

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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OFFICE OF THE UNITED STATES )  
TRUSTEE, )  
                                Petitioner, )  
                                v. ) No. 22-1238  
JOHN Q. HAMMONS FALL 2006, LLC, )  
ET AL., )  
                                Respondents. )  
- - - - -

Pages: 1 through 73  
Place: Washington, D.C.  
Date: January 9, 2024

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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 -- I think those cases  
18 make 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 -- I think that Reich  
10 is inapposite here because it's a  
11 bait-and-switch case, but I think even in Reich,  
12 a case where there was a bait and switch and  
13 there was a state statute that promised a  
14 refund, but, instead, the state courts tried to  
15 say no refund was available, even in that case,  
16 the Court left open a determination of relief  
17 consistent with McKesson, which could be  
18 leveling up or leveling 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 -- by one piece of this  
11 case, okay? I do agree that McKesson and Harper  
12 say, if you have a pre-deprivation mechanism to  
13 protect yourself, the government can level up or  
14 down because you should have taken advantage of  
15 your ability to 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 invoke 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, I -- you know, taking the premise  
19                  of your question there was pre-deprivation  
20                  relief, here, I think that the right solution  
21                  for everybody is the same solution that would  
22                  have happened had Respondents filed suit on day  
23                  one under the Declaratory Judgment Act.  The --  
24                  they would have obtained a ruling that would  
25                  say, yes, this is unconstitutionally un-uniform.

1 And 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 -- but I think the  
6 point 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 I -- so, I -- if -- if  
8 you're concerned about that set of cases, I  
9 would really urge you not to craft the remedy  
10 for 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 -- you're -- Justice  
20 Barrett's question is, how are you going to  
21 implement your 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 these -- those are closed cases  
20 where, okay, it's not somebody asking for  
21 something who might lose because his case is  
22 closed and he doesn't care anymore. You have to  
23 go claw it back from somebody whose case is  
24 closed. And I just haven't heard of anything  
25 quite like that 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 I -- so, to be  
12 clear, I don't think the order in this case  
13 would be an injunction to the BA districts to do  
14 that. The judgment in this case is the motion  
15 to redetermine fees is denied because  
16 Respondents paid the correct level. But I think  
17 this is a problem that arises anytime you have  
18 --

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

25 And -- and I think Justice Barrett's

1 question and mine is just, honestly, I haven't  
2 seen something like that before. How does it  
3 work?

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

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

9 MS. HANSFORD: Oh.

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

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

14 JUSTICE GORSUCH: Put aside the  
15 leveling down.

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

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

21 MS. HANSFORD: So the collection -- in  
22 the collection remedy --

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

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

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

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

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

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

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

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

23 JUSTICE GORSUCH: There's no judicial  
24 --

25 MS. HANSFORD: -- in Morales-Santana

1 said --

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

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

13 JUSTICE GORSUCH: Put those aside.  
14 Those are -- those are -- those are --

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

18 JUSTICE GORSUCH: Okay. Okay.

19 MS. HANSFORD: And in those cases, I  
20 do think --

21 JUSTICE GORSUCH: A third.

22 MS. HANSFORD: -- there's a statutory  
23 obligation --

24 JUSTICE GORSUCH: Okay.

25 MS. HANSFORD: -- to pay under

1 1129(a)(12).

2 JUSTICE GORSUCH: That's helpful.

3 JUSTICE JACKSON: Ms. --

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

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

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

25 JUSTICE JACKSON: Ms. Hansford --

1 MS. HANSFORD: -- those last pennies.

2 JUSTICE JACKSON: Ms. Hansford, I'm --  
3 I'm wondering whether this isn't -- I read your  
4 brief and the arguments that you're making as  
5 though the collection remedy was sort of like  
6 your second option, that -- that some of these  
7 problems that I -- concerns that I share and the  
8 problems that have been addressed are a reason  
9 why we wouldn't necessarily think that a  
10 retrospective remedy is appropriate.

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

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

1 not be perfect and would leave in place a larger  
2 disparity.

3 JUSTICE JACKSON: But wait. Why would  
4 we think --

5 MS. HANSFORD: It's all in the  
6 Constitution.

7 JUSTICE JACKSON: -- so why would we  
8 think that the retrospective is -- as -- there  
9 are three options here --

10 MS. HANSFORD: Yes.

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

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

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

25 So why would we -- what is the



1 argument for doing a retrospective remedy?

2 MS. HANSFORD: I -- I -- I think that  
3 you should not do a retrospective remedy. I --  
4 I completely agree. I think Respondents' only  
5 argument that that's required is an idea that  
6 the Due Process Clause compels it because there  
7 wasn't pre-deprivation relief here, and I don't  
8 think that's correct.

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

18 JUSTICE JACKSON: Yeah. And just to  
19 be clear, I don't know how I feel. You said you  
20 agree with me. I don't know. I'm just trying  
21 to understand what the -- the basis for saying  
22 we should do this remedial -- retrospectively  
23 is.

24 MS. HANSFORD: Yeah. And -- and so I  
25 -- I think that one reason that prospective

1 makes sense is because the -- the -- the  
2 disparity is so small and that you're not going  
3 to get to a smaller disparity by starting to  
4 give refunds. Yes, Mr. Geyser might be happy if  
5 his client gets \$2.5 million, but as a  
6 constitutional matter, that will be a disparity  
7 of 6.3 million instead of a disparity of 3.8  
8 overall. That's worse from the Constitution's  
9 perspective.

10 JUSTICE KAGAN: If I could understand  
11 your argument, I mean, you acknowledge that this  
12 prospective-only solution is one that depends on  
13 whether the party has been given a meaningful  
14 pre-deprivation remedy. Is that correct?

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

16 JUSTICE KAGAN: And others have  
17 brought up the fact that there are some people  
18 out there who actually took advantage of such a  
19 remedy --

20 MS. HANSFORD: Yes.

21 JUSTICE KAGAN: -- right? So would  
22 they -- would you be able to apply the  
23 prospective-only solution to them, or is this a  
24 prospective-only for Mr. Geyser's client, but  
25 there are other people out there who you would

1 have to acknowledge that prospective-only  
2 doesn't work?

