No. 20-46

IN THE
Supreme Court of the United States

PORT OF CORPUS CHRISTI AUTHORITY OF NUECES COUNTY TEXAS,
Petitioner,

v.

SHERWIN ALUMINA COMPANY, LLC AND SHERWIN PIPELINE, INC.,
Respondents.

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

BRIEF OF INDIANA AND 29 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Office of the Indiana Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov
**Counsel of Record*

CURTIS T. HILL, JR.
Attorney General
THOMAS M. FISHER*
Solicitor General
KIAN HUDSON
Deputy Solicitor General
JULIA C. PAYNE
Deputy Attorney General

Counsel for Amici *States*
Additional counsel with signature block

QUESTION PRESENTED

Whether a bankruptcy court's *in rem* jurisdiction over a debtor's property allows it to exercise *in rem* jurisdiction over the separate property of an arm of the State without that entity's consent and without violating that entity's sovereign immunity?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES [CONT'D]

CASES [CONT'D]

CASES [CONT'D]

CASES [CONT'D]

STATUTES

STATUTES [CONT'D]

OTHER AUTHORITIES

OTHER AUTHORITIES [CONT'D]

INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Alabama, Alaska, California, Colorado, Connecticut, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Maine, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, Washington, and Wisconsin respectfully submit this brief as *amici curiae* in support of Petitioner.

The decision below held that state sovereign immunity does not prevent federal bankruptcy courts from eliminating state property interests, and, as a practical matter, does not apply to *any* bankruptcy proceeding. *Amici* States have an interest in seeing the Court correct that decision: It threatens countless state property interests and undermines the sovereign immunity necessary to "accord States the dignity that is consistent with their status as sovereign entities." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002).

Amici States file this brief to urge the Court to grant the petition and reverse the decision below.

---

[1] Counsel of record for all parties received notice of *Amici* States' intention to file this brief and consented to the States' notice.

REASONS FOR GRANTING THE PETITION

Though federal bankruptcy courts do not hold judicial power under Article III, the Bankruptcy Code purports to grant them "jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge," *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 363–64 (2006), as well as jurisdiction over all disputes "related" to the bankruptcy, such as "causes of action owned by the debtor which become property of the estate . . . [and] suits between third parties which have an effect on the bankruptcy estate," *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 & n.5 (1995) (internal quotation marks and citations omitted). Bankruptcy courts exercise this jurisdiction in hundreds of thousands of cases each year: The year ending March 31, 2019, for example, saw more than 770,000 bankruptcy cases filed. U.S. Courts, *Table F-2 – Bankruptcy Filings* (Mar. 31, 2019), https://www.uscourts.gov/statistics/table/f-2/bankruptcy-filings/2019/03/31. Bankruptcy-court orders thus affect the interests of countless entities—debtors and creditors, as well as third parties.

Parties to bankruptcy proceedings regularly seek orders that would affect interests held by States. Yet States are not ordinary litigants: They are "sovereign entities" that possess "the dignity and essential attributes inhering in that status." *Alden v. Maine*, 527 U.S. 706, 713–14 (1999). And it "is inherent in the nature of sovereignty not to be amenable to the suit of an in-

dividual *without its consent*." *Id.* at 716 (internal quotation marks and citation omitted). This immunity from suit protects States against "the indignity of . . . coercive process of judicial tribunals at the instance of private parties," *id.* at 749 (quoting *In re Ayers*, 123 U.S. 443, 506 (1887)), safeguards States' "financial integrity," *id.* at 750, and prevents state policies from being "'controlled by the mandates of judicial tribunals . . . in favor of individual interests,'" *id.* (quoting *In re Ayers*, 123 U.S. at 505).

Bankruptcy courts' jurisdiction and States' sovereign immunity together produce a frequently recurring question: When does state sovereign immunity bar bankruptcy-court jurisdiction?

This question is enormously important, for it goes to the validity of innumerable orders affecting countless state interests. The Court's decisions, however, have left lower courts without a clear answer. The decision below, for example, held that bankruptcy courts' power to authorize sales "free and clear of any interest," 11 U.S.C. § 363(f), can be used to extinguish *any* state interest—here, an easement providing access to a state entity's own property, Pet. App. 18a.

