No. _____

In The Supreme Court of the United States

CALIFORNIA STATE LANDS COMMISSION,

Petitioner,

v.

EUGENE DAVIS, in his capacity as Liquidating Trustee of the Venoco Liquidating Trust, and STATE OF CALIFORNIA,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Central Virginia Community College v. Katz,* 546 U.S. 356 (2006), this Court held that the States' ratification of the Bankruptcy Clause operated as a limited consent to suit in the bankruptcy courts. The scope of this "limited" consent to suit was "chiefly" to "a narrow jurisdiction exercised in bankruptcy proceedings . . . *in rem*—a narrow jurisdiction that does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction" and to "proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts." 546 U.S. at 378. In the fifteen years since *Katz*, the Court has not defined this limited waiver of sovereign immunity. Much less has it had occasion to apply *Katz* to a proceeding as far removed from a bankruptcy court's jurisdiction as this one.

In this case, a liquidating trustee has brought a claim against the California State Lands Commission (the "Commission") for inverse condemnation of land located in California and held in a post-confirmation liquidating trust. The inverse condemnation is alleged to have commenced post-confirmation—after the property at issue had been transferred out of the debtors' estate and into the trust—and is premised on actions taken to prevent pollutant releases which present a substantial risk to the public health, safety and the environment.

The questions presented are:

1. Whether the States' consent to suit in the bankruptcy courts, found to exist in *Katz*, reaches a

QUESTIONS PRESENTED—Continued

suit brought against a State, after the effective date of a debtor's plan of liquidation, seeking money damages from a State treasury on a claim that does not arise under federal bankruptcy law, insolvency law, or a claim that was historically brought "as a core aspect of the administration of bankruptcy estates." 546 U.S. at 372.

2. Whether this Court should reconsider *Central Virginia Community College v. Katz*.

RULE 29.6 STATEMENT

As a governmental entity that is an arm of the State of California, the California State Lands Commission is not required to file a corporate disclosure statement pursuant to Supreme Court Rule 29.6.

RELATED PROCEEDINGS

In re Venoco, LLC, et al., No. 17-10828 (bankruptcy reorganization proceeding), U.S. Bankruptcy Court for the District of Delaware.

Davis v. California, et al., No. 18-50908 (adversary proceeding), U.S. Bankruptcy Court for the District of Delaware. Judgment entered January 2, 2019.

State v. Davis, Nos. 1-19-mc-00007; 1-19-mc-00011; and 1-19-cv-00463, U.S. District Court for the District of Delaware. Judgment entered January 3, 2020.

Davis v. State, et al., Nos. 20-1061; 20-1062; and 20-1063, U.S. Court of Appeals for the Third Circuit. Judgment entered May 24, 2021.

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INTRODUCTORY STATEMENT

In *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), a narrow majority of this Court held that the Bankruptcy Clause of the U.S. Constitution, art. I, § 8, cl. 4, was intended to "authorize limited subordination of state sovereign immunity in the bankruptcy arena." *Id*. at 363. Because bankruptcy jurisdiction is principally *in rem*, the majority observed, "it does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction." *Id*. at 362. Accordingly, "insofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction . . . implicate States' sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity," the majority held. *Id.* at 373.

Katz involved proceedings to recover preferential transfers made to state entities immediately prior to bankruptcy, proceedings that were part and parcel of bankruptcy practice at the time of the Framing and which the Court determined were "necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts." *Id*. at 378-79. Beyond preferential transfer proceedings, however, the Court did not specify what other proceedings, if any, are "ancillary to" or "necessary to effectuate" bankruptcy courts' *in rem* jurisdiction. *See id*. at 368 & n.15. The present case involves a substantial and unwarranted expansion of *Katz*—one that threatens to deny States immunity from any suit arising post-confirmation, so long as the suit affects property held in a liquidating trust.

In April 2017, Venoco, LLC ("Venoco"), an oil and gas exploration and production company with operations almost exclusively located in California, and headquartered in Colorado, filed for Chapter 11 bankruptcy in the District of Delaware. Immediately before doing so, it abandoned an offshore drilling platform and 32 offshore oil and gas wells on property leased from the California State Lands Commission (the "Commission") off the coast of Santa Barbara. That action left the Commission with no choice but to take immediate action to take over those sites in order to decommission uncapped wells that threatened the environment and the public health and safety. As part of that process, the Commission utilized other facilities of Venoco located on the adjacent coastline that were part of the facilities normally used to process and render safe oil and gas from those sites while operating.

Venoco's bankruptcy culminated with the confirmation of a plan of liquidation in May 2018, the creation of a liquidation trust, and the appointment of a trustee to oversee the post-confirmation administration of assets that had been transferred to the trust from the debtors' estate. Two weeks after the effective date of the liquidation plan, in October 2018, the Post-Confirmation Liquidating Trustee (the "Liquidating Trustee") commenced an adversary proceeding (the "Adversary Proceeding") against the Commission and the State of California (the "State"), claiming that from and after October 15, 2018 they had engaged in an inverse condemnation of Venoco's onshore processing facility by reason of the Commission's "use" of that

facility to engage in the abatement activities it was carrying out to protect the citizens of California.

The Commission and the State asserted a sovereign immunity defense, which was rejected by the Delaware Bankruptcy and District Courts and the Third Circuit. Despite the fact that the Liquidating Trustee's claim was a post-bankruptcy claim seeking compensation for property that was no longer in the possession of the debtors' estate (which no longer existed) or under the custody of the Bankruptcy Court, the Third Circuit opined that the claim "furthers the Court's *in rem* functions." App. 4a.

The Third Circuit's decision threatens to greatly expand what this Court stated, under *Katz*, was only a "limited" abrogation of state sovereign immunity in core bankruptcy proceedings. It would allow a post-confirmation trustee to bring suit in federal court against a State for essentially any claim with respect to property in a post-confirmation liquidating trust, solely because it might augment the estate, without limitation to when the claim arose, its subject matter, or whether it was based on bankruptcy or non-bankruptcy law. Because the Third Circuit's decision is controlling in the Delaware Bankruptcy Court, if allowed to stand, it will have an outsized effect on liquidating trusts created in the wake of the nation's largest bankruptcies, which are disproportionately filed in Delaware.[1]

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[1] In one study of the 159 largest bankruptcy cases filed from January 1, 2007 to June 20, 2012, 57 out of 159 (or 36%) were filed

This case also presents a timely opportunity for the Court to reconsider its holding in *Katz*, which represents an outlier in the Court's sovereign immunity jurisprudence. The analysis in *Katz* is based almost entirely upon speculative and selective historical analysis of the Framers' intent in drafting the Bankruptcy Clause and the States' intent in ratifying it, and with little attempt to reconcile the analysis there with that of the Court's numerous other decisions with respect to sovereign immunity in general, and Eleventh Amendment immunity in particular.[2]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 998 F.3d 94 and is reproduced at App. 1a-29a. The opinion of the United States District Court for the District of Delaware is reported at 610 B.R. 239 and is reproduced at App. 30a-46a. The opinion of the United States Bankruptcy Court for the District of Delaware is reported at 596 B.R. 480 and is reproduced at App. 47a-70a.

in Delaware Bankruptcy Court. Samir D. Parikh, *Modern Forum Shopping in Bankruptcy*, 46 Conn. L. Rev. 159, 181, 209-226 (2013).

