No. 21-109

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

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

In *Central Virginia Community College v. Katz*, 546 U.S. 356, 378 (2006), this Court held that, by ratifying the Bankruptcy Clause of the U.S. Constitution, states waived sovereign immunity in proceedings necessary to effectuate a bankruptcy court's exercise of its *in rem* jurisdiction over property of the debtor and its estate. This waiver extends to proceedings that may require *in personam* process to further the court's *in rem* functions. *Id.* at 371–72.

During the Chapter 11 liquidation of Venoco, LLC, the California State Lands Commission began using a piece of Venoco's property. Prior to the October 1, 2018 effective date of Venoco's liquidation plan, the Commission gave notice that, as of October 15, it would stop making payments for using the property. As a result, the court-appointed liquidating trustee brought a bankruptcy adversary proceeding against the Commission and the State of California alleging ongoing inverse condemnation of the property (now held in a liquidating trust). The Commission and the State moved to dismiss. The Third Circuit held that *Katz* forecloses their sovereign immunity defense because the proceeding enforces rights in the property of Venoco and its estate and will facilitate the fair distribution of those assets to creditors, furthering the bankruptcy court's *in rem* functions.

The question presented is:

Whether sovereign immunity is an available defense to an inverse condemnation adversary proceeding brought by a liquidating trustee to obtain just compensation for a state agency's ongoing inverse condemnation of estate property.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondent certifies that Venoco, LLC's parent corporations were Apollo Credit Opportunity Trading Fund III AIV LLC; Apollo Investment Corporation; and MAST OC I Master Fund LP. No publicly held company owns 10% or more of Venoco's stock.

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INTRODUCTION

The Commission attempts to convince this Court that the Third Circuit's decision allows abrogation of sovereign immunity to extend to virtually any suit relating to former debtor property. *E.g.*, Pet. 24. But the Third Circuit held only that applying *Katz* to the facts before it, the Commission's Eleventh Amendment sovereign immunity does not bar the Trustee's inverse condemnation suit because the adversary proceeding furthers two critical functions of the Bankruptcy Court's *in rem* jurisdiction. Pet. App. 19a–21a. The Third Circuit thus applied the proper framework in holding that *Katz* forecloses the Commission's claim of sovereign immunity. Pet. App. 4a. The Third Circuit's "holding is limited" and applies to the facts of "this case." Pet. App. 25a. In any event, the Commission's argument that this case involves a post-effective date application of *Katz* is disputed. Pet. App. 22a–23a. This factual dispute is another reason the Court should deny the petition.

STATEMENT OF THE CASE

I. Factual Background

Venoco, LLC ("Venoco") was an oil and gas company that operated an offshore oil and gas platform off the California coast for 20 years. Venoco produced oil and gas from offshore wells it owned and operated in state waters in the South Ellwood Field near Santa Barbara, California. *See* JA 117–18, 124.[1] Venoco produced this oil and gas using its offshore drilling rig, Platform Holly, and then it transported the oil and gas by Venoco's pipeline to Venoco's Ellwood Onshore Facility ("EOF") located onshore about three miles north of the platform for processing. JA 124. From the EOF, the oil was then transported to market by a third-party pipeline. JA 124. Venoco owned the EOF, its equipment, and the permits necessary to operate the facility, including a valuable air permit, all of which vested in the Venoco Liquidating Trust ("Trust") on October 1, 2018 ("the Effective Date"). JA 123–24.

Venoco had rights in the offshore wells through leases issued by the State of California ("the State"), acting through the California State Lands Commission ("the Commission"). JA 117–18. Following the rupture of the third-party pipeline in 2015, Venoco safely and temporarily abandoned its wells and then sought authorization from the Commission and the State to pursue several alternative means to transport oil from the EOF to market. JA 117, 124, 682. The Commission and the State declined at every

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[1] "JA" references the page in the Joint Appendix filed in the Third Circuit.

turn, leaving Venoco no choice but to file for bankruptcy. JA 117 n.2, 124.

Prior to and during the bankruptcy, Venoco coordinated with the Commission to transition operation of Platform Holly and the EOF to the Commission in a safe and orderly manner to facilitate decommissioning of the platform and permanent plugging and abandonment of the wells. JA 125–28. Beginning in April 2017, Venoco and the Commission entered into several agreements for the Commission to reimburse Venoco for Venoco's costs to continue operating the leases on an interim basis, and the Commission received non-exclusive access and use rights to the EOF to facilitate the transition and the anticipated decommissioning efforts. JA 118–19, 125–26, 132–60. During this time, Venoco maintained Platform Holly and the EOF in a "safe and non-producing state." JA 682.

On April 17, 2017, Venoco filed for Chapter 11 bankruptcy protection in the U.S. Bankruptcy Court for the District of Delaware ("Bankruptcy Court"). JA 121–23. Earlier that same day, Venoco quitclaimed its leases in the South Ellwood Field to the Commission, thereby relinquishing its rights in the field, including its ownership of Platform Holly. JA 117–18, 124. Because of the pre-petition quitclaims, the Commission became responsible for decommissioning Platform Holly and permanently plugging the abandoned wells in the South Ellwood Field. JA 118. Venoco remained the owner, operator, and permittee for the EOF. JA 120.

In September 2017, the first of the agreements between Venoco and the Commission terminated.

JA 118. At that time, Venoco safely transitioned operation of the South Ellwood Field and Platform Holly to the Commission's third-party contractor, which agreed to continue operating Platform Holly and the EOF. JA 118, 125, 682. The Commission and Venoco also entered into a "Gap Agreement" to allow the Commission to continue its temporary use of the EOF. JA 118–19, 125–26. In exchange, the Commission agreed to pay Venoco's actual expenses and to negotiate in good faith with Venoco for a reasonable payment amount for the Commission's continued use of the EOF. JA 118–19, 125–26, 154–55. If Venoco and the Commission could not agree on a valuation for the EOF, the Commission would be bound by the amount determined by a court of law. JA 155.

