisions are in conflict with more recent decisions that have upheld the amendment's constitutionality. *See In re Exide Techs.*, -- B.R. -- , 2020 WL 211400 (Bankr. D. Del. Jan. 9, 2020), *appeal pending*, No. 20-76 (D. Del.); *Clinton Nurseries, Inc. v. Harrington (In*

re Clinton Nurseries, Inc.), 608 B.R. 96 (Bankr. D. Conn. 2019), *appeal pending*, Nos. 19-1428 & 19-1433 (D. Conn.).

35. Based on the earlier decisions, Debtors argue that the 2017 amendment is unconstitutionally non-uniform under either the Bankruptcy Clause, governing "Laws on the subject of Bankruptcies," U.S. Const. Art. I, § 8, cl. 4, or the tax Uniformity Clause, governing duties, imports and excises, U.S. Const. Art. I, § 8, cl. 1. Motion ¶¶ 18, 19. The cited decisions found a lack of uniformity because the 2017 amendment's increased fee was not initially collected in bankruptcy administrator districts. *See Circuit City*, 606 B.R. at 269-70; *Life Partners*, 606 B.R. at 286; *Buffets*, 597 B.R. at 595-96.

36. In addition, based on the *Buffets* and *Life Partners* decisions, Debtors argue that the 2017 amendment does not apply to cases filed before its enactment date, and implicitly suggest that such application violates the Due Process Clause. Motion ¶¶ 17, 19.

37. Debtors acknowledge that the most recent bankruptcy court decisions that have addressed these challenges to the 2017 amendment have rejected them: Judge Walrath's decision in *Exide*, 2020 WL 211400 (Bankr. D. Del. Jan. 9, 2020), and Judge Tancredi's decision in *Clinton Nurseries*, 608 B.R. 96 (Bankr. D. Conn. 2019). Motion ¶ 16.

38. This Court likewise should reject Debtors' arguments. The *Exide* and *Clinton Nurseries* courts correctly held, as explained in thorough and well-reasoned opinions, that there is no lack of uniformity in the 2017 amendment because the statute requires that the same fees be imposed in bankruptcy administrator districts as in United States Trustee districts. 28 U.S.C. § 1930(a)(6), (7); *Exide*, 2020 WL 211400, at *12; *Clinton Nurseries*, 608 B.R. at 112-13. In addition, as explained below, the uniformity argument fails for the additional, independent reasons

that (a) as found in *Exide*, even if there were a statutory difference in fees between the bankruptcy administrator districts and the United States Trustee districts, such a difference would be within the scope of flexibility accorded Congress by the Constitution, *Exide*, 2020 WL 211400, at *12, (b) neither the Uniformity nor the Bankruptcy Clause applies to the 2017 amendment, and (c) even if there were an unconstitutional difference in fees, relieving Debtors of their fee obligation under the 2017 amendment would not be the proper remedy.

39. The *Exide* and *Circuit City* courts also correctly held that the 2017 amendment makes no exception for cases filed before its enactment date. *Exide*, 2020 WL 211400, at *2-3; *Circuit City*, 606 B.R. at 268. Rather, by its express terms, the 2017 amendment applies as long as quarterly fees are payable based on disbursements made in a quarter beginning on or after January 1, 2018. And the amendment's application to all open cases, regardless of filing date, does not violate the Due Process Clause. As Judge Walrath explained in *Exide*, under the long-established rational-basis test applied to due process challenges (but not applied in *Buffets* or *Life Partners*), the 2017 amendment raises no constitutional issue. *Exide*, 2020 WL 211400, at *6; *Life Partners*, 606 B.R. at 288-89; *Buffets*, 597 B.R. at 596-97.

40. Accordingly, this Court should deny the Motion.

I. THE 2017 AMENDMENT DOES NOT VIOLATE THE BANKRUPTCY CLAUSE; INDEED, IT WAS NOT EVEN ENACTED UNDER THAT CLAUSE.

41. The Bankruptcy Clause of the Constitution provides that Congress "shall have the power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. 1, § 8, cl. 4.

42. The two principal purposes of the Bankruptcy Clause are **(i)** to enable Congress to pass a nationwide bankruptcy law enforceable among the states because, "[g]iven the sovereign status of the States, questions were raised as to whether one State had to recognize the relief given to a debtor by another State"; and **(ii)** to prohibit Congress from enacting private bankruptcy laws. *See Ry. Labor Execs. Ass'n v. Gibbons*, 455 U.S. 457, 472 (1982). The Bankruptcy Clause thus "forbids only two things": "arbitrary regional differences in the provisions of the Bankruptcy Code" and "bankruptcy laws limited to a single debtor." *In re Reese*, 91 F.3d 37, 39 (7th Cir. 1996).

43. Given the history and purpose of the Bankruptcy Clause, "the term 'uniform' was intended to grant an additional power at the expense of the fifty states, rather than to limit the scope of Congress's delegated powers." *Schultz v. United States*, 529 F.3d 343, 356 (6th Cir. 2008).

44. Moreover, there is "flexibility inherent" in the Bankruptcy Clause that tolerates significant differences in application of bankruptcy laws. *Blanchette v. Conn. Gen. Ins. Corps. (Regional Rail Reorganization Act Cases)*, 419 U.S. 102, 158 (1974) (rejecting uniformity challenge to statute that applied only in a single statutorily defined region because "it overlooks the flexibility inherent in the constitutional provision").

45. Only once in the nation's history has the Supreme Court held that a statute violated the Bankruptcy Clause. It did so because the challenged act, by its terms, applied to only one regional bankrupt railroad, therefore, the statute was "nothing more than a private bill," which the Framers sought to prevent by adopting the Bankruptcy Clause. *Gibbons*, 455 U.S. at 470-72.

46. The 2017 amendment does not violate the Bankruptcy Clause for three reasons. First, the 2017 amendment is not a law "on the subject of Bankruptcies" because it does not adjust

a bankrupt debtor's obligations to its creditors. Second, there no lack of uniformity. The law is uniform because section 1930(a)(7) requires that any fees charged in bankruptcy administrator districts be "equal" to those imposed under section 1930(a)(6). Alternatively, any difference in fees is within the flexibility afforded Congress by the Bankruptcy Clause. Third, the Bankruptcy Clause applies to Congress's power to enact "Laws." But the alleged lack of uniformity—the failure to collect the section 1930(a)(6) fees in bankruptcy administrator districts—is not the result of the law that Congress enacted but from a difference in how it was implemented.

47. Lastly, even if there were an unconstitutional disuniformity, relieving Debtors of the fees Congress intended them to pay is not the proper remedy.

A. The 2017 Amendment Is Not a Law "on the Subject of Bankruptcies" within the Scope of the Bankruptcy Clause, But Is Within Congress's Power Under the Necessary and Proper Clause.

48. The Bankruptcy Clause's uniformity requirement only applies if a law is "on the subject of Bankruptcies." U.S. Const. art. 1, § 8, cl. 4.

49. To succeed in their Bankruptcy Clause challenge, Debtors must show that Congress could only have enacted the 2017 amendment pursuant to that enumerated power, and not any of its other constitutional powers that include no uniformity requirement. Debtors cannot do so. The 2017 amendment is not a law "on the subject of Bankruptcies," but rather was authorized under the Constitution's Necessary and Proper Clause.

50. The Supreme Court has defined "bankruptcy" as the "'subject of the relations between [a] . . . debtor and his creditors, extending to his and their relief.'" *Gibbons*, 455 U.S. at 466 (quoting *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 186 (1902)). "Congress' power under the Bankruptcy Clause 'contemplate[s] an adjustment of a failing debtor's obligations.'" *Gibbons*,

455 U.S. at 466 (quoting *Moyses*, 186 U.S. at 186). Of particular importance, "[t]he subject of 'bankruptcies' includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property. The grant to Congress involves the power to impair the obligation of contracts, and this the states were forbidden to do." *Moyses*, 186 U.S. at 188.

