1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CENTRAL VIRGINIA COMMUNITY :

4 COLLEGE, ET AL., :

5 Petitioners, :

6 v. : No. 04-885

7 BERNARD KATZ, LIQUIDATING :

8 SUPERVISOR FOR WALLACE'S :

9 BOOKSTORES, INC. :

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11 Washington, D.C.

12 Monday, October 31, 2005

13 The above-entitled matter came on for oral argument

14 before the Supreme Court of the United States at 11:00 a.m.

15 APPEARANCES:

16 WILLIAM E. THRO, ESQ., Solicitor General, Richmond,

17 Virginia; on behalf of the Petitioners.

18 KIM MARTIN LEWIS, ESQ., Cincinnati, Ohio; on behalf of the

19 Respondent.

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1 P R O C E E D I N G S

2 [11:00 a.m.]

3 CHIEF JUSTICE ROBERTS: We'll hear argument next in

4 Central Virginia Community College versus Katz.

5 Mr. Thro.

6 ORAL ARGUMENT OF WILLIAM E. THRO

7 ON BEHALF OF PETITIONERS

8 MR. THRO: Mr. Chief Justice, and may it please the

9 Court:

10 This case involves a conflict between two

11 constitutional values. On the one hand, Congress has the

12 sovereign power to make laws which apply to everyone, including

13 the States. On the other hand, the States have sovereign

14 immunity from all aspects of suit.

15 In the past, this Court has reconciled this conflict

16 by drawing a line between sovereign power and sovereign

17 immunity. States are bound by Federal law, but the States are

18 immune from monetary damages for violations of those laws.

19 In the bankruptcy context, this line means the

20 States are bound by the discharge decisions, but that the States

21 are immune from the trustee's attempts to augment the estate

22 through monetary judgment.

23 JUSTICE O'CONNOR: Can you tell us how often States

24 are creditors in bankruptcies around the country? Do you have

25 any idea?

1 MR. THRO: There is some information to that effect
2 in the amicus brief of Ohio and every other State of the Union,
3 Justice O'Connor, but my recollection is that the States are
4 creditors in probably the majority of bankruptcies around the
5 country.
6 JUSTICE O'CONNOR: So, if you're correct, how would
7 the result you want affect all the other creditors in these
8 bankruptcies?
9 MR. THRO: It would have some impact on the other
10 creditors, in that you would not be able to augment the estate
11 by collecting a monetary judgment from the State.
12 JUSTICE O'CONNOR: And probably, on your theory,
13 States can disregard the automatic stay that issues --
14 MR. THRO: No, not at all --
15 JUSTICE O'CONNOR: -- when a bankruptcy --
16 MR. THRO: -- Your Honor.
17 JUSTICE O'CONNOR: -- commences?
18 MR. THRO: No. Under our -- under our theory, the
19 -- theory, the States are bound by the automatic stay. The
20 States are also bound by --
21 JUSTICE O'CONNOR: How is that, on your theory?
22 MR. THRO: Well, because --
23 JUSTICE O'CONNOR: Why wouldn't the sovereign
24 immunity extend to that?
25 MR. THRO: The automatic stay is an exercise of

1 sovereign -- of the sovereign power of Congress, just as the
2 discharge decisions of a bankruptcy court are an exercise of the
3 sovereign power of Congress. The States are bound by the
4 discharge decisions. States are also bound by the automatic
5 stay. Where we draw the line is where the trustee attempts to
6 get a monetary judgment as a means of augmenting the estate,
7 which is what is happening with this case.
8 JUSTICE KENNEDY: Well, why don't we say that that's
9 the exercise of the sovereign power of commerce, just -- of
10 Congress, just like you said? That --
11 MR. THRO: The automatic --
12 JUSTICE KENNEDY: I mean, it seems that that answer
13 is just conclusory, that it's an exercise of the sovereign power
14 of Congress, okay. That's just -- that's just a conclusion.
15 That's not a reason.
16 MR. THRO: Yes, Your Honor. The -- this Court's
17 decisions have struck a balance between respecting the need for
18 the States to obey Federal law and, at the same time, respecting
19 the constitutional value of the States' sovereign immunity.
20 What we have here in -- with respect to the automatic stay and
21 with respect to the discharge decisions, is States being bound
22 by Federal law, no different than the States being bound by the
23 minimum wage law, for example. But what we have with respect to
24 the trustee's attempts to augment the estate by collecting a
25 monetary judgment against the States is an attempt to invade the

