

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 OFFICE OF THE UNITED STATES)
4 TRUSTEE,)
5 Petitioner,)
6 v.) No. 22-1238
7 JOHN Q. HAMMONS FALL 2006, LLC,)
8 ET AL.,)
9 Respondents.)
10 - - - - -

11
12 Washington, D.C.
13 Tuesday, January 9, 2024
14

15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 11:33 a.m.
18

19 APPEARANCES:
20 MASHA G. HANSFORD, Assistant to the Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf
22 of the Petitioner.
23 DANIEL L. GEYSER, ESQUIRE, Dallas, Texas; on behalf of
24 the Respondents.
25

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P R O C E E D I N G S

(11:33 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 22-1238, the Office of the United States Trustee against John Q. Hammons Fall 2006, LLC.

Ms. Hansford.

ORAL ARGUMENT OF MASHA G. HANSFORD

ON BEHALF OF THE PETITIONER

MS. HANSFORD: Mr. Chief Justice, and may it please the Court:

This case presents the question that this Court left open in Siegel, what the appropriate remedy is for the uniformity violation that resulted when debtors in a small sliver of cases, four dozen cases, in the two states that use bankruptcy administrators did not pay the increased quarterly fees mandated by Congress in the U.S. Trustee districts.

As this Court has recognized time and again, the touchstone of the remedial inquiry is congressional intent. And, here, there's unusually strong evidence that Congress would choose to fix the constitutional violation by mandating uniformly higher fees. That means the

1 appropriate remedy in this case is a mandate of
2 higher fees nationwide, either standing alone or
3 in combination with a retrospective effort to
4 collect the \$3.8 million in fees that the BA
5 debtors collectively underpaid.

6 Now Respondents instead urge a refund
7 remedy which when applied nationwide would
8 require taxpayers to foot the bill for
9 approximately \$326 million to fund windfalls for
10 the largest users of the bankruptcy system, like
11 Respondents, who paid exactly what Congress
12 intended that they pay.

13 The problem with that approach is that
14 as a practical matter, it'll actually make the
15 disparity larger. Worse yet, it goes directly
16 contrary to congressional intent. Congress has
17 for decades sought to make the bankruptcy system
18 self-sustaining at no cost to the taxpayer, and
19 it enacted the 2017 Act fee increase for that
20 reason.

21 Now Respondents' argument that the Due
22 Process Clause compels this topsy-turvy solution
23 simply don't hold up. Respondents must
24 establish both that the Due Process Clause
25 requires retrospective relief and that that

1 retrospective relief must take the form of
2 refunds. But they cannot make either showing.

3 Respondents had a meaningful
4 opportunity for a pre-deprivation hearing here,
5 and the Due Process Clause requires nothing
6 further. And to the extent retrospective relief
7 is required, that relief should be additional
8 collections.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: Do we normally look
11 to legislative intent to determine the
12 appropriate remedy for a constitutional
13 violation?

14 MS. HANSFORD: Yes, Justice Thomas. I
15 think this Court's cases are crystal-clear that
16 the question and in particular the critical
17 question here, which is the leveling-up or
18 leveling-down question, uniform fees at the
19 higher level or the lower level is a question
20 of congressional intent.

21 JUSTICE THOMAS: What's your best
22 example of that?

23 MS. HANSFORD: I think that
24 Morales-Santana has an extensive discussion of
25 how congressional intent is the guiding

1 question --

2 JUSTICE THOMAS: Do you have any cases
3 in which there was a monetary remedy involved?

4 MS. HANSFORD: Yes, absolutely. So I
5 think the tax cases are classic money cases, and
6 in those cases, Levin -- Levin versus Department
7 of Commerce, McKesson, all those cases lay out
8 that leveling up or leveling down might be
9 appropriate.

10 JUSTICE THOMAS: It seems that both --
11 that McKesson or Reich, those cases go the other
12 -- don't support you, though?

13 MS. HANSFORD: We very much disagree
14 with that, Justice Thomas. I think those cases
15 support us both on the prospective/retrospective
16 question but also the leveling up/leveling down
17 question. So, first, I think those cases make
18 clear that when, as here, there's a
19 pre-deprivation remedy, you can have
20 prospective-only relief.

21 But, more significantly, those cases
22 make clear that additional collections can be
23 the right remedy, and that's because of the
24 nature of the violation here. The violation
25 here is not that Respondents paid a fee that

1 Congress wasn't authorized to impose. There's
2 no question Congress was authorized to impose
3 the fee. The mistake here was that Congress
4 inadvertently let the BA administrators have the
5 option of not charging those fees, so it
6 accidentally undercollected.

7 JUSTICE THOMAS: Does Reich help you
8 on the pre-deprivation relief?

9 MS. HANSFORD: I think that Reich is
10 inapposite here because it's a bait-and-switch
11 case, but I think even in Reich, a case where
12 there was a bait and switch and there was a
13 state statute that promised a refund, but,
14 instead, the state courts tried to say no refund
15 was available, even in that case, the Court left
16 open a determination of relief consistent with
17 McKesson, which could be leveling up or leveling
18 down.

19 And I think it's critical that even in
20 those cases, which I think mainly come up in the
21 tax context, where there is a due process
22 requirement for retrospective relief, that
23 relief can be leveling up.

24 I don't think there's any dispute here
25 that to the extent every penny of those \$3.8

1 million is collected, Respondents would be made
2 entirely whole. They will not have been subject
3 in hindsight to a discriminatory scheme. And I
4 think that goes to show that their injury is not
5 a monetary injury.

6 JUSTICE JACKSON: Ms. --

7 JUSTICE SOTOMAYOR: Ms. --

8 JUSTICE JACKSON: Go ahead.

9 JUSTICE SOTOMAYOR: Ms. Hansford, I --
10 I'm troubled by one piece of this case, okay? I
11 do agree McKesson and Harper say, if you have a
12 pre-deprivation mechanism to protect yourself,
13 the government can level up or down because you
14 should have taken advantage of your ability to
15 protect yourself.

16 Putting aside Respondents' argument
17 that if they didn't pay the fee here, they would
18 have been thrown out of court -- and I agree
19 that there's examples of people who didn't pay
20 the fee. They put the money in escrow, or some
21 actually withheld it and didn't get thrown out.

22 So there -- assuming there's a
23 pre-deprivation remedy, which I do, okay, and I
24 think McKesson would control, there's a part of
25 your argument that troubles me, and it's with

1 the people who invoked the remedy, meaning I
2 under -- in normal course of litigation, if you
3 think you shouldn't pay something, don't pay it.
4 Go to court and don't pay it. And some people
5 did that.

6 But now you're saying to them you did
7 the right thing to protect yourself from the
8 inequality, but now I can claw back that money
9 when I level down -- or level up, I mean. To
10 me, that doesn't seem quite right. The clawback
11 is what's troubling me because, if you claw
12 back, there really is no pre-deprivation remedy.
13 You're going to end up having had to pay and
14 continuing to pay something you thought was
15 unequal at the time.

16 And so there's my -- the nub of my
17 problem. It's the clawback. It's less the --
18 the concept that you can level up or down and
19 say that people who paid and shouldn't have,
20 well, that's their problem. They should have --
21 that's -- you know, they knew that they might be
22 paying or should have known they were paying
23 more and should have protected themselves, and
24 they chose not to. That's forfeiture and
25 waiver.

1 What do I do with the clawback that
2 you're asking for?

3 MS. HANSFORD: So -- so, Justice
4 Sotomayor, kind of three things I want to say in
5 response to that.

6 First, just a small clarification, and
7 I take that your premise is there was a
8 pre-deprivation remedy in this case, and I think
9 that's absolutely correct.

10 Just as a clarification, I do think
11 that McKesson specifically says, when there is
12 no pre-deprivation remedy, you can still level
13 up or level down. The requirement is, in
14 hindsight, a uniform scheme which can be level
15 up or level down. So I really don't think the
16 pre-deprivation question goes to which relief is
17 appropriate.

18 But, you know, taking the premise of
19 your question there was pre-deprivation relief,
20 here, I think that the right solution for
21 everybody is the same solution that would have
22 happened had Respondents filed suit on day one
23 under the Declaratory Judgment Act. The -- they
24 would have obtained a ruling that would say,
25 yes, this is unconstitutionally un-uniform. And

1 we look at congressional intent, and
2 congressional intent is plainly -- and I think
3 the evidence here is overwhelming -- uniformly
4 higher fees nationwide, that means the right
5 remedy is a leveling-up remedy of collecting
6 additional fees in the BA districts. And so,
7 from day one, those BA administrators would know
8 they have to collect the higher fees. They
9 can't have the exception. They have to follow
10 the Judicial Conference's standing order.

