No. 04-885

In The Supreme Court of the United States

CENTRAL VIRGINIA COMMUNITY COLLEGE,
VIRGINIA MILITARY INSTITUTE,
NEW RIVER COMMUNITY COLLEGE, and
BLUE RIDGE COMMUNITY COLLEGE,

Petitioners,

v.

BERNARD KATZ, Liquidating Supervisor for
Wallace's Bookstores, Inc.,

Respondent.

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

BRIEF OF THE PETITIONERS

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QUESTION PRESENTED

May Congress use the Article I Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, to abrogate the States' sovereign immunity?

PARTIES TO THE PROCEEDINGS

The Petitioners are four public institutions of higher education – Central Virginia Community College, Virginia Military Institute, New River Community College, and Blue Ridge Community College.

The Respondent is Bernard Katz, who is the Liquidating Supervisor for the bankrupt estate of *In re Wallace's Bookstores, Inc.*, No. 01-50545 (Bkr. E.D. Ky.). Katz commenced a bankruptcy adversary proceeding against each of the Petitioners.

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BRIEF OF THE PETITIONERS

Central Virginia Community College, Virginia Military Institute, New River Community College, and Blue Ridge Community College (collectively, "the Virginia Institutions"), by and through their counsel, Virginia Attorney General Judith Williams Jagdmann, submit their Brief.[1] For the reasons stated below, the judgment of the United States Court of Appeals for the Sixth Circuit – that Congress may use the Article I Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, to abrogate the States' sovereign immunity – should be reversed.[2]

OPINIONS BELOW

The decision of the court of appeals is unpublished, but reported as *Katz v. Central Virginia Community College (In re Wallace's Bookstores)*, 106 Fed. Appx. 341 (6th Cir. 2004)

[1] Like all public institutions of higher education in Virginia, the Virginia Institutions are considered the Commonwealth for purposes of sovereign immunity. *See Shepard v. Irving*, 204 F. Supp. 2d 902, 912 (E.D. Va. 2002); *University of Virginia v. Robertson (In re Robertson)*, 243 B.R. 657, 661 n.4 (W.D. Va. 2000) (bankruptcy appeal); *DeBauche v. Virginia Commonwealth Univ*., 7 F. Supp. 2d 718, 722 (E.D. Va. 1998); *Thorpe v. Virginia State Univ.*, 6 F. Supp. 2d 507, 509 n.4 (E.D. Va. 1998).

[2] Although this proceeding questions the constitutionality of 11 U.S.C. § 106(a), which purports to abrogate the States' sovereign immunity for adversary proceedings in bankruptcy, neither the United States nor any agency, officer, or employee thereof is a party. Because 28 U.S.C. § 2403(a) is applicable, the Virginia Institutions, on two separate occasions, advised the court of appeals that there was a constitutional challenge to a federal statute and that the Attorney General of the United States should be notified of the challenge. Apparently, the Attorney General of the United States was never notified. Moreover, the Virginia Institutions included a Rule 29.4(b) statement in the Petition for Certiorari and served a copy of the Petition on the Solicitor General of the United States.

(*per curiam*). It is reprinted in the Joint Appendix at 46. The decision of the United States District Court for the Eastern District of Kentucky is unpublished and unreported, but is reprinted in the Joint Appendix at 44. The four decisions of the United States Bankruptcy Court for the Eastern District of Kentucky also are unpublished and unreported, but are reprinted in the Joint Appendix at 40 (Central Virginia Community College), 38 (Virginia Military Institute), 36 (New River Community College), and 42 (Blue Ridge Community College).[3] The decision of the Sixth Circuit denying rehearing *en banc* is unpublished and unreported. It is reprinted in the Joint Appendix at 48.

JURISDICTION

The panel decision of the court of appeals was entered on August 4, 2004. The decision of the court of appeals denying the Virginia Institutions' petition for rehearing *en banc* was entered on September 30, 2004.[4] This Court has jurisdiction under 28 U.S.C. § 1254(1). A Writ of Certiorari was granted on April 4, 2005. *See* 125 S. Ct. 1727 (2005).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This petition involves the following constitutional and statutory provisions:

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[3] In the bankruptcy court, there were four separate cases – one against each of the institutions. The four appeals were consolidated in the district court and taken as one appeal to the court of appeals. The Virginia Institutions filed one Petition for a Writ of Certiorari.

[4] The court of appeals stayed its mandate pending this Court's resolution of the Petition.

1. The Bankruptcy Clause of the United States Constitution, Art. I, § 8, cl. 4, states that the Congress shall have the power: "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

2. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

3. The Eleventh Amendment to the United States Constitution provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state. . . ."

4. The federal statute at issue in this petition, 11 U.S.C. § 106(a), provides:

> (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:
>
> Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.
>
> The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> The court may issue against a governmental unit an order, process, or judgment under

such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

INTRODUCTION

In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), this Court, reaffirming the principles of *Hans v. Louisiana*, 134 U.S. 1 (1890) and explicitly overruling *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), held that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe*, 517 U.S. at 73.[5]

[5] In subsequent decisions, this Court has repeatedly emphasized that "Congress lacks power under Article I to abrogate the States' sovereign immunity." *Kimel v. Florida Bd. of Regents,* 528 U.S. 62*,* 78

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Because the Bankruptcy Clause is an Article I power, "Congress may not abrogate the States' Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause. . . ." *Hoffman v. Connecticut Dep't of Income Maint.,* 492 U.S. 96, 105 (1989) (O'Connor, J., concurring).[6] Indeed, "it has not been widely thought that the federal antitrust, bankruptcy, or copyright statutes abrogated the States' sovereign immunity. This Court never has awarded relief against a State under any of those statutory schemes." *Seminole Tribe*, 517 U.S. at 73 n.16.[7]

(2000). *See also Board of Trustees of Univ. of Alabama v. Garrett,* 531 U.S. 356, 364 (2001) ("Congress may not . . . base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."); *Kimel*, 528 U.S. at 80 ("Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals."); *Alden v. Maine*, 527 U.S. 706, 748 (1999) ("[I]t is settled doctrine that neither substantive federal law nor attempted congressional abrogation under Article I bars a State from raising a constitutional defense of sovereign immunity in federal court. . . ."); *Florida Prepaid Postsecondary Education Expense Bd. v. College Sav. Bank,* 527 U.S. 627, 636 (1999) ("Congress may not abrogate state sovereign immunity pursuant to its Article I powers. . . .").

[6] Individual Justices have expressed similar sentiments. *See Tennessee Student Assistance Corp. v. Hood,* 124 S. Ct. 1905, 1920 (2004) (*Hood II*), 124 S. Ct. at 1920 (Thomas, J., joined by Scalia, J., dissenting) ("This Court has repeatedly stated that 'Congress may not . . . base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I.' "); *Hoffman,* 492 U.S. at 105 (Scalia, J., concurring) (stating his belief that Congress should not be able to use any of its Article I powers to abrogate sovereign immunity); *Union Gas Co.,* 491 U.S. at 42 (Scalia, J., joined by Rehnquist, C.J., O'Connor & Kennedy, JJ., dissenting) ("[I]f the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers. An interpretation of the original Constitution which permits Congress to eliminate sovereign immunity only if it wants to renders the doctrine a practical nullity and is therefore unreasonable.").

[7] Moreover, one of this Court's first applications of *Seminole Tribe* involved bankruptcy. After the Seventh Circuit held that Congress

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Relying on the logic of *Seminole Tribe*, *six* courts of appeals have held that Congress may not use the Article I Bankruptcy Clause to abrogate sovereign immunity. *See Georgia Higher Education Assistance Corp. v. Crow (In re Crow)*, 394 F.3d 918, 921-22 (11th Cir. 2004); *Nelson v. La Crosse 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. v. Department of Pub. Welfare (In re Sacred Heart Hosp.)*, 133 F.3d 237, 243 (3rd 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)*, 119 F.3d 1140, 1145-46 (4th Cir. 1997). However, the Sixth Circuit, relying in part on an analysis rejected by *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.2 (1985), concluded that Congress may use the Article I Bankruptcy Clause to abrogate sovereign immunity. *See Hood v. Tennessee Student Assistance Corp. (In re Hood)*, 319 F.3d 755, 764-68 (6th Cir. 2003) (*Hood I*).[8] In this case, the Sixth Circuit, relying

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could use the Article I Bankruptcy Clause to abrogate sovereign immunity, this Court granted certiorari, vacated the judgment and remanded for further proceedings in light of *Seminole Tribe*. *See Ohio Agric. Commodity Depositors Fund v. Mahern (In re Merchants Grain),* 59 F.3d 630 (7th Cir. 1995), *cert. granted, judgment vacated, and remanded*, 517 U.S. 1130 (1996). Ultimately, that case became moot before the Seventh Circuit could render a decision on remand. However, the Seventh Circuit subsequently held that Congress may not use the Article I Bankruptcy Clause to abrogate sovereign immunity. *Nelson*, 301 F.3d 820.

[8] Although this Court agreed to review *Hood I* in order "to decide whether Congress has the authority to abrogate state sovereign immunity under the Bankruptcy Clause," *Hood II,* 124 S. Ct. at 1915 (Thomas, J., joined by Scalia, J., dissenting), this Court ultimately decided the case on other grounds (*in rem* jurisdiction) and, thus, declined "to decide whether a bankruptcy court's exercise of personal

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exclusively on its previous decision in *Hood I*, reached the same conclusion.[9] J.A. at 46. Because the lower court's decision is contrary to the well-established principles of *Seminole Tribe*, the judgment should be reversed.

STATEMENT OF THE CASE

1. The factual and procedural background for this matter is relatively straightforward. Wallace's Bookstores, Inc., a Kentucky corporation, operated college and university bookstores in a number of States. Each of the four Virginia Institutions did business with the company prior to it declaring bankruptcy. After commencement of the bankruptcy proceeding, the Respondent, Bernard Katz, who is the Liquidating Supervisor of the bankrupt estate, commenced four different adversary proceedings – one against each of the Virginia Institutions.

