No. 02-1606

IN THE

Supreme Court of the United States

TENNESSEE STUDENT ASSISTANCE CORPORATION,

Petitioner,

v.

PAMELA L. HOOD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN SUPPORT OF RESPONDENT FOR *AMICUS CURIAE* THE COMMERCIAL LAW LEAGUE OF AMERICA

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INTEREST OF THE AMICI[1]

The Commercial Law League of America (the "CLLA"), founded in 1895, is the nation's oldest organization of attorneys and other experts in credit and finance. Its membership exceeds 3,900 individuals actively engaged in the fields of commercial law, bankruptcy and reorganizations. The 1,200 bankruptcy lawyers and bankruptcy judges of the Bankruptcy Section of the CLLA represent virtually every state, both small and large practices, and divergent interests and parties. The CLLA has testified on numerous occasions before Congress as experts in the bankruptcy and reorganization fields.

The CLLA appears as *amicus* to provide a practical, experienced perspective to complement and reinforce the scholarship and arguments of the Respondent and the other *amici* supporting the Respondent.

The CLLA has long represented and advocated creditor interests, but its members recognize that the fair, equitable, uniform and efficient administration of bankruptcy cases and debtor-creditor relations requires that all parties, including the States, participate in the bankruptcy process. Had the States retained sovereign immunity from the discharge of indebtedness (or from other generally applicable bankruptcy

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1. Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, the *Amicus* files this brief with the written consent of both parties, which are lodged herewith. No counsel for a party authored this brief in whole or in part. No person or entity other than *Amicus* and its counsel made a monetary contribution for the preparation or submission of this brief. Michael S. Schreiber, a professor of law at Cardozo Law School and a member of the New York Bar contributed to the preparation of this brief. Louis S. Robin of the Massachusetts Bar and Peter C. Califano of the California Bar, officers of the CLLA, also assisted in its preparation.

court powers) that would have perpetuated the very disunity, disorder and uncertainty which the Framers and the People confronted and rectified when they granted Congress the power to enact "uniform laws on the subject of bankruptcies."

The appearance as *amicus* of a predominantly creditor-oriented organization to advocate universal discharge of debts is not paradoxical or incongruous. It is empirical and logical. Creditors recognize that the bankruptcy system best serves all interests when the availability of a discharge from debts provides the incentive for the debtor to dedicate her assets for equitable, economical, expeditious distribution among creditors.

As the brief of the State of Ohio (hereinafter, the "States' Brief") acknowledges, the States frequently have debts or other interests to be addressed in bankruptcy cases. The CLLA – and creditors generally – have learned from experience that the implications of State sovereign immunity reach far beyond discharge determinations, to include, for example, the automatic stay (11 U.S.C. § 362), the turn-over of assets (11 U.S.C. § 544), the determination of tax liability (11 U.S.C. § 505) and certain special tax provisions in chapter 11 cases (11 U.S.C. § 1146(c)).

Although these particular powers under modern bankruptcy law may not have been expressly considered by the Framers, they represent necessary and appropriate expressions of Congress's power to pass "uniform laws on the subject of bankruptcies."

> In using that phraseology, the founders of the Nation could not define or foresee the limits of its future application, but in all their work, they clearly understood that 'they were not building a

> strait-jacket to restrain the growth and shackle the spirits of their descendants for all time to come.

Charles Warren, *Bankruptcy in the United States* at 4 (Harvard University Press 1935) [hereinafter "Warren"].

The decision in *Hood v. Tennessee Student Assistance Corp.*, 319 F.3d 755 (6th Cir. 2003) advances the salutary goals of a uniform bankruptcy system. Reversal would undermine both the Constitutional structure and modern bankruptcy law and process.

SUMMARY OF THE ARGUMENT

> The thought which we will develop is that when insolvency comes the debtor's affairs should be liquidated for the benefit of his creditors on the basis of equality. As a corollary, the debtor (if he aids toward that end) ought to be discharged from further liability on the debts to which, on a basis of equality, he has now dedicated his assets.

Garrard Glenn, *The Law Governing Liquidation* (Baker Voorhis & Company 1935) [hereinafter "Glenn"] at 4. The "reality" is "that debtors and creditors are partners in debt, and never more so than when debtors are insolvent." Bruce H. Mann, *Republic of Debtors: Bankruptcy in the Age of American Independence*, 45 (Harvard U. Press 2002) [hereinafter "Mann"].

