No. 24-940

IN THE

Supreme Court of the United States

TIMOTHY L. BLIXSETH,

Petitioner,

v.

MONTANA DEPARTMENT OF REVENUE,

Respondent.

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

AMICI CURIAE BRIEF OF THE HON. J. RICH LEONARD (RET.) AND LAW PROFESSORS LAURA COORDES, DIANE LOURDES DICK, ISHAQ KUNDAWALA, NANCY B. RAPOPORT, AND RICHARD SQUIRE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Your *amici curiae* are the Hon. J. Rich Leonard (ret.) who served as a U.S. Magistrate Judge from 1981–1992 and U.S. Bankruptcy Judge in the Eastern District of North Carolina from 1992–2013, and now serves as the Dean of the Norman Adrian Wiggins School of Law at Campbell University, and Law Professors Laura Coordes (Arizona State University, Sandra Day O'Connor College of Law); Diane Lourdes Dick (University of Iowa College of Law); Ishaq Kundawala (Mercer University School of Law); Nancy B. Rapoport (William S. Boyd School of Law, University of Nevada, Las Vegas); and Richard Squire (Fordham Law School).[1]

A diverse group of nationally recognized scholars, including some who have previously participated before this Court as *amici*, they have devoted a large part of their careers to teaching, studying, and writing about the Bankruptcy Code's history, structure, text, and policy objectives. Thus, they have an interest in its interpretation and implementation. They also have an interest in protecting the bankruptcy system and the integrity of the judicial process that is essential to it.

SUMMARY OF THE ARGUMENT

In 2011, the State of Montana forced Timothy Blixseth into an involuntary bankruptcy under 11 U.S.C. § 303.

1. No counsel for a party authored the brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *amici curiae* or counsel made such a monetary contribution. Counsel for the parties received timely notice of *amici*'s intent to file this brief.

In 2013, the bankruptcy court dismissed Montana's petition because it was improper. And then, for over eleven years, the parties litigated the dismissal and Blixseth's entitlement to damages under § 303(i) for the improper filing. Reversing the Bankruptcy Appellate Panel, the Ninth Circuit determined that, due to Montana's sovereign immunity, it cannot be liable for § 303(i) damages.

Blixseth is now asking this Court to consider at least two issues. First, whether Congress, pursuant to § 106(a), properly abrogated states' sovereign immunity to § 303(i) damages. That challenging issue implicates *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356 (2006), and a multi-circuit split on § 106(a)'s constitutionality. Second, whether Montana waived its sovereign immunity to § 303(i) damages when it initiated the involuntary bankruptcy. That issue is easier.

Both issues present matters of first impression that this Court has never addressed. However, *amici* are less concerned about which issue this Court takes up and more concerned that, left undisturbed, the Ninth Circuit's decision could be interpreted as sanctioning the "inconsistency, anomaly and unfairness" that this Court sought to prevent in *Lapides v. Bd. of Regents*, 535 U.S. 613, 620 (2002). *Amici* describe in Section III, *infra*, how the Ninth Circuit's decision could position states, when they voluntarily invoke federal jurisdiction, to misuse judicial process and obtain the benefits of substantive federal law without its burdens.

Amici will focus on two narrow but dispositive issues to suggest how to conform the decision to this Court's sovereign immunity decisions.

First, this Court's *Clark*, *Gunter*, *Gardner*, and *Lapides* decisions provide that the nature of a proceeding determines the extent of a state's waiver of sovereign immunity when it voluntarily seeks relief from a federal court under federal law. Rather than considering the unique nature of an involuntary bankruptcy proceeding, however, the Ninth Circuit equated proofs of claims and involuntary petitions and, thus, imposed a claims-counterclaim limit on the waiver.

That limitation makes sense for proofs of claim and other claims-oriented civil actions but is inapplicable to involuntary bankruptcy proceedings. Further, § 303 is unique because it contemplates post-petition and post-dismissal damages for a debtor. Rather than stating a claim, a state that files an involuntary petition against a debtor waives its sovereign immunity to the full extent necessary for a court to rule on the petition and consider damages for an improper petition. Anything less would violate *Lapides*'s prohibitions.