These adversary proceedings involve three different types of actions. First, pursuant to 11 U.S.C. §§ 547 and 550, Katz seeks to recover alleged preferential transfers.[10]

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jurisdiction over a State would be valid under the Eleventh Amendment." *Id*. at 1915 (Opinion of Court).

[9] Because this Court, in deciding *Hood II*, never addressed the correctness of the Sixth Circuit's rationale in *Hood I*, the reasoning of *Hood I* remains binding precedent in the Sixth Circuit. *See Moltan Co. v. Eagle-Picher Indus., Inc.,* 55 F.3d 1171, 1176 (6th Cir. 1995) ("We cannot overturn the prior published opinion of another panel and are therefore bound by these previous decisions."). As a result, the three-judge panel of the lower court had no choice but to follow *Hood I* and summarily affirm.

[10] Originally, Katz, acting pursuant to 11 U.S.C. §§ 544 and 550, also sought to recover preferential transfers allegedly made in violation of Kentucky law. However, Katz voluntarily dismissed these claims with prejudice after this Court granted certiorari. Because there continues to be a live case or controversy between Katz and the Virginia Institutions,

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Essentially, Katz is attempting to recover money that indisputably belongs to the Virginia Institutions. Second, Katz seeks to recover accounts receivable that are allegedly owed because of agreements between the debtor and the Virginia Institutions. In other words, Katz is attempting to recover money for an alleged breach of contract claim. Third, pursuant to 11 U.S.C. § 502, Katz seeks to have any pre-petition claims of the Virginia Institutions disallowed. In effect, Katz is attempting to stop the Virginia Institutions from collecting money that is owed to them.

Specifically, Katz seeks a total of $356,174.79[11] from the Virginia Institutions – $68,285.00 from Central Virginia Community College,[12] $56,004.00 from Virginia Military Institute,[13] $162,513.61 from New River Community College,[14] and $69,372.18 from Blue Ridge Community College.[15] *See* J.A. at 14, ¶ 15; J.A. at 15, ¶ 24 (Central Virginia Community College); J.A. at 5, ¶ 15; J.A. at 6, ¶ 24 (Virginia

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the dismissal of these claims does not affect this Court's jurisdiction nor the need for this Court to resolve the question presented.

[11] This total reflects $167,874.21 in receivables and $188,300.58 in alleged preferential transfers.

[12] This total reflects $4,898.00 in receivables and $63,387.00 in alleged preferential transfers.

[13] This total reflects $30,409.00 in receivables and $25,595.00 in alleged preferential transfers. Originally, Katz sought $77,654.00 in alleged preferential transfers. *See* J.A. at 7, ¶ 33. However, after Katz dismissed his state law preference claims, the amount was reduced to $25,595.00. *See* J.A. at 6, ¶ 24.

[14] This total reflects $97,249.61 in receivables and $65,264.00 in alleged preferential transfers.

[15] This total reflects $35,317.60 in receivables and $34,054.58 in alleged preferential transfers. Originally, Katz sought $35,312.50 in alleged preferential transfers. *See* J.A. at 24, ¶ 34. However, after Katz dismissed his state law preference claims, the amount was reduced to $34,054.58. *See* J.A. at 23, ¶ 26.

Military Institute); J.A. at 31, ¶ 19; J.A. at 33, ¶ 28 (New River Community College); J.A. at 22, ¶ 17; J.A at 23, ¶ 26 (Blue Ridge Community College). Katz alleges that the preferential transfers were purportedly made by the debtor pursuant to separate agreements with each of the institutions. *See* J.A. at 15, ¶ 24 (Central Virginia Community College); J.A. at 6, ¶ 24 (Virginia Military Institute); J.A. at 33, ¶ 28 (New River Community College); J.A. at 23, ¶ 26 (Blue Ridge Community College). The four adversary complaints also allege that the Virginia Institutions, as unsecured creditors, each should be denied the right to any distribution from the bankruptcy estate on any proof of claim they might have filed. *See* J.A. at 16, ¶ 33 (Central Virginia Community College); J.A. at 9, ¶ 42 (Virginia Military Institute); J.A. at 34, ¶ 37 (New River Community College); J.A. at 26, ¶ 43 (Blue Ridge Community College).

2. The Virginia Institutions moved to dismiss all of the adversary proceedings on sovereign immunity grounds. However, the bankruptcy court, following *Hood I*, denied the Motion to Dismiss.[16] *See* J.A. at 40-41 (Central Virginia Community College); J.A. at 38-39 (Virginia Military Institute); J.A. at 36-37 (New River Community College); J.A. at 42-43 (Blue Ridge Community College).

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[16] Additionally, Katz argued that Virginia Military Institute had waived sovereign immunity by filing for all $56,004.00 in claims against it by filing a proof of claim for $43,237.60. Initially, the bankruptcy court accepted this argument and included waiver as an alternative grounds for denying Virginia Military Institute's Motion to Dismiss. *See* Order of April 24, 2003 at ¶ 3, *Katz v. Virginia Military Institute* (*In re Wallace's Bookstores*) (Bkr. E.D. Ky.) (No. 03-05068). However, in its final order concerning Virginia Military Institute, the bankruptcy court did not mention waiver of sovereign immunity, but relied exclusively on abrogation of sovereign immunity. *See* J.A. at 38-39.

3. Because a denial of sovereign immunity is a final judgment under the collateral order doctrine, *see Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.,* 506 U. S. 139, 141-45 (1993), the Virginia Institutions appealed to the district court. The district court, following *Hood I*, held that sovereign immunity had been abrogated. J.A. at 44-45.

4. The Virginia Institutions appealed to the court of appeals. The Sixth Circuit apparently delayed resolution of the appeal until after this Court decided *Hood II*. Once this Court rendered its decision without resolving whether Congress could use the Bankruptcy Clause to abrogate sovereign immunity, *Hood II*, 124 S. Ct. at 1915, the court of appeals applied its decision in *Hood I* and affirmed. J.A. at 46-47. The court of appeals denied the Virginia Institutions' petition for rehearing *en banc*. J.A. at 48-49.

5. Because the sole basis for the lower court's decision was its previous decision in *Hood I*, this Court is, for all practical purposes, reviewing the correctness of the holding in *Hood I*. Thus, it is appropriate to review briefly the Sixth Circuit's rationale for holding that Congress may use the Bankruptcy Clause to abrogate sovereign immunity. In concluding that Congress may use the Article I Bankruptcy Clause to abrogate sovereign immunity, the court of appeals made three points.

a. First, unlike the Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits, the Sixth Circuit interpreted *Seminole Tribe* as leaving open the possibility that Congress could use *some* of its Article I powers to abrogate sovereign immunity. *Hood I*, 319 F.3d at 761-62. *See also Hood II*, 124 S. Ct. at 1920 (Thomas, J., joined by Scalia, J., dissenting) ("[T]he Court of Appeals held that the Bankruptcy Clause operates differently than Congress' other Article I powers because of its 'uniformity requirement.'"). Instead, the Sixth Circuit

declared that "neither *Seminole Tribe* nor any of the Supreme Court's other recent sovereign immunity cases address Congress's Bankruptcy Clause powers as understood in the plan of the Convention." *Hood I*, 319 F.3d at 761-62.

b. Second, the Sixth Circuit found the text of the Bankruptcy Clause to be significant. Unlike the other Article I powers, the Bankruptcy Clause requires that there be "uniform laws." *See* U.S. Const. art. I, § 8, cl. 4 ("To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."). Although every other Circuit to address the issue has found this Uniformity Requirement to be limited to a requirement of "geographic uniformity," *see Crow,* 394 F.3d at 922; *Nelson*, 301 F.3d at 834; *Mitchell*, 209 F.3d at 119; *Sacred Heart,* 133 F.3d at 243; *Fernandez*, 123 F.3d at 244; *Schlossberg*, 119 F.3d at 1145-46, the court of appeals rejected this interpretation. *Hood I* at 763-64. Instead, the Sixth Circuit found that the Uniformity Requirement was more than a mere legislative preference; it was a constitutional mandate. *See Id*. at 764-67. In the lower court's view, "a federal bankruptcy system could cure the previous systems' ills only if it applied uniformly to all creditors and debtors. . . ." *Id.* at 767.

c. Third, the Sixth Circuit adopted the rationale of the four-Justice dissent in *Atascadero* and the four-Justice plurality in *Union Gas.* To explain, in his dissent in *Atascadero*, Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, focused on Hamilton's *The Federalist No. 81*, which had long been interpreted as supporting the proposition that the States retained sovereign immunity after the Constitution was adopted. Justice Brennan argued that a closer examination of *The Federalist No. 81*, and particularly in cross-reference to Hamilton's *The Federalist No. 32,* showed that Hamilton agreed that a surrender of the sovereign power to

legislate inevitably resulted in a surrender of sovereign immunity. *See Atascadero*, 473 U.S. at 276-78 (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., dissenting).[17] Four years later, in *Union Gas,* the same four Justices reiterated their belief that the surrender of sovereign authority to legislate necessarily included a surrender of sovereign immunity from suit. *See Union Gas,* 491 U.S. at 19-20 (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., announcing the judgment of the Court).[18] In *Hood I*, the court

[17] As the dissenting Justices explained:

> A careful reading of this passage, however, in the context of Hamilton's views elsewhere in *The Federalist*, demonstrates precisely the opposite. In the cases arising under state law that would find their way into federal court under the state citizen diversity clause, a defense of state sovereign immunity would be as valid in federal court as it would be in state court. 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; as Hamilton had said in discussing the judicial power, "every government *ought to possess the means of executing its own provisions by its own authority*," *The Federalist No. 80* (emphasis in original). To interpret Article III to impose an independent limit on the lawmaking power of Congress would be to turn the "plan of the convention" on its head.

Atascadero, 473 U.S. at 276-78 (footnotes and some citations omitted) (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., dissenting).

