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

REPLY BRIEF OF THE PETITIONERS

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REPLY BRIEF OF THE PETITIONERS

This Court granted certiorari to determine whether Congress may use the Article I Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, to abrogate the States' sovereign immunity. Having avoided this exact issue in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004) (*Hood II*), this Court presumably wished to decide an issue that divides the Circuits, is constantly recurring, and affects all fifty States. Indeed, the *sole* rationale for the lower court's decision is that Congress may use the Bankruptcy Clause to abrogate sovereign immunity.

Yet, Katz largely ignores the question presented. Instead, he urges this Court to decide this case on alternative grounds.[1] Specifically, he argues that: (1) the United States has delegated its "sovereign exemption" to him and, thus, his suit is actually a suit between the United

[1] Katz asserts that this Court should address his novel arguments as a means of avoiding the question of whether 11 U.S.C. § 106(a) is unconstitutional. However, all of Katz' arguments are equally based on constitutional considerations, not the statutory language of the Bankruptcy Code, and acceptance of any of those novel points would have serious ramifications for the States. Consequently, this Court simply would be substituting one constitutional question for another. Moreover, while the lower court found 11 U.S.C. § 106(a) to be valid, six different Circuits have ruled that it is unconstitutional. *See Georgia Higher Educ. Assistance Corp. v. Crow* (*In re Crow*), 394 F.3d 918, 921-22 (11th Cir. 2004); *Nelson v. LaCrosse County Dist. Attorney* (*In re Nelson*), 301 F.3d 820, 832 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd.* (*In re Mitchell*), 209 F.3d 1111, 1121 (9th Cir. 2000); *Sacred Heart Hosp. 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). Thus, in order to have national uniformity, it is imperative that this Court resolve the constitutionality of 11 U.S.C. § 106(a).

States and Virginia; (2) because Virginia Military Institute filed a proof of claim, sovereign immunity has been waived for *all* claims against Virginia Military Institute as well as all claims against Central Virginia Community College, New River Community College, and Blue Ridge Community College; and (3) the suit to recover preferences falls within an *in rem* jurisdiction exception to sovereign immunity.[2] None of these arguments were addressed by the court of appeals. Because this Court sits as a court of review, not as a court of "first view," this Court should decline to address them. *See Cutter v. Wilkinson*, 125 S. Ct. 2113, 2120 n.7 (2005) (declining to address federalism arguments that were presented, but not passed on in the court of appeals). Rather, this Court should focus exclusively on the question presented. If this Court concludes that Congress may not use the Bankruptcy Clause to abrogate sovereign immunity, then this Court may

[2] Throughout this litigation, Katz has pursued breach of contract claims against the Petitioners. *See* J.A. at 14, ¶ 15 (Central Virginia Community College); J.A. at 5, ¶ 15 (Virginia Military Institute); J.A. at 31, ¶ 19 (New River Community College); J.A. at 22, ¶ 17 (Blue Ridge Community College). However, after reading the *Brief of the Petitioners*, Katz attempted to abandon his breach of contract claims. *See Resp. Br.* at 7 n.13 ("Katz has moved voluntarily to dismiss the second group of claims, leaving only the preference actions."). On September 13, 2005, the bankruptcy court – correctly noting that it had no jurisdiction to entertain such a request – denied Katz' motion to dismiss the breach of contract claims. *Katz v. New River Community Coll.* (*In re Wallace's Bookstores, Inc.*) ___ B.R. ___, 2005 WL 2224849 (Bkr. E.D. Ky. 2005). Thus, the breach of contract claims remain in the case.