When the parties failed to agree on a valuation after a few months, the parties subsequently amended and extended the Gap Agreement to provide that the Commission would pay Venoco $100,000 per month for its continued use of the EOF. JA 159. The Commission's obligation to compensate Venoco for its ongoing use of the EOF if and when the parties agreed on a valuation for that use was not extinguished. JA 159–60. Moreover, the Gap Agreement provided that these periodic payments were not the full value of just compensation for the EOF, but only interim payments that would be "caught up" when there was a final agreement or court decision determining the amount for reasonable use of the EOF. JA 155, 159–60; *see also* JA 524–25; *cf.* JA 162–63 (Venoco's demand for unpaid fees).

Venoco and the Commission extended the Gap Agreement several times. JA 125–26. Throughout this period, Venoco sought (to no avail) to negotiate the

EOF's purchase price with the Commission. JA 119–20, 126, 524–25, 589. Beginning in June 2018, the Gap Agreement continued on a month-to-month basis. JA 125–26. The Commission also filed a proof of claim in the Chapter 11 cases in October 2017 for an estimated $130 million contingent claim against Venoco for costs to plug the South Ellwood Field wells and decommission Platform Holly and other facilities. JA 122 n.6, 630–706. The contingent claim included $29 million to $35 million for EOF operating costs related to the plugging and decommissioning efforts. JA 705.[2]

Just prior to the Effective Date, the Commission notified Venoco that it would cease making payments for its use of the EOF and expressed its intent to continue its use of the property—without compensation—indefinitely. *See* JA 117, 126–27, 129. As a result, the Gap Agreement was promptly terminated on October 15, 2018, and the inverse condemnation adversary proceeding ("Adversary Proceeding") commenced on October 16, 2018. JA 126.

II. Proceedings Below

A. The Chapter 11 Proceeding

On May 23, 2018, the Bankruptcy Court approved Venoco's Chapter 11 Liquidation Plan ("the Plan"), JA 441–78, which the Commission actively supported and voted to accept, JA 884, 889. The Plan became effective on October 1, 2018. JA 123. As part of the Plan

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[2] In July 2021, the Bankruptcy Court approved a settlement agreement resolving this proof of claim and others. Bankr. Proc. D.I. 1233, 1236. The settlement has no impact on the inverse condemnation claims here. Bankr. Proc. D.I. 1236 at 9 (Settlement Agreement ¶ 8).

and the Liquidating Trust Agreement it incorporates ("Trust Agreement"), the Bankruptcy Court created the Trust and transferred to that Trust assets from Venoco's bankruptcy estate. JA 302–04. Those assets include the EOF, the EOF-related permits, and any claims Venoco had against the Commission and the State related to the EOF. JA 322–26, 459, 495, 498. The Bankruptcy Court appointed Respondent Eugene Davis as Trustee of the Trust and authorized him to "[a]llow, settle, object to or reconcile any Claims against" Venoco's estate. JA 305, 328. The Trustee also has the responsibility of "collecting, holding, distributing and liquidating the Liquidating Trust Assets for the benefit" of Venoco's creditors that filed claims against the bankruptcy estate and "otherwise administering the wind-down" of the estate. JA 302; *see also* JA 459, 559, 566–67.

The Trustee is accountable to the Bankruptcy Court and the beneficiaries of the Trust in several ways. *See, e.g.*, Bankr. Proc. D.I. 1121, 1239 (quarterly reports). He also seeks approval of the Bankruptcy Court as part of the ongoing Chapter 11 process as appropriate. *See* Pet. 8 n.5 (approval of settlement of the Commission's proof of claim). In the event of non-responsiveness or lack of reporting, the Trust Agreement provides a mechanism for removal of the Trustee. JA 312.

The Bankruptcy Court's confirmation order provides that the court retained jurisdiction over actions "[t]o recover all assets of the Debtors and property of the Debtors' Estates, which shall be for the benefit of the Liquidating Trust, wherever located." JA 473. Moreover, the Trust Agreement: provides that the

Bankruptcy Court has jurisdiction over the administration of the Trust and any actions against the Trustee, JA 316; requires court approval before selling or abandoning Trust assets, JA 305; and states that "[a]ll funds in the Liquidating Trust shall be deemed in *custodia legis* until" they are paid out, "and no Beneficiary . . . can bind, pledge, encumber, execute upon, garnish, or attach the Liquidating Trust Assets or the Liquidating Trustee in any manner or compel payment from the Liquidating Trust except by order of the Bankruptcy Court," JA 317.

The Plan specifically addressed the disposition of the EOF, noting that the ongoing negotiations between Venoco and the Commission to convey the EOF are "part of an overall resolution of [the Commission's] Claim against Venoco." JA 525.

B. The Adversary Proceeding

On October 16, 2018, the Trustee brought inverse condemnation claims against the Commission and the State. JA 116, 128–31. The claims were brought at this time because the Commission notified Venoco that it would cease making even partial compensation payments for use and occupancy of the EOF on October 15. JA 117, 126, 128–30.

The Trustee's inverse condemnation suit seeks just compensation for both the period following the termination of the Gap Agreement (during which the Trust has received no compensation from the Commission) and the period prior to termination, including periods prior to the Effective Date of the Plan (during which the Trust received some but not full compensation from the Commission). JA 119–20, 128–29;

see also JA 155, 159–60, 524–25; Pet. 7 n.4 (Gap Agreement "call[ed] for nominal payments").

The Commission and the State filed motions to dismiss, arguing that the Bankruptcy Court lacked subject matter jurisdiction, the Trustee failed to exhaust state law remedies, and Eleventh Amendment sovereign immunity barred the complaint. Pet. App. 51a–52a. The Bankruptcy Court denied the motions to dismiss on all counts. Pet. App. 52a, 70a.

C. The District Court Appeal

The District Court granted the Commission and the State leave to appeal only the sovereign immunity issue. Pet. App. 32a. The District Court affirmed the Bankruptcy Court's determination that the Trustee's inverse condemnation claim is not barred by sovereign immunity. Pet. App. 40a–41a, 46a. The Commission and the State appealed. JA 1.

