No. 24–940

In the Supreme Court of the United States

TIMOTHY L. BLIXSETH,
Petitioner,

v.

MONTANA DEPARTMENT OF REVENUE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The States agreed "in the plan of the Convention" to waive their sovereign immunity in "proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts." *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 377–78 (2006).

The question presented is:

Whether the States agreed in the plan of the Convention to waive their sovereign immunity in an adversary proceeding under 11 U.S.C. § 303(i) seeking costs, attorney's fees, and monetary damages for a dismissed involuntary bankruptcy petition.

PARTIES TO THE PROCEEDING

Petitioner (plaintiff-appellant below) is Timothy L. Blixseth.

Respondent (defendant-appellee below) is Montana Department of Revenue.

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INTRODUCTION

Twenty years ago, Petitioner Timothy Blixseth bankrupted his luxury resort by pocketing over $200 million in loan proceeds. At every turn—through two decades of litigation—he cast blame on others. This case is but the latest chapter in this saga. After Respondent Montana Department of Revenue's involuntary bankruptcy petition for unpaid taxes against Blixseth was dismissed, Blixseth sued the Department under 11 U.S.C. § 303(i) for costs, attorney's fees, and $500 million in damages. Most, if not all, of the alleged damages have nothing to do with the Department or the involuntary petition. (But that is perhaps the point.) In any event, the Ninth Circuit correctly held that sovereign immunity barred Blixseth's suit. Now, he asks this Court to revive it.

The petition does not warrant review. To start, the lopsided circuit split on whether Congress's abrogation of state sovereign immunity in 11 U.S.C. §106(a) was a valid exercise of its power has been irrelevant for years. After *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), the States' plan-of-the-Convention waiver—not congressional abrogation—controls the sovereign immunity analysis in bankruptcy proceedings. Blixseth's request for certiorari thus depends on answering a question that this Court already said need not be answered.

But even if the Court were inclined to resolve the question presented, this would be an exceptionally poor vehicle to do it. Blixseth "waive[d] the right to judgment" under Section 303(i) by selling his rights and interests in such a claim against the Department as part of his bankruptcy settlement. The question presented is thus not

dispositive to the outcome of this case—Blixseth's claims were dead on arrival.

Blixseth's petition reduces to a plea for error correction on an issue of first impression. Worse still, there is no error to correct. Using the same framework adopted by other courts since *Katz*, the Ninth Circuit properly determined that a Section 303(i) adversary proceeding does not further the bankruptcy court's *in rem* jurisdiction and therefore was not included in the States' plan-of-the-Convention waiver.

The Court should deny the petition and bring Blixseth's crusade to a definitive end.

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 106(a)(1) provides:

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

11 U.S.C. § 303(i) provides:

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment—

(1) against the petitioners and in favor of the debtor for—

(A) costs; or

(B) a reasonable attorney's fee; or

(2) against any petitioner that filed the petition in bad faith, for—

(A) any damages proximately caused by such filing; or

(B) punitive damages.

STATEMENT OF THE CASE

A. Factual Background

1. Timothy Blixseth and his ex-wife founded the Yellowstone Mountain Club, "a ski and golf resort built on the twin pillars of luxury and exclusivity." *Blixseth v. Yellowstone Mountain Club, LLC*, 742 F.3d 1215, 1218 (9th Cir. 2014). Five years later, with ambitions—or at least representations—to take Yellowstone global, Blixseth borrowed $342 million. *Ibid.*; *see Blixseth v. Credit Suisse*, 961 F.3d 1074, 1078 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1394 (2022). "The same day, over $200 million of this money was disbursed by Blixseth to various personal accounts and payoffs benefitting Blixseth and [his ex-wife] personally." *Yellowstone Mountain Club*, 742 F.3d at 1218 (cleaned up). To no one's surprise, Yellowstone eventually filed for bankruptcy, and a litigation avalanche ensued. *Ibid.*; *see Blixseth v. Glasser (In re Yellowstone Mountain Club, LLC)*, 2014 WL 1369363, at *1 & n.4 (D. Mont. Apr. 7, 2014) ("The ongoing saga of the Yellowstone Club bankruptcy starting in 2008 is arguably one for the record books. Published decisions and opinions addressing the multitude of issues litigated and decided within the [c]ase occupy literally hundreds of pages of text.") (collecting cases).

From the beginning, Blixseth "argu[ed] that his ex-wife and others were the cause of Yellowstone's financial problems." *Yellowstone Mountain Club*, 742 F.3d at 1218. No court was duped: "The lenders['] … wrongdoing is not comparable in degree or kind to Blixseth's wrongdoing. Blixseth defrauded the Club entities and their minority members, massively enriching himself; breached fiduciary duties; and then constructed barriers to recovery of his ill-gotten gains by the subsequent fraudulent transfer …." *Blixseth v. Glasser (In re Yellowstone Mountain Club, LLC)*, 656 F. App'x 307, 311 (9th Cir. 2016); *see also Blixseth*, 742 F.3d at 1218. In the end, Blixseth was found liable for $286 million. *See Blixseth v. Kirschner* (*In re Yellowstone Mountain Club, LLC)*, 2012 WL 6043282, at *8–*9 (Bankr. D. Mont. Dec. 5, 2012), *aff'd*, 2014 WL 1369363 (D. Mont. Apr. 7, 2014), *aff'd in part, rev'd in part*, 656 F. App'x 307 (9th Cir. 2016).

To settle litigation arising from the bankruptcy, Blixseth agreed to "sell," transfer[]," and "assign[]" "any and all rights and interests in his litigation matters," including "303(i) damages and sanction claims in the NV involuntary." Resp. App. 1, 4, 6–7.

