No. _____

In The Supreme Court of the United States

TENNESSEE STUDENT ASSISTANCE CORPORATION,

Petitioner,

V.

PAMELA L. HOOD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Congress has the authority to abrogate state sovereign immunity under the Bankruptcy Clause of Article I, U.S. Const., art. I, § 8, cl.4.

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PETITION FOR A WRIT OF CERITORARI

The Attorney General and Reporter of Tennessee, on behalf of the Tennessee Student Assistance Corporation, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

LIST OF PARTIES

In addition to the parties named in the caption, the United States of America, its Department of Education, and University Account Services were also listed as parties in the adversary proceeding filed in the bankruptcy court. Only the parties named in the caption were parties on appeal.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-26) is reported at 319 F.3d. 755 (6th Cir. 2003). The opinion of the bankruptcy appellate panel (App. 27-60) is reported at 262 B.R. 412 (6th Cir. BAP, filed May 22, 2001). The opinion of the bankruptcy court (App. 62-81) is reported at 2000 WL 33965623 (Bankr. W.D. Tenn., filed July 24, 2000).

JURISDICTION

The court of appeals entered its judgment on February 3, 2003. No party sought rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Bankruptcy Clause of the Constitution grants the following power to Congress:

> To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.

U.S. Const., art. I, § 8, cl. 4.

Bankruptcy Code, 11 U.S.C. § 106 provides in pertinent part:

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Section[] . . . 523 . . . of this title.

Bankruptcy Code, 11 U.S.C. § 523 provides in pertinent part:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

. . .

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents.

STATEMENT OF THE CASE

The Bankruptcy Code establishes many exceptions to the discharge of debts after the completion of a bankruptcy case. 11 U.S.C. § 523(a). One of the types of debt that is excluded from discharge is a debt for an educational loan guaranteed by a governmental unit or made under any program funded in whole or in part by a governmental unit. The only limitation of this exception is when the repayment of such a student loan will impose an undue hardship on the debtor and the debtor's dependents. 11 U.S.C. § 523(a)(8). To qualify for the hardship discharge provision, a debtor must file an adversary proceeding against the party to whom the debt is owed.

Between July 1988 and February 1990, respondent signed promissory notes for student loans guaranteed by petitioner, the Tennessee Student Assistance Corporation (hereafter, "the State" or "TSAC"). App. 29. TSAC is a governmental corporation created by the Tennessee legislature to administer student assistance programs authorized by law and to guarantee student loans and loans to a student's parents under the provisions of the federal Higher Education Act of

1965, as amended. Tenn. Code Ann. §§ 49-4-201, *et seq.*; 49-4-401.

On February 26, 1999, respondent filed a "no-asset" Chapter 7 bankruptcy in the United States Bankruptcy Court for the Western District of Tennessee, Western Division. App. 29. Sallie Mae Service, Inc., submitted a claim to the bankruptcy court, which it subsequently assigned to the State. However, the State did not itself ever file a claim in the bankruptcy case. App. 6, 29.

Respondent received her general discharge on June 4, 1999, without addressing her student loans. She subsequently reopened the case on September 14, 1999, and on October 14, 1999, she filed a complaint for hardship discharge under 11 U.S.C. § 523(a)(8), naming the United States of America, its Department of Education and Sallie Mae Service, Inc., as defendants. On February 22, 2000, respondent amended the complaint to add the State as a defendant. At the time of filing the complaint, respondent owed the State $4,169.31. App. 29-30.

The State filed a motion to dismiss the complaint, arguing that the bankruptcy court did not have jurisdiction over TSAC based on its sovereign immunity as a state agency. Following a hearing, the bankruptcy court denied the State's motion. In its decision, the bankruptcy court found that TSAC was a state agency entitled to assert the protection of sovereign immunity under the Eleventh Amendment, but that Congress validly abrogated that immunity when it enacted 11 U.S.C. § 106(a). The bankruptcy court based its decision on both the presumption of constitutionality of the statute and on the need for uniformity in application of the bankruptcy laws. App. 65, 79-80.

The State appealed to the United States Bankruptcy Appellate Panel for the Sixth Circuit, which affirmed the bankruptcy court's decision. The bankruptcy appellate panel determined that the states ceded their sovereignty over the bankruptcy discharge as a part of the plan of the

Constitutional Convention and that, where there is no sovereignty, there can be no sovereign immunity. App. 60.