1 State treasury, which this Court's decisions clearly state is
2 barred by sovereign immunity.
3 JUSTICE BREYER: Tell me, if you're -- if you're
4 right -- let's suppose you're right. I'm over here. That's --
5 [Laughter.]
6 MR. THRO: Sorry, Justice Breyer.
7 JUSTICE BREYER: That's all right. So, it's hard to
8 figure out, because the direction -- you can't tell by the
9 sound. I don't know if there's a modern system that would help
10 with that, but -- you're right.
11 Suppose that the State -- suppose you're right.
12 What I'd worry about -- and I'd like your response to this -- is
13 that in bankruptcies, or weak firms -- a lot of firms are weak,
14 and they owe a lot of money to the States. So, the States
15 figure this out after a while. It takes a few years to seep
16 through, but once they see what they can do, they say, "Here's
17 what we'll do. Settle your claims against the State, which
18 happen to be pretty good, for 50 cents on the dollar. Give us
19 the money. And you're -- we're out of it." So, they settle it.
20 A month later, phhht, bankrupt.
21 Now, two things have happened. The States got 50
22 cents on the dollar, every other creditor gets 5 cents on the
23 dollar, because they were a month ahead of it. The second thing
24 that happened is, the creditor -- the firm lost the chance to
25 come in and be rehabilitated. So, the result of this is two bad

1 things: bankruptcy's law's basic purpose, to treat creditors
2 fairly, bankruptcy law's basic purpose, to give firms a chance
3 to rehabilitate, are both seriously undermined. So, given the
4 Bankruptcy Clause in the Constitution, how is it possible to say
5 that Congress does not have the power to prevent those two very,
6 very seriously harmful results -- harmful in terms of the basic
7 purpose of the Bankruptcy Clause?
8 MR. THRO: Your Honor, the Constitution --
9 specifically, the Eleventh Amendment -- confirms that the States
10 are not to be treated like private parties. Private parties are
11 not immune from contract actions; States are. Private parties
12 are not immune from torts -- from tort actions.
13 JUSTICE BREYER: But there is not a Tort Clause of
14 the United States Constitution. There is not a Contract Clause.
15 And there is a Bankruptcy Clause.
16 MR. THRO: There is a Bankruptcy Clause, Your Honor,
17 and that clause empowers Congress to make bankruptcy laws which
18 apply throughout the entire Nation and which apply to the
19 States. However, the Bankruptcy Clause does not authorize
20 Congress to abrogate the State's sovereign immunity from suit.
21 When -- while abrogation can be accomplished using other
22 provisions, it cannot be accomplished using the bankruptcy
23 provision.
24 JUSTICE SCALIA: Bankruptcy Clause presumably does
25 not allow Congress to set up the bankruptcy law in such a way

1 that it would amount to a taking of property without just
2 compensation, right? Wouldn't allow another constitution to be
3 violated. So the only question here is whether the
4 constitutional protection of States' sovereign immunity can be
5 taken away by the Bankruptcy Clause; whereas, other provisions
6 clearly can, right?
7 MR. THRO: Yes, Your Honor. And this Court said, in
8 Seminole Tribe, that the Article 1 powers could not be used to
9 take away, or to abrogate, the States' sovereign immunity. Now,
10 obviously, section 5 of the Fourteenth Amendment can be used to
11 do it, but there is no suggestion that Congress used section 5
12 of the Fourteenth Amendment in enacting its attempt to abrogate
13 sovereign immunity.
14 JUSTICE STEVENS: But, may I ask, how do you -- how
15 do you reach the conclusion that you're bound by the automatic
16 stay and the discharge? Why aren't those also an infringement
17 of State sovereignty?
18 MR. THRO: I think there is a strong argument which
19 can be made that both the automatic stay and the discharge
20 decisions infringe upon State sovereignty. However, this
21 Court's decisions, dating back to at least New York versus
22 Irving Trust in 1933, have made it clear that the States are
23 bound by the provisions of the discharge orders. I think, also,
24 the automatic stay is something similar to the Ex Parte Young
25 doctrine, in terms of the States being enjoined from doing

1 something else. However --

2 JUSTICE SCALIA: To say -- to say that the State

3 can't be sued is not the same thing as saying that the State can

4 sue, is it? You --

5 MR. THRO: No, it's not, Your Honor.

6 JUSTICE SCALIA: -- you can prevent the State from

7 suing, even though you can't sue the State. There's no

8 incompatibility, is there?

