No. 02-1606

In The Supreme Court of the United States

TENNESSEE STUDENT ASSISTANCE CORPORATION,

Petitioner,

v.

PAMELA L. HOOD,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

The issue in this case is not whether the States are immune from the operation of federal bankruptcy law. The States fully recognize that they, their officers, and their agencies are bound by the United States Constitution and by federal statutes that comport with the constitutional design. *Alden v. Maine*, 527 U.S. 706, 755 (1999); U.S. CONST. art. VI. The State of Tennessee has never contended otherwise. Rather, the issue in this case is whether the States are immune from private rights of action to enforce the federal bankruptcy laws. That question turns not on the specifics of practice under modern bankruptcy statutes or the general policy aims of bankruptcy law, but on a question of constitutional law: whether the States in ratifying the Constitution waived, or authorized Congress to abrogate, their inherent sovereign immunity from suits by private individuals in bankruptcy cases.

I. THE RESPONDENT PRESENTS NO COMPELLING EVIDENCE THAT THE POWER TO MAKE UNIFORM BANKRUPTCY LAWS REQUIRED A BREACH OF THE STATES' SOVEREIGN IMMUNITY.

This Court has repeatedly declared that "Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals." *Kimel v. Florida Board of Regents*, 528 U.S. 62, 80 (2000); *Seminole Tribe v. Florida*, 517 U.S. 44, 72 (1996). The bankruptcy power, of course, is among the Article I powers. The only element distinguishing the Bankruptcy Clause from the other Article I powers is the concept of "uniformity:" Congress is granted the power "to establish . . . uniform laws on the subject of bankruptcies

throughout the United States." U.S. CONST. art. I, § 8, cl. 4. Therefore, stripped of the trappings of contemporary bankruptcy practice and policy, and of speculation about future consequences, the respondent's only argument in this case is that the concept of "uniform laws" embodied in the Bankruptcy Clause necessarily trumped the States' sovereign immunity.

The respondent has not presented the "compelling evidence" necessary to show that granting Congress the power to make uniform bankruptcy laws required the States to surrender their sovereign immunity from private-party actions. *Alden*, 527 U.S. at 730-731; *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781 (1991). The respondent and her amici seem to offer much evidence and argument that the Bankruptcy Clause was intended to grant complete, exclusive, plenary power to Congress. But the Court has repeatedly held that "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents . . . suits by private parties against unconsenting States." *Federal Maritime Comm'n v. South Carolina State Ports Auth.,* 535 U.S. 743, 767-768 (2002); *Seminole Tribe*, 517 U.S. at 72. The logic of the argument that uniformity overrides sovereign immunity because it constitutes a complete lawmaking power therefore would carry far beyond the arena of bankruptcy and would require nothing short of repudiation of *Seminole Tribe*.

The respondent therefore shifts to an argument that it is not the magnitude, but the nature of the power to make uniform bankruptcy laws that necessarily overrides state sovereign immunity. The respondent and her amici submit evidence that debtor-creditor issues presented matters of national concern that the Framers of the Constitution saw

as requiring a national solution. Indeed, this Court has recognized that the uniformity provision was intended to authorize a national law enforceable in whatever State the debtor might be found, as well as to prohibit private bankruptcy laws benefiting individual debtors. *Railway Labor Executives' Ass'n v. Gibbons,* 455 U.S. 457, 472 (1982). But the respondent and her amici offer no compelling evidence to support their leap to the conclusion that the Framers contemplated that a "uniform" national solution necessarily would entail waiver or abrogation of state sovereign immunity, or would require that the States as creditors must be treated the same as any other creditors. This Court has already decided that "the uniformity requirement of the Bankruptcy Clause is not an Equal Protection Clause for bankrupts." *Railway Labor*, 455 U.S. at 471 n.11. Just as "[t]he uniformity requirement is not a straitjacket that forbids Congress to distinguish among classes of debtors," there is no reason to suppose that uniformity requires that all creditors must be identically subject to suit. *Id.* at 469.

