No. 02-1606

In The

Supreme Court of the United States

TENNESSEE STUDENT ASSISTANCE CORPORATION, *Petitioner*,

v.

PAMELA L. HOOD, *Respondent*.

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

Brief in Support of Petition for Writ of Certiorari for *Amici Curiae* Professors Susan Block-Lieb, Kenneth N. Klee, Jonathan C. Lipson, Bruce A. Markell, Lawrence Ponoroff and Elizabeth Warren

Susan M. Freeman
Counsel of Record
James R. Martin
Lewis and Roca LLP
40 North Central Avenue
Phoenix, AZ 85004
602-262-5311

Richard Lieb
Kronish Lieb Weiner & Hellman, LLP
1114 Avenue of the Americas
New York, NY 10036-7798
212-479-6000

Counsel for Amici Curiae

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THE FEDERALIST, The Modern Library's 2000 edition, edited by Robert Scigliano:

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Janet A. Flaccus, *The Eleventh Amendment and Bankruptcy Jurisdiction Over States*,
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INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae are law professors who teach and write in the area of bankruptcy.[2] Their interest in this case lies solely in the coherent and comprehensive development of the law. *Amici* are not predisposed to debtors, or creditors, or federal or State governmental bodies. They file this brief in support of the Petition for Writ of Certiorari, although they support the decision below, because this case addresses an issue of vital interest to the bankruptcy bar and the courts that cries for resolution on a national basis. *Amici* Professors propose to offer historical facts and a perspective on the developing law of sovereign immunity in bankruptcy and the importance of resolving now the authority of bankruptcy courts over State entities.

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[1] Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the *Amici* file this brief with the written consent of all parties, which are appended hereto. No counsel for a party authored this brief in whole or in part. No person or entity including *Amici* or their counsel made a monetary contribution for the preparation or submission of this brief; it has been prepared *pro bono.*

[2] Kenneth N. Klee is a Professor of Law at the University of California at Los Angeles School of Law. Elizabeth Warren is the Leo Gottlieb Professor of Law at Harvard Law School. Bruce A. Markell is the Doris S. and Theodore B. Lee Professor of Law at the William S. Boyd School of Law, University of Nevada Las Vegas. Lawrence Ponoroff is Dean and Mitchell Franklin Professor of Law at Tulane Law School. Jonathan C. Lipson is an Associate Professor of Law at the University of Baltimore School of Law. Susan Block-Lieb is a Professor of Law at Fordham University Law School.

DISCUSSION OF THE QUESTION PRESENTED

Petitioner, the Tennessee Student Assistance Corporation, has presented the issue as "Whether Congress has the authority to abrogate State sovereign immunity under the Bankruptcy Clause of Article I, U.S. Const., art. I, § 8, cl. 4." While *Amici Curiae* agree that this is one way to frame the issue presented in this case, the more precise question raised by the Sixth Circuit's opinion is:

Whether the States surrendered their sovereignty in the area of bankruptcy, and consequently any sovereign immunity, through the plan of the constitutional convention and the ratification of the Constitution.

If the States surrendered their immunity over bankruptcy through the plan of convention itself, then any attempted abrogation by Congress is superfluous. This issue is specific to bankruptcy and is not addressed in *Seminole Tribe* or any of the Court's subsequent cases on the scope of the Eleventh Amendment and the sovereign immunity of the States.

SUMMARY OF ARGUMENT

There are millions of cases pending in American bankruptcy courts; assertion of State sovereign immunity is now commonplace in bankruptcy cases, and has an enormous impact on the bankruptcy system, debtors and creditors. It has spawned extensive and expensive litigation, and intra- and inter-circuit splits of authority over the nature of sovereign immunity in bankruptcy. Courts wrestling with the competing constitutional interests of State sovereign immunity and a uniform bankruptcy system have created divergent approaches to reconciling these interests.

These diverse views are possible in part because the Court has never before addressed the argument adopted by the Sixth Circuit in this case: that the States surrendered their sovereignty in bankruptcy through the plan of the constitutional convention and signing the Constitution. The Court has recognized that the States surrendered their sovereignty, and consequently their immunity from suit, in other areas through the plan of the convention. The Court has also addressed the authority of federal courts acting in bankruptcy over the States in other contexts, and has raised but never answered the question of whether the States lack sovereign immunity in the area of bankruptcy as a result of the federal, constitutional power over bankruptcy. Specifically, the approach taken by the Sixth Circuit is not addressed by *Seminole Tribe* and its progeny.