2. After Blixseth's fraud became public in 2010, Respondent Montana Department of Revenue audited Blixseth and his business entities, identifying a $57 million tax deficiency for the 2002 through 2006 tax years. Pet. App. 5a; *see Department of Revenue v. Blixseth*, 942 F.3d 1179, 1181 (9th Cir. 2019). Blixseth disputed the audit with the Montana State Tax Appeals Board, save for an approximately $200,000 disallowed deduction. *Ibid.*

While Blixseth's dispute was pending, the Department, the Idaho State Tax Commission, and the California Franchise Tax Board filed an involuntary bankruptcy

petition against Blixseth for unpaid taxes under 11 U.S.C. § 303. Pet. App. 5a, 157a–160a; *Blixseth*, 942 F.3d at 1181–82. The Department's claim was based on the undisputed portion of the tax audit. *Blixseth*, 942 F.3d at 1181. Shortly after filing, California and Idaho settled with Blixseth and withdrew as petitioning creditors. Pet. App. 5a; *Blixseth*, 942 F.3d at 1182. The Yellowstone Club Liquidating Trust later joined as a petitioning creditor, asserting a $41 million claim against Blixseth based on a judgment in the Yellowstone Mountain Club bankruptcy. *Ibid.*

The bankruptcy court eventually granted Blixseth's motion for summary judgment on the involuntary petition, finding, in part, that the Department lacked standing to serve as a petitioning creditor because its claim was subject to a bona fide dispute over amount. Pet. App. 5a; *Blixseth*, 942 F.3d at 1182. The Ninth Circuit affirmed. Pet. App. 5a–6a; *Blixseth*, 942 F.3d at 1187. On remand, the bankruptcy court dismissed the involuntary petition for want of prosecution. Pet. App. 22a.

B. Procedural History

1. After the involuntary petition was dismissed, Blixseth filed an adversary proceeding against the Department under Section 303(i) seeking attorneys' fees and costs; proximate, compensatory, and punitive damages; and sanctions against counsel. Pet. App. 148a–149a. In short, Blixseth alleged that the Department filed the involuntary petition in bad faith as "part of a broader conspiracy to ruin [him], both personally and financially," forcing him

to sell assets and properties worth $500 million.[1] *Id.* at 138a, 140a–145a (¶¶ 89, 97–115).

The Department moved to dismiss, asserting sovereign immunity against Blixseth's claims. Pet. App. 101a. The bankruptcy court denied the motion except as to Blixseth's claim for punitive damages. *Id.* at 100a. In denying the Department sovereign immunity, the bankruptcy court jumbled the sovereign immunity analysis, conflating distinct waiver theories and relying on Section 106(a)'s abrogation. *See, e.g.*, *id.* at 96a, 99a.

The Department appealed to the Bankruptcy Appellate Panel for the Ninth Circuit. Pet. App. 60a. The BAP dismissed the Department's appeal, (erroneously) holding that it lacked jurisdiction to consider the denial of sovereign immunity under the collateral order doctrine. *Id.* at 9a, 20a. The Department then appealed to the Ninth Circuit. *Id.* at 4a.

2. The Ninth Circuit reversed the bankruptcy court's denial of sovereign immunity. Pet. App. 19a. The court first held that the Department did not waive its sovereign immunity through litigation conduct by filing the involuntary petition. *Id.* at 9a–12a. The court explained that a litigation waiver extends only to compulsory counterclaims, and a Section 303(i) claim is not a compulsory counterclaim to the involuntary petition because they do not

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[1] Blixseth detailed this conspiracy in a sprawling 477-paragraph complaint, alleging that federal agencies, including the IRS, FBI, and DOJ, and senior government officials, including former Attorney General Eric Holder, former FBI Director Robert Mueller, and former Governor of Montana Brian Schweitzer conspired to ruin him and steal his fortune. *See* Compl., *Blixseth v. IRS*, 2021 WL 519885 (D. Nev. Feb. 11, 2021), *aff'd sub nom. Blixseth v. U.S. IRS*, 2022 WL 822124 (9th Cir. Mar. 17, 2022), ECF Doc. 1. Blixseth sought over $3 billion in compensatory and punitive damages. *See, e.g.*, *id.* ¶ 437.

share the same "aggregate set of operative facts." *Id.* at 11a–12a.

The Ninth Circuit next held that the Department's counsel did not waive the Department's sovereign immunity because "the 'unequivocal expression' of elimination of sovereign immunity" that this Court "insists upon is an expression in statutory text." Pet. App. 12a (quoting *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992)) (cleaned up). Counsel thus "could not and did not effect an 'unequivocal' waiver" of the Department's sovereign immunity. *Ibid.*

Finally, the court found that the bankruptcy court improperly relied on 11 U.S.C. § 106(a) as a basis for ruling that the Department could not assert its immunity because, under circuit precedent, Section 106(a) is an "unconstitutional assertion of Congress's power." Pet. App. 13a (quoting *Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1121 (9th Cir. 2000)). More importantly though, the court reasoned that Section 106(a) does not "survive [the Court's] analysis" in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006). *Id.* at 19a.

The Ninth Circuit concluded that under *Katz*, a Section 303(i) adversary proceeding is not a bankruptcy proceeding in which the States agreed in the plan of the Constitutional Convention to subordinate their sovereign immunity because it furthers none of the three "[c]ritical features" of every bankruptcy proceeding: "[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, or her, or it from further liability for old debts." Pet. App. 15a (quoting *Katz*, 546 U.S. at 363–64); *see id.* at 14a–19a. Rather,

Section 303(i) creates a remedial scheme to compensate a debtor for a dismissed involuntary petition—a function "markedly distinct" from bankruptcy's three "critical functions." *Id.* at 17a–18a.

Blixseth sought en banc review, and the Ninth Circuit denied the petition with no noted dissent. Pet. App. 50a.

REASONS FOR DENYING THE PETITION

To start, there is no circuit conflict worthy of the Court's review. The 6-1 circuit split on whether Section 106(a) is constitutional is as stale as it is lopsided. No circuit court has weighed in on this issue since *Katz* held twenty years ago that the answer to this question does not matter. Since then, the ability to assert sovereign immunity in bankruptcy depends on whether a proceeding is "necessary to effectuate the bankruptcy court's *in rem* jurisdiction"—not on Section 106(a). *Katz*, 546 U.S. at 378.

In any event, this case is also a uniquely poor vehicle because the question presented is not outcome-determinative. To settle litigation arising out of the Yellowstone Mountain Club bankruptcy, Blixseth sold, transferred, and assigned his rights and interests in a Section 303(i) claim against the Department. Section 303(i) requires that the debtor has not "waive[d] the right to judgment," and by relinquishing all rights in his Section 303(i) claim, Blixseth did just that. The question presented is thus no more than an invitation for advisory analysis on an abstract question of law, unfitting for this Court's review.

On top of this, Blixseth overstates the importance of the question presented. Involuntary bankruptcy petitions are largely ineffective and, in turn, have become exceedingly rare. It took decades for this issue to surface for the first time, and it may never come up again. The Court thus

need not squander its limited resources on this one-off case.