11 I think that's the right solution in
12 this case, and that's -- and so that's why I
13 don't think there's any reason to treat people
14 who exercise --

15 JUSTICE SOTOMAYOR: But that goes back
16 to the clawback, because you're saying that -- I
17 accept you could -- your equality can be
18 everybody pays equally.

19 MS. HANSFORD: Mm-hmm.

20 JUSTICE SOTOMAYOR: This whole fight
21 is about the clawback. Who gets to claw back?
22 Who gets to -- do you get a pass on trying to
23 get the money from the people who benefited or
24 -- and can you keep the fees from people who
25 withheld it? Can you get it back from people

1 who didn't pay or escrow?

2 MS. HANSFORD: But I think --

3 JUSTICE SOTOMAYOR: That -- that's the
4 whole issue.

5 MS. HANSFORD: But I think the point
6 is that in that case, no clawback would be
7 required because the just prospective relief of
8 saying everybody has to pay the higher fees
9 would take care of it. And that was the right
10 answer then. And I think there's no way that
11 Respondents or anyone else should be able to get
12 more, which is payment at the lower levels that
13 Congress never intended nationwide because they
14 waited.

15 JUSTICE BARRETT: Let's say --

16 MS. HANSFORD: And I do think that --

17 JUSTICE BARRETT: -- it's
18 retrospective. I think maybe that's what we're
19 talking about. Let's say we don't accept your
20 argument that it's prospective. We're saying
21 that retrospective relief is required and the
22 question is just whether you're leveling up or
23 leveling down then.

24 I take Justice Sotomayor's question to
25 be what about debtors like MF Global.

1 MS. HANSFORD: So -- so, Justice
2 Barrett, I guess first I want to say that there
3 are five cases that we're aware of in the
4 category like MF Global. So, if you do think
5 the answer is different as to those cases, I
6 don't think that would have a big practical or
7 other consequence, but -- so, if -- if you're
8 concerned about that set of cases, I would
9 really urge you not to craft a remedy for
10 Respondents here based on those cases.

11 But I think, as a conceptual matter,
12 those cases come out the same. And if you think
13 of the AAPC case, the Telephone Consumer
14 Protection Act, the people who -- there was a
15 disuniform scheme and the problem with that
16 scheme was that there was an exception for
17 government debt robocallers, which is what
18 created the disparity.

19 But I don't think there's a question
20 that the people who made non-government debt
21 robocalls before even at the time when
22 mistakenly the scheme was being administered
23 un-uniformly remain liable. They were always
24 required to not make the robocalls, and if they
25 did, they remain liable.

1 And Footnote 12 of the plurality makes
2 clear that you don't need to go back in time and
3 compensate those people for -- and that's
4 another example of a money case, Justice Thomas
5 -- that you don't need to go back and compensate
6 those people for financial penalties or
7 financial liability that they incurred because
8 they were doing exactly what Congress intended.

9 JUSTICE BARRETT: Okay. Let me -- let
10 me -- let me just ask you this. Let's assume
11 that we disagree with you about the prospective
12 and we're -- we're accepting just as I said at
13 the beginning that it has to be retrospective.

14 Do you want to address the practical
15 difficulties, like the former bankruptcy judges
16 pointing out the practical difficulties of
17 trying to level up here and go back and reopen
18 these cases and extract money from the debtors
19 in the BA districts?

20 MS. HANSFORD: Yes, absolutely,
21 Justice Barrett. And I think there are
22 practical problems on both sides. And I think,
23 overall, the practical problems are actually
24 much worse with a refund remedy because it needs
25 to be implemented in about 40 times as many

1 cases, about 2100 cases, instead of the 48
2 cases.

3 And so how a refund would need to work
4 is the debtor would need to come forward and
5 request a refund. And 85 percent of those cases
6 are closed. In -- in some of them, the debtor
7 continues to exist, the reorganized debtor. In
8 some of them, the debtor has gone out of
9 business. There may not be a way to reach that
10 debtor. The plan may not provide what to do
11 with excess funds. Cases may actually need to
12 be reopened, and, ironically, I think you're --

13 JUSTICE GORSUCH: Well --

14 MS. HANSFORD: -- more likely to
15 reopen --

16 JUSTICE GORSUCH: -- I -- I think
17 that -- that you're -- you're -- you're --
18 you're -- you're missing the -- the thrust of
19 the question. You're -- Justice Barrett's
20 question is, how are you going to implement your
21 remedy?

22 On the other hand, if -- if -- if Mr.
23 Geyser were to prevail, somebody would have to
24 come forward and try and reopen and good luck
25 with that, all right, if they haven't preserved

1 their arguments. And that's what you're saying
2 and I -- I take that point. And so maybe a lot
3 of people who would be entitled to won't be able
4 to, and that's the end of it, but Mr. Geysler
5 will be happy and his client will be happy.

6 On your end, I -- I think we have to
7 tell the Judicial Conference to go do something
8 in the first instance. I think we have to tell
9 the Judicial Conference, who's not a party to
10 this lawsuit -- and I know the Chief Justice has
11 great authority over that body.

12 (Laughter.)

13 JUSTICE GORSUCH: -- but I'm not so
14 sure about the rest of us. And what order do we
15 issue to them I guess is a question I have and I
16 think Justice Barrett's getting at. And --
17 and -- and how are they going to go do it?
18 Who's going to go do it?

19 And those are closed cases where,
20 okay, it's not somebody asking for something who
21 might lose because his case is closed and he
22 doesn't care anymore. You have to go claw it
23 back from somebody whose case is closed. And I
24 just haven't heard of anything quite like that
25 before, so help me out.

1 MS. HANSFORD: So, Justice Gorsuch, a
2 lot of really important things in that question
3 and I want to get to all of them.

4 I think, to start with the first,
5 which is, as a practical matter, what would
6 happen if this Court ordered the additional
7 collection remedy, I don't think there's
8 anything unusual about that. I think that if --

9 JUSTICE GORSUCH: Ordering a non-party
10 to the case to take action?

11 MS. HANSFORD: So -- so, to be clear,
12 I don't think the order in this case would be an
13 injunction to the BA districts to do that. The
14 judgment in this case is the motion to
15 redetermine fees is denied because Respondents
16 paid the correct level. But I think this is a
17 problem that arises anytime you have --

18 JUSTICE GORSUCH: Well, but that's
19 premised on the idea that -- that a court can
20 compel this clawback. And I guess I'm wondering
21 -- again, we've spoken around -- a lot around
22 it, but at the end of the day, for it to work,
23 somebody has to order the clawback.

24 And -- and I think Justice Barrett's
25 question and mine is just, honestly, I haven't

1 seen something like that before. How does it
2 work?

3 MS. HANSFORD: So I don't think that
4 in a leveling-down case or a leveling-down tax
5 case there's any rule that the judgment --

6 JUSTICE GORSUCH: I'm talking about
7 leveling up. Just stick with the leveling up --

8 MS. HANSFORD: Oh.

9 JUSTICE GORSUCH: -- and the remedy
10 you're proposing.

11 MS. HANSFORD: I -- I apologize,
12 Justice Gorsuch.

13 JUSTICE GORSUCH: Put aside the
14 leveling down.

15 MS. HANSFORD: That's a terminology
16 issue. By leveling down, I meant collection
17 remedy. We can call it leveling up.

18 JUSTICE GORSUCH: Okay. All right.
19 Whatever you want to call --

20 MS. HANSFORD: So the collection and
21 the collection remedy.

22 JUSTICE GORSUCH: Whatever you want to
23 call it, counsel, is fine by me. How do I do
24 it?

25 MS. HANSFORD: So, in -- in the tax

1 context, where the courts establish that you can
2 level up or level down, there's no rule that the
3 court's judgment itself has to compel the
4 actors, and I think the reason for that --

5 JUSTICE GORSUCH: Fine, fine, fine,
6 fine. How does it happen?

7 MS. HANSFORD: So the way it happens
8 is that the -- the BA administrators read this
9 Court's decision and they see that they are
10 required to collect additional fees.

11 JUSTICE GORSUCH: Are they? They're
12 not bound by anything. They're not -- they're
13 not parties to this case.

14 MS. HANSFORD: But I think this
15 Court's declaratory judgment that --

16 JUSTICE GORSUCH: There's no
17 declaratory judgment. It's -- it's just that
18 Mr. Geyser loses.

19 MS. HANSFORD: That -- that's the
20 particular judgment in this case. But, as
21 Footnote 29 --

22 JUSTICE GORSUCH: There's no judicial
23 --

24 MS. HANSFORD: -- in Morales-Santana
25 said --

1 JUSTICE GORSUCH: There's no judicial
2 decree telling anybody, but let's put -- even
3 putting that aside, how practically are they
4 going to do it?