[2] Respondent the State of California has informed the State Lands Commission that it does not intend to file its own petition or response to the State Lands Commission's petition, but that if the Court grants certiorari it would intend to file merits briefs in support of the petitioner.

STATEMENT OF JURISDICTION

This Court has jurisdiction of this Petition under 28 U.S.C. § 1254(1). The United States Court of Appeals for the Third Circuit entered judgment on May 24, 2021.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Bankruptcy Clause of the United States Constitution, art. I, § 8, cl. 4, provides:

> The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.

2. 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, or by Citizens or Subjects of any Foreign State.

STATEMENT OF FACTS

A. History of Platform Holly and the Ellwood Onshore Facility

Venoco was an oil and gas exploration and production company that produced oil and gas off the Central Coast of California. Until April 17, 2017, Venoco was

a party to certain leases with the Commission of oil well rights located in the South Ellwood Field (the "Leases"). The Leases covered access to and use of Platform Holly, an offshore platform located 1.8 miles off the Central Coast of California used to conduct drilling operations. JA 116-177 (the "Complaint" or "Compl.").[3]

Since the 1970s, an onshore facility known as the Ellwood Onshore Oil and Gas Processing Facility (the "EOF") has been used to process and render safe oil and gas produced from Platform Holly. JA 170-177. Platform Holly and the EOF were built to operate as integrated components of the overall production and treatment operations in the South Ellwood Field. JA 123-124, 126.

Disaster struck in May 2015. An underground common carrier pipeline ruptured. JA 124. No means remained of transporting oil and gas to market. Venoco claimed it would "no longer be capable of meeting the terms and obligations arising from" the Leases and, in April 2017, quitclaimed the Leases to the Commission, although it remained the owner of the EOF. JA 124, 133-134.

When Venoco quitclaimed the Leases, it suspended performance on Platform Holly and the oil and gas wells. JA 124-125. Venoco recognized, however, that it had "remaining obligations . . . under . . . [the

[3] "JA" references the page in the Joint Appendix, filed in this case in the United States Court of Appeals for the Third Circuit.

Leases] relating to the plugging and abandonment of the Quitclaimed Facilities." JA 133.

Venoco's quitclaiming of its leases, its impending bankruptcy, and its plan to eliminate staff necessary to operate Platform Holly and the EOF created substantial concerns of imminent threats to public health and safety, and to the environment. JA 169-177. To protect against these threats and based on Venoco's claimed lack of funds, the Commission and Venoco entered into a Temporary Services Agreement on April 14, 2017, pursuant to which the Commission agreed to pay Venoco to continue activities at the quitclaimed fields and facilities, including paying for ongoing staffing and maintenance of Platform Holly and the EOF. JA 132-152. On September 14, 2017, the Commission entered into an agreement with Venoco (the "Gap Agreement") in which the Commission, through contractors, substituted itself for Venoco's decommissioning activities, including the Commission's temporary, non-exclusive use of the EOF. JA 153-157.[4]

B. The Venoco Bankruptcy Proceeding

On April 17, 2017, Venoco and its affiliated debtors (the "Venoco Debtors") filed their Chapter 11 bankruptcy cases in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy

[4] The Gap Agreement, calling for nominal payments to Venoco, was intended by the Commission to be of short duration while a proposed settlement with Venoco was being finalized. A settlement, however, was never reached.

Proceeding"). JA 116-177. On March 21, 2018, they filed a plan of liquidation. JA 330-440 (the "Plan").

The Plan provided for establishment of a liquidating trust (the "Trust") and the appointment of the Liquidating Trustee, Eugene Davis, to oversee the post-confirmation administration of the assets that had been transferred to the Trust from the Venoco Debtors' bankruptcy estate. *See* Plan, JA 328, 413-414; *see also* 11 U.S.C. § 1123(a)(5)(B) (providing that a plan may be implemented by transfer of the property of the estate to entities organized after the confirmation of the plan). On May 23, 2018, the Bankruptcy Court entered an order confirming the Plan (the "Confirmation Order"). JA 441-593. The Plan's effective date was October 1, 2018 (the "Effective Date"). Bankr. Proc., D.I. 1024.[5] JA 599.

C. The Adversary Proceeding

On August 22, 2018, Venoco notified the Commission of its intent to terminate the Gap Agreement effective October 15, 2018. JA 161-163. Given the continuing threat to human health and safety and to

[5] On October 13, 2017, the Commission filed a prepetition claim in the Bankruptcy Proceeding, for work being performed by the Commission which Venoco was obligated to perform, including the plugging and decommissioning of its wells and related necessary operations (the "Proof of Claim"). JA 630-706. This Proof of Claim and other prepetition claims of major creditors are the subject of a settlement agreement with the Liquidating Trustee. An order approving that settlement was entered by the Bankruptcy Court on July 14, 2021. Bankr. Proc. D.I. 1233 and 1236.

the environment from oil and gas discharges from unplugged wells serviced by the EOF following the termination of the Gap Agreement, the Commission, exercising its police powers, continued its presence on the EOF.[6] JA 117, 119-120.

On October 16, 2018, the first day following termination of the Gap Agreement, the Liquidating Trustee commenced the Adversary Proceeding in the Bankruptcy Court. JA 10-11, 116-177. The Complaint alleges that the Commission engaged in an inverse condemnation and seeks compensation for the Commission's "use" of the EOF from and after October 15, 2018. *Id.*

D. The Liquidating Trust

Upon the Plan's Effective Date, the Liquidating Trustee became responsible for collecting, holding, liquidating, and distributing the Trust's assets for the benefit of the Venoco Debtors' creditors. JA 302, 353. The Trust Agreement provides that "[a]ny good faith determination by the Liquidating Trustee as to what actions are in the best interests of the Liquidating Trust shall be determinative." JA 308. Except as provided in the Trust Agreement or in the Plan, the Liquidating Trustee "need not obtain an order or approval

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[6] The Complaint for inverse condemnation states that "Plaintiff does not oppose Defendants' occupancy of the site or their stated objective of ensuring there is no threat to public health and safety or break in the management and operation of the [EOF]." JA 119.

of the Bankruptcy Court in the exercise of any power, rights, or discretion conferred hereunder, or account to the Bankruptcy Court." JA 308.