Finally, the decision below is correct. Section 303(i) serves deterrent and compensatory functions, far removed from the "[c]ritical features of every bankruptcy proceeding" that help define the scope of the States' plan-of-the-Convention waiver. *Katz*, 546 U.S. at 363–64. A Section 303(i) proceeding does not adjudicate rights in the bankruptcy estate, issue ancillary orders enforcing the bankruptcy court's *in rem* adjudications, or protect a debtor's fresh start. It authorizes a debtor suit for retrospective monetary damages and nothing more.

Moreover, debtor remedies for a dismissed involuntary petition were anything but "a core aspect of the administration of bankrupt estates since at least the 18th century." *Katz*, 546 U.S. at 372. Bankruptcy, a creditor-focused regime, offered no protection to debtors for over a century after the Founding. There is little chance the Framers would have understood the Bankruptcy Clause to authorize such a proceeding against the States.

I. The circuit split is exaggerated and irrelevant.

Blixseth asserts (at 8, 12) a "significant" and "growing" circuit split over whether Section 106(a) is constitutional. *But see* Pet. i (mustering only that a few circuits have "indicated that Section 106(a) is constitutional, at least in some scenarios"). Not exactly. All but one circuit considering the issue has held that Section 106(a) is unconstitutional. But more to the point, no court has weighed in since *Katz* rendered this question unnecessary almost twenty years ago.

1. To begin, even if resolving Section 106(a)'s constitutionality was not an anachronistic exercise, no meaningful split exists.

Six circuits—the Third, Fourth, Fifth, Seventh, Ninth, and Eleventh—and the Tenth Circuit BAP have held that, under *Seminole Tribe of Fl. v. Florida*, 517 U.S. 44 (1996), Congress's attempted abrogation of state sovereign immunity in Section 106(a) is unconstitutional because Article I does not grant Congress the power to abrogate sovereign immunity. *See Sacred Heart Hosp. of Norristown v. Pennsylvania (In re Sacred Heart Hosp. of Norristown)*, 133 F.3d 237, 243 (3d Cir. 1998); *Schlossberg v. Maryland (In re Creative Goldsmiths of Washington, D.C.)*, 119 F.3d 1140, 1147 (4th Cir. 1997); *Dep't of Transp. & Dev. v. PNL Asset Mgmt. Co. (In re Fernandez*), 123 F.3d 241, 243 (5th Cir. 1997), *amended by* 130 F.3d 1138, 1139 (5th Cir. 1997); *Nelson v. La Crosse Cnty. Dist. Att'y (In re Nelson)*, 301 F.3d 820, 832 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1121 (9th Cir. 2000); *Ga. Higher Educ. Assistance Corp. v. Crow (In re Crow)*, 394 F.3d 918, 921–22 (11th Cir. 2004); *Straight v. Wyo. Dep't of Transp. (In re Straight)*, 248 B.R. 403, 416 (BAP. 10th Cir. 2000).

Only the Sixth Circuit disagrees. *See Hood v. Tenn. Student Assistance Corp. (In re Hood*), 319 F.3d 755, 767–68 (6th Cir. 2003), *aff'd and remanded sub nom. Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004). Blixseth claims (at 11) that the First and Second Circuits have too, but that is not right.[2] These pre-*Seminole Tribe*

[2] Blixseth also mistakenly aligns the Third Circuit with this side of the circuit split. The Third Circuit held that Section 106(a) is unconstitutional in *Sacred Heart Hosp. of Norristown v. Pennsylvania (In re Sacred Heart Hosp. of Norristown)*, 133 F.3d 237 (3d Cir. 1998) and then recognized that *Katz* "displaced" this decision. *Davis v. California (In re Venoco LLC)*, 998 F.3d 94, 104 (3d Cir. 2021), *cert. denied sub nom. Cal. State Lands Comm'n v. Davis*, 142 S. Ct. 231 (2021).

cases neither relied on congressional abrogation nor even considered the current version of Section 106(a).

In *WJM, Inc. v. Massachusetts Department of Public Welfare*, the First Circuit rejected the plaintiffs' abrogation theory "given the uncertainty that permeate[d]" the subject and found that the Massachusetts Department of Public Welfare waived its sovereign immunity under the *former* Section 106(a)—the predecessor to the current Section 106(b)—by filing proofs of claim in the plaintiffs' bankruptcy proceedings. 840 F.2d 996, 1001–03 (1st Cir. 1988), *abrogated on other grounds by Reopell v. Massachusetts*, 936 F.2d 12, 15 (1st Cir. 1991); *compare* 11 U.S.C. 106(a) (1982), *with* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 106, 92 Stat. 2549, 2555-56 (1978). The Second Circuit later "agree[d] with the First Circuit's analysis" in *WJM* that the former Section 106(a) does not abrogate state sovereign immunity but conditions state participation in litigation on the State waiving its immunity. *995 Fifth Ave. Assocs., L.P. v. N.Y. State Dep't of Tax'n & Fin. (In re 995 Fifth Ave. Assocs., L.P.)*, 963 F.2d 503, 508–09 (2d Cir. 1992). Put simply, the First and Second Circuit's contribution to this circuit conflict is based on the predecessor to the wrong sub-section in Section 106.

At any rate, crowning a victor in this lopsided (at least 6-1) circuit split would be academic. *Katz*'s plan-of-the-Convention waiver analysis "precedes and obviates the need for the 'congressional abrogation' inquiry" under Section 106(a). *Fla. Dep't of Revenue v. Diaz (In re Diaz)*, 647 F.3d 1073, 1084 (11th Cir. 2011); *accord* Pet. App. 19a (finding that relying on Section 106(a) as a basis to deny sovereign immunity does not "survive the *Katz* analysis"); *Davis*, 998 F.3d at 104 (noting that *Katz*

"displaced" decisions finding Section 106(a) unconstitutional).

2. In *Katz*, the Court set out to resolve the question "left open" by *Hood*: "whether Congress' attempt to abrogate state sovereign immunity in 11 U.S.C. § 106(a) is valid." 546 U.S. at 361. Rather than answer this question—(sort of) the same question Blixseth asks the Court to answer now, *see* p. 14, *infra*—the Court minted a new waiver theory in bankruptcy: The "States agreed in the plan of the Convention not to assert" sovereign immunity in certain bankruptcy proceedings. *Katz*, 546 U.S. at 377; *see Allen v. Cooper*, 589 U.S. 248, 259 (2020) (describing *Katz* as "discard[ing] our usual rule … that *Congress* must speak … to abrogate sovereign immunity") (emphasis in original). Consistent with the "principally *in rem*" nature of bankruptcy jurisdiction, *Katz* reasoned that the States agreed to a "limited" subordination of their sovereign immunity "in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts." 546 U.S. at 369, 378.