9 MR. THRO: No, there's not, Your Honor. What we

10 have --

11 JUSTICE O'CONNOR: Now, do you -- do you agree that

12 there are situations where, notwithstanding the sovereign

13 immunity of States, there can be in rem jurisdiction in a court

14 to resolve claims against property --

15 MR. THRO: Certain --

16 JUSTICE O'CONNOR: -- and bind the State, as well?

17 MR. THRO: Certainly, this Court's decisions

18 indicate that, in some instances, there can be in rem decisions

19 which --

20 JUSTICE O'CONNOR: Well, maybe bankruptcy estates

21 are one such instance.

22 MR. THRO: As this Court noted in Hood, the

23 bankruptcy decisions regarding the discharge are in rem and, of

24 course, are binding upon the State. But what we have here is

25 not an in rem proceeding. As this Court noted in Nordic

1 Village, an action to recover a preferential transfer claim is
2 not an in rem proceeding. Rather, as this Court noted in
3 Schoenthal versus Irving Trust in 1932, and Granfinanciera
4 versus Nordberg in 1989, actions to recover preferential
5 transfer are much like actions to recover a contract claim.
6 That is, like a contract claim, they do not involve the core
7 bankruptcy proceedings, but, rather, involve matters that are --
8 or controversies that are tangential to the core bankruptcy
9 proceedings. They're nothing more than an attempt to augment
10 the State.
11 And where we would draw the line, and where we
12 propose that this Court draws -- draw the line -- and a line
13 that we believe is consistent with this Court's previous
14 decisions -- is that the States are bound by discharge, the
15 States are subject to the automatic stay, but the trustees'
16 attempts to obtain monetary judgments, and thereby augment the
17 value of the estate, are barred by sovereign immunity.
18 JUSTICE STEVENS: Wouldn't it at least be
19 theoretically possible to differentiate between setting aside a
20 preference, on the one hand, and just bringing a suit for a tort
21 or a breach of contact, on the other? One could treat the
22 assets that are -- were transferred prematurely -- or hastily,
23 whatever you call it -- as part of the estate. At least it's
24 conceptually possible.
25 MR. THRO: Right. Conceptually, it's possible. And

1 certainly there is an argument that the bankruptcy code says
2 that preferential transfer is, in fact, property of the State.
3 With respect, however, to a preference to a State, we would say
4 that that particular reading, as applied to the State, is
5 unconstitutional. I don't believe Congress can make a law which
6 would require the State to divest money or something to which
7 the State has in its possession in which the State has a
8 colorable claim of ownership. Here, there is no dispute that
9 the money is in the State treasury. What they are trying to do
10 is to recover a monetary judgment from the State. As this Court
11 said in Schoenfeld [sic] and in Granfinanciera, this is very
12 much like a contracts claim.
13 JUSTICE SCALIA: I suppose you could say that a --
14 the intangible of a contract claim is part of the estate, too,
15 right? It's --
16 MR. THRO: The current bankruptcy code does not say
17 that. In theory, I --
18 JUSTICE SCALIA: But, I mean, you could be --
19 there's no less reason to say that that's part of the res than
20 there is to say that the preferential transfer is.
21 MR. THRO: That's correct, Your Honor. And just as
22 the contract claims are barred, so are the preferential --
23 JUSTICE STEVENS: Except Congress --
24 MR. THRO: -- transfer claims.
25 JUSTICE STEVENS: -- has drawn that very distinction

1 hadn't it?

2 MR. THRO: I'm sorry, Your Honor?

3 JUSTICE STEVENS: I said Congress has drawn the

4 distinction that -- between the preferential claim and the

5 contract claim.

6 MR. THRO: Congress has drawn a distinction between

7 preferential transfer claims and contracts claims. However,

8 this Court has noted that the difference between an action to

9 recover a contract claim in order to augment the estate and an

10 action to recover a preferential transfer in order to augment

11 the estate, that there really is no difference. Both are --

12 JUSTICE STEVENS: But the theory of the second is

13 that you're not augmenting the estate, you're merely preserving

14 the estate, isn't it?

15 MR. THRO: I think -- Congress has certainly defined

16 the estate so that a preferential transfer is considered

17 property. I'm not sure that Congress can do that when the

18 preferential transfer involves the estate. That strikes me as

19 the effect of Congress, in effect, saying that property which

20 clearly belongs to the State no longer does. I think that's

21 probably an affront to Tenth Amendment federalism concerns. But

22 what we do have here is a situation where, like in a breach of

23 contract claim, they are trying to recovery a monetary judgment

24 in order to augment the estate. It's our position that that is

25 barred by sovereign immunity.