3 MS. HANSFORD: So, Justice Kagan, I  
4 think the better answer is that prospective-only  
5 works for every single person, with the caveat I  
6 gave Justice Barrett that the people who invoked  
7 it are a small universe, so if you're worried  
8 about them, we -- please don't let that drive  
9 the decision.

10 The reason I think the answer is the  
11 same for everyone is the constitutional due  
12 process question is was there an opportunity for  
13 a pre-deprivation hearing, not whether you  
14 invoked it or not. And the fact that they had  
15 the opportunity for a pre-deprivation hearing  
16 meant that they were able to get a hearing on  
17 this question, and as McKesson says in Footnote  
18 21, that -- that's an additional safeguard that  
19 ensures that their property wasn't wrongfully  
20 taken. It wasn't here because they paid the  
21 right level of fees.

22 What was wrong all along is --

23 JUSTICE KAGAN: I guess I had thought  
24 of the McKesson line of cases as sort of a -- a  
25 forfeiture doctrine. It's like we're not going

1 to worry about you. If you were given a  
2 pre-deprivation remedy, you didn't take it, you  
3 now arrive at this situation, we don't really  
4 care if you overpaid.

5 But -- but -- but, if you think of it  
6 that way, you couldn't make the answer that you  
7 gave, right?

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

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

24 And we just want to make sure that  
25 because we took away from you the option of

1 getting a pre-deprivation hearing, you're no  
2 worse off. And I think that even those five  
3 debtors are no worse off because the right  
4 answer in their case was always you guys were  
5 paying the right amount. You are like the  
6 robocallers who are not collecting government  
7 debts. All along, you were supposed to pay the  
8 higher fees. The problem was some people were  
9 allowed to pay less, and the retrospective  
10 question is, do we need to go back and fix that?  
11 I think there are a lot of good reasons we don't  
12 need to do that.

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

25 JUSTICE JACKSON: I guess I don't

1 understand why the government is conceding what  
2 Justice Kagan said about the prospective-only  
3 remedy depending on whether there has been a  
4 meaningful pre-deprivation -- I -- I mean, I  
5 understand that comes from McKesson and the tax  
6 cases, but are those cases really on all fours  
7 with what's happening here? I could see a world  
8 -- have we ever applied those cases and that  
9 concept outside of the tax scenario?

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

20 And the reason that this issue and  
21 this requirement -- constitutional requirement  
22 of prospective-only relief only comes up in that  
23 context is because the tax context is a -- is a  
24 situation where we think the government can  
25 prevent you from challenging first, getting a

1 meaningful hearing first, and then arguing  
2 later.

3 JUSTICE JACKSON: What about the  
4 prospective-only remedies in the Morales-Santana  
5 scenario, et cetera? Did -- did that turn on  
6 whether or not there was a pre-deprivation  
7 hearing?

8 MS. HANSFORD: Well, I -- I -- so --  
9 so exactly. In that case, there wasn't -- the  
10 Court didn't have to say -- it didn't have to  
11 justify why it was allowed to do  
12 prospective-only relief. And in AAPC, this  
13 Court didn't have to justify why  
14 prospective-only relief were required.

15 I think, if we lived in Respondents'  
16 world where almost always prospective-only  
17 relief was not an option, those cases could not  
18 have come out the way they did because there's  
19 no -- there's no reason that prospective-only  
20 relief would be constitutionally permissible in  
21 those cases but not in this one.

22 And I think, again, AAPC is a good  
23 example. If you start in that case with the  
24 premise that, no matter what, you have to do  
25 retrospective relief, you -- you then get to a

1 -- a place where you can't actually impose  
2 retrospective liability on the people who made  
3 government debt calls because they wouldn't have  
4 enough notice. And then I think you would have  
5 to get -- get to the opposite result. In AAPC,  
6 you would have to say, we sever the whole  
7 statute instead of just the exception if you  
8 start with that premise.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Justice Thomas?

12 Justice Alito? Okay.

13 Justice Kagan?

14 Justice Gorsuch, anything further?

15 Good?

16 Justice Kavanaugh?

17 Justice Barrett?

18 Justice Jackson?

19 Thank you, counsel.

20 Mr. Geysler.

21 ORAL ARGUMENT OF DANIEL L. GEYSER

22 ON BEHALF OF THE RESPONDENTS

23 MR. GEYSER: Thank you, Mr. Chief

24 Justice, and may it please the Court:

25 Respondents are entitled to a refund



1 for the unconstitutional fees paid under the  
2 2017 Act. Under a century of this Court's  
3 jurisprudence, prospective-only relief is  
4 insufficient to redress a past monetary injury.  
5 If the government unlawfully collects funds, it  
6 is required to rectify that violation with  
7 meaningful backward-looking relief. It cannot  
8 simply keep the unconstitutional fees and  
9 promise not to do it again.

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

20           The government finally responds that  
21 if it can't simply keep the money, this Court,  
22 acting alone, should authorize what Congress has  
23 refused to do: implement a clawback program  
24 seeking 800 percent higher fees in administrator  
25 districts over a half decade after the fact.

1 This extreme proposal invites chaos in  
2 bankruptcy courts and promises an administrative  
3 morass.

4           It is neither legally nor practically  
5 feasible, and there is zero indication Congress  
6 would endorse a severe retroactive imposition,  
7 just as Congress refused to apply the 2020 Act  
8 retroactively. The government has not  
9 identified any statutory authority for  
10 unleashing a massive fee campaign across two  
11 states, reopening closed and final cases,  
12 disturbing confirmed and consummated plans, and  
13 somehow overriding multiple provisions of the  
14 Bankruptcy Code.

15           Even when construing an actual  
16 statute, this Court refuses to apply provisions  
17 retroactively unless the political branches have  
18 clearly confronted and accepted the acute costs  
19 and unmistakable language.

20           It is stunning for the government to  
21 ask this Court, without a hint of authority from  
22 Congress, to impose this kind of profound  
23 retroactive cost on dozens of bankruptcies and  
24 hundreds or thousands of stakeholders across two  
25 separate states. That is a policy decision

1 reserved for the political branches, and it is  
2 Congress's alone to make.