To this end, post-*Katz*, courts ask not whether a Bankruptcy Code section is listed in Section 106(a) but whether a proceeding against the State is necessary to effectuate—or furthers—the bankruptcy court's *in rem* jurisdiction. *See, e.g.*, Pet. App. 17a; *Diaz*, 647 F.3d at 1085; *Davis*, 998 F.3d at 104. So just as answering whether Section 106(a) is a valid abrogation of sovereign immunity was "not necessary" in *Katz*, it is not necessary now either. 546 U.S. at 362.

To be sure, "the line between 'plan-of-the-Convention waiver' and 'congressional abrogation' is a murky one." *Torres v. Tex. Dep't of Pub. Safety*, 597 U.S. 580, 604 (2022) (Thomas, J., dissenting). *Katz* vacillated between

disclaiming Congress's role in abrogating the States' sovereign immunity in bankruptcy proceedings and defining Congress's power to carry that out. *Compare* 546 U.S. at 378–79 ("[O]ur decision today" does not "rest[] on any statement Congress ha[s] made on the subject of state sovereign immunity."), *with id.* at 379 (framing the "relevant question" as whether "Congress' determination" to bind States to discharge orders in bankruptcy proceedings "is within the scope of its power to enact 'Laws on the subject of Bankruptcies'"). Either way though, the result is the same.

"Congress has no powers except those specified in the Constitution." *United States v. Kebodeaux*, 570 U.S. 387, 408 (2013). After all, without "a valid exercise of constitutional authority," *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62, 78 (2000), "[n]ot even the most crystalline abrogation can take effect," *Allen*, 589 U.S. at 255. In bankruptcy, the States "agreed in the plan of the Convention not to assert any sovereign immunity defense" in proceedings "necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts." *Katz*, 546 U.S. at 377–78. In turn, Congress's "power" to determine that the States "should be amenable to such proceedings"—a power that "arises from the Bankruptcy Clause itself"—extends no further than the States' plan-of-the-Convention waiver. *Id.* at 379. Stated the other way, if the States did not agree in the plan of the Convention to relinquish their immunity in a particular proceeding, Congress's power to "treat States in the same way as other creditors" does not reach that proceeding either. *Ibid.*

Here, the relevant question is not—as courts would have grappled with before *Katz*—whether Section 106(a)'s abrogation of the States' sovereign immunity in

Section 303(i) proceedings is constitutional; it is whether the States agreed in the plan of the Convention not to assert their sovereign immunity in these proceedings. *See* Pet. App. 17a; *see, e.g.*, *Katz*, 546 U.S. at 362 (deciding whether the States waived their sovereign immunity in preference avoidance proceedings). Far from a certworthy circuit split, the Ninth Circuit decided this issue as one of first impression. In this regard, the Court need not diverge from its "ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals." *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 587 U.S. 490, 493 (2019) (per curiam).

3. Finally, the Court "need not answer" whether Section 106(a) is constitutional in its entirety "to resolve the question presented." *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 305 n.10 (2023). Though Blixseth paints the petition in historic terms, offering the Court (at 13) the opportunity to resolve whether Section 106(a) is constitutional "once and for all"—a question that Blixseth alleges has escaped this Court and ostensibly left the lower courts rudderless "for over three decades"—he frames the question presented much more narrowly: whether "the Eleventh Amendment prevents Congress from authorizing citizens to collect damages against states" for a dismissed involuntary bankruptcy petition. Pet. i. Indeed, Blixseth concedes elsewhere that the issue is a narrow one, assuring the Court (at 14) that it "need not address all" fifty-nine Bankruptcy Code provisions in Section 106(a) to resolve the question presented. Yet clarifying Section 106(a)—"particularly [as] to Section 303(i) damages claims"—is not an issue that would "greatly benefit" the lower courts because it has never come up before. Pet. 12.

Nor does the Court need to provide "necessary guidance as to how to properly evaluate Section 106(a)'s constitutionality in other various scenarios." Pet. 14. *Katz* already identified the "[c]ritical features of every bankruptcy proceeding," *see* 546 U.S. at 363–64, which courts treat as "useful guidelines" to analyze whether a proceeding falls within the scope of the States' plan-of-the-Convention waiver. *See* Pet. App. 17a; *Davis*, 998 F.3d at 104; *Diaz*, 647 F.3d at 1084; *accord Texas v. Soileau (In re Soileau)*, 488 F.3d 302, 307–08 (5th Cir. 2007). If a conflict develops in how courts apply *Katz*—Blixseth points to none—the Court can provide guidance at the proper time.

II. This case is an unsuitable vehicle to resolve the question presented.

Even were there a circuit conflict worthy of this Court's consideration, the petition is unfit for review because the Court's disposition would not affect the case's outcome. The Court has long maintained that it does not grant a writ of certiorari to "decide abstract questions of law … which, if decided either way, affect no right" of the parties. *Supervisors v. Stanley*, 105 U.S. 305, 311 (1882); *see The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation."). This well-settled practice weighs decisively against granting review here.

At its core, Blixseth lacks "a cause of action under the statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). "[I]nterpretation of the Bankruptcy Code starts where all such inquiries must begin: with the language of the statute itself." *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (citation

omitted). A judgment under Section 303(i) is available only "if the debtor does not waive the right to judgment under this subsection." § 303(i). Waiver, this Court has said, is "the intentional relinquishment or abandonment of a known right." *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417 (2022) (citation omitted). Applied here, a debtor cannot obtain a judgment under Section 303(i) if he has intentionally relinquished or abandoned the "right to judgment." § 303(i).

To settle litigation arising out of the Yellowstone Mountain Club bankruptcy, Blixseth "transfer[red] … any and all rights and interests in his litigation matters," including "303(i) damages and sanction claims in the NV involuntary." Resp. App. 4, 6; *see id.* at 5 ("Blixseth shall convey the full rights to all of Blixseth's litigation matters and rights therein as described in Exhibit A."). With this act, Blixseth intentionally relinquished—or "waive[d]"—"the right to judgment." § 303(i); *see Warth v. Seldin*, 422 U.S. 490, 499 (1975) (explaining that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"). A favorable decision in this Court would thus not change the case's outcome because Blixseth never had a claim to begin with.