Second, while *amici* are mostly focused on waiver, and less focused on the more difficult *Katz* issue, they are puzzled that the Ninth Circuit excluded involuntary bankruptcy and its damages provisions from *Katz*'s bankruptcy exception to sovereign immunity. After all, that exception is based on and limited to what the Framers understood about bankruptcy at the Convention. Because the Framers' sole understanding about bankruptcy was involuntary bankruptcy, *amici* cannot think of a bankruptcy feature that was more critical to the Framers than involuntary bankruptcy. Thus, just as "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," *Katz*, 546 U.S. at 372, they would have understood it to authorize Congress to determine involuntary bankruptcy's pleading requirements and hold all petitioners accountable when they violate such requirements.

Although *amici* understand that this Court is not primarily concerned with error correction, the Ninth Circuit's decision is not a one-off error that is limited to this case. It is a clear departure from this Court's waiver decisions, could pose problems inside and outside of bankruptcy, and warrants review.

ARGUMENT

I. Independent of the *Katz* and § 106(a) abrogation issues, this Court should grant certiorari to determine the extent to which a state waives sovereign immunity when it files an involuntary bankruptcy and seeks relief under the comprehensive scheme for involuntary bankruptcy.

Regardless of whether this Court also addresses the trickier issues of *Katz* and § 106(a)'s constitutionality, this Court can reverse on the independent issue of waiver. Contrary to the Ninth Circuit's decision, when a state chooses to file an involuntary bankruptcy petition, it waives its sovereign immunity as to the entirety of the comprehensive scheme for involuntary bankruptcy, including its § 303(i) damages provisions, and not just the parts of § 303 that benefit it.

A. This Court regularly grants certiorari to consider novel and important sovereign immunity waiver issues.

This Court regularly considers whether and to what extent a state has waived its sovereign immunity in litigation, including in bankruptcy. It cannot take up every waiver case. Rather, guided by the importance of state and federal sovereign immunity,[2] it frequently intervenes when (i) a new litigation waiver issue presents itself and (ii) not intervening might sanction a departure from its waiver decisions.

First, this case's waiver issue is a novel issue that this Court has never been asked to address. Most of this Court's waiver decisions involve states invoking federal jurisdiction indirectly or defensively. However, this case could be the most significant example of a state voluntarily and directly invoking jurisdiction for its strategic benefit. And likely because it is a matter of first impression, the Ninth Circuit and bankruptcy court viewed the "waiver by proof of claim" outcome in *Gardner v. New Jersey*, 329 U.S. 565 (1947), as an irresistible starting point for an ultimately too-literal application of *Gardner*. Thus, this waiver issue is also prone to misconstruction.

Second, this case's waiver issue is an important one. This Court has addressed litigation waiver in narrow

2. On March 26, 2025, this Court issued its opinion in *United States v. Miller*, 604 U.S. ___ (2025), deciding whether § 106(a) abrogates federal sovereign immunity for state claims under 11 U.S.C. § 544. While federal sovereign immunity analysis is different from state sovereign immunity analysis and not applicable here, *Miller* further illustrates that sovereign immunity is a critical issue for this Court.

bankruptcy contexts for proofs of claim, dischargeability disputes, and preference actions. Those issues were important enough that this Court reviewed them, but they arose as mere subcomponents of a broader bankruptcy process. However, this case involves § 303, one of the Bankruptcy Code's central, jurisdiction-making provisions.

The issue starts by asking if a state waives sovereign immunity when it files an involuntary petition and initiates the bankruptcy process. It then asks whether that waiver continues after the petition is dismissed. Typically, that is not a novel question because dismissal usually cuts off jurisdiction and sovereign immunity waivers. However, that question has never been addressed in the bankruptcy context, where dismissal is a precondition to § 303(i) damages, a "case" can involve a myriad of "proceedings," and the jurisdictional rules are so different that this Court is often asked to interpret them. *See, e.g.*, *Stern v. Marshall*, 564 U.S. 462 (2011). Thus, the issue also asks when seemingly separate proceedings are just one continuous proceeding under § 303.

So rather than being isolated to a subcomponent of the bankruptcy process, the suggested waiver in this case occurred when Montana initiated the bankruptcy process against Blixseth and, thus, occurred at the genesis of the court's core subject matter jurisdiction over the case and all of its subparts.