3 I welcome the Court's questions.

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

6 MR. GEYSER: Sure. So the -- so the  
7 -- I'm sorry, the -- the pre-deprivation  
8 argument that we -- that we had a right or  
9 didn't have a right for pre-deprivation relief?  
10 To make --

11 JUSTICE THOMAS: That you did -- that  
12 the -- well, the argument is that if there is a  
13 pre-deprivation relief available, if -- if  
14 pre-deprivation relief is available, and you  
15 didn't take advantage of it, then you are  
16 hard-pressed to make the arguments that you're  
17 making now.

18 And I'd like you to respond, because  
19 the government seems to be of the view that your  
20 retrospective argument cannot survive because  
21 you did have that available.

22 MR. GEYSER: Sure. I'm sorry, Justice  
23 Thomas. So the -- under this Court's cases, now  
24 it is true that McKesson and Harper suggested in  
25 cases where there was not both a pre-deprivation

1 and a post-deprivation --

2 JUSTICE THOMAS: Yeah.

3 MR. GEYSER: -- remedy that  
4 pre-deprivation relief might be enough. When  
5 that question was presented in both Reich and  
6 Newsweek, this Court couldn't have been clearer.  
7 It said that there has to be an exclusive  
8 pre-deprivation remedy.

9 And the government concedes in this  
10 case that this remedy under the code is not  
11 exclusive. Parties have -- the absolute right,  
12 and they've had it for a long time, where they  
13 can assert a challenge to the fees before or  
14 after the fact.

15 The exact same remedies are available  
16 before and after the fact. No one is on notice,  
17 just looking to first principles, that they are  
18 forfeiting their right to challenge an  
19 unconstitutional fee unless they object in  
20 advance.

21 That's exactly -- that was the core  
22 rationale of Reich and Newsweek. It is -- that  
23 is in also the bait and switch. And it wasn't  
24 premised on the fact that there was an  
25 affirmative statute that says, we'll give you

1 your fees after the fact.

2           It was based on the fact that the  
3 government was saying in advance if they want to  
4 rely on a pre-deprivation remedy to foreclose a  
5 post-deprivation remedy, that if you have a  
6 problem with this, this is your one and only  
7 time to raise it. The government can't say the  
8 Bankruptcy Code authorizes these challenges  
9 before or later, but, in fact, now we're  
10 deciding you should have done it before, even  
11 though there was absolutely no -- no notice of  
12 that whatsoever.

13           And I think Reich and Newsweek  
14 couldn't be clearer on that.

15           JUSTICE SOTOMAYOR: But -- but those  
16 cases had to do with raising the objection at  
17 all. Nobody stopped you from getting  
18 prospective relief. You've gotten the treatment  
19 of equality that you sought.

20           You came in and said, I'm being  
21 treated unequally --

22           JUSTICE THOMAS: Yeah.

23           JUSTICE SOTOMAYOR: -- and I want to  
24 be treated equally. And the government's  
25 saying, you're right, you were treated

1       unequally, now everybody has to pay the same  
2       fee. You don't like that answer, but you got a  
3       remedy.

4               MR. GEYSER: Well --

5               JUSTICE SOTOMAYOR: Those other two  
6       cases had to do with situations where you're  
7       being told, you're not going to be able to get  
8       the legal issue resolved. You're not going to  
9       be able to resolve the inequality at all.

10              MR. GEYSER: No, Justice Sotomayor.  
11       And -- and to be very clear, Reich and Newsweek  
12       both ended by saying, we'll remand for the  
13       court -- for the -- for the -- the state in  
14       those cases to provide meaningful  
15       backward-looking relief, consistent with the  
16       Court's mandate in McKesson and Harper.

17              And -- and to also be very clear, in  
18       those cases, they again said, the fact that  
19       there was a pre-deprivation remedy, and it was  
20       undisputed in those cases that there was  
21       absolutely a pre-deprivation remedy, had the  
22       parties invoked it, they would have been just  
23       fine. But there also was a post-deprivation  
24       option.

25              And unless the state makes clear in

1 advance, again, this is just fundamental due  
2 process 101, you have to make clear in advance,  
3 providing fair notice to a reasonable party that  
4 if you don't invoke the remedy in advance,  
5 you're forfeiting something after the fact. And  
6 I don't think it --

7 JUSTICE JACKSON: The thing that I'm  
8 struggling with is understanding what difference  
9 it makes in this particular situation whether  
10 you had a pre- or post-deprivation remedy when  
11 it seems pretty clear that making that claim  
12 leads to the determination not that you pay less  
13 but that everybody pays more.

14 Do you -- do you -- do you concede  
15 that that's Congress's intention not only sort  
16 of initially but also as reinforced in the  
17 legislation that it enacted after this problem  
18 came to light?

19 MR. GEYSER: Absolutely not, Your  
20 Honor. And just to be clear, if you agree with  
21 me that then the -- that the solution then is  
22 either leveling up or leveling down, then I  
23 think that that would be agreeing that a  
24 prospective-only remedy is off the table, as I  
25 think it quite clearly is.

1                   Now the question is, should you level  
2 up or level down? Now the government has  
3 suggested that this is as simple as sending out  
4 48 bills to --

5                   JUSTICE JACKSON: No, the -- the  
6 government has suggested that it's Congress's  
7 intent that actually is what we should care  
8 about in making that determination. And so my  
9 question to you is, do you dispute that Congress  
10 wanted everyone to pay the higher fee?

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

14                  JUSTICE JACKSON: Okay.

15                  MR. GEYSER: So it's -- we don't  
16 dispute that if Congress could go back in time  
17 from day one, they're not faced with any  
18 retroactivity problems, they're not faced with  
19 the prospect of opening closed and final cases,  
20 disturbing final confirmation orders that are  
21 non-appealable at this point, Congress would  
22 have done this correctly if someone had tapped  
23 them on the shoulder and said, the 2017 Act has  
24 a flaw, you should fix this.