51. While there has been a "progressive liberalization in respect of the operation of the bankruptcy power" to a broad class of voluntary debtors from its original application only to involuntary bankruptcies of merchants and traders, *see Moyses*, 186 U.S. at 184; *Cont'l Ill. Nat. Bank & Trust Co. of Chicago v. Chicago, R.I. & P. Ry. Co.*, 294 U.S. 648, 668 (1935), the defining characteristic of laws "on the subject of Bankruptcies" has always been that they adjust the obligations of a failing debtor. *See, e.g., Cont'l Ill. Nat. Bank & Trust Co.*, 294 U.S. at 668 (explaining that, "although actual bankruptcy may not supervene" when debtors could pay given sufficient time, the law in question was "none the less [a] law[] on the subject of bankruptcies" because it "contemplate[d] an adjustment of a failing debtor's obligations").

52. Moreover, in assessing Congress's constitutional powers, "it is important to bear in mind the distinction between the subject matter, bankruptcy, in regard to which congress is empowered to legislate, and the means, machinery or practice congress has prescribed for carrying that power into effect." *United States v. Pusey*, 27 F. Cas. 631, 632 (C.C.E.D. Mich. 1872). As for the latter, the Constitution empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ." U.S. Const. art. I, § 8, cl. 18. *See also Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 513 (1938) ("To this specific grant [of power by the Bankruptcy Clause], there must be added the powers of the general grant of clause eighteen. 'To make all Laws which shall be necessary and proper for carrying into Execution the

foregoing Powers * * *.'"); *Pusey*, 27 F. Cas. at 633 ("The proceedings in bankruptcy do not constitute the end to be accomplished by a bankrupt act. They constitute the machinery, so to speak, by which that end is to be obtained, viz.: the appropriation of the debtor's property to the payment of his debts.").

53. Recourse to the Bankruptcy Clause is necessary to justify Congressional action only if the action impairs the obligation of contracts in order to adjust a failing debtor's obligations to its creditors. *See Gibbons*, 455 U.S. at 465-66 (concluding statute was enacted under Bankruptcy Clause not Commerce Clause because Congress "prescribe[d] the manner in which the property" of the railroad "is to be distributed among its creditors"); *Blanchette*, 419 U.S. at 181 (Douglas, J., dissenting) (rejecting argument that statute was authorized by Commerce Clause because "it is the bankruptcy power that gives Congress power to cut down on the obligation of contracts" and thus "[r]ecourse to the Bankruptcy Clause is necessary to sustain this statute, for . . . it authorizes significant impairment beyond that permitted under s 77"); *Conn. Gen. Ins. Corp. v. U.S. Ry. Ass'n*, 383 F. Supp. 510, 534 (E.D. Pa 1974) ("[R]ecourse to the bankruptcy clause to justify Congressional action is necessary only if that action impairs the obligation of contracts.").

54. Section 1930(a)(6) does not do so. It provides a funding mechanism for the administration of bankruptcy matters, including paying for additional bankruptcy judgeships—it does not alter a failing debtor's obligations. *See Gibbons*, 455 U.S. at 466; *In re Reese*, 91 F.3d at 39-40; *cf. U.S. Trustee v. Gryphon at Stone Mansion, Inc.*, 166 F.3d 552, 557 (3d Cir. 1999) ("Congress's mandate requiring payment of post-confirmation quarterly fees is not an effort to alter the terms of pre-existing debts; rather, it creates a new expense that did not exist before the plan was confirmed.") (internal quotations omitted).

55. Because section 1930 does not alter a debtor's obligations, it is not a law "on the subject of Bankruptcies" within the scope of the Bankruptcy Clause's uniformity provision. Instead, like other aspects of the "machinery" through which bankruptcy laws are implemented, it is authorized by Congress's broad powers under the Necessary and Proper Clause. *See United States v. Comstock*, 560 U.S. 126, 133-34 (2010) ("[T]he Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'") (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 413, 418 (1819)).

56. Bankruptcy courts that have concluded that section 1930(a)(6) is a law "on the subject of Bankruptcies" neither mentioned the Necessary and Proper Clause nor considered the distinction between laws that are within the enumerated power versus those that are within Congress's broad "necessary and proper" powers. *See Clinton Nurseries*, 608 B.R. at 111-13; *Life Partners*, 606 B.R. at 288; *Exide*, 2020 WL 211400, at *9-10. However, precedent makes clear that the breadth of Congress's powers noted by those courts is due to the broad powers conferred by the Necessary and Proper Clause. Thus, for example, the Supreme Court explained in *United States v. Fox* (cited in *Clinton Nurseries*, 608 B.R. at 112):

> There is no doubt of the competency of Congress to provide, by suitable penalties, for the enforcement of *all legislation necessary or proper* to the execution of powers with which it is intrusted. And as it is authorized 'to establish uniform laws on the subject of bankruptcies throughout the United States,' it may embrace within its legislation whatever may be deemed important to a complete and effective bankrupt system.

95 U.S. 670, 672 (1878) (emphasis added). The emphasized language shows that the Supreme Court was referring to Congress's broad powers under the Necessary and Proper Clause when it

concluded that Congress "may embrace within its legislation whatever may be deemed important to a complete and effective bankrupt system." *Id*. *Accord Comstock*, 560 U.S. at 136; *Pusey*, 27 F. Cas. at 632-633. *Cf. United States v. Fisher*, 6 U.S. 358, 396 (1805) (holding statute granting United States priority on debts of insolvent debtors was constitutionally authorized by Necessary and Proper Clause because "[t]he government is to pay the debt of the union, and must be authorized to use the means which appear to itself most eligible to effect that object").[11]

57. Contrary to the holding of *Victoria Farms*, which also did not address the Necessary and Proper Clause, the fact that a law affects a bankruptcy right or remedy cannot mean, without more, that the law is one "on the subject of Bankruptcies" within the scope of the Bankruptcy Clause. *See Victoria Farms*, 38 F.3d at 1530-31 (reasoning that the United States Trustee Program has a "direct effect" upon debtors and creditors and higher fees have "a concrete effect" on the relief available to creditors). Every statute imposing or increasing a financial obligation, such as a property tax, a license fee, or a domestic support obligation, likewise could "reduce[] the amount of funds that the debtor can ultimately pay to his creditors." *Victoria Farms*, 38 F.3d at 1531. Such laws also have a direct impact on bankruptcy proceedings because failure to pay taxes or domestic support obligations can be grounds to dismiss or convert a case or to deny plan confirmation. *See* 11 U.S.C. § 1112(b)(4)(I), (P); *id*. § 1129(b)(14), (d). The Supreme Court has

[11] The *Clinton Nurseries* court also relied on *In re Klein*. *Clinton Nurseries*, 608 B.R. at 112 (citing *In re Klein*, 42 U.S. 277, 14 F. Cas. 716, 718 (C.C.D. Mo. 1843)). As later explained by *In re Reiman*, another case cited by *Clinton Nurseries*, 608 B.R. at 112, "[t]he views thus set forth [in *Klein*] proceed upon the well established principle that, *in making laws necessary and proper* to carry into execution the powers vested by the constitution in the government of the United States, congress possesses the choice of means, and may use any means which are, in fact, conducive to the exercise of a power granted by the constitution." *In re Reiman*, 20 F. Cas. 490, 494 (S.D.N.Y. 1874) (emphasis added).

never intimated that taxes or laws imposing domestic support obligations would be "on the subject of Bankruptcies." U.S. Const., art. I, § 8, cl. 4.

58. Nor does the fact that a law may only exist because of bankruptcy mean that Congress may enact it only under the Bankruptcy Clause. *Id*. To the contrary, the Supreme Court has stated that criminal laws such as bankruptcy fraud—which would not exist absent bankruptcy—are authorized by the Necessary and Proper Clause. *See* 18 U.S.C. § 151, *et seq*.; *Comstock*, 560 U.S. at 136 ("Congress routinely exercises its authority [under the Necessary and Proper Clause] to enact criminal laws in furtherance of, for example, its enumerated powers . . . to regulate bankruptcy . . . ."); *see also Pusey*, 27 F. Cas. at 632-633 (holding the Necessary and Proper Clause empowered Congress to pass a law criminalizing certain transfers made within three months before filing for bankruptcy).