[18] The plurality observed:

> We have recognized that the States enjoy no immunity where there has been " 'a surrender of this immunity in the

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of appeals, without noting or acknowledging the four-Justice *Atascadero* dissent or the four-Justice *Union Gas* plurality, essentially adopted the same reasoning. *Hood I*, 319 F.3d at 766. The court of appeals observed:

> The question is whether Hamilton's identification of the uniform powers as examples of categories in which states have ceded sovereignty includes the ceding of immunity from suit. We conclude that *No. 32* does in fact refer to the ceding of sovereign immunity. Hamilton's cross-reference to this discussion in *No. 81*'s discussion of ceding sovereign immunity can *only* suggest that, in the minds of the Framers, ceding sovereignty by the methods described in *No. 32* implies ceding sovereign immunity as discussed in *No. 81*. There is no other explanation for his cross-reference in *No. 81*. Thus *The Federalist No. 81* and *No. 32* suggest that the states ceded their immunity by granting Congress the power to make uniform laws.

Hood I, 319 F.3d at 766 (citations omitted) (emphasis added). The lower court was adopting a rationale that had

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> plan of the convention.'" Because the Commerce Clause withholds power from the States at the same time as it confers it on Congress, and because the congressional power thus conferred would be incomplete without the authority to render States liable in damages, it must be that, to 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 (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., announcing the judgment of the Court) (citations omitted).

been rejected in *Atascadero* and *Seminole Tribe*. *See Seminole Tribe*, 517 U.S. at 65-66 (overruling *Union Gas*); *Atascadero*, 473 U.S. at 238-39 n.2 (rejecting the position set forth by the four-Justice dissent). Based on that rationale, the court of appeals held that by surrendering the sovereign power to make uniform bankruptcy laws, the States necessarily surrendered their sovereign immunity. Thus, because Congress can pass bankruptcy laws, it can abrogate the States' sovereign immunity for suits arising out of bankruptcy.

SUMMARY OF ARGUMENT

The Virginia Institutions' argument for reversal of the Sixth Circuit's Judgment is straightforward.

First, Congress may not use the Article I Bankruptcy Clause to abrogate the States' sovereign immunity. This conclusion flows from well-established constitutional principles. The Constitution creates dual sovereigns – the National Government and the States. As a consequence of being sovereign, the States are immune from suit. Although Congress may abrogate the States' sovereign immunity, the abrogation exception is limited to enforcement of the Fourteenth Amendment. The abrogation exception does not extend to the general Article I powers, such as the Bankruptcy Clause. Because sovereign immunity has not been validly abrogated, the Virginia Institutions are immune.

Second, the Uniformity Requirement does not alter the analysis. Initially, the Uniformity Requirement does not require that all debtors and creditors be treated alike or that the States be treated like private parties. Congress may create different classes of debtors and may acknowledge that similar transactions have different consequences in different States. Additionally, a need for national uniformity does not trump the States' sovereign immunity.

While there is a need for uniformity with respect to intellectual property and some aspects of commerce, neither the commerce power nor the intellectual property power can be used to diminish the States' sovereign immunity. Furthermore, the Uniformity Requirement actually limits, rather than expands, powers of Congress. The other Article I powers are not subject to a requirement of uniformity. Although the "Dormant Commerce Clause" prohibits the States from regulating interstate commerce in the absence of congressional action, there is no "Dormant Bankruptcy Clause." Thus, the Bankruptcy Clause power is narrower than the other Article I powers – an interpretation which is confirmed by the historical record.

Third, Hamilton's writings do not alter the analysis. Contrary to the lower court's interpretation, Hamilton believed that the sovereign power to legislate was separate and distinct from the sovereign immunity from suit. Additionally, regardless of what Hamilton believed, his writings are not dispositive. The overwhelming national consensus – as con-firmed by the rapid adoption of the Eleventh Amendment – was that the States were immune from suit. Finally, acceptance of the lower court's rationale would transform this Court's dual sovereignty jurisprudence. It would require not only overruling *Seminole Tribe*, but also overruling *Hans.* Such a development would cast serious doubt on the viability of dual sovereignty decisions outside of the immunity context.

ARGUMENT

I. CONGRESS MAY NOT USE THE ARTICLE I BANKRUPTCY CLAUSE TO ABROGATE SOVEREIGN IMMUNITY.

"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." *Seminole Tribe*, 517 U.S. at 72. Thus, while the Bankruptcy Clause allows Congress to make uniform bankruptcy laws, it does not allow Congress to abrogate the States' sovereign immunity.

This conclusion logically flows from basic constitutional principles. First, the Constitution establishes dual sovereigns – the States and the National Government – each of which exercises sovereign power in their respective sphere without interference from the other. *See* U.S. Const. amend. X. Second, one consequence of the States being sovereign is that they retain sovereign immunity from suit. *See* U.S. Const. amend XI. Third, while Congress may abrogate the States' sovereign immunity in extraordinary circumstances, this exception is limited to circumstances in which Congress is enforcing the Fourteenth Amendment. The abrogation exception does not extend to the general Article I powers, such as the Bankruptcy Clause.

A. The Constitution Creates Dual Sovereigns.

The Constitution "split the atom of sovereignty" by "establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).[19] By dividing

[19] Justice Kennedy's idea of dividing power between dual sovereigns is not new. As early as 1768, John Dickinson suggested that sovereignty should be divided between the British Parliament and the Colonial Legislatures. *See* 1 Alfred H. Kelly, Winfred A. Harbison & Herman Belz, *The American Constitution: Its Origins and Development* 46-49 (7th ed. 1991).

sovereignty between the National Government and the States,[20] the Constitution insured that "a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *The Federalist No. 51*, at 291 (James Madison). *See also The Federalist No. 28*, at 149 (Alexander Hamilton) ("Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.").[21] Thus, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

This division of sovereignty between the States and the National Government "is a defining feature of our Nation's constitutional blueprint." *Federal Maritime*

[20] Prior to the adoption of the Constitution, the thirteen States effectively were thirteen sovereign nations. *See Declaration of Independence* ("these United colonies are and of right ought to be free and independent states"). Each individual State retained the "Full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do." *Id.* Indeed, the Articles of Confederation explicitly recognized that each State "retains its sovereignty, freedom, and independence, which is not by this confederation expressly delegated to the United States, in Congress assembled." *Articles of Confederation*, art. II. In sum, before the ratification of the United States Constitution, the States were sovereign entities. *See Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991).

[21] Throughout this Brief, all page number citations to *The Federalist* are from *The Federalist Papers* (Clinton Rossiter, ed. 1961, Mentor Books Edition 1999).

Comm'n v. South Carolina State Ports Auth., 535 U.S. 743, 751 (2002). It "protects us from our own best intentions" by preventing the concentration of "power in one location as an expedient solution to the crisis of the day." *New York v. United States*, 505 U.S. 144, 187 (1992). The division of power between *dual sovereigns*, the States and the National Government, is reflected throughout the Constitution's text, *see Printz v. United States*, 521 U.S. 898, 919 (1997), as well as its structure. *See Alden*, 527 U.S. at 714-15. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

Because "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom," *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., joined by O'Connor, J., concurring), this Court has intervened to maintain the prerogatives of both the States and the National Government.[22] In order to

[22] Moreover, this Court has reinforced the division of power among the Sovereigns by insisting that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will v. Michigan State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted). *See also Gregory,* 501 U.S. at 460-61 (clear statement required to dictate qualifications for state officials); *Atascadero*, 473 U.S. at 242 (no abrogation of sovereign immunity without clear statement); *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 16 (1981) (clear statement required to impose conditions on the receipt of federal funds). In other words, the sovereignty of the States is far too important to be undermined by inference or implication. Rather, the sovereignty of the States can only be diminished by a clear expression of congressional intent within the statutory text.

preserve the sovereignty of the National Government, this Court has prevented the States from imposing term limits on members of Congress, *U.S. Term Limits*, 514 U.S. at 800-01, and instructing members of Congress as to how to vote on certain issues, *Cook v. Gralike*, 531 U.S. 510, 519-22, (2001). Similarly, it has invalidated state laws that infringe on the right to travel, *Saenz v. Roe,* 526 U.S. 489 (1999), that undermine the Nation's foreign policy, *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 372-74 (2000), and that exempt a State from generally applicable regulations of interstate commerce. *Reno v. Condon,* 528 U.S. 141, 150 (2000). Conversely, in order to preserve the sovereignty of the States, this Court has prevented the National Government from requiring the States to pass particular legislation, *New York,* 505 U.S. at 162, commandeering state and local officials to enforce federal law, *Printz*, 521 U.S. at 935, dictating the location of the State Capitol, *Coyle v. Smith,* 221 U.S. 559, 579 (1911), or regulating purely local matters under the guise of interstate commerce. *United States v. Morrison*, 529 U.S. 598, 617-19 (2000); *Lopez*, 514 U.S. at 561 n.3.

B. The States Have Immunity From Suit.

"An integral component of that 'residuary and inviolable sovereignty' retained by the States is their immunity from private suits." *Federal Maritime Comm'n*, 535 U.S. at 751. *See also The Federalist No. 39,* at 213 (James Madison) ("the proposed government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."); *No. 81*, at 455 (Alexander Hamilton) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent.*") (emphasis

original). The adoption of the Constitution "did not disturb States' immunity from private suits, thus firmly enshrining this principle in our constitutional framework." *Federal Maritime Comm'n,* 535 U.S. at 752. Indeed, "leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity." *Alden*, 527 U.S. at 716.

The widespread acceptance of this proposition is demonstrated by the reaction to *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419 (1793), which held that private citizens from one State could sue another State.[23] *Id*. at 468 (Cushing, J.); 440 (Wilson, J.); 478-79 (Jay, C.J.); 450-53 (Blair, J.). Almost immediately, Congress passed and the States subsequently ratified the Eleventh Amendment, which effectively overturns *Chisholm*. *See Federal Maritime Comm'n*, 535 U.S. at 752; *Alden,* 527 U.S. at 721. While the text of the Eleventh Amendment is limited to "the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision," *Id.* at 723, the Eleventh Amendment confirms a much broader proposition – the States are immune from suit.[24] *Hans,* 134 U.S. at 15 (Federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when

[23] This Court has explicitly acknowledged that *Chisholm* was wrong. *See Federal Maritime Comm'n,* 535 U.S. at 752-53; *Alden,* 527 U.S. at 721-22.