The issue could not be more novel or fundamental.

B. When a state files an involuntary petition, it voluntarily invokes bankruptcy jurisdiction and waives its sovereign immunity in the bankruptcy, at least to some extent.

Montana concedes that a "limited, voluntary waiver of its Eleventh Amendment immunity occurred with the filing of the Involuntary Petition." App. 95a (quoting Montana) (internal quotations omitted). This Court has never addressed that issue specifically. However, its waiver decisions suggest that there would at least be a limited waiver of sovereign immunity when a state voluntarily invokes jurisdiction by forcing a debtor into bankruptcy. Blixseth summarizes those waiver decisions in his petition, but they warrant an overview here.

Long ago, this Court held that "the immunity from suit belonging to a State . . . is a personal privilege which it may waive at pleasure." *Clark v. Barnard*, 108 U.S. 436, 447 (1883). Similarly, it reiterated that a waiver occurs if a state "voluntarily invokes our jurisdiction" or "makes a 'clear declaration' that it intends to submit itself to our jurisdiction." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999) (internal citations omitted). *See also Lapides*, 535 U.S. at 620 (waiver occurred when state "voluntarily invoked the federal court's jurisdiction" via removal).

However, determining the extent of the waiver requires additional analysis.

C. The extent of a state's waiver depends on the nature of the proceeding in which it occurs.

A state waives sovereign immunity only to the extent that it voluntarily invokes federal court jurisdiction. *See id.* at 618-19. In turn, the extent to which it invokes jurisdiction depends on the nature of, and the issues raised in, the proceeding.

In *Clark*, the state "appeared in the cause and presented and prosecuted a claim to the fund in controversy." *Clark*, 108 U.S. at 448. Thus, it made "itself a party to the litigation to the full extent required for its complete determination." *Ibid.* In *Gunter*, this Court held that "where a State voluntarily becomes a party to a cause . . . it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." *Gunter v. Atl. Coast Line R.R.*, 200 U.S. 273, 284 (1906) (citing *Clark*, 108 U.S. at 447).

Thus, a state's waiver will be to the full extent of the "rights" that "it submitted" for a "judicial determination." *Ibid.* That is, its waiver is only as broad as the procedural and substantive rules and issues that it invokes when it seeks relief. *See Gardner*, 329 U.S. at 573 (claimant "must abide the consequences of [the claims allowance] procedure") (citing *Wiswall v. Campbell*, 93 U.S. 347, 351 (1876) (one "submitting himself to the jurisdiction of the bankrupt court" is "bound by what is judicially determined in the legitimate course of the proceeding" and his "remedies for the purpose of this proof [of claim] are prescribed by the law").

D. When a state invokes § 303's comprehensive scheme for involuntary bankruptcies, it waives its sovereign immunity as to the entire scheme, including § 303(i) damages.

With little analysis, the Ninth Circuit equated proofs of claim and involuntary petitions. As a result, it failed to consider the unique nature of an involuntary proceeding, which submits for adjudication all issues related to the petition, including the issue of damages for a petition that is filed improperly.

1. Equating involuntary petitions and proofs of claim, the Ninth Circuit forced an incompatible claims analysis on Montana's petition.

The Ninth Circuit assumed that an involuntary bankruptcy petition is just like a proof of claim. It could have been influenced by the bankruptcy court's emphasis on proofs of claim and counterclaims. *See* App. 92a-93a, 95a-96a. Whatever the reason, it employed a narrow, claims-oriented analysis.

It first observed that the "State never filed a proof of claim, so any litigation waiver must be predicated upon the existence of a claim arising out of the adversary proceeding brought by the State."[3] App. 10a. It then characterized Montana's involuntary petition as one

3. It was Blixseth who filed an adversary proceeding, not the State. Presumably, then, the Ninth Circuit was looking for the "existence of a claim arising out of the [involuntary] proceeding brought by the State." App. 10a.

merely alleging a "debt of unpaid taxes from an improper tax deduction." *Id.* 11a-12a (asking whether Blixseth had "claims arising from the factual predicate" of Montana's "alleged tax deficiency" claim). *See also id.* 10a (Montana's alleged debt was a "§ 303(b) claim").