Under the Plan, there is no oversight committee, and no duty to file employment or fee applications. Although the Plan does require annual reports to the Bankruptcy Court and Trust beneficiaries, *see* JA 313-314, the record does not reflect compliance with this requirement. There has not been a status conference with respect to the Trust or the Liquidating Trustee's activities in over two years. In short, the Liquidating Trustee is operating independently of the Bankruptcy Court, just as would any other party that has emerged from bankruptcy.

PROCEDURAL HISTORY

On November 15, 2018, the Commission and the State moved in the Bankruptcy Court to dismiss the Liquidating Trustee's Complaint on grounds, among other things, of sovereign immunity. On January 2, 2019, the Bankruptcy Court entered an order denying the motions to dismiss. App. 47a-70a. It stated that "the *in rem* jurisdiction of the Bankruptcy Court defeats a claim of sovereign immunity," App. 54a, and concluded that this "condemnation case is an *in rem* proceeding to which the Court's jurisdiction attaches." App. 54a.

The Commission and State appealed, and, on January 3, 2020, the District Court affirmed the

Bankruptcy Court's determination. App. 30a-46a. The District Court concluded that the Liquidating Trustee's inverse condemnation claims effectuated the Bankruptcy Court's *in rem* jurisdiction because the Liquidating Trustee brought the Complaint to fulfill his obligations under the Plan to collect and liquidate the Trust's assets for the benefit of the Venoco Debtors' creditors and in furtherance of the wind-down of the bankruptcy estates. The District Court reasoned that "whether the inverse condemnation claims themselves are *in rem* is of no moment," finding that the relevant question is whether the claims are "asserted in proceedings that are ancillary to or give effect to the bankruptcy court's *in rem* jurisdiction." App. 41a-42a (citing *Katz*, 546 U.S. at 373).

On appeal by the Commission and the State, the Third Circuit affirmed the District Court's finding that *Katz* applied and rejected the assertion of sovereign immunity. App. 1a-29a. The Third Circuit found that the Bankruptcy Court's *in rem* functions did not end when the Plan became effective, since the Trust exists primarily to facilitate the "equitable distribution of [the debtor's property] among the debtor's creditors." App. 23a-24a (citing *Katz*, 546 U.S. at 364). While acknowledging that the Commission had taken the position that "there is no *res* for the bankruptcy court's jurisdiction to attach," App. 22a, because the Liquidating Trustee's claims arose after the Effective Date, and the Venoco Debtors' estates had ceased to exist, the Third Circuit found the argument irrelevant, stating: "We do not need to decide whether the Adversary

Proceeding only pertains to post-effective date claims, as we reject the [Commission's] argument even if it were true." App. 23a (citing *In re Resorts International, Inc.*, 372 F.3d 154, 165 (3d Cir. 2004)).

The heart of the Third Circuit's decision is its discussion as to why the Adversary Proceeding has the requisite close nexus to two of "bankruptcy's three critical functions." App. 15a. First, the Court of Appeals states that the Adversary Proceeding "furthers the Bankruptcy Court's exercise of jurisdiction over property of the Debtors and their estates, as it seeks a ruling on rights in the Onshore Facility." App. 19a. The Court of Appeals goes on to say, "while the Adversary Proceeding may not be clearly *in rem* in form, its function is to decide rights in Venoco's property." App. 19a.

Second, the Third Circuit states that the Adversary Proceeding will "facilitat[e] equitable distribution of the estate's assets . . . [and] the Onshore Facility is a significant asset for Venoco and its creditors." App. 20a. Incorrectly stating that the Commission and the State were seeking to "prevent[] any judicial scrutiny over whether they can use the Onshore Facility without payment," App. 20a, the Third Circuit ignores the Commission's and the State's statements that the California courts were open to the Liquidating Trustee's inverse condemnation claims and that they had no objection to litigating those claims in the courts

established for such proceedings in California. Appellants' Brief in Third Circuit at 40 & n.18, 53 & n.21.[7]

The Third Circuit's approach to this case is perhaps best exemplified by its response to the Commission's argument "that sovereign immunity is fundamental to our constitutional design and the exercise of eminent domain power is especially central to [States'] sovereignty." App. 21a. While the Third Circuit acknowledged that these propositions were "true as a general matter," it nonetheless believed that "bankruptcy is a different ball game, and the effect on state sovereignty is not the focus of our analysis. The focus is instead on ensuring that state sovereignty will not interfere with the bankruptcy court's jurisdiction." App. 21a.

REASONS THE PETITION SHOULD BE GRANTED

This Court should grant review of the Third Circuit's decision for at least three reasons:

First, the Third Circuit's decision is not only wrong, but it also greatly expands what was supposed to have been under *Katz* a "limited" abrogation of state sovereign immunity, to fundamentally different proceedings from the avoidance and recovery of preferential transfers that were the subject of *Katz*. The

[7] The Commission expects to show in a proper condemnation trial that the EOF is not a "significant asset," but, due to the significant contamination that must be remediated, has a negative value for the Trust.

decision abrogates the States' sovereign immunity in virtually any suit brought by a trustee affecting property in a post-confirmation liquidating trust, thereby threatening core sovereignty interests of the States.

Second, the decision will have an unusually broad impact on bankruptcy proceedings, because the Third Circuit sits over one of the most active venues for large corporate bankruptcies.

Third, the Third Circuit's decision provides an opportunity for this Court to reconsider *Katz*, or, at the least, an opportunity to provide clarity as to its scope.

I. THE DECISION BELOW IS WRONG.

A. State Sovereign Immunity Is a Fundamental Feature of Our Constitutional Scheme and Exceptions Thereto Require a Compelling Basis in the Constitution.

This Court has repeatedly emphasized that "immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution and which they retain today[.]" *Alden v. Maine*, 527 U.S. 706, 713 (1999); *see Fed. Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 751-52 (2002) ("immunity from private suits" is "[a]n integral component" of the States' sovereignty). As this Court stated a century ago, the "[Eleventh] Amendment is but an exemplification" of the States' immunity that is embedded into the constitutional design. *Ex parte New York*, 256 U.S. 490, 497 (1921).