[24] The Eleventh Amendment does not exist solely in order to "preven[t] federal-court judgments that must be paid out of a State's treasury," *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 48 (1994). It also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct and Sewer Auth.*, 506 U.S. at 146 (internal quotation marks omitted).

establishing the judicial power of the United States."). *Cf. Puerto Rico Aqueduct and Sewer Auth*. 506 U.S. at 146 ("The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity."); *Blatchford*, 501 U.S. at 779 ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms. . . ."). "Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design." *Alden,* 527 U.S. at 733.

Thus, the immunity confirmed by the Eleventh Amendment bars suits against the States by Indian Tribes, *Blatchford,* 501 U.S. at 782, foreign nations, *Principality of Monaco v. Mississippi,* 292 U.S. 313, 330-32 (1934), and corporations created by the National Government. *Smith v. Reeves*, 178 U.S. 436, 446, 449 (1900). Moreover, it applies to proceedings in state court, *Alden*, 527 U.S. at 712, in federal administrative proceedings, *Federal Maritime Comm'n*, 535 U.S. at 760, in admiralty, *In re New York*, 256 U.S. 490, 503 (1921), and in situations where the State's treasury is not implicated. *See Doe v. Regents of the Univ. of California,* 519 U.S. 425, 431 (1997). Indeed, there is a presumption "that the Constitution was not intended to 'rais[e] up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Federal Maritime Comm'n*, 535 U.S. at 755 (quoting *Hans*, 134 U.S. at 18).

Yet, while sovereign immunity is quite broad, it is not absolute. There are five exceptions. First, the "States, in ratifying the Constitution, did surrender a portion of their

inherent immunity by consenting to suits brought by sister States or by the Federal Government." *Federal Maritime Comm'n*, 535 U.S. at 752. *See also Virginia v. Maryland*, 540 U.S. 56 (2003) (State against State); *Chao v. Virginia Dep't of Transp.,* 291 F.3d 276 (4th Cir. 2002) (National Government against State). Second, when a State invokes the jurisdiction of a federal court, it exposes itself to the equivalent of a compulsory counterclaim that does not exceed in amount or differ in kind from the relief sought by the State.[25] *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe,* 498 U.S. 505, 509 (1991);[26] *United States Fidelity & Guaranty Co.,* 309 U.S. at 511-12; *United States v. Shaw,* 309 U.S. 495, 501-02 (1940).[27] Third,

[25] Thus, where the State initiates a suit for injunctive relief, a counter-claim or cross-claim for damages is barred. *Potawatomi Tribe*, 498 U.S. at 509; *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940). In other words, the initiation of litigation did not create a broad waiver, *see Potawatomi Tribe*, 498 U.S. at 509. Rather, the filing of a claim merely allows the adjudication of *that* claim. *See Gardner v. New Jersey,* 329 U.S. 565, 574 (1947). Consequently, where a sovereign brings an action for damages, any counterclaim seeking an amount of damages greater than the amount originally sought by the State, even with respect to a mandatory counterclaim, is barred by sovereign immunity. *Shaw*, 309 U.S. at 501. Therefore, if a state agency files a proof of claim in bankruptcy, any resulting waiver logically is limited to the amount of the proof of claim.

[26] While *Potawatomi Tribe* involved a suit initiated by an Indian Tribe rather than a State, the same principles are equally applicable to the States. *See Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 756 (1998) (tribal immunity akin to that of other governments until abrogated).

[27] Although *United States Fidelity & Guaranty Co.* and *Shaw* involved suits initiated by the National Government rather than a State, "it cannot be doubted that the question whether a . . . suit is one against the State . . . must depend upon the same principles that determine whether a . . . suit is one against the United States." *Tindal v. Wesley*, 167 U.S. 204, 213 (1897). *See also California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-07 (1998) ("In considering whether the

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under the terms of the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908), federal courts generally may enjoin state officers, in their official capacities, to conform their conduct to federal law.[28] *See Frew v. Hawkins*, 124 S. Ct. 899, 903 (2004); *Quern v. Jordan*, 440 U.S. 332, 337 (1979). Fourth, a State may waive its sovereign immunity.[29]

Eleventh Amendment applies . . . , this Court's decisions in cases involving the sovereign immunity of the Federal Government . . . provide guidance, for this Court has recognized a correlation between sovereign immunity principles applicable to States and the Federal Government.").

[28] In essence, the *Ex Parte Young* doctrine insures "that the doctrine of sovereign immunity remains meaningful, while also giving recognition to the need to prevent violations of federal law." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997). Yet "[t]he real interests served by [sovereign immunity] are not to be sacrificed to elementary mechanics of captions and pleading. Application of the *Ex Parte Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction." *Id.* at 270 (citations omitted). Thus, this Court has recognized two exceptions to the doctrine. First, the doctrine is inapplicable in those situations where Congress has enacted a comprehensive "remedial scheme." *Seminole Tribe*, 517 U.S. at 71-75. Second, the *Ex Parte Young* doctrine was inapplicable when there are "special sovereignty interests" involved. *Coeur d'Alene Tribe*, 521 U.S. at 287-88.

[29] However, such waivers must be express. There are no constructive waivers of sovereign immunity. *College Sav. Bank*, 527 U.S. at 681-84. *See also United States v. King,* 395 U.S. 1, 4 (1969) (describing the "settled propositio[n]" that the United States' waiver of sovereign immunity "cannot be implied but must be unequivocally expressed"). Thus, receipt of federal funds, general participation in a federal program, or an agreement to recognize and abide by federal laws, regulations, and guidelines alone are insufficient to waive sovereign immunity. *See Atascadero*, 473 U.S. at 246-47.

Moreover, express waivers of sovereign immunity will be found "only where stated 'by the most expressive language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.' " *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (citation omitted). Thus, a State does not consent to suit in federal court by merely consenting to suit in the courts of its own

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College Sav. Bank v. Florida Prepaid Postsecondary Education Expense Bd., 527 U.S. 666, 670 (1999). Finally, in extraordinary circumstances, Congress may abrogate the States' sovereign immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

It is this last exception – the ability of Congress to abrogate sovereign immunity – that is central to this case. Congress, acting pursuant to the Bankruptcy Clause, has attempted to abrogate the States' sovereign immunity for certain causes of action that may arise only in bankruptcy. *See* 11 U.S.C. § 106(a). The constitutionality of that attempt at abrogation is at issue in this case.

C. The Abrogation Exception Is Limited To Circumstances Where Congress Is Enforcing the Fourteenth Amendment.

Quite simply, Congress' ability to abrogate sovereign immunity depends upon the constitutional power that Congress purports to use. *Kimel*, 528 U.S. at 78-80. "Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals." *Id.* at 80. "Section 5 of the Fourteenth Amendment, however, does grant Congress the authority

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creation. *Smith v. Reeves,* 178 U.S. 436, 441-45 (1900). Nor does it consent to suit in federal court by merely stating its intention to "sue and be sued," *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association,* 450 U.S. 147, 149-50 (1981) (*per curiam*), or even by authorizing suits against it "in any court of competent jurisdiction." *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-79 (1946). "Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment . . . [absent] intent to subject itself to suit in federal court." *Atascadero*, 473 U.S. at 241 (citations omitted).

to abrogate the States' sovereign immunity." *Id.* This distinction between the Article I powers and the Fourteenth Amendment enforcement powers stems from the fundamentally different purposes of these two portions of the Constitution.

The Article I powers define and limit the National Government to preserve the sovereignty of the States. *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."). *See also* Akhil Reed Amar, *The Bill of Rights* (1998) (arguing that the Bill of Rights originally was intended, in part, to protect the States from abuses by the National Government). Indeed, "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York,* 505 U.S. at 156-57. "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 73. Because the Tenth and Eleventh Amendments confirm the limited nature of the Article I powers, "Congress lacks power under Article I to abrogate the States' sovereign immunity."[30]

[30] Moreover, Congress may not use its Article I powers to exact an express waiver of sovereign immunity or otherwise diminish the States' sovereign immunity. *See College Sav. Bank,* 527 U.S. at 683 ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*."). Consequently, although Congress has attempted to declare that the filing of a proof of claim constitutes waiver, 11 U.S.C. § 106(b), that provision is suspect. *See Schlossberg*, 119 F.3d at 1147 ("While 11 U.S.C. § 106(b) may correctly describe those

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Kimel, 528 U.S. at 78. "Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *Seminole Tribe,* 517 U.S. at 72.

In contrast, the Fourteenth Amendment diminishes the States' sovereign authority while enhancing the power of the National Government.[31] First, both the Equal Protection Clause and Privileges or Immunities Clause imposed substantive restrictions on the States. *See Johnson v. California*, 125 S. Ct. 1141, 1146 (2005) (Equal Protection); *Saenz*, 526 U.S. at 503-04 (Privileges or Immunities). Moreover, although the Bill of Rights originally did not apply to the States, *Barron v. Mayor of*

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actions that, as a matter of constitutional law, constitute a state's waiver of the Eleventh Amendment, it is nevertheless not within Congress' power to abrogate such immunity by 'deeming' a waiver."); *Grabscheid v. Michigan Employment Sec. Comm'n (In re C.J. Rogers, Inc.)*, 212 B.R. 265, 269-73 (E.D. Mich. 1997) (finding that 11 U.S.C. § 106(b), though couched in terms of a waiver, is really an impermissible abrogation of a state's sovereign immunity). *But see Arecibo Cmty. Health v. Puerto Rico*, 270 F.3d 17, 24-27 (1st Cir. 2001) (holding that section 106(b) is not a constructive waiver provision); *Straight v. Wyoming Dep't of Transp. (In re Straight)*, 143 F.3d 1387, 1392 (10th Cir. 1997) ("[Section] 106(b) does not pretend to abrogate a state's immunity, it merely codifies an existing equitable circumstance under which a state can choose to preserve its immunity by not participating in a bankruptcy proceeding or to partially waive that immunity by filing a claim.").