The Sixth Circuit's conclusion derives, in part, from an extensive historical analysis of the bankruptcy clause and the understanding of the federal bankruptcy power at the time of the ratification of the Constitution. This analysis intersects with the discussion of the limits of State sovereignty and federal power set forth by Alexander Hamilton in THE FEDERALIST Nos. 32 and 81, which demonstrates that the States knowingly relinquished their sovereignty, including their sovereign immunity, in the area of bankruptcy when the Constitution was proposed and ratified.

This case squarely presents the issue of the extent of State immunity from federal bankruptcy proceedings. It offers the opportunity to establish a uniform approach to this issue and resolve the divergent approaches that have been taken by the many lower courts. And, it will enable the Court to examine the federal bankruptcy power in light of a comprehensive analysis of that power's historical origins and

understanding. Accordingly, the Court should grant the Petition for Writ of Certiorari.

ARGUMENT

I. This Case Presents An Issue Of Critical Concern To All Potential Participants In Bankruptcy Proceedings.

Regardless of how the Question Presented is phrased, the underlying issue raised in this case is whether the States are immune from federal court bankruptcy proceedings. The resolution of this issue affects most bankruptcy cases in the country. The scope of the problem is immense, the Circuits are divided in their responses, and this is a typical fact pattern the Court can use to guide courts and parties.

A. The States as Creditors Have an Enormous Impact on Bankruptcy Proceedings and the Rights of Creditors.

States are typically creditors in bankruptcy cases, and often among the largest creditors. *See, e.g., Nelson v. La Crosse County Dist. Atty. (In re Nelson)*, 254 B.R. 436 (Bankr. W.D. Wisc. 2000), *rev'd*, 258 B.R. 374 (W.D. Wisc. 2001), *reversal aff'd*, 301 F.3d 820 (7th Cir. 2002); Leonard H. Gerson, *A Bankruptcy Exception to Eleventh Amendment Immunity: Limiting the Seminole Tribe Doctrine*, 74 AM. BANKR. L.J. 1, 3 (2000). If bankruptcy courts are unable to affect States' claims without their consent in each case, giving States the ability to "opt out" of the federal bankruptcy system, that system is threatened in a variety of ways. *See generally In re NVR L.P.*, 206 B.R. 831, 843 (Bankr. E.D. Va. 1997) (describing the bankruptcy system as "in grave danger if the states cannot be bound by orders

issued by the federal courts under bankruptcy law"); Gerson, *supra*, at 2-4, 7-10.

- State immunity from discharge determinations impedes the fresh start promised by the Bankruptcy Code, one of its "primary purposes." *See, e.g., Perez v. Campbell*, 402 U.S. 637 (1971).

- State immunity from determinations of State claims in bankruptcy courts frustrates fairness to creditors, another primary purpose of federal bankruptcy law. If the bankruptcy courts cannot resolve State claims, they cannot distribute estates "in accord with fair and equitable requirements," *Gardner v. New Jersey*, 329 U.S. 565, 577 (1947), nor provide for "a ratable distribution of assets among the bankrupt's creditors," *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161 (1946).

- State immunity from bankruptcy process hampers the "orderly and expeditious" resolution of estates, yet another "fundamental purpose" of the bankruptcy system. *New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933). Immunity allows States to "pull out chunks of an estate from the reorganization court and transfer a part of the struggle over the corpus into tax bureaus and other state tribunals," thus "seriously impair[ing] the power of the court to administer the estate." *Gardner*, 329 U.S. at 577.

- Some bankruptcy issues affecting State claims are exclusively within the province of bankruptcy courts, such as an undue hardship determinations relating to student loans and exceptions to discharge on grounds of fraud, breach of fiduciary duty, embezzlement and willful and malicious injury. *See* 11 U.S.C. §§ 523(a)(8); 523(c)(1). Even non-exclusive decisions are impacted by State sovereign immunity, however, because any such protection extends to State court lawsuits under *Alden v. Maine*, preventing courts from forcing the determination of claim amounts and allowance, discharge and other fundamental bankruptcy rulings in any forum. *See Alden v. Maine*, 527 U.S. 706 (1999).