59. Thus, no one contends that the fact that some jurisdictions have bankruptcy appellate panels ("BAPs"), and others do not, violates the Bankruptcy Clause even though BAPs exist only to adjudicate bankruptcy appeals. 28 U.S.C. § 158(b)(6) (providing appeals may be heard by BAPs only in districts in which the district court judges authorize this by majority vote); *see also* COURT INSIDER: WHAT IS A BANKRUPTCY APPELLATE PANEL? (November 26, 2012), https://www.uscourts.gov/news/2012/11/26/court-insider-what-bankruptcy-appellate-panel (discussing impact of BAPs).

60. Nor does anyone contend that differences in bankruptcy courts' local rules, which again arise only in bankruptcy, raise any constitutional uniformity problem, although those rules may affect both procedural rights and substantive outcomes. *See* Fed. R. Bankr. P. 9029(a)(2) (contemplating the enforcement of "[a] local rule imposing a requirement of form . . . in a manner

that causes a party to lose rights" in the event of a "[]willful failure to comply with the requirement"); Fed. R. Bankr. P. 9029(b) (contemplating that a single judge may impose a "sanction or other disadvantage" on a litigant for failure to comply with the judge's procedures so long as the alleged violator had "actual notice of the requirement").

61. Neither the law governing BAPs, local rules of procedure, nor the law governing fees in bankruptcy cases, are substantive bankruptcy laws that fall within the purview of the Bankruptcy Clause.

62. Because section 1930(a)(6) does not modify any rights or remedies as between a bankrupt debtor and its creditors, it is not a law "on the subject of Bankruptcies" subject to the uniformity provision of the Bankruptcy Clause. U.S. Const. art. I, § 8, cl. 4.

B. The 2017 Amendment Is Not Unconstitutionally Non-Uniform.

1. The 2017 amendment is uniform because section 1930(a)(7) requires equal fees.

63. Section 1930(a)(6) and (7) governs the imposition of quarterly fees in chapter 11 cases. Section 1930(a)(6) applies throughout all Program districts, imposing the same fee schedule in every district. Section 1930(a)(7), in turn, mandates that quarterly fees in bankruptcy administrator districts "be equal to those imposed by [section 1930(a)(6)]." Congress thus established a regime in which the same quarterly fees are required in every federal judicial district, regardless of whether that district participates in the Program. Thus, the "laws" governing bankruptcy fees are "uniform." *Cf.* U.S. Const. art. I, § 8, cl. 4.

64. As a result, although the 2017 amendment only changed the text of section 1930(a)(6), "[t]he 2017 Amendments did not increase quarterly fees in the UST districts only,"

because "[a]s soon as the higher fees imposed by the 2017 Amendments went into effect in UST districts, 28 U.S.C. § 1930(a)(7) *automatically* operated to mandate higher fees in [bankruptcy-administrator] districts." *Clinton Nurseries*, 608 B.R. at 117 n.28 (emphasis in original); *see also Exide*, 2020 WL 211400, at *12 (holding "the 2017 Amendment should have been self-executing in [bankruptcy administrator] districts").

65. The unexplained failure of bankruptcy administrators to implement the amended fee schedule in January 2018 was inconsistent not only with the statute but also with the Judicial Conference's standing instructions that quarterly fees "be imposed in bankruptcy administrator districts in the amounts specified in 28 U.S.C. § 1930, as those amounts may be amended from time to time," 2001 JCUS Report at 46, and the administrators' duty to "promptly carry into effect" those orders. 28 U.S.C. § 331.

66. Despite the equality requirement of subsection (a)(7), the *Life Partners* court found that use of the term "may" in subsection (a)(7) provides the Judicial Conference discretion to charge fees different from those set forth in 28 U.S.C. § 1930(a)(6). *See Life Partners*, 606 B.R. at 286-87.[12]

67. The reasoning of the *Life Partners* court is flawed. Use of the word "may" does not invariably confer discretion. *See Citizens & Southern Nat'l Bank v. Bougas*, 434 U.S. 35, 38 (1977) (holding venue provision stating that actions "may" be had in certain location was "not permissive, but mandatory"); *Nevada Power Co. v. Watt*, 711 F.2d 913, 919-20 (10th Cir. 1983)

[12] *Buffets* did not address the phrase "equal to" in section 1930(a)(7). *Buffets*, 597 B.R. at 594-95. The *Circuit City* court emphasized the term "may" in quoting the statute, but did not discuss it. *Circuit City*, 606 B.R. at 264, 269-70.

(holding law stating that Secretary of Interior "may" consider certain factors in establishing fees means that he must do so, noting that "[c]ourts have construed 'may' to mean 'must' when statutory context and legislative history so required").

68. Rather, the word "may" must be read together with the words "equal to." As explained in *Clinton Nurseries*, section 1930(a)(7) grants the Judicial Conference the authority *only* to charge quarterly fees that are "equal to" those under subsection (a)(6). *See Clinton Nurseries*, 608 B.R. at 115-16. "[B]y stating that the Judicial Conference may require equal fees, Congress implied that the Judicial Conference could not require fees that were not equal." *Id*. at 115.

69. Any other reading would render the words "equal to" superfluous, contrary to basic principles of statutory interpretation. *See, e.g., Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) ("[O]ne of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (alteration and internal quotation omitted); *Clinton Nurseries*, 608 B.R. at 116. "Moreover, it would violate the *expressio unius* canon because by stating that the Judicial Conference may require equal fees, Congress implied that the Judicial Conference could not require fees that were not equal." *Clinton Nurseries*, 608 B.R. at 116.

70. It would be particularly anomalous to interpret the law as non-uniform given that Congress enacted section 1930(a)(7) specifically to cure what the Ninth Circuit—incorrectly—found to be a lack of uniformity in prior law in *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525

(9th Cir. 1994), *as amended by* 46 F.3d 969 (1995).[13] At the time of the *Victoria Farms* case, debtors did not have to pay any quarterly fees in the bankruptcy administrator districts located in Alabama and North Carolina. In a divided opinion, the *Victoria Farms* majority held that the bifurcated system of United States Trustee and bankruptcy administrator districts, with no quarterly fees charged in the latter, violated the Bankruptcy Clause. *Id*. at 1532.[14] The Ninth Circuit thus struck down section 317(a), which extended the time for North Carolina and Alabama to opt-in to the United States Trustee system, but did not strike down the quarterly fees provision, instead ordering the debtor to pay all of the quarterly fees owed. *Id.* at 1534.

71. In response to *Victoria Farms*, the Judicial Conference of the United States asked Congress to enact a statutory provision imposing quarterly fees in bankruptcy administrator districts because it "determined that implementing the establishment of chapter 11 quarterly fees in the bankruptcy administrator districts would eliminate any *Victoria Farms* problem." *See* 1999 H. Subcomm. Hearing at 26.

72. In 2001, Congress granted the Judicial Conference's request and amended section 1930 to add section 1930(a)(7). Federal Courts Improvements Act of 2000, Pub. L. No. 106-518, § 105, 114 Stat. 2410 (2000). *See also supra* ¶¶ 10-13.

73. Any interpretation of section 1930(a)(7) to permit quarterly fees in bankruptcy administrator districts different from those set forth in section 1930(a)(6) would be contrary to

[13] As explained *supra* ¶ 57, the United States disagrees with *Victoria Farms* that there was a uniformity problem.

[14] Debtors challenge only the differential in fees; they do not allege that excepting the bankruptcy administrator districts from the United States Trustee Program violates the Constitution.

Congress's specific intent in passing subsection (a)(7) to cure the perceived lack of uniformity identified in the *Victoria Farms* decision by providing for equal fees.

74. This purpose—to cure the perceived uniformity problem—dovetails with another principal of statutory interpretation: "'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Clinton Nurseries*, 608 B.R. 608 B.R. at 115 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). Because section 1930(a)(7) can fairly be read to avoid any constitutional uniformity problem, it should be so read. *Id*.

2. If there were a difference in fees, it would be within the scope of flexibility permitted by the Bankruptcy Clause.

75. As explained by Judge Walrath in *Exide*, the 2017 amendment is uniform for the separate and independent reason that even if there were a statutory difference in fees, such a difference would not render the fees unconstitutionally non-uniform. *Exide*, 2020 WL 211400, at *12.

76. The Bankruptcy Clause's "uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Blanchette*, 419 U.S. at 159. Nor was it "intended to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for remedy only in certain regions." *Id*. (internal quotation omitted).