In any event, while there are fundamental differences between the breach of contract claims and the preferential transfer claims, those differences are irrelevant for purposes of the question presented. If Congress may not use the Bankruptcy Clause to abrogate sovereign immunity, then both the breach of contract claims and the preferential transfer claims are equally barred by sovereign immunity.

choose to remand the case to the court of appeals for consideration of any remaining issues.[3]

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

To the extent that Katz addresses the question presented, he essentially argues that a Sovereign's power to legislate substantively is inseparable from a Sovereign's immunity. Thus, in his view, when the States ceded the power to enact bankruptcy laws to the new National Government, the States necessarily and inherently ceded their immunity as well. This view, which has never commanded a majority of this Court, was rejected explicitly in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 n.2 (1985) and *Seminole Tribe v. Florida*, 517 U.S. 44, 72 n.16 (1996).[4] "The Constitution, by delegating to Congress the power to establish the supreme law of the land when

[3] In the event that this Court remands for further proceedings, there will be serious questions as to whether Katz waived the *in rem* and liquidating supervisor as sovereign arguments by failing to raise them in the district court or the court of appeals. *See Tennessee Student Assistance Corp. v. Hood*, 319 F.3d 755, 760 (2003) (*Hood I*) (Sixth Circuit "will not consider arguments raised for the first time on appeal. . . ."). A similar issue will exist with respect to whether the effect of one agency filing a proof of claim may be extrapolated to other state agencies and institutions.

[4] Although *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 14-15 (1989), held that Congress might use some of its Article I powers to abrogate sovereign immunity, only four Justices endorsed the view that by ceding the sovereign power to legislate, the States had also ceded their sovereign immunity from suit. *See id. at* 19-20 (Brennan, J., joined by Marshall, Blackmun, & Stevens, J.J., announcing the judgment of the Court). Justice White, who provided the fifth vote for the judgment, refused to join in this rationale. *See id.* at 56-57 (White, J., concurring).

acting within its enumerated powers, does not foreclose a State from asserting immunity to claims arising under federal law merely because that law derives not from the State itself but from the national power." *Alden v. Maine*, 527 U.S. 706, 732 (1999). Nevertheless, two points should be reiterated.

First, in assessing whether sovereign immunity applies to a particular proceeding, the relevant inquiry is not whether the proceeding, as such existed in 1788, but whether such proceedings could be brought against the States at that time. *See Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 755 (2002) (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.'") (quoting *Hans v. Louisiana*, 134 U.S. 1, 18 (1890)) (emphasis added). Suits between private parties for payment of a note, such as was the basis for the suit in *Hans*, were common in 1788, but breach of contract suits against the States were unknown. Similarly, suits to recover preferential transfers may well have existed in 1788, but such proceedings against the States were unknown. Accordingly, sovereign immunity applies to Katz' claims.

Second, in assessing whether the States ceded their immunity for bankruptcy proceedings in the Plan of Convention, the presumption is against a surrender of immunity. *See Alden*, 527 U.S. at 730-31. In the absence of "compelling evidence" that the States were required to surrender this power to Congress pursuant to the constitutional design, "Congress may not use its Article I powers to diminish the States' sovereign immunity." *Id.* at 730-31. Because there is no "compelling evidence" that the States intended to cede their immunity for suits in bankruptcy,

the States retained their immunity. *See id.* at 741 ("We believe, however, that the Founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity."). Accordingly, States have retained their sovereign immunity in the area of bankruptcy.

II. THE UNITED STATES HAS NOT DELEGATED ITS SOVEREIGN EXEMPTION TO KATZ.

Katz, like all bankruptcy trustees and liquidating supervisors, "is 'the representative of the estate [of the debtor]', *not 'an arm of the Government*.'" *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 849 (1989) (brackets original, emphasis added). *See also Schlossberg v. Barney* (*In re Barney*), 380 F.3d 174, 181 (4th Cir. 2004) ("[W]e do not believe that Congress intended the bankruptcy trustee to wield the extraordinary collection powers of the federal government."). Nevertheless, in an effort to avoid the question presented, Katz asserts that this case is really a suit between the United States and the Commonwealth of Virginia and, thus, is not subject to Virginia's sovereign immunity. Specifically, Katz contends that the United States has delegated its "sovereign exemption" from the States' sovereign immunity to liquidating trustees such as Katz. This argument was neither pressed nor passed on below and should not be addressed by this Court. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) ("[W]e generally do not address arguments that were not the basis for the decision below."). However, should this Court choose to address it, it should be rejected.