1 JUSTICE O'CONNOR: Well, now --

2 JUSTICE SOUTER: What if the --

3 JUSTICE O'CONNOR: -- Mr. Thro, doesn't the

4 Respondent want to dismiss the contract claims here?

5 MR. THRO: The Respondent had asked the bankruptcy

6 court -- after reading our brief, the Respondent asked the

7 bankruptcy court to dismiss --

8 JUSTICE O'CONNOR: Yes. So, why do you insist that

9 they be adjudicated?

10 MR. THRO: Well, Your Honor, I think this is an

11 attempt by the Respondent to rewrite the question presented.

12 Neither --

13 JUSTICE O'CONNOR: Yes, but why --

14 MR. THRO: -- our petition --

15 JUSTICE O'CONNOR: -- why should we force a

16 plaintiff below to pursue claims they want to give up? That

17 just seems so odd to me.

18 MR. THRO: It is rather odd, Your Honor, but my read

19 of this Court's rules are that there is no mechanism for a

20 Respondent, the party that won below, to, in effect, give up its

21 victory once they get in this Court. I'm not quite sure why

22 they wish to drop the breach of contract claims. Perhaps they

23 feel that by dropping the breach of contract claim, they somehow

24 obtain a tactical advantage. And, if that's the case, certainly

25 this Court should not allow them to rewrite the question

1 presented in order to obtain a tactical advantage. But, in any
2 event, both the breach of contract claim and the preferential
3 transfer claims are attempts to augment the estate and are
4 barred by sovereign immunity.
5 JUSTICE KENNEDY: Well, do you think the waiver
6 argument that's made is properly before us?
7 MR. THRO: No. The waiver argument is not properly
8 before you. It was not passed upon by the Court of Appeals
9 below. Moreover, it was, for the most part, not preserved in
10 the Court of Appeals below. While they did argue that Virginia
11 Military Institute waived sovereign immunity for all claims
12 involving Virginia Military Institute in the Sixth Circuit, they
13 made no such argument that filing proof of claim constituted a
14 waiver of sovereign immunity for the transactions involving the
15 other institutions.
16 JUSTICE KENNEDY: You may be right about that, but,
17 while I've got you here, let's assume just one State entity, not
18 multiple State entities. And the State has received a
19 preferential transfer of $2,000. It still has an outstanding
20 claim -- a different claim against the same bankrupt for $1,000.
21 And it goes in to enforce its claim for $1,000. Could we hold,
22 consistently with the Eleventh Amendment, that that is a waiver?
23 MR. THRO: I believe that this Court's decisions
24 indicate the following position. When a State files a proof of
25 claim, it exposes itself to the trustee's defenses to that

1 claim. So, in other words, if the -- if the -- if the
2 preferential transfer was part of the same transaction or
3 occurrence --
4 JUSTICE KENNEDY: No, different claim. The --
5 MR. THRO: Different claim.
6 JUSTICE KENNEDY: One, the State received $2,000
7 worth of taxes, but it -- still have its $1,000 contract claim.
8 MR. THRO: Then I believe that this Court's opinions
9 indicate that that would not be a waiver with respect to the
10 different transaction or occurrence. Certainly, by filing the
11 proof of claim you would expose yourself to the trustee's
12 defenses with respect to the same transaction or occurrence.
13 JUSTICE SOUTER: Go --
14 JUSTICE GINSBURG: So was -- there's a section in
15 the back of -- I think it's 160(c) [sic] -- that says if it's an
16 unrelated transaction, then -- so, it would be a permissive
17 counterclaim if we had ordinary civil proceedings. Then there
18 can be a setoff to the extent of the claim that's being made
19 against the bankrupt estate. There can't be any affirmative
20 recovery, as there could be with a permissive -- with a
21 compulsory counterclaim. But you're saying that that section is
22 unconstitutional -- 160(c) [sic]?
23 MR. THRO: To the extent that 106(c) goes beyond the
24 rule announced in Gardner, then, yes, it has constitutional
25 problems. But you need not reach the constitutionality of