Respondent and amici also argue that sovereignty was considered by the Framers to be indivisible, so that a cession of any attribute of sovereignty necessarily carried with it a cession of all sovereignty in that area. Thus they deny, if not completely ignore, this Court's recognition in *Seminole Tribe*, and the decisions following it, that even when the States completely yielded to Congress' lawmaking power over a particular area, they retained their sovereign immunity from suits by private parties. *Seminole Tribe*, 517 U.S. at 72-73.

Contrary to the respondent's insistence, Alexander Hamilton's writings do not furnish compelling evidence that a grant of authority to make uniform bankruptcy

laws automatically alienated state sovereign immunity in that area as well. At most, Hamilton's writings are ambiguous on that point. More plausibly, however, Hamilton's arguments confirm the distinction between lawmaking sovereignty and sovereign immunity that this Court has recognized in *Seminole Tribe* and its progeny.

In *Federalist* No. 81, while discussing the judicial power under Article III, Hamilton was trying to assure his readers that, contrary to fears raised by opponents of ratification, the Constitution would not permit suits by private parties against States to collect debts owed by the States. He described the States' inherent immunity from suits by individuals as "one of the attributes of sovereignty," thus suggesting that there are other attributes including, for example, lawmaking authority. FEDERALIST No. 81, at 549 (Alexander Hamilton) (J. Cooke ed. 1961). Hamilton then referenced his earlier discussion of Congress' taxation power in *Federalist* No. 32 as describing "circumstances which are necessary to produce an alienation of state sovereignty." *Id.* But he did not say that the circumstances described in *Federalist* No. 32 would be necessary *and sufficient* to alienate *all* attributes of sovereignty. Indeed, *Federalist* No. 32 by its own terms addressed only legislative authority, the "power to prescribe a rule" (as in the Naturalization Clause, where "if each State had power to prescribe a DISTINCT RULE there could be no UNIFORM RULE"). FEDERALIST No. 32, at 201 (Alexander Hamilton).

Returning to his discussion of sovereign immunity from suit, Hamilton characterized the examples discussed in *Federalist* No. 32 as furnishing "no colour to pretend" that the Constitution, "the plan," would allow private parties to sue States to collect debts. FEDERALIST No. 81, at

549. Thus, under "the plan," even the bankruptcy power would not authorize Congress to create a private right of action for a bankrupt to collect on debts owing from States. How then could the bankruptcy power authorize Congress to create a right for a bankrupt to file suit seeking the similar economic benefit of canceling a debt owing to a State? The more plausible reading of the *Federalist* indicates that Hamilton would say that it did not. *Federalist* No. 32, discussing Congressional power, spoke only of alienating the legislative attribute of sovereignty in a given subject area, and gave "no colour to pretend" that state sovereign immunity was by the plan of the Convention waived in the face of the judicial power discussed in *Federalist* No. 81.

Nor do respondent's other historical arguments provide compelling evidence that the States in the plan of the Convention yielded their sovereign immunity from private suits in bankruptcy cases. The respondent and her amici anachronistically try to cast the first federal bankruptcy law, the Act of 1800, as representing modern pro-debtor notions of "fresh start" and "voluntary, debtor-initiated bankruptcy." They gloss over the reality that, while the Framers saw a need for a national, uniform bankruptcy law, they did not necessarily intend that it favor debtors. For example, though James Madison argued for the usefulness of a federal bankruptcy law to assist in the regulation of commerce, it was for the purpose of preventing frauds, not relieving debtors. FEDERALIST No. 42, at 287 (James Madison). Indeed, Madison and others considered "an abolition of debts," like "the rage for paper money" or "an equal division of property," to be an "improper or wicked project." FEDERALIST No. 10, at 65 (James Madison). *See also* STANLEY ELKINS & ERIC MCKITRICK,

THE AGE OF FEDERALISM 702 (Oxford 1993). The idea of a "fresh start" for debtors as a primary purpose of bankruptcy law was foreign to the Framers. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 43 (1995).