Having reduced an involuntary petition to a statement of a claim, it then asked whether Blixseth's § 303(i) damages claim was the "equivalent of a compulsory counterclaim" to Montana's "claim." *Ibid.* It concluded that it was not because the § 303(i) claim "cannot arise out of the same factual predicate that supports the § 303(b) claim." *Ibid.*

Although that analysis is applicable to proofs of claims and claims-based civil actions, it is incompatible with involuntary proceedings. That is because a petitioner does not state a claim when it files an involuntary petition. First, the only effect of the petition is the commencement of an "involuntary case" against the debtor. 11 U.S.C. §§ 303(a)-(b). Second, if the petition is not dismissed, then the petitioner is entitled to an "order for relief." *See generally id.* § 303 (relief limited to order for relief).[4] The order for relief only indicates that the debtor is a proper debtor under the Bankruptcy Code.

4. *See also, e.g.*, Fed. R. Bankr. P. 1011(b) (debtor can assert a "claim against a petitioning creditor" only "for the purpose of defeating the petition").

Montana's petition best illustrates how an involuntary petition cannot state a claim. In their petition, the states made three sworn allegations:

- "Petitioner[s] are eligible to file this petition pursuant to 11 U.S.C. § 303 (b)."
- "The debtor is a person against whom an order for relief may be entered under" the Bankruptcy Code.
- "The debtor is generally not paying such debtor's debts as they become due, unless such debts are the subject of a bona fide dispute as to liability or amount."

App. 157a.

They then "request[ed] that an order for relief be entered against the debtor under" § 303(b), and nothing more. *Id.* 158a. They also provided "creditor information," including the "nature" and "amount" of their claims. *Ibid.* However, rather than submitting a claim for adjudication, they provided that information solely to establish their eligibility to file the petition.

2. With its involuntary petition, a state waives sovereign immunity for § 303's entire scheme, including § 303(i) damages.

Again, *Clark*, *Gunter*, and *Gardner* recognize, but also limit, a state's waiver of its sovereign immunity to the full extent of the applicable procedural and substantive rules and issues that it invokes when it seeks relief. *Clark*,

108 U.S. at 448; *Gunter*, 200 U.S. at 284; *Gardner*, 329 U.S. at 573. Thus, comparing what a claimant invokes with a proof of claim to what a petitioner invokes with an involuntary petition establishes that a state-petitioner waives sovereign immunity to the full extent of § 303, including its damages and indemnity provisions.

First, consistent with this Court's waiver decisions, *supra*, a state that files a proof of claim voluntarily invokes bankruptcy jurisdiction and waives its sovereign immunity to the full extent necessary for a complete adjudication of its claim and related counterclaims and issues. In that context, a claims focus makes sense, not because all waivers are about claims, but because the proceeding itself (whether a civil action or bankruptcy claim proceeding) is all about claims. In turn, a complete adjudication must invoke the entirety of bankruptcy's procedural and substantive claim rules.[5]

Second, it follows by analogy that a state that files an involuntary petition voluntarily invokes bankruptcy jurisdiction and waives its sovereign immunity to the full extent necessary for a complete adjudication of its petition and related issues. In that context, a claims focus has no place because, before the order for relief, an involuntary bankruptcy proceeding is not about claims. It is solely about determining whether the petition is proper. In turn, a complete adjudication invokes all of the procedural and substantive rules for involuntary bankruptcy, not just the parts that benefit the state.[6]

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5. *See, e.g.*, §§ 501, 506, 507, 510, 523; Fed. R. Bankr. P. 3001-3022.

6. *See*, *e.g.*, § 303(a)-(k); Fed. R. Bankr. P. 1003, 1004, 1010, 1011, 1013, 1018.

Just as a state-claimant should anticipate a debtor filing counterclaims, a state-petitioner should fairly anticipate a debtor seeking statutory damages for an improper petition. The former is true because a proof of claim submits the parties' claims for adjudication. The latter is true because an involuntary petition submits for adjudication all issues related to the petition, including whether statutory damages and indemnity are warranted if a state files an improper petition.