"[T]hose who are interested in the American system must give English origins the place of first importance." Glenn at 291. At the start of the Eighteenth Century, English law first recognized what common sense and practical experience taught: creditors recover more assets, faster and with less cost, when the motivation for debtors to deliver their assets for distribution to creditors arises not only from compulsion but also from reward.

The same common sense and practical experience applied in the Colonies and States, of course, but their differing bankruptcy and insolvency schemes necessarily frustrated and prevented the separate, but mutually-reinforcing, goals of debtors and creditors. The Framers understood the problem. Their remediation included the "surrender of [sovereign] immunity in the plan of the convention" when the Constitution empowered Congress to enact uniform laws on the subject of bankruptcies. *See Alden v. Maine*, 527 U.S. 706, 717 (1999), citing The Federalist No. 81 (Hamilton).

Sovereign immunity from the bankruptcy discharge (and the bankruptcy process generally) is ahistorical, is not dictated by this Court's Eleventh Amendment jurisprudence and is in derogation of the language, purpose and structure of and the Constitution and the understandings of the Founding Fathers.

> In passing upon the grave constitutional question presented in this case, we must never forget, as Chief Justice Marshall admonished, that the Constitution is 'intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs,' and that '(i)ts means are adequate to its ends.' Cases do arise presenting questions which could not have been foreseen by the Framers. In such cases, the Constitution has been treated as a living document adaptable to new situations. *But we are not called upon today to expand the Constitution to meet a new situation. For, in this case, we need only look to history and time-honored principles of constitutional law – principles that have been applied consistently by all branches of the Government throughout our history. It is those*

> *who assert the invalidity of [section 106 of the Bankruptcy Code] who seek to amend the Constitution in this case.*

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 479, 682-83 (1952) (emphasis added) (internal citations omitted).

The symbiotic relationship between debtors and creditors requires that all creditors – including the States – be participants in the bankruptcy process and the discharge of debts. The Framers understood this; the Constitution authorizes it.

Petitioners and their *amici* misread the relevant history, misstate the problems attendant to State sovereign immunity and misapply this Court's Eleventh Amendment jurisprudence. For the reasons set forth below, and as demonstrated in the brief of Respondent and the briefs of the other *amici* in support of Respondent, the judgment below should be affirmed.

ARGUMENT

I. The Surrender of Sovereign Immunity Is Inherent In the Plan of the Convention

History, language and logic provide "compelling evidence' that the States were required to surrender their sovereign immunity "pursuant to the constitutional design" with respect to bankruptcies. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781 (1991). Section 106 of the Bankruptcy Code simply acknowledges and memorializes what the "plan of the convention" did two hundred years earlier.

A. History

When the Constitution was enacted, debtors and creditors confronted differing State laws, rights and remedies. Some States had laws modeled on English bankruptcy law; New York, for one, had a law that afforded a debtor a discharge from debts on consent of three-quarters of the creditors; other States had provisions for discharge of the debtor from prison, but not for discharge of the debtor's debts. Warren at 6-7. "The only consistency among debt laws in the eighteenth century was that every colony, and later every state, permitted imprisonment for debt." Mann at 79.

The hodgepodge of laws and their uneven enforcement offered debtors no assurance that the protections afforded by the bankruptcy law of one state would be enforced in another state: "a state cannot by such a law discharge one of its own citizens from his contracts with citizens of other states, though made after the passage of the law, unless they voluntarily became parties to the proceedings in insolvency." *Brown v. Smart*, 145 U.S. 454, 457 (1892). Debtors with multi-state relationships and debts had little incentive to give up their assets for the benefit of local creditors when doing so afforded them no protection from creditors in other States.

The disparate laws and multiple jurisdictions also adversely affected creditors. The Colonies began to recognize that the property of an insolvent belonged to all creditors, not simply the quickest (Mann at 47-48), but the realization of that ideal was difficult. The absence of a discharge binding upon all creditors meant that creditors could offer little to entice debtors to file bankruptcy. Hon. Randall J. Haines, *The Uniformity Power: Why Bankruptcy Is Different*, 77 Am. Bank. L.J. 129, 155 (2003) [hereinafter "Haines"].