77. As the Supreme Court has explained, this construction of the Bankruptcy Clause comports with the Court's construction of the tax Uniformity Clause, U.S. Const., art I, § 8, cl. 1.

See Blanchette, 419 U.S. at 160. In that context, the Supreme Court has explained that constitutional uniformity "does not require Congress to devise a tax that falls equally or proportionately on each State," nor does it "prevent Congress from defining the subject of a tax by drawing distinctions between similar classes." *United States v. Ptasynski*, 462 U.S. 74, 82 (1983) (citing the *Head Money Cases*, 112 U.S. 580, 595 (1884)). Rather, a "tax is uniform when it operates with the same force and effect in every place where the subject of it is found." *Id*. (quoting the *Head Money Cases*, 112 U.S. at 594). *Cf. Schultz*, 529 F.3d at 355 (finding that a lower level of scrutiny should apply to the uniformity requirement of the Bankruptcy Clause than applied in *Ptasynski* to the tax Uniformity Clause).

78. Thus, the Eighth Circuit found no unconstitutional lack of uniformity in an analogous challenge to the implementation of quarterly fees at different times in different districts when they were first enacted. *See In re Prines*, 867 F.2d 478, 480 (8th Cir. 1989). *Prines* addressed the gradual roll-out of the Program, when it was expanded with different effective dates for districts that participated in the pilot program than for those that did not. *Id*. at 482-83.

79. The Eighth Circuit upheld the different effective dates for charging quarterly fees. The Eighth Circuit rejected the argument that heightened scrutiny was required because of the uniformity provision of the Bankruptcy Clause, holding instead that the "appropriate standard for measuring classifications in bankruptcy legislation to be 'that of rational justification." *Id*. at 485 (quoting *United States v. Kras*, 409 U.S. 434, 446 (1973)). The Eighth Circuit held that "[t]he assessment of a quarterly fee to fund the trustee program consistent with the exercise of authority by the trustee over a case satisfies the rational basis test." *Id*.

80. The Eighth Circuit also ruled that debtors were being treated equally because "pending cases are subject to the quarterly fee assessment only if the [United States] trustee has authority over them." *Id*. at 485. *See also In re Miles*, 330 B.R. 861, 863 (Bankr. M.D. Ga. 2005) (holding debtors failed to show cases are administered any differently between bankruptcy administrator and United States Trustee districts and "law could be construed as uniform if the programs operate the same").

81. The same is true here. As the *Exide* court held, "section 1930(a)(6) is uniform, because it applies with the same force and effect in every place where the subject of it is found—that is, in all UST districts." *Exide*, 2020 WL 211400, at *12; *cf. In re Prines*, 867 F.2d 478, 485 (8th Cir. 1989) (upholding disparate effective dates for quarterly fees imposed in roll-out of Program against equal protection challenge, because debtors were being treated equally when "pending cases are subject to the quarterly fee assessment only if the [United States] trustee has authority over them"). And if, counterfactually, the 2017 amendment increased fees only in United States Trustee districts, such an assessment to fund the Program "consistent with the exercise of authority" by United States Trustees "satisfies the rational basis test." *Prines*, 867 F.2d at 845.

82. Notably, the statement in *Victoria Farms* that there can be no rational basis for a law when Congress has not articulated its reasons, 38 F.3d at 1532—relied on by the *Buffets* and *Circuit City* courts, *Buffets*, 597 B.R. at 595; *Circuit City*, 606 B.R. at 269; *see also Life Partners*, 606 B.R. at 287—is incorrect, which may explain why the Ninth Circuit amended its opinion to fix that mistake by excising that language, *see* 46 F.3d 969 (9th Cir. 1995). To the contrary, the Supreme Court has made clear that Congress need not state its reasons for a law to pass rational-basis review. *See Gonzalez v Raich*, 545 U.S. 1, 21 (2005) ("[W]e have never required Congress

to make particularized findings in order to legislate . . . ."); *FCC v Beach Comms.*, 508 U.S. 307, 315 (1993) ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."); *Alamo Rent-a-Car, Inc. v. Sarasota-Manatee Airport Authority*, 825 F.2d 367, 371 n.4 (11th Cir. 1987) ("A governmental body is not required to articulate its purposes when enacting legislation.").

83. The 2017 amendment "addresses a geographically isolated problem," which "is confined to UST districts, namely the depletion of the UST System Fund." *Exide*, 2020 WL 211400, at *12. Because the depletion of the Fund "is only a problem in UST districts," it was "proper for Congress to increase the fees in those districts to solve that problem." *Id.* (citing *Blanchette*, 419 U.S. at 160).

C. Inconsistent Application of the 2017 Amendment Does Not Deprive Congress of the Constitutional Authority to Have Enacted It in the First Place.

84. Debtors complain that the 2017 amendment "is not being applied consistently across the United States" because the Judicial Conference rolled it out later in two states. Motion ¶ 20. But the Bankruptcy Clause, by its terms, applies only to "Laws," U.S. Const. art. 1, § 8, cl. 4, *i.e.*, acts of Congress—not a law's implementation by other branches of government.

85. Accordingly, a difference in a law's implementation does not render that law unconstitutionally non-uniform. *See Clinton Nurseries*, 608 B.R. at 113 and 115-16 (agreeing that the quarterly fee statute is "uniform on its face" and that the different fees assessed across districts was "the consequence of the Judicial Conference's late, and only prospective, implementation of fee increases [on] October 1, 2018," which was "contrary to the text of 28 U.S.C. § 1930(a)(7)");

Exide, 2020 WL 211400, at *12 (holding that the failure to properly enforce the 2017 amendment in bankruptcy administrator districts did "not render the law itself non-uniform"); *cf. Rosenberg v. United States*, 72 Fed. Cl. 387, 395-96 (Ct. Fed. Cl. 2006) (holding that complaint alleging that IRS engaged in "*ultra vires* and nonuniform collection" of a tax did not allege a violation of the tax uniformity clause, U.S. Const., art. I, § 8, cl. 1, because "[t]he Uniformity Clause . . . is a limitation on legislative, not executive, action"); *Peony Park v. O'Malley*, 121 F. Supp. 690 (D. Neb. 1954) (rejecting tax uniformity challenge where statute was uniform but enforcement was not), *aff'd*, 223 F.2d 668 (8th Cir. 1955).

86. Any other rule would mean that individual government actors—whether members of the judicial or executive branch—could unilaterally render an otherwise valid act of Congress unconstitutional. A court clerk who believes a particular statutory bankruptcy fee to be unwise could undermine Congress's contrary determination simply by failing to collect the fee, rendering it unconstitutionally non-uniform. That, of course, is not the law.

87. There is nothing explaining why—despite the equality requirements of section 1930(a)(7) and the 2001 Directive—the bankruptcy administrators failed to collect the increased fees in January 1, 2018, nor why the Executive Committee decided in September 2018 to permit bankruptcy administrator districts to belatedly charge the increased fees only in cases filed on or after October 1, 2018. *See* Report of the Proceedings of the Judicial Conference of the United States, at 11-12 (Sept. 13, 2018), https://www.uscourts.gov/sites/default/files/2018-09_proceedings.pdf. Nothing in the 2017 amendment established October 1, 2018 as a trigger date to implement the amended fee schedule, nor supports any decision to carve out cases pending as of that date.

88. Whatever the reason for it, the inconsistent implementation of the 2017 amendment does not deprive Congress of the constitutional authority to enact it in the first place. Because the law itself is uniform, it raises no issue under the Bankruptcy Clause.

D. Even If There Were Any Unconstitutional Disuniformity, the Remedy Debtors Seek Would Be Improper.

89. Even assuming that the law is unconstitutionally non-uniform, this would not excuse Debtors from paying the fees required by Congress.

90. Of course, "[w]hen the 'right invoked is that of equal treatment,' the appropriate remedy is a mandate of equal treatment." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017) (brackets omitted). But that result "can be accomplished" in one of two ways, and "[t]he choice between these outcomes is governed by the legislature's intent, as revealed by the statute at hand." *Id*. at 1698-99 (holding remedy for equal protection violation resulting from immigration law that treated unwed mothers and fathers differently was to accord both the less favorable treatment).