- State immunity from bankruptcy proceedings precludes the existence of a "uniform" system of bankruptcy, as required by the Constitution's Bankruptcy Clause. *See Sturges v. Crowninshield*, 17 U.S. (4 Wheat) 122, 193-94 (1819). States can and do take different positions on the extent of their immunity, and lower courts struggling to reconcile the federal bankruptcy power with State sovereignty have created an array of different approaches to the issue.

The issue presented in this case thus involves competing concerns. On one hand stand principles of federalism and State sovereignty as embodied in the Eleventh Amendment. On the other stand the purposes of federal bankruptcy law and the constitutional interest in uniformity as embodied in the Bankruptcy Clause. The analysis adopted by the Sixth Circuit concludes that the

Framers of the Constitution weighed these interests and agreed that State sovereignty must give way. Other courts' approaches are diverse and inconsistent; the issue needs to be definitively resolved.

B. Debate Over the Proper Role of States in Bankruptcy Proceedings Has Created Both Intra- and Inter-Circuit Splits.

In this case, the Sixth Circuit became the first court of appeals to find that the States ceded their sovereignty in the area of bankruptcy through the plan of convention. The Sixth Circuit decision is in direct conflict with that of the Seventh Circuit in *Nelson v. La Crosse County District Attorney*, 301 F.3d 820 (2002), the only other court of appeals decision to expressly consider the same arguments.

Perhaps the best example of the conflicting positions created by this issue in other circuits comes from the Fourth Circuit, which has issued a quartet of post-*Seminole Tribe* decisions addressing the interplay between bankruptcy law and State sovereign immunity. The Fourth Circuit first concluded that the Eleventh Amendment barred an action to recover a preference payment from the State. *See Schlossberg v. Maryland (In re Creative Goldsmiths)*, 119 F. 3d 1140 (4th Cir. 1997). The court concluded that the Article I bankruptcy clause did not give Congress the authority to abrogate the State's sovereign immunity. *See id.* at 1145-46.

One month later, however, a different panel of the Fourth Circuit concluded that the Eleventh Amendment did *not* immunize a State from the effects of a confirmation order that prejudiced the rights of the State. *See Maryland v. Antonelli Creditors' Liquidating Trust*, 123 F.3d 777, 786-87 (4th Cir. 1997). Likewise, in 1999, the Fourth Circuit ruled that the Eleventh Amendment did not prevent a bankruptcy

court from reopening a bankruptcy case to determine the dischargeability of a State's claim. *See Virginia v. Collins (In re Collins)*, 173 F.3d 924 (4th Cir. 1999).

Finally, in its most recent pronouncement on the subject, the Fourth Circuit found that the Eleventh Amendment did bar a contested proceeding to recover money from a State. *See NVR Homes, Inc. v. Clerks of the Circuit Courts (In re NVR, L.P.)*, 189 F.3d 442 (1999). Thus, Fourth Circuit panels appear to have reached a consensus on two points: 1) the Eleventh Amendment does not bar general discharge determinations, even if they affect a State's claims; but 2) the Eleventh Amendment does bar any proceeding to obtain a money judgment against a State. Beyond these two rules, the Fourth Circuit decisions do little other than to confirm that questions continue to plague the application of State sovereign immunity in bankruptcy courts. None of the Fourth Circuit opinions addresses the plan of the convention arguments considered by the Sixth and Seventh Circuits.

Other circuits have also weighed in on the issue, but also without considering the plan of the convention argument. The Court of Appeals for the Fifth Circuit has held both that Article I's Bankruptcy Clause does not permit Congress to abrogate State immunity, *Department of Transp. & Dev. v. PNL Asset Mgmt. Co. LLC (In re Fernandez)*, 123 F.3d 241 (5th Cir. 1997) (considering immunity in an adversary proceeding), and that sovereign immunity does not prevent a bankruptcy court from discharging debts to a State, *Texas v. Walker*, 142 F.3d 813 (5th Cir. 1998).

The Third Circuit has also held that the Bankruptcy Clause does not give Congress the power to abrogate the States' immunity. *See Sacred Heart Hosp. v. Pennsylvania (In re Sacred Heart Hosp.)*, 133 F.3d 237 (3d Cir. 1998).

The Ninth Circuit has found that States are immune from adversary complaints on dischargeability issues, *In re Mitchell*, 209 F.3d 1111 (9th Cir. 2000), but that "a bankruptcy court's discharge order is binding on a State" and cannot be ignored based on a claim of immunity. *Goldberg v. Ellett (In re Ellett)*, 254 F.3d 1135, 1141 (9th Cir. 2001).