"This fundamental aspect of the States' 'inviolable sovereignty' was well established and widely accepted at the founding." *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019) (citing THE FEDERALIST No. 39, p. 245 (C. Rossiter ed. 1961) (J. Madison)). Indeed, "[i]t is inherent in the nature of [a state's] sovereignty not to be amenable to the suit of an individual without its consent." THE FEDERALIST No. 81, p. 487 (A. Hamilton).

"The Founders believed that both 'common law sovereign immunity' and 'law-of-nations sovereign immunity' prevented States from being amenable to process in any court without their consent." *Franchise Tax Board*, 139 S. Ct. at 1493. As a result, "[t]he Constitution's use of the term 'States' reflects both of these kinds of traditional immunity," *id*. at 1494, which the States retained after adoption of the Constitution, "except as altered by the plan of the Convention or certain constitutional Amendments." *Alden*, 527 U.S. at 713. In *Alden*, the Court noted that in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781 (1991), it had said that a court looks to see whether there is "***compelling*** evidence that the Founders thought such a surrender [of immunity from suit] inherent in the constitutional compact." *Alden*, 527 U.S. at 731 (emphasis added).

A plurality of this Court held in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19-20 (1989), that Congress could use its Article I powers to abrogate state sovereign immunity, stating that the power to regulate interstate commerce, for instance, would be "incomplete

without the authority to render States liable in damages." Only seven years later, though, this Court overruled this decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), rejecting *Union Gas* as "a solitary departure from established law," *id*. at 66, and reaffirmed the "fundamental" principle "that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III." *Id*. at 65.

In the 25 years since *Seminole Tribe*, the Court has had numerous occasions to review that holding but has never wavered in adhering thereto. Even where Congress enacted "'unequivocal statutory language' abrogating the States' immunity from suit," *Allen v. Cooper*, 140 S. Ct. 994 (2020), this Court unanimously affirmed that Congress lacked the Article I power "to circumvent" the limits placed by sovereign immunity on federal court jurisdiction. *Id*. at 1001-03, 1007 (Copyright Remedy Clarification Act's waiver of sovereign immunity in copyright infringement actions against States is unconstitutional); *see also Alden*, 527 U.S. 706 (1999) (Fair Labor Standards Act's abrogation of state sovereign immunity from suits brought in a State's own courts was barred by *Seminole*); *Fla. Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (Patent Remedy Act's abrogation of state sovereign immunity is unconstitutional).

This Court has, thus, zealously guarded state sovereign immunity from erosion or diminution, unless abrogation has a compelling basis in the Constitution itself. The Third Circuit's decision, therefore, can stand only if it correctly reflects the "limited" incursion on the

State's immunity imposed by *Katz*, and if *Katz* itself has a "compelling basis" in the Constitution.

B. The Decision Below Extends *Katz* to Fundamentally Different Proceedings and Expands the Abrogation of State Sovereign Immunity Beyond that Intended by the Framers.

In *Katz*, a liquidating trustee—acting under the Bankruptcy Code—sought to avoid and recover alleged preferential transfers made to certain state institutions of higher education by the insolvent debtor. *See* 11 U.S.C. §§ 547(b), 550(a). In a 5-4 decision, *Katz* held that the Eleventh Amendment did not prevent the bankruptcy courts from hearing actions for the avoidance and recovery of such preferences even if the proceedings might involve *in personam* process.

Three critical aspects of *Katz* bear emphasis. First, this Court repeatedly emphasized that "[b]ankruptcy jurisdiction, at its core, is *in rem.*" *Katz*, 546 U.S. at 362 (citation omitted); *see also id.* at 363-64 ("Critical features of every bankruptcy proceeding are the exercise of exclusive jurisdiction over all of the debtor's property. . . ."); *id.* at 369 ("Bankruptcy jurisdiction, as understood today and at the time of the framing, is principally *in rem* jurisdiction.") (citations omitted); *id.* at 378 ("The scope of this consent was limited; the jurisdiction exercised in bankruptcy proceedings was chiefly *in rem*—a narrow jurisdiction. . . ."). From this, it drew the conclusion that bankruptcy court

jurisdiction "does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction." *Id.* at 362; *see also id.* at 378.

Second, this Court held that the Bankruptcy Clause was intended "to authorize *limited* subordination of state sovereign immunity in the bankruptcy arena." 546 U.S. at 363 (emphasis added); *see also id.* at 378 ("The scope of this consent was *limited*. . . .") (emphasis added). Indeed, all of the 18th-century examples of ancillary orders relied upon by the *Katz* majority were orders for recovery of debtors' property and preferential transfers. *Id.* at 370-71. None of those ancillary orders, notably though, were issued against a State.

Third, *Katz*'s holding was very narrow. Specifically, the Court held that "those who crafted the Bankruptcy Clause would have understood it to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property" *id.* at 372, 379, because the authority to take such actions "has been a core aspect of the administration of bankrupt estates since at least the 18th century," *id.* at 372 (citations omitted).

The Adversary Proceeding at issue in this case, however, does not involve the Bankruptcy Court's exercise of *in rem* jurisdiction. This Court has defined the *in rem* jurisdiction of the bankruptcy courts as the "exclusive jurisdiction over a debtor's property, wherever located, and over the estate." *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447 (2004). This case,

though, differs from *Hood* and other cases dealing with issues arising during bankruptcy proceedings, since, here the property that had been within the Bankruptcy Court's *in rem* jurisdiction (which included the EOF) was transferred to the Trust before the alleged inverse condemnation commenced. JA 304, 353, 360, 397, 412. The principle that the bankruptcy estate ceases to exist once a plan is confirmed is well established in bankruptcy law. *In re Western Integrated Networks, LLC*, 322 B.R. 156, 163 (Bankr. D. Colo. 2004) ("[A] complaint for turnover cannot exist once the bankruptcy court confirms the debtor's plan because the estate ceases to exist upon plan confirmation."); *see also In re Jamesway Corp.*, 202 B.R. 697, 701 (Bankr. S.D.N.Y. 1996) (once the plan is confirmed the bankruptcy estate ceases to exist).