III. Blixseth overstates the practical consequences of the decision below.

The decision below will have minimal practical consequences, much less "be felt across the nation." Pet. 1. The bottom line is that "involuntary petitions are exceedingly rare." Richard M. Hynes & Steven D. Walt, *Revitalizing Involuntary Bankruptcy*, 105 Iowa L. Rev. 1127, 1165 (2020); Jason 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, 132 (2013) ("[A] combination of factors has reduced involuntary bankruptcy to the rarest of exceptions in U.S. practice."). They are so rare, in fact, that involuntary petitions now account for less than one percent of all bankruptcy filings. *See, e.g.*, Hynes & Walt, 105 Iowa L. Rev. at 1150–51 (calculating that "involuntary petitions account for 0.05 percent of all bankruptcy cases" between 2007 and 2017).[3] And for good reason. Filing an involuntary petition has been described as "probably the world's worst debt collection device." Brad E. Godshall & Peter M. Giluhy, *The Involuntary Bankruptcy Petition: The World's Worst Debt Collection Device?*, 53 Bus. Law. 1315, 1316 (1998).

At bottom, that this sovereign immunity issue has not surfaced until now—decades since Congress enacted Section 303 in 1978 and Section 106's operative text in 1994—says it all. "Today involuntary bankruptcy plays almost no role in real world practice," *see* Hynes & Walt, 105 Iowa L. Rev. at 1132, so the Court need not "restore balance" to anything. Pet. 28.

IV. The decision below is correct.

What Blixseth really seeks is error-correction on the application of sovereign immunity principles. That is not remotely certworthy, but there is no error to correct in all events.

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[3] *See also* Administrative Office of the U.S. Courts, Caseload Statistics Data Tables, U.S. Bankruptcy Courts–Voluntary and Involuntary Cases Filed, by Chapter of the Bankruptcy Code (2023) (Table 7.2), available at bit.ly/41HsaEH (last visited April 4, 2025).

A. The States did not agree in the plan of the Convention to waive their sovereign immunity to Section 303(i) claims.

1. The States' plan-of-the-Convention waiver does not extend to Section 303(i) adversary proceedings. *Katz* clarified that not every law "labeled a 'bankruptcy' law" can "properly impinge upon state sovereign immunity." 546 U.S. at 378 n.15. Put slightly differently, the scope of the States' waiver does not depend on whether Congress inserted a proceeding into the Bankruptcy Code. Rather, the waiver extends to proceedings that further one of bankruptcy's three "[c]ritical features": "[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, or her, or it from further liability for old debts." *Katz*, 546 U.S. at 363–64; Pet. App. 17a. A Section 303(i) proceeding furthers none of them.

Section 303(i) serves deterrent and compensatory functions. *See generally Green v. Mansour*, 474 U.S. 64, 68 (1985) ("[C]ompensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment."). The mere threat of damages serves "to deter frivolous filings"—a function served *before* the bankruptcy court exercises any jurisdiction at all. *Vibe Micro Inc. v. SIG Cap., LLC (Matter of 8Speed8, Inc.)*, 921 F.3d 1193, 1197 (9th Cir. 2019) (Bennett, J., dissenting). And more fundamentally, Section 303(i) creates a "remedial scheme" that "addresses the full range of remedies" for a failed involuntary petition, *Miles v. Okun (In re Miles)*, 430 F.3d 1083, 1090 (9th Cir. 2005)—a function

"too late to be considered essential to any *in rem* functions of the bankruptcy court." *Diaz*, 647 F.3d at 1086.

Section 303(i)'s remedial function is "markedly distinct" (Pet. App. 18a) from proceedings that carry out the first and second critical functions of bankruptcy—those that "decide[] and affect[] interests in the res, the property of the debtor and its estate" or that have a "broader effect on the equitable distribution of the debtor's property." *Davis*, 998 F.3d at 104. Section 303(i)'s "purpose does not become ripe unless and until dismissal has occurred." *Reyes-Colon v. Banco Popular De P.R.*, 110 F.4th 54, 65 (1st Cir. 2024) (cleaned up). Yet dismissal "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case." *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 456 (2017) (quoting 11 U.S.C. § 349(b)(3)); *see* 11 U.S.C. § 541(a). And so, when presiding over a Section 303(i) claim, the bankruptcy court is neither "adjudicating rights in the bankrupt estate" nor "issu[ing] ancillary orders enforcing their *in rem* adjudications"—the estate does not exist. *Katz*, 546 U.S. at 362, 370; *see Gardner v. New Jersey*, 329 U.S. 565, 574 (1947) ("The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res*.").

Nor does a Section 303(i) proceeding protect the third critical feature: the "ultimate discharge that gives the debtor a 'fresh start.'" *Katz*, 546 U.S. at 364. Unlike, for example, proceedings seeking to enforce a debtor's discharge, the bankruptcy court did not discharge Blixseth from "old debts," so there is no "fresh start" to protect. Pet. App. 18a (quoting *Katz*, 546 U.S. at 364); *see generally Hood*, 541 U.S. at 448 ("States, whether or not they choose to participate in the proceeding, are bound by a

bankruptcy court's discharge order no less than other creditors."); *see, e.g.*, *Slayton v. White (In re Slayton)*, 409 B.R. 897, 903–04 (Bankr. N.D. Ill. 2009) (finding that the State could not assert sovereign immunity in proceeding enforcing the discharge injunction).

2. "History and experience" confirm that the States did not cede their sovereign immunity in the plan of the Convention to Section 303(i) claims. *Alden v. Maine*, 527 U.S. 706, 727 (1999) (citation omitted). States enjoy the sovereign immunity that they "enjoyed before the ratification of the Constitution … except as altered by the plan of the Convention or certain constitutional Amendments." *Id.* at 713. And as this Court has long presumed, "the Constitution was not intended to 'rais[e] up' any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002) (citation omitted). To this end, the Court has "attribute[d] great significance" to the absence of analogous proceedings "at the time of the founding or for many years thereafter." *Ibid.* Consistent with this approach, *Katz* reasoned that the Framers "would have understood [the Bankruptcy Clause] to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property" because these proceedings had been "a core aspect of the administration of bankrupt estates since at least the 18th century." 546 U.S. at 372 (citing examples).