Thus, this case presents a direct conflict between the Sixth and Seventh Circuits. But it is also part of a series of court of appeals decisions grappling with the proper scope of State immunity in bankruptcy. The cases involve not only conflicts between the circuits but also delicately distinguished cases from different panels of the same circuits that seek to strike an appropriate balance between State sovereignty and the national bankruptcy system. The Court should grant *certiorari* now to resolve these conflicts.

C. Attempts by Courts to Address the Consequences of a Limited Scope of Authority Over States Have Created a Confusing Array of Diverse Approaches.

This Court, together with the federal judiciary as a whole, has always recognized the discharge of debts as the central protection offered to debtors through bankruptcy. With a view toward preserving that goal in the face of State assertions of sovereign immunity, courts and litigants have followed a variety of approaches. Some have turned to *Ex parte Young* injunctions. *See Seminole Tribe v. Florida,* 517 U.S. 44, 72 n.16 (1996) (suggesting *Ex parte Young* injunctions as a way to avoid the effects of State sovereign immunity); *Goldberg v. Ellett (In re Ellett*), 254 F.3d 1135 (9th Cir. 2001) (applying *Ex parte Young* doctrine to enjoin efforts by State official to collect on debt after discharge), *cert. denied*, 534 U.S. 1127 (2002). This approach is far too costly for most insolvent debtors, and cumbersome for

overburdened bankruptcy courts having State issues in most of their vast dockets of cases.

Others have tried to fit bankruptcy proceedings within the *in rem* exception to sovereign immunity. *See California v. Deep Sea Research*, 523 U.S. 491 (1997) (recognizing *in rem* exception to State sovereign immunity); *Horwitz v. Zywiczynski (In re Zywiczynski)*, 210 B.R. 924, 929-930, 932 (Bankr. W.D.N.Y. 1997) (concluding that court had authority under its *in rem* jurisdiction to determine whether property claimed by the State was subject to turnover pursuant to section 542 of the Bankruptcy Code, 11 U.S.C. § 542, notwithstanding *Seminole Tribe*).

Some courts have reasoned that bankruptcy proceedings do not constitute "suits" under the language of the Eleventh Amendment. *See, e.g., Texas v. Walker*, 142 F.3d 813, 820-22 (5th Cir. 1998) (finding that a discharge order concerning a debt owed to a State does not constitute a suit). Other courts have wrestled with what conduct suffices to constitute a waiver of immunity by a State that appears in a bankruptcy case. *See, e.g., Arizona ex rel. Industrial Comm'n v. Bliemeister (In re Bliemeister)*, 296 F.3d 858, 862 (9th Cir. 2002).

The issue of State sovereign immunity has also prompted extensive debate among practitioners and scholars of bankruptcy, with a similar diversity of views. *E.g.* Ralph Brubaker, *Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory Ex Parte Young Relief*, 76 AM. BANKR. L.J. 461 (2002); Kelli Blythe Dexter, *The Bankruptcy Estate v. The State, Round Eleven: Recent Developments in Sovereign Immunity*, 10 J. BANKR. L. & PRAC. 41 (2000); Janet A. Flaccus, *The Eleventh Amendment and Bankruptcy Jurisdiction Over States*, 10 J. BANKR. L. & PRAC. 207 (2001); Hon. Randolph J. Haines,

Getting to Abrogation, 75 AM. BANKR. L.J. 447 (2001); Eric. R. Sender, *The Constitutionality of Section 106: A Historical Solution to a Modern Debate*, 17 BANKR. DEV. J. 131 (2001).

These diverse approaches to a common problem undermine the very uniformity that should be the hallmark of federal bankruptcy law. The 1.5 million debtors who file for bankruptcy each year, most of whom owe debts of one kind or another to States, are entitled to receive both uniform and predictable treatment of their claims. The Court should grant the Petition for Writ of Certiorari in order to bring both uniformity and certainty to this area of the law.

II. This Case Presents A Historical Analysis Of Bankruptcy And The Bankruptcy Clause Not Previously Considered By The Court.