91. Thus, the Ninth Circuit in *Victoria Farms* did not strike down the quarterly fees provision, despite finding an unconstitutional lack of uniformity, instead ordering the debtor to pay all of the quarterly fees owed. 38 F.3d at 1534.

92. It cannot reasonably be disputed which remedial "outcome[]" Congress would choose here. *Morales-Santana*, 137 S. Ct. at 1698. Any differences in the fees assessed is contrary Congress's express instruction to impose fees "equal to those imposed under [section 1930(a)(6)]," to 28 U.S.C. § 1930(a)(7). Indeed, "had the Judicial Conference implemented the quarterly fees in [bankruptcy administrator] districts without any change in the UST's actions, the Debtors would

have nothing to complain of under the facts alleged." *Clinton Nurseries*, 608 B.R. at 120. To the extent this case presents any problem of constitutional dimension, the appropriate remedy would be to require nationwide adherence to the statute as written—not to compel the United States Trustee to disregard the statute. *Accord Clinton Nurseries*, 608 B.R. at 121 ("[T]he remedy does not lie in striking down the law or forcing the UST to disregard the law as written").

II. THE 2017 AMENDMENT DOES NOT VIOLATE THE TAX UNIFORMITY CLAUSE.

93. Contrary to Debtors' contention, the tax Uniformity Clause, U.S. Const., art. I, § 8, cl. 1, has no bearing on this issue. *See* Motion ¶ 18 (citing *Buffets, LLC*, 597 B.R. at 594-95, *Circuit City*, 606 B.R. at 269-70, and *Life Partners*, 606 B.R. at 286-88).

94. The Constitution gives Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises . . . but *all Duties, Imposts and Excises* shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1 (emphasis added).

95. Quarterly fees imposed under sections 1930(a)(6) and (7) are not "Duties," "Imposts," or "Excises." U.S. Const. Art. I, § 8, cl. 1. Rather, they are user fees, payable only by debtors or others in ongoing chapter 11 cases, for the purpose of funding the bankruptcy system they are using. *See United States Trustee v. Gryphon at the Stone Mansion, Inc.*, 166 F.3d 552, 554 (3d Cir. 1999); *Exide Techs.*, 2020 WL 211400, at * 7.

96. Section 1930's structure supports this conclusion because all its subsections impose bankruptcy fees, not taxes. *See Nijhawan v. Holder*, 557 U.S. 29, 39 (2009) ("Where, as here, Congress uses similar statutory language and similar statutory structure in two adjoining provisions, it normally intends similar interpretations."). Section 1930(a)(6) denominates the

charges at issue here as fees. And the other provisions of section 1930 prescribe a series of fees rather than taxes.

97. User fees are not subject to the constitutional limitations on the government's power to tax, and thus are "outside the scope of the Uniformity Clause's prohibitions." *Thomson Multimedia Inc. v. United States*, 340 F.3d 1355, 1363-64 (Fed. Cir. 2003). *See also Augusta Towing Co. v. United States*, 5 Cl. Ct. 160, 167 (Ct. Cl. 1984) ("A user charge is one type of revenue measure designed to compensate the Government for supplying a benefit to the user and, as such, is not subject to the constitutional limitations on the Government's power to tax, including the Tax Uniformity clause."). Thus, the tax Uniformity Clause does not apply.

98. Even if this clause somehow applied to the quarterly fee statute, it was still not violated. As discussed above, the statute enacted by Congress is uniform, inconsistent application of the statute does not deprive Congress of the authority to enact it,[15] and, if there were a uniformity problem, excusing Debtors from paying the fee Congress mandated would not be the appropriate remedy. *See supra* Parts I(B), (C) & (D).

III. THE 2017 AMENDMENT APPLIES TO THIS CASE.

99. Debtors argue, based on their reliance on *Buffets* and *Life Partners*, that the 2017 amendment "cannot be applied retroactively to cases filed before its enactment." Motion ¶ 19. Debtors are doubly wrong. As *Exide* and *Circuit City* have held, the 2017 amendment provides

[15] "The Uniformity Clause conditions *Congress'* power to impose indirect taxes," *United States v. Ptasynski*, 462 U.S. 74, 80 (1983) (emphasis added), and thus is a "limitation on legislative, not executive, action." *Rosenberg v. United States*, 72 Fed. Cl. 387, 395 (2006).

no exception based on case-filing date.[16] *Exide*, 2020 WL 211400, at *2-*3; *Circuit City*, 606 B.R. at 268. And application of the 2017 amendment to determine the amount of post-enactment fees payable based on post-enactment disbursements is prospective, not retroactive. *Exide*, 2020 WL 211400, at *5; *Circuit City*, 606 B.R. at 268.

100. In concluding that the 2017 amendment does not apply to cases pending on its enactment date, the *Buffets* court inappropriately relied on a presumption against retroactivity. *See Buffets*, 597 B.R. at 594. The Supreme Court has set forth the "sequence of analysis when an objection is made to applying a particular statute said to affect a vested right or to impose some burden on the basis of an act or event preceding the statute's enactment." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 37 (2006). This Court must "first look to 'whether Congress has expressly prescribed the statute's proper reach,'" *id.* (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994)), or in the absence of such express language, this Court must determine the "temporal reach specifically intended" by applying "'normal rules of construction.'" *Id.* (quoting *Lindh v. Murphy*, 521 U.S. 320, 326 (1997)). "If that effort fails," this Court must "ask whether applying the statute to the person objecting would have a retroactive consequence in the disfavored sense of 'affecting substantive rights, liabilities, or duties [on the basis of] conduct arising before [its] enactment." *Id.* (quoting *Landgraf*, 511 U.S. at 278). Only "[i]f the answer is yes," must this Court "then apply the presumption against retroactivity by construing the statute as inapplicable to the event or act in question. . . ." *Id.*

[16] The *Clinton Nurseries* decision did not address this issue because the debtors in that case filed for bankruptcy after the enactment of the 2017 amendment.

101. Here, Congress specified that the amendment would apply only to disbursements made more than nine weeks after the amendment became law. Congress thus expressly prescribed the temporal reach of the 2017 amendment and it is not retroactive. For both of those reasons, the presumption against retroactivity plays no role in interpreting the amendment.

A. The 2017 Amendment's Application Is Based on When Disbursements Are Made, with No Exception for Previously Filed Cases.

102. The 2017 amendment expressly applies to quarterly fees payable based on disbursements of $1 million or more made in a quarter beginning on or after January 1, 2018, during fiscal years 2018 through 2022. Because this application is clear from the amendment's plain language, resort to the presumption against retroactivity is inappropriate. *See Fernandez-Vargas*, 548 U.S. at 37; *Landgraf*, 511 U.S. at 280.

103. Congress was explicit about the 2017 amendment's temporal scope. Section 1930(a)(6)(B) expressly states that it applies "[d]uring each of fiscal years 2018 through 2022" if, during that time, there is "a quarterly fee payable for a quarter in which disbursements equal or exceed" $1 million, and the Fund is below a certain threshold. 28 U.S.C. § 1930(a)(6)(B).

104. In addition, the 2017 amendment expressly provides that it "shall apply to quarterly fees payable under section 1930(a)(6) . . . for disbursements made in any calendar quarter that begins on or after the [October 26, 2017] date of enactment," *i.e.*, on or after January 1, 2018. Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, § 1004(c) (uncodified).

105. Thus, Congress defined the amendment's temporal scope as applying to disbursements made in quarters starting on or after January 1, 2018 through fiscal year 2022.

106. As explained by Judge Walrath, "[t]he language of [§ 1930(a)(6)(B)] indicates that the object of the amendment is not cases, but disbursements." *Exide*, 2020 WL 211400, at *2. And "the temporal reach of the amendment is also expressly defined, not through case dates, but through fiscal years: 2018 through 2022." *Id.*

107. The only reference in the statute to cases is in a portion not amended in 2017. Section 1930(a)(6)(A) provides that "a quarterly fee shall be paid . . . *in each case* . . . ." 28 U.S.C. § 1930(a)(6)(A) (emphasis added). This again indicates that the prescribed fees are due in all cases, regardless of filing date. *See Exide*, 2020 WL 211400, at *3. By providing that the fees apply "in each case," Congress structured the statute so that the listed fees would apply in all open cases, regardless of filing date, even when it amended the fee amounts.