Worse, the decision below suggests that sovereign immunity places no constitutional limits on bankruptcy proceedings at all, *id.*, citing *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440 (2004)—which reasoned that the "*in rem*" nature of bankruptcy courts' jurisdiction means the exercise of that jurisdiction "is not an affront to the sovereignty of the State,"

id. at 450 n.5—and *Katz*, which said that sovereign immunity does not apply to certain "orders ancillary" to that jurisdiction, 546 U.S. at 373. Yet *Hood* and *Katz refused* to declare "that every law labeled a 'bankruptcy' law could . . . properly impinge upon state sovereign immunity," *Katz*, 546 U.S. at 378 n.15; *see also Hood*, 541 U.S. at 450 n.5. Indeed, the Court has applied sovereign immunity both to bankruptcy proceedings, *see United States v. Nordic Vill. Inc.*, 503 U.S. 30, 38–39 (1992); *Hoffman v. Conn. Dep't of Income Maint.*, 492 U.S. 96, 104 (1989), and to the adjudication of conflicting state claims to a decedent's estate—an *in rem* proceeding that strongly resembles the distribution of the bankruptcy estate, *Cory v. White*, 457 U.S. 85, 89–91 (1982).

The Court should grant the petition to clarify its decisions and reiterate that that bankruptcy is no sovereign-immunity-free zone.

I. This Case Presents a Recurring Question of National Importance That Has Confused the Lower Courts

A. The decision below incorrectly creates a novel and categorical bankruptcy-specific exception to sovereign immunity

1. For the first 110 years—at least—of our nation's history, federal courts had no reason to consider how state sovereign immunity might limit federal bankruptcy law. From 1789 until the 1898 Bankruptcy Act, Congress passed just three bankruptcy statutes—the

1800, 1841, and 1867 Acts. These three statutes were in effect for a total of just sixteen years—the first three years, the second two years, and the third eleven years—and *none* of them purported to discharge debts owed to state or federal governments. *See* Karen Cordry, Seminole *Seven Years On*, in Ann. Surv. of Bankr. Law 383 (2003); Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 345, 353, 361–62 (1991).

The 1800 Act expressly excluded debts owed to federal and state governments from the bankruptcy discharge. *See id.* at 347; 2 Stat. 19, 36. And while the 1841 and 1867 Acts did not specifically address the question, courts held that sovereign immunity precluded these statutes' application to debts owed to federal and state governments.[2] Notably, those decisions, issued in the first few decades following the Constitution's ratification, strongly suggest that the Constitution was *not* originally understood to allow States to

---

[2] *See, e.g.*, *People v. Herkimer*, 1825 WL 1681 (N.Y. Sup. Ct. 1825) ("The acts . . . of bankruptcy have been held, in England, not to bind the King. . . . The reason of that case applies to the insolvent acts, and the same rule must prevail."); *Com. v. Hutchinson*, 10 Pa. 466, 467–68 (1849) ("[D]ebts due the commonwealth are not barred by the bankrupt certificate"); *State v. Shelton*, 47 Conn. 400 (1879) (refusing to apply federal bankruptcy discharge to a debt owed a State, explaining "that the bankruptcy act of 1867 was intended to operate upon the citizens and corporations of the several states, and not upon the states, either in their united or separate sovereign capacities"); *United States v. Herron*, 87 U.S. (20 Wall.) 251, 263 & n.21 (1873) (citing *Hutchinson* and *Herkimer* and holding that discharge did not apply to debt owed to the United States).

be treated as mere private parties in federal bankruptcy proceedings.

The 1898 Act marked a turning point: The United States has had a federal bankruptcy law ever since, and the law "brought the country much closer to the basic type of system still in effect today." Tabb, *supra*, at 362–63. And, in some circumstances, the Act applied to federal and state governments: Rather than exempt all debts owed to federal and state governments from the bankruptcy discharge, it exempted taxes levied by taxing jurisdictions in which the debtor resided. 52 Stat. 840, 851. It also provided that the general process for proving claims applied equally to "all claims of the United States and of any State," *id.* at 867, gave priority to "taxes legally due . . . to the United States or any State," and—for the purpose of paying such taxes out of the estate—gave bankruptcy courts authority to determine such taxes' "amount or legality," *id.* at 874.

The 1898 Act, however, "contained no provision expressly indicating the extent to which its provisions applied to governmental entities or expressly addressing the question of sovereign immunity." S. Elizabeth Gibson, *Congressional Response to* Hoffman *and* Nordic Village*: Amended Section 106 and Sovereign Immunity*, 69 Am. Bankr. L.J. 311, 347 n.2 (1995). For example, while the Act allowed some debts owed to governments to be discharged, it said nothing about how that discharge was to be enforced. And these discharges did not apply to States directly, since courts at the time entered a general discharge that could be

raised as an affirmative defense in any subsequent state-court collection action. *See Brown v. Felsen*, 442 U.S. 127, 129–30 (1979).