Katz' argument depends on the validity of two propositions. First, it must be constitutionally possible for the United States to delegate its sovereign exemption to a private party. Second, assuming that it is constitutionally possible for the United States to delegate its sovereign exemption, the United States must actually have done so. Neither proposition is true.

First, it is doubtful that the United States may delegate the sovereign exemption to another party. *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 785 (1991). "The consent, 'inherent in the convention,' to suit by the United States – at the instance and under the control of responsible federal officers – is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself." *Id. See also United States ex rel. Long v. SCS Business & Technical Inst., Inc.*, 173 F.3d 870, 883 (D.C. Cir. 1999) ("To assume that the United States possesses plenary power to do what it will with its Eleventh Amendment exemption is to acknowledge that Congress can make an end-run around the limits that that Amendment imposes on its legislative choices.").

Second, even if the United States constitutionally may delegate its sovereign exemption, it has not done so. "[I]f 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 Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted). "[T]he clear statement principle reflects 'an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.'" *Raygor v.*

Regents of the University of Minnesota, 534 U.S. 533, 543 (2002). Thus, if Katz is going to claim that the United States' sovereign exemption has been delegated to him, he must identify a statute that clearly and unambiguously delegates the sovereign exemption. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000) (Because Congress did not clearly and unambiguously state that a State was a "person" under the False Claims Act, a *qui tam* relator could not bring suit on behalf of the United States against a State.). There is no such statute.

III. SOVEREIGN IMMUNITY HAS NOT BEEN WAIVED.

In a further effort to avoid the question presented, Katz asserts that because Virginia Military Institute filed a proof of claim, sovereign immunity is waived for all claims against Virginia Military Institute *and all claims against any other agency or institution of the Commonwealth of Virginia*.[5] While Katz did argue in the lower courts that the filing of a proof of claim by Virginia Military Institute constituted a waiver of sovereign immunity *for all claims against Virginia Military Institute*, Katz never argued that such a waiver extended beyond Virginia Military Institute. Because the court of appeals never passed on the argument, this Court should decline to address it. *See Heath v. Alabama*, 474 U.S. 82,

[5] Katz made this waiver argument in his *Brief in Opposition to the Petition*. *See Br. in Op*. at 2-5. In deciding to grant certiorari, this Court "necessarily considered and rejected that contention as a basis for denying review." *United States v. Williams*, 504 U.S. 36, 40 (1992).

87 (1985) ("Even if we were not jurisdictionally barred from considering claims not pressed or passed upon in the [lower courts], as has sometimes been stated, . . . the longstanding rule that this Court will not consider such claims creates, at the least, a weighty presumption against review."). However, should this Court decide to consider this argument, it should be rejected.[6]

Katz' waiver argument depends upon two propositions. First, when a state agency files a proof of claim for any amount, it waives its sovereign immunity for *all* claims against it. Second, when one state agency files a proof of claim, the legal effect of that filing is extrapolated to every other agency and institution of the State. Neither proposition is correct.

A. When a State Agency Files A Proof of Claim in Bankruptcy, It Does Not Waive Sovereign Immunity for All Claims.

When a State initiates litigation, it does not waive its sovereign immunity for *all* claims against it. Rather, it merely invokes the jurisdiction of the federal courts and exposes itself to defenses that may exist to its suit. These include compulsory counter-claims that do not exceed in amount or differ in kind from the relief sought by the State.[7]

[6] In the event that this Court decides to address the waiver argument, it should do so only after addressing the abrogation argument. When confronted with both an abrogation argument and a waiver argument, this Court has decided the abrogation issue first and then proceeded to address the waiver argument. *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999).

[7] Similarly, when a State removes a suit from state court to federal court, it does not waive its sovereign immunity for all claims against it.