108. Debtors effectively ask the Court to re-write the amendment to apply to quarterly fees payable in "any calendar quarter that begins on or after the date of enactment other than in pending cases." But those are not the words that Congress wrote.

109. To the contrary, "[t]he application of the increased fees is not a function of when a case was filed or a plan confirmed; rather, the application of the increased fees is a function of the amount and timing of a disbursement and the health of the UST fund." *Exide*, 2020 WL 211400, at 2.

110. The *Life Partners* court incorrectly reasoned that the 2017 amendment to section 1930(a)(6) should not be read to apply to pending cases based on the effective-date provision of an amendment to 11 U.S.C. § 1222, regarding the contents of a chapter 12 plan. *Life Partners*, 606 B.R. at 285. In fact, as Judge Walrath held in *Exide*, 2020 WL 211400, at *3, the section 1222 amendment supports application of the 2017 amendment to section 1930(a)(6) to all open cases.

In amending section 1222, Congress expressly provided that the amendment did *not* apply to pending cases unless a plan had not yet been confirmed and there had been no discharge order.[17] Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, § 1005(c) (uncodified). This amendment shows that if Congress did not want the fee increase to apply to all pending cases, it knew how to say that and would have said so explicitly, as it did with the chapter 12 amendment. *See Exide*, 2020 WL 211400, at *3 ("If the 2017 Amendment did not generally apply to pending, post-confirmation cases . . . there would have been no need for Congress to say that it did not apply to pending, post-confirmation chapter 12 cases.").

111. Further, the Supreme Court has explained that where two sections of the same legislation "address wholly distinct subject matters," no "negative inference" arises when one section "explicitly provides that it applies to pending cases" and the other section does not. *Martin v. Hadix*, 527 U.S. 343, 355-57 (1999).

112. Any re-write of the 2017 amendment to exclude pending cases would undermine Congress's funding goals. The Judiciary Committee recommended passage of the amendment to

[17] The amendment provides:

> (c) EFFECTIVE DATE.—The amendments made by this section shall apply to—
>
> (1) any bankruptcy case—
>
> (A) that is pending on the date of enactment of this Act;
>
> (B) in which the plan under chapter 12 of title 11, United States Code, has not been confirmed on the date of enactment of this Act; and
>
> (C) relating to which an order of discharge under section 1228 of title 11, United States Code, has not been entered; and
>
> (2) any bankruptcy case that commences on or after the date of enactment of this Act.

replenish the United States Trustee System Fund and to fund bankruptcy judgeships. *See* H.R. Rep. No. 115-130, at 8. The Committee expected the amendment to accomplish this goal in part based on an estimate from the Congressional Budget Office, *id*. at 9, which read the amendment to increase the fees paid "by entities *that are already in bankruptcy*"—not just those that file for bankruptcy after the amendment's effective date. Cong. Budget Office Cost Estimate, H.R. 2266, Bankruptcy Judgeship Act of 2017, at 5 (May 18, 2017) (emphasis added); *see also id.* at 1 (stating amendment would increase fees paid "by entities that are *currently* in Chapter 11 bankruptcy") (emphasis added); *id*. ("The act also would adjust the formula used to set certain quarterly fees paid by businesses involved in *ongoing* Chapter 11 bankruptcy cases . . . .") (emphasis added).

113. It was based on this application to all open cases that the Congressional Budget Office concluded that the fee increase would fully offset the increases in direct spending. *Id*. at 9.[18] Re-writing the statute so that it applies to only a subset of the cases originally intended—those filed after the amendment's enactment date—would be contrary to the legislative intent to fully offset the increased direct spending, as reflected in the Congressional Budget Office analysis, as well as Congress's intent to avoid imposing the costs of the United States Trustee Program on

[18] The version of the bill reviewed by the Congressional Budget Office included substantially the same language as the final version—passed five months later—mandating application of the increased fees to disbursements made in any quarter after its effective date. H.R. 2266, 115th Cong. (May 17, 2017). *Compare* H.R. 2266, 115th Cong. (May 17, 2017) ("The amendments made by this section shall apply to quarterly fees payable under section 1930(a)(6) of title 28 of the United States Code, as amended by this section, for disbursements made in any calendar quarter that begins on or after the effective date of the amendments made by this section."), *with* Bankruptcy Judgeship Act of 2017, Pub. L. No. 115-72, § 1004(c) (uncodified) ("The amendments made by this section shall apply to quarterly fees payable under section 1930(a)(6) of title 28, United States Code, as amended by this section, for disbursements made in any calendar quarter that begins on or after the date of enactment of this Act.").

taxpayers. *Cf. Murphy v. NCAA*, 138 S. Ct. 1461, 1484 (2018) (holding that severing provision of law would be contrary to legislative intent where Congressional Budget Office's estimate that the law would impose no cost on the federal government "would certainly be incorrect" if the statute were severed).

114. It would be particularly surprising if Congress *sub silentio* exempted pending cases from the 2017 amendment given that, in the thirty-plus years since Congress first imposed quarterly fees in 1986, Congress has *never* exempted previously filed cases from laws imposing or increasing quarterly fees. Indeed, when Congress first enacted the quarterly fee statute in 1986, the Eighth Circuit squarely rejected the argument, like the one Debtors make here, that the fees did not apply to cases pending in pilot districts on its effective date. *See In re Prines*, 867 F.2d 478 (8th Cir. 1989).[19]

115. Likewise, in 1996, Congress amended section 1930(a)(6) to extend the quarterly-fee obligation past the date of plan confirmation. The 1996 amendment's effective date provision, like the 2017 amendment, made no reference to case-filing date. *See* Balanced Budget Downpayment Act, Pub. L. 104-99, § 211, 110 Stat. 26 (Jan. 26, 1996) (amending section 101(a) of Public Law 104-91 to state that "the General Provisions for the Department of Justice included in title I" of House Conference Report 104-378 "are hereby enacted into law").[20]

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[19] The 1986 Act provided that in non-pilot districts the quarterly fees would not become effective until a specified period of time after the statute's general effective date. *See Prines*, 867 F.2d at 484; Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. 99-554, § 302(d), 100 Stat. 3088, 3120–21 (1986). By contrast, for pilot districts, the Act contained no such provision for a delayed effective date. *In re Prines*, 867 F.2d at 483.

[20] Section 101(a) of Public Law 104-91 referred to House Report 104-378, which contained the statutory change extending the quarterly fee obligation past the date of confirmation. *See* National Marine Fisheries Laboratories Act of 1996, P.L. 104-91, § 101(a), 110 Stat. 7 (Jan. 6, 1996)

116. Because some courts did as Debtors ask and effectively rewrote the 1996 amendment to exclude cases pending on its enactment date, Congress was obligated to clarify in a subsequent amendment that the January 1996 amendment applied to all open cases. *See* Omnibus Consol. Appropriations Act of 1997, Pub. L. No. 104-208, § 109(d), 110 Stat. 3009, 3009-19 (Sept. 30, 1996) (amending section 101(a) of Public Law 104-91, as amended by section 211 of Public Law 104-99, to clarify that quarterly fees payable under 28 U.S.C. § 1930(a)(6) "shall accrue and be payable from and after January 27, 1996, in all cases (including, without limitation, any cases pending as of that date), regardless of confirmation status of their plans").[21] That Congress was forced to issue a clarifying amendment because courts refused to apply the statutory language as written does not change what Congress intended in the first instance. *See NCNB Texas Nat. Bank. v. Cowden*, 895 F.2d 1488 (5th Cir. 1990) (clarifying amendments to statutes simply "make what was intended all along even more unmistakably clear"); *Fielder v. State Farm Mutual Auto. Ins. Co.*, 799 F.2d 656, 660 (11th Cir. 1986) ("[A] conflict among the courts in construing statutes is an indication that a subsequent amendment is intended to clarify, rather than change, the existing law.") (internal quotation marks omitted). Having established that the original 1996 amendment

(incorporating by reference change to statute proposed by House Conference Report 104-378); H.R. Conf. Rep. No. 104-378, Title I, General Provisions—Department of Justice § 111, at 17 (1995) (providing language of amendment enacted into law by the Public Law 104-99).