D. The Third Circuit Appeal

The Third Circuit affirmed the District Court's order affirming the Bankruptcy Court's decision, holding that *Katz* "forecloses the assertion of sovereign immunity" by the Commission and the State. Pet. App. 4a. The Third Circuit recognized that, although states maintain their sovereign immunity under our constitutional structure, such immunity is not absolute and must give way in several instances. Pet. App. 8a–10a.

Before *Katz*, courts faced with questions of sovereign immunity in the bankruptcy context focused on statutory abrogation and consistently concluded that the Bankruptcy Code did not clearly abrogate state sovereign immunity. Pet. App. 10a. In response to these decisions, Congress amended the Bankruptcy

Code in an attempt to abrogate sovereign immunity in certain instances. Pet. App. 10a. The courts of appeals reached differing conclusions regarding the constitutionality of this amendment, but subsequent opinions of this Court "displaced" such decisions. Pet. App. 10a–11a.

The first of those subsequent opinions was *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004), which the Third Circuit explained "rejected an assertion of sovereign immunity" regarding the discharge of student debt because when the "'bankruptcy court's jurisdiction over the res is unquestioned, . . . the exercise of its *in rem* jurisdiction to discharge a debt does not infringe state sovereignty.'" Pet. App. 11a (quoting *Hood*, 541 U.S. at 448).

The Third Circuit explained that *Katz* came next, expanding the "narrow holding" in *Hood*. Pet. App. 12a. The case involved a "liquidating supervisor of a bookstore that filed for Chapter 11 bankruptcy," who "sought to recover preferential transfers made to [state] educational institutions . . . otherwise entitled to sovereign immunity." Pet. App. 12a (footnote omitted) (citing *Katz*, 546 U.S. at 360). This Court rejected the assertion of sovereign immunity based on three principles that the Third Circuit summarized in its opinion.

First, "under the Constitution's Bankruptcy Clause, states are deemed to have waived their sovereign immunity in certain bankruptcy proceedings," meaning that "we look to the scope of constitutional waiver recognized by *Katz* instead of congressional abrogation through the Bankruptcy Code . . . ." Pet. App. 12a–13a; *see Katz*, 546 U.S. at 378. Second, "*Katz*

did not foreclose the sovereign immunity defense in all bankruptcy proceedings." Pet. App. 13a (citing *Katz*, 546 U.S. at 378 n.15). Third, *Katz* "does not require a proceeding to be technically *in rem*." Pet. App. 14a (citing *Katz*, 546 U.S. at 370). Rather the "focus is on function and not form . . . ." Pet. App. 14a.

The *Katz* Court concluded that sovereign immunity could not be asserted against the preference action at issue. 546 U.S. at 359. Even though that proceeding was not squarely *in rem*, the *Katz* Court further explained, the states would have understood that the laws covered by the Bankruptcy Clause "included laws providing, in certain limited respects, for more than simple adjudications of rights in the res." *See id.* at 370. Therefore, even if a proceeding is "merely ancillary to the Bankruptcy Court's exercise of its *in rem* jurisdiction," it does not implicate state sovereign immunity. *Id.* at 371.

Before applying this holding to the Commission's sovereign immunity defense, the Third Circuit laid out an analytical framework based on three critical features of bankruptcy proceedings identified by the *Katz* Court:

> "[1] the exercise of exclusive jurisdiction over all of the debtor's property, [2] the equitable distribution of that property among the debtor's creditors, and [3] the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts." *In re Diaz*, 647 F.3d 1073, 1084 (11th Cir. 2011) (quoting *Katz*, 546 U.S. at 363–64).

Pet. App. 15a. The Third Circuit noted that this is a "useful starting point" because "*Katz* did not define the range of proceedings that further a bankruptcy court's *in rem* jurisdiction." *See* Pet. App. 15a. Thus, courts "analyze correctly if they ask whether a proceeding directly relates to one or more of these three functions." Pet. App. 18a (citing *Diaz*, 647 F.3d at 1084).

The Third Circuit concluded that here the Commission cannot invoke its sovereign immunity defense to the inverse condemnation Adversary Proceeding. Pet. App. 18a. This is because the Adversary Proceeding implicates two of the three critical functions of bankruptcy. Pet. App. 19a. First, the "Adversary Proceeding furthers the Bankruptcy Court's exercise of jurisdiction over property of [Venoco and its affiliate debtors] and their estates, as it seeks a ruling on rights in the [EOF]." Pet. App. 19a; *see also* Pet. App. 19a ("At its core, the Adversary Proceeding is about whether the [the Commission] can use Venoco's property for free.") (citing JA 129).

Second, the Adversary Proceeding furthers the "equitable distribution of the estate's assets"—particularly the EOF, which the court recognized "is a significant asset for Venoco and its creditors," the disposition of which was contemplated by the Plan. Pet. App. 20a. Specifically, the Third Circuit noted that the Plan "acknowledged the Commission was 'receiving significant value from the use of the Debtors' assets' and that the 'value of the use of those assets [was] being negotiated between the parties.'" Pet. App. 20a (quoting JA 589). The court also acknowledged the Commission's role as "a major creditor" of

Venoco that filed a proof of claim, so that the Commission has "a stake in how the Trust's assets are liquidated and distributed." Pet. App. 20a.

In rejecting the Commission's Eleventh Amendment sovereign immunity argument, the Third Circuit expressly limited its holding to the facts before it and disclaimed any attempt to "define the entire scope of the Bankruptcy Court's *in rem* jurisdiction . . . ." Pet. App. 25a.

REASONS FOR DENYING THE PETITION

I. The Third Circuit's Ruling Is Correct.

A. The Adversary Proceeding falls squarely within *Katz*.

Using the basic principles outlined in *Katz*—to which the parties agreed[3]—the Third Circuit correctly held that *Katz* forecloses the Commission's argument that it is entitled to Eleventh Amendment sovereign immunity.