As a result, even after the 1898 Act States continued to have little reason to think bankruptcy actions would undermine their sovereign immunity. Indeed, it was not until 1978 that Congress even attempted to abrogate States' sovereign immunity in the bankruptcy context. *See* 92 Stat. 2549, 2555–56.

This Court addressed how the Bankruptcy Code applies to States on a handful of occasions in the first half of the twentieth century, but in none of those cases did it suggest that Congress could remove States' sovereign immunity involuntarily, much less that such immunity is categorically inapplicable in bankruptcy. Thus, in 1931 the Court held that while the 1898 Act did not explicitly give "bankruptcy courts the power to sell property of the bankrupt free from incumbrances," it implicitly authorized bankruptcy courts to sell the debtor's property free of state tax liens. *Van Huffel v. Harkelrode*, 284 U.S. 225, 227 (1931). The Court did not discuss state sovereign immunity, but reasoned simply that "[t]o transfer the lien from the property to the proceeds of its sale is the exercise of a lesser power; and legislation conferring it is obviously constitutional." *Id.* at 228.

Two years later the Court upheld a bankruptcy-court order barring a State's tax claim because the State had failed to satisfy a procedural requirement, concluding that "[i]f a state desires to participate in

the assets of a bankrupt, she must submit to appropriate requirements by the controlling power." *People of State of New York v. Irving Tr. Co.*, 288 U.S. 329, 333 (1933). The Court again did not discuss state sovereign immunity, but simply announced its policy judgment that exempting States would make "orderly and expeditious proceedings . . . impossible and a fundamental purpose of the Bankruptcy Act would be frustrated." *Id.*

In 1947 the Court finally addressed state sovereign immunity in bankruptcy directly, in *Gardner v. New Jersey*, 329 U.S. 565 (1947). New Jersey had filed a claim for payment of taxes in the federal bankruptcy court, and after the court partially accepted objections to New Jersey's claim, the State argued that its sovereign immunity barred the court from doing so. *Id.* at 568–72. This Court, relying on *Van Huffel* and *Irving Trust*, rejected New Jersey's argument, emphasizing that the State had effectively waived its sovereign immunity by freely choosing to avail itself of the bankruptcy court's jurisdiction: "When a State files a proof of claim . . . it is using a traditional method of collecting a debt. . . . [H]e who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure." *Id.* at 573. The Court added that adjudication of New Jersey's claim was not "a suit against the State," because "[t]he whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res." *Id.* at 574. It thus concluded that "[w]hen the State becomes the actor and files a claim against the fund it waives any

immunity which it otherwise might have had respecting the adjudication of the claim." *Id.*

Importantly, the Court has never read *Gardner* as declaring bankruptcy somehow entirely insulated from state sovereign immunity. In *Hoffman v. Connecticut Department of Income Maintenance*, for example, the Court considered a sovereign-immunity challenge to a bankruptcy-court order requiring a state agency to pay the debtor for services rendered pursuant to a state Medicaid contract. 492 U.S. 96, 99 (1989) (plurality opinion). The Court held that sovereign immunity barred the order. *Id.* It explained that bankruptcy courts cannot "issue a money judgment against a State that has not filed a proof of claim in the bankruptcy proceeding," thereby underscoring that a State waives its sovereign immunity *only* when it deliberately chooses to participate in the bankruptcy proceeding. *Id.*

A few years later the Court decided *United States v. Nordic Village Inc.*, where it held that the federal government's sovereign immunity similarly barred a bankruptcy court from ordering the Internal Revenue Service to return money paid by the debtor's agent. 503 U.S. 30, 31 (1992). The Court rejected the argument that "a bankruptcy court's *in rem* jurisdiction overrides sovereign immunity." *Id.* at 38. The argument failed both because (1) the bankruptcy trustee "sought to recover a sum of money, not particular dollars," and there was thus "no *res* to which the court's *in rem* jurisdiction could have attached," and (2) any "*in rem* exception to the sovereign-immunity bar" does

not apply to "monetary recovery." *Id.* (internal quotation marks and citations omitted).

In 1996, the Court issued its decision in *Seminole Tribe of Florida v. Florida*, holding that "[e]ven when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against un-consenting States." 517 U.S. 44, 72 (1996). And, if there were any doubt this holding extended to bankruptcy, shortly thereafter the Court vacated and remanded a bankruptcy case for consideration in light thereof. *See Ohio Agric. Commodity Depositors Fund v. Mahern*, 1996 U.S. LEXIS 2408 (1996).