25                  But we definitely dispute --



1 JUSTICE JACKSON: And how they would  
2 have corrected it would -- was not to lower  
3 everybody's fees to the BA level. How they  
4 would have corrected it would be to say  
5 everybody has to pay the higher fee.

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

8 JUSTICE JACKSON: Why is that not a  
9 choice they have today?

10 MR. GEYSER: Because Congress hasn't  
11 yet invented a time travel machine. They can't  
12 go back in time and say, we now will fix this in  
13 advance so we don't have this profound  
14 retroactivity problem.

15 JUSTICE JACKSON: No, no, no. I -- I  
16 --

17 MR. GEYSER: But --

18 JUSTICE JACKSON: -- I guess I don't  
19 understand. I mean, back in the day, the  
20 problem was that the higher fee level that  
21 Congress implemented in the statute wasn't being  
22 applied to everyone. And I appreciate that it  
23 was being applied to your client.

24 But you're asking now for a refund for  
25 that period of time so that the remedy is to

1 make your client pay less, and that's how we're  
2 going to make it equal.

3 And I'm just saying, I don't see  
4 anything in the legislative history, in the, you  
5 know, way in which this entire scheme has  
6 developed that would suggest that that's what  
7 Congress would have intended.

8 MR. GEYSER: Well, I -- I can do one  
9 better than legislative history because the 2020  
10 Act said, we're going to fix the problem and  
11 we're going to fix it prospectively only. That  
12 was Congress's determination that --

13 JUSTICE JACKSON: I don't see why that  
14 doesn't hurt you.

15 MR. GEYSER: Oh.

16 JUSTICE JACKSON: You're asking for a  
17 refund.

18 MR. GEYSER: Well, we --

19 JUSTICE JACKSON: The government is  
20 saying, yes, right.

21 MR. GEYSER: But, no -- but, Your  
22 Honor, I think it helps us a lot. In the 2020  
23 Act, Congress recognized that there is a problem  
24 that we need to fix. And they even said in the  
25 preamble to the Act -- and, again, this isn't

1 legislative history, this is in the Act itself.  
2 They said that the debtors in the administrator  
3 districts should have been paying this all  
4 along.

5 And you would expect then, if Congress  
6 were fine with retroactive implication, a  
7 retroactive clawback, the next sentence would  
8 be, and now they have to pay those fees. But  
9 Congress --

10 JUSTICE KAGAN: No. So I take the  
11 point, Mr. Geyser, that what Congress really  
12 wanted was a prospective and don't bother us  
13 about the past, and that seems fair enough. And  
14 it -- maybe it supports Ms. Hansford if there  
15 weren't a constitutional problem, which, of  
16 course, you say there is as to the  
17 prospectivity.

18 But as to the -- let's put  
19 prospectivity aside, and you have to level by  
20 refund or level by collection. I forget which  
21 one is up and which one is down in this context.  
22 It seems -- it -- it seems really hard to figure  
23 out what Congress wanted because it didn't know  
24 that everything was going to get messed up in  
25 this way.

1                   But we do know a couple of things,  
2                   that Congress back in the past, before  
3                   everything got messed up, wanted higher and  
4                   equalized fees, and we also know that Congress  
5                   wants a program which is entirely self-funded  
6                   and which does not impose burdens on the  
7                   taxpayer.

8                   And when you put the former, which I  
9                   agree is sort of like, well back in the past  
10                  with the latter, which is continual, Congress  
11                  never wants to impose burdens on the taxpayer  
12                  with respect to bankruptcy, you know, it thinks  
13                  that the people who use bankruptcy should pay  
14                  for bankruptcy, then it seems to me that there's  
15                  a pretty strong case that Ms. Hansford says that  
16                  it should be equalization by collection.

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

20                  The first is that that would be a  
21                  retroactive imposition. We can -- we can  
22                  disagree whether it's impermissibly retroactive,  
23                  where it actually would be unconstitutional  
24                  under the Due Process Clause to try that kind of  
25                  remedy, but it is at least severely retroactive.

1           And if it is, it would be  
2 extraordinary for this Court, I can't think of a  
3 single case where this Court has said, in  
4 fashioning a remedy, it can ignore the fact that  
5 the remedy that the Court itself would be  
6 unleashing through a judge-made order, it has to  
7 make up this judge-made remedy and then it has  
8 to make up that that same judge-made remedy  
9 applies retroactively, which is strongly  
10 disfavored in the law. So I am -- so I think  
11 that's one major obstacle.

12           A second major obstacle is that the  
13 government's suggestion of just sending out  
14 bills to debtors is simply wrong. That's not  
15 the way bankruptcy works.

16           And, in fact, the government's  
17 proposal would violate multiple sections of the  
18 code. And they can't just wipe -- just waive  
19 away those violations. If Congress wants to set  
20 aside affirmative provisions of the United  
21 States Code and the Bankruptcy Code that bar the  
22 government's relief, then Congress can do that,  
23 but I don't think this Court can.

24           I don't think this Court can authorize  
25 a remedy that's inconsistent with the Bankruptcy

1 Code. And there are multiple provisions --

2 JUSTICE SOTOMAYOR: I'm sorry. Why do  
3 we care? Why do you care? I mean, you cared  
4 about being treated unequally. You're being  
5 told you'll be treated equally. That someone  
6 else may get a pass, why is that hurting you?

7 MR. GEYSER: It -- it --

8 JUSTICE SOTOMAYOR: Meaning that as  
9 your opposing counsel pointed out, whether it  
10 was Morales-Santana, whether it was the robot  
11 call case, there were people who received  
12 benefits that they shouldn't have and we took  
13 them -- there were citizens who shouldn't have  
14 been citizens. There are people who made  
15 robocalls that shouldn't have been penalized.  
16 They -- some got a free pass and some got  
17 penalties.

18 MR. GEYSER: Well, the reason --

19 JUSTICE SOTOMAYOR: You're -- you're  
20 -- you're saying that due process requires that  
21 somehow, because we're worried about someone  
22 else's rights, we shouldn't let the government  
23 at least try or order it to try. And some of  
24 those people might be successful in saying, I  
25 don't have to pay and some might not be. The

1 courts below will figure that out.