[31] Similarly, the Thirteenth, Fifteenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments contain provisions that allow Congress to enforce these Amendments against the States. *See* U.S. Const. amends. XIII, § 2; XV, §2; XIX § 2; XXIII, § 2; XXIV, § 2; XXVI, § 2. Presumably, if the States were violating the rights guaranteed by one of these Amendments, Congress would be able to abrogate the States' sovereign immunity as a means of enforcing the Amendments.

Baltimore, 32 U.S. (7 Pet.) 243, 249 (1833), the Due Process Clause incorporated most of the provisions of the Bill of Rights.[32] *See* 2 David M. O'Brien, *Constitutional Law and Politics* 310-11 (5th ed. 2003) (chart listing cases and specific provisions of the Bill of Rights). *Cf.* Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986) (arguing that the Privileges or Immunities Clause incorporates all provisions of the Bill of Rights). Second, Section 5 gives Congress the authority to enact legislation that enforces the substantive guarantees of the Fourteenth Amendment against the States. *See City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997). Consequently, if the States have engaged in conduct that violates the Fourteenth Amendment, then Congress can take remedial action to correct the violation and to prevent future violations. *Kimel*, 528 U.S. at 81. Because "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment," *Fitzpatrick*, 427 U.S. at 456 (citation omitted), one way of enforcing the Fourteenth Amendment is to abrogate the States' sovereign immunity.[33] If Congress is enforcing the Fourteenth Amendment,

[32] Indeed, it appears that the only provisions of the Bill of Rights that have not been incorporated are: (1) the Second Amendment; (2) the Third Amendment; (3) that portion of the Fifth Amendment guaranteeing a right to indictment by a grand jury; (4) that portion of the Seventh Amendment guaranteeing a right to a jury trial in civil cases; and (5) that portion of the Eighth Amendment prohibiting excessive fines and bail. 2 O'Brien, *supra*, at 312.

[33] If Congress wishes to abrogate sovereign immunity as a means of enforcing the Fourteenth Amendment, then it must make "a clear legislative statement." *Blatchford*, 501 U.S., at 786. "To temper Congress' acknowledged powers of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional

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then it may abrogate the States' sovereign immunity. *See Tennessee v. Lane,* 541 U.S. 509, 518 (2004); *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003); *Garrett,* 531 U.S. at 364; *Kimel*, 528 U.S. at 80; *Alden*, 527 U.S. at 756; *College Sav. Bank*, 527 U.S. at 670; *Florida Prepaid*, 527 U.S. at 637; *Seminole Tribe,* 517 U.S. at 59. In other words, abrogation of sovereign immunity is an appropriate response to unconstitutional conduct by the States.

In sum, the ability of Congress to abrogate sovereign immunity depends upon the nature of the power that Congress purports to use. If Congress is seeking merely to use its general Article I powers, then the principles of dual sovereignty, as confirmed by the both the Tenth and Eleventh Amendments, as well as the Constitution's structures, preclude abrogation. In contrast, if Congress is seeking to remedy unconstitutional conduct, then it may abrogate sovereign immunity. Because the power to pass bankruptcy laws is a general Article I power and not an effort to enforce the Fourteenth Amendment,[34] Congress

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structure, we have applied a simple but stringent test: 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'" *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989).

[34] Katz has never suggested that Congress abrogated sovereign immunity as a means of enforcing the Fourteenth Amendment. Furthermore, the Circuits that have addressed the issue have universally held that 11 U.S.C. § 106(a) is not valid Fourteenth Amendment legislation. *See Crow,* 394 F.3d at 922-24; *Schlossberg*, 119 F.3d at 1146-47.

may not use the Article I Bankruptcy Clause to abrogate sovereign immunity.[35]

[35] Regardless of how this Court decides the abrogation issue with respect to Katz' preferential transfer claims, it is clear that Katz' contract claims are barred by sovereign immunity. This is so for two reasons.

First, the purported abrogation of sovereign immunity in 11 U.S.C. § 106(a) *does not apply* to causes of action – such as contract actions – belonging to the debtor that become property of the estate under 11 U.S.C. § 541. *See* 11 U.S.C. § 106(a)(1) (listing specific code sections for which sovereign immunity is abrogated and omitting § 541). *See also House Judiciary Committee, Bankruptcy Reform Act of 1994 – Section-By-Section Description*, Cong. Rec. H 10764, 10766 (103rd Cong., 2nd Sess., Oct. 4, 1994) (Section 106(a) "allows the assertion of bankruptcy causes of action, but specifically excludes causes of action belonging to the debtor that become property of the estate under section 541."). "Indeed, 11 U.S.C. § 106(a)(1) conspicuously omits § 541 from those particular sections of the Bankruptcy Code to which sovereign immunity is specifically abrogated." *William Ross, Inc. v. Biehn Const., Inc. (In re William Ross, Inc.),* 199 B.R. 551, 554 (Bankr. W.D. Pa. 1996). Because Katz' contract claims against the Virginia Institutions only become property of the estate by way of 11 U.S.C. § 541, *see Id*. and because there is no purported abrogation of sovereign immunity for claims involving 11 U.S.C. § 541, sovereign immunity bars the contract claims. Katz cannot claim that sovereign immunity is abrogated for the contract claims.

Second, contrary to Katz' assertions in Count II of the various complaints, J.A. at 5-6 (Virginia Military Institute); J.A. at 14 (Central Virginia); J.A. at 22-23 (Blue Ridge); J.A. at 32 (New River), 11 U.S.C. § 542 – which is covered by the purported abrogation – *cannot be used to recover funds allegedly owed* on the contracts. Quite simply, 11 U.S.C. § 542 applies only to debts that have been reduced to judgment. *William Ross, Inc*., 199 B.R. at 554. It does not apply to claims – such as Katz' contract actions – where there is a dispute as to both whether money is owed and, if so, the amount of money owed. *See Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1102 (2d Cir. 1993). Indeed, to say that 11 U.S.C. § 542 somehow applies to Katz' unresolved contract claims is to ignore the fundamental distinction between common law actions and actions created by the Bankruptcy Code. *See Northern Pipeline Const. Co. v. Marathon Pipeline Co.,* 458 U.S. 50, 82-84 (1982).

Because the purported abrogation of sovereign immunity does not apply to causes of action that become property of the estate under 11

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Since Congress' attempt to abrogate sovereign immunity is invalid, Katz' claims against the Virginia Institutions are barred by sovereign immunity.[36] Absent a valid abrogation

U.S.C. § 541 and because Katz may not use 11 U.S.C. § 542 to litigate a contract dispute, sovereign immunity bars Katz' contract claims. Therefore, to the extent that the lower court held that sovereign immunity did not bar Katz' contract claims, the court of appeals should be summarily reversed.

[36] Although the question presented is limited to whether Congress abrogated sovereign immunity, Katz nevertheless may attempt to argue that (1) Virginia Military Institute's filing of a proof of claim constitutes a waiver of sovereign immunity for *all* of the Virginia Institutions; or (2) *Hood II* expanded *in rem* jurisdiction so that it encompasses all adversary proceedings. Because these arguments were not addressed by the district court or the court of appeals and because this Court is not a court of "first view," this Court should decline to address them. *See Cutter v. Wilkinson,* 125 S. Ct. 2113, 2120 n.7 (2005). Rather, this Court should confine itself to the narrow issue contained in the question presented – whether Congress may use the Bankruptcy Clause to abrogate sovereign immunity?

However, if Katz makes such arguments and if this Court decides to address these arguments, then those arguments should be rejected.

First, the filing of a proof of claim by one state agency does not waive sovereign immunity for all state agencies. To explain, the term "waiver" is a mischaracterization of what occurs when a State files a proof of claim or initiates litigation. Sovereign immunity is immunity from being sued by another party. As such, it does not really come into play when the sovereign is the plaintiff. To the contrary, there is the use of a wholly separate power, the voluntary right of a State to invoke its right of access to a federal court to protect the State's legal interests. Karen Cordry, *Seminole Seven Years On* in *Annual Survey of Bankruptcy Law 2002-03* 383, 455 (William L. Norton ed. 2003). *See also* Dan Schweitzer, *LaPides v. Board of Regents of the University of Georgia System: A Partial Answer to the Sovereign Immunity-Waiver Conundrum*, 17 Nat'l Envir. L.J. 3 (Dec. 2002/Jan. 2003). When a State initiates litigation, the State does not "waive" sovereign immunity, but the State merely exposes itself to the equivalent of a compulsory counterclaim that does not exceed in amount or differ in kind from the relief sought by the State. Thus, when a State files a proof of claim in bankruptcy, the bankruptcy court may entertain the debtor's objections to that claim. *Gardner,* 329 U.S. at 574. However, the bankruptcy court

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of the State's sovereign immunity, sovereign immunity bars an adversary proceeding against a state agency to recover a preferential transfer. *Hoffman*, 492 U.S. at 102-04. *See also Nordic Village*, 503 U.S. at 38 (Absent a valid waiver, sovereign immunity bars bankruptcy adversary proceeding against the National Government that seeks to recover a post-petition transfer.). Katz' adversary proceedings are substantively indistinguishable from the proceedings at issue in *Hoffman* and *Nordic Village*.

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may not order relief of a different type or order a monetary payment that exceeds the amount of the proof of claim. Therefore, after the proof of claim was filed, the bankruptcy court could hear any objections that Katz might have to that claim and could order relief against Virginia Military Institute up to the amount of $43,237.60. However, the bankruptcy court could not order relief beyond the $43,237.60. That portion of Katz' claim that is greater than $43,237.60 is barred by sovereign immunity.