1 106(c). What we were talking about here is basically a
2 straightforward application of this Court's precedence in a line
3 that you have drawn in other contexts.
4 JUSTICE GINSBURG: But if we're talking just about
5 VMI, not about the other schools, then you -- if this claim is
6 unrelated, so that it would be a permissive counterclaim, then
7 you would say not even against VMI could you have the setoff.
8 MR. THRO: That's correct, Your Honor. In -- this
9 Court's decisions dealing with what effect happens when a
10 sovereign entity initiates litigation indicate that the
11 sovereign, by initiating litigation, certainly exposes itself to
12 defenses, but does not expose itself to affirmative recoveries.
13 JUSTICE GINSBURG: But why shouldn't a setoff be a
14 defense, even if it's unrelated? I mean, there were such things
15 in -- at common law, were there not, that you could set off an
16 unrelated debt?
17 MR. THRO: Yes, Your Honor. And to the extent that
18 a setoff is a defense, it would be permitted. But I may have
19 misunderstood your hypothetical that you were talking about, a
20 setoff which involved an affirmative recovery against the State.
21 JUSTICE GINSBURG: No, I mean a setoff --
22 MR. THRO: Okay.
23 JUSTICE GINSBURG: -- only --
24 MR. THRO: Then I misunderstood your hypothetical.
25 I'm sorry, Your Honor.

1 JUSTICE SOUTER: Mr. Thro, I -- am I correct in
2 assuming that if the -- if the preference in a case like this,
3 that had been given to the State, were not a bank transfer, a
4 check, but were some tangible object, like a gold bar, that
5 there would be in rem jurisdiction on the part of the court to
6 get the gold bar back as a -- even though its function is that
7 of a preferential transfer?
8 MR. THRO: I don't think so, Your Honor. I --
9 although this Court has recognized certain in rem exceptions to
10 sovereign immunity, particularly in the admiralty context, this
11 Court has never recognized -- said that sovereign immunity
12 allows a Federal court to order the State to return something
13 where, number one, it's in the State's possession, as it would
14 be in your hypothetical, and, number two, the State has at least
15 a colorable claim of ownership, which, if I understood your
16 hypothetical correctly, the State does have a colorable claim of
17 ownership. But you need not reach -- deal with the intangible
18 or personal property issues. The only thing that is at issue
19 here is a demand for a monetary judgment.
20 JUSTICE SOUTER: Well, that's -- with respect to --
21 I mean, you can say that of any claim that is valued in dollars.
22 But, I mean, your -- you know, what I'm getting at is your
23 position that there is no distinction to be drawn between the
24 contract action and the preferential transfer. And my point
25 was, some transfers might be satisfied -- might be sought in

1 what, at least in the traditional classification, would be an in
2 rem, rather than an in personam, action. Would your answer be
3 any different if the -- if the gold bar were simply sitting on
4 the -- on the desk of some State purchasing agent, as opposed to
5 deposited in the -- in the State treasury or sold by the State
6 for the monetary value?
7 MR. THRO: As I understand this Court's decisions on
8 this, if the -- if the property is in the possession of the
9 State, and if the State has a colorable claim to ownership, then
10 sovereign immunity will bar the -- a court --
11 JUSTICE SOUTER: Okay, so --
12 MR. THRO: -- a Federal court order to --
13 JUSTICE SOUTER: -- in effect, you're saying there
14 are some in rem exceptions, but not all in rem actions are
15 exceptions. And this would not --
16 MR. THRO: This Court has certainly recognized
17 certain in rem exceptions, notably in the Treasure Salvors case,
18 where the State did not have a colorable claim to title, and
19 also in Deep Sea Research, where the State did not have
20 possession of the object. Also, in the Whiting Pools case, the
21 Federal Government had possession of a intangible asset, but it
22 was clear that the debtor still had the ownership interest, and
23 this Court said that, in that circumstance, the Federal court
24 would -- could order the return.
25 JUSTICE SCALIA: Well, I suppose you could have a

1 contract action that -- in which the State promises to turn over
2 a particular parcel of land that it owns, or even, for that
3 matter, a gold bar that is on somebody's -- some State
4 functionary's desk. And I guess you could have a suit for that
5 gold bar or for the piece of property. And I guess you could
6 call that an in rem action, if you wanted to. But it wouldn't
7 be.
8 MR. THRO: Right. It would be a gross in -- a
9 radical in -- expansion of in rem jurisdiction. Traditionally
10 --
11 JUSTICE SOUTER: Well, because --
12 MR. THRO: -- in rem --
13 JUSTICE SOUTER: -- because we normally deal with
14 that as specific performance of the contract, and what -- you
15 know it's in rem, in the sense that we're talking about an
16 object, but that's not what we mean, traditionally, by "in rem
17 jurisdiction," is it?
18 MR. THRO: Traditionally, in rem jurisdiction has a
19 couple of characteristics. One is, it is -- it is everyone
20 against the world. It binds --
21 JUSTICE SOUTER: Yes, you sue -- in effect, you sue
22 the race, rather than --
23 MR. THRO: Right.
24 JUSTICE SOUTER: -- than the person.
25 MR. THRO: And --