[21] Notably, in the same statute as the clarifying amendment, Congress also increased the quarterly fees, again with no express reference to the fee change's application to pending cases. Omnibus Consol. Appropriations Act of 1997, Pub. L. No. 104-208, § 109(a), 110 Stat. 3009 (Sept. 30, 1996). Yet again, that September 1996 fee increase applied to post-enactment disbursements with no exception for cases filed before its enactment date. *See In re PJ Keating Co.*, 205 B.R. 663, 666 (Bankr. D. Mass. 1997) (reflecting application of amendment).

contained no exception for pending cases, Congress had no reason to think bankruptcy courts would again refuse to apply another quarterly fee amendment to pending cases.

B. The 2017 Amendment's Application to this Case Based on Post-Enactment Disbursements to Calculate Post-Enactment Fees Is Prospective, Not Retroactive.

117. Contrary to Debtors' claim, application of the 2017 amendment to post-enactment disbursements to determine the amount of post-enactment fees, is prospective, not retroactive. *See Exide*, 2020 WL 211400, at *5; *Circuit City*, 606 B.R. at 268-69. For this reason, as well, the presumption against retroactivity does not apply.

118. The Supreme Court's decision in *Landgraf* undermines Debtors' contention that the amendment is retroactive as applied here. A statute does not operate retroactively "merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." 511 U.S. at 269 (citation omitted); *see also Exide*, 2020 WL 211400, at *4 (explaining that "reliance on previous law does not automatically render a statute unconstitutional"). Nor is a law retroactive simply because its application requires some reference to antecedent facts. *EPA v. New Orleans Pub. Serv., Inc.*, 826 F.2d 361, 365 (5th Cir. 1987) (holding that law altering classification of transformers for purposes of future matters is not retroactive).

119. "To determine whether a statute's application in a particular situation is prospective or retroactive, we focus on the conduct which is implicated by the application of the statute. '[A] statute's application is usually deemed prospective when it implicates conduct occurring on or after the [statute's] effective date.'" *FDIC v. Faulkner*, 991 F.2d 262, 266 (5th Cir. 1993) (quoting *McAndrews v. Fleet Bank of Massachusetts*, 989 F.2d 13, 16 (1st Cir.1993)).

120. Thus, for example, a new property tax is "uncontroversially prospective" even if the property was purchased prior to enactment of the tax *See Landgraf*, 511 U.S. at 269 n.24 ("Even uncontroversially prospective statutes may unsettle expectations and impose burdens on past conduct: a new property tax or zoning regulation may upset the reasonable expectations that prompted those affected to acquire property.").

121. As *Exide* concluded, the same is true here. The 2017 amendment only triggers prospective assessment of increased fees based on disbursements made after the amendment's enactment date in open chapter 11 cases. *See Exide*, 2020 WL 211400, at *5 ("[T]he 2017 Amendment is not a retroactive statute because it applies only to post-enactment date disbursements of debtors in cases pending on or after the enactment date."); *see also Martin*, 527 U.S. at 360-61 (finding "no retroactivity problem" in applying new attorney compensation rate to attorney's work done after statutory amendment, in cases filed before the statutory amendment); *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1054, 1058 (11th Cir. 2008) (holding statute that imposed quarterly assessments based on prior year's market share was not retroactive because the assessments "are based upon current participation in the market, such that new entrants are assessed, as well as those who participated in the past").

122. This is so because the obligation to pay fees is triggered only by conduct that occurs weeks after its enactment. Given this, the 2017 amendment is prospective, not retroactive.

123. This conclusion is buttressed by the vast weight of authority that has reviewed similar quarterly fee challenges in the past. No fewer than three circuit courts, four district courts, and eight bankruptcy courts—including this Court, *In re Munford, Inc.*, 216 B.R. 913, 916–17

(Bankr. N.D. Ga. 1997)—all have rejected the argument that application of the quarterly fee requirement to pending cases would be impermissibly retroactive.[22]

IV. EVEN IF THE AMENDMENT'S APPLICATION TO THIS CASE WERE RETROACTIVE, IT WOULD BE CONSTITUTIONAL BECAUSE IT WOULD NOT VIOLATE THE DUE PROCESS CLAUSE.

124. Although Debtors do not expressly argue that application of the 2017 amendment to cases filed before its enactment would be unconstitutional, two cases on which they rely, *Life Partners* and *Buffets*, found that such application would violate the Due Process Clause.[23] Both courts erred because neither applied the correct test: rational basis review.

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[22] *U.S. Trustee v. Gryphon at Stone Mansion, Inc.*, 166 F.3d 552, 557 n.7 (3d Cir. 1999) (in dictum); *In re CF & I Fabricators of Utah, Inc.*, 150 F.3d 1233, 1237–38 (10th Cir. 1998); *In re Prines*, 867 F.2d at 485; *In re Harness*, 218 B.R. 163, 165 (D. Kan. 1998); *In re Post-Confirmation Fees*, 224 B.R. 793, 795 (E.D. Wash. 1998); *Vergos v. Uncle Bud's, Inc.*, No. 3-97-0296, 1998 WL 652542, at *8–9 (M.D. Tenn. Aug. 17, 1998); *In re Prines*, 82 B.R. 110, 112 (D.S.D. 1987); *In re A.H. Robins Co., Inc.*, 219 B.R. 145, 148 (Bankr. E.D. Va. 1998); *In re Richardson Serv. Corp.*, 210 B.R. 332, 334–35 (Bankr. W.D. Mo. 1997); *In re Driggs*, 206 B.R. 787, 791 (Bankr. D. Md. 1997); *In re Munford, Inc.*, 216 B.R .at 916–17; *In re McLean Square Assocs., G.P.*, 201 B.R. 436, 440–41 (Bankr. E.D. Va. 1996); *In re Foxcroft Square Co.*, 198 B.R. 99, 104-05 (Bankr. E.D. Pa. 1996); *Matter of Upton Printing*, 197 B.R. 616, 619–20 (Bankr. E.D. La. 1996); *In re Cent. Fla. Elec., Inc.*, 197 B.R. 380, 381–82 (Bankr. M.D. Fla. 1996). To be sure, some bankruptcy courts held applying the quarterly fee requirement to pending cases was retroactive, but this was considered a minority opinion, *see In re Rhead*, 232 B.R. 175, 180 n.3 (Bankr. D. Ariz. 1999), and no appellate court so held.

[23] Although some other challenges to the 2017 amendment have asserted claims under the Takings Clause, Debtors do not assert such a claim, and no bankruptcy court to date has held that the amendment constitutes a taking. If Debtors were to assert a takings claim, the United States Trustee requests the opportunity to brief the many reasons why such a claim would fail. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 615 (2013) ("It is beyond dispute that taxes and user fees . . . are not takings.") (internal quotation marks and alterations omitted); *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1054 (11th Cir. 2008) ("[T]he takings analysis is not an appropriate analysis for the constitutional evaluation of an obligation imposed by Congress merely to pay money.").

125. The 2017 amendment easily satisfies the requirements of the Due Process Clause. The constitutional restraint upon enacting retroactive civil legislation is a "modest" one. *Landgraf*, 511 U.S. at 272. Laws adjusting the burdens and benefits of economic life are presumed to be constitutional and the burden is on the party complaining of a due process violation to establish that Congress has acted in an arbitrary and irrational way. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

126. "Under the deferential standard of review applied in substantive due process challenges to economic legislation there is no need for mathematical precision in the fit between justification and means." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 639 (1993). As long as there is a legitimate legislative purpose furthered by rational means, economic legislation meets the test of due process. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) (rejecting due process challenge to retroactive statute requiring nearly $25 million payment by petitioners); *United States v. Carlton*, 512 U.S. 26 (1994) (upholding amendment to estate tax deduction that operated retroactively).

127. Debtors bear the burden to show that Congress acted in an arbitrary and irrational way. *Concrete Pipe*, 508 U.S. at 637. They have not made that showing. Nor could they.