Second, the basis for jurisdiction in this case is *in personam*, not *in rem*. An *in rem* action is fundamentally different from "an adversary proceeding by the bankruptcy trustee seeking to recover property in the hands of the State on the grounds that the transfer was a voidable preference." *Hood II,* 120 S. Ct. at 1914. Indeed, in *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992), this Court held that an adversary proceeding to recover a preferential transfer was not an *in rem* proceeding. *Id.* at 38 ("Respondent sought to recover a sum of money, not 'particular dollars,' so there was no *res* to which the court's *in rem* jurisdiction could have attached."). *See also Hoffman*, 492 U.S. at 102. ("[A] State that files no proof of claim would be bound, like other creditors, by discharge of debts in bankruptcy, . . . but would not be subjected to monetary recovery."). In other words, Katz seeks property unequivocally in the possession of the Virginia Institutions to which the Virginia Institutions undoubtedly have title. Any judgment the bankruptcy court might issue would determine a claim against only the Virginia Institutions, and not "against the world."

II. THE BANKRUPTCY CLAUSE'S UNIFORMITY REQUIREMENT DOES NOT ALTER THE ANALYSIS.

As observed above, unlike the other Article I powers, the Bankruptcy Clause requires that there be "uniform laws." *See* U.S. Const. art. I, § 8, cl. 4 ("To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.").[37] In the view of the court of appeals, the presence of this Uniformity Requirement signified that "the Bankruptcy Clause operates differently than Congress' other Article I powers," *Hood II*, 124 S. Ct. at 1920 (Thomas, J., joined by Scalia, J., dissenting). Specifically, the Sixth Circuit held, "because a federal bankruptcy system could cure the previous systems' ills only if it applied uniformly to all creditors and debtors, the Bankruptcy Clause must grant Congress the power to abrogate the states' sovereign immunity." *Hood I*, 319 F.3d at 767.

Yet, the court of appeals was incorrect. The Uniformity Requirement does not alter the basic analysis – Congress may not use any of the Article I Bankruptcy Clause to abrogate sovereign immunity. This is so for three reasons.

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[37] Of course, this constitutional provision – Article I, Section 8, clause 4 – actually contains two parts. The first part is the Naturalization Clause ("To establish an uniform Rule of Naturalization . . .") and the second part is the Bankruptcy Clause. Yet, while both the Naturalization Clause and the Bankruptcy Clause use the term "uniform" and while the two Clauses are separated by a comma rather than semicolon, there does not appear to be any constitutional linkage between the two Clauses. Indeed, Madison described naturalization and bankruptcy as distinctly different issues. *See The Federalist No. 42*, at 237-39 (James Madison). He engaged in an extensive discussion of the Naturalization Clause, *Id*. at 237-39, but devoted only one sentence to the Bankruptcy Clause, *Id.* at 239. In any event, Madison never suggested that either Clause could be used to diminish the States' sovereign immunity.

First, the Uniformity Requirement does not require that all debtors and creditors be treated alike or that the states be treated like private parties. Second, the need for national uniformity does not trump the States' sovereign immunity. Third, "[t]he power the Bankruptcy Clause grants Congress, however, is internally limited by the uniformity requirement." 1 Laurence H. Tribe, *American Constitutional Law* 847 (3d ed. 2000). Thus, the Bankruptcy Clause power is actually narrower, not broader, than the other Article I powers, an interpretation confirmed by the historical record.

A. The Uniformity Requirement Does Not Require That The States Be Treated Like Private Parties.

"The uniformity requirement is not a straightjacket that forbids Congress to distinguish among classes of debtors, nor does it prohibit Congress from recognizing that state laws do not treat commercial transactions in a uniform manner."[38] *Railway Labor Executives Ass'n v. Gibbons,* 455 U.S. 457, 469 (1982). "The uniformity requirement of the Bankruptcy Clause is not an Equal

[38] Indeed, there are many contexts where the Bankruptcy Code explicitly treats the States and their local governments differently than other creditors. Taxes, for instance, receive priority under 11 U.S.C. § 507(a)(8), but tax liens can be subordinated to priority creditors in 11 U.S.C. § 724(b). Under 11 U.S.C. § 505, debtors have special rights to relitigate tax claims – even those claims on which the debtor has defaulted prior to the filing of the bankruptcy petition. Similarly, the automatic stay, 11 U.S.C. § 362(a), has an exception for police and regulatory activities. *See* 11 U.S.C. § 362(b)(4). However, the States and their local governments are subject to special anti-discrimination provisions in 11 U.S.C. § 525 to which there is no police and regulatory exception. *Federal Communications Comm'n v. Nextwave Pers. Communications, Inc.*, 537 U.S. 293, 302 (2003).

Protection Clause for bankrupts." *Id.* at 471 n.11. Thus, Congress may "define classes of debtors" and "structure relief accordingly."[39] *Id.* at 473. Indeed, Congress may enact bankruptcy laws that are limited to one industry in one region. *See Blanchette v. Connecticut General Ins. Corporations*, 419 U.S. 102, 158-59 (1974). Moreover, "uniformity does not require the elimination of any differences among the States in their laws governing commercial transactions." *Railway Labor,* 455 U.S. at 469. A federal bankruptcy statute "may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States."[40] *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918). *See also Hanover National Bank v. Moyses*, 186 U.S. 190, 189-90 (1902) (Congress can give effect to the allowance of exemptions prescribed by state law without violating the uniformity

[39] For example, certain entities, such as insurance companies and most banks, are not permitted to file for bankruptcy protection. 11 U.S.C. § 109(b)(2). Moreover, there are special chapters for family farmers, 11 U.S.C. §§ 1201 through 1231, and municipalities, 11 U.S.C. §§ 901 through 946. Furthermore, railroads are not permitted to file under Chapter 7, but may file under Chapter 11. *See* 11 U.S.C. § 109(b)(1) and (d).

[40] The "basic federal rule" in bankruptcy is that state law governs the substance of claims and the burden of proof required. *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 20 (2000). For example, the current Bankruptcy Code uses state law to determine what property rights are considered to be "property of the estate." *Butner v. United States*, 440 U.S. 48, 54 (1979). Similarly, the determination of property rights in the property of the estate is made under state law. *Raleigh*, 530 U.S. at 15. Moreover, the Bankruptcy Code does not create a federal right of setoff, but, instead, generally preserves existing setoff rights created under state law, in 11 U.S.C. § 553(a). *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995).

requirement.).[41] Rather, "[t]he constitutional requirement of uniformity is a requirement of geographic uniformity." *Vanston Bondholders Protective Comm. v. Green,* 329 U.S. 156, 172 (1946) (Frankfurter, J., joined by Jackson & Burton, JJ., concurring).[42] In other words, as long as the bankruptcy laws mandate that similar transactions involving similar debtors be treated the same way by the bankruptcy courts *within a particular State*, the Uniformity Requirement is satisfied.[43] There is no mandate that the States be treated the same as private parties.[44]

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[41] Under 11 U.S.C. § 522(b), a State may require – to the total exclusion of federal law – that its state laws determine what comes out of the estate as exemptions. Of course, state laws regarding exemptions can vary widely and result in great disparity. For example, under Virginia law, the homestead exemption may not exceed $5,000.00 for an individual, or plus up to an additional $500.00 in value for each dependent. *Virginia Code* § 34-4. In contrast, under Florida law, the homestead exemption is unlimited in amount. *Florida Const*. art. X, § 4.

[42] As Justice Frankfurter, joined by Justices Jackson & Burton, explained:

> To establish uniform laws of bankruptcy does not mean wiping out the differences among the forty-eight States in their laws governing commercial transactions. The Constitution did not intend that transactions that have different legal consequences because they took place in different States shall come out with the same result because they passed through a bankruptcy court. In the absence of bankruptcy such differences are the familiar results of a federal system having forty-eight diverse codes of local law. These differences inherent in our federal scheme the day before a bankruptcy are not wiped out or transmuted the day after.

Vanston, 329 U.S. at 172-73. (Frankfurter, J., joined by Jackson & Burton, JJ., concurring).

[43] Recognizing that the States are immune from adversary proceedings in bankruptcy would not make the system non-uniform in a way that would have concerned the Framers. "If it had the effect, for instance, of making all state debts non-dischargeable, this would only return the system to what occurred under the British law that was the

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B. The Need for National Uniformity Does Not Trump The States' Sovereign Immunity.

The need for national uniformity does not trump the States' sovereign immunity.[45] To explain, when Congress

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template for American bankruptcy law when the Constitution was passed." Cordry, *supra*, at 443.

[44] Furthermore, there are sound policy reasons for treating the States differently from private parties. As Professor Feibelman has observed:

> In the first place, state governments are important regulatory agents. Whether by historical accident or purposeful design, the American states share responsibility with the national government for creating and administering public law. In contemporary society, this function demands considerable expertise, coherence, and consistency. As a general rule, bankruptcy law and bankruptcy courts should not interfere with the regulatory activities of governmental entities – federal, state, or local. In the case of federal regulators, however, the interference of bankruptcy law may be more justifiable because Congress is able to ensure that federal bankruptcy law and federal regulators are not working at cross-purposes. There is no similar institutional bridge between state governments and bankruptcy courts. The possibility that bankruptcy courts might interfere with important regulatory activity is thus significantly greater with respect to state governments.

Adam Feibelman, *Federal Bankruptcy Law and State Sovereign Immunity*, 81 Tex. L. Rev. 1381, 1385 (2003).

[45] Moreover, the fact that the States benefit from the Nation's bankruptcy laws does not mean that Congress has greater power to abrogate immunity. The States, particularly state universities, develop and own intellectual property. Yet, despite this direct benefit to the States, Congress may not use the Intellectual Property Clause to abrogate sovereign immunity. *See College Sav. Bank*, 527 U.S. at 669-670; *Florida Prepaid*, 527 U.S. at 636.

Similarly, the States frequently act as participants in interstate commerce. Indeed, when Congress regulates interstate commerce, those regulations are applicable to the States. *See Condon*, 528 U.S. at 148-49. Yet, despite this benefit to the States and despite Congress' clear

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exercises its powers under the Intellectual Property Clause, U.S. Const. art. I, § 8, cl. 8, there is a need for national uniformity. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc*., 489 U.S. 141, 156 (1989) ("[T]he States may not offer patent-like protection to intellectual creations which would otherwise remain unprotected as a matter of federal law."). Yet, despite this need for uniformity, the States' sovereign immunity bars intellectual property claims. *Florida Prepaid*, 527 U.S. at 645 ("The need for uniformity in the construction of patent law is undoubtedly important, but that is a factor which belongs to the Article I patent-power calculus, rather than to any determination of whether a state plea of sovereign immunity deprives a patentee of property without due process of law.").