An adversary proceeding seeking monetary damages for a dismissed involuntary petition lacks any historical precedent let alone "compelling evidence that the Founders thought such a surrender inherent in the constitutional compact." *Blatchford v. Native Vill. of Noatak &*

Circle Vill., 501 U.S. 775, 781 (1991). For three centuries—from 1542, when England passed the first bankruptcy law, until 1841, when Congress established voluntary bankruptcy, a "watershed event in bankruptcy history"—only creditors could place merchant debtors in involuntary bankruptcy. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 7–8, 14, 17 (1995). Bankruptcy's "overriding purpose" was to "aid creditors" in collecting debts: "Relief was not *for* debtors, but *from* debtors." *Id.* at 8 (emphasis in original); *see Katz*, 546 U.S. at 365, 373 (explaining that the first federal bankruptcy law, modeled off the English bankruptcy statute, was "chiefly" designed to benefit creditors); *Cont'l Ill. Nat. Bank & Tr. Co. of Chi. v. Chi., R.I. & P. Ry. Co.*, 294 U.S. 648, 668 (1935) ("The English law of bankruptcy, as it existed at the time of the adoption of the Constitution, was conceived wholly in the interest of the creditor.").

Worse yet, debtors enjoyed no recourse for dismissed involuntary petitions at the time of the Founding and for more than a century after.[4] A debtor could not recover costs until 1898, *see* Bankruptcy Act of 1898, Pub. L. No. 55-541, § 3(e), 30 Stat. 544, 547 (1898) (repealed 1978), and could not seek monetary damages until Congress enacted the current Section 303(i) in the Bankruptcy Reform Act of 1978. *See* 92 Stat. at 2559. This makes sense. "The premise of debtor misconduct as the basis for involuntary bankruptcy, rather than financial status, remained

[4] This was no aberration in debtor fortune: "History's annals are replete with tales of draconian treatment of debtors." Tabb, 3 Am. Bankr. Inst. L. Rev. at 7; *see* Douglas G. Baird, *Elements of Bankruptcy* 30 (3d ed. 2001) (describing the prevailing attitude of debtors in 17th-century England as "miscreants who deserved whatever fate befell them").

in place until the Bankruptcy Reform Act of 1978 was enacted." Tabb, 3 Am. Bankr. Inst. L. Rev. at 8.

On this record, the Framers would not have understood that the States agreed to waive their sovereign immunity in debtor suits for monetary damages arising from a dismissed involuntary petition—an "action[] unknown to the law"—when they ratified the Bankruptcy Clause.[5] *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). Far from "a core aspect of the administration of bankrupt estates since at least the 18th century," debtors had not the slightest recourse against dismissed involuntary petitions for over a century after the States ratified the Constitution. *Katz*, 546 U.S. at 372. In other words, this is not a case in which we are merely left with the "absence of a perfect historical analogue," *PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 505 (2021); there is no analogue at all.

B. The Department did not waive its immunity to a Section 303(i) claim by filing the involuntary petition.

1. To begin, Blixseth conflates two distinct waiver doctrines, asserting (at 15) that a State's "affirmative litigation conduct" is a "key way that Section 106(a) can be constitutional." *See, e.g.*, *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 253–54 (2011) (distinguishing between waiver and congressional abrogation). That makes no sense. If the Department waived its sovereign

[5] The Framers would have been especially wary of a proceeding like this in which a plaintiff could seek hundreds of millions of dollars in cooked-up damages—a potentially "staggering burden[]" on the public fisc. *Alden*, 527 U.S. at 750; *see* Resp. C.A. Br. 29–31 (discussing Blixseth's specious damages allegations); *see, e.g.*, Pet. App. 135a (¶ 74) (alleging that the Department caused Blixseth to develop cancer).

immunity to a Section 303(i) claim by filing the involuntary petition—a question not presented to the Court for review—the Court would not reach the question presented on Congressional authority to authorize Section 303(i) claims against the States. This kitchen-sink approach underscores Blixseth's true aim: error-correction on the decision below.

Doctrinal confusion aside, the Ninth Circuit correctly held that the Department did not voluntarily waive its sovereign immunity to Blixseth's Section 303(i) claim. Though a State's voluntary appearance in federal court can waive its Eleventh Amendment immunity, *see Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 619 (2002), this waiver does not extend to all claims against the State. Rather, the State waives its immunity only to compulsory counterclaims—claims that "arise from the same transaction or occurrence" as the State's claim. Fed. R. Civ. P. 13(a). This limitation applies whether the State voluntarily appears in bankruptcy court—by, for example, filing a proof of claim—or even in federal court by filing a full-blown lawsuit.

In *Gardner v. New Jersey*, the Court held that when a State "invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance … it waives any immunity which it otherwise might have had respecting the adjudication of the claim." 329 U.S. at 573–74. "Most circuits agree" that *Gardner*'s proof-of-claim waiver is limited to "compulsory counterclaims." *Ossen v. Dep't of Soc. Servs. (In re Charter Oak Assocs.)*, 361 F.3d 760, 768 (2d Cir. 2004) (collecting cases). In fact, Section 106(b) codified that filing a proof of claim waives any governmental unit's sovereign immunity to claims "that arose out of the same transaction or occurrence"—

compulsory counterclaims under Rule 13(a). 11 U.S.C. § 106(b); *see* 140 Cong. Rec. H10,766 (Oct. 4, 1994) (clarifying Section 106(b) "by allowing a compulsory counterclaim" against a governmental unit that has filed a proof of claim); *State Bd. of Equalization v. Harleston (In re Harleston)*, 331 F.3d 699, 702 n.1 (9th Cir. 2003) ("The decision in *Gardner* was codified at 11 U.S.C. § 106(b).").

And even when a State sues in federal court, courts of appeals agree that the State waives its immunity to compulsory counterclaims but no more. *See Bd. of Regents of Univ. of Wis. Sys. v. Phx. Int'l Software, Inc.*, 653 F.3d 448, 470 (7th Cir. 2011) (collecting cases); *accord, e.g.*, *Regents of Univ. of N.M. v. Knight*, 321 F.3d 1111, 1126–27 (Fed. Cir. 2003); *Schlossberg*, 119 F.3d at 1148; *Texas v. Caremark Inc.*, 584 F.3d 655, 659 (5th Cir. 2009). To sum up, no matter what or where a State files, its sovereign immunity waiver extends only to compulsory counterclaims.