This appeal to avoiding "inconsistency, anomaly, and unfairness," *Lapides*, 535 U.S. at 620, is stronger for an involuntary petition than it is for a proof of claim. When a state files a claim, it merely makes a protective intervention in one part of a larger bankruptcy. When a state files an involuntary petition, it creates the entire bankruptcy case without any compulsion to do so. And it is always in control of whether it becomes liable, either by filing a proper petition or not filing one at all.

E. A state's waiver extends, post-dismissal, to § 303(i) damage claims.

Blixseth correctly argues that a § 303(i) "claim is simply an ancillary part of the involuntary bankruptcy proceeding." Pet. at 18. That issue of separateness warrants deeper emphasis.

First, unlike in most dismissed civil actions, a bankruptcy court will not only retain jurisdiction to enforce core § 303(i) claims after it dismisses an involuntary petition, but the dismissal is also a precondition to hearing a debtor's § 303(i) claims. *See, e.g.*, *Reyes-Colón v. Banco Popular de P.R.*, 110 F.4th 54, 66 (1st Cir. 2024) (holding

that it is well-settled that a court has post-dismissal jurisdiction to hear § 303(i) damages claims, regardless of whether the court expressly retains jurisdiction in the dismissal order).

Second, the Federal Circuit suggests how *Gunter* would treat this separateness issue. It explains that in *Gunter* the "disputes between the railroad and the State were part of *one continuous action*, a point that was critical to the Supreme Court's determination that the State could not assert immunity in the 'later' action." *Biomedical Patent Mgmt. Corp. v. California*, 505 F.3d 1328, 1336 (Fed. Cir. 2007) (emphasis in original).[7] The "continuous proceeding" in *Gunter* was the initial suit obtaining injunctive relief against a state and the later proceeding to enforce it. *Gunter*, 200 U.S. at 281, 292 (sovereign immunity not applicable to enforcement action because court was merely "acting in a matter ancillary" to the original case).

Thus, when a state asks a bankruptcy court to rule on its petition, it knows that the court can dismiss its petition without losing jurisdiction over § 303(i) claims. It follows, then, that, when a debtor seeks § 303(i) damages via an adversary proceeding, that is not a new or independent action against a state. It merely arises in, is ancillary to,

7. It also cites other helpful cases. *See Biomedical*, 505 F.3d at 1337-38. *Vas-Cath Corp. v. Curators of the Univ. of Missouri*, 473 F.3d 1376, 1382 (Fed. Cir. 2007) (waiver extends to a later phase of a continuous proceeding); *New Hampshire v. Ramsey*, 366 F.3d 1, 16 (1st Cir. 2004) (waiver in an administrative proceeding continued to court's review of that proceeding because state invoked "grievance procedures (knowing that those procedures ultimately provided for federal judicial review) . . .").

or is a continuation of the involuntary proceeding that the state initiated.[8]

II. Given the centuries-old role of involuntary bankruptcies, this Court should grant certiorari to clarify that the entire involuntary bankruptcy scheme (including its damages provisions) is included in *Katz*'s bankruptcy exception.

This Court can correct the Ninth Circuit's error and avoid the policy issues addressed below by considering the easier litigation waiver issue, *supra*. *Amici* will not, then, dwell on *Katz* except to state that they are puzzled that the Ninth Circuit excluded § 303's comprehensive involuntary bankruptcy scheme (including § 303(i) damages) from *Katz*'s historically-justified bankruptcy exception.

In *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356 (2006), this Court bypassed the Congressional abrogation issue and held that "States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'" 546 U.S. at 377. They did so as "necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts." *Id.* at 378.

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8. *See Pierce v. First Commer. Leasing Corp. (In re Pierce)*, No. 05-102, 2006 Bankr. LEXIS 4589, at *5 (Bankr. M.D. Ala. Oct. 24, 2006) (collecting many examples of debtors raising § 303(i) claims by motion in the involuntary proceeding rather than via an adversary proceeding). Thus, there is no meaningful difference between the involuntary proceeding and the adversary proceeding.

Informed by the Framers' understanding of bankruptcy at the time of the Convention, this Court limited the sovereign immunity exception to bankruptcy's "[c]ritical features": (1) "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 [it] from further liability for old debts." *Id.* at 363-64.