5 MS. HANSFORD: Oh, all right. So I'll
6 get back to Note 29 in Morales-Santana later,
7 but, as a practical matter, what happens is you
8 send a collection notice to the reorganized --
9 so I -- I guess, to start with the easiest
10 cases, there are 10 open cases, and that's --

11 JUSTICE GORSUCH: Put those aside.
12 Those are -- those are -- those are --

13 MS. HANSFORD: Well, but that's a
14 third of the fee payments, and that would
15 substantially close the gap.

16 JUSTICE GORSUCH: Okay. Okay.

17 MS. HANSFORD: And in those cases, I
18 do think --

19 JUSTICE GORSUCH: A third.

20 MS. HANSFORD: -- there's a statutory
21 obligation --

22 JUSTICE GORSUCH: Okay.

23 MS. HANSFORD: -- to pay under
24 1129(a)(12).

25 JUSTICE GORSUCH: That's helpful.

1 JUSTICE JACKSON: Ms. --

2 MS. HANSFORD: So the -- so I think
3 that's a big chunk of it. But I think, for the
4 other cases, there is in many of the cases a
5 reorganized debtor that still exists or an
6 individual. To that individual, the BA
7 administrators send a collection notice.

8 We think many of them will be able to
9 pay. A lot of the amounts at issue are just a
10 few thousand dollars. We think a lot of those
11 people will have the ability to pay and will
12 pay. If not, it gets referred to the collection
13 just like any other government debt.

14 We admit that there are at least two
15 cases, the liquidated cases, which represent a
16 total underpayment of I think it's about \$27,000
17 where it will not be collectable, and I think
18 the good-faith remedy in this case, and this
19 Court has been clear in McKesson that perfection
20 is not required, will have to accept that you're
21 not going to be able to claw back --

22 JUSTICE JACKSON: Ms. Hansford --

23 MS. HANSFORD: -- those last pennies.

24 JUSTICE JACKSON: Ms. Hansford, I'm --
25 I'm wondering whether this isn't -- I read your

1 brief and the arguments that you're making as
2 though the collection remedy was sort of like
3 your second option, that -- that some of these
4 problems that I -- concerns that I share and the
5 problems that have been addressed are a reason
6 why we wouldn't necessarily think that a
7 retrospective remedy is appropriate.

8 So it's precisely because going back
9 and clawing this money from the BA districts
10 that got a windfall before because they didn't
11 -- weren't required to pay the higher amounts,
12 because that's a little unfortunate and may be
13 difficult to do, why the government is saying
14 really the best remedy here is to just look
15 forward and say, from now on, everybody has to
16 pay the same fee.

17 MS. HANSFORD: I -- I think that's
18 exactly right, Justice Jackson. We do think
19 that to the extent the Court thinks
20 retrospective relief is required, a meaningful
21 albeit not perfect collection remedy can be
22 executed. I think that the refund remedy would
23 not be perfect and would leave in place a larger
24 disparity.

25 JUSTICE JACKSON: But wait. Why would

1 we think --

2 MS. HANSFORD: It's all in the
3 Constitution.

4 JUSTICE JACKSON: -- so why would we
5 think that the retrospective as -- there are
6 three options here --

7 MS. HANSFORD: Yes.

8 JUSTICE JACKSON: -- right? It seems
9 to me the -- not the Petitioner, the Respondent
10 in this case is seeking a refund, which I
11 understand is retrospective, but he wants a
12 refund. That's one.

13 The second is I guess leveling up by
14 making sure that the people who in this window
15 of time didn't get the amount or didn't pay the
16 amount pay. And that's the clawback that we've
17 been talking about.

18 And then the third is recognizing that
19 the government has changed its policy with
20 respect to this, that everyone is now uniform,
21 that we just go forward doing a uniform thing.

22 So why would we -- what is the
23 argument for doing a retrospective remedy?

24 MS. HANSFORD: I -- I -- I think that
25 you should not do a retrospective remedy. I --

1 I completely agree. I think Respondents' only
2 argument that that's required is an idea that
3 the Due Process Clause compels it because there
4 wasn't pre-deprivation relief here, and I don't
5 think that's correct.

6 But the reason that I agree with you,
7 Justice Jackson, that prospective-only relief
8 makes the most sense here is, if you look at
9 this, the disparity is so tiny, 2 percent of
10 cases, about 1 percent of the total payments.
11 Congress meant to collect \$330 million. It
12 collected 326 million of them because of the
13 mistake it made, and so we're 99 percent of the
14 way there.

15 JUSTICE JACKSON: Yeah. And just to
16 be clear, I don't know how I feel. You say you
17 agree with me. I don't know. I'm just trying
18 to understand what the -- the basis for saying
19 we should do this remedy -- retrospectively is.

20 MS. HANSFORD: Yeah. And -- and so I
21 think that one reason that prospective makes
22 sense is because the -- the -- the disparity is
23 so small and that you're not going to get to a
24 smaller disparity by starting to give refunds.
25 Yes, Mr. Geyser might be happy if his client

1 gets \$2.5 million, but as a constitutional
2 matter, that will be a disparity of 6.3 million
3 instead of a disparity of 3.8 overall. That's
4 worse from the Constitution's perspective.

5 JUSTICE KAGAN: If I could understand
6 your argument, I mean, you acknowledge that this
7 prospective-only solution is one that depends on
8 whether the party has been given a meaningful
9 pre-deprivation remedy. Is that correct?

10 MS. HANSFORD: Yes, that's correct.

11 JUSTICE KAGAN: And others have
12 brought up the fact that there are some people
13 out there who actually took advantage of such a
14 remedy --

15 MS. HANSFORD: Yes.

16 JUSTICE KAGAN: -- right? So would
17 they -- would you be able to apply the
18 prospective-only solution to them, or is this a
19 prospective-only for Mr. Geyser's client, but
20 there are other people out there who you would
21 have to acknowledge that prospective-only
22 doesn't work?

23 MS. HANSFORD: So, Justice Kagan, I
24 think the better answer is that prospective-only
25 works for every single person, with the caveat I

1 gave Justice Barrett that the people who invoked
2 it are a small universe, so if you're worried
3 about them, we -- please don't let that drive
4 the decision.

5 The reason I think the answer is the
6 same for everyone is the constitutional due
7 process question is was there an opportunity for
8 a pre-deprivation hearing, not whether you
9 invoked it or not. And the fact that they had
10 the opportunity for a pre-deprivation hearing
11 meant that they were able to get a hearing on
12 this question, and as McKesson says in Footnote
13 21, that -- that's an additional safeguard that
14 ensures that their property wasn't wrongfully
15 taken. It wasn't here because they paid the
16 right level of fees.

17 What was wrong all along is --

18 JUSTICE KAGAN: I guess I had thought
19 of the McKesson line of cases as sort of a -- a
20 forfeiture doctrine. It's like we're not going
21 to worry about you. If you were given a
22 pre-deprivation remedy, you didn't take it, you
23 now arrive at this situation, we don't really
24 care if you overpaid.

25 But -- but -- but, if you think of it

1 that way, you couldn't make the answer that you
2 gave, right?

3 MS. HANSFORD: Yeah, that's right,
4 Justice Kagan. And I -- I'll take another stab
5 at why I don't think of it that way. But,
6 again, if you want to say there is a requirement
7 of a retrospective remedy or of a refund for
8 these five cases, we really don't have a big
9 problem with that. That's not a big cost for
10 the taxpayers. That's not a huge -- it makes
11 the disparity a little worse, but it's not a big
12 deal.

13 The reason that I don't think that
14 it's a forfeiture doctrine is we just want to
15 make sure -- and almost always there's a
16 pre-deprivation remedy. That's the hallmark of
17 due process. The tax cases are unusual because
18 of the special considerations there.

19 And we just want to make sure that
20 because we took away from you the option of
21 getting a pre-deprivation hearing, you're no
22 worse off. And I think that even those five
23 debtors are no worse off because the right
24 answer in their case was always you guys were
25 paying the right amount. You are like the

1 robocallers who are not collecting government
2 debts. All along, you were supposed to pay the
3 higher fees. The problem was some people were
4 allowed to pay less, and the retrospective
5 question is, do we need to go back and fix that?
6 I think there are a lot of good reasons we don't
7 need to do that.

8 But I think, as this Court put it, for
9 instance, in *Collins v. Yellen*, one way to think
10 about the constitutional violation here is that
11 the Constitution kind of preempted by its force
12 from the outset this exception for the BA
13 districts that said that the BA districts may be
14 allowed to pay less. And if you think of it
15 that way, the right rule all along was uniform
16 fees at the higher levels. And there's no
17 reason that anyone in that world should be
18 paying fees at the lower levels that Congress
19 emphatically did not intend.