In *Katz*, this Court determined that sovereign immunity did not bar an adversary proceeding brought by a liquidating trustee to avoid an alleged preferential transfer by the debtor to certain Virginia institutions of higher education that were considered arms of the State. 546 U.S. at 360. The Court held that "[i]n ratifying the Bankruptcy Clause, the States acqui-

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[3] Pet. App. 16a (citing Oral Arg. Tr. 7:19–23, 24:4–9; *accord Diaz*, 647 F.3d at 1084); *see also* Third Cir. Reply Br. of Pet'r 11 (attempting to distinguish the Trustee's Adversary Proceeding from the preference proceeding in *Katz* by applying the three "critical features" of bankruptcy proceedings).

esced 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.

Consistent with *Katz* and opinions issued by the Eleventh Circuit and a number of bankruptcy courts, the Third Circuit asked whether the Trustee's Adversary Proceeding "directly relates to one or more" of the three critical functions of bankruptcy. Pet. App. 18a. It correctly concluded that the Adversary Proceeding implicates two such functions: "the exercise of exclusive jurisdiction over all of the debtor's property" and "the equitable distribution of that property among the debtor's creditors." Pet. App. 15a, 19a–20a; *see also Katz*, 546 U.S. at 363–64.

This is unsurprising. Although inverse condemnation may not be clearly *in rem* in form, the function of the Trustee's complaint is to decide rights in Venoco's property (the EOF) now vested in the Trust and occupied by the Commission. *See United States v. Sid-Mars Rest. & Lounge, Inc.*, 644 F.3d 270, 286 (5th Cir. 2011) (Dennis, J., dissenting) ("Although I have not found cases explicitly declaring that inverse condemnation suits are *in rem* proceedings, . . . they are substantially equivalent to condemnation actions and essential to the self-executing constitutional protection of private property owners from governmental takings without just compensation."). As the Third Circuit stated, "[a]t its core, the Adversary Proceeding is about whether the California Parties can use Venoco's property for free." Pet. App. 19a (citing JA 129).

Additionally, the Third Circuit made an astute observation. Writing for the panel, Judge Ambro—himself a seasoned bankruptcy lawyer before taking the bench—recognized the perverse consequences of a contrary ruling:

> If the California Parties could assert sovereign immunity in the Adversary Proceeding, they would have a win-win—able to recover from the Trust on account of their claims against Venoco while preventing any judicial scrutiny over whether they can use the [EOF] without payment. And they would improve their status vis-à-vis other creditors solely owing to their status as a state that can invoke sovereign immunity, just the kind of result *Katz* wanted to avoid. *See DBSI,* 463 B.R. at 713 ("[The aim of equitable distribution of the *res*], and the desire for uniform application of the bankruptcy laws, would be jeopardized if the states were able to draw resources from the *res* or retain estate property when other creditors were unable to do so." (citing *Katz*, 546 U.S. at 362–64)).

Pet. App. 20a.[4] Uniformity—not just in geographic application—but "in [the] treatment of state and private

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[4] The Commission claims that the Third Circuit's reliance on the Commission's role as a creditor "conflates" the proof of claim, which "relates to the cleanup and abatement of offshore oil and gas wells and related facilities," with the inverse condemnation claim, which "relates to the post-confirmation continuation of emergency operations undertaken at the non-leased EOF, which

creditors" is an underlying rationale of the Bankruptcy Clause. *Katz*, 546 U.S. at 376 n.13.

The Commission attempts to distinguish the Adversary Proceeding from the preferential transfer action in *Katz* on the basis that the Trustee's claim arose after the Effective Date. Pet. 21–22. It is unnecessary to reach this issue because Venoco's estate did not literally end at confirmation. *See* Pet. App. 23a; *infra* pp. 19–22. Nonetheless, the Commission's allegations are factually inaccurate.

As the Complaint notes, "[t]his dispute traces back to before [Venoco] filed [for] bankruptcy" in April 2017. JA 117. Just prior to filing for bankruptcy, Venoco quitclaimed its rights in the offshore leases in coordination with the Commission; remained the owner, operator, and permittee of the EOF; and worked with the Commission to ensure continued operations of the EOF. JA 117–19, 125–26. The Commission's occupancy of the EOF then began in September 2017—during the pendency of the bankruptcy and

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is not on state land." *See* Pet. 23–24 (citing Pet. 8 n.5). The Commission misstates the record. There was no emergency at the EOF at the time the Trust transitioned control of the site to the Commission, no emergency has arisen since to the Trustee's knowledge, and the only purpose for the Commission taking control of the site has been and continues to be to serve as an onshore base for its decommissioning activities. JA 125 (Venoco was contractually obligated to operate the EOF safely until transition to the Commission's contractor); 524 (agreements between Venoco and the Commission allowed the Commission to use the EOF to decommission Platform Holly); 589 (the Commission is using the EOF to facilitate decommissioning); 682 (acknowledging the safe state before Venoco transitioned the EOF to the Commission's contractor).

over a year before the Effective Date. JA 118–19. Further, the Complaint seeks to recover just compensation due not only *after* the termination of the Gap Agreement, but also unpaid amounts that accrued *prior* to the Effective Date. JA 119; *see also* JA 162–63. The Gap Agreement (as amended) provides that the Commission's periodic payments were not the full value of just compensation for the EOF, but only interim payments that would be "caught up" when there was a final agreement or court decision determining the amount for reasonable use of the EOF. JA 155, 159–60, 524–25. The Commission and the State still owe just compensation to "catch up" any amounts paid prior to October 2018. Contrary to the Commission's mischaracterizations, *e.g.*, Pet. 33, the Trustee's suit contains pre-Effective Date claims that have a "close and immediate" connection to the Bankruptcy Court's *in rem* jurisdiction over the estate.

The Commission alleges that the Adversary Proceeding does not "facilitate[ ] equitable distribution of the estate's assets" because the "actual" distribution "had already taken place in the confirmed Plan, and the purpose of the Trust was only to effectuate that previously determined distribution." Pet. 23. This is incorrect. Moreover, the Plan does not "determine" any distribution. Rather, it sets forth the way in which distributions *may* be made by the Trust. All such distributions, however, are based on a number of assumptions and are speculative in both timing and amount. *See* JA 542; *see also* JA 560.[5]

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[5] The Commission also argues that this case is unlike the proceeding in *Katz* because it "presents solely non-bankruptcy

Far from representing "a substantial and unwarranted expansion of *Katz*," Pet. 1, the Third Circuit adhered strictly to the framework the parties agreed controls the analysis, applied it to the facts at hand, recognized the broader implications of the Commission's position, and limited its holding to the case before it. The Commission's arguments to the contrary are unavailing, and such a carefully crafted opinion does not warrant further review by this Court.