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See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505, 509 (1991); *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 511-12 (1940); *United States v. Shaw*, 309 U.S. 495, 501-02 (1940). On occasion, this Court has described the initiation of litigation in federal court as constituting a "waiver" of sovereign immunity. *See Gardner v. New Jersey*, 329 U.S. 565, 573-74 (1947) (When a State files a bankruptcy proof of claim, it "waives any immunity . . . respecting the adjudication of *the claim*.") (emphasis added). Yet, the use of the term "waiver" is something of a mischaracterization. Sovereign immunity is immunity from suit by another party. As such, it does not come into play when the State initiates litigation. Rather, the initiation of litigation is merely the voluntary action by a State to invoke its right of access to a federal court to protect the State's legal interests. *See* Karen Cordry, *Seminole Seven Years On*, in *Annual Survey of Bankruptcy Law 2002-03*, 383, 455 (William L. Norton ed., 2003).

This Court's decisions implicitly hold that the initiation of litigation simply exposes the State to the equivalent of a compulsory counter-claim that does not exceed in amount or differ in kind from the relief sought by the State. For example, where the sovereign 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 Fid. & Guar. Co.*, 309 U.S. at 513. In other

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See Stewart v. North Carolina, 393 F.3d 484, 488-90 (4th Cir. 2005). Rather, the act of removal merely diminishes sovereign immunity for "state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings." *Lapides v. Board of Regents of the University Sys. of Georgia*, 535 U.S. 613, 617 (2002).

words, the filing of a claim did not create a broad waiver of sovereign immunity. *See Potawatomi Tribe*, 498 U.S. at 509. Rather, the filing of a claim merely allows the adjudication of *that* claim. *Gardner*, 329 U.S. at 574. Consequently, where a State brings an action for damages, any counter-claim seeking an amount of damages in excess of the amount originally sought by the sovereign, even with respect to a mandatory counter-claim, is barred by sovereign immunity. *Shaw*, 309 U.S. at 501. Similarly, if a state agency files a proof of claim in bankruptcy, the resulting partial waiver of sovereign immunity logically is limited to the amount of its claim.[8]

A close reading of *Gardner* confirms this point. In *Gardner*, the State filed a proof of claim for taxes allegedly owed to the State. *Gardner*, 329 U.S. at 570. In response, the bankruptcy trustee raised various defenses to the claim for taxes. *Id.* at 570-71. In other words, the bankruptcy trustee was not seeking to obtain a payment of money from the State, but was merely defending against the State's claim. *See id.* at 574 ("The State is seeking something from the debtor. No judgment is sought against the State."). Nevertheless, the State contended that sovereign immunity barred the trustee's defenses. *See id*. at 571 ("The Attorney General of New Jersey thereupon entered a special appearance in the proceedings, claiming, *inter alia*, that the entertainment of the petition would constitute a prohibited suit against the State, both as

[8] Indeed, two Circuits interpreting the Bankruptcy Act, the predecessor to the current Bankruptcy Code, held that any partial waiver resulting from a proof of claim was limited to the amount of the proof of claim. *See Jones v. Yorke* (*In re Friendship Med. Center, Ltd.*), 710 F.2d 1297, 1301 (7th Cir. 1983); *Ohio v. Madeline Marie Nursing Homes Nos. 1 & 2*, 694 F.2d 449, 462 (6th Cir. 1982).

respects the determination of the amount of the claim and its priority or lien."). This Court ultimately held that the State's sovereign immunity had been partially waived by the State's act of filing a proof of claim. *See id.* at 574.

However, the partial waiver of sovereign immunity was limited to the amount and adjudication of the State's proof of claim. *See id.* ("When the State becomes the actor and files a claim against the fund it waives any *immunity which it otherwise might have had respecting the adjudication of the claim.*") (emphasis added). Put another way, "if a state files a proof of claim, it waives immunity from any actions that are the equivalent of a compulsory counterclaim." Adam Feibelman, *Federal Bankruptcy Law and State Sovereign Immunity*, 81 Tex. L. Rev. 1381, 1401 (2003). This Court never held that the trustee could obtain an affirmative recovery from the State – a payment of money that was greater than the amount of the proof of claim. Nor did this Court hold that sovereign immunity had been waived for *all claims* against the State.[9] *Gardner*