1 JUSTICE SOUTER: And in the -- in a -- in a specific
2 performance contract action, you sue the person.
3 MR. THRO: Right. And a specific performance
4 contract action, while barred in Federal court, would, of
5 course, be allowed in State court, to the extent that Virginia
6 has --
7 JUSTICE SCALIA: What about a rescission action in
8 which the private party has conveyed property to the State, and
9 the State doesn't pay, and the private party seeks to rescind
10 the action and to receive back the property that it turned over,
11 which is real estate or a gold bar? Could that not --
12 MR. THRO: Right.
13 JUSTICE SCALIA: -- not be a -- characterized as an
14 in rem action? He's seeking back the property he gave over.
15 MR. THRO: I don't believe it could be characterized
16 as an in rem action, given the traditional understandings of "in
17 rem." But, regardless of whether you call it "in rem" or "in
18 personam," sovereign immunity would still bar such a thing in
19 Federal court. This Court has never said that there is an in
20 rem exception to sovereign immunity. To the contrary, you
21 explicitly rejected an in rem exception to sovereign immunity in
22 Nordic Village, at least where money was concerned. You have
23 allowed recovery in certain limited circumstances, such as the
24 admiralty cases. Those do not exist here. This is not an in
25 rem proceeding. Preferential transfer is not an in rem

1 proceeding under Nordic Village. Moreover, as this Court's
2 opinions in Schoenthal and Granfinanciera make clear, it's more
3 -- it's a traditional sort of common law, similar to a contract
4 action.
5 JUSTICE KENNEDY: I'd like to get away from in rem
6 and back to the waiver aspect that's being argued here. Let's
7 assume that there is an offset obligation that the State has to
8 comply with, that there's been a preference and it has another
9 claim, and with just one entity. If that's true, it seems to me
10 somewhat unfair to say that the State can proceed on multiple
11 fronts with different entities and fractionate its immunity so
12 that if there are more than three entities -- or if there are
13 three or four entities, each one is judged separately as to the
14 offset obligation. It seems to me that if one State entity is
15 subject to offset, then all of them are.
16 MR. THRO: I believe --
17 JUSTICE KENNEDY: Otherwise, the State immunity, it
18 seems to me, can be -- can be fractionated.
19 MR. THRO: Well, I believe that this Court's
20 decisions in the bankruptcy context draw the line with respect
21 to the same transaction or occurrence. So, to the extent that
22 it arises out of the same transaction or occurrence, then you've
23 got that, sort of, partial or limited waiver. Where --
24 JUSTICE KENNEDY: But I --
25 MR. THRO: -- however, with --

1 JUSTICE KENNEDY: -- I thought, with respect to
2 Justice Ginsburg's colloquy -- and my own, earlier -- that we
3 said that there is an offset obligation, even if they're
4 different claims.
5 MR. THRO: There is an offset. I --
6 JUSTICE KENNEDY: And now -- and now I want to
7 extrapolate from that to multiple entities, each of which
8 asserts its own immunity.
9 MR. THRO: Right. I think the offset obligation --
10 my understanding of Justice Ginsburg's hypothetical was that the
11 -- was that we were talking about an offset that would not be an
12 affirmative recovery, but would merely be using as -- an offset
13 as one of the trustee's defenses to the claim.
14 JUSTICE SCALIA: Against the entire State --
15 MR. THRO: Against the entire State.
16 JUSTICE SCALIA: -- including any money owed to the
17 other -- to the other State institutions. You acknowledged that
18 that --
19 MR. THRO: Yes.
20 JUSTICE SCALIA: -- offset could be --
21 MR. THRO: Yes.
22 JUSTICE SCALIA: -- applied not just against the
23 college here, but against the --
24 MR. THRO: No.
25 JUSTICE SCALIA: -- other entities.