Focused on those features, the Ninth Circuit determined that § 303(i) damage claims do not "effectuate" the bankruptcy court's exclusive jurisdiction, "concern" property of the bankruptcy estate, or "further" the debtor's discharge. *Id.* 17a-18a. Thus, it held that Montana enjoyed sovereign immunity against those claims. *Id.* 19a. As a mechanical application of *Katz*, the holding is understandable.

However, if one accepts *Katz*'s emphasis on the Framers' understanding of bankruptcy, then involuntary bankruptcy represented the entirety of their bankruptcy understanding at the Convention. *See In re Morris*, 12 B.R. 321, 331 (Bankr. N.D. Ill. 1981) (until the 19th Century, bankruptcy was always "an involuntary proceeding brought by creditors").[9] To borrow this Court's characterization of preference actions in *Katz*, 546 U.S. at 372, involuntary bankruptcy has been a "core aspect of the administration of bankrupt estates since at least

9. *See also* Jason J. Kilborn & Adrian Walters, *Involuntary Bankruptcy as Debt Collection: Multi-Jurisdictional Lessons in Choosing the Right Tool for the Job*, 87 Am. Bankr. L.J. 123, 128 (2013); John C. McCoid, II, *The Origins of Voluntary Bankruptcy*, 5 Bankr. Dev. J. 361, 361 (1988).

the 18th century." While its requirements varied across centuries, the scheme always imposed pleading and other requirements to limit creditors' access to its remedies.

And *Katz* does not support picking and choosing which of those requirements should be included. After all, this Court did not flyspeck in *Katz* the individual provisions now applicable to preference actions. Instead, it concluded 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." *Ibid.* Reworded for § 303, those who crafted the Bankruptcy Clause would have understood it to authorize Congress to determine involuntary bankruptcy's pleading requirements and hold state-petitioners accountable when they violated them.

Critically then, this Court did not conclude in *Katz* that the states abrogated their sovereign immunity only as to the precise statutory version of a particular "critical feature" of bankruptcy at the Convention. Instead, it saw abrogation at the conceptual level, even if the concept would evolve (e.g., the general concept of *in rem* jurisdiction; a bankruptcy estate; an automatic stay; a claims allowance and distribution procedure; a discharge and discharge challenge procedure; a preference action; etc.). Involuntary bankruptcy was not just the core bankruptcy concept for the Framers. At the time and for many decades later, it was the sole source of jurisdiction for all other critical post-petition bankruptcy features.

Finally, this Court viewed "orders directing turnover of preferential transfers" as "ancillary to the bankruptcy courts' *in rem* jurisdiction," and, thus, included them

in *Katz*'s bankruptcy exception. *Id.* at 373. By contrast, involuntary bankruptcy was, at the time of the Convention, the sole basis for *in rem* jurisdiction and ancillary orders that further it. Thus, as a "critical feature" of bankruptcy, involuntary bankruptcy must fall under the *Katz* exception. Even today, § 303(i) damages effectuate bankruptcy jurisdiction by better enabling courts to protect and limit jurisdiction.

III. The Ninth Circuit's decision could be read as sanctioning the "inconsistency, anomaly and unfairness" that this Court sought to prevent in *Lapides*, with harmful effects in and outside of bankruptcy.

To decide whether a state has sovereign immunity to § 303(i) damages, this Court can consider the Congressional abrogation issue, the litigation waiver issue, or both issues. *Amici* are less concerned about which issue this Court considers and more concerned about whether it leaves both issues unaddressed. *Lapides* frames *amici*'s concerns.

This Court has never been so emphatic about sovereign immunity policy considerations than it was in *Lapides*. In fact, lower courts repeatedly rely on *Lapides*'s principal rationale about avoiding "inconsistency, anomaly, and unfairness" when states raise sovereign immunity. *See Lapides*, 535 U.S. at 620. Courts do so to prevent states from using sovereign immunity unfairly. They also do so to protect the integrity of judicial process and enforce rules that are calibrated to ensure and limit access to courts.