2 MR. GEYSER: Your Honor, the -- the  
3 reason that we care is that we're entitled to  
4 meaningful backward-looking relief, which this  
5 Court has made clear is not just saying, we're  
6 going to in theory correct it. It has to apply  
7 it and enforce it. That's the words that  
8 McKesson used, playing off language that goes  
9 back a century in this Court's cases.

10 So it matters very --

11 JUSTICE SOTOMAYOR: So the  
12 government's told now you go claw back. I don't  
13 know how they're going to do it. And -- and --  
14 and I don't know why we have to answer that  
15 question.

16 MR. GEYSER: Oh, I -- I think you do.  
17 And if you don't, this is what's going to  
18 happen. They're going to try somehow, some  
19 way -- I -- I agree with Justice Gorsuch, I  
20 still have no idea how they're going to do this  
21 -- to collect these funds from the administrator  
22 districts.

23 JUSTICE SOTOMAYOR: They've got 10 big  
24 companies that are still in bankruptcy,  
25 31 percent recovery. I have to tell you, on bad

1 debt, 31 percent is a great recovery.

2 MR. GEYSER: But -- but it's not so  
3 good when you're trying to equalize an  
4 unconstitutional scheme that's been imposed on  
5 the taxpayers. When McKesson suggested the  
6 possibility that a few people slipping through  
7 the cracks here and there might be enough, they  
8 didn't say that 35 percent of the people  
9 slipping through the cracks would be sufficient.  
10 But --

11 JUSTICE BARRETT: Mr. Geysler, can I  
12 ask -- oh, sorry. Finish.

13 MR. GEYSER: No.

14 JUSTICE BARRETT: I -- I was just  
15 going to ask you, back to this question about  
16 prospective and retrospective relief -- I -- and  
17 I -- I'm not sure if the answer to this isn't a  
18 loaded question -- does it matter if the request  
19 was for equitable relief or injunctive relief  
20 versus money damages?

21 I mean, it seems to me Justice Jackson  
22 asked earlier, do we have any cases outside of  
23 the tax context? And I wondered that too, you  
24 know, outside of the Dormant Commerce Clause  
25 context or the tax context.



1           But, as I was sitting down, like, with  
2 my law clerk and we were debating this, we were  
3 trying to figure out, in many equal protection  
4 cases, which would be, you know, similar to the  
5 Uniformity Clause, where you're talking about  
6 discriminatory treatment, the kind of relief  
7 sought is just to end the disparity moving  
8 forward and it's equitable relief that's sought,  
9 which seems to me a possible distinction between  
10 citizenship and -- and those sorts of things.

11           And, here, what -- what you asked for  
12 is money. Does that -- does that matter? I  
13 don't know the answer to that question.

14           MR. GEYSER: I -- I think it does  
15 matter in the sense that when you look at this  
16 Court's cases -- and, you know, my -- my very  
17 able friends, they would tell you if they had  
18 better authority than an immigration case where  
19 retroactive relief is precluded by the  
20 Constitution and a robocall case where the party  
21 was seeking prospective-only relief. All of  
22 this Court's cases dealing with prospective-only  
23 treatment is because that's what the party asked  
24 for. So it was a very easy question for the  
25 Court.

1                   And this is where the language comes  
2                   from where the Court says, well, what would  
3                   Congress want? The Court is trying to conform  
4                   the statute to meet the constitutional standard,  
5                   and all they have to do is -- they're asking the  
6                   same question today as they would have asked all  
7                   the way going back to the beginning when the  
8                   statute was originally passed. What would  
9                   Congress have done at that moment had they known  
10                  the right answer?

11                  That's a very different question when  
12                  you have time that has passed, you have a  
13                  constitutional exaction, which is an invalid fee  
14                  that's been collected, and now we have to figure  
15                  out how to provide meaningful backward-looking  
16                  relief.

17                  And the tax cases too, it's not --  
18                  Dormant Commerce Clause cases, they do involve,  
19                  basically, disparate treatment. It's saying,  
20                  you're favoring in-state people over  
21                  out-of-state people. It's -- I think it's a  
22                  very close parallel to the uniformity problem.

23                  And some of this Court's cases also  
24                  dealt with equal protection claims where someone  
25                  was exacted some sort of money that -- and it's

1 not a windfall, and it's not a question of they  
2 should have paid it anyway. The point is that  
3 if Congress wants or a state wants someone to  
4 pay money, they have to do it under a  
5 constitutional scheme.

6 And if they haven't -- if they haven't  
7 done that, then their choices are either to  
8 level up or level down. And I agree the  
9 terminology is confusing. It's actually flipped  
10 back and forth at each stage of, I think, all of  
11 these cases that I know of. But the -- in this  
12 case, a clawback remedy simply isn't an option.

13 And -- and I want to be very clear why  
14 that is. One is that there is a constitutional  
15 impediment to it. The administrator district  
16 debtors will have a solid due process claim that  
17 this is impermissibly retroactive.

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

21 MR. GEYSER: Your Honor, then what  
22 will happen is, if that claim succeeds, this  
23 case will somehow have to come back to this  
24 Court because it will turn out that, in fact,  
25 the government had one permissible option,

1 providing a refund, because the clawback remedy  
2 doesn't work.

3 But I think you can see right now even  
4 from the former bankruptcy judges' brief that  
5 even putting the constitutional concern aside,  
6 there are provisions of the Bankruptcy Code that  
7 foreclose what the government wants to do. I  
8 mean, they -- when they say they're just sending  
9 out a bill, they're not sending out a bill.  
10 They have to go into the bankruptcy case; they  
11 have to upset a final and non-appealable  
12 confirmation order. Right away you're violating  
13 Section 1141 of the Bankruptcy Code.

14 JUSTICE JACKSON: What if the  
15 government's answer is, we don't want to do  
16 that? Our -- our solution is move on. Our  
17 solution -- and you're -- you're saying that's  
18 not constitutionally permitted, and I'm trying  
19 to understand why.