[9] Of course, in enacting 11 U.S.C. § 106(c), Congress purported to redefine and expand the scope of the partial waiver of sovereign immunity that results from the filing a proof of claim. However, *College Savings Bank* casts serious doubt on the ability of Congress to declare that a particular action diminishes sovereign immunity or the extent of any resulting partial waiver. *See College Savings Bank*, 527 U.S. at 685-87. Similarly, a rule that the filing of a proof of claim constitutes a waiver of sovereign immunity for all claims would undermine the limits on Congress' power to abrogate the States' sovereign immunity. *See College Savings 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*. Forced waiver and abrogation are not even different sides of the same coin – they are the same side of the same coin.").

did not involve any counter-claims and nothing in that case suggested a waiver for all claims.

Furthermore, a rule that the filing of a proof of claim constitutes a waiver of sovereign immunity for *all* claims has serious constitutional consequences. Generally, if a State wishes to collect a debt from a bankrupt entity, it must file a proof of claim. *See Hood II*, 541 U.S. at 447. Thus, if the filing of a proof of claim constitutes a waiver of sovereign immunity for *all* claims, then the State must choose between exercising its lawful right to collect a debt and waiving its sovereign immunity. Forcing a State to make such a choice is unconstitutional. *See College Savings Bank*, 527 U.S. at 687 ("In any event, we think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed – and the voluntariness of waiver destroyed – when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.").

Thus, when Virginia Military Institute filed a proof of claim for $43,237.60, it exposed itself to the equivalent of a compulsory counter-claim for $43,237.60. Katz was free to pursue all defenses and claims, including a claim that Virginia Military Institute received a preferential transfer that arose out of the same transaction or occurrence, as long as the amount of recovery by Katz does not exceed $43,237.60. However, under any circumstances, Virginia Military Institute retains sovereign immunity for any amount over $43,237.60.[10]

[10] If this Court concludes that the filing of a proof of claim by a state agency waives sovereign immunity for all claims against that state agency, then there are serious questions regarding the authority

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B. When One State Agency Files a Proof of Claim in Bankruptcy, the Effects of That Filing May Not Be Extrapolated to Other State Agencies.

Regardless of the impact of Virginia Military Institute's filing of a proof of claim on Virginia Military Institute's sovereign immunity, it has no effect on the sovereign immunity of the other Petitioners – Central Virginia Community College, New River Community College, and Blue Ridge Community College.

Extrapolating the effects of filing a proof of claim from one agency to another is incompatible with the principle that "a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign." *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). The rule of strict construction in favor of the sovereign demands that the effects of the filing of a proof of claim are limited to the state agency that filed the

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of state employees to file proofs of claim on behalf of their agencies. To explain, under Virginia law, only the General Assembly has authority to waive the sovereign immunity of the Commonwealth and there can be no waiver by implication or by affirmative acts of individual officers or employees. *See Hinchey v. Ogden*, 307 S.E.2d 891, 895 (Va. 1983). Thus, if the filing of a proof of claim constitutes a waiver of sovereign immunity for all claims, then the Virginia Military Institute employee who filed the proof of claim had no authority to do so. Given that its employee committed an *ultra vires* act, Virginia Military Institute should be allowed to withdraw its proof of claim. It should not be bound by the *ultra vires* acts of its employees.

While the withdrawal of the proof of claim would result in a forfeiture of Virginia Military Institute's right to recover a debt, it would also result in a restoration of the sovereign immunity. *See Smith v. Dowden*, 47 F.3d 940, 944 (8th Cir. 1995) (When a creditor withdraws a proof of claim prior to the commencement of an adversary proceeding, the creditor's right to a jury trial is restored.).