In any event, the 1800 Act gave opportunity for a "fresh start," such as it was, only to selected debtors – merchants, bankers, brokers, and some others engaged in commerce. BRUCE MANN, REPUBLIC OF DEBTORS 222 (Harvard 2002). By its express terms, the Act provided only for "involuntary," creditor-initiated bankruptcy. Tabb, 3 AM. BANKR. INST. L. REV. at 14. As Professor Mann has shown through anecdotal evidence, only with great ingenuity were debtors and their lawyers able to take advantage of collusive proceedings in which a sympathetic creditor (often a family member) would by filing a petition assist a debtor desiring a discharge. MANN, REPUBLIC OF DEBTORS 229 *et seq.* To argue, therefore, as the respondent does, that sovereign immunity was necessarily waived because to except States from the bankruptcy process would impede the goals of fresh starts and debtor relief through voluntary bankruptcies is to ascribe modern-day policy views to the Framers' idea of bankruptcy. The Framers and the early Congresses almost certainly did not see it that way.

Perhaps most telling is the fact, also glossed over by respondent and her amici, that the Act of 1800 by its express terms was not to be construed "to lessen or impair any right to, or security for, money due to the United States or to any of them." Act of April 4, 1800, ch. 19, § 62, 2 Stat. 19, 36 (repealed 1803); MANN, REPUBLIC OF DEBTORS 228. Section 62 plainly stands as evidence that the early Congresses (and the Framers) did not think the

bankruptcy power should reach the States' interests. The respondent's amici err in suggesting that if Congress lacked constitutional authority to allow bankruptcy suits against States, § 62 would have been superfluous. Section 62 provided that the bankruptcy law did not reach creditor States at all, by suit or by any other means. By the respondent's logic, the Act of 1800 would have been unconstitutionally non-uniform for failing to allow actions against creditor States' interests. Again, there is no evidence that the early Congresses or the Framers thought so.

It is a gross mischaracterization to say that the States are trying to "opt out" of the bankruptcy system, or trying to "control" it, or trying to assert a "blanket" exemption from it. The respondent ignores the distinction between being subject to constitutionally-authorized laws (which the States are) and being subject to suits by private parties (which the States are not), in the same way and for the same reason she denies the distinction between lawmaking authority and sovereign immunity as distinct attributes of sovereignty. The Framers, the early Congresses, and this Court did and do observe those distinctions. Granting Congress the power to make uniform laws did not destroy the States' immunity from suits by private parties.

II. WHETHER BANKRUPTCY JURISDICTION IS *IN REM* DOES NOT DETERMINE WHETHER THE STATES RETAIN SOVEREIGN IMMUNITY.

The respondent and her amici argue that bankruptcy courts exercise *in rem* jurisdiction, and that sovereign immunity does not protect States from such proceedings.

With only one brief mention, the Sixth Circuit accepted that argument. [Pet. App. 22]

That argument, however, completely overlooks the fact that Hood filed an adversary proceeding naming the petitioner as a defendant and expressly praying for issuance of "proper process," and for judgment that her debt owing to TSAC be "dissolved." [Joint App. 9-10] "[S]uch a proceeding is not an *in rem* action merely involving property of the bankruptcy estate, but an *in personam* action against the State." *Nelson v. La Crosse Co. Dist. Atty.*, 301 F.3d 820, 837 (7th Cir. 2002). The distinction observed by the Seventh Circuit accords with the accepted definitions of "*in personam,*" "*in rem,*" and "*quasi in rem.*"[1]

Even if the respondent's characterization of her adversary proceeding as *in rem* were correct, "[t]he fact that a suit in a federal court is *in rem,* or *quasi in rem*, furnishes no ground for the issue of process against a nonconsenting state. . . . [W]hen the State withholds its consent, the court has no authority to issue process against the State to compel it to subject itself to the court's

[1] "A judgment *in personam* imposes a personal liability or obligation on one person in favor of another. A judgment *in rem* affects the interests of all persons in designated property. A judgment *quasi in rem* affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a preexisting claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him." *Shaffer v. Heitner*, 433 U.S. 186, 199 n.17, (1977); *Hanson v. Denckla*, 357 U.S. 235, 246 n.12 (1958).

judgment, *whatever the nature of the suit." Missouri v. Fiske*, 290 U.S. 18, 28 (1933) (emphasis added).