This Court has never, in *Seminole Tribe* or elsewhere, addressed the plan of the convention analysis for the surrender of State sovereign immunity in bankruptcy. The Court has, however, repeatedly recognized that the States did surrender some portions of their sovereignty through the Constitution. The majority opinion in *Seminole* itself twice acknowledges that the States enjoy immunity except where there was a "surrender of this immunity in the plan of the convention." *See Seminole Tribe*, 517 U.S. at 68 & n.13. *See also Alden v. Maine*, 527 U.S. 706, 713 (1999) (referring to retention of sovereignty by States "except as altered by the plan of the convention"); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (recognizing express consent to suit, consent through the plan of the convention, and abrogation as grounds for loss of immunity); *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323 (1934) (considering "whether the plan of the Constitution involves the surrender of immunity when the suit is brought

against a State, without her consent, by a foreign State"); *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (discussing immunity as an inherent attribute of State sovereignty "[u]nless, therefore, there is a surrender of this immunity in the plan of the convention").

This Court recognized that the States surrendered their immunity as to suits against entities created under the Interstate Compact Clause, Article I, section 10, clause 3 of the Constitution. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 41-42 (1994). The Court found that the Port Authority could be sued in federal court because, as "part of the federal plan prescribed by the Constitution, the States agreed to the power sharing, coordination, and unified action that typify Compact Clause creations." *Id.*; *see also id.* at 56 (J. O'Connor, dissenting) ("the crux of the Court's analysis rests on its apparent belief that the States ceded their sovereignty in the interstate compact context in the plan of the convention").

The Court has also occasionally addressed the role of the States in bankruptcy proceedings, but never with reference to the plan of the convention. *Seminole Tribe* includes a brief footnoted debate between the majority and the dissenters regarding its implications for bankruptcy. Justice Stevens' dissenting opinion cautioned that the Court's ruling could stand in the way of enforcement of bankruptcy and certain other federal laws. *See Seminole Tribe,* 517 U.S. at 77 & n.1. The majority responded that this concern was "exaggerated both in its substance and in its significance", 517 U.S. at 73 n.16.

This brief exchange in *Seminole Tribe* did not consider the Supreme Court's own history of affirming orders by bankruptcy courts that eliminate State claims, despite State objections. In 1931, for example, the Court

considered the authority of a federal court to eliminate a State tax lien on the basis of a Bankruptcy Act provision. *See Van Huffel v. Harkelrode*, 284 U.S. 225 (1931). Denying Ohio's objections, the Court could find no reason why "state taxes should be deemed to have been excluded from the scope of this general [bankruptcy] power to sell free from [State] encumbrances." *Id.* at 228. Thus, the Court held that a federal court could alter a State's lien rights in a bankruptcy case without the State's consent.

Two years later, the Court considered the fate of a State's untimely claim for unpaid franchise taxes. *See New York v. Irving Trust Co.*, 288 U.S. 329 (1933). The Court affirmed the district court's decision to bar the State's claim. The Court explained: "If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated." *Id.* at 333, 53 S. Ct. at 391. The Court expressed no doubts about the authority of the federal court to extinguish New York State's claim to the debtor's assets.

The Court again considered the power of a federal court sitting in bankruptcy to adjudicate State tax claims in *Gardner v. New Jersey*, 329 U.S. 565 (1947). The Court declared that "[t]he constitutional authority of Congress to grant the bankruptcy court power to deal with the lien of a State has been settled." *Id.* at 578. Consequently, "the reorganization court had jurisdiction over the proof and allowance of the tax claims and . . . the exercise of that power was not a suit against the State." *Id.* at 572.

Beyond these decisions, the Court has never explicitly addressed the relationship between bankruptcy and State sovereignty. In 1989, the Court did consider the effect

of the then-current version of section 106 of the Bankruptcy Code, 11 U.S.C. § 106, which purported to abrogate State immunity. *See Hoffman v. Connecticut Dep't of Income Maint.*, 492 U.S. 96 (1989). The Court held that "Congress did not abrogate Eleventh Amendment immunity by enacting § 106(c)." *Id.* at 104. Consequently, the Court did not "address whether [Congress] had the authority to do so under its bankruptcy power." *Id.*[3]

Now, by granting the Petition for Writ of Certiorari in this case, the Court has the opportunity to bring together these two lines of cases and consider both the scope of the surrender of State sovereignty through the plan of the constitutional convention and the authority of the courts to apply federal bankruptcy law to the States. The Court can also answer the questions raised but not answered in *Hoffman* and *Seminole Tribe* regarding the relationship between the federal bankruptcy power and State sovereign immunity.