The Court returned to the subject of bankruptcy and sovereign immunity in 2004, when it decided *Tennessee Student Assistance Corporation v. Hood*, 541 U.S. 440 (2004). Citing *Gardner*'s discussion of the *in rem* nature of bankruptcy proceedings, *id.* at 447, the Court concluded that discharging debts the debtor owes a State is not a "suit against the state," *id.*, "because the court's jurisdiction is premised on the debtor and his estate, and not on the creditors," *id.* at 447. Relying on *Van Huffel*, *Irving Trust*, and *Gardner*—as well as its decisions excluding state sovereign immunity in certain *in rem* admiralty contexts—the Court held that a bankruptcy court's "exercise of its *in rem* jurisdiction to discharge a student loan debt is not an affront to the sovereignty of the State." *Id.* at 450 n.5. Notably, the Court neither attempted to reconcile this decision with *Nordic Village*—other than suggesting

in passing that there the "bankruptcy court's jurisdiction over the *res*" was not "unquestioned," *id.* at 448—nor attempted to reconcile its emphasis on the purportedly *in rem* nature of bankruptcy with its statement in *Missouri v. Fiske*, 290 U.S. 18, 28 (1933), that "[t]he fact that a suit in a federal court is *in rem*, or quasi *in rem*, furnishes no ground for the issue of process against a nonconsenting state." The Court did make clear, however, that it did *not* "hold that every exercise of a bankruptcy court's *in rem* jurisdiction will not offend the sovereignty of the State." *Id.*

The Court's most recent decision in this area came two years later, when it issued a 5-4 decision holding that state sovereign immunity does not bar actions to set aside preferential transfers to state agencies. *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 359 (2006). The Court again emphasized the *in rem* nature of bankruptcy, *id.* at 369–73, but declined to decide "whether actions to recover preferential transfers . . . are themselves properly characterized as *in rem*." *Id.* at 372. It instead announced that such proceedings are "ancillary to the bankruptcy courts' *in rem* jurisdiction" and are therefore not implicated by sovereign immunity. *Id.* at 373. The Court repeated its earlier admonition that it was *not* "suggest[ing] that every law labeled a 'bankruptcy' law could . . . properly impinge upon state sovereign immunity," but declined to explain how lower courts should determine when state sovereign immunity does and does not apply to such laws. *Id.* at 378 n.15.

In sum, the Court has explicitly addressed the intersection of state sovereign immunity and federal bankruptcy law just a handful of times, starting only in the mid-twentieth century. And these decisions not only lack early historical support, but are also belied by the early decisions refusing to apply the 1841 and 1867 Acts to debts owed to federal and state governments. It is thus far from clear whether the Court should preserve these decisions going forward.

2. But even if the Court were to decline to disturb its earlier precedents, these decisions are limited to the notion that state sovereign immunity is not offended when bankruptcy courts exercise *in rem* jurisdiction over the *debtor's property* to discharge *obligations to creditors*.

The decision below, however, created a much broader exception that threatens to destroy any constitutional state-sovereignty limits in bankruptcy. Upholding the elimination of Petitioner's easement in a 363(f) sale, it declared that a bankruptcy court "can extinguish the state's interest burdening" the debtor's estate "without implicating the Eleventh Amendment." Pet. App. 18a–19a. That is neither how bankruptcy nor our constitutional system works.

Under 363(f), a debtor may sell its property "free and clear" of liens and other interests. This provision codifies the authority the Court recognized in *Van Huffel*, and is premised on the bankruptcy court's power "to collect, reduce to money and distribute the estates of bankrupts, and to determine controversies

with relation thereto." *Van Huffel*, 284 U.S. at 228. Such free-and-clear sales have historically applied to claims for payment secured by interests held *against* the property, such as liens or mortgages; the proceeds of such sales are then used to satisfy the claim for payment. *See, e.g., id.* (describing this power as the authority "[t]o transfer the lien from the property to the proceeds of its sale"). The purpose of such sales is to ensure that a lien owner "may not, without the bankruptcy court's permission, institute proceedings in a state court to enforce [the lien], since so doing might interfere with the orderly administration of the estate." *Straton v. New*, 283 U.S. 318, 321 (1931). This rule benefits the debtor and creditors, including in many circumstances the lienholder itself.

Accordingly, it is understandable why—at least under the reasoning of *Gardner*, *Katz*, and *Hood*—state sovereign immunity would not block a 363(f) sale where the State is a *creditor* holding a claim for payment secured against the debtor's property. Bankruptcy law would prevent the State from attempting, by virtue of its lien, to control the debtor's disposition of its property and thereby interfere with the debtor's "fresh start." *Hood*, 541 U.S. at 447.