Confirmation is not merely some trivial event in an ongoing relationship between the debtor and the bankruptcy court until every last penny of assets has been collected and distributed. It is a meaningful event that draws a distinct line between the rights of creditors and debtors before and after it occurs. It cuts off many rights of creditors if not asserted to that point, but it equally removes the debtor from the bankruptcy court's protections and sends it back out into the world as an independent actor. *Pettibone Corp. v. Easley*, 935 F.2d 120, 122 (7th Cir. 1991) ("Once the bankruptcy court confirms a plan of reorganization, the debtor may go about its business without further supervision or approval. The firm also is without the *protection* of the bankruptcy court.") (emphasis in original). In

particular, the assets that were property of the estate are either transferred under the plan or devolve back into the debtor's independent control (or, in this case, the control of the Liquidating Trustee who was appointed to carry out those debtor functions). *In re Resorts*, 372 F.3d at 169. As such, what the Liquidating Trustee does with them is no part of the *in rem* jurisdiction of the Bankruptcy Court.

Since the Liquidating Trustee's suit does not involve property that is within the Bankruptcy Court's *in rem* jurisdiction, the Third Circuit was forced to characterize the Liquidating Trustee's suit as one that "further[s] a bankruptcy court's *in rem* jurisdiction," App. 11a, 12a, 14a, 15a, 16a, 17a, 22a, 25a, by which it meant that the suit is somehow "merely ancillary to," "in furtherance of," or "necessary to effectuate" the Bankruptcy Court's *in rem* jurisdiction. App. 15a. But the Liquidating Trustee's suit is none of those things, at least not in the sense that this Court used those terms in *Katz*.

One need only compare the Liquidating Trustee's suit to the avoidance action at issue in *Katz*. That proceeding was initiated pursuant to express powers granted by sections 547(h) and 550(a) of the Bankruptcy Code "to marshal the entirety of the debtor's estate[.]" 546 U.S. at 371-72. While those proceedings might involve *in personam* process, they were deemed to be "ancillary to and in furtherance of the court's *in rem* jurisdiction," *id*. at 372, since the marshaling of a debtor's assets is an initial, necessary step in order for the bankruptcy court to secure "exclusive jurisdiction

over all of the debtor's property." *Katz*, 546 U.S. at 363-64. Moreover, the proceedings in *Katz* had clear antecedents in the insolvency practice at the time of Founding (albeit the evidence presented related only to suits against private parties, not States). *See id.* at 372-73. Therefore, the *Katz* majority reasoned that the States could have expected to have such proceedings allowed against them under the Bankruptcy Clause. *See id.* at 373.

Here, the Adversary Proceeding differs from the proceeding in *Katz* in three critical respects. First, the Liquidating Trustee's suit seeks "inverse condemnation damages" against the Commission for its alleged "continued occupancy and special use" of the EOF. JA 116-117 and Compl. ¶ 1. It thus presents solely non-bankruptcy law claims arising under California law and the Fifth Amendment's Takings Clause.

Second, unlike *Katz*'s action to recover a prepetition transfer, the Liquidating Trustee's claim arose based upon events arising *after* the Plan's Effective Date. The alleged inverse condemnation commenced the day after the Commission's right to occupy the EOF pursuant to the Gap Agreement terminated, October 16, 2018. JA 126 (Compl. ¶ 32). The Plan had been confirmed months earlier and had become effective on October 1, 2018, at which time the Trust was vested with property of the former bankruptcy estates. JA 123 (Compl. ¶ 23).

Third, the preference claim in *Katz* was in furtherance of an essential feature of a bankruptcy

proceeding—the marshaling of the debtor's estate, so that it can be equitably distributed among creditors. *Katz*, 546 U.S., at 371-72. It is undisputed that such proceedings were known both in English, and then American, law, *see id.* at 364, 372-73, such that the Constitution's drafters were presumably familiar with such avoidance proceedings. Here, by contrast, the Third Circuit makes the strained argument that the Liquidating Trustee's post-confirmation suit "furthers the Bankruptcy Clause's exercise of jurisdiction over property of the Debtors and their estates, as it seeks a ruling on rights in the Onshore Facility." App. 19a. The Court defends this argument as follows: "And while the Adversary Proceeding may not be clearly *in rem* in form, its function is to decide rights in Venoco's property. . . . At its core, the Adversary Proceeding is about whether the California Parties can use Venoco's property for free." App. 19a.

The Third Circuit's analogy to a bankruptcy proceeding's marshaling of a debtor's assets collapses upon even a cursory analysis. When the Complaint was filed, the EOF was not the Venoco Debtors' property nor part of their estate. It was property of the *successor* to Venoco Debtors' estate—the Liquidating Trust—and dealt with post-confirmation non-bankruptcy causes of action.

The Third Circuit's argument is not limited in kind or in time. Under its reasoning, any suit brought by a trustee touching in any way upon property in the Trust can be characterized as "deciding rights" in the property—*e.g.*, a routine post-confirmation property

tax dispute about amounts owed on property in the Trust could result in a State being haled into the Bankruptcy Court, instead of the courts that would ordinarily hear tax disputes.

The Third Circuit further stated that the Liquidating Trustee's dispute will "facilitate[e] equitable distribution of the estate's assets . . . [and] the Onshore Facility is a significant asset for Venoco and its creditors." App. 20a. Putting aside the fact that the Commission maintains that the EOF has negative value for the Trust given needed environmental remediation thereon, that argument ignores entirely the fact that the actual equitable distribution of assets had already taken place in the confirmed Plan, and the purpose of the Trust was only to effectuate that previously determined distribution. JA 439. Again, this argument would allow virtually any suit brought by the Liquidating Trustee touching on property in the Trust to be heard in bankruptcy court.

Finally, the Third Circuit attempted to bolster its argument by pointing to the fact that the Commission filed a proof of claim for clean-up and abatement expenses it had incurred relating to the Leases. App. 19a-20a. But that conflates two separate matters. The Commission's proof of claim relates to the cleanup and abatement of offshore oil and gas wells and related facilities, which was determined and allowed by an order entered by the Bankruptcy Court on July 14, 2021. *See* n.5, *supra*. The alleged inverse condemnation relates to the post-confirmation continuation of emergency

operations undertaken at the non-leased EOF, which is not on state land.

In any event, even if the Commission had filed no claim, it would still, under the Third Circuit's reasoning, be deemed a creditor of the "estate" and "draw[ing] resources from the *res*," by virtue of the alleged inverse condemnation, and, therefore would be "improving . . . [its] status vis-à-vis other creditors solely owing to . . . [its] status as a state[.]" App. 20a. The Third Circuit's argument effectively renders any dispute over property in a liquidating trust as potentially disrupting the equitable distribution of property from a bankruptcy estate.