A Section 303(i) claim, like its common-law equivalent malicious prosecution, is not a compulsory counterclaim when an involuntary petition is filed under Section 303. Pet. App. 10a–11a; *see Miyao v. Kuntz (In re Sweet Transfer & Storage, Inc.)*, 896 F.2d 1189, 1191 (9th Cir. 1990) ("[T]he § 303(i) action is analogous to an action for malicious prosecution."); *accord In re Glannon*, 245 B.R. 882, 889 (D. Kan. 2000). The Ninth Circuit correctly concluded that a Section 303(i) claim fails the "logical relationship test" used to identify compulsory counterclaims because it does not arise from the same "aggregate set of operative facts" as the involuntary petition. Pet. App. 10a–11a (citations omitted); *see Hammervold v. Blank*, 3 F.4th 803, 810 (5th Cir. 2021) (concluding that

a malicious prosecution claim is not a compulsory counterclaim because it "arise[s] out of the fact of the first lawsuit—and not the facts underlying that lawsuit"). In practice, the facts needed to prove that Blixseth owed unpaid taxes from an improper tax deduction differ from the alleged facts supporting Blixseth's epic "conspiracy to ruin [him], both personally and financially." Pet. App. 139a (¶ 89); *see also id.* at 11a–12a.

C. Summary reversal would be inappropriate.

Devoting all of three sentences in the Introduction, Blixseth proposes (at 3) that the Court "could just summarily reverse" the decision below based on a purported waiver by the Department's counsel. For one, the Court need not consider undeveloped arguments much less one on an issue outside the scope of the question presented. *See South Dakota v. Bourland*, 508 U.S. 679, 697 (1993) (declining to consider undeveloped argument); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 27 n.5 (2010) (same). But more than that, as this Court has explained many times, it is "a court of review, not of first view," and so finds it "generally unwise to consider arguments in the first instance" that the lower courts "did not have occasion to address." *Byrd v. United States*, 584 U.S. 395, 404 (2018); *see, e.g.*, *Town of Chester v. Laroe Estates*, Inc., 581 U.S. 433, 441 n.4 (2017) ("[I]n light of … the lack of a reasoned conclusion on this question from the Court of Appeals, we are not inclined to resolve it in the first instance."); *City & Cty. of S.F. v. Sheehan*, 575 U.S. 600, 609 (2015) ("The Court does not ordinarily decide questions that were not passed on below."); *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("Because these [arguments] were not addressed by the Court of Appeals,

and mindful that we are a court of review, not of first view, we do not consider them here.").

Though the Ninth Circuit held that the Department's outside counsel could not waive the State's sovereign immunity in response to a judge's spontaneous demand in open court (without consulting the State), it did not consider whether Counsel gave an unequivocal waiver if he did have such authority. Pet. App. 12a. That the Ninth Circuit did not reach this question is even more important here because "the question whether a constitutional right has been waived always involves factual matters." *Tacon v. Arizona*, 410 U.S. 351, 354 (1973) (Douglas, J., dissenting). And applying "the facts of a particular case without the benefit of … lower court determinations is not a sensible exercise of this Court's discretion." *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552, n.3 (1990).

At any rate, Counsel did not waive the Department's sovereign immunity. "States may, of course, consent to suit." *Torres*, 597 U.S. at 587. To do so, "[a] State's consent to suit must be 'unequivocally expressed' in the text of [a] relevant statute." *Sossamon v. Texas*, 563 U.S. 277, 284 (2011); *see, e.g.*, *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 579 (1946) (concluding that "the Utah statutes fall short of the clear declaration by a state of its consent to be sued in the federal courts"); *Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 149–50 (1981) (per curiam) (looking to state statute to determine whether State waived its immunity); *accord Kaplan v. Univ. of Louisville*, 10 F.4th 569, 577 (6th Cir. 2021) (finding no waiver when "neither party points us to any Kentucky statute waiving its immunity for such suits"). Only by requiring this "'clear declaration' *by the State*" can it be "certain that the State in fact

consents to suit." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999) (emphasis in original). Counsel thus "could not and did not effect an 'unequivocal waiver' … through his statements to the court." Pet. App. 12a.

But even if he could, Counsel did not unequivocally waive the Department's immunity. On the contrary, Counsel equivocated at every step, parrying the court's insistence on getting an "explicit [statement] on the record" that the Department is "exposing [it]self to anything … that the Bankruptcy Court says needs to be remedied" with hedged responses. Pet. App. 153a–154a; *see Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010) (waiving a constitutional right must be "the product of a free and deliberate choice") (citation omitted). Simply put, when "indulg[ing] every reasonable presumption against waiver," no waiver occurred here. *Coll. Sav. Bank*, 527 U.S. at 682 (citation omitted); *see also United States v. Williams*, 514 U.S. 527, 531 (1995) ("construing ambiguities in favor of immunity").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel for Respondent

May 2, 2025

APPENDIX

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Appendix A:

LETTER OF COMMITMENT

This Letter of Commitment is given this 22 day of November, 2017, by Marty Kehoe, of Portland, Oregon. It is based upon a *Purchase and Sale Agreement* between Marty Kehoe (Kehoe) and Timothy Blixseth (Blixseth), wherein Blixseth will transfer and sell to Kehoe all rights and interests in litigation listed on Exhibit A, attached hereto and by this reference incorporated herein.

As part of that *Purchase and Sale Agreement,* Kehoe has agreed to pay the Yellowstone Club Liquidating Trust and its Trustee, Brian A. Glasser (Trust), the sum of Three Million and no/100 Dollars ($3,000,000.00) pursuant to the *Settlement Agreement* between the Trustee and Blixseth, once the Restraining Order or other Orders are lifted by the Federal District Court, Kehoe will make that payment in accordance with the *Settlement Agreement* timeframe.

Kehoe affirms that he is not related to Blixseth or affiliated with any Blixseth related entity and the $3,000,000.00 is not derived from any asset that Blixseth previously transferred either directly or indirectly to Kehoe.

DATED this 27 day of November, 2017.