> Only a uniform federal law with a discharge (1) binding across state lines . . . and (2) effective against

> states whose laws, courts and sheriffs refused to acknowledge foreign state discharges could end the stalemate and permit all creditors to offer a sufficient collective incentive for the debtor to disclose and turn over all his assets.

Id. at 155-56.

The Framers' response to these problems was two-fold. First, of course, was to grant Congress the power to enact "uniform laws on the subject of bankruptcies." Second, was the early bankruptcy legislation enacted under that power.

Congress turned to bankruptcy legislation in the first session of the 1st Congress and returned to the subject of bankruptcy in each of the next four Congresses. Warren at 10. The first bankruptcy law, enacted in 1800, was essentially the same as the legislation introduced in each of the earlier Congresses. *Id*. The template for the Bankruptcy Act of 1800 was the existing English bankruptcy law. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 American Bankruptcy Institute Law Review 5 at 7 (1995); Warren at 13-14.

Three aspects of the Bankruptcy Act of 1800 provide compelling evidence that the States did not retain – and were understood at the time as having not retained – sovereign immunity over the subject of bankruptcies.

First, the Bankruptcy Act of 1800 was enacted only three years after the enactment of the Eleventh Amendment and only seven years after *Chisolm v. Georgia*, 2 Dall. 419 (1793) – the decision that "shocked" the nation into enacting that amendment. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 669 (1999). It is illogical – if not extraordinary – to assume that the Congress in 1800 disregarded or ignored the recent reaffirmation of the States' sovereignty immunity. Yet, the 1800 Act expressly made

debts owed to the States immune from discharge. Bankruptcy Act of 1800, § 62. The *amici* States Brief notes this provision, but misses its import. That affirmative statutory grant of immunity would have been superfluous if the States had retained sovereign immunity in bankruptcy.

Second, the 1800 Act contained uniform exemptions for debtors. *Id*., § 34. Nothing in the Act suggests an individual debtor could not enforce those exemptions against the States or recover exempt property in the possession of the State. Congress must have understood that that would be the result and that debtors would be without a remedy if the States – as they argue today – enjoyed sovereign immunity.

Third, the 1800 Act expressly authorized federal courts to issue writs of habeas corpus to free debtors from state prisons. *Id*., § 38. Judge Haines has noted that this provision uniquely conferred federal jurisdiction over the States and their conduct (and his analysis need not be repeated here). Haines at 174-81. The inclusion of the writ of habeas corpus – without recorded dissent or concern – in the 1800 Act demonstrates compellingly that the Framers understood that the power to enact "uniform laws on the subject of bankruptcies" was intended to invade the usual prerogatives and protections of State sovereignty.

"[E]arly congressional enactments provide contemporaneous and weighty evidence of the Constitution's meaning." *Printz v. United States*, 521 U.S. 898, 905 (1997) (Scalia, J.) (internal alteration and quotation marks omitted). The Bankruptcy Act of 1800 (which was essentially the same as legislation introduced in the first four Congresses) provides "contemporaneous and weighty evidence" that the plan of the convention surrendered the sovereign immunity of the States "on the subject of bankruptcies throughout the United States."

B. Language of the Bankruptcy Clause

Three facts about the bankruptcy clause itself appear unarguable. First, there is little recorded discussion of bankruptcy during the convention or in the subsequent advocacy in favor of or against the ratification of the Constitution. *See* Amicus Brief of the Council of State Governments, Etc. at 10 [hereinafter "Council Brief"]. Second, the subject of bankruptcy apparently surfaced first at the Convention during debate over the Full Faith and Credit Clause. *See Railway Labor Executives Ass'n v. Gibbons*, 455 U.S. 457, 471-72 (1982); Warren at 4-5. Third, the bankruptcy power was considered to be related to the federal power to regulate interstate and international commerce as expressed in the commerce clause. *See* Council Brief at 11; *See* Warren at 7.

That minimal expression compels examination of the text of the bankruptcy clause, including a comparison of that text with the text of other powers in Section 8 of Article I of the Constitution.

That examination itself raises three questions. If the bankruptcy clause is no more than an adjunct to the commerce power, why is it separately enunciated? If the reference to a "uniform" law is a limitation on the power of Congress, and not a grant of affirmative power, why was the language not placed at the end of the commerce clause, like the requirement at the end of the first clause of Section 8 ("but all duties, imposts and excises shall be uniform throughout the United States")? If the subject of bankruptcies first arose during the discussion of Full Faith and Credit, why does the provision appear as a grant of power in Article I rather than as an obligation of the States under Article IV?