B. The Third Circuit correctly rejected the Commission's arguments.

The Commission alleges that the Third Circuit made several errors that warrant granting its petition. Pet. 14–24. The Third Circuit duly considered each of the Commission's arguments and appropriately rejected them.

1. The Commission argues that the Third Circuit's holding is incorrect because it "effectively renders any dispute over property in a liquidating trust as potentially disrupting the equitable distribution of property from a bankruptcy estate" and extends *Katz* "to virtually any suit relating to former debtor property, without any limit as to time, subject matter, or

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law claims." Pet. 21. Nothing in *Katz* limits the opinion solely to claims arising under the Bankruptcy Code. As the Third Circuit explained, such an approach would be "unworkable" because the Code itself "often incorporates applicable state laws." Pet. App. 13a n.8. It is also irrelevant that the inverse condemnation proceeding seeks money damages. *See* Pet. 21. Under *Katz*, the question is not whether the proceeding is itself *in rem*, but whether it furthers the *in rem* jurisdiction of the bankruptcy court. 546 U.S. at 371–72, 378.

the legal basis of the claim." Pet. 24. The Third Circuit, however, did not state any new test regarding the scope of *Katz* or its reach over liquidating trusts. Nor did it say that *Katz* reaches all post-effective date causes of action or all causes of action against a state or state agency playing no role in the underlying bankruptcy, regardless of the theory of the suit. Rather, the Third Circuit applied the framework functions of bankruptcy court *in rem* jurisdiction this Court established in *Katz* and concluded that the case before it implicates two of those functions. Pet. App. 19a–20a.

The Commission fails to acknowledge that the Third Circuit disclaimed that its holding extends beyond the facts of the case before it. *See* Pet. App. 18a ("We do not offer a one-size-fits-all test because claims and proceedings in bankruptcy are varied and fact-specific."); Pet. App. 25a ("Our holding is limited . . . . We only hold that, in this case, the Bankruptcy Court's *in rem* jurisdiction extends to the estate's property transferred to the Trust . . . ."). The court also explained that the Commission's "parade of horribles" would not come to pass because "[a] court must still undertake the proper analysis under *Katz*, and it must also have statutory jurisdiction over the proceeding . . . ." Pet. App. 25a. Thus, a liquidating trustee who cannot show both that his cause of action furthers the *in rem* jurisdiction of the bankruptcy court and that it falls within the jurisdiction of the bankruptcy court, 28 U.S.C. § 157, cannot proceed.

Further, this case is unlikely to recur with any frequency in the future. The Adversary Proceeding arose because a state regulatory agency—that is also a creditor in the bankruptcy case—refused to provide

just compensation for its use and occupancy of a significant asset of a bankruptcy debtor.[6] That situation is unlikely to recur because it is predicated on the debtor operating in a highly regulated field (such as the offshore oil and gas industry) that is subject to regulations under which the state agency must assume some responsibility or carry out some action following the debtor's liquidation that may result in taking property that once belonged to the now-liquidated debtor company. *See* JA 117–20, 124–28. The Commission has acknowledged just how rare this situation is. Third Cir. Reply Br. of Pet'r 15 ("[T]he parties in three rounds of briefing have not identified a single decided bankruptcy case involving an inverse condemnation claim."). Accordingly, the decision below will not create a flood of inverse condemnation adversary proceedings against which states have no sovereign immunity.

2. The Commission claims that the Third Circuit's holding is in error because the Adversary Proceeding "does not involve the Bankruptcy Court's exercise of *in rem* jurisdiction" due to the estate ending upon confirmation. Pet. 18–19. This is wrong for three reasons.

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[6] The Commission asserts that the EOF has "negative value." Pet. 13 n.7, 23. The Trustee disagrees, and nothing in the record supports this assertion. But even if true, it has no bearing on the application of *Katz*. The question of how much value may be added to the Trust for distribution to Venoco's former creditors—including the Commission—is for the Bankruptcy Court. The Adversary Proceeding still furthers the Bankruptcy Court's exercise of jurisdiction over Venoco and its estate and impacts the equitable distribution of Venoco's property.

First, although typically "the debtor's estate ceases to exist once confirmation [of a plan] has occurred," *In re Resorts Int'l, Inc.*, 372 F.3d 154, 165 (3d Cir. 2004) (citation omitted), here, the estate did not end at Plan confirmation. That action vested all the estate's assets in the Trust—not in a reorganized debtor. Pet. App. 22a n.14 (citing JA 459); *see also* 11 U.S.C. § 1141(b).

Second, the Commission's argument ignores the vast body of case law holding that plan confirmation does not automatically strip the bankruptcy court of jurisdiction over estate property upon the effective date of a bankruptcy plan. As the Third Circuit correctly explained, the Bankruptcy Court has post-confirmation jurisdiction in Chapter 11 proceedings, like here, over any claim that has a "close nexus to the bankruptcy plan or proceeding." Pet. App. 23a (quoting *Resorts Int'l*, 372 F.3d at 166). This jurisdiction exists even if (in some instances) the estate "technically" ended upon confirmation. Pet. App. 23a; *see also Resorts Int'l*, 372 F.3d at 165–67.