20 JUSTICE JACKSON: I guess I don't
21 understand why the government is conceding what
22 Justice Kagan said about the prospective-only
23 remedy depending on whether there has been a
24 meaningful pre-deprivation -- I mean, I
25 understand that comes from *McKesson* and the tax

1 cases, but are those cases really on all fours
2 with what's happening here? I could see a world
3 -- have we ever applied those cases and that
4 concept outside of the tax scenario?

5 MS. HANSFORD: I can't think of a time
6 when this Court applied it outside of the tax
7 scenario, but I do read those cases to stand for
8 the more general proposition that if we don't
9 give you a pre-deprivation hearing, you
10 shouldn't be worse off before that. I think the
11 reason, though, Justice Jackson, that you
12 haven't applied it out of the tax context is
13 because almost always there's a pre-deprivation
14 hearing available, as there was here.

15 And the reason that this issue and
16 this requirement -- constitutional requirement
17 of prospective-only relief only comes up in that
18 context is because the tax context is -- is a
19 situation where we think the government can
20 prevent you from challenging first, getting a
21 meaningful hearing first, and then arguing
22 later.

23 JUSTICE JACKSON: What about the
24 prospective-only remedies in the Morales-Santana
25 scenario, et cetera? Did -- did that turn on

1 whether or not there was a pre-deprivation
2 hearing?

3 MS. HANSFORD: Well, so exactly. In
4 that case, there wasn't -- the Court didn't have
5 to say -- it didn't have to justify why it was
6 allowed to do prospective-only relief. And in
7 AAPC, this Court didn't have to justify why
8 prospective-only relief were required.

9 I think, if we lived in Respondents'
10 world where almost always prospective-only
11 relief was not an option, those cases could not
12 have come out the way they did because there's
13 no -- there's no reason that prospective-only
14 relief would be constitutionally permissible in
15 those cases but not in this one.

16 And I think, again, AAPC is a good
17 example. If you start in that case with the
18 premise that, no matter what, you have to do
19 retrospective relief, you -- you then get to a
20 place where you can't actually impose
21 retrospective liability on the people who made
22 government debt calls because they wouldn't have
23 enough notice. And then I think you would have
24 to get to the opposite result. In AAPC, you
25 would have to say we sever the whole statute

1 instead of just the exception if you start with
2 that premise.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas?

6 Justice Alito?

7 Justice Kagan?

8 Justice Gorsuch, anything further?

9 Justice Kavanaugh?

10 Justice Barrett?

11 Justice Jackson?

12 Thank you, counsel.

13 Mr. Geysler.

14 ORAL ARGUMENT OF DANIEL L. GEYSER

15 ON BEHALF OF THE RESPONDENTS

16 MR. GEYSER: Thank you, Mr. Chief

17 Justice, and may it please the Court:

18 Respondents are entitled to a refund
19 for the unconstitutional fees paid under the
20 2017 Act. Under a century of this Court's
21 jurisprudence, prospective-only relief is
22 insufficient to redress a past monetary injury.
23 If the government unlawfully collects funds, it
24 is required to rectify that violation with
25 meaningful backward-looking relief. It cannot

1 simply keep the unconstitutional fees and
2 promise not to do it again.

3 The government is also wrong that
4 Respondents somehow forfeited their rights by
5 failing to invoke a pre-deprivation remedy.
6 Under settled law, due process requires
7 retrospective relief unless an exclusive
8 pre-deprivation remedy is both clear and
9 certain. The government cannot meet any of
10 those conditions here, where the code authorizes
11 the same remedies and the same relief before or
12 after payment.

13 The government finally responds that
14 if it can't simply keep the money, this Court,
15 acting alone, should authorize what Congress has
16 refused to do: implement a clawback program
17 seeking 800 percent higher fees in administrator
18 districts over a half decade after the fact.
19 This extreme proposal invites chaos in
20 bankruptcy courts and promises an administrative
21 morass.

22 It is neither legally nor practically
23 feasible, and there is zero indication Congress
24 would endorse a severe retroactive imposition,
25 just as Congress refused to apply the 2020 Act

1 retroactively. The government has not
2 identified any statutory authority for
3 unleashing a massive fee campaign across two
4 states, reopening closed and final cases,
5 disturbing confirmed and consummated plans, and
6 somehow overriding multiple provisions of the
7 Bankruptcy Code.

8 Even when construing an actual
9 statute, this Court refuses to apply provisions
10 retroactively unless the political branches have
11 clearly confronted and accepted the acute costs
12 and unmistakable language.

13 It is stunning for the government to
14 ask this Court, without a hint of authority from
15 Congress, to impose this kind of profound
16 retroactive cost on dozens of bankruptcies and
17 hundreds or thousands of stakeholders across two
18 separate states. That is a policy decision
19 reserved for the political branches, and it is
20 Congress's alone to make.

21 I welcome the Court's questions.

22 JUSTICE THOMAS: Would you elaborate a
23 bit more on your pre-deprivation argument?

24 MR. GEYSER: Sure. So the -- so the
25 -- I'm sorry, the pre-deprivation argument that

1 we -- that we had a right or didn't have a right
2 for pre-deprivation relief? To make --

3 JUSTICE THOMAS: That you did -- that
4 the -- well, the argument is that if there is a
5 pre-deprivation relief available,
6 pre-deprivation relief is available, and you
7 didn't take advantage of it, then you are
8 hard-pressed to make the arguments that you're
9 making now.

10 And I'd like you to respond, because
11 the government seems to be of the view that your
12 retrospective argument cannot survive because
13 you did have that available.

14 MR. GEYSER: Sure. I'm sorry, Justice
15 Thomas. So the -- under this Court's cases, now
16 it is true that McKesson and Harper suggested in
17 cases where there was not both a pre-deprivation
18 and a post-deprivation --

19 JUSTICE THOMAS: Yeah.

20 MR. GEYSER: -- remedy that
21 pre-deprivation relief might be enough. When
22 that question was presented in both Reich and
23 Newsweek, this Court couldn't have been clearer.
24 It said that there has to be an exclusive
25 pre-deprivation remedy.

1 And the government concedes in this
2 case that this remedy under the code is not
3 exclusive. Parties have the absolute right, and
4 they've had it for a long time, where they can
5 assert a challenge to the fees before or after
6 the fact.

7 The exact same remedies are available
8 before and after the fact. No one is on notice,
9 just looking to first principles, that they are
10 forfeiting their right to challenge an
11 unconstitutional fee unless they object in
12 advance.

13 That's exactly -- that was the core
14 rationale of Reich and Newsweek. It is -- that
15 is in also the bait and switch. And it wasn't
16 premised on the fact that there was an
17 affirmative statute that says we'll give you
18 your fees after the fact.

19 It was based on the fact that the
20 government was saying in advance if they want to
21 rely on a predeprivation remedy to foreclose a
22 post-deprivation remedy, that if you have a
23 problem with this, this is your one and only
24 time to raise it. The government can't say the
25 Bankruptcy Code authorizes these challenges

1 before or later, but, in fact, now we're
2 deciding you should have done it before, even
3 though there was absolutely no -- no notice of
4 that whatsoever.

5 And I think Reich and Newsweek
6 couldn't be clearer on that.

7 JUSTICE SOTOMAYOR: But -- but those
8 cases had to do with raising the objection at
9 all. Nobody stopped you from getting
10 prospective relief. You've gotten the treatment
11 of equality that you sought.

12 You came in and said, I'm being
13 treated unequally --

14 JUSTICE THOMAS: Yeah.

15 JUSTICE SOTOMAYOR: -- and I want to
16 be treated equally. And the government's saying
17 you're right, you were treated unequally, now
18 everybody has to pay the same fee. You don't
19 like that answer, but you got a remedy.

20 MR. GEYSER: Well --

21 JUSTICE SOTOMAYOR: Those other two
22 cases had to do with situations where you're
23 being told you're not going to be able to get
24 the legal issue resolved. You're not going to
25 be able to resolve the inequality at all.

1 MR. GEYSER: No, Justice Sotomayor.
2 And to be very clear, Reich and Newsweek both
3 ended by saying we'll remand for the court --
4 for the -- for the -- the state in those cases
5 to provide meaningful backward-looking relief,
6 consistent with the Court's mandate in McKesson
7 and Harper.

8 And -- and to also be very clear, in
9 those cases, they again said the fact that there
10 was a pre-deprivation remedy, and it was
11 undisputed in those cases that there was
12 absolutely a pre-deprivation remedy, had the
13 parties invoked it, they would have been just
14 fine. But there also was a post-deprivation
15 option.