This Court has rejected as "unpersuasive" the argument "that a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992). In that case, the Court initially found the premise for the argument lacking since, as in this case, neither the respondent nor the bankruptcy court purported to invoke *in rem* jurisdiction. *Id.* The Court emphasized, in any event, that "we have never applied an *in rem* exception to the sovereign immunity bar against monetary recovery, and have suggested that no such exception exists." *Id.* (citations omitted). That *Nordic Village* involved a suit for monetary relief makes the principles reaffirmed there no less applicable. Eleventh Amendment immunity is not limited to actions seeking a money judgment, but also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Seminole Tribe*, 517 U.S. at 58 (citations omitted). *Nordic Village* involved immunity of the federal government rather than of a State, but this Court recognizes the correlation between sovereign immunity principles applicable to the States and to the United States. *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-507 (1998).

The principles of *Missouri v. Fiske*, as reaffirmed in the *Nordic Village* bankruptcy case, remain solid law and have never been called into question by this Court. The respondent questions *Fiske*'s applicability to bankruptcy by asserting that *New York v. Irving Trust Co.*, 288 U.S. 329 (1933), decided the same year as *Fiske*, accorded bankruptcy a "different status." *Irving Trust*, however, did not involve the issuance of process against a State. New

York filed a notice of demand for taxes, but did so after the deadlines set by the bankruptcy court for the filing of claims. This Court affirmed the striking of New York's claim notice, simply holding that "[i]f a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power." *Id.* at 333. New York had manifested its desire to participate in the particular assets of the bankrupt estate by filing its claim, late though it was. This Court did not hold that the bankruptcy court could issue process to compel New York to appear in that case. The Court was not called upon to address, and did not discuss, the consequences for the State of the issuance of a bankruptcy discharge. *Irving Trust* therefore is not in the least inconsistent with *Fiske*.

Nor was *Fiske* "implicitly overruled" by *Deep Sea Research*, as the respondent and her amici would have it. *Deep Sea Research* turned on "the special characteristics of *in rem* admiralty actions." 523 U.S. at 510 (Stevens, J. concurring). The Court not only limited its holding to such actions, but pointedly refused to extend it even to *in rem* admiralty actions in other circumstances, much less to bankruptcy or other types of actions. *Id.* at 508. The precise circumstances addressed by the Court's limited holding involved not an assertion of jurisdiction over a State, but jurisdiction over a specified *res*, the shipwrecked *Brother Jonathan*, a vessel that was not in the State's possession. *Id.* at 507-508. The issuance of process against a State was not at issue. *See id.* at 495-497.

Under *Fiske* and *Nordic Village*, therefore, the respondent's insistent characterization of bankruptcy proceedings as *in rem*, even if accurate, is simply beside the point and would not avoid the States' sovereign immunity. With only two exceptions, none of the cases cited by

respondent or her amici for the proposition that bankruptcy cases are *in rem* even involve debts owing to States. *Katchen v. Landy*, 382 U.S. 323 (1966); *Straton v. New*, 283 U.S. 318 (1931); *Bailey v. Baker Ice Machine Co.,* 239 U.S. 268 (1915); *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300 (1911); *Hanover National Bank v. Moyses*, 186 U.S. 181 (1902). The two cited cases that did involve debts to States were *Gardner v. New Jersey*, 329 U.S. 565, 570, 574 (1947), in which the State waived immunity as to a claim it filed, and *Irving Trust*, in which the State also affirmatively acted by filing a claim, albeit late.

Hanover Bank, the earliest in the string of cases cited by respondent for the *in rem* characterization of bankruptcy, equivocally phrased the proposition that "[p]roceedings in bankruptcy are, generally speaking, in the nature of proceedings *in rem*. . . . " *Hanover Bank*, 186 U.S. at 191-192. As authority, the *Hanover Bank* opinion cited *New Lamp Chimney Co. v. Ansonia Brass and Copper Co.*, 91 U.S. 656, 661-662 (1875), in which the Court noted that "a decree adjudging a corporation bankrupt is in the nature of a decree *in rem*, as respects the *status* of the corporation." (Emphasis in original).