claim. Moreover, extrapolation of the effects from one agency to another, so as to allow an affirmative recovery, is contrary to the idea that the filing a proof of claim allows counter-claims to be brought, at most, only as to claims arising out of the same transaction or occurrence. *See* 11 U.S.C. § 106(b). Thus, the effects of one state agency's filing of a proof of claim normally may not be extrapolated to another state agency or institution because separate transactions will be involved. *See Sacred Heart Hosp. v. Department of Pub. Welfare* (*In re Sacred Heart Hosp. of Norristown*), 204 B.R. 132, 142 (E.D. Pa. 1997); *William Ross, Inc. v. Biehn Constr., Inc.* (*In re Ross*), 199 B.R. 551, 556 (Bkr. W.D. Pa. 1996); *Bezner v. East Jersey State Prison* (*In re Exact Temp, Inc.*), 231 B.R. 566, 571 (Bkr. D.N.J. 1999); *Unicare Homes, Inc. v. Four Seasons Care Centers, Inc.* (*In re Four Seasons Care Centers, Inc.*), 119 B.R. 681, 683-684 (Bkr. D. Minn. 1990) (All holding that the filing of a proof of claim by one state agency does not waive the sovereign immunity of another state agency.). *But see Ossen v. Department of Social Servs.* (*In re Charter Oak Associates*), 361 F.3d 760, 772 (2nd Cir.) (Holding that, at least where the State acts as a unitary creditor, the filing of a proof of claim by one agency waives the sovereign immunity of the other agencies.), *cert. denied*, 125 S. Ct. 408 (2004).

IV. THE SUIT TO RECOVER PREFERENCES DOES NOT FALL WITHIN AN *IN REM* JURISDICTION EXCEPTION TO SOVEREIGN IMMUNITY.

In a final effort to avoid the question presented, Katz asserts that his attempt to recover preferences falls with an *in rem* jurisdiction exception to sovereign immunity. This argument was neither pressed nor passed on below

and should not be addressed by this Court. *See Matsushita Elec. Indus. Co.*, 516 U.S. at 379 n.5; *Heath*, 474 U.S. at 87. However, in the event that this Court chooses to address it, it should be rejected.

Katz' argument depends upon two propositions. First, a suit to recover preferences falls within the *in rem* jurisdiction of the bankruptcy court. Second, assuming that a suit to recover preferences does fall within the *in rem* jurisdiction of the bankruptcy court, there is a broad *in rem* exception to sovereign immunity. Neither proposition is valid.[11]

A. A Suit To Recover a Preferential Transfer Does Not Fall Within the Bankruptcy Court's *In Rem* Jurisdiction.

A suit to recover a preferential transfer does not fall within the bankruptcy court's *in rem* jurisdiction. *United States v. Nordic Vill.*, 503 U.S. 30, 38 (1992). This is so for two reasons. First, because a suit to recover a preferential transfer seeks "to recover a sum of money, not 'particular dollars,' . . . there [is] no *res* to which the court's *in rem* jurisdiction could [attach]." *Id.* at 38 (citation omitted). "A suit for payment of funds from the [State's] Treasury is quite different from a suit for the return of tangible property in which the debtor retained ownership." *Id.* at 39.

[11] Katz does not contend that his breach of contract claims fall within the bankruptcy court's *in rem* jurisdiction. Thus, regardless of whether the preference claims fall within an *in rem* exception to sovereign immunity, the breach of contract claims are not within such an exception.

Second, unlike an *in rem* proceeding, a suit to recover a preferential transfer does not bind the entire world. *See Hood II*, 541 U.S. at 448 (An *in rem* proceeding determines "all claims that anyone, whether named in the action or not, has to the property or thing in question. The proceeding is 'one against the world.' "). A suit to recover a preferential transfer does not seek a determination as to the debtor's status as a bankrupt, *see id.* at 453, but seeks to recover money. Indeed, preference actions, along with fraudulent conveyance actions, "are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 (1989). *See also Schoenthal v. Irving Trust Co*., 287 U.S. 92, 94-95 (1932) ("Suits to recover preferences constitute no part of the proceedings in bankruptcy *but concern controversies arising out of it*.") (emphasis added). *Cf. Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71-72 (1982) (action to recover breach of contract claim so as to augment the bankruptcy estate is not a "public right."). In other words, the *in rem* determination of discharge, which is entered in the umbrella proceeding and is intended to be universally applicable, "is unlike an adversary proceeding by a bankruptcy trustee seeking to recover property in the State's hands on the grounds that the transfer was a voidable preference." *Hood II*, 541 U.S. at 454.