16 And unless the state makes clear in
17 advance, again, this is just fundamental due
18 process 101, you have to make clear in advance,
19 providing fair notice to a reasonable party that
20 if you don't invoke the remedy in advance,
21 you're forfeiting something after the fact. And
22 I don't --

23 JUSTICE JACKSON: The thing that I'm
24 struggling with is understanding what difference
25 it makes in this particular situation whether

1 you had a pre- or post-deprivation remedy when
2 it seems pretty clear that making that claim
3 leads to the determination not that you pay less
4 but that everybody pays more.

5 Do you -- do you -- do you concede
6 that that's Congress's intention not only sort
7 of initially but also as reinforced in the
8 legislation that it enacted after this problem
9 came to light?

10 MR. GEYSER: Absolutely not, Your
11 Honor. And just to be clear, if you agree with
12 me that then the -- that the solution then is
13 either leveling up or leveling down, then I
14 think that that would be agreeing that a
15 prospective-only remedy is off the table, as I
16 think it quite clearly is.

17 Now the question is, should you level
18 up or level down? Now the government has
19 suggested that this is as simple as sending out
20 48 bills to --

21 JUSTICE JACKSON: No, the -- the
22 government has suggested that it's Congress's
23 intent that actually is what we should care
24 about in making that determination. And so my
25 question to you is, do you dispute that Congress

1 wanted everyone to pay the higher fee?

2 MR. GEYSER: We -- we -- we do -- we
3 dispute it. It's a yes-and-no answer, and if I
4 could explain why?

5 JUSTICE JACKSON: Okay.

6 MR. GEYSER: So it's -- we don't
7 dispute that if Congress could go back in time
8 from day one, they're not faced with any
9 retroactivity problems, they're not faced with
10 the prospect of opening closed and final cases,
11 disturbing final confirmation orders that are
12 non-appealable at this point, Congress would
13 have done this correctly if someone had tapped
14 them on the shoulder and said the 2017 Act has a
15 flaw, you should fix this.

16 But we definitely dispute --

17 JUSTICE JACKSON: And how they would
18 have corrected it would -- was not to lower
19 everybody's fees to the BA level. How they
20 would have corrected it would be to say
21 everybody has to pay the higher fee?

22 MR. GEYSER: Absolutely, but that's
23 not a choice Congress has today.

24 JUSTICE JACKSON: Why is that not a
25 choice they have today?

1 MR. GEYSER: Because Congress hasn't
2 yet invented a time travel machine. They can't
3 go back in time and say, we will now fix this in
4 advance so we don't have this profound
5 retroactivity problem.

6 JUSTICE JACKSON: No, no, no. I -- I
7 --

8 MR. GEYSER: But --

9 JUSTICE JACKSON: -- I guess I don't
10 understand. I mean, back in the day, the
11 problem was that the higher fee level that
12 Congress implemented in the statute wasn't being
13 applied to everyone. And I appreciate that it
14 was being applied to your client.

15 But you're asking now for a refund for
16 that period of time so that the remedy is to
17 make your client pay less, and that's how we're
18 going to make it equal.

19 And I'm just saying I don't see
20 anything in the legislative history, in the, you
21 know, way in which this entire scheme has
22 developed that would suggest that that's what
23 Congress would have intended.

24 MR. GEYSER: Well, I -- I can do one
25 better than legislative history because the 2020

1 Act said we're going to fix the problem and
2 we're going to fix it prospectively only. That
3 was Congress's determination that --

4 JUSTICE JACKSON: I don't see why that
5 doesn't hurt you.

6 MR. GEYSER: Oh.

7 JUSTICE JACKSON: You're asking for a
8 refund.

9 MR. GEYSER: Well, we --

10 JUSTICE JACKSON: The government is
11 saying yes, right.

12 MR. GEYSER: But, no, Your Honor, I
13 think it helps us a lot. In the 2020 Act,
14 Congress recognized that there is a problem that
15 we need to fix. And they even said in the
16 preamble to the Act -- and, again, this isn't
17 legislative history, this is in the Act itself.
18 They said that the debtors in the administrator
19 districts should have been paying this all
20 along.

21 And you would expect then, if Congress
22 were fine with retroactive implication, a
23 retroactive clawback, the next sentence would be
24 and now they have to pay those fees. But
25 Congress --

1 JUSTICE KAGAN: No. So I take the
2 point, Mr. Geyser, that what Congress really
3 wanted was a prospective and don't bother us
4 about the past, and that seems fair enough. And
5 maybe it supports Ms. Hansford if there weren't
6 a constitutional problem, which, of course, you
7 say there is as to the prospectivity.

8 But as to the -- let's put
9 prospectivity aside, and you have to level by
10 refund or level by collection. I forget which
11 one is up and which one is down in this context.
12 It seems -- it seems really hard to figure out
13 what Congress wanted because it didn't know that
14 everything was going to get messed up in this
15 way.

16 But we do know a couple of things,
17 that Congress back in the past, before
18 everything got messed up, wanted higher and
19 equalized fees, and we also know that Congress
20 wants a program which is entirely self-funded
21 and which does not impose burdens on the
22 taxpayer.

23 And when you put the former, which I
24 agree is sort of like well back in the past with
25 the latter, which is continual, Congress never

1 wants to impose burdens on the taxpayer with
2 respect to bankruptcy, you know, it thinks that
3 the people who use bankruptcy should pay for
4 bankruptcy, then it seems to me that there's a
5 pretty strong case that Ms. Hansford says that
6 it should be equalization by collection.

7 MR. GEYSER: Well, Your Honor, I think
8 then, if that's true, then it's up to Congress
9 to say that and I think for a few reasons.

10 The first is that that would be a
11 retroactive imposition. We can -- we can
12 disagree whether it's impermissibly retroactive,
13 where it actually would be unconstitutional
14 under the Due Process Clause to try that kind of
15 remedy, but it is at least severely retroactive.

16 And if it is, it would be
17 extraordinary for this Court, I can't think of a
18 single case where this Court has said in
19 fashioning a remedy it can ignore the fact that
20 the remedy that the Court itself would be
21 unleashing through a judge-made order, it has to
22 make up this judge-made remedy and then it has
23 to make up that that same judge-made remedy
24 applies retroactively, which is strongly
25 disfavored in the law. So I -- so I think

1 that's one major obstacle.

2 A second major obstacle is that the
3 government's suggestion of just sending out
4 bills to debtors is simply wrong. That's not
5 the way bankruptcy works.

6 And, in fact, the government's
7 proposal would violate multiple sections of the
8 code. And they can't just wipe -- just waive
9 away those violations. If Congress wants to set
10 aside affirmative provisions of the United
11 States Code and the Bankruptcy Code that bar the
12 government's relief, then Congress can do that,
13 but I don't think this Court can.

14 I don't think this Court can authorize
15 a remedy that's inconsistent with the Bankruptcy
16 Code. And there are multiple provisions --

17 JUSTICE SOTOMAYOR: I'm sorry. Why do
18 we care? Why do you care? I mean, you cared
19 about being treated unequally. You're being
20 told you'll be treated equally. That someone
21 else may get a pass, why is that hurting you?

22 MR. GEYSER: It -- it --

23 JUSTICE SOTOMAYOR: Meaning that as
24 your opposing counsel pointed out, whether it
25 was Morales-Santana, whether it was the robocall

1 case, there were people who received benefits
2 that they shouldn't have and we took them --
3 there were citizens who shouldn't have been
4 citizens. There are people who made robocalls
5 that shouldn't have been penalized. They --
6 some got a free pass and some got penalties.

7 MR. GEYSER: Well, the reason --

8 JUSTICE SOTOMAYOR: You're -- you're
9 -- you're saying that due process requires that
10 somehow, because we're worried about someone
11 else's rights, we shouldn't let the government
12 at least try or order it to try. And some of
13 those people might be successful in saying I
14 don't have to pay and some might not be. The
15 courts below will figure that out.

16 MR. GEYSER: Your Honor, the -- the
17 reason that we care is that we're entitled to
18 meaningful backward-looking relief, which this
19 Court has made clear is not just saying we're
20 going to in theory correct it. It has to apply
21 it and enforce it. That's the words that
22 McKesson used, playing off language that goes
23 back a century in this Court's cases.

24 So it matters very --

25 JUSTICE SOTOMAYOR: So the

1 government's told now you go clawback. I don't
2 know how they're going to do it. And -- and --
3 and I don't know why we have to answer that
4 question.

5 MR. GEYSER: Oh, I think you do. And
6 if you don't, this is what's going to happen.
7 They're going to try somehow, some way -- I
8 agree with Justice Gorsuch, I still have no idea
9 how they're going to do this -- to collect these
10 funds from the administrator districts.

11 JUSTICE SOTOMAYOR: They've got 10 big
12 companies that are still in bankruptcy,
13 31 percent recovery. I have to tell you, on bad
14 debt, 31 percent is a great recovery.