The State appealed the bankruptcy appellate panel's decision, but the court of appeals affirmed for essentially the same reasons as stated by the bankruptcy appellate panel. At oral argument, respondent claimed for the first time that the State had waived its sovereign immunity because a proof of claim had been submitted to the bankruptcy court by Sallie Mae, the initial creditor for respondent's student loans, which subsequently assigned the claim to the State. The court of appeals panel majority ruled that this argument had been waived by respondent as a result of her failure to raise it before the bankruptcy court, the bankruptcy appellate panel, or in her brief in the court of appeals.[1] App. 6-8, 21-22. One member of the court would have accepted her argument and concluded that the State had waived its immunity by virtue of a proof of claim filed by a third party with respect to a debt that was subsequently assigned to the State. App. 22-26.

On the issue of the effect of the Bankruptcy Code on the State's sovereign immunity, the court of appeals ruled that Congress validly abrogated the states' sovereign immunity through the exercise of its power under the Bankruptcy Clause, U.S. Const. art. 1, § 8, cl. 4, because the states had, in ratifying that provision, already agreed to the elimination of their immunity with respect to bankruptcy laws. App. 17-21.

In reaching this decision, the court of appeals relied extensively on its own interpretation of the Federalist Papers, notably The Federalist Nos. 32 and 81. It noted that this Court had relied heavily on The Federalist No. 81 in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), but apparently concluded that this Court had overlooked a key portion of The Federalist No. 81, and its relationship to The Federalist No. 32. Based on its reading of those two papers, the court

of appeals concluded that there had been a waiver of the state's immunity "in the plan of the convention" with respect to bankruptcy cases. Hence, it did not view this Court's holding in *Seminole Tribe* as applicable to Congress' power to abrogate state immunity under its Bankruptcy Clause powers, despite the Court's express references to the bankruptcy power in both the majority and dissenting opinions. App. 17-22.

On the State's motion, the court of appeals stayed the mandate to allow time to file this petition, and thereafter until this Court disposes of the case. App. 84-85.

REASONS FOR GRANTING THE WRIT

A. The Court of Appeals' Decision Conflicts with Decisions of Five Other Circuits and Diverges from This Court's Holdings That Congress Lacks Authority to Abrogate Sovereign Immunity Through the Exercise of an Article I Power.

1. The Decision Below Conflicts with Those of All Other Circuits That Have Addressed the Issue.

The court of appeals' decision is in direct conflict with the decisions of five other circuit courts. *See Nelson v. LaCrosse County Dist. Attorney* (*In re Nelson*), 301 F.3d 820, 832 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd.* (*In re Mitchell*), 209 F.3d 1111, 1121 (9th Cir. 2000); *Sacred Heart Hosp. of Norristown v. Pennsylvania* (*In re Sacred Heart Hosp. of Norristown*), 133 F.3d 237, 243 (3d Cir. 1998); *Fernandez v. PNL Asset Mgmt. Co. LLC* (*In re Fernandez*), 123 F.3d 241, 243 (5th Cir.), amended by 130 F.3d 1138, 1139 (5th Cir. 1997); *Schlossberg v. Maryland (In re Creative Goldsmiths of Washington, D.C.*), 119 F.3d 1140, 1145-46 (4th Cir. 1997), *cert. denied*, 523 U.S. 1075 (1998). No other circuit has ruled that Congress has the authority to subject a state to an individual's suit in a bankruptcy court by abrogating sovereign immunity through the exercise of Article I powers in 11 U.S.C. § 106(a).

Absent intervention by this Court, it will be impossible to reconcile the difference in treatment of states' sovereign immunity between the Sixth Circuit and the other circuits that have ruled on the issue.

In the decisions of the Third, Fourth, Fifth, and Ninth Circuits, the courts unhesitatingly accepted and applied this Court's holding in *Seminole Tribe* to Congress' Article I Bankruptcy Clause power, finding no meaningful difference between that power and any of Congress' other Article I powers. In *Schlossberg*, the Fourth Circuit rejected the argument that "the states in subscribing to the Constitution conferred on the federal government the power to enact bankruptcy laws for enforcement in federal courts" and stated that "[w]e find unpersuasive the argument of the United States that the Bankruptcy Clause's provision for the enactment of 'uniform laws on the subject of Bankruptcies . . . requires Congressional powers under this clause to be distinguished from other Article I powers." 119 F.3d at 1145-46.