Despite its description of a bankruptcy decree as *in rem*, however, the Court in *New Lamp* upheld the sovereign immunity of the United States. The Court emphasized that "it is settled law that the certificate of discharge does not release any debt which the bankrupt owes to the United States." *Id.* at 664. Congress, of course, has since waived the sovereign immunity of the United States in bankruptcy. But in light of *New Lamp, Fiske*, and *Nordic Village*, the question whether sovereign immunity of the States has been waived or abrogated is completely unaffected by any characterization of bankruptcy jurisdiction as *in rem*.

III. THE RESPONDENT CANNOT CIRCUMVENT THE STATE'S SOVEREIGN IMMUNITY BY LABELING HER ADVERSARY PROCEEDING A MERE "MOTION."

Finally, in an argument dependent on her characterization of bankruptcy jurisdiction as *in rem*, the respondent argues that her effort to obtain a discharge of her student loan debt did not require compulsory process against the State because she could have achieved her goal by filing a mere motion rather than a full, formal adversary proceeding. Because her *in rem* theory fails, the respondent's argument on this point fails as well.

Moreover, even accepting for the sake of argument that the aims of some adversary proceedings in bankruptcy might be accomplished as well by motion, the respondent overlooks the particular nature of her claim in this case. Unlike many bankruptcy controversies, this case in an important sense involves the respondent's claim against the Tennessee Student Assistance Corporation, rather than its claim against her.

Under the Bankruptcy Code, most debts are discharged by operation of law without any affirmative action required of the debtor beyond the filing of the original petition and the surrender of assets. 11 U.S.C. § 523. Even many of the exceptions to discharge found in Bankruptcy Code § 523 do not prevent discharge of particular debts unless the creditors take action to establish their exceptions. 11 U.S.C. § 523(c)(1). As to those debts, the debtor has a presumptive right to discharge unless the creditor establishes an exception.

In contrast, student loan debts such as the respondent's are not discharged "unless excepting such debt from

discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8). According to the legislative history, paragraph (8) of § 523(a) "is intended to be self-executing and the lender or institution is not required to file a complaint to determine the nondischargeability of any student loan." S. REP. No. 95-989, *reprinted in* 1978 U.S. C.C.A.N. 5787, 5865. In other words, by operation of the statutes, student loan debt is presumptively nondischargeable; the creditor has a statutory right to its nondischargeability unless the debtor establishes the "undue hardship" exception. A debtor in the respondent's position, therefore, is not simply seeking a discharge of her debt, but is also seeking to extinguish the creditor's right under the bankruptcy statute to a presumptive nondischargeability of that debt.

In light of the congressional intent underlying § 523(a)(8), it makes sense that a debtor seeking to extinguish a creditor State's statutory right to nondischargeability – particularly when the State has not already submitted to the court's jurisdiction – must establish *in personam* jurisdiction by the court over the creditor. Accordingly, the Rules of Bankruptcy Procedure provide that a claim such as respondent's should be brought as an adversary proceeding (Fed. R. Bankr. P. 4007(a) and 7001(6)) and that the plaintiff debtor must obtain service of process. Fed. R. Bankr. P. 7004. In the face of such a proceeding, an unconsenting State may assert its sovereign immunity. But given the intent of Congress in enacting § 523(a)(8), and of the promulgators of the Bankruptcy Rules, the debtor cannot avoid that sovereign immunity by the mere artifice of re-labeling her action as a motion.

This Court has repeatedly made clear that it is the substance of an action that determines the effect of the Eleventh Amendment, not the vagaries of a party's pleadings. *See Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 270 (1997) ("The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings," and the Court is not bound by "empty formalism"); and *Federal Maritime Comm'n,* 535 U.S. at 757 (proceeding before Article I agency tribunal was barred where action "walks, talks, and squawks very much like a lawsuit."). Even if the debtor here could ignore the Bankruptcy Rules and refile this complaint as a "motion," that would not change the essential nature of the proceeding that is being brought against the State or avoid the impact of the Eleventh Amendment.

CONCLUSION

For the reasons stated here and in petitioner's initial brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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