In sum, the decision below represents a dangerous and unreasonable extension of *Katz*. It renders this Court's limits on *Katz*'s abrogation on sovereign immunity so elastic that it can extend to virtually any suit relating to former debtor property, without any limit as to time, subject matter, or the legal basis of the claim. The Liquidating Trustee's suit presents nothing more than a standard, non-bankruptcy claim arising after the Venoco Debtors and their property has exited the Bankruptcy Court Proceeding. As such, it does not fall within the "limited" abrogation of sovereign immunity found in *Katz* to have been intended by the plan of Convention.

C. Even if the Third Circuit Appropriately Applied *Katz*, the Decision Is Wrong Because *Katz* Is Problematic in Several Respects, and the Court Should Revisit Its Holding in that Case.

In *Seminole Tribe*, the Court held that Congress could not subject States to suit under the Commerce Clause, stating in sweeping and unequivocal terms that

> 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.

And, most striking for these purposes was its direct acknowledgment immediately following that statement that its ruling would expressly apply to bankruptcy and that there was "no established tradition in the lower federal courts of allowing enforcement of [bankruptcy laws] against the states." 517 U.S. at 72-73 & n.16; *see id.* at 77 (Stevens, J., dissenting). Rather than overturn *Seminole Tribe* outright, however, the majority in *Katz* explained that bankruptcy was unique among all other Article I powers and concluded that the States ceded their sovereign immunity when they ratified the Bankruptcy Clause.[8] As shown below, the

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[8] *Katz* described those statements as "dicta" that "we are not bound to follow." *Katz*, 546 U.S. at 363. However, prior to *Katz*, no court treated them as dicta. The limits on Article I powers was the "analytical core of *Seminole Tribe*," and "it is objectively impossible to reconcile *Katz* with *Seminole Tribe* and its progeny."

evidence in support of that conclusion is lacking and, in any event, conflates whether the States intended to provide uniform discharge protections to debtors with the wholly separate question of whether such protection would apply to obligations of the States.

1. The Need to Maintain "Uniform" Bankruptcy Laws Does Not Require a Waiver of States' Sovereign Immunity.

The majority in *Katz* stated that under the Articles of Confederation, "[u]ncoordinated actions of multiple sovereigns, each laying claim to the debtor's body and effects according to different rules," resulted in one jurisdiction imprisoning debtors discharged by another, and the Framers sought to prevent this "rampant injustice" by creating the potential for a nationally uniform discharge. *Katz*, 546 U.S. at 362-69, 375-77. The *Katz* majority concluded that to ensure such uniformity, the States understood and agreed they would need to forgo sovereign immunity in bankruptcy proceedings. *Id*. at 377.

There are at least three problems with this rationale. First, it is a non sequitur to say that to achieve a uniform national bankruptcy law, the States must have intended to waive their sovereign immunity. As

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Stephen I. Vladeck, *State Sovereign Immunity and the Roberts Court*, 5 Charleston L. Rev. 99, 121-22 (2010). *See also* Scott Dodson, *The Metes and Bounds of State Sovereign Immunity*, 29 Hastings Const. L.Q. 721, 744 (2002); Stephanie Cochran, Note, *Should It Stay or Should It Go?* Seminole Tribe *in the Post*-Katz *Era*, 62 U. Miami L. Rev. 157, 178-80 (2007).

the dissent in *Katz* noted, this argument "conflates two distinct attributes of sovereignty: the authority of a sovereign to enact legislation regulating its own citizens, and sovereign immunity against suit by private citizens. . . . These two attributes of sovereignty often do not run together—and for purposes of enacting a uniform law of bankruptcy, they need not run together." *Id*. at 383 (Thomas, J., dissenting); *see* Graham K. Bryant, *The Historical Argument for State Sovereign Immunity in Bankruptcy Proceeding*s, 87 Miss. L.J. 49, 65 (2018) ("The Framers never fathomed that by granting Congress the power to create uniform bankruptcy laws for the whole country, the states would necessarily lose their sovereign immunity with respect to bankruptcy. . . ."); Jonathan C. Lipson, *Debt and Democracy: Toward a Constitutional Theory of Bankruptcy*, 83 Notre Dame L. Rev. 605, 643 (2008) ("Evidence that the Framers wanted to create a congressional power to preempt inconsistent state laws is not evidence that Congress wanted to empower individuals to drag states into federal courts.").

There is no more reason why a geographically uniform bankruptcy law, enacted as a matter of federal legislative supremacy, must result in a loss of immunity than is the case with respect to other Article I powers, such as the Commerce and Patent Clauses, which equally apply to States but are not enforceable through private suits against the States. *Allen v. Cooper*, 140.S Ct. 994 (2020) (applying *Seminole* to hold Congress cannot abrogate States' immunity from copyright infringement suits). The Court has never suggested that

the need for uniformity under the Commerce Clause carries with it a waiver of sovereign immunity, despite the recognition in *Seminole Tribe* and elsewhere of "the unparalleled breadth of that clause's legislative reach and its obvious critical import in regulating virtually every aspect of the national economy." Martin H. Redish & Daniel M. Greenfield, *Bankruptcy, Sovereign Immunity and the Dilemma of Principled Decision Making: The Curious Case of* Central Virginia Community College v. Katz, 15 Am. Bankr. Inst. L. Rev. 13, 16-17 (2007). Accordingly, "the Court's asserted dichotomy between Bankruptcy Clause and Commerce Clause cases is unambiguously indefensible." *Id*. at 18; *see* Suzanna Sherry, *Logic Without Experience: The Problem of Federal Appellate Courts*, 82 Notre Dame L. Rev. 97, 113-14 (2006) (concluding there is "no persuasive distinction" between the clauses "that might justify the vast difference in consequences for state sovereign immunity. . . .").

Second, if, as the *Katz* majority reasoned, bankruptcy law must treat all similarly situated creditors and debtors equally in order to achieve the goal of uniformity, it would seem to follow that federal bankruptcy law must govern all aspects of bankruptcy. Yet, the Bankruptcy Code allows States to accord widely divergent laws to debtors, with the vast range of homestead exemptions being just one example. Joseph Pace, Note, *Bankruptcy as Constitutional Property: Using Statutory Entitlement Theory to Abrogate State Sovereign Immunity*, 119 Yale L.J. 1568, 1593 (2010). The Court recognized long ago that variation in state laws

impacting creditor and debtor rights is permissible and may lead to different results in different States. *See*, *e.g.*, *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918); *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 190 (1902).

Third, if the Framers' chief concern was enforcing discharge orders across state lines, this required nothing more than a provision requiring States to "respect the discharge orders of their sister States under the Full Faith and Credit Clause . . . [it did not require authorizing] private suits against the States." *Katz*, 546 U.S. at 390-91 (Thomas, J., dissenting). In other words, sovereign immunity "need not even have entered into the calculation." Redish & Greenfield, 15 Am. Bankr. Inst. L. Rev. 13, 34; *see* Pace, 119 Yale L.J. 1568, 1596.