/s/ Marty Kehoe
MK Development
Portland, Oregon

ACKNOWLEDGED AND APPROVED

/s/ Timothy Blixseth

EXHIBIT A
Litigation Rights

- 303(i) damages and sanctions claims in the NV Involuntary;
- Potential 42 US Code § 1983 claims/their state equivalent, against any former and current employees of the State of Montana and anyone that conspired with them;
- *Timothy Blixseth_v. Stephen Brown, et al.* Case No. 2:13-cv-00032-SHE and related appeal(s);
- Any and all possible claims against Wayne L. Prim and 395 Lampe, LLC;
- Any and all possible claims against Edra Blixseth;
- Any interest/claims in the Desert Ranch. LLLP and Desert Ranch Management, LLC bankruptcies;
- Any and all claims relating to Blixseth's alleged interest/Desert Ranch, LLLP's interest in/Desert Ranch Management. LLC's interest in Overlook Partners, LP;
- Malpractice claim against Tim O'Sullivan and claims against Gary Di Silvestri;
- Any and all rights and claims arising from/out of the Exculpation Appeal; and
- Any and all possible claims against Blixseth's attorneys for malpractice

PURCHASE AND SALE AGREEMENT

This Agreement is entered into this 20th day of November, 2017, by and between Timothy L. Blixseth ("Blixseth") as Seller/Transferor and Marty Kehoe, as Buyer/Transferee ("Buyer").

WHEREAS, the parties understand that Blixseth is in the process of settling litigation with and involving the Yellowstone Club Liquidating Trust and its Trustee, Brian A. Glasser ("Trust").

WHEREAS, Buyer understands that Blixseth has brought or contemplates bringing certain actions against the Trustee and certain Trust Related Parties and other claims against other parties relating to his prior ownership of the Yellowstone Club.

WHEREAS, Buyer understands that the Trustee and Blixseth have moved forward to fully and finally resolve all differences and claims by way of a global settlement agreement between them as to all prior litigation which has been or which could be brought and any other matters between them.

NOW THEREFORE, in consideration of this Purchase and Sale Agreement set forth herein, Blixseth and Buyer agree as follows:

1. For good and valuable consideration, Seller and Buyer agree to perform in accordance with this Agreement and acknowledge that time is of the essence.
2. Buyer understands that as a part of the Settlement Agreement between the Trustee and Blixseth there is a requirement that in order to obtain a lifting of any restraining order or other orders that the

Buyer's identity will be disclosed. Once the restraining order or orders are lifted then there will be a payment from the Buyer, who is unrelated and unaffiliated with Blixseth, of $3,000,000.00 to the Trustee. That Payment will require the Trustee to honor his obligation to dismiss all litigation and judgments described in the Settlement Agreement between the Trust and Blixseth with prejudice. In exchange for the Payment, Blixseth hereby transfers to Buyer any and all rights and interests in his litigation matters listed in EXHIBIT A, attached hereto, and incorporated herein by reference.

3. Buyer agrees to pay Trustee said $3,000,000.00 when the Settlement Agreement between the Trust and Blixseth has been signed by the Trustee, approved by the Board of the Yellowstone Club Liquidating Trust, and the restraining order or orders are lifted. Buyer agrees to pay the Payment to the Trustee within ten (10) business days of the later of (a) the date on which the Trustee provides notice of the Board's approval of this agreement, and (b) the date the restraining order is modified to allow Blixseth to lawfully transfer all litigation rights and interests as described in EXHIBIT A. Buyer understands that this Agreement shall be null and void if Buyer fails to timely make Payment.
4. Buyer represents and warrants that Buyer has never been associated with Blixseth, directly or indirectly in any business transaction, in any way, shape, or form. The source of the funds are not derived from any asset Blixseth has ever previously transferred, either directly or indirectly to the Buyer.

5. Buyers shall receive and Blixseth shall convey the full rights to all of Blixseth's litigation matters and rights therein as described in EXHIBIT A, as soon as the said restraining order is lifted by the Court. Buyer agrees to prosecute the litigation matters at the direction of Blixseth. Buyer is not receiving any asset that Blixseth previously transferred, either directly or indirectly, to Buyer. Further, Blixseth agrees to fully cooperate with Buyer and to execute any such legal documents as needed for Buyer to optimize the success of the actions/cases described in EXHIBIT A and which are transferred herein for fair consideration.
6. Buyer represents and warrants that he is not related to Blixseth or any entity related to or affiliated with Blixseth.
7. The Patties to this Agreement agree to maintain its confidentiality except as otherwise necessary to disclose such Agreement to the Trustee or to pursue the claims and/or litigation rights transferred hereunder, as described in EXHIBIT A.
8. The parties understand any Agreement to transfer the litigation rights described in EXHIBIT A is not effective until the restraining order is modified or vacated specifically allowing such transfer.

DATED: 11/27/17	DATED: 11-27-17
/s/ Timothy L. Blixseth Seller/Transferor	/s/ Marty Kehoe Buyer/Transferee

EXHIBIT A
Litigation Rights

- 303(i) damages and sanctions claims in the NV Involuntary;
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- Any interest/claims in the Desert Ranch. LLLP and Desert Ranch Management, LLC bankruptcies;
- Any and all claims relating to Blixseth's alleged interest/Desert Ranch, LLLP's interest in/Desert Ranch Management, LLC's interest in Overlook Partners, LP;
- Malpractice claim against Tim O'Sullivan and claims against Gary Di Silvestri;
- Any and all rights and claims arising from/out of the Exculpation Appeal; and
- Any and all possible claims against Blixseth's attorneys for malpractice

DECLARATION OF TIMOTHY L BLIXSETH

I, TIMOTHY L BLIXSETH, declare and state as follows:

1. I am an individual over 18 years of age and competent to make this Declaration.

2. If called upon to do so, I could and would competently testify as to the facts set forth in this Declaration.

3. The facts set forth below are true of my personal knowledge.

4. The source of the Payment that is the subject of the Settlement Agreement between myself and the Yellowstone Club Liquidating Trustee is (a) solely the result of my encumbering, transferring or assigning my litigation rights identified in Schedule 6.1 of the Settlement Agreement and attached hereto as Exhibit 1, other than litigation rights released pursuant hereto, to a third party who is not related to me or affiliated with any of my related entity and (b) not from or derived from any asset that I previously transferred, either directly or indirectly, to such third party.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 21, 2017, at Palm Desert, California.

/s/ Timothy L. Blixseth

Schedule 6.1
Litigation Rights

- 303(i) damages and sanctions claims in the NV Involuntary;
- Potential 42 US Code § 1983 claims/their state equivalent, against any former and current employees of the State of Montana and anyone that conspired with them;
- *Timothy Blixsethv. Stephen Brown, et al,* Case No. 2:13-cv-00032-SHE and related appeal(s);
- Any and all possible claims against Wayne L. Prim and 395 Lampe, LLC;
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