Although the issue of the Bankruptcy Court's statutory jurisdiction was not on appeal before the Third Circuit (nor is it before this Court), the Third Circuit properly concluded that the Bankruptcy Court had jurisdiction because its "critical *in rem* functions did not end when the Plan became effective." Pet. App. 23a. Because "the Trust exists primarily to facilitate the 'equitable distribution of [the debtor's property] among the debtor's creditors,'" Pet. App. 23a–24a (quoting *Katz*, 546 U.S. at 364), the Adversary Proceeding involving that property is sufficiently "related to" the bankruptcy proceeding to warrant continuing

jurisdiction, *see Resorts Int'l*, 372 F.3d at 164–67. Further, under the Plan, "the Bankruptcy Court retained substantial control over the Trust assets, which were in essence a continuation of the estate." Pet. App. 24a; *see also supra* pp. 5–6. This type of continuing jurisdiction is an important feature of the Bankruptcy Code and included in chapter 11 plans as market standard:

> As the Plan was one of liquidation, there was no reorganized debtor that continued to do business, the Debtors did not receive a discharge, *see* 11 U.S.C. § 1141(d)(3), and the Bankruptcy Court continued to oversee the Trust's administration and distribution of the estate's assets under the Plan, *see* 11 U.S.C. § 1142(b).

Pet. App. 24a. The Commission does not acknowledge these authorities, much less explain why the Third Circuit was wrong to rely on them.

Instead, the Commission cites cases that expressly undermine its no-jurisdiction argument. *See* Pet. 19. For example, it cites *In re Jamesway Corp.*, 202 B.R. 697, 701 (Bankr. S.D.N.Y. 1996), which states that although the "bankruptcy estate cease[s] to exist" upon plan confirmation, the bankruptcy court may "retain[] jurisdiction over certain matters." And it cites *In re Western Integrated Networks, LLC*, 322 B.R. 156, 162 (Bankr. D. Colo. 2005), which acknowledges that "a bankruptcy court retains jurisdiction" to enforce, interpret, or aid in the plan's oper-

ation "[a]fter confirmation of a chapter 11 plan." Neither of these cases conflict with the Third Circuit's approach or reasoning.

In fact, the Third Circuit is not alone in taking its approach. Its "close nexus" test is consistent with the approach taken to post-confirmation bankruptcy court jurisdiction in other circuits. The Ninth Circuit, for example, uses the "close nexus" test to account for the jurisdictional concerns associated with "the bankruptcy estate no longer exist[ing]" after confirmation. *See In re Wilshire Courtyard*, 729 F.3d 1279, 1287–88 (9th Cir. 2013) (noting that the test recognizes the limited nature of post-confirmation jurisdiction, but retains a certain flexibility). The Fourth Circuit likewise uses the "close nexus" test because it limits post-confirmation jurisdiction while remaining a "logical corollary of [28 U.S.C. § 1334's] 'related to' jurisdiction." *See Valley Historic Ltd. P'ship v. Bank of N.Y.*, 486 F.3d 831, 836–37 (4th Cir. 2007). Other circuits have followed suit. *See, e.g.*, *In re Kachkar*, 769 F. App'x 673, 679 (11th Cir. 2019) (per curiam); *cf. In re Greektown Holdings, LLC*, 728 F.3d 567, 577–78 (6th Cir. 2013) (applying a "nexus" test); *In re DPH Holdings Corp.*, 448 F. App'x 134, 137 (2d Cir. 2011) (summary order) (applying variation of the "close nexus" test). The Third Circuit's approach here is not an outlier.

Third, in *Katz*, the timing of the preferential transfer adversary proceeding had no bearing on this Court's holding. Nor does the timing of the Trustee's complaint here undermine the Adversary Proceeding's close connection to the bankruptcy case. *See DPH Holdings,* 448 F. App'x at 137 ("The adversary proceeding arose post-confirmation; but that does not

change this result. A party can invoke the authority of the bankruptcy court to exercise post confirmation jurisdiction if the matter has a close nexus to the bankruptcy plan . . . . " (internal citations omitted)). Under the "close nexus" test, the bankruptcy court has post-confirmation jurisdiction over all claims filed after plan confirmation, "regardless of when the conduct giving rise to the claim or cause of action occurred." *In re Seven Fields Dev. Corp.*, 505 F.3d 237, 264–65 (3d Cir. 2007).

3. The Commission also maintains that the fundamental nature of sovereign immunity somehow compels a different result. Pet. 14–17. The Third Circuit quickly rejected this point, explaining 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 sovereign immunity will not interfere with the bankruptcy court's jurisdiction over the estate's property as well as its orderly administration." Pet. App. 21a. This is consistent with this Court's recent statement that "[i]n bankruptcy, we decided, sovereign immunity has no place," and that *Katz* "viewed bankruptcy as on a different plane, governed by principles all its own." *Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020). Although this dictum does not mean that sovereign immunity can never be asserted in a bankruptcy proceeding, *see* Pet. App. 14a, *Allen* belies the Commission's argument that *Katz* does not apply to the Adversary Proceeding merely because sovereign immunity is fundamental to our constitutional design.

4. The Commission also alleges that the Third Circuit erred because, unlike the proceedings in *Katz*, the Adversary Proceeding lacks a "clear antecedent[ ]

in the insolvency practice at the time of [the] Founding." Pet. 21. This Court has not erected such a hurdle.

Although *Katz* certainly recognized the historical "backdrop against which the Bankruptcy Clause was adopted" and under which "the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted," 546 U.S. at 368, 378, the Third Circuit explained that *Katz* renders such analysis unnecessary. Pet. App. 21a. Rather than limiting the reach of its waiver to proceedings that existed at the time the Bankruptcy Clause was enacted, "*Katz* already concluded that drawing the line at whether a proceeding furthers the bankruptcy court's *in rem* jurisdiction is consistent with the historical understanding of the scope of sovereign immunity waiver." Pet. App. 22a (citing *Katz*, 546 U.S. at 370); *cf. Hood*, 541 U.S. at 452 (noting that "there [wa]s no need to engage in a comparative analysis to determine whether the adjudication would be an affront to States' sovereignty" because this Court "ha[s] long held that the bankruptcy courts' exercise of *in rem* jurisdiction is not such an offense" and the proceeding was not "the type of proceeding from which the Framers would have thought the States possessed immunity when they agreed to enter the Union").