2. The Majority's Historical Analysis Does Not Indicate that States Agreed in the Plan of the Convention to Cede Their Sovereign Immunity.

The majority in *Katz* also concluded that the historical evidence indicated that the States would have understood they were ceding sovereignty in bankruptcy proceedings. Given the "absence of extensive debate over the text of the Bankruptcy Clause" at the Constitutional Convention, *Katz*, 546 U.S. at 369, the majority relied principally on the fact that Congress enacted legislation in 1800 authorizing federal courts to issue writs of habeas corpus requiring States to release debtors from prison and that there was "no

record of any objection . . . based on an infringement of sovereign immunity," *id.* at 375.

The absence of objection to such legislation is unremarkable, though, since the habeas writ "was well established by the time of the framing, and consistent with then-prevailing notions of sovereignty." *Katz*, 546 U.S. at 388-89 (Thomas, J., dissenting). At the time, imprisonment for debt was properly regarded as a creditor collection remedy, not a criminal proceeding for violating state law. And, in any event, many colonial bankruptcy acts specifically provided that habeas relief did not extend to debts due to the sovereign. *See* Thomas E. Plank, *State Sovereignty in Bankruptcy After* Katz, 15 Am. Bankr. Inst. L. Rev. 59, 78 (2007) (reviewing 18th-century bankruptcy law and concluding "the Court's historical analysis fails completely"). Accordingly, the writs "were not thought to involve the doctrine of sovereign immunity, and the Supreme Court's early case law domesticated these concepts in the face of the [E]leventh [A]mendment through what eventually coalesced into the *Ex parte Young* doctrine." Ralph Brubaker, *Explaining* Katz*'s New Bankruptcy Exception to State Sovereign Immunity: The Bankruptcy Power as a Federal Forum Power*, 15 Am. Bankr. Inst. L. Rev. 95, 117 (2007) (citation and internal quotation marks omitted).

3. The Majority's Distinction Between *In Rem* and *In Personam* Jurisdiction Does Not Support Its Holding.

Finally, as further evidence that the Bankruptcy Clause stands apart from other Article I, Section 8 powers, the majority in *Katz* pointed to the Court's earlier decision in *Hood*, in which it observed that because bankruptcy jurisdiction is principally *in rem*, as opposed to *in personam*, "it does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction." *Katz*, 546 U.S. at 362 (citing *Hood*, 541 U.S. at 450-51). *Katz* went further, however, concluding that because some bankruptcy powers "unquestionably involved more than mere adjudication of rights in a *res*," the states also "acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts." *Id*. at 378.

Hood's premise that an exercise of *in rem* jurisdiction does not implicate states' sovereignty "has little relevance to a consideration of the issue in *Katz*, for the proceedings in *Hood* and *Katz* are quite different." Redish & Greenfield, 15 Am. Bankr. Inst. L. Rev. 13, 44-45. The *Hood* Court held that the discharge proceeding at issue there did not infringe state sovereignty because the debtor did "not seek monetary damages or any affirmative relief from a State by seeking to discharge a debt; nor [did] he subject an unwilling State to a coercive judicial process." *Hood*, 541 U.S. at 450-51. The trustee's preference action in *Katz*, however,

did exactly those things. *See* Redish & Greenfield, 15 Am. Bankr. Inst. L. Rev. 13, 44-45. If one takes the position in *Hood*—that *in rem* jurisdiction is legitimate because it is not *in personam* and does not seek payment—and then holds that one can use *in personam* jurisdiction to seek to obtain assets in *in rem* actions "the output is a dizzyingly circular paralogism." Pace, 119 Yale L.J. 1568, 1599-1600; *see* T. Haller IV Jackson, *Fee Shifting and Sovereign Immunity After* Seminole Tribe, 88 Neb. L. Rev. 1, 41-43 (2009) (in allowing efforts to disgorge preferential transfers " . . . the Court ignored the fact that the very thing which made *Hood* inoffensive to sovereignty was the absence of interference with money the state already had in the bank").

Against this backdrop, a reexamination of *Katz* is warranted.

II. THIS CASE IS IMPORTANT AND WARRANTS REVIEW.

A. The Decision Below Greatly Expands *Katz*'s Abrogation of State Sovereign Immunity, Placing Core State Sovereignty Interests at Risk.

This case is important and warrants review because the Third Circuit decision greatly expands *Katz*'s abrogation of state sovereign immunity in several respects—with the effect that States can be sued in bankruptcy court over essentially any claim relating to property contained in a liquidating trust or in any other action that might be viewed as obtaining

additional assets available to creditors. Not only is this undue expansion without support in the reasoning and constitutional underpinnings of *Katz*, but it threatens core sovereignty interests of the States.

As an initial matter, as noted above, the Third Circuit improperly expands *Katz* to suits arising after the bankruptcy courts have ceased to exercise *in rem* jurisdiction over a bankruptcy debtor's property, as well as to suits which lack a close and immediate nexus to the three core "critical features of every bankruptcy proceeding," instead concluding that this Adversary Proceeding "furthered" the Bankruptcy Court's *in rem* jurisdiction because the suit affected rights to trust property available for distribution. *See supra* Section I.B.

Just as critical, the Third Circuit's decision has the effect of essentially ceding to the Bankruptcy Court the question of when sovereign immunity is to be abrogated. The Third Circuit identified as a factor justifying application of *Katz*'s abrogation of sovereign immunity the fact that the Plan here provided that the "Bankruptcy Court retained substantial control" over former estate property. *Id*. While the "substantial control" retained by the Bankruptcy Court in this case is actually questionable, whatever control that Court may have is the product of the Plan proposed by the Debtors, agreed to by the parties, and approved by the Bankruptcy Court. Thus, as the Third Circuit would have it, the scope of *Katz* abrogation turns on the extent to which a debtor chooses to ask that a court, through the confirmation of a plan, grant to itself

"control" over former estate property. But, it is axiomatic that "if a court lacks jurisdiction over a dispute, it cannot create that jurisdiction by simply stating it has jurisdiction in a confirmation or other order." *In re Resorts*, 372 F.3d at 161.