Here, however, the decision below upheld a 363(f) sale that eliminated not a lien or other secured claim for payment but *a distinct property right that a state entity held as a third party*. State law provides that the easement at issue here is a property right dominant to the servient estate, *Redburn v. City of Victoria*, 898 F.3d 486, 495 (5th Cir. 2018), that may not be

unilaterally divested by the owner of the servient estate, *May v. San Antonio & A.P. Town Site Co.,* 18 S.W. 959, 960 (Tex. 1892). The decision below held that the bankruptcy court could eradicate this property right in order to generate revenue to be distributed to creditors. But because the state entity whose property right was eliminated was a third party, not a creditor, *the state entity was not among the beneficiaries of the sale*. Far from it—the state entity lost a valuable property interest, an easement used to reach its own property. That bankruptcy courts' *in rem* jurisdiction gives them the power to "transfer the [State's] lien from the property to the proceeds of its sale," *Van Huffel*, 284 U.S. at 228, does not imply that they have the power to *eliminate* a State's property interest without the State's consent.

The decision below wrongly concluded that the Constitution secures States no sovereign immunity in bankruptcy cases at all—even where, as here, the State is a non-creditor third-party who holds a property right dominant to property in the bankruptcy estate. Pet. App. 18a–19a. That rule goes much too far.

B. Allowing bankruptcy to serve as an end-run around sovereign immunity creates severe problems

This case presents an issue of critical importance because allowing bankruptcy courts to divest third-party state entities of their property interests without their consent will impede state projects and undermine state treasuries. *Amici* States, like all States, commonly hold property rights for public use. States

often obtain easements to build roads and other public works, and easements play an integral role in the cooperative state and federal scheme to place valuable oil and gas pipelines. *See* 15 U.S.C. § 717f. And States routinely acquire with taxpayer dollars, or obtain via operation of state law, countless other less-than-fee-simple interests in land: These interests include conservation easements to provide public access to beaches and inland waterways, protect land uses protected by the public trust doctrine, promote important ecological objectives, preserve access to the State's own lands, and ensure conservation of private land to protect nearby state resources. *See, e.g.,* Cal. Pub. Res. Code §§ 5011.7, 6210.4, 6210.5, 6210.9, 6339, 7552.5, 30534, 31402.2; Fla. Stat. §§ 253.0251, 259.105, 570.71; N.J. Stat. § 12:3-64.

The unprecedented decision below would allow bankruptcy courts to use 363(f) to divest States of their property rights—even where States do not consent or appear in court to request anything from the bankruptcy estate. And there will be many opportunities for bankruptcy courts to do so, for the 363(f) sale "has become an increasingly important aspect of Chapter 11 filings." Matthew T. Gunlock, *An Appeal to Equity: Why Bankruptcy Courts Should Resort to Equitable Powers for Latitude in Their Interpretation of "Interests" Under Section 363(f) of the Bankruptcy Code*, 47 Wm. & Mary L. Rev. 347, 352 (2005).

Of course some state property interests are not capable of being reduced to a monetary award—such as

an easement providing the only practical access to a public beach. Moreover, because in these situations the State is not a creditor, it is not clear how bankruptcy courts will ensure States are compensated for the loss of their property. It is axiomatic that private parties cannot take government property, period. *See, e.g., In re PennEast Pipeline Co., LLC*, 938 F.3d 96, 102 (3d Cir. 2019) (holding private party could not use *in rem* procedure to take State's property without consent); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 262 (1997) (applying sovereign immunity to bar quiet title action against state property). Yet the Fifth Circuit's decision would give private parties the ability to use bankruptcy to do exactly that, potentially forcing States to pay multiple times for the same easement or lose access to their property.

Nor are the problems with the decision below limited to free-and-clear sales. Bankruptcy trustees may also sell jointly owned property. 11 U.S.C. § 363(h). And creditors can sometimes compel the sale of property in which both debtors *and* third-party non-debtors share interests, even where the non-debtor does *not* consent. *See, e.g., In re Sturman*, 222 B.R. 694, 702 (Bankr. S.D.N.Y. 1998). This means that when a State co-owns property with a private debtor, the State's interest in the property could be sold—without its consent—for the benefit of creditors.