III. The Bankruptcy Clause Was Intended To Encompass Immunity From Suit.

The Sixth Circuit and Bankruptcy Appellate Panel opinions discuss the Federalist Papers and the bankruptcy and naturalization clause of the Constitution. Upon taking certiorari of this case, the Court would be provided with

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[3] Congress subsequently amended § 106 to more explicitly abrogate State immunity. The Supreme Court has not addressed the current version of § 106. The Court did grant *certiorari* in *In re Merchants Grain*, 59 F.3d 630 (7th Cir. 1995), which might have presented the issue, but then elected simply to remand the case for "further consideration in light of *Seminole Tribe*." *Ohio Agric. Commodity Depositors Fund v. Mahern*, 517 U.S. 1130 (1996).

further briefing and historical analysis. *Amici* note to the Court at this stage, however, that historical information does exist to place the Federalist debates into a context critical for understanding the plan of the convention and the scope of federal bankruptcy power.

Hamilton explained that the plan of the convention included a surrender of State sovereign immunity where the Constitution "granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." *See* THE FEDERALIST NO. 32 at 192 (Robert Scigliano, ed. 2000) (emphasis in original). As an example of this type of federal authority, Hamilton cited to the power over naturalization, which appears together with the federal bankruptcy power in the same constitutional clause.

Today, to speak of State immunity from bankruptcy as "absolutely and totally contradictory and repugnant" may seem a bit extreme. The Framers of the Constitution, however, had a different perspective. In 1789, a discharge of debts was profoundly bound up with the powers of the sovereign, rather than merely an issue between individual debtors and their creditors.

First, at the time of ratification, a bankruptcy discharge meant a release from debtors' prison, not merely a fresh financial start. "The only consistency among debt laws in the eighteenth century was that every colony, and later every state, permitted imprisonment for debt – most on *mesne* process, and all on execution of a judgment." Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence* 79 (Harvard U. Press 2002); *see also* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 12 (1995). Early colonial and State insolvency relief laws were

brief and limited, providing for release from imprisonment, often without a discharge from debt, and in some instances either assigning property to creditors or even binding debtors in service to their creditors. Mann at 51-53, 79-80, 177-79. The first federal bankruptcy act, enacted in 1800 following ratification of the Constitution, provided for a discharge, not only of debts but also of the person of the debtor from debtor's prison. *See id.*; Bankruptcy Act of 1800, Sess. I, Ch. 19, §§ 34, 38.

Thus, the creation of a discharge by federal statute directly conflicted with the sovereign authority of the States to punish and imprison debtors, and to impose their own terms for release. An effective, and uniform, federal law would have been impossible if the States could not be bound by the federal discharge, as only the States could give it effect by releasing debtors from their prisons. Legislative preemption alone would have been insufficient to bind States to obey bankruptcy discharge orders. Moreover, state action alone, without the unifying influence of federal authority, would be unable to create a uniform system for the discharge of debts. State authority in this respect is necessarily limited both by the contracts clause of the United States Constitution and by the States' limited territorial authority. *See Ogden v. Saunders*, 25 U.S. (12 Wheat) 213 (1827) (discussing nature of state and federal authority over bankruptcy issues); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat) 122 (1819) (same).

Second, in ratifying the Constitution, the States were also aware of the diversity of existing State approaches to bankruptcy:

> Prior to the drafting of the Constitution, at least four States followed the practice of passing private Acts to relieve

> individual debtors. Given the sovereign status of the States, questions were raised as to whether one State had to recognize the relief given to a debtor by another State. Uniformity among state debtor insolvency laws was an impossibility and the practice of passing private bankruptcy laws was subject to abuse if the legislators were less than honest. Thus, it is not surprising that the Bankruptcy Clause was introduced during discussion of the Full Faith and Credit Clause. The Framers *sought to provide Congress with the power to enact uniform laws on the subject enforceable among the States.*

Railway Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 472 (1982) (internal citations omitted) (emphasis added); *see* Mann at 51-53, 55, 59-61, 79, 177-80, 183. If the States' immunity had not been surrendered, the Constitution's grant of power to Congress to create a uniform bankruptcy system, *enforceable among the States*, would have been meaningless.