This case is also important and warrants review because of the significant and outsized authority the Third Circuit's decision effectively accords post-confirmation liquidating trustees. A trustee is subject to the constraints of the Bankruptcy Code and of a bankruptcy court "only to the extent provided in the plan of reorganization." *In re Johns-Manville Corp.*, 7 F.3d 32, 34 (2d Cir. 1993); *see also In re Smith*, 141 F.3d 1179 (9th Cir. 1998). As is typical of liquidating trustees, the Liquidating Trustee here is subject to no meaningful oversight by creditors or the court under the terms of the Trust Agreement. JA 307. Therefore, the Complaint pursued by the Liquidating Trustee was a traditional private suit in every meaningful way free of the constraints of the Bankruptcy Code.

This case well illustrates the risks for state sovereign immunity resulting from the Third Circuit's unduly expansive reading of *Katz*. In the ordinary course, the Liquidating Trustee's inverse condemnation suit would be heard before a California court and jury where the EOF is located—which the Commission has conceded may adjudicate the claims the Liquidating Trustee seeks to bring. That court and jury would bring their familiarity with local conditions to bear in resolving this dispute, placing into context the health and environmental concerns that motivated

the Commission's actions. Witnesses on both sides would be able to appear in a local court with minimum disruption and expense. The California court would also be well versed in the state substantive law applicable to the Liquidating Trustee's inverse condemnation action.

By contrast, the Liquidating Trustee's action purports to require the Commission to defend itself thousands of miles from where the relevant events took place before a court and jury with no familiarity with the Pacific Coast. California is forced to undergo the effort and expense of transporting its witnesses, consisting primarily of local contractors and government employees, across country and creating a legal defense team in a foreign jurisdiction. Finally, the Bankruptcy Court will be required to apply California law of inverse condemnation, which falls well outside its familiar terrain of federal bankruptcy law.

In sum, the Third Circuit's expansion of *Katz* will open up States to suits challenging regulatory, tax, condemnation, and other actions brought in a distant bankruptcy court having no experience with applicable state laws or practices.

Accentuating the importance of this case even more is the fact that the Third Circuit hears appeals from one of the most active venues in which major corporate bankruptcy proceedings are brought.

B. This Case Warrants Review in Order to Provide Principled Guidance as to Breadth of *Katz*'s Applicability.

Confusion abounds in the academic literature as to the limits of *Katz*. *See*, *e.g.*, Richard Lieb, *State Sovereign Immunity: Bankruptcy Is Special*, 14 Am. Bankr. Inst. L. Rev. 201, 212-13 (2006) ("The issues remaining unresolved after *Katz* include whether money judgments or orders for other types of affirmative relief may be obtained against States on a variety of claims arising under the Bankruptcy Code, for example, to enforce or extend the section 362(a) automatic stay; to recover damages under section 362(k); . . . or to order a turnover to the trustee pursuant to Bankruptcy Code section 542 of property in the possession of a State."); Pace, 119 Yale L.J. 1568, 1574 (observing that *Katz* "prompts a new set of questions," such as: "What are the dimensions of an ancillary order? To which bankruptcy laws does the ancillary order theory apply? Insofar as the majority purported to ground its conclusion in the Framers' comprehension of contemporary bankruptcy law, how should the courts adapt that intent to modern innovations in the Bankruptcy Code?").

Not merely an academic dispute, *Katz* has resulted in considerable confusion in the lower courts as well. Some have read *Katz*'s sovereign immunity waiver narrowly, *see*, *e.g.*, *Fla. Dep't of Revenue v. Diaz (In re Diaz)*, 647 F.3d 1073, 1084, 1086 (11th Cir. 2011) (interpreting *Katz* "to mean that some proceedings, although they may arise under the Bankruptcy Code,

nevertheless lack a meaningful nexus to the bankruptcy courts' *in rem* jurisdiction and thus do not fall within the scope of the states' consent to suit"), while others have read it far more broadly, *see*, *e.g.*, *Kids World of Am., Inc. v. Ga. Dep't of Early Care & Learning*, 349 B.R. 152, 165 (Bankr. W.D. Ky. 2006) (describing the *Katz* holding as determining that "the States are subject to proceedings that properly lie within the scope of Congress' power to enact 'Laws on the subject of Bankruptcies'"). Yet others have explicitly raised questions regarding the scope of the Court's holding. *See*, *e.g.*, *Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 307 (5th Cir. 2007) (referencing "uncertainty . . . as to the outer limits of the holding of *Katz*"); *Fla. Dep't of Revenue v. Omine (In re Omine)*, 485 F.3d 1305, 1313 (11th Cir. 2007) (referring to "the remaining gray area" post-*Katz* "as to what power provided by the bankruptcy code cannot be used against the state"); *Phila. Entmt. & Dev. Partners, L.P. v. Pa. Dep't of Revenue (In re Phila. Entmt & Dev. Partners, L.P.)*, 549 B.R. 103, 133-35 (Bankr. E.D. Pa. 2016) (acknowledging difficulty in determining whether *Katz* applies to claims other than preference actions).

This case warrants review to resolve confusion as to *Katz*'s limits.

III. THIS CASE IS A GOOD VEHICLE TO DECIDE THE QUESTIONS PRESENTED.

This case is a good vehicle to decide the two questions presented. Each of the three opinions below relies

upon *Katz* to conclude that the Commission cannot seek dismissal of the Adversary Proceeding on the basis of sovereign immunity. Moreover, the Adversary Proceeding is not a Code-based action of the type that was before this Court in *Katz*, but rather presents a non-bankruptcy law claim with respect to property arising after the transfer of the property to a post-confirmation liquidating trust. Squarely presented, therefore, is whether the Adversary Proceeding lies outside the constitutionally authorized abrogation of sovereign immunity found by *Katz*.

Although the Liquidating Trustee contended in the Bankruptcy Court that the Commission waived sovereign immunity by filing a claim in the bankruptcy proceeding, that Court decided the question of sovereign immunity without reaching that issue. Similarly, neither the District Court nor the Third Circuit discuss—nor rest their decisions in any way on—whether the Commission by its actions waived a sovereign immunity defense. Instead, all three courts below squarely address sovereign immunity and leave other potentially dispositive issues for later resolution. Having considered and decided that sovereign immunity is abrogated, none of the courts below will revisit that determination hereafter.

Finally, this Court has not considered the scope of *Katz*'s holding in the 15 years since its decision, despite developments in this Court's sovereign immunity jurisprudence over that time. If certiorari is not granted, there will now be even less of a likelihood that bankruptcy cases presenting the scope of *Katz* will reach

this Court, since the Third Circuit's decision will both discourage appeals by States and pressure States to settle.

CONCLUSION

For these reasons, the Commission respectfully requests that this Petition be granted.

Respectfully submitted,

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