20 MR. GEYSER: For -- for exactly the  
21 same reasons that -- the government's arguments  
22 should be familiar to this Court because it's  
23 the exact argument that Florida made in McKesson  
24 and Harper. Florida said, we fixed the problem  
25 going forward, we promise not to do it again,

1 and we would rather keep the taxes that we  
2 collected under this unconstitutional scheme; in  
3 fact, refunding them would just be a windfall to  
4 the favored class. And this Court said, that's  
5 not good enough.

6 Under the Constitution -- again, this  
7 is going back for -- for over a century now of  
8 this Court's cases -- when the government exacts  
9 money that it's not allowed to have, it has to  
10 provide meaningful backward-looking relief. It  
11 can't just --

12 JUSTICE JACKSON: Why do you say  
13 they're not allowed to have it, though, in this  
14 situation? This is what -- I feel like you're  
15 conflating different legal frameworks, and  
16 that's where I'm getting confused. I thought  
17 you conceded that they could have the higher  
18 fee, that everybody agrees that the Congress  
19 wanted the higher fee. So what is it about this  
20 that they're not allowed to have?

21 MR. GEYSER: It -- it's the exact same  
22 thing they're not allowed to have in an equal  
23 protection violation or Dormant Commerce Clause  
24 violation. No one in McKesson and Harper was  
25 saying that a state couldn't enact a tax that

1 applies evenly to everyone, and the businesses  
2 that were objecting in that case would, in fact,  
3 have to pay it. But those businesses don't have  
4 to pay a fee that's been exacted under a  
5 constitutionally flawed scheme.

6 I -- I think that's settled under  
7 McKesson, Harper, going back to the 1920s,  
8 dealing with Montana National Bank and Bennett.

9 JUSTICE KAVANAUGH: You want  
10 perfection, though, in how this is all going to  
11 work out. But, even under your approach,  
12 there's not going to be perfection, as the  
13 government details at length, because the  
14 refunds will not get to everyone.

15 MR. GEYSER: Well, I -- first, we --  
16 we disagree with them. We're -- we're far more  
17 --

18 JUSTICE KAVANAUGH: So, if there's not  
19 -- there's not perfection on the collection  
20 side -- I understand it's not going to be a  
21 hundred percent perfection, but it's not going  
22 to be perfection under your approach either. So  
23 --

24 MR. GEYSER: So a -- a -- a few  
25 responses to that. The -- the first is that

1 it's a --

2 JUSTICE KAVANAUGH: Not even close to  
3 perfection.

4 MR. GEYSER: Well, I mean, under the  
5 former bankruptcy judges' brief, there -- they  
6 suggest there is a high possibility the  
7 government won't collect a single cent unless  
8 they can override and set aside the Bankruptcy  
9 Code.

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

14 But talk about my question, which is  
15 about there's not going to be close to  
16 perfection under your approach either.

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

21 Normally, if there's a financial  
22 incentive, there's an easy way to collect it.  
23 There's a class action pending right now in the  
24 Court of Federal Claims, and I'm fairly  
25 confident that those lawyers who are fairly

1       industrious will find a way to distribute the  
2       money. If they do get the money, which they  
3       will, they can distribute it to the plans.

4                 Almost every bankruptcy plan has  
5       provisions for what to do with assets that come  
6       into the plan after confirmation. That is just  
7       a settled, you know, component of a bankruptcy  
8       plan. So it's really as simple as looking up  
9       who is entitled to it, sending the check in, and  
10      it's distributed according to the plan terms.

11                JUSTICE KAVANAUGH: One other  
12      question, which is, if the bankruptcy  
13      administrators in Alabama and North Carolina had  
14      followed the standing order and collected the  
15      proper fees back in 2018, you would have paid  
16      the same amount that you paid, correct?

17                MR. GEYSER: That -- that would have  
18      eliminated the constitutional prejudice that we  
19      are currently suffering.

20                JUSTICE KAVANAUGH: You would have  
21      paid the same amount that you paid, correct?

22                MR. GEYSER: Yes, we would have -- we  
23      would have paid the same amount, just as every  
24      single challenger in McKesson and Harper and  
25      anyone objecting to a Dormant Commerce Clause



1 claim or an equal protection claim would have  
2 paid the same amount had Congress extended the  
3 benefits uniformly. But the fact is, when they  
4 don't do that, that's where the problem arises.

5 Now I do want to provide another  
6 answer to Your Honor's question about, you know,  
7 what about the inability to get full refunds on  
8 our side?

9 Now, again, we think it's going to be  
10 pretty close to a hundred percent collection,  
11 but even if that's wrong, the provision of full  
12 relief entitles a hundred percent of the injured  
13 class to collect. The only people at that point  
14 who wouldn't collect would be people who are  
15 voluntarily electing not to do it. So they  
16 would -- they would not suffer any  
17 constitutional prejudice.

18 The constitutional prejudice is, in  
19 fact, cured in full by providing a full refund.  
20 That's the meaningful backward-looking relief.  
21 Then the Court doesn't even have to worry how do  
22 we balance these two things? The -- the entire  
23 injured class, anyone who wants to assert their  
24 rights, will be made whole by a refund.

25 And the other point I'd like to make

1 too is even if the Court -- and this goes  
2 somewhat to what -- what does Congress really  
3 want here. The -- the Court could order a  
4 refund, and if my friends are right that there's  
5 actually no due process problem with asking  
6 people to pay money, you know, well over half a  
7 decade after the fact and there's no problem  
8 with disturbing closed and final bankruptcy  
9 cases where bankruptcy puts a premium on  
10 finality, there's no problem with overriding a  
11 confirmed plan of reorganization that is final,  
12 non-appealable, then Congress can pass a law  
13 tomorrow, the day after this Court's decision,  
14 that says, in fact, we don't want refunds; in  
15 fact, claw back those funds.

16           And then my prediction is the debtors  
17 in the administrator districts will challenge  
18 that on due process grounds, and I believe  
19 they'll probably prevail. But, at least at that  
20 point, it's Congress that's doing the work  
21 instead of the government coming to this Court  
22 and saying why don't you do what we didn't do?