B. Sovereign Immunity Bars *In Rem* Proceedings.

Regardless of whether Katz' suits to recover preferential transfers can be regarded as *in rem* proceedings, sovereign immunity bars any effort to recover a preferential transfer. *Nordic Vill.*, 503 U.S. at 38-39; *Hoffman v. Connecticut Dep't of Income Maint.*, 492 U.S. 96, 100 (1989).

First, despite Katz' assertions, *Hood II* did not establish a general bankruptcy *in rem* exception to sovereign immunity. To the contrary, *Hood II* merely held that a bankruptcy "court's exercise of its *in rem* jurisdiction to discharge a student loan debt is not an affront to the sovereignty of the State." *Hood II*, 541 U.S. at 451 n.5. It did not establish a broad rule and it has no application outside of the discharge of student loans owed to a State. Indeed, this Court disclaimed the creation of such an exception and explicitly suggested that there may be exercises of a bankruptcy court's *in rem* jurisdiction that are barred by sovereign immunity. *Id.* ("This is not to say, 'a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity,'. . . . Nor do we hold that every exercise of a bankruptcy court's *in rem* jurisdiction will not offend the sovereignty of the State.").

Second, the distinction between *in rem* jurisdiction and *in personam* jurisdiction is irrelevant for constitutional purposes. *See Shaffer v. Heitner*, 433 U.S. 186, 207 (1977) (The constitutional test for whether a state court may exercise jurisdiction is the same regardless of whether jurisdiction is *in rem* or *in personam*.). Thus, to the extent that sovereign immunity bars an *in personam* proceeding, it will also bar an *in rem* proceeding. *Missouri v. Fiske*, 290 U.S. 18, 28 (1933) ("The fact that a suit in a

federal court is *in rem*, or *quasi in rem*, furnishes *no ground* for the issue of process against a non-consenting state.") (emphasis added). Consequently, this Court has "never applied an *in rem* exception to the sovereign-immunity bar against monetary recovery, and [has] suggested that no such exception exists." *Nordic Vill.*, 503 U.S. at 38. Moreover, sovereign immunity "bars federal jurisdiction over general title disputes relating to State property interests." *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506 (1998). *See also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 281 (1997) ("It is common ground between the parties, at this stage of the litigation, that the Tribe could not maintain a quiet title suit against Idaho in federal court, absent the State's consent."); *id.* at 291 (O'Connor, J., joined by Scalia & Thomas, J.J., concurring) (Sovereign immunity bars action "because a ruling in the Tribe's favor, in practical effect, would be indistinguishable from an order granting the Tribe title to submerged lands."); *id*. at 305 (Souter, J., joined by Stevens, Ginsburg, & Breyer, J.J., dissenting) ("[W]e have of course drawn the jurisdictional line short of ultimately quieting title. . . .").

Third, while this Court has held that sovereign immunity did not bar *in rem* proceeding in certain circumstances, *see Deep Sea Research*, 523 U.S. at 506; *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 210-11 (1983); *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 691-92 (1982), these decisions do not establish a broad general *in rem* exception to sovereign immunity. As this Court explained, *Whiting Pools, Inc.* simply "upheld a Bankruptcy Court order that the IRS turn over tangible property of the debtor it had seized before the debtor filed for bankruptcy protection. A suit for payment of funds from the Treasury is quite different from a suit for the

return of tangible property in which the debtor retained ownership." *Nordic Vill.*, 503 U.S. at 38-39. Moreover the admiralty decisions – *Deep Sea Research* and *Treasure Salvors* – involved situations where the State did not have possession of the res, *Deep Sea Research*, 523 U.S. at 494-95, or lacked a colorable claim of title to the res, *Treasure Salvors*, 458 U.S. at 697. Where, as here, the State has possession of the money and there is no dispute that the State is entitled to the money, *Deep Sea Research* and *Treasure Salvors* have no applicability.

CONCLUSION

For the reasons stated above, in the *Brief of the Petitioners*, and in the *Amici* Briefs supporting the Petitioners, 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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