Inconsistent with *Lapides*, the Ninth Circuit suggests that a state can voluntarily and in its sole discretion invoke

the involuntary bankruptcy process to obtain its benefits but then use sovereign immunity to shield itself from any liability for misusing that process. It makes that suggestion even though the process expressly contemplates statutory liability for misuse. Thus, the decision could position states to use sovereign immunity to "achieve unfair tactical advantage[s]" after they invoke jurisdiction. *See id.* at 621 (internal quotations and citations omitted).

This Court has made sure that its rules do not position parties to misuse them, rather than focusing on whether parties might be prone to misusing them. *Ibid* (citing *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 393-94 (1998) (Kennedy, J., concurring)).

So rather than suggesting that states will misuse sovereign immunity, *per se*, *amici* are concerned that the Ninth Circuit's decision could position states to do so, in at least two ways.

A. The decision could position states to undermine judicial process in involuntary bankruptcies and position them to do so outside of bankruptcy.

This Court's docket is lined with examples of litigants, especially governmental litigants, who insist on testing the statutory and inherent powers of federal courts to protect the judicial process.

Through a combination of rules and inherent powers, courts may and must "protect their integrity and prevent abuses of the judicial process." *Shepherd v. ABC*, 62 F.3d 1469, 1474 (D.C. Cir. 1995) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991)). *See also Degen v. United*

States, 517 U.S. 820, 823 (1996) (courts "have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities") (collecting cases); *Miller v. Donald*, 541 F.3d 1091, 1096 (11th Cir. 2008) (without access conditions and restrictions on judicial process, "[f]rivolous and vexatious law suits threaten the availability of a well-functioning judiciary to all litigants") (citing *In re McDonald,* 489 U.S. 180, 184 (1989)).

The Ninth Circuit's decision does not explicitly strip bankruptcy courts of their inherent power to protect the bankruptcy process. However, it does appear to strip them of their statutory powers under § 303 to prevent states' potential one-sided use of the involuntary bankruptcy process. Relying on this decision, may a state now file an involuntary bankruptcy case to reap all of it benefits but then use sovereign immunity to shield itself from all of the debtor protections that § 303 imposes, including its pleading requirements and damages provisions?

In stripping courts of certain § 303 deterrents, the decision could also position states to rely on sovereign immunity to misuse judicial process in other bankruptcy and in non-bankruptcy contexts. Even the most earnest state could use the decision to test its immunity to similar statutory deterrents. In fact, if states' sovereign immunity extends as far as the Ninth Circuit suggests, then the decision might also position states to resist courts' inherent powers, too.

Amici are unaware of any decision of this Court that has permitted a state to voluntarily invoke federal jurisdiction and then later use sovereign immunity as

a defense to its conduct in the judicial process. To the contrary, this Court's waiver decisions have, as discussed above, repeatedly protected the judicial process by prohibiting its misuse.

B. The decision could enhance states' leverage for threatening and filing involuntary petitions and non-bankruptcy litigation.

Not only could the Ninth Circuit's decision position states to misuse judicial process without liability, but it could also enhance their leverage to threaten and file involuntary bankruptcies and to exploit the purpose of other substantive federal laws.

In involuntary bankruptcy, the stakes could not be higher for debtors and other forced participants. An involuntary bankruptcy, as a "case," potentially exposes unwilling debtors and their other creditors to a vast and onerous procedure that is unknown in typical litigation. *Fin. Oversight & Mgmt. Bd. v. Cooperativa De Ahorro Y Credito Abraham Rosa (In re Fin. Oversight & Mgmt. Bd.)*, 52 F.4th 465, 482 (1st Cir. 2022). Worse, an involuntary petition can be an "extreme remedy with serious consequences to the alleged debtor, such as loss of credit standing, inability to transfer assets and carry on business affairs, and public embarrassment." *In re Reid*, 773 F.2d 945, 946 (7th Cir. 1985).