23           In 2020, Congress could have had a  
24 retroactive imposition. They refused to do  
25 that, presumably because they didn't want to

1 take the political heat from the stakeholders in  
2 the administrator districts of imposing these  
3 fees after the fact. And, again, it's not as  
4 simple as -- as bothering the debtors. And this  
5 also goes to other problems in the Bankruptcy  
6 Code with --

7 JUSTICE KAVANAUGH: Congress could  
8 have done it your way too.

9 MR. GEYSER: Congress could have and  
10 --

11 JUSTICE KAVANAUGH: They didn't.

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

13 JUSTICE KAVANAUGH: Presumably because  
14 it's 326 million and they don't -- that would be  
15 inconsistent with the usual principle that  
16 bankruptcy pays for itself.

17 MR. GEYSER: And -- and there -- there  
18 is a surplus in the -- in the United States  
19 Trustee Fund that could probably cover the --  
20 the majority, if not all, of what's owed. And  
21 if Congress is concerned about that, Congress  
22 can pass a new tax tomorrow that reimburses the  
23 taxpayers, taxing the -- the users of the  
24 bankruptcy system. But that -- that's not an  
25 excuse.

1 Florida made similar objections in  
2 McKesson and Harper. Florida said, we really  
3 have good uses for this money and it's really  
4 going to hurt us if we have to give this back.  
5 It's actually going to create economic turmoil.

6 And the Court's answer was, that's too  
7 bad. You passed an unconstitutional tax, you  
8 need to provide meaningful backward-looking  
9 relief, so you either have to stomach the  
10 political cost of imposing that tax  
11 retroactively on the favored class and deal with  
12 the political fallout, or you have to provide  
13 refunds. Those are your two constitutional --

14 JUSTICE KAGAN: But the thing that's  
15 different, of course, here is that the only  
16 constitutional problem with this was an equality  
17 problem, and so it could be fixed either way.

18 And as Justice Kavanaugh just said,  
19 everything we know about Congress not wanting to  
20 impose bankruptcy costs on taxpayers suggests  
21 that if it's at all possible, it should be done  
22 by collection.

23 MR. GEYSER: Well, I -- I don't think  
24 that is everything we know because, again,  
25 Congress could have imposed that fee

1 retroactively in 2020.

2 JUSTICE KAGAN: It could have done  
3 either one. It didn't know it was having this  
4 problem. Now, you know, so this is a -- a  
5 little bit of a constructive enterprise,  
6 granted, but we can apply to a constructive  
7 enterprise the things we know about how Congress  
8 funds bankruptcy.

9 MR. GEYSER: Sure, Your Honor. But,  
10 it -- normally, again, if this were an actual  
11 statute that just said, collect fees in  
12 administrator districts, this Court would not  
13 construe that statute to authorize a retroactive  
14 remedy tacking on fees five years after the fact  
15 unless Congress spoke clearly and unmistakably.

16 When -- when even the Court in the  
17 Bowen case asked, does an agency have the  
18 general authority just as a background matter to  
19 apply statutes retroactively when a regulation  
20 is struck down for technical problems, they're  
21 basically trying to say, look, we goofed. We're  
22 going to do it right this time and cover the  
23 full period. This Court said the agency doesn't  
24 have that authority.

25 So I think it's quite remarkable for

1 the government to say that judges themselves,  
2 who -- who the -- the court is not politically  
3 accountable, if someone is upset when they're  
4 asked to pay these refunds, they don't know who  
5 to call. The -- I -- I hope they don't call,  
6 you know, the Chief Justice and say that we wish  
7 you hadn't done this. If Congress -- if -- if  
8 Congress wants to pass this law, Congress can do  
9 it.

10 And, again, if the government is  
11 confident --

12 JUSTICE KAGAN: You're creating a  
13 conflict for the Chief Justice now.

14 (Laughter.)

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

17 (Laughter.)

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

19 JUSTICE JACKSON: Can I ask you, how  
20 -- how do you square your answer about the  
21 requirement of meaningful backward-looking  
22 relief in -- in this situation with the cases  
23 like Morales-Santana, where they didn't get  
24 backward-looking relief?

25 MR. GEYSER: Sure, Your Honor.

1 There -- there are literally two cases the  
2 government -- actually, there are three because  
3 they added -- they tacked on one in their reply  
4 brief, and I'll start with that one first --

5 JUSTICE JACKSON: But they are Supreme  
6 Court cases.

7 MR. GEYSER: They are. But the third  
8 one is the easiest and I'll -- I'll get -- the  
9 first -- the third one, the Manhart decision, is  
10 a Title VII case. It applies the statutory  
11 equity -- equity standard, and Title VII  
12 specifically says that retroactive remedies are  
13 not required, and the Court had good reasons in  
14 that case not to require them. That is very  
15 different than the constitutional standard that  
16 does require it.

17 In Morales-Santana, that is an  
18 immigration case where it was impossible to  
19 provide retroactive remedies, and the -- the  
20 challenger in that case was seeking prospective  
21 relief. That challenger did not say --

22 JUSTICE JACKSON: So is it -- is it  
23 just about what they ask for, or was -- is it  
24 about the possibility of getting it? Because  
25 there's a world in which what we're talking

1 about here is how impossible it is to give a  
2 retrospective remedy in this case either  
3 leveling up or leveling down.

4           You've made very ably the argument for  
5 why it's impossible to do it retrospectively  
6 leveling up. And Justice Kagan points to the  
7 argument about why it's impossible to do it  
8 retrospectively leveling down because it's  
9 inconsistent with the entirety of the bankruptcy  
10 scheme as Congress has laid it forward.

11           So I guess I'm just trying to  
12 understand why we couldn't rely on something  
13 like Morales-Santana and the fact that it -- if  
14 it's hard to do or impossible to do, then we can  
15 just go prospective.

16           MR. GEYSER: Well, Your Honor, I think  
17 that if you want to read something from  
18 Morales-Santana, it's that the government's  
19 theory of clawing back funds is not a  
20 permissible theory in this case. It's not an  
21 option they have because they need affirmative  
22 relief from Congress to --

23           JUSTICE JACKSON: Right. I'd like to  
24 read it broader.

25           MR. GEYSER: Okay.



1 JUSTICE JACKSON: I'd like to read it  
2 broader than that to --

3 MR. GEYSER: Yeah. Well --

4 JUSTICE JACKSON: -- to support the  
5 view that there's nothing unconstitutionally  
6 problematic about necessarily a prospective-only  
7 remedy.