In *Fernandez*, the Fifth Circuit also rejected the argument that the uniformity provision of the Bankruptcy Clause distinguished it from the clauses dealt with in *Seminole Tribe*. After noting that this Court had explicitly referred to the effect of its decision on bankruptcy cases, that court found "no principled reason to distinguish in a relevant way Congress' Commerce Clause power that it purported to exercise in *Seminole Tribe* from its power under the Bankruptcy Clause for the purposes of state sovereign immunity." 123 F.3d at 244. In *Sacred Heart*, the Third Circuit echoed the views of the Fifth Circuit. 133 F.3d at 243. And the Ninth Circuit concurred as well in *Mitchell*, holding that "*Florida Prepaid* [*Postsecondary Educ. Expense Bd. v. College Savs. Bank*, 527 U.S. 627 (1999)], which held that Congress cannot abrogate sovereign immunity under the Patent Clause of Article I, reaffirms that there is no exception to *Seminole Tribe* for exclusively

federal powers, even those involving exclusive federal jurisdiction. . . . In short, there is no policy-based exception--such as national uniformity--to the *Seminole Tribe* rule that Congress may not abrogate state immunity from suit under Article I." 209 F.3d at 1118. Finally, the Seventh Circuit, in *Nelson*, not only rejected the general version of these arguments but also discussed the precise variation of that argument advanced by the Sixth Circuit and flatly rejected its conclusions. 301 F.3d at 832-33. As a result, there is a square and direct conflict between the Sixth Circuit's holding in this case and the holdings of all five other circuits that have ruled on the issue.

2. The Decision Below Conflicts with This Court's Express Statements in *Seminole Tribe.*

The Sixth Circuit's opinion is in direct conflict with this Court's statements in *Seminole Tribe*. In *Seminole Tribe*, the Court overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), noting that *Union Gas* was the only decision upholding the abrogation of sovereign immunity under a constitutional provision other than the Fourteenth Amendment. *Seminole Tribe*, 517 U.S. at 66. As this Court stated:

> In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. [footnote omitted] The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.

Seminole Tribe, 517 U.S. at 72-73. Footnote 16, in turn, noted that the dissent "understands our opinion to prohibit federal jurisdiction over suits to enforce the bankruptcy, copyright, and antitrust

laws against the States." *Seminole Tribe*, 517 U.S. at 72-73, n. 16. While responding that there were still remedies for enforcing compliance with those laws, so that the dissent's complaint was overstated, the Court plainly agreed that those laws were, indeed, subject to the Court's broadly stated holding on the scope of Congress' Article I powers. Indeed, as the Court noted, "[t]his Court never has awarded relief against a State under any of those statutory schemes." *Id.*

Since *Seminole Tribe*, the Court has consistently held that Congress does not have the authority to abrogate state sovereign immunity through the exercise of any of its Article I powers (which include the Bankruptcy Clause). *See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (Patent); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (Trademark); *Alden v. Maine*, 527 U.S. 706 (1999) (Commerce – overtime pay); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (Commerce – age discrimination); *Alabama v. Garrett*, 531 U.S. 356 (2001) (Commerce – disability); *Federal Maritime Commission v. South Carolina*, 535 U.S. 743 (2002) (Commerce – maritime commerce). In concluding that bankruptcy is "different," the Sixth Circuit has rejected this Court's clear, unequivocal, and unambiguous statement that Congress may not use Article I powers to authorize suits against states, even where the Constitution "vests in Congress complete law-making authority over a particular area." *Seminole Tribe*, 517 U.S. at 72-73.

3. The Decision Is Based on an Analysis That Was Expressly Repudiated by This Court in *Seminole Tribe* And That Would Be Broadly Applicable to Many Federal Laws If Correct.

As justification for departing from the principle established in *Seminole Tribe* and its progeny, and followed by the circuit court decisions upholding sovereign immunity, the court of

appeals explained that none of this Court's sovereign immunity decisions specifically addressed Congress' Bankruptcy Clause power and its relationship to the "plan of the Convention."[2] App. 9. Absent a case from this Court expressly addressing the exact argument that it was considering, the court of appeals concluded that it was free to conduct its own analysis of the Framers' intent on the issue. In doing so, the court of appeals interpreted the uniformity requirement of the Bankruptcy Clause as demonstrating that the Framers intended to remove all aspects of sovereignty from the states through "the plan of the Convention." The court of appeals further concluded that, when the states ceded their legislative powers in the area of bankruptcy law, they also ceded all other aspects of sovereignty at that time, including their immunity from suit by private parties. Therefore, despite the unambiguous message of *Seminole Tribe* and its progeny, the court of appeals ultimately concluded that the states had given Congress the power to abrogate their sovereign immunity through the ratification of the Constitution and its Bankruptcy Clause and that Congress validly exercised that power in 11 U.S.C. § 106(a). App. 17-19. Thus, it apparently concluded that this Court's statements directly referencing the application of *Seminole Tribe* to bankruptcy cases were dicta that could be disregarded as inaccurate in the absence of express consideration of the points that the court of appeals viewed as dispositive.[3]