Contrary to the Commission's claims, a proceeding such as inverse condemnation would have been "known both in English, and then American, law." Pet. 22. The principle of just compensation for governmental taking of private property "goes back at least 800 years to Magna Carta, which specifically protected agricultural crops from uncompensated takings." *Horne v. Dep't of Agric.*, 576 U.S. 350, 358

(2015). These principles traveled to the New World where some colonies incorporated them into law as early as 1641. *Id.* at 358–59.

* * *

By repeating these rejected arguments, the petition seemingly attempts to find legal error in the Third Circuit's ruling. However, the Commission's efforts are unavailing and the petition constitutes no more than a quarrel about the *results* the Third Circuit reached in applying the correct law (*Katz*). Consequently, the petition should be denied. Sup. Ct. R. 10.

C. There is no need for this Court to overrule *Katz*.

The Commission spends several pages attempting to demonstrate that *Katz* is flawed and guidance is needed to elucidate the opinion's scope. Pet. 25–32, 36–37. This is unpersuasive for two reasons. First, the Commission failed to preserve any claims that *Katz* was wrongly decided or based on faulty reasoning. Second, even if the Commission was not required to raise these arguments below, any confusion is strictly academic.

1. The Commission has not preserved for review its assertions that *Katz* is wrongly decided.

The Commission argues that *Katz* is "problematic" in several respects and, therefore, the Court

should overrule *Katz*. Pet. ii, 25; *see also* Pet. 25–32.[7] The Court should reject the Commission's request.

The Commission did not raise any of its arguments questioning the validity of *Katz* below and is therefore prohibited from doing so now. *See June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2117 (2020) (plurality opinion) (argument raised for the first time in the cross-petition for certiorari was waived); *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (argument regarding the governing law not raised below was waived). The Commission did argue below (as it does in the petition) that *Katz* does not reach the facts of this case, but it did not assert at any point in the proceedings below that *Katz* should not apply because it was wrongly decided. In fact, when asked at oral argument about this Court's description of *Katz* more recently in *Allen*, the Commission's counsel conceded that *Katz* and its reliance on the exceptional nature of bankruptcy and the Framers' intentions "probably is correct." Oral Arg. Tr. 13:20–15:3. Such an "unmistakable concession" before the Third Circuit "bars [the Court's] consideration" of the validity of *Katz* in this appeal. *June Med. Servs.*, 140 S. Ct. at 2118.

The Commission has also failed to satisfy the stringent standard necessary to overcome the doctrine of *stare decisis*. "Overruling precedent is never a small matter." *Kimble v. Marvel Ent., LLC*, 576 U.S.

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[7] The Commission stops short of using the word "overrule," but there can be no question that this is the remedy sought. *See, e.g.,* Pet. ii (asking the Court to "reconsider" *Katz*); Pet. 25 (asking the Court to "revisit" *Katz*); Pet. 32 (asking the Court to "reexamin[e]" *Katz*).

446, 455 (2015). Adherence to precedent is "a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014). To be sure, "*[s]tare decisis* is not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). But departing from precedent demands "special justification"—something more than "an argument that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014).

The Commission does not address this legal standard, attempting instead to rely on a number of academic papers as evidence that *Katz* was wrongly decided or has caused scholars confusion. *See, e.g.*, Pet. 27–28, 36. Whether the outcome is "right and well-reasoned" is "*not* the test for overturning precedent." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2423 (2019) (emphasis added). And the fact that some scholars disagree with *Katz* does not supply the "special justification" necessary to overrule *Katz*. *See Halliburton Co.*, 573 U.S. at 266.

Moreover, overruling precedent is even more disfavored here because the Court has relied on *Katz* subsequently in determining that Article I of the Constitution does not authorize Congress to abrogate States' Eleventh Amendment sovereign immunity from copyright infringement suits. *Allen*, 140 S. Ct. at 1002–03, 1007; *see also Bay Mills Indian Cmty.*, 572 U.S. at 798 (the need for a "special justification" to depart from precedent is "more than usually so" where, *inter alia*, the Court has subsequently relied on the case at issue).

"To reverse a decision, [this Court] demand[s] a 'special justification,' over and above the belief 'that the precedent was wrongly decided.'" *Allen*, 140 S. Ct.

at 1003 (quoting *Halliburton Co.*, 573 U.S. at 266). Here, the Commission provides nothing of the sort.

2. The Commission overstates the effect of the Third Circuit's opinion.

The Commission claims the Third Circuit's opinion warrants review because it grants too much authority to the Bankruptcy Court and to liquidating trustees. Neither is true.

First, the Commission argues the Third Circuit's decision "ced[ed] to the Bankruptcy Court the question of when sovereign immunity is to be abrogated" by "creat[ing] jurisdiction" with the Plan's retention of jurisdiction provisions. *See* Pet. 33–34. In actuality, the Third Circuit did not attempt to "create" jurisdiction here. The Bankruptcy Court had statutory jurisdiction because the Adversary Proceeding had a "close nexus to the bankruptcy plan or proceeding." *Resorts Int'l*, 372 F.3d at 166–67; *see* Pet. App. 19a–20a, 23a–24a. As a result, the Plan's retention of jurisdiction provisions governed the extent of the Bankruptcy Court's jurisdiction. *Resorts Int'l*, 372 F.3d at 161 (noting that if there is statutory bankruptcy court jurisdiction, "[r]etention of jurisdiction provisions will be given effect").

Second, the Commission wrongly claims that the Third Circuit grants "significant and outsized authority" to liquidating trustees. Pet. 34. However, the Commission is wrong in arguing that the Trustee "is subject to no meaningful oversight" by the Bankruptcy Court or the beneficiaries of the Trust. Pet. 34. The Trustee has regularly and publicly filed quarterly reports since confirmation of the Plan. *See, e.g.*, Bankr. Proc. D.I. 1121, 1239. The Trustee also seeks

approval of the Bankruptcy Court as part of the ongoing Chapter 11 process as appropriate. *See* Pet. 8 n.5 (describing Bankruptcy Court approval of settlement of Petitioner's proof of claim). That there has been no hearing recently in the Bankruptcy Court, *see* Pet. 10, suggests only a lack of controversy regarding the Trustee's actions. *E.g.*, Bankr. Proc. D.I. 1169, 1237 (court notices canceling hearings). Also, in the event of a lack of responsiveness or reporting, the Trustee can be removed. JA 312.