Making matters worse, the decision below would force States to defend their property interests in bankruptcy proceedings around the country. In contrast to

proceedings in Article III district courts, bankruptcy has lenient venue rules, 28 U.S.C. § 1408, and permits nationwide service, *compare* Fed. R. Civ. P. 4(e) *with* Fed. R. Bankr. P. 7004(d). And most courts have held that bankruptcy courts have personal jurisdiction any time a party has sufficient contacts with the United States generally, whether or not the party has any contacts with the forum State. *See* 8 Norton Bankr. L. & Prac. 3d § 162:7. The decision below would thus allow bankruptcy courts to compel a State—on pain of losing its property—to defend itself in myriad proceedings thousands of miles away.

C. The decision below exemplifies the lower-court confusion over the applicability of sovereign immunity in bankruptcy

The decision below is just one example of the lower courts' confusion regarding how to apply *Hood*—a confusion at least partially caused by the difficulty of "squar[ing]" these decisions "with this Court's settled state sovereign immunity jurisprudence," *see Katz,* 546 U.S. at 379 (Thomas, J., dissenting).

While some courts seem to agree with the below decision's mistaken reading of *Hood* and *Katz*, *see, e.g., In re Harnett*, 558 B.R. 655, 659–60 (Bankr. D. Conn. 2016); *In re DBSI, Inc.*, 463 B.R. 709, 713 (Bankr. D. Del. 2012), many courts have followed the Court's example in *Hoffman* and *Nordic Village* and held that States *can* raise sovereign immunity defenses in bankruptcy, *see, e.g., In re Patriot Coal Corp*,

562 B.R. 632, 635 (Bankr. E.D. Va. 2016); *In re La Paloma Generating Co.*, 588 B.R. 695, 732 (Bankr. D. Del. 2018), *aff'd sub nom. In re La Paloma Generating Co. LLC*, 607 B.R. 794 (D. Del. 2019); *Shieldalloy Metallurgical Corp. v. New Jersey Dep't of Envtl. Prot.*, 743 F. Supp. 2d 429, 438 (D.N.J. 2010).

The Court should resolve this confusion and reaffirm that States can assert sovereign immunity in *in rem* proceedings where their property is at stake. "[A]n action—otherwise barred as an *in personam* action against the State—cannot be maintained through seizure of property owned by the State." *Fla. Department of State v. Treasure Salvors, Inc.,* 458 U.S. 670, 699 (1982); *see also In re New York*, 256 U.S. 503, 510 (1921) ("The principle so uniformly held to exempt the property of municipal corporations . . . from seizure by admiralty process in rem applies with even greater force to exempt public property of a state . . . ."). A wholesale "*in rem*" exception would allow sovereign immunity to "easily be circumvented; an action for damages could be brought simply by first attaching property that belonged to the State and then proceeding *in rem*." *Treasure Salvors*, 458 U.S. at 699.

Yet the decision below allows this circumvention, putting state fiscs, public works, and conservation efforts at the whim of bankruptcy courts. *Hood* and *Katz* do not contemplate, much less compel, this result.

II. The Court Should Use This Case To Reestablish Its Precedents on a Practicable, Historically Grounded Basis

A. Sovereign immunity protects property interests States hold as non-creditor third-parties

Several justices of this Court have questioned whether the Court has taken the right approach to sovereign immunity in the bankruptcy context. *See Cent. Virginia Cmty. Coll v. Katz,* 546 U.S. 356, 379–93 (2006) (Thomas, J., dissenting). For good reason—it is far from clear that this approach is supported by historical evidence or consistent with the Court's other sovereign-immunity decisions. *Id.* But in any case, it is clear that the Court's current precedents go no farther than permitting bankruptcy-court jurisdiction over *claims for payment* States hold *as creditors*.

The Court has justified its decisions on the basis of the bankruptcy court's *in rem* jurisdiction over the "*debtor's* property" and the "equitable distribution of that property among the debtor's *creditors*." *Id.* at 363–64 (emphasis added). The Court has reasoned that the exercise of this jurisdiction need not involve suit against the State because the only *res* over which the bankruptcy court truly exercises jurisdiction in these circumstances is the *debtor's* property.

Accordingly, under the Court's current precedents, a 363(f) sale of property sold free and clear of a State's lien does not offend the State's sovereign immunity.

Such a sale effectuates the purpose of the lien: A lien is simply a right to have the property to which it is attached be used for payment of a debt, and that is precisely what such a sale does.