8 MR. GEYSER: I -- I think, if this  
9 Court wanted to adopt that theory, it would have  
10 to affirmatively overrule Reich and Newsweek.  
11 It would really be picking a direct fight that  
12 -- in a way that can't be squared with those  
13 cases.

14 Those cases made abundantly clear that  
15 unless there is an exclusive pre-deprivation  
16 remedy, the government has to provide meaningful  
17 backward-looking relief. So, I -- and, again,  
18 when we look at the most directly --

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

21 MR. GEYSER: I -- I have not. So I've  
22 dealt with Manhart, which is the one in the  
23 reply.

24 We have Morales-Santana, where the  
25 Court specifically acknowledged -- there was

1 a -- there was a two-Justice concurrence that  
2 said that because of the plenary authority of  
3 Congress over citizenship, the Court doesn't  
4 have the power to adjust citizenship looking  
5 backwards. It has -- it can -- has to do  
6 whatever Congress has said in terms of whether  
7 citizen is -- citizenship's conferred or not.

8 And the majority opinion didn't spell  
9 out that rationale, but if you look at the pages  
10 in the briefs, the parties' briefs that they  
11 cite for this very point, it spells out exactly  
12 that rationale.

13 And the third case is the robocall  
14 case, which, with -- with the greatest of  
15 respect, was --

16 JUSTICE KAVANAUGH: You disagree with.

17 MR. GEYSER: Well, we -- we --  
18 actually, I'm not even sure we do. The way I  
19 read the footnote in that case, and it was a  
20 single footnote, it didn't have any rationale or  
21 analysis, and the parties' briefs barely did  
22 either. It was a single page --

23 (Laughter.)

24 MR. GEYSER: -- it was a single page  
25 of the parties' briefs. And I look at the --

1 the language in that footnote as reserving the  
2 question. It wasn't resolving it. It said,  
3 the -- the result in this case does not lift the  
4 fines that have been imposed.

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

14 But that's very, very different, the  
15 fact that they're relying, that the government's  
16 relying on a case like that instead of cases  
17 involving an illegal exaction of money under a  
18 scheme that treats one class differently than  
19 another, like, it doesn't take a whole lot to  
20 say which one of these are more analogous, and  
21 the government --

22 CHIEF JUSTICE ROBERTS: Thank you.

23 Thank you, counsel.

24 Justice Thomas?

25 Justice Alito?

1 Justice Gorsuch?

2 Justice Barrett?

3 Justice Jackson?

4 JUSTICE JACKSON: Can I just -- I just  
5 have one more little thing, which is I'm  
6 wondering if it matters that there are  
7 individual rights at issue in some of these  
8 equal protection cases.

9 It seems to me that this uniformity  
10 constitutional provision that's at the heart of  
11 this is really about limiting congressional  
12 power. And I guess you could say the same is  
13 true of the Commerce Clause. So I appreciate  
14 that.

15 But is there something to the notion  
16 of we're not going to necessarily worry about a  
17 meaningful backward-looking monetary remedy for  
18 a violation that is really about limiting  
19 Congress's power and has been remedied because  
20 Congress has changed the statute now and  
21 everybody's being treated equally going forward?

22 MR. GEYSER: So I -- I think, Your  
23 Honor, you -- you stole my first answer, which  
24 is that it is exactly the same as the other  
25 rights where the Court said you do have to

1 provide meaningful backward-looking relief.

2           The second is that this is  
3           constraining Congress's authority, but it's  
4           constraining Congress's authority to protect  
5           individuals. It's so that certain debtors don't  
6           find themselves disfavored with respect to other  
7           debtors.

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

20                   JUSTICE JACKSON: Thank you.

21                   CHIEF JUSTICE ROBERTS: Thank you,  
22          counsel.

23                   Rebuttal, Ms. Hansford.

24

25

1 REBUTTAL ARGUMENT OF MASHA G. HANSFORD  
2 ON BEHALF OF THE PETITIONER

3 MS. HANSFORD: Thank you, Mr. Chief  
4 Justice. I want to start with Justice Barrett's  
5 question of whether what the parties asked for  
6 matters.

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

21 To address the Manhart case that my  
22 friend talked about, I do think that that is a  
23 great example of a case that was about money.  
24 There was a specific dispute as to whether money  
25 should be paid back.

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

12                  I think that reasoning applies a  
13                  fortiori here because the Constitution does not  
14                  provide that backpay should be allowed. It does  
15                  not have a presumption of retrospective relief  
16                  in this context.

17                  I would also point you to the Fulton  
18                  case. That is a tax case. That's where the --  
19                  I -- I think what the Court normally does in  
20                  cases when it withdraws a benefit is it does it  
21                  prospectively. That's more comfortable. The  
22                  exception to that is the tax context because it  
23                  can't do it because of the due process overlay.  
24                  And so Fulton is a case where there was no  
25                  argument there was pre-deprivation relief, so it

1 had to be retrospective, but the Court left open  
2 whether it's level up, level down. And on  
3 remand, the court did impose additional  
4 collections.

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

23 The -- the -- the last thing I would  
24 talk about is congressional intent. And my  
25 friend conceded that on day one, what Congress



1 would do is impose higher fees. But, of course,  
2 the reason that Congress didn't do it on day one  
3 is because my friend and others waited to bring  
4 these suits. My friend waited for two years  
5 after this was enacted to bring the suit. He  
6 could have brought the suit earlier.

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

19           Just one tiny factual point, which is  
20 my friend talks about how high this increase is,  
21 800 percent higher. The fees were, oh, there  
22 was a 1 percent cap on the fee increase. So my  
23 friend's clients overpaid 2.8 million on a  
24 billion dollars in disbursements. This is a fee  
25 on the largest users who are best situated to

1 bear this.

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

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

19           We ask the Court to reject that  
20 approach and to reverse. Thank you.

21           CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23           The case is submitted.

24           (Whereupon, at 12:35 p.m., the case  
25 was submitted.)

## Official

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