15 MR. GEYSER: But -- but it's not so
16 good when you're trying to equalize an
17 unconstitutional scheme that's been imposed on
18 the taxpayers. When McKesson suggested the
19 possibility that a few people slipping through
20 the cracks here and there might be enough, they
21 didn't say that 35 percent of the people
22 slipping through the cracks would be sufficient.
23 But --

24 JUSTICE BARRETT: Mr. Geyser, can I
25 ask -- oh, sorry. Finish.

1 MR. GEYSER: No.

2 JUSTICE BARRETT: I was just going to
3 ask you, back to this question about prospective
4 and retrospective relief -- and I -- I'm not
5 sure if the answer to this isn't a loaded
6 question -- does it matter if the request was
7 for equitable relief or injunctive relief versus
8 money damages?

9 I mean, it seems to me Justice Jackson
10 asked earlier, do we have any cases outside of
11 the tax context? And I wondered that too, you
12 know, outside of the Dormant Commerce Clause
13 context or the tax context.

14 But, as I was sitting down, like, with
15 my law clerk and we were debating this, we were
16 trying to figure out, in many equal protection
17 cases, which would be, you know, similar to the
18 Uniformity Clause, where you're talking about
19 discriminatory treatment, the kind of relief
20 sought is just to end the disparity moving
21 forward and it's equitable relief that's sought,
22 which seems to me a possible distinction between
23 citizenship and -- and those sorts of things.

24 And, here, what -- what you asked for
25 is money. Does that -- does that matter? I

1 don't know the answer to that question.

2 MR. GEYSER: I -- I think it does
3 matter in the sense that when you look at this
4 Court's cases -- and, you know, my -- my very
5 able friends, they would tell you if they had
6 better authority than an immigration case where
7 retroactive relief is precluded by the
8 Constitution and a robocall case where the party
9 was seeking prospective-only relief. All of
10 this Court's cases dealing with prospective-only
11 treatment is because that's what the party asked
12 for. So it was a very easy question for the
13 Court.

14 And this is where the language comes
15 from where the Court says, well, what would
16 Congress want? The Court is trying to conform
17 the statute to meet the constitutional standard,
18 and all they have to do is -- they're asking the
19 same question today as they would have asked all
20 the way going back to the beginning when the
21 statute was originally passed. What would
22 Congress have done at that moment had they known
23 the right answer?

24 That's a very different question when
25 you have time that has passed, you have a

1 constitutional exaction, which is an invalid fee
2 that's been collected, and now we have to figure
3 out how to provide meaningful backward-looking
4 relief.

5 And the tax cases too, it's not --
6 Dormant Commerce Clause cases, they do involve,
7 basically, disparate treatment. It's saying
8 you're favoring in-state people over
9 out-of-state people. It's -- I think it's a
10 very close parallel to the uniformity problem.

11 And some of this Court's cases also
12 dealt with equal protection claims where someone
13 was exacted some sort of money that -- and it's
14 not a windfall, and it's not a question of they
15 should have paid it anyway. The point is that
16 if Congress wants or a state wants someone to
17 pay money, they have to do it under a
18 constitutional scheme.

19 And if they haven't -- if they haven't
20 done that, then their choices are either to
21 level up or level down. And I agree the
22 terminology is confusing. It's actually flipped
23 back and forth at each stage of, I think, all of
24 these cases that I know of. But the -- in this
25 case, a clawback remedy simply isn't an option.

1 And -- and I want to be very clear why
2 that is. One is that there is a constitutional
3 impediment to it. The administrator district
4 debtors will have a solid due process claim that
5 this is impermissibly retroactive.

6 JUSTICE JACKSON: But they're not
7 before us. Shouldn't we let them make that
8 claim in the next case?

9 MR. GEYSER: Your Honor, then what
10 will happen is, if that claim succeeds, this
11 case will somehow have to come back to this
12 Court because it will turn out that, in fact,
13 the government had one permissible option,
14 providing a refund, because the clawback remedy
15 doesn't work.

16 But I think you can see right now even
17 from the former bankruptcy judges' brief that
18 even putting the constitutional concern aside,
19 there are provisions of the Bankruptcy Code that
20 foreclose what the government wants to do. I
21 mean, they -- when they say they're just sending
22 out a bill, they're not sending out a bill.
23 They have to go into the bankruptcy case; they
24 have to upset a final and non-appealable
25 confirmation order. Right away you're violating

1 Section 1141 of the Bankruptcy Code.

2 JUSTICE JACKSON: What if the
3 government's answer is we don't want to do that?
4 Our -- our solution is move on. Our solution --
5 and you're -- you're saying that's not
6 constitutionally permitted, and I'm trying to
7 understand why.

8 MR. GEYSER: For -- for exactly the
9 same reasons that -- the government's arguments
10 should be familiar to this Court because it's
11 the exact argument that Florida made in McKesson
12 and Harper. Florida said we fixed the problem
13 going forward, we promise not to do it again,
14 and we would rather keep the taxes that we
15 collected under this unconstitutional scheme; in
16 fact, refunding them would just be a windfall to
17 the favored class. And this Court said that's
18 not good enough.

19 Under the Constitution -- again, this
20 is going back for -- for over a century now of
21 this Court's cases -- when the government exacts
22 money that it's not allowed to have, it has to
23 provide meaningful backward-looking relief. It
24 can't just --

25 JUSTICE JACKSON: Why do you say

1 they're not allowed to have it, though, in this
2 situation? This is what -- I feel like you're
3 conflating different legal frameworks, and
4 that's where I'm getting confused. I thought
5 you conceded that they could have the higher
6 fee, that everybody agrees that Congress wanted
7 the higher fee. So what is it about this that
8 they're not allowed to have?

9 MR. GEYSER: It's the exact same thing
10 they're not allowed to have in equal protection
11 violation or Dormant Commerce Clause violation.
12 No one in McKesson and Harper was saying that a
13 state couldn't enact a tax that applies evenly
14 to everyone, and the businesses that were
15 objecting in that case would, in fact, have to
16 pay it. But those businesses don't have to pay
17 a fee that's been exacted under a
18 constitutionally flawed scheme.

19 I think that's settled under McKesson,
20 Harper, going back to the 1920s, dealing with
21 Montana National Bank and Bennett.

22 JUSTICE KAVANAUGH: You want
23 perfection, though, in how this is all going to
24 work out. But, even under your approach,
25 there's not going to be perfection, as the

1 government details at length, because the
2 refunds will not get to everyone.

3 MR. GEYSER: Well, first, we -- we
4 disagree with them. We're far more --

5 JUSTICE KAVANAUGH: So, if there's not
6 -- there's not perfection on the collection
7 side -- I understand it's not going to be a
8 hundred percent perfection, but it's not going
9 to be perfection under your approach either. So
10 --

11 MR. GEYSER: So a -- a -- a few
12 responses to that. The -- the first is that
13 it's a --

14 JUSTICE KAVANAUGH: Not even close to
15 perfection.

16 MR. GEYSER: Well, I mean, under the
17 former bankruptcy judges' brief, there -- they
18 suggest there is a high possibility the
19 government won't collect a single cent unless
20 they can override and set aside the Bankruptcy
21 Code.

22 JUSTICE KAVANAUGH: Yeah, that's four
23 bankruptcy judges, I understand. They're -- I
24 get it. But, you know, the government says they
25 could get more, and we'll see.

1 But talk about my question, which is
2 about there's not going to be close to
3 perfection under your approach either.

4 MR. GEYSER: Well, first, again, we're
5 -- we're not sure about that. Normally, when --
6 it's very easy to give people money while it can
7 be very hard to take money from people.

8 Normally, if there's a financial
9 incentive, there's an easy way to collect it.
10 There's a class action pending right now in the
11 Court of Federal Claims, and I'm fairly
12 confident that those lawyers who are fairly
13 industrious will find a way to distribute the
14 money. If they do get the money, which they
15 will, they can distribute it to the plans.

16 Almost every bankruptcy plan has
17 provisions for what to do with assets that come
18 into the plan after confirmation. That is just
19 a settled, you know, component of a bankruptcy
20 plan. So it's really as simple as looking up
21 who is entitled to it, sending the check in, and
22 it's distributed according to the plan terms.

23 JUSTICE KAVANAUGH: One other
24 question, which is, if the bankruptcy
25 administrators in Alabama and North Carolina had

1 followed the standing order and collected the
2 proper fees back in 2018, you would have paid
3 the same amount that you paid, correct?