3. There is no judicial "confusion" regarding Katz.

Even if the Commission can challenge the validity of *Katz* for the first time now, overruling *Katz* is unwarranted because the lower courts have had no trouble applying this precedent.

Citing *Diaz*, 647 F.3d at 1084, 1086, and *In re Kids World of America, Inc.*, 349 B.R. 152, 165 (Bankr. W.D. Ky. 2006), the Commission claims that there is "considerable confusion" in the lower courts. Pet. 36–37. But these cases hardly support that assertion. Although the Eleventh Circuit remarked in *Diaz* that "some proceedings" under the Bankruptcy Code may lie beyond the scope of *Katz*, 647 F.3d at 1084, this simply restates the guidance regarding the critical features of bankruptcy court *in rem* jurisdiction. *Katz*, 546 U.S. at 363–64. Because the proceeding in *Kids World of America* was also a turnover action (like the preference action in *Katz*), the district court had no reason to consider the scope of *Katz* at all, let alone experience confusion as a result. 349 B.R. at 164, 166.

The Commission's remaining cases fare no better. *See* Pet. 37. In *In re Soileau*, 488 F.3d 302, 307 (5th

Cir. 2007), the Fifth Circuit wondered rhetorically about "the outer limits of the holdings of *Katz* and *Hood*," but concluded that the proceeding before it was "purely *in rem*" and therefore "undeniably countenanced by *Katz* and *Hood*." The "gray area" referenced by the Eleventh Circuit in *In re Omine*, 485 F.3d 1305, 1314 (11th Cir. 2007), is a red herring because there appears to be no confusion that *Katz* applies to proceedings enforcing the automatic bankruptcy stay, which are "necessary to effectuate the *in rem* jurisdiction of the bankruptcy court[ ]." A number of courts have reached this conclusion. *See, e.g.*, *In re NCVAMD, Inc.*, No. 10-03098-8-SWH, 2013 WL 6860816, at *2–3 (Bankr. E.D.N.C. Dec. 31, 2013); *In re Schroeder*, No. BK08-40711-TLS, 2009 WL 3526504, at *3–5 (Bankr. D. Neb. Oct. 23, 2009).

Lastly, the Commission cites *In re Philadelphia Entertainment & Development Partners, L.P.*, 549 B.R. 103, 133–35 (Bankr. E.D. Pa. 2016), as indicia that courts have "difficulty in determining whether *Katz* applies to claims other than preference actions." Pet. 38. But the fact that courts dealing with different kinds of turnover and preferential transfer actions may sometimes reach differing conclusions does not help the Commission's case. *This* case is premised on inverse condemnation rather than any turnover action.

In any event, gray areas in the *Katz* Court's opinion are still not enough to support granting the petition to consider whether to overrule *Katz*. "If the kind of hand-wringing about blurry lines" that the Commission offers here "were enough to justify breaking with precedent, [this Court] might have to discard whole volumes of the U.S. Reports." *See Harris v.*

Quinn, 573 U.S. 616, 671 (2014) (Kagan, J., dissenting). The Commission's assertion that the courts are confused rings hollow.

II. Review Also Should Be Denied Because of Serious Vehicle Problems.

This case is a poor vehicle for the Court to further delineate the scope of *Katz* for three important reasons: it arises from circumstances that are unlikely to recur with any frequency; there is a factual dispute about the timing of the claims here; and questions about the applicability of *Katz* are infrequent.

As discussed above, *see supra* p. 18–19, this case is an outlier. Even if the Commission were correct that the Third Circuit's opinion drastically expands *Katz* or that *Katz* was wrongly decided, the circumstances of this case make it a poor vehicle for refining the parameters of *Katz*. *Cf. Jackson v. Metro. Edison Co.*, 419 U.S. 345, 365–66 (1974) (Marshall, J., dissenting) (arguing that factual "complexities" make a case a "very poor vehicle" for resolving the questions presented).

Additionally, the parties disagree about whether this case even involves a post-effective date application of *Katz*. *Compare* Pet. 3, 19, 22 *with supra* pp. 15–16. If there is any need to further refine the scope of *Katz*, this case is a poor vehicle for doing so.

Finally, questions regarding the applicability of *Katz* are not common. In the fifteen years since this Court issued *Katz*, courts of appeals have issued only six opinions (including the one at issue here) that meaningfully engage with that decision. *See In re DPH Holdings Corp.,* 448 F. App'x 134, 137–38 (2d

Cir. 2011) (summary order) (*Katz* applies to an adversary proceeding seeking a declaratory judgment related to insurance policies that were estate property); *In re Diaz*, 647 F.3d 1073, 1085–88 (11th Cir. 2011) (*Katz* generally applies to proceedings to enforce the automatic bankruptcy stay and discharge injunction, but not to claims of alleged stay violations brought years later and after the discharge order); *Vill. of Rosemont v. Jaffe*, 482 F.3d 926, 936–37 (7th Cir. 2007) (*Katz* does not apply to a proceeding related to a state-issued revocable license, particularly where the state agency was not a creditor in the bankruptcy); *In re Soileau*, 488 F.3d 302, 307–08 (5th Cir. 2007) (*Katz* applies to a proceeding to determine the dischargeability of a debt, a "purely *in rem*" action); *In re Omine*, 485 F.3d 1305, 1312–14 (11th Cir. 2007) (*Katz* applies to an ancillary order to enforce the automatic bankruptcy stay).

The Commission argues that the Court should grant the petition because the Third Circuit's decision, if allowed to stand, "will have an outsized effect" in light of the fact that the Delaware Bankruptcy Court is one of the busiest in the country for "large[ ] bankruptcies." Pet. 3, 35. Be that as it may, the number of people impacted is not the test for certiorari or this Court would favor granting cases from the most populated circuits.

Further, because eight circuits have yet to apply *Katz* to an assertion of sovereign immunity in a bankruptcy case, at a minimum this Court should allow further percolation of *Katz* in the lower courts before granting review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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