The placement and wording may be unintentional. However, "[w]hen two parts of a provision [of the Constitution] use different language to address the same or similar subject matter, a difference in meaning is assumed." *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (internal citation omitted). *Cf. TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant. It is our duty to give effect, if possible, to every clause and word of a statute) (internal alteration and quotation marks omitted).

The better answer – and the one that is consistent with both the foregoing rules of statutory construction and the evidence of the Bankruptcy Act of 1800 – is that the distinct wording and separate placement were necessary to distinguish the clause and the surrender of sovereign immunity which it effected from other Article I powers.

C. Logic

The Framers understood and appreciated the practicalities and the effects of what they did. There is nothing in their contemporaneous expressions or actions that implies that the Framers intended other than to remedy the existing problems on the subject of bankruptcies. Logical inference also provides compelling evidence of the States' surrender of sovereign immunity.

The bankruptcy clause was intended to remedy the problem of one State not enforcing the discharge (or other law) of another State. As a consequence, creditors could be immune from the effects of bankruptcy unless they voluntarily participated in the case. The States' retention of

sovereign immunity would render the power to enact uniform laws on the subject of bankruptcies only a partial and ineffectual remedy, leaving the debts of States immune to discharge "unless they voluntarily become parties to the proceedings."

The bankruptcy clause of the Constitution was intended to remedy the problem of inequality of distribution among creditors if one creditor could stand aside and other creditors were forced to race for the assets. The States' retention of sovereign immunity would render the power to enact uniform laws on the subject of bankruptcies only a partial and ineffectual remedy, leaving States as preferred creditors "unless they voluntarily become parties to the proceedings."

The differences among the States with respect to the treatment of debtors and creditors inhibited commerce among the States. At a minimum, merchants and other creditors had to consider the uncertainty and difficulty of enforcement and collection in making their business decisions (just as creditors today would have to consider the risk that States would opt-out of bankruptcy cases). Uniform laws on the subject of bankruptcies were intended to remedy these problems. The States' retention of sovereign immunity would render the power to enact uniform laws on the subject of bankruptcies only a partial and ineffectual remedy, allowing the States to determine from bankruptcy case to bankruptcy case whether or not "they voluntarily become parties to the proceedings."

None of history, text or logic suggests that the bankruptcy clause was intended to be an incomplete or weak remedy for the problems on the subject of bankruptcies confronting the Nation. On the contrary, history, text and logic all provide compelling evidence that the bankruptcy clause was intended

to be effective and pervasive, and that the waiver of State sovereign immunity was an intended and necessary component in achieving that result.

II. Affirmance Adheres to this Court's Recent Eleventh Amendment Jurisprudence

The Eleventh Amendment – and the sovereign immunity that the Amendment reaffirms – protect the States from private suits. *See Alden v. Maine*, 527 U.S. 706 (1999). Congress cannot use its Article I powers to authorize private suits against the States to enforce federal law absent consent by the State or consent in the "plan of the convention." *Blatchford* at 784.

The compelling historical and textual evidence of consent in the plan of the Convention is set forth in Point I, *supra*. There is, however, another respect in which the issue now before the Court differs materially from the issues addressed in the Court's recent Eleventh Amendment jurisprudence. This difference derives from the "subject of bankruptcies," the essence of the debtor-creditor relationship and the means by which bankruptcy law has been and is now enforced. This difference provides further evidence that the states were required to surrender their sovereign immunity with respect to the subject of bankruptcies "pursuant to the constitutional design." *Alden* at 731.

The Court's recent Eleventh Amendment jurisprudence involves the purported exercise of Congressional power under Article I of the Constitution to authorize private suits (*e.g.*, *Alden*) by a "particular person" (*Blatchford* at 785) or "individual interests" (*Ex parte Ayers*, 123 U.S. 443, 505 (1887)) against a State. The Court has invalidated Congressional efforts to permit private suits by Indian tribes (*Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)); private suits under the ADEA (*Kimel v. Florida Bd. of

Regents, 528 U.S. 62 (2000)); private actions before the Federal Maritime Commission (*Federal Maritime Commission v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002)); private actions under the ADA (*Board of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001)); private suits under the FLSA (*Alden*); private suits under the Trademark Remedy Act (*College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 527 U.S. 666 (1999)); and, private action under the Lanham Act (*Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999)).