Third, when the Constitution was drafted and ratified, delinquent debt was extensive and held across State borders. The economic impact of wars, accompanied by disruption of foreign trade, post-war contractions, and consequent commercial risks, and the vagaries of business in an era before insurance, had led to economic declines and failures by merchants of integrity. *E.g.* Mann at 55-57, 83-84, 102, 169-71, 176-77. The indebtedness was public as well as private, in part because States as well as Congress had issued bills of credit and loan certificates to purchase supplies and pay soldiers on the promise of paying interest or accepting

them in payment of taxes. *Id.* at 169-70. Speculation in public debt by investors was rampant. *Id.* at 175-76.

Key delegates to the constitutional convention were aware of this, and aware of pending issues of applying State insolvency and bankruptcy rules to debtors and creditors who lived in different States, and the value of addressing the issue on a national level. *Id.* at 185. One of the Pennsylvania lawyer delegates to the convention had a pending case in which he was defending a debtor who had received a Maryland discharge, then been imprisoned by a Pennsylvania creditor for unpaid debt, in which he was arguing the obligation of one State to recognize another State's discharge. *Id.* at 184-85. He had recently received a decision for another client that under the Articles of Confederation, a discharge by a New Jersey court shielded a debtor from arrest in that State, but did not bind Pennsylvania courts or discharge him from being imprisoned in Pennsylvania for another debt. *Id.* at 184.

Records of ratification debates in the States also include recognition by at least some of the participants that the purpose of the constitutional provision empowering Congress to establish uniform laws on bankruptcy was for a bankruptcy determination "when conformed to in one state" to be "effectual to secure the debtor throughout the union." *Id.* at 186 n.35 (citing a delegate to the Connecticut ratifying convention, Samuel Holden Parson to William Cushing, Jan. 11, 1788, in DHRC, 3:572).

The impact of uniformity was likewise recognized by Antifederalist writers. "The anonymous 'Federal Farmer' argued that even if uniform bankruptcy laws were practicable – which he thought unlikely given 'the extent of the country, and the very different ideas of the different parts in it, respecting credit, and the mode of making men's

property liable for paying their debts' – a federal bankruptcy power was nonetheless an interference 'with the internal police of the separate states, especially with their administering justice among their own citizens.'" *Id.* at 187.

The concept of a uniform bankruptcy law is thus comparable to the uniform immigration and naturalization laws to which Hamilton referred in THE FEDERALIST. Under the federal system, citizens were citizens of the nation, not the independent States. No State government could refuse to recognize a person's citizenship, and no State government could imprison a bankrupt citizen or refuse to recognize his bankruptcy discharge in the face of contrary federal law. For the States to be permitted to flaunt federal bankruptcy authority would have been "contradictory and repugnant" to the Constitutional scheme. As federal bankruptcy authority has always been exercised by the federal courts, the bankruptcy clause necessarily subjects the States to suit on bankruptcy matters. *See* Tabb, *History of the Bankruptcy Laws, supra*, at 14, 25.

Fourth, bankruptcy was tied to State sovereignty because of its relationship to State policy and economic power. The first federal bankruptcy act provided relief only to merchants or traders, and was opposed by agrarian and plantation interests. *See* Mann at 216-19; Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 346 (Spring 1991); Charles Warren, *Bankruptcy in United States History* at 18-19 (1935). Continuing opposition resulted in the repeal of the first act in 1803, only three years after it was passed. *See* Tabb, *History of the Bankruptcy Laws, supra*, at 15; Warren, *supra*, at 21.

Thomas Jefferson himself opposed federal bankruptcy legislation because he perceived the proposed laws as pro-merchant and anti-agrarian. Jefferson was

particularly concerned that federal law would eliminate some of the protections provided to debtors under existing State laws. *See* Warren at 16; Mann at 197. For example, Virginia State law at the time protected freehold lands from execution. *See id.* As Jefferson recognized, the federal bankruptcy power superseded the States' control of lands within their own borders, a direct affront to their sovereignty.

Through the bankruptcy clause, the people granted the federal government the authority to control citizens, contracts and commerce that would otherwise have been under State control. The people even handed the federal government the keys to State prisons when it came to bankrupt debtors. This is the context in which this Court should analyze State sovereign immunity from suit on bankruptcy claims in general, and from dischargeability proceedings in particular.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Susan M. Freeman
Counsel of Record
James R. Martin
Lewis and Roca LLP
40 North Central Avenue
Phoenix, AZ 85004
602-262-5311

Richard Lieb
Kronish Lieb Weiner & Hellman, LLP
1114 Avenue of the Americas
New York, NY 10036-7798
212-479-6000

Counsel for Amici Curiae
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