128. The Supreme Court already has held that Congress has a legitimate purpose in imposing bankruptcy fees—even when they may foreclose bankruptcy relief to certain debtors—and that the rational basis for such fees so that users instead of taxpayers pay the costs of the bankruptcy system is "readily apparent." *United States v. Kras*, 409 U.S. 434, 448 (1973). *See also Alamo Rent-a-Car, Inc. v. Sarasota-Manatee Airport Authority*, 825 F.2d 367, 373 (11th Cir. 1987) ("Revenue raising is undoubtedly a legitimate and substantial government objective."); *In*

re Munford, Inc., 216 B.R. 913, 916–17 (Bankr. N.D. Ga. 1997) (holding the 1996 amendment to section 1930(a)(6) was a rational means to satisfy a legitimate legislative purpose: "the policies of oversight and self-funding of the administration of bankruptcy cases"). Thus, Judge Walrath held that "in enacting the 2017 Amendment Congress had a legitimate legislative purpose: to prevent revenue loss and preserve the UST Program's self-funded character." *Exide*, 2020 WL 211400, at *6.

129. And "Congress's decision to impose higher fees on larger pending chapter 11 cases is rationally related to that goal." *Id*.

130. The quarterly fee increase was necessary to carry out the congressional policy specified in 28 U.S.C. § 589a(b)—that the fees recover the costs of the United States Trustee Program. By 2017, that purpose was imperiled by the shortfall in revenue that had accrued over the course of several years such that, without an increase, the costs of the bankruptcy system would fall on taxpayers. *See supra* ¶¶ 16-25. Through the amendment, Congress determined the amount and timing of the fee increase necessitated by the shortfall in revenue.

131. Congress met the low constitutional burden of acting rationally in applying the temporary fee increase in all pending cases, rather than only in cases filed after its effective date. As Judge Walrath found, it was "logical" for Congress to assume that larger cases tax the system more than smaller cases and that the size of the case can be determined based on the size of disbursements. *Exide*, 2020 WL 211400, at *6; *see also* H.R. Rep. No. 99-764 at 26 (showing that Congress imposed quarterly fees based on disbursements because it determined that "[s]maller chapter 11 debtors should pay smaller additional fees than larger debtors").

132. "In addition, applying the increased fees to pending cases, including confirmed cases, is rational as it spreads the costs among more chapter 11 debtors and allows Congress's funding goal to be met more quickly." *Exide*, 2020 WL 211400, at *6; *see also* H.R. Rep. No. 115-130, at 9 (stating that the Judiciary Committee expected "based on informal estimates by [the Congressional Budget Office]" that the increased quarterly fees would increase revenues "by an amount sufficient to fully offset the increases in direct spending caused by the bill"); Cong. Budget Office Cost Estimate, H.R. 2266, Bankruptcy Judgeship Act of 2017, at 5 (May 18, 2017) (relying on application of the fee increase to pending cases for cost and revenue estimates).

133. Congress's 2017 legislation was far from the type of action legislation that may be struck down under the Due Process Clause. As the Supreme Court has held, "[i]t is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them." *United States v. Sperry*, 493 U.S. 52, 64 (1989). *See also Carlton*, 512 U.S. at 32 ("Congress, of course, might have chosen to make up the unanticipated revenue loss through general prospective taxation, but that choice would have burdened equally 'innocent' taxpayers. Instead, it decided to prevent the loss by denying the deduction to those who had made purely tax-motivated stock transfers. We cannot say that its decision was unreasonable."); *Usery*, 428 U.S. at 18 ("We find . . . that the imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor . . . ."); *Alamo Rent-a-Car, Inc. v. Sarasota-Manatee Airport Authority*, 825 F.2d 367, 369, 370-72 (11th Cir. 1987) (upholding airport user fee of 10% of rental car company's gross receipts under rational basis review, finding that distinctions between companies were based on a "rational

assessment of the relative benefits and the extent of use of each category" and the classifications need not be made with "perfection or mathematical exactitude").

134. Because the 2017 amendment "approaches the problem of cost spreading rationally; whether a broader"—or narrower—"cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Usery*, 428 U.S. at 19. Thus, a dozen courts, including this Court, *In re Munford, Inc.*, 216 B.R. at 916–17, have found that application of prior quarterly fee enactments to pending cases was supported by a rational legislative purpose and constitutional.[24]

135. Critically, the *Buffets* and *Life Partners* cases on which Debtors rely failed to discuss much less apply rational-basis review. Instead, they found that the amendment violated due process based on what they perceived as a lack of fair notice and an unfairness in the amount of the fees. *Life Partners*, 606 B.R. at 288 (noting that "[i]f the fee increase were a modest increase" the court would be more inclined to agree that it is constitutional); *Buffets*, 597 B.R. at 597 (finding that the movants did not have "sufficient notice of the increased fees prior to filing chapter 11 or confirmation of a plan"). But as the Supreme Court held in *Landgraf*: "[T]he potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope." 511 U.S. at 267.

[24] *Gryphon at Stone Mansion, Inc.*, 166 F.3d at 557 n.7 (in dictum); *In re Prines*, 867 F.2d at 485; *In re Harness*, 218 B.R. at 165; *In re Post-Confirmation Fees*, 224 B.R. at 796; *Vergos*, 1998 WL 652542, at *9; *In re Prines*, 82 B.R. at 112; *In re A.H. Robins Co., Inc.*, 219 B.R. at 148; *In re Richardson Serv. Corp.*, 210 B.R. at 334–35; *In re Munford, Inc.*, 216 B.R. at 916–17; *In re McLean Square Assocs., G.P.*, 201 B.R. at 441; *Matter of Upton Printing*, 197 B.R. at 619–20; *In re Cent. Fla. Elec., Inc.*, 197 B.R. at 381–82.

136. Moreover, Debtors have no constitutional right to demand that legislation imposing quarterly fees remain forever static. Any "assumption" that quarterly fees would never change after a case is filed is "patently unreasonable." *In re CF & I Fabricators of Utah, Inc.*, 150 F.3d at 1239; *Gryphon at Stone Mansion, Inc.*, 166 F.3d at 557 n.7 (noting quarterly fees do not violate the Takings Clause "because, due to the vagaries of the bankruptcy process, there can be no reasonable expectation that the amount of the final distribution will remain fixed throughout the process").

137. And while fair notice is one of the interests protected by the Due Process Clause, *Landgraf*, 511 U.S. at 266, that fact does not alter the test for constitutionality: whether Congress had a legitimate legislative purpose furthered by rational means. Thus, "[n]either lack of notice nor unexpected increases in post-confirmation liability supports the conclusion that the 2017 Amendment is violative of due process." *Exide*, 2020 WL 211400, at *4.

138. If "fair notice" were the sole test, retroactive legislation would be overturned with alarming frequency. But the Supreme Court has routinely rejected due process challenges even where the statutory change or a new liability was not expected. *See, e.g.*, *Carlton*, 512 U.S. at 33 ("Although Carlton's reliance is uncontested—and the reading of the original statute on which he relied appears to have been correct—his reliance alone is insufficient to establish a constitutional violation."); *Usery*, 428 U.S. at 16 ("[I]t may be that the liability imposed by the Act . . . was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations."); *Concrete Pipe*, 508 U.S. at 637 (same); *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) (same).

139. "This is true even though the effect of the legislation is to impose a new duty or liability based on past acts." *Usery*, 428 U.S. at 16. "Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *R.A. Gray & Co.*, 467 U.S. at 729.

140. When Congress amended section 1930(a)(6) in 2017, it did so thoughtfully and carefully. Congress ensured that the temporary increase in fees would not be charged if the Fund balance reached a certain level. It set caps on fees. And it provided for the temporary increase to expire. This is a far cry from the sort of arbitrary or irrational action that could violate the Due Process Clause.

CONCLUSION

For these reasons, the United States Trustee respectfully asks this Court to deny the Motion.

Date: March 2, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 2, 2020, I electronically filed the foregoing UNITED STATES TRUSTEE'S SUPPLEMENTAL OBJECTION TO DEBTORS' MOTION TO DETERMINE FEES PAYABLE TO THE UNITED STATES TRUSTEE PROGRAM using the Bankruptcy Court's Electronic Case Filing program, which sends a notice of this document and an accompanying link to this document to the following party who has appeared in this case under the Bankruptcy Court's Electronic Case Filing program:

Matthew W. Levin

/s/ Thomas W. Dworschak