Such private suits unconstitutionally invade the sovereign immunity of the States as derived "from the structure of the original Constitution itself." *Alden* at 728. It was not within the contemplation of the Framers and not inherent in the plan of the convention that individual suits would be a means, let alone the means, of enforcing federal law. *See Federal Maritime Commission.*

However, bankruptcy law at the time of the Constitutional convention and today was and is fundamentally different. In bankruptcy, private suit is and has always been *the means* of enforcing bankruptcy law. It would be unusual, if not extraordinary, for the federal government itself to bring suit to enforce the rights of an individual debtor or creditor, even though the rights or duties of either are defined by federal law.[2]

2. The impractability, if not impossibility, of federal enforcement of the bankruptcy law should be obvious from the fact that more than 1.5 million bankruptcy cases were filed in 2003. The States Brief (at 1) observes that over 440,000 bankruptcy cases were filed in the second quarter of this year and objects that "a State [may be forced] to defend its rights at a time and place solely of the debtor's choosing." Were federal enforcement to be the norm, the States would not be immune and would confront the same litigations and same forum, but the federal government would bear the added time and expense of the litigations now spread among the 50 States.

Bankruptcy has been defined by the Court as the "subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his or their relief" that "includes the power to discharge debts." *Railway Labor* at 466 (citation omitted). The "core" of bankruptcy is the restructuring of debtor-creditor relationships. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982). The discharge is "at the core of federal bankruptcy power." *Id.*

English law, Colonial law and State law were no different. The individual, not the government, enforced the rights and remedies of the debtor. The Framers must have understood that the power transferred to the federal government to enact "laws on the subject of bankruptcies" would follow historical precedent and authorize private suits. Federal government enforcement would have been "anomalous," not a considered option. Where the States were creditors or otherwise involved with debtors, they could only have anticipated that private, not governmental, suit would be the rule. This was true, for example, with respect to *habeas corpus* under the Bankruptcy Act of 1800. *See id.*, § 38.

Bankruptcy thus provides the converse of the situation that has previously come to this Court. Bankruptcy presents the question whether the federal government *must* enforce rights that are almost always private, not whether Congress can authorize private parties to enforce rights that the federal government could enforce against the States. Outside of bankruptcy, private suits to enforce federal law may be "anomalous" (*Federal Maritime Commission*) but such suits are normal, if not necessary, to enforce the rights *inter se* of debtors and creditors.

In sum, the "subject of bankruptcies" presumes private enforcement of rights. The Framers contemplated private suits, not federal governmental enforcement. If the States

had retained sovereign immunity with respect to "laws on the subject of bankruptcies," then they would have effectively immunized themselves from the reach of federal bankruptcy law, would have left debtors with no remedy for the rights conferred under federal law and effectively eviscerated the power to enact "uniform laws on the subject of bankruptcies" and the Supremacy Clause with respect to bankruptcy law. Such perverse results can not have been and should not be inferred as the "plan of the convention."

III. The Waiver of Sovereign Immunity With Respect to Discharge of Debt Does Not Offend the Dignity of the States

Sovereign immunity preserves the "dignity" that the States retained after the Constitution was enacted. Unlike *Federal Maritime Commission* or *Alden*, this case does not involve a private cause of action against the State which Congress has created and authorized as an alternative to direct federal enforcement. This case illustrates well why suits against the States in bankruptcy should not be considered unconstitutional offenses to State dignity. The debtor merely seeks to establish that she owes nothing to the State, not that the State owes anything to her. The dignity of the State is left unblemished.

Congress created a private *need* to sue the States, not a *right* to sue, with respect to student loan discharge. *See* 11 U.S.C. § 523(a)(8). The dignity of the States in the federal system is less offended where Congress requires a private citizen to sue before obtaining relief from the State than where – as in the situations that have heretofore come to this Court – Congress grants a private *right* to sue the States.