Sovereign immunity does, however, bar bankruptcy courts from extinguishing property interests held by States *as third-party non-creditors*. Both in the bankruptcy context and elsewhere, the Court has long held that sovereign immunity prohibits federal courts from exercising jurisdiction—including *in rem* jurisdiction—to adjudicate a State's property interests without the State's consent. *See, e.g., California v. Deep Sea Research, Inc.* 523 U.S. 491, 506 (1998) (explaining that "the Eleventh Amendment bars federal jurisdiction over general title disputes relating to state property interests"); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997) (applying sovereign immunity to bar quiet title action); *United States v. Brosnan*, 363 U.S. 237, 242 (1960) ("[A]ny suit affecting property in which [the United States] had an interest . . . was therefore a suit against the United States which could not be maintained without its consent."); *Chandler v. Dix*, 194 U.S. 590, 591 (1904) ("The state's title . . . is the only one assailed. The state, therefore, is a necessary party . . . and, as this suit cannot be maintained against a state, the bill . . . must be dismissed.").

The decision below squarely contradicts this longstanding precedent. The 363(f) sale here was not "like Tennessee's debt claim against Pamela Hood's estate." Pet. App. 18a. Neither *Hood* nor *Katz* involved

a real property right of a *third-party non-creditor*. The below decision's brief explanation rests on the idea that the *in rem* nature of bankruptcy proceedings permits bankruptcy-court divestment of *any* state property interest without implicating sovereign immunity. Pet. App. 18a–19a. But neither *Hood* nor *Katz* contemplated such an extraordinary result. As the Court noted in *Katz*, not "every law labelled a 'bankruptcy law' could . . . properly impinge upon state sovereign immunity." 546 U.S. at 378 n.15.

B. The history of bankruptcy law supports the distinction between creditors' claims for payment and third-parties' property rights

The Court should grant the petition to correct the mistaken decision below and reestablish its precedent on surer footing: Whether or not bankruptcy courts may adjudicate claims for payment States hold as *creditors*, sovereign immunity surely bars them from adjudicating property interests States hold as *non-creditor third-parties*. This distinction is clear, practicable, and supported by the historical evidence.

Historically, the bounds of a bankruptcy court's jurisdiction were understood not to extend beyond the *debtor's* property or obligations. *See e.g., In re Michaelis & Lindeman*, 196 F. 718, 719 (S.D.N.Y. 1912); *In re Klein*, 14 F. Cas. 716 (C.C.D. Mo. 1843) (Catron, J., riding circuit). The purpose of this jurisdiction is to "place the *property of the bankrupt* under the control of court" with the end goal of "its equal distribution

among the creditors." *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300, 307 (1911) (emphasis added). This prevents "a race of diligence" by creditors to seek attachment of the debtor's property. *Id.* at 308.

And because it is the debtor who placed *her own* property within the jurisdiction of the bankruptcy court, bankruptcy proceedings traditionally do not require adjudicating the property rights of non-creditor third parties. The State's sovereignty is therefore generally not impugned in such cases since (1) it is not the State's property interests that are being adjudicated; and (2) the end goal is "equal distribution among the creditors." *Id.* at 307.

Indeed, the Court's decisions delineating the bounds of bankruptcy courts' jurisdictional authority repeatedly emphasize that the jurisdiction concerns the *res* of the *debtor*. *See, e.g., Shawhan v. Wherritt,* 48 U.S. 627 (1849); *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U.S. 656, 661 (1875); *Hanover Nat. Bank v. Moyses*, 186 U.S. 181, 192 (1902); *Straton v. New*, 283 U.S. 318, 321 (1931). Notably, in each of these cases, jurisdiction extended no further than the debtor's property or the proceeds of sale of that property. As the Court noted in *Katz*, this strict understanding of the limits of bankruptcy jurisdiction antedate constitutional ratification: Early commentators recognized that bankruptcy assignees could "pursue any legal method of recovering [*the debtor's*] property." 546 U.S. at 370 (quoting 2 W. Blackstone, Commentaries on the Laws of England 486 (1766)).

As noted above, at the same time the Court has long recognized that sovereign immunity applies in *in rem* cases affecting the *State's* property. *See, e.g., Christian v. Atl. & N.C.R. Co.,* 133 U.S. 233, 243–4, (1890) (distinguishing cases "in which the interests of the state may be indirectly affected" and cases where "the object is to take and appropriate the state's property for the purpose of satisfying [a debtor's] obligations"); *In re New York*, 256 U.S. 503, 510 (1921); *Coeur d'Alene*, 521 U.S. at 281.