4 MR. GEYSER: That -- that would have
5 eliminated the constitutional prejudice that we
6 are currently suffering.

7 JUSTICE KAVANAUGH: You would have
8 paid the same amount that you paid, correct?

9 MR. GEYSER: Yes, we would have -- we
10 would have paid the same amount, just as every
11 single challenger in McKesson and Harper and
12 anyone objecting to a Dormant Commerce Clause
13 claim or equal protection claim would have paid
14 the same amount had Congress extended the
15 benefits uniformly. But the fact is, when they
16 don't do that, that's where the problem arises.

17 Now I do want to provide another
18 answer to Your Honor's question about, you know,
19 what about the inability to get full refunds on
20 our side?

21 Now, again, we think it's going to be
22 pretty close to a hundred percent collection,
23 but even if that's wrong, the provision of full
24 relief entitles a hundred percent of the injured
25 class to collect. The only people at that point

1 who wouldn't collect would be people who are
2 voluntarily electing not to do it. So they
3 would -- they would not suffer any
4 constitutional prejudice.

5 The constitutional prejudice is, in
6 fact, cured in full by providing a full refund.
7 That's the meaningful backward-looking relief.
8 Then the Court doesn't even have to worry how do
9 we balance these two things? The -- the entire
10 injured class, anyone who wants to assert their
11 rights, will be made whole by a refund.

12 And the other point I'd like to make
13 too is even if the Court -- and this goes
14 somewhat to what does Congress really want here.
15 The -- the Court could order a refund, and if my
16 friends are right that there's actually no due
17 process problem with asking people to pay money,
18 you know, well over half a decade after the fact
19 and there's no problem with disturbing closed
20 and final bankruptcy cases where bankruptcy puts
21 a premium on finality, there's no problem with
22 overriding a confirmed plan of reorganization
23 that is final, non-appealable, then Congress can
24 pass a law tomorrow, the day after this Court's
25 decision, that says, in fact, we don't want

1 refunds; in fact, claw back those funds.

2 And then my prediction is the debtors
3 in the administrator districts will challenge
4 that on due process grounds, and I believe
5 they'll probably prevail. But, at least at that
6 point, it's Congress that's doing the work
7 instead of the government coming to this Court
8 and saying why don't you do what we didn't do.

9 In 2020, Congress could have had a
10 retroactive imposition. They refused to do
11 that, presumably because they didn't want to
12 take the political heat from the stakeholders in
13 the administrator districts of imposing these
14 fees after the fact. And, again, it's not as
15 simple as -- as bothering the debtors. And this
16 also goes to other problems in the Bankruptcy
17 Code with --

18 JUSTICE KAVANAUGH: Congress could
19 have done it your way too.

20 MR. GEYSER: Congress could have and
21 --

22 JUSTICE KAVANAUGH: They didn't.

23 MR. GEYSER: And -- and they didn't.

24 JUSTICE KAVANAUGH: Presumably because
25 it's 326 million and they don't -- that would be

1 inconsistent with the usual principle that
2 bankruptcy pays for itself.

3 MR. GEYSER: And -- and there -- there
4 is a surplus in the -- in the United States
5 Trustee fund that could probably cover the --
6 the majority, if not all, of what's owed. And
7 if Congress is concerned about that, Congress
8 can pass a new tax tomorrow that reimburses the
9 taxpayers, taxing the users of the bankruptcy
10 system. But that -- that's not an excuse.

11 Florida made similar objections in
12 McKesson and Harper. Florida said, we really
13 have good uses for this money and it's really
14 going to hurt us if we have to give this back.
15 It's actually going to create economic turmoil.

16 And the Court's answer was, that's too
17 bad. You passed an unconstitutional tax, you
18 need to provide meaningful backward-looking
19 relief, so you either have to stomach the
20 political cost of imposing that tax
21 retroactively on the favored class and deal with
22 the political fallout, or you have to provide
23 refunds. Those are your two constitutional --

24 JUSTICE KAGAN: But the thing that's
25 different, of course, here is that the only

1 constitutional problem with this was an equality
2 problem, and so it could be fixed either way.

3 And as Justice Kavanaugh just said,
4 everything we know about Congress not wanting to
5 impose bankruptcy costs on taxpayers suggests
6 that if it's at all possible, it should be done
7 by collection.

8 MR. GEYSER: Well, I -- I don't think
9 that is everything we know because, again,
10 Congress could have imposed that fee
11 retroactively in 2020.

12 JUSTICE KAGAN: It could have done
13 either one. It didn't know it was having this
14 problem. Now, you know, so this is a -- a
15 little bit of a constructive enterprise,
16 granted, but we can apply to a constructive
17 enterprise the things we know about how Congress
18 funds bankruptcy.

19 MR. GEYSER: Sure, Your Honor. But,
20 normally, again, if this were an actual statute
21 that just said collect fees in administrator
22 districts, this Court would not construe that
23 statute to authorize a retroactive remedy
24 tacking on fees five years after the fact unless
25 Congress spoke clearly and unmistakably.

1 When -- when even the Court in the
2 Bowen case asked does an agency have the general
3 authority just as a background matter to apply
4 statutes retroactively when a regulation is
5 struck down for technical problems, they're
6 basically trying to say, look, we goofed. We're
7 going to do it right this time and cover the
8 full period. This Court said the agency doesn't
9 have that authority.

10 So I think it's quite remarkable for
11 the government to say that judges themselves,
12 who -- who the -- the court is not politically
13 accountable, if someone is upset when they're
14 asked to pay these refunds, they don't know who
15 to call. I -- I hope they don't call, you know,
16 the Chief Justice and say that we wish you
17 hadn't done this. If Congress -- if Congress
18 wants to pass this law, Congress can do it.

19 And, again, if the government is
20 confident --

21 JUSTICE KAGAN: You're creating a
22 conflict for the Chief Justice now.

23 (Laughter.)

24 CHIEF JUSTICE ROBERTS: Yeah. And
25 just to be clear, I didn't do it.

1 (Laughter.)

2 MR. GEYSER: And -- and we --

3 JUSTICE JACKSON: Can I ask you, how
4 do you square your answer about the requirement
5 of meaningful backward-looking relief in -- in
6 this situation with the cases like
7 Morales-Santana, where they didn't get
8 backward-looking relief?

9 MR. GEYSER: Sure, Your Honor.
10 There -- there are literally two cases the
11 government -- actually, there are three because
12 they added -- they tacked on one in their reply
13 brief, and I'll start with that one first --

14 JUSTICE JACKSON: But they are Supreme
15 Court cases.

16 MR. GEYSER: They are. But the third
17 one is the easiest and I'll get -- the first --
18 the third one, the Manhart decision, is a Title
19 VII case. It applies the statutory equity --
20 equity standard, and Title VII specifically says
21 that retroactive remedies are not required, and
22 the Court had good reasons in that case not to
23 require them. That is very different than the
24 constitutional standard that does require it.

25 In Morales-Santana, that is an

1 immigration case where it was impossible to
2 provide retroactive remedies, and the -- the
3 challenger in that case was seeking prospective
4 relief. That challenger did not say --

5 JUSTICE JACKSON: So is it -- is it
6 just about what they ask for, or was -- is it
7 about the possibility of getting it? Because
8 there's a world in which what we're talking
9 about here is how impossible it is to give a
10 retrospective remedy in this case either
11 leveling up or leveling down.

12 You've made very ably the argument for
13 why it's impossible to do it retrospectively
14 leveling up. And Justice Kagan points to the
15 argument about why it's impossible to do it
16 retrospectively leveling down because it's
17 inconsistent with the entirety of the bankruptcy
18 scheme as Congress has laid it forward.

19 So I guess I'm just trying to
20 understand why we couldn't rely on something
21 like Morales-Santana and the fact that it -- if
22 it's hard to do or impossible to do, then we can
23 just go prospective.

24 MR. GEYSER: Well, Your Honor, I think
25 that if you want to read something from

1 Morales-Santana, it's that the government's
2 theory of clawing back funds is not a
3 permissible theory in this case. It's not an
4 option they have because they need affirmative
5 relief from Congress to --

6 JUSTICE JACKSON: Right. I'd like to
7 read it broader.

8 MR. GEYSER: Okay.

9 JUSTICE JACKSON: I'd like to read it
10 broader than that to --

11 MR. GEYSER: Yeah. Well --

12 JUSTICE JACKSON: -- to support the
13 view that there's nothing unconstitutionally
14 problematic about necessarily a prospective-only
15 remedy.

16 MR. GEYSER: I -- I think, if this
17 Court wanted to adopt that theory, it would have
18 to affirmatively overrule Reich and Newsweek.
19 It would really be picking a direct fight in a
20 way that can't be squared with those cases.