Debt discharge is inoffensive to State dignity in other material respects. There are no damages or invasion of the State treasury. The debtor seeks only to eliminate or avoid an obligation or debt, not to recover anything. That is particularly true in this case, where the debtor's relationship with the State arises from a voluntary act of the State in becoming a lender or creditor. The State has chosen and determined its relation to the debtor. Unlike those situations which have been found offensive to State dignity, no private party has chosen to impose or enforce a relation or duty upon the State. The State may not have "consented" to be sued, but it certainly has chosen a relationship with an individual with knowledge that the relationship could be adjusted or discharged in the bankruptcy court.

The minimal (if any) affront to the States is further demonstrated by the ease with which the requirement of suit against the State can be undone. The present statute denies a discharge of student debt "unless" the debtor proves financial hardship. 11 U.S.C. § 523(a)(8). The statute places the burden of persuasion on the debtor. However, the identical result could be obtained without suit against the State by amending existing law to provide that the debtor obtains a discharge of her student loan unless the State objects. The burden of coming forward might change, but the burden of persuasion could be left as it is: upon objection, the debtor would have the burden of proving hardship.[3]

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3. This is essentially the practice for certain other debts that are declared non-dischargeable, but nevertheless become dischargeable if the affected creditor does not object. 11 U.S.C. § 523(c)(1). A practical equivalent also exists under the present system for claims allowance. Claims are presumptively valid unless a party objects. Upon objection, the claimant has the burden of proof, however. *See* Federal Rules of Bankruptcy Procedure 3001(f) and 3007.

A similar result cannot be obtained under any other non-bankruptcy federal law. Congress cannot create an effective remedy by shifting the burden of litigation from the private litigant to the objecting state for the simple reason that in non-bankruptcy federal cases nothing requires a state to commence litigation for a declaration that it is not violating federal law. In bankruptcy the private suit is unnecessary because relief can be obtained without suit. In the non-bankruptcy context – as in the statutes previously before the Court – the private suit is the only means of obtaining relief. The distinction between the more flexible and adjustable bankruptcy process and the process outside of bankruptcy means that the former is less offensive to the dignity of the States than the latter.

The proceeding to discharge a debt is particularly inoffensive to State dignity. The uniform enforceability of the discharge and the release from debtors' prison were two of the underlying problems that induced the constitutional requirement of uniform bankruptcy laws. The dignity of the States at the time of the Constitution must be viewed in the context of the States being subject to suits to release debtors from prison. To the extent that a debtor's discharge today could be viewed as affecting State dignity, that effect is demonstrably less offensive than the suits that could have been and were brought against the States at or before the time of the Constitution.

Debt discharge is inoffensive to State dignity in other material respects. The relationship between the individual as debtor and the State as creditor inherently intrudes less upon the State than in the non-bankruptcy context when an individual seeks an affirmative recovery from the State. The debtor seeks only to eliminate or avoid an obligation or debt. That is particularly true in this case, where the relationship to the State arises from a voluntary act of the

State in becoming a lender or creditor. The State, as creditor, is "an entity that has a claim *against the debtor*." 11 U.S.C. §101(10)(A) (emphasis added). By contrast, where the State is sued, the private party pursues her claim *against the State*. (Emphasis added).

In this case, the State has chosen and determined its relation to the debtor. Unlike the situation which offends State dignity, the private party has not been authorized to impose or enforce a relation or duty upon the State. The State may not have "consented" to be sued, but it has undertaken and selected a relationship with an individual with knowledge that the relationship could be adjusted or discharged in the bankruptcy court.

Discharge acts prospectively to bar the State and its officers from collecting a debt in violation of federal law; it does not authorize an individual to sue the State to redress past violations of federal law (like the statutes that been invalidated heretofore). The State as creditor is not haled into court to defend itself from a claim or obligation created by Congress. Congress determines how and whether the obligation can be enforced, but Congress does not create or establish the obligation, let alone authorize private suit to enforce the obligation.

This is not to ignore the current statutory scheme or the substantive effects that derive from that scheme. However, Congress unquestionably has the power under the bankruptcy clause – should it choose to exercise that power – to eliminate or discharge fully and unconditionally a debtor's obligations or debts to the State. By choosing not to exercise the greater power, but rather to establish a procedure and a standard instead of the unqualified relief that could be imposed constitutionally, Congress has actually conferred or accorded greater dignity to the States than they would otherwise have and more than the Eleventh Amendment and sovereign

immunity require. Rather than a categorical command prohibiting State enforcement of a debt owed to the State, Congress has granted the State the right and opportunity to prove or establish that enforcement should not be prohibited under particular circumstances. It strains the meaning of the word to hold that the States' "dignity" is offended by an opportunity to avoid a result when, as here, the imposition of the result is constitutional and not offensive.