The Sixth Circuit's exact analysis, though, with its connection of the "plan of the convention" language in The Federalist No. 81 to the discussion of preemption of state laws in The Federalist No. 32, and its finding of a correlative waiver of immunity from suit in areas where such preemption exists, has been repeatedly debated within this Court on prior occasions. It is the crux of the argument in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), where Justice Brennan stated – in dissent – that:

> The States retained their full sovereign authority over state-created causes of action as they did over their traditional sources of revenue. See The Federalist No. 32 (discussing taxation). On the other hand, where the Federal Government, in the "plan of the convention," had substantive lawmaking authority, the States no longer retained their full sovereignty and could be subject to suit in federal court. . . . In these areas, in which the Federal Government had substantive lawmaking authority, Article III's federal-question grant of jurisdiction gave the federal courts power that extended just as far as the legislative power of Congress . . . .

473 U.S. at 277-78. Justice Brennan went on to state in footnote 25:

> Hamilton used the phrase "plan of the convention" frequently as a synonym for the Constitution. . . . . In No. 32, . . . Hamilton had said that "as the plan of the convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States." . . . Therefore, the States had surrendered their immunity from suit on federal causes of action when the Constitution was ratified. . . . Again, insofar as the states have thus given up powers to the Federal Government in the "plan of the convention," they are no longer full sovereigns and may be subjected to suit.

473 U.S. at 277 n. 25.

Similarly, in *Union Gas*, the plurality stated "[w]e have recognized that the States enjoy no immunity where there has been a surrender of this immunity in the plan of the convention. . . . [T]o the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable. The States held liable under such a congressional enactment are thus not 'unconsenting'; they gave their consent all at once, in ratifying the Constitution containing the Commerce Clause, rather than on a case-by-case basis." *Union Gas*, 491 U.S. at 19-20 (internal citations and quotations omitted).

In short, the decision below is nothing more than a return to the arguments made in *Atascadero* and *Union Gas*. Those arguments, however, are not the law of the land. The failure to recognize the similarity of the arguments or even to cite and discuss those prior opinions is the only basis on which the court below could avoid the square conflict between its position and that expressed by this Court in *Seminole Tribe* and its progeny.

The only suggestion in the court of appeals' opinion of some additional factor beyond those discussed in *Atascadero* and *Union Gas* is its reliance upon the uniformity language of the Bankruptcy Clause. In its view, that language has some additional constitutional significance that distinguishes the Bankruptcy Clause from the Commerce Clause or the Indian Commerce Clause. App. 12-14. That view, though, also squarely conflicts with this Court's holding in *Federal Maritime Commission*. There, the Court rejected the plaintiffs' argument that the need for uniformity in the regulation of maritime commerce warranted a finding that the states had granted Congress the power to abrogate their immunity in connection with that legislative power. 535 U.S. at 767-768. Uniformity, so far as can be determined from the Sixth Circuit's opinion, is simply another way of saying that Congress has been given the utmost power to exclude states from legislating in the area in question. But this Court has already ruled in *Seminole Tribe* that the degree of congressional power is irrelevant to the issue of state immunity from suit.[4] If the Sixth Circuit's view were correct, there is no reason why it should be limited to the Bankruptcy Clause. To the extent that power is given to Congress to preempt state legislation in any area, it would thus have the same power to abrogate state immunity that the Sixth Circuit argues for with respect to the Bankruptcy Clause. In short, the argument would have returned full circle to the position espoused in *Union Gas*.

Review by this Court of the court of appeals' decision is warranted, given its divergence from the holdings of all other circuit courts ruling on the issue and from the principle consistently upheld by this Court - that Congress cannot abrogate states' sovereign immunity through exercise of an Article I power.