1 MR. THRO: The offset with respect to that
2 particular -- with respect to that particular transaction or
3 occurrence, not to the other transactions or occurrences.
4 JUSTICE GINSBURG: So, you're not -- I thought your
5 position was: VMI, okay. If they filed a claim, then they're
6 open to affirmative recovery if it's a compulsory counterclaim;
7 offset, if it's a permissive counterclaim. But I thought you
8 said, as to the three other schools, no waiver. There's not --
9 no way you can lump them in. I thought that was --
10 MR. THRO: Yes.
11 JUSTICE GINSBURG: -- your position.
12 MR. THRO: There is no way that you can lump in the
13 other three schools. With respect to VMI, by filing a proof of
14 claim, VMI exposed itself to the trustee's defenses. To the
15 extent that the setoff is a defense for the trustee, then, of
16 course, that setoff would apply to VMI.
17 Before I sit down, I'd like to make three points.
18 First, Seminole Tribe controls. Congress may not
19 use its Article 1 Bankruptcy Clause to abrogate sovereign
20 immunity.
21 Second, to rule in favor of Virginia does not
22 require any alterations in this Court's jurisprudence; however,
23 to rule for Mr. Katz on any theory requires certain fundamental
24 changes in this Court's jurisprudence.
25 Finally, regardless of context, sovereign immunity

1 bars monetary judgment claims. States are immune from contract
2 actions; private parties are not. States are immune from court
3 actions; private parties are not. States are immune from
4 actions by the trustee to augment the estate; private parties
5 are not.
6 Thank you.
7 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
8 Ms. Lewis.
9 ORAL ARGUMENT OF KIM MARTIN LEWIS
10 ON BEHALF OF RESPONDENT
11 MS. LEWIS: Mr. Chief Justice, and may it please the
12 Court:
13 The -- if the States are permitted to opt out of the
14 collective bankruptcy process, and they're permitted to
15 disregard Federal preference statutes with impunity, it will
16 have a negative effect on the bankruptcy process.
17 States are large creditors.
18 CHIEF JUSTICE ROBERTS: Well, it's the same problem
19 in the patent area, isn't it? And yet, in the Florida Prepaid
20 cases, we've enforced the sovereign immunity with respect to
21 patent proceedings.
22 MS. LEWIS: Your Honor, in the Florida Prepaid case,
23 there was an alternative State remedy. In that case the
24 plaintiff could sue the State of Florida -- I'm sorry -- yes,
25 could sue the State of Florida in that particular case. In this

1 case, they can't do that. There is a -- an estate
2 representative, who has one option, and that option, to preserve
3 the collective benefit of the estate, is to sue the estate -- or
4 to sue the State in the bankruptcy court.
5 JUSTICE SOUTER: Assuming that's so, for sovereign
6 immunity purposes, why should it make a difference?
7 MS. LEWIS: For -- well --
8 JUSTICE SOUTER: Yes, I mean, this is a tougher
9 case, but if sovereign immunity is the issue, why does it make
10 any difference?
11 MS. LEWIS: I do believe that it makes a difference
12 that there is no alternative remedy. However, in this case, I
13 don't think --
14 JUSTICE SOUTER: Why? What does that have to do
15 with the theory of sovereign immunity?
16 MS. LEWIS: I'm not sure that it has anything to do,
17 directly, with the theory of sovereign immunity, but --
18 JUSTICE SOUTER: Believe me, I -- I mean, I -- as
19 you know, I'm not a big fan of sovereign immunity in these
20 circumstances, but I'm not quite sure how to get around it,
21 based on the fact that there is no alternative remedy here.
22 MS. LEWIS: Well, Justice Souter, the thing that I
23 think is very troubling in this case is that there's a very
24 basic bankruptcy policy, and that basic bankruptcy policy on
25 preferences is equality of distribution and to prevent of

1 abusive debt-collection practices on the eve of bankruptcy.

2 JUSTICE SOUTER: Then, basically, you're making the

3 argument from the uniformity phrase -- uniform bankruptcy laws.

4 That's essentially your argument. And you're saying, in the --

5 in this case, that that trumps the sovereign immunity, and that

6 gets you out of Seminole Tribe.

7 MS. LEWIS: I believe that it -- I believe that it

8 does, Your Honor. But I -- I'm not sure the Court even has to

9 reach the uniformity argument in this case, because the fact

10 that Virginia Military Institute, on behalf of the Commonwealth

11 of Virginia, waived its sovereign immunity.

12 JUSTICE O'CONNOR: Well, but, of course, that

13 doesn't hold true for the other agencies, necessarily, unless

14 you think VMI can waive it for all of them. That seems to me to

15 be only a partial argument.

16 MS. LEWIS: Justice O'Connor, the -- VMI waived the

17 only sovereign immunity that existed, which was the Commonwealth

18 of Virginia's sovereign immunity. And, as a result -- all of

19 the agencies of the Commonwealth of Virginia served as unitary

20 creditors -- and so, when VMI waived the only sovereign immunity

21 that existed, there was nothing left to waive. And, at that

22 point, the recoveries of the estate -- which were recoveries

23 against other agencies, not only VMI -- were -- the Respondent

24 was permitted to bring those actions.