Similarly, while there might be a "constitutional necessity of uniformity in the regulation of maritime commerce" under the Foreign Commerce Clause, U.S. Const. art. I, § 8, cl. 3, the States' sovereign immunity is not diminished. *Federal Maritime Comm'n*, 535 U.S. at 767. Moreover, although "the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause," *Seminole Tribe,* 517 U.S. at 62, the Indian Commerce Clause cannot be used to abrogate sovereign immunity. *Id.* at 47. Furthermore, even though "[i]t would be difficult to overstate the breadth and depth of the [interstate] commerce power," *Union Gas*, 491 U.S. at 20 (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., announcing the judgment of the Court), the States are immune from suits based on statutes

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authority to subject the States to general Interstate Commerce Clause regulation, Congress may not use the Interstate Commerce Clause to abrogate sovereign immunity. *See Garrett,* 531 U.S. at 364; *Kimel*, 528 U.S. at 78-80.

passed pursuant to the Interstate Commerce Clause. *See Garrett,* 531 U.S. at 364; *Kimel*, 528 U.S. at 78-80. If the need for national uniformity in intellectual property, foreign commerce, Indian commerce, and interstate commerce does not trump the States' sovereign immunity, then surely the Bankruptcy Clause's Uniformity Requirement does not do so. *See Seminole Tribe*, 517 U.S. at 72 ("[T]he 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 . . . that is under the exclusive control of the Federal Government.").

C. The Uniformity Requirement Limits the Power of Congress.

The Uniformity Requirement does not expand the power of the Congress so that the Bankruptcy Clause may be used to abrogate sovereign immunity. To the contrary, the Uniformity Requirement actually is an "affirmative limitation or restriction upon Congress' power." *Railway Labor*, 455 U.S. at 468. As a result, Congress' power under the Bankruptcy Clause is significantly less than Congress' power under the other Article I Clauses, not greater.

To explain, when Congress exercises its Interstate Commerce Clause authority, there is no requirement of uniformity. *See Hodel v. Indiana*, 452 U.S. 314, 332 (1981); *Secretary of Agric. v. Central Roig Refining Co.*, 338 U.S. 604, 616 (1950). *See also Railway Labor*, 455 U.S. at 468 (Uniformity Requirement mandates "uniformity in the applicability of legislation," which is not required by the Commerce Clause). Thus, "Congress may devise . . . a national policy with due regard for the varying and fluctuating interests of different regions." *Central Roig*, 338 U.S. at 616. *See also Hodel,* 452 U.S. at 332 ("A claim of

arbitrariness cannot rest solely on a statute's lack of uniform geographic impact.").

In sharp contrast, as explained above, when Congress exercises its Bankruptcy Clause authority, it must achieve uniformity. *Railway Labor,* 455 U.S. at 468-70. Consequently, Congress is prohibited "from enacting a bankruptcy law that, by definition, applies only to one regional debtor. To survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors." *Id.* at 473. Because there is a requirement of uniformity for bankruptcy laws, Congress' power under the Bankruptcy Clause is less than its power under the Commerce Clause.

Similarly, if Congress has *not* exercised its Interstate Commerce Clause powers, the States *may not* regulate interstate commerce. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 571 (1997); *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). A "negative command, known as the dormant Commerce Clause" bars the States from regulating interstate commerce even in those situations where Congress has not acted, because it is assumed that, in such cases, Congress has chosen not to regulate and that choice must be respected by the States. *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995).

In sharp contrast, if Congress has not exercised its Bankruptcy Clause powers, the States *may* enact bankruptcy laws so long as such regulation does not violate the Contract Clause, U.S. Const. art. I, § 10, cl. 1. *See Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 196-97 (1819). *See also* David P. Curie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* 149-50 (1985) (contrasting Chief Justice Marshall's pronouncements

regarding the Bankruptcy Clause with his pronouncements regarding the Interstate Commerce Clause). In other words, the mere existence of the bankruptcy power, if unexercised by Congress, does not preempt state action on the subject. *Brown v. Smart*, 145 U.S. 454, 457 (1892). Indeed, in the absence of federal laws, States could even discharge debts, so long as the discharge was properly limited in time and scope. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827). Because there is no "Dormant Bankruptcy Clause," Congress' power under the Bankruptcy Clause is less than its power under the Interstate Commerce Clause. Thus, there is no basis for exempting the Bankruptcy Clause from the rationale of *Seminole Tribe* and *Hans*.

Moreover, the historical record confirms that the scope of Bankruptcy Clause power is narrow. The Bankruptcy Clause effectively was ignored in both the Constitutional Convention and the subsequent struggle for ratification. During the Constitutional Convention, the Delegates ignored the subject of a national bankruptcy power until virtually the end of the Convention and then adopted it with only token opposition.[46] Cordry, *supra*, at 400.[47] *See also*

[46] On August 29, 1787 – less than three weeks before the September 17 signing – Charles Pinckney of South Carolina moved to include a reference to the power of Congress to establish "uniform laws of bankruptcy." Three days later, on September 1, John Rutledge of South Carolina suggested that the reference should be placed after the existing reference to the power to establish uniform rules of naturalization and this recommendation was accepted on September 3. Cordry, *supra*, at 400.

[47] In his classic account of the Constitutional Convention, Professor Farrand mentions the bankruptcy power only once. Max Farrand, *The Framing of the Constitution of the United States* 141 (1913).

Railway Labor, 455 U.S. at 471 (discussing constitutional debates on the Bankruptcy Clause). Similarly, in the eighty-five essays that compromise *The Federalist*, a *single sentence* is devoted to the Bankruptcy Clause. *See The Federalist No. 42*, at 239 (James Madison) ("The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce and will prevent so many frauds where the parties or their property may lie or be removed into different States that the expediency of it seems not likely to be drawn into question."). As the lower court correctly noted, the Bankruptcy Clause power was not mentioned in the States' Ratification Debates. *See Hood I*, 319 F.3d at 766-68. If the Bankruptcy Clause power were broader than the other Article I powers, then surely it would have generated more comment and debate in both the Constitutional Convention and in the writings urging ratification.

Furthermore, after the adoption of the Constitution, Congress almost completely ignored the Bankruptcy Clause power. *See* Joseph Story, *A Familiar Exposition of the Constitution of the United States* § 175 (Regnery Gateway 1986) (1840) ("The power to pass bankrupt laws is equally important and proper to be intrusted to Congress, although it is greatly to be regretted, that it has not, except for very brief periods been acted upon by Congress."). The first federal bankruptcy laws were not passed until 1800 and then repealed two and a half years later. *See* Lawrence Friedman, *A History of American Law* 238 (1973).[48] Congress then waited until 1841 to pass a

[48] When Congress did pass a bankruptcy act, the law was limited to merchants and did not extend to farmers or other occupations. See Friedman, *supra*, at 238-39. *See also* William Rawale, *A View of the Constitution of the United States* (2nd ed. 1829) in 2 Phillip B. Kurland &

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second bankruptcy act and then repealed it after a mere two years. *Id.* Congress tried yet again in 1867 and this attempt lasted a full eleven years. *Id*. at 480-81. It was not until 1898 – 110 years after the Constitution's adoption – that Congress managed to pass a bankruptcy act that remained in effect for an extended period. *Id.* at 482. If the Bankruptcy Clause power were somehow greater than the other Article I powers, one would expect Congress to exercise that power on a regular basis, not to effectively ignore it.[49]

Ralph Lerner (eds.), *The Founders' Constitution* 639 (Liberty Fund 2005) ("Bankrupt laws are generally, perhaps properly, considered as confined to the mercantile class, who are more exposed to pecuniary vicissitudes than those who pursue some other occupations.").

[49] Moreover, when Congress does exercise its Bankruptcy Clause powers, there are compelling reasons to treat the States differently from private parties. As Professor Feibelman explained:

> When states take actions to recover financial obligations from private citizens, they may seem to act more like private creditors than when they engage in regulatory activities. However, it is impossible to fully separate states' financial and regulatory interests. The reason that states raise money in the first place is to fund their governmental activities and to provide public goods. They also often use financial tools to affect the behavior of private actors. Furthermore, states face constraints that private creditors do not face in making up for revenue lost to private insolvencies. Competitive markets insure that private creditors can and do easily adjust their rates to reflect their added costs from insolvency losses. To make a similar adjustment by raising additional revenues, states must overcome more daunting political obstacles.

Feibelman, *supra*, at 1385.

III. HAMILTON'S WRITINGS DO NOT ALTER THE ANALYSIS.

The lower court, like the four-Justice dissent in *Atascadero* and the four-Justice plurality in *Union Gas*, placed great emphasis on Hamilton's writings in *The Federalist No. 32* and *The Federalist No. 81*. Reading those two essays together and disregarding any of the other essays, the court of appeals in *Hood I* concluded that – at least in Hamilton's view – when the States had surrendered their sovereign authority to make bankruptcy laws, they also had surrendered their sovereign immunity from bankruptcy proceedings. Because Congress had the power to legislate, it necessarily had the power to abrogate.

Yet, the Sixth Circuit rationale was incorrect. Hamilton's writings do not alter the analysis – the Bankruptcy Clause may not be used to abrogate sovereign immunity. This is so for three reasons. First, the lower court misinterpreted Hamilton. Second, regardless of what Hamilton thought, his views are not dispositive. Third, acceptance of the court of appeals' reasoning would transform this Court's dual sovereignty jurisprudence.

A. The Lower Court Misinterpreted Hamilton.

The lower court, focusing only on *The Federalist Nos. 32* and *81* assumed, at least implicitly, that Hamilton believed the sovereign power to legislate could not be separated from the sovereign immunity from suit. Because sovereign power was inseparable from sovereign immunity, the surrender of sovereign power to legislate necessarily included the surrender of sovereign immunity. Thus, when the States ratified the Constitution and surrendered their sovereign power to make bankruptcy laws, they necessarily also surrendered their sovereign immunity from suits arising out of bankruptcy.