B. This Case Presents an Important Issue with the Potential to Affect States Outside the Sixth Circuit.

Resolution by this Court of the conflict between the decision below and the decisions of other circuit courts is also needed because the Sixth Circuit's decision will affect states located outside its territorial jurisdiction. The issue in this case could affect each of the fifty states and the territories of the United States. Given the national platform on which a great many businesses operate and the mobility of individual debtors, it is likely that any of the states or territories could be hailed into bankruptcy court in one of the districts situated in the Sixth Circuit. Indeed, the same issue is currently pending before the Sixth Circuit in another case involving the Commonwealth of Massachusetts, arising out of *In re Service Merchandise*, 265 B.R. 917 (M.D. Tenn. 2001), where the District Court found states entitled to sovereign immunity in bankruptcy. *H.J. Wilson Co., Inc. v. Massachusetts Commonwealth*, No. 01-6050 (6th Cir.). That case did not involve a student loan discharge, but an adversary proceeding for determination of the debtor's tax liability and for a refund of any excess taxes paid. An appeal in that case is currently pending before the Sixth Circuit following briefing. That case will be controlled by the decision in this case, and for that reason, Massachusetts has sought a stay of the proceedings on appeal pending final disposition of this case.

In addition to subjecting states to the indignity of suits without their consent, the economic

costs to states could be overwhelming. The costs of travel and retention of local counsel alone could well present crisis situations in these treacherous economic times for states forced to defend suits in distant courts at the hands of private litigants. This would be particularly true if debtors are able to force states to appear at a time of their own choosing even in the absence of any actual collection efforts by the state.

The burdens placed on the states by the court of appeals' decision are only exacerbated by the increasing number of bankruptcy cases filed each year across the country. Filings for the last year exceeded 1.5 million; and the number continues to swell. The problem is made even greater by the extremely liberal venue provisions in the Bankruptcy Code; business entities, in particular, may file wherever even a single affiliate has established its "domicile" for the greater part of 180 days prior to the filing. See 28 U.S.C. § 1408. If this decision is allowed to stand, it is not difficult to imagine the prospect of individual and corporate debtors with significant obligations to a state agency establishing a presence in one of the states in the Sixth Circuit's jurisdiction simply to avoid the rulings of all of the circuits that have so far upheld the states' sovereign immunity in bankruptcy cases.

In sum, the court of appeals' decision creates a conflict with the decisions of five other circuit courts and is inconsistent with this Court's decisions disallowing abrogation of sovereign immunity by the exercise of Article I powers. Such inconsistency creates great uncertainty among the states regarding their protection from lawsuits by individuals and businesses who choose to file bankruptcy.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2003

1. Not only was the issue not raised until oral argument in the court of appeals, the record on appeal does not include either the proof of claim submitted by Sallie Mae or the document assigning the claim to TSAC. App. 6-8.

2. The Sixth Circuit did not remark on the fact that this Court has decided several cases involving bankruptcy and the Eleventh Amendment, all on the assumption that the Amendment *does* apply to bankruptcy cases as a general matter. *See Hoffman v. Connecticut Dep't. of Income Maintenance,* 492 U.S. 96 (1989); *Gardner v. New Jersey,* 329 U.S. 565 (1947); *Ashton v. Cameron County Water Imp. Dist. No. 1,* 298 U.S. 513 (1936); *New York v. Irving Trust Co.*, 288 U.S. 329 (1933). Under the Sixth Circuit's analysis, none of the decisional analysis undertaken by this Court in those cases was necessary, since in its view the states had already waived their immunity completely with respect to bankruptcy when they ratified the Constitution. App. 17-21.

3. In a footnote in *Seminole Tribe*, the majority responded to concerns about the effect of its decision on bankruptcy cases by noting that the court of appeals' case cited by the dissent (*In re Merchants Grain*, 59 F.3d 630 (7th Cir. 1995)) was based on *Union Gas*, which the majority opinion explicitly overruled. 517 U.S. at 72 n. 16. The Court granted certiorari in *Merchant's Grain* shortly after *Seminole Tribe* issued, vacated the decision, which denied immunity to the state, and remanded it for reconsideration in light of its decision in *Seminole Tribe*. *Ohio Agric. Commodity Depositors Fund v. Mahern*, 517 U.S. 1130 (1996). In addition to the majority's language in footnote 16 in *Seminole Tribe*, bankruptcy was also referenced by the dissent in three places. 517 U.S. at 77, n.1; at 90, n. 12; and at 93-94. At a minimum, it cannot be said that this Court was unaware of the fact that its decision would have an impact upon bankruptcy cases.

4. Indeed, the Court suggested in *Seminole Tribe* that the Indian Commerce Power was perhaps the most plenary power in the Constitution as regards the relationship between the United States and the States, yet concluded that that fact gave Congress no power to abrogate state immunity. 517 U.S. at 62-63. *A fortiori*, the same is true of the Bankruptcy Power which limits states only when and if the federal government actually chooses to legislate on the subject. *Sturges v. Crowninshield,* 17 U.S. (4 Wheat.) 122, 196 (1819); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1825).