21 Those cases made abundantly clear that
22 unless there is an exclusive pre-deprivation
23 remedy, the government has to provide meaningful
24 backward-looking relief. So -- and, again, when
25 we look at the most directly --

1 JUSTICE KAVANAUGH: Have you dealt
2 with all three of the government's cases yet?

3 MR. GEYSER: I -- I have not. So I've
4 dealt with Manhart, which is the one in the
5 reply.

6 We have Morales-Santana, where the
7 Court specifically acknowledged -- there was
8 a -- there was a two-Justice concurrence that
9 said that because of the plenary authority of
10 Congress over citizenship, the Court doesn't
11 have the power to adjust citizenship looking
12 backwards. It has -- it has to do whatever
13 Congress has said in terms of whether citizen is
14 -- citizenship's conferred or not.

15 And the majority opinion didn't spell
16 out that rationale, but if you look at the pages
17 in the briefs, the parties' briefs that they
18 cite for this very point, it spells out exactly
19 that rationale.

20 And the third case is the robocall
21 case, which, with -- with the greatest of
22 respect, was --

23 JUSTICE KAVANAUGH: You disagree with.

24 MR. GEYSER: Well, we -- we --
25 actually, I'm not even sure we do. The way I

1 read the footnote in that case, and it was a
2 single footnote, it didn't have any rationale or
3 analysis, and the parties' briefs barely did
4 either. It was a single page --

5 (Laughter.)

6 MR. GEYSER: -- it was a single page
7 of the parties' briefs. And I look at the --
8 the language in that footnote as reserving the
9 question. It wasn't resolving it. It said
10 the -- the result in this case does not lift the
11 fines that have been imposed.

12 It didn't necessarily say that if
13 someone had brought that challenge, because,
14 again, the petition -- the challengers in that
15 case, they didn't have any fines. Their
16 contention was going forward seeking prospective
17 relief, we'd like to make these calls. And the
18 Court sensibly said you're violating a general
19 robocall provision that's been in place for
20 decades and so you can't do that.

21 But that's very, very different, the
22 fact that they're relying, the government's
23 relying on a case like that instead of cases
24 involving an illegal exaction of money under a
25 scheme that treats one class differently than

1 another, like, it doesn't take a whole lot to
2 say which one of these are more analogous, and
3 the government --

4 CHIEF JUSTICE ROBERTS: Thank you.
5 Thank you, counsel.

6 Justice Thomas?

7 Justice Alito?

8 Justice Gorsuch?

9 Justice Barrett?

10 Justice Jackson?

11 JUSTICE JACKSON: Can I just -- I just
12 have one more little thing, which is I'm
13 wondering if it matters that there are
14 individual rights at issue in some of these
15 equal protection cases.

16 It seems to me that this uniformity
17 constitutional provision that's at the heart of
18 this is really about limiting congressional
19 power. And I guess you could say the same is
20 true of the Commerce Clause. So I appreciate
21 that.

22 But is there something to the notion
23 of we're not going to necessarily worry about a
24 meaningful backward-looking monetary remedy for
25 a violation that is really about limiting

1 Congress's power and has been remedied because
2 Congress has changed the statute now and
3 everybody's being treated equally going forward?

4 MR. GEYSER: So I -- I think, Your
5 Honor, you -- you stole my first answer, which
6 is that it is exactly the same as the other
7 rights where the Court said you do have to
8 provide meaningful backward-looking relief.

9 The second is that this is
10 constraining Congress's authority, but it's
11 constraining Congress's authority to protect
12 individuals. It's so that certain debtors don't
13 find themselves disfavored with respect to other
14 debtors.

15 So I do think there is an individual
16 rights component to the right that's being
17 protected. And now that we've paid that money
18 under that unconstitutional scheme, if Congress
19 wants to say tomorrow to make this Court's job
20 very easy, it could say Congress hasn't spoken.
21 Normally, when the Court confronts these types
22 of questions, it gives the state or the
23 government a reasonable amount of time to
24 respond, and when they don't, they say the
25 injured party doesn't have to wait any longer.

1 We're going to order a refund.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Rebuttal, Ms. Hansford.

6 REBUTTAL ARGUMENT OF MASHA G. HANSFORD

7 ON BEHALF OF THE PETITIONER

8 MS. HANSFORD: Thank you, Mr. Chief
9 Justice. I want to start with Justice Barrett's
10 question of whether what the parties asked for
11 matters.

12 I think both in Levin versus
13 Department of Commerce and Morales-Santana
14 Footnote 29, the Court said that what the
15 parties asked for does not circumscribe the
16 relief offered and parties never asked for the
17 relief of the withdrawal of the benefit, and the
18 fact that you're allowed to withdraw the benefit
19 shows that you don't need to reward the
20 successful challenger. That was the case in
21 Morales-Santana. That was the case in AAPC.
22 Neither one got the relief they wanted, and when
23 this Court specifically addressed that and said
24 they may be no better off, but that is not a
25 problem.

1 To address the Manhart case that my
2 friend talked about, I do think that that is a
3 great example of a case that was about money.
4 There was a specific dispute as to whether money
5 should be paid back.

6 There was no question in that case
7 that women paid too much into pension funds
8 because they were women and were required for
9 that reason to pay too much. And the Court said
10 even in that circumstance that's illegal. Title
11 VII prevents it. There is a statutory
12 presumption of backpay that the statute provides
13 and still we're not going to award retrospective
14 relief because this was probably a good-faith
15 mistake, there were reasons for it, and the
16 financial impact nationwide would be too much.

17 I think that reasoning applies a
18 fortiori here because the Constitution does not
19 provide that backpay should be allowed. It does
20 not have a presumption of retrospective relief
21 in this context.

22 I would also point you to the Fulton
23 case. That is a tax case. That's where the --
24 I think what the Court normally does in cases
25 when it withdraws a benefit is it does it

1 prospectively. That's more comfortable. The
2 exception to that is the tax context because it
3 can't do it because of the due process overlay.
4 And so Fulton is a case where there was no
5 argument there was pre-deprivation relief, so it
6 had to be retrospective, but the Court left open
7 whether it's level up, level down. And on
8 remand, the court did impose additional
9 collections.

10 On the argument that the clawback
11 didn't work, I think, as my friend's exchange
12 with Justice Kavanaugh made clear, the refund
13 also won't work. And if you think the Court
14 needs to wait and see how well we do the
15 collections, well, before giving my friend a
16 refund, you need to wait and see whether we can
17 actually successfully refund the \$326 million,
18 and until we get to 322 million, things are
19 worse off from the Constitution's perspective
20 because the Constitution is not like the False
21 Claims Act for relators where there's a bounty
22 for being a successful challenger. All the
23 Constitution wants here is uniformity in one
24 direction or another. We're 99 percent of the
25 way there. And I think starting to give refunds

1 might make the Respondent happy, but it's not
2 going to be a more constitutional solution.

3 The -- the -- the last thing I would
4 talk about is congressional intent. And my
5 friend conceded that on day one, what Congress
6 would do is impose higher fees. But, of course,
7 the reason that Congress didn't do it on day one
8 is because my friend and others waited to bring
9 these suits. My friend waited for two years
10 after this was enacted to bring the suit. He
11 could have brought the suit earlier.

12 And Congress was incredibly proactive
13 here. It responded to the body of lower court
14 cases before they even reached this Court,
15 before the Siegel decision. If these suits had
16 been brought on day one, Congress could have
17 fixed it on day one. My friend never would have
18 been subject to the disparate treatment of some
19 BA debtors paying less. But he would not be
20 financially any better off because, of course,
21 his injury is not that he paid the 2.5 million
22 in fees that Congress wanted him to pay. It's
23 that these 48 debtors paid too little.

24 Just one tiny factual point, which is
25 my friend talks about how high this increase is,

1 800 percent higher. The fees were, oh, there
2 was a 1 percent cap on the fee increase. So my
3 friend's clients overpaid 2.8 million on a
4 billion dollars in disbursements. This is a fee
5 on the largest users who are best situated to
6 bear this.

7 So I guess I would just say that my
8 friend's remedy of refunds would undo the 2017
9 Act, which was meant to protect taxpayers, and
10 it would require them to pay hundreds of
11 millions of dollars to reimburse the bankruptcy
12 system's largest users.

13 It flies in the teeth of congressional
14 intent. It flies in the face of Congress's
15 specific findings in the 2020 Act, which not
16 only were that Congress always wanted these to
17 be uniform, but also Sections 2(a) and 2(b) of
18 the 2020 Act talk about Congress's specific
19 intent that the system be self-funded at no cost
20 to taxpayers. And the idea that Congress would
21 choose a refund remedy of undoing the 2017 Act
22 flies in the face of congressional intent and
23 the democratic process.

24 We ask the Court to reject that
25 approach and to reverse. Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 The case is submitted.

4 (Whereupon, at 12:35 p.m., the case
5 was submitted.)

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