Hood I, 319 F.3d at 767. Of course, if the surrender of sovereign power always includes surrender of sovereign immunity, it logically follows that, by surrendering the Article I powers to the National Government, the States surrendered their immunity for suits arising out of the National Government's exercise of the Article I powers. *See Union Gas,* 491 U.S. at 19-20 (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., announcing the judgment of the Court); *Atascadero,* 473 U.S. at 277-78 (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., dissenting). Thus, there is no sovereign immunity with respect to *any* of the Article I powers. *See Union Gas* 491 U.S. at 42 (Scalia, J., joined by Rehnquist, C.J., O'Connor, & Kennedy, JJ., dissenting,) ("[I]f the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers."). In effect, if Congress has the power to legislate substantively, then it has the power to abrogate immunity.

However, the Sixth Circuit, by focusing exclusively on two essays, misinterpreted Hamilton's views. Hamilton believed that the sovereign power to legislate could be separated from sovereign immunity from suit. For example, in *The Federalist No. 82*, Hamilton states that his comments in *The Federalist No. 32* concerned only the sovereign power to legislate and that the rules might be different with respect to judicial authority – sovereign immunity. *The Federalist No. 82* at 460 (Alexander Hamilton) ("Though these principles may not apply with the same force to the judiciary as to the legislative power . . . "). Moreover, while Hamilton supported a strong National Government, his writings also reflect a belief that the States would protect the People from abuses by the National Government. *See generally* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1492-1520 (1987). *See also The Federalist No. 28*, at 149 (Alexander Hamilton) ("Power being almost always the

rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government."). The idea that the States would check the power of the National Government is fully consistent with the idea that both the States and the National Government are sovereign. If both the States and the National Government are sovereign, then the separation of sovereign power from sovereign immunity is not only possible, but also necessary.

If, as *The Federalist No. 82* and his other writings indicate, Hamilton believed that sovereign power could be separated from sovereign immunity, then the analysis changes completely. Surrender of sovereign power does not necessarily entail surrender of sovereign immunity. The States could surrender their sovereign authority over foreign, Indian, and interstate commerce, but retain sovereign immunity in those areas. *See Federal Maritime Comm'n*, 535 U.S. at 767; *Kimel*, 528 U.S. at 78; *Seminole Tribe,* 517 U.S. at 72. Similarly, the States could surrender their sovereign power over intellectual property, but still be immune. *See College Sav. Bank*, 527 U.S. at 669-70; *Florida Prepaid*, 527 U.S. at 636. Conversely, the National Government could be prohibited from exercising sovereign powers in contexts not mentioned in Article I, *see* U.S. Const. amend. X, but retain sovereign immunity in all of those contexts. *See Department of the Army v. Blue Fox*, 525 U.S. 255, 260 (1999). Thus, when the States surrendered their sovereign power to make bankruptcy laws, the States did not necessarily surrender their sovereign immunity from suits related to bankruptcy. If Hamilton believed in the division of sovereignty, then it is this interpretation – that the States surrendered power, but not immunity – that is correct.

B. Hamilton's Views Are Not Dispositive.

Even if the Sixth Circuit's interpretation – that Hamilton believed the surrender of sovereign authority to legislate necessarily required the surrender of sovereign immunity – is correct, Hamilton's views are not dispositive of the issue.[50]

The historical reality is that *some* of the Framers believed that the States, by ratifying the Constitution, had surrendered their sovereign immunity. *See* 1 Phillip Kurland & Ralph Lerner (eds.), *The Founders Constitution* 242-46 (Liberty Fund 2005) (explaining the contrasting views of the Framers on the issue of the nature of federalism). *See also Id*. at 246-97 (various letters, essays, and publications from the framing generation setting forth differing views on federalism). Indeed, the four Justices in the *Chisholm* anti-immunity majority – Chief Justice Jay, Justice Cushing, Justice Wilson, and Justice Blair – played significant roles in the Constitutional Convention, the subsequent State Ratification Conventions, or in the authorship of *The Federalist*. *See* Kermit L. Hall (ed.), *Oxford Companion to the Supreme Court of the United States* 90, 244-45, 515-16, 1091-92 (2nd ed. 2005) (biographies of Justice Blair, Justice Cushing, Chief Justice Jay, and Justice Wilson).[51] Yet, as the rapid adoption of the

[50] Moreover, *The Federalist* itself, while certainly informative and influential, is not dispositive. It is appropriate to consult not only *The Federalist*, but also the "writings of other intelligent and informed people of the time" that "display how the text of the Constitution was originally understood." Antonin Scalia, *A Matter of Interpretation: Federal Courts & The Law* 38 (1997).

[51] The lone *Chisholm* dissenter – Justice Iredell – played a significant role in both the Constitutional Convention and North Carolina's Ratification Convention. Hall, *supra*, at 509 (biography of Justice Iredell).

Eleventh Amendment in reaction to *Chisholm* demonstrates, the overwhelming national consensus was that the States had *not* surrendered their sovereign immunity when they surrendered sovereign authority to the National Government. *See* David E. Kyvig, *Explicit & Authentic Acts: Amending the U.S. Constitution, 1776-1995* 113-14 (1996) (noting that the Eleventh Amendment overwhelmingly passed Congress and was ratified by the States within a year). It is this overwhelming national consensus in favor of the States' sovereign immunity, not the individual views of a distinct minority of Framers, which should control.

C. Acceptance of the Lower Court's Interpretation Would Transform This Court's Dual Sovereignty Jurisprudence.

"The 'dual sovereignty' of our national and state governments is a novel experiment. But like many ingenious and complex innovations, it is a fragile one." Sandra Day O'Connor, *The Majesty of the Law* 56 (Paperback ed. 2004). Thus, in deciding a case involving the principles of dual sovereignty, this Court must be particularly vigilant regarding the ramifications of any decision.

This case illustrates the point. The court of appeals held that because Congress has the authority to enact substantive bankruptcy law, it necessarily also has the authority to abrogate sovereign immunity. This rationale is virtually identical to that articulated by the four-Justice plurality in *Union Gas* and the four-Justice dissent in *Atascadero. See Union Gas,* 491 U.S. at 19-20 (Brennan, J., joined by Marshall, Blackmun, & Stevens, JJ., announcing the judgment of the Court); *Atascadero,* 473 U.S. at 277-78 (Brennan, J., joined by Marshall, Blackmun, &

Stevens, JJ., dissenting). If this rationale applies to the Bankruptcy Clause, then it also applies to the Commerce Clause, the Intellectual Property Clause, and all other Article I Clauses. *Hoffman,* 492 U.S. at 111 (Marshall, J., joined Brennan, Blackmun, & Stevens, JJ., dissenting) ("I see no reason to treat Congress' power under the Bankruptcy Clause any differently [than the Commerce Clause], for both constitutional provisions give Congress plenary power over national economic activity."). In other words, if Congress can legislate, it can abrogate.

If this rule – that the power to legislate includes the power to abrogate – is the constitutional reality, then this Court's decisions in *Federal Maritime Commission, Garrett, Kimel*, *Alden, Florida Prepaid*, *College Savings Bank,* and, ultimately, *Seminole Tribe* logically have to be overruled. Under this rule, Congress' authority to regulate the terms and conditions of employment, *Garrett*; *Kimel*; *Alden*; to create an intellectual property system, *Florida Prepaid*; *College Savings Bank*; to regulate maritime commerce, *Federal Maritime Commission*; or to regulate commerce with Indian Tribes, *Seminole Tribe*; necessarily must include the authority to abrogate. Moreover, under the view that links the general power to legislate with extraordinary power to abrogate, sovereign immunity would never bar a federal claim that was not otherwise invalid as a matter of substantive constitutional law. While the States arguably would retain their immunity until Congress actually legislated, *see* Cordry, *supra* at 410 n.113, this rule effectively would overrule *Hans.* Thus, sovereign immunity would never bar a federal claim. Given that this Court has repeatedly reaffirmed the validity of *Hans* over the past 115 years, *see Seminole Tribe*, 517 U.S. at 54 n.7 (listing cases affirming the

validity of *Hans*), it would be extraordinary for this Court to suddenly abandon the proposition.

Moreover, if this Court were to adopt a constitutional rule that effectively abolished the States' sovereign immunity from federal claims, then serious doubt would be cast on the principles of dual sovereignty in other contexts. If Congress may destroy the States' sovereign immunity simply by legislating, then one must question whether the States retain sovereignty at all. *See* John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* 41-85 (2002) (arguing that the States are not sovereign and do not have sovereign immunity); Gary Wills, *A Necessary Evil: A History of American Distrust of Government* 57-70 (1999) (suggesting that the individual States were never sovereign). If the States are not sovereign, then Congress – in the exercise of its normal legislative powers – could force state officials to enforce federal law, force state legislatures to enact specific legislation, or even dictate the location of the State Capitol. Thus, *Printz, New York,* and *Coyle* would be overruled. Similarly, if the States are not sovereign, then it is difficult to imagine why Congress may not pass the Violence Against Women Act (*Morrison*), the Gun-Free School Zones Act (*Lopez*), and the Religious Freedom Restoration Act (*Boerne*).

In sum, if the thread of sovereign immunity in the bankruptcy context is removed, then the tapestry of dual sovereignty quickly and almost inevitably unravels. "An interpretation of the original Constitution which permits Congress to eliminate sovereign immunity only if it wants to renders the doctrine a practical nullity and is therefore unreasonable." *Union Gas,* 491 U.S. at 42 (Scalia, J., joined by Rehnquist, C.J., O'Connor, & Kennedy, JJ., dissenting). Thus, this Court should reject the reasoning of

the lower court and reaffirm the principles of *Hans* and *Seminole Tribe*.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Sixth Circuit – that Congress may use the Article I Bankruptcy Clause to abrogate the States' sovereign immunity – should be **REVERSED.**

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