This distinction—between the *res* of the debtor and the *res* of a third party—underlies the authority to sell debtor property free and clear of liens, "rendering to the parties interested their respective priorities in the proceeds." *Ray v. Norseworthy*, 90 U.S. 128, 134 (1874). The Court has upheld this authority because bankruptcy courts' jurisdiction encompasses disputes between the debtor "and any *creditors* . . . to the *ascertainment and liquidation of the liens and other specific claims thereon*, to the adjustment of the . . . conflicting interests of all parties, and to . . . the due administration of the assets *among all the creditors*." *Id.* at 134 & nn. 3–6. Because the bankruptcy court has the power to discharge the debtor's obligation, it has the "lesser power" of "transfer[ing]" a lien securing the obligation "from the property to the proceeds of its sale." *Van Huffel v. Harkelrode*, 284 U.S. 225, 228 (1931).

When it comes to bankruptcy sales of property encumbered by non-creditor third-parties' interests, however, the result was very different. Early commentators noted that a "trustee transfers only such that

he has, and if it be real property, *he has no authority to warrant the title, other than his title to the same and in the condition which he received it*." Brandenburg on Bankruptcy § 1293 (1917) (emphasis added); *see also* William Miller Collier et. al, *The Law and Practice of Bankruptcy Under the National Bankruptcy Act of 1898* 1120 (11th ed. 1917) ("A lien or other incumbrance on real property belonging to the bankrupt attaches to such property in the hands of his trustee, and is effectual against such property to the same extent as though bankruptcy had not intervened . . . ."). Nineteenth and early twentieth century bankruptcy courts were keenly aware of this distinction. *See, e.g.*, *In re Rockwood*, 91 F. 363, 364 (N.D. Iowa 1899) (holding that Bankruptcy Code did not authorize marshall "to take property away from the possession of a third party who holds it under a claim of right or title"); *In re Kelly*, 91 F. 504, 505 (W.D. Tenn. 1899) (noting that it would be "quite impossible for congress to pass an act to seize property in the hands of third persons").

In 1978 Congress chose to depart from this history and expand bankruptcy courts' power to authorize sales of estate property "free and clear of *any interest* in such property of an entity other than the estate." 92 Stat. 2549, 2572–73 (emphasis added). But whether or not Congress has the power to authorize "free and clear" sales that divest property interests of non-creditor *private parties*, the States' sovereign immunity precludes such sales as applied to States.

There is simply no historical support for the notion that federal bankruptcy courts may destroy property

interests States hold as non-creditor third-parties. The Court should grant the petition and reaffirm that state sovereign immunity applies to bankruptcy courts just as it does to Article III courts.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Office of the Indiana
Attorney General
IGC South, 5th Floor
302 W. Washington St.
Indianapolis, IN 46204
(317) 232-6255
Tom.Fisher@atg.in.gov
**Counsel of Record*

CURTIS T. HILL, JR.
Attorney General
THOMAS M. FISHER*
Solicitor General
KIAN HUDSON
Deputy Solicitor General
JULIA C. PAYNE
Deputy Attorney General

Counsel for Amici *States*

Dated: August 19, 2020

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

KEVIN G. CLARKSON
Attorney General
State of Alaska

XAVIER BECERRA
Attorney General
State of California

PHILIP J. WEISER
Attorney General
State of Colorado

WILLIAM TONG
Attorney General
State of Connecticut

ASHLEY MOODY
Attorney General
State of Florida

CHRISTOPHER M. CARR
Attorney General
State of Georgia

LAWRENCE G. WASDEN
Attorney General
State of Idaho

DEREK SCHMIDT
Attorney General
State of Kansas

DANIEL CAMERON
Attorney General
Commonwealth of
Kentucky

JEFFREY M. LANDRY
Attorney General
State of Louisiana

AARON M. FREY
Attorney General
State of Maine

DANA NESSEL
Attorney General
State of Michigan

KEITH ELLISON
Attorney General
State of Minnesota

TIMOTHY C. FOX
Attorney General
State of Montana

DOUG PETERSON
Attorney General
State of Nebraska

AARON D. FORD
Attorney General
State of Nevada

HECTOR H. BALDERAS
Attorney General
State of New Mexico

WAYNE STENEHJEM
Attorney General
State of North Dakota

DAVID A. YOST
Attorney General
State of Ohio

MIKE HUNTER
Attorney General
State of Oklahoma

ELLEN F. ROSENBLUM
Attorney General
State of Oregon

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania

ALAN WILSON
Attorney General
State of South Carolina

JASON R. RAVNSBORG
Attorney General
State of South Dakota

SEAN D. REYES
Attorney General
State of Utah

MARK R. HERRING
Attorney General
Commonwealth of Virginia

ROBERT W. FERGUSON
Attorney General
State of Washington

JOSH KAUL
Attorney General
State of Wisconsin