There are legitimate uses of involuntary bankruptcies, but a potential for misuse has always been a concern. Specifically, there was a fear that they might be used "to frighten or force debtors into a compliance with their wishes and into acts of injustice to other creditors and

to themselves." Amir Shachmurove, *Consequences of a Relic's Codification: The Dubious Case for Bad Faith Dismissals of Involuntary Bankruptcy Petitions*, 26 Am. Bankr. Inst. L. Rev. 115, 122 (2018) (quoting President Ulysses Grant in 1873). Similarly, in 1898, Rep. John Lewis characterized involuntary bankruptcy as a "weapon in the hands of the creditor to press collections of debt harshly, to intimidate, and to destroy." *Ibid*. And as Judge Friendly explains, the Bankruptcy Act of 1898 was intent on preserving creditor rights while also protecting debtors from "harassment of ill-considered or oppressive involuntary petitions, including those by a single creditor interest." *In re Gibraltor Amusements, Ltd.*, 291 F.2d 22, 28-29 (2d Cir. 1961) (Friendly, J., dissenting).

Congress added § 303(i) and § 303(e) to the involuntary bankruptcy scheme as additional deterrents against improper filings. *McMillan v. Maestri (In re McMillan)*, 543 B.R. 808, 818 (Bankr. N.D. Tex. 2016) (provisions were designed to "discourage frivolous petitions" as well as "spiteful petitions, based on a desire to embarrass the debtor . . . or to put the debtor out of business without good cause . . . .") (internal quotation marks and citations omitted). Together, they provide that a debtor may seek not only a judgment for damages that it suffers from an involuntary case, but also an indemnity bond to cover those damages. 11 U.S.C. §§ 303(i), (e).

However, the Ninth Circuit relies on state sovereign immunity to eliminate those deterrents when a state is the petitioner. And to the extent that the decision makes states immune to statutory liability for even egregious pleading violations, it could also reduce a state's incentive to use involuntary petitions for legitimate bankruptcy purposes.

Two troubling examples:

Example 1: The Code requires three petitioning creditors so that a single creditor cannot use involuntary bankruptcy as an improper collection tool. 11 U.S.C. § 303(b)(i). However, the decision could incentivize a state to file an improper single-petitioner involuntary petition. It might get dismissed, even quickly, but a state could, as Montana is alleged to have done, wage a long, expensive appeal without any statutory risk of liability.

Example 2: The Code requires that a petitioning creditor's claim not be "contingent" or the "subject of a bona fide dispute." *Ibid.* However, the decision could incentivize a state to intentionally file a single-creditor petition solely on the basis of a disputed or unaccrued claim. Even with a quick dismissal, a state could mire the debtor in appeals with no statutory liability for doing so.

Although there are few examples of states misusing involuntary petitions, these are not hypothetical concerns. First, there is this case. Montana filed the involuntary petition in 2011; the court dismissed it in 2013; and the parties have been litigating the dismissal for over 11 years. App. 4a-5a. That is a long and expensive battle.

Second, other, more involuntary-oriented bankruptcy systems illustrate more broadly *amici*'s concerns about undermining deterrents to improper filings. *See generally* Kilborn & Walters, *supra* note 9, at 123, 138 (tracing how less deterrent-oriented jurisdictions, like England, where involuntary bankruptcy is employed far more frequently, have creditors, especially governmental creditors, "using the threat of a bankruptcy order to coerce payment from

the debtor, potentially to the disadvantage of competing creditors and without the protective intermediation of the courts charged with regulating ordinary collections").

Thus, the Ninth Circuit's decision could enhance a state's leverage to threaten a debtor with involuntary bankruptcy if it excuses a state from the statutory incentive to threaten bankruptcy only in good faith. If a state threatens bankruptcy to conform a debtor's behavior to the state's interests, then the debtor must assume that the threat is real, even if it is clearly meritless under § 303. Whereas private parties must conform their conduct to § 303's requirements, the decision essentially moots the requirements for states by making them immune to liability. In short, the decision could position states to employ a "super threat" that is inconsistent with bankruptcy's purpose.

The decision could also extend states' use of bankruptcy threats to an increase in state-initiated filings. The filings do not have to increase for the decision to warrant review. Thus, it is not enough to suggest that involuntary bankruptcy cases are so rarely filed that this Court can recognize the Ninth Circuit's error but still tolerate it without a review. Rather, the prospect that the decision could increase improper filings makes review even more warranted.

Further, if the decision increases a state's leverage to exploit one substantive area of the law like bankruptcy, then a state could try to extend the decision to exploit non-bankruptcy substantive areas, too.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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