The CLLA would be remiss as *amicus* if it did not apprise the Court of other representative circumstances where State sovereign immunity – were it to exist – would have substantial negative impact on the bankruptcy system.

First among these circumstances is a provision that allows the equality of distribution that bankruptcy demands. That provision, of course, is the automatic stay. 11 U.S.C. § 362. As enacted, the automatic stay applies to the States (as "entities" under the Bankruptcy Code). However, the present statutory scheme would allow the States to violate or ignore the stay with apparent impunity.

The express remedy for violation of the automatic stay is damages: "An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances may recover punitive damages." 11 U.S.C. § 362(h). The remedy is, by its terms, available only to an "individual", not a governmental entity. However, sovereign immunity would bar a suit by an "individual" to recover damages against the State. Stay violations are generally void, but sovereign immunity would bar an action to recover an asset seized or to remedy other acts taken in violation of the stay. Even if the federal government could intercede to pursue such a plain violation of federal law, that intervention might not allow compensation to the party

aggrieved and would probably be too late to provide effective redress.

A second problem would arise if the States had retained sovereign immunity. The Bankruptcy Code makes the trustee the "representative of the estate" and gives the trustee the "capacity to sue and be sued." 11 U.S.C. § 323. However, the trustee could not sue the States without their consent – neither in the bankruptcy court (as the statutory scheme intends) nor in state court. *See Alden.* This denies the trustee (and the estate the trustee represents) access to the "avoiding powers," including the power to recover fraudulent conveyances or preferences. *See* 11 U.S.C. §§ 542-549.

One need not be "[]willing to assume the States will refuse to honor the Constitution or obey the binding laws of the United States" (*Alden* at 755) to conclude that the inability of the trustee to sue would render the avoidance powers useless against the States. First, it strains credulity (if not budgetary concerns) to assume that the federal government would pursue fraudulent conveyances or preferences on behalf of individual estates. Second, preferences and fraudulent conveyances are often not obvious. There are elements of proof and defenses. Even a State aware of its obligations and intending to fulfill them might conclude in good faith that the retention of an asset or the avoidance of an obligation did not violate the Constitution or "the binding laws of the United States." Third, pursuing a voidable transaction becomes problematical when it is necessary to rely upon the "good faith of the States . . . as an important assurance" (*Id*.) that there will be a recovery to justify the cost and time of the exercise. Fourth, proving a fraudulent conveyance or preference may require discovery from the transferee. Without the ability to bring suit, there is limited ability to obtain the requisite discovery.

The final examples are remedies that are available in reorganization cases, but which would not be available against the States if they had sovereign immunity. These remedies include the sale of property free and clear of liens (11 U.S.C. § 1123(a)(5)(D)); the satisfaction or modification of a lien (11 U.S.C. § 1123(a)(5)(E)); the curing or waiving of any default (11 U.S.C. § 1123(a)(5)(G)); and prohibitions on the collection or enforcement of certain taxes (11 U.S.C. § 1146(c)). The uncertainty that would ensue would frustrate, if not prevent, the ability to reorganize.

It is self-evident that the "plan of the convention" – were the convention to be held today – would include the surrender of State sovereign immunity as a component in the construction of any "uniform law on the subject of bankruptcies." It should equally be self-evident that the "plan of the convention" that took place 225 years ago when the Framers drafted the Constitution also included the surrender of State sovereign immunity.

CONCLUSION

The Bankruptcy Code does not offend State sovereignity. The People removed the States' sovereign immunity with respect to the "subject of bankruptcies" as part of the constitutional design. Reversal of the decision below would undermine the uniform bankruptcy system and return "the subject of bankruptcies" to the vagaries, disunity and uncertainty prevalent at the time of the enactment of the Constitution and that the Framers sought to remedy by the bankruptcy clause.

For the reasons set forth above and in the briefs of the Respondent and the *amici* in support of the Respondent, the decision below should be affirmed.

Respectfully submitted,

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