25 CHIEF JUSTICE ROBERTS: Your waiver argument is --

1 is it under 106(b) or 106(c)? It's beyond both of those, isn't
2 it?
3 MS. LEWIS: Chief Justice, it's not under 106(b) or
4 106(c), because the waiver of sovereign immunity -- 106(a)
5 provides that, with respect to preference claims --
6 CHIEF JUSTICE ROBERTS: That's an abrogation, that's
7 not --
8 MS. LEWIS: That --
9 CHIEF JUSTICE ROBERTS: -- a waiver.
10 MS. LEWIS: -- that's correct, Your Honor.
11 CHIEF JUSTICE ROBERTS: Well, my question would be,
12 How can you argue in favor of waiver when you have a statute
13 with a much more limited waiver, the limits in 106(b) and
14 106(c), and you're saying, "Well, they waived it much more
15 broadly"? It would seem to me that the most you can argue is
16 that there was a waiver under 106(b) or 106(c), but that doesn't
17 get rid of the whole case.
18 MS. LEWIS: Your Honor, I don't believe that 106(b)
19 or 106(c) limits the waiver in this case, because, again, the
20 sovereign immunity that was waived was the sovereign immunity of
21 the Commonwealth of Virginia. And so, the claims that were
22 asserted in that action, the preference actions that are served
23 against VMI and the other institutions, are preserved, because
24 we can --
25 JUSTICE SCALIA: Well, you're saying that much of

1 the language of (b) is ineffective and superfluous? (b)
2 certainly tries to limit it. It says "has waived sovereign
3 immunity with respect to a claim against such governmental unit
4 that is property of the estate and that arose out of the same
5 transaction." You're just saying all of that is ineffective,
6 then?
7 MS. LEWIS: I'm saying that, in this context, it
8 isn't -- it isn't effective, Your Honor.
9 JUSTICE SCALIA: In what context would it be
10 effective?
11 MS. LEWIS: The -- 106(b) was intended for claims
12 that didn't -- that did not arise under the bankruptcy code.
13 106(a) claims, which was the abrogation of sovereign immunity,
14 are claims that arise under the code. 106(b) and 106(c), there
15 is no sovereign immunity to waive. So, 106(b) and 106(c) were
16 designed for the contract claims that Justice Scalia referred to
17 earlier in the Petitioner's argument.
18 And then we looked to the Federal -- this Court's
19 jurisprudence with respect to what constitutes a waiver of
20 sovereign immunity. And we would most naturally look at the
21 Lapides case, in which -- in which a State came into this --
22 removed a case from State to Federal court, and the court said
23 it didn't matter the type of claim that was being asserted, or
24 that there was affirmative recovery that was being asserted,
25 but, in fact, they constituted a waiver of sovereign immunity.

1 And the State certainly can't say, here, that they
2 didn't know the filing of a proof of claim would constitute a
3 waiver of sovereign immunity, because back in 1947, in the
4 Gardner versus New Jersey case, this Court acknowledged that
5 filing a proof of claim constituted a waiver.
6 And there are ways that a State could avoid this.
7 They could have a process by which they had to go through --
8 whether it be the Attorney General's office, or whomever -- that
9 in order to file a proof of claim, they had to first go
10 somewhere to get authority to do that. And that most naturally
11 happens with corporations, because, as this Court is aware in
12 the Granfinanciera case, if you -- if you assert a proof of
13 claim, you waive your jury-trial right. And that is a large
14 issue for corporations --
15 CHIEF JUSTICE ROBERTS: How do we interpret the
16 statute to establish that Congress intended the States to waive
17 their immunity with the filing of the claim? I don't see that
18 anywhere in the statute.
19 MS. LEWIS: I'm sorry, can you --
20 CHIEF JUSTICE ROBERTS: You're arguing that by
21 filing the claim, the State has waived all of its immunity, but
22 I don't see where in the statute it imposes that kind of waiver
23 upon States. I see where they abrogate the immunity, but that's
24 different than saying that there's a waiver. Is your argument
25 that just because they abrogated immunity, and it turned out

1 they didn't -- may or may not have that authority, they
2 necessarily imposed a waiver?
3 MS. LEWIS: I don't think 106(b) applies with
4 respect to the preference claims, Your Honor.
5 CHIEF JUSTICE ROBERTS: Okay. Well, then where is
6 the waiver of sovereign immunity in this statute?
7 MS. LEWIS: The -- in -- 106(b) and 106(c) specifies
8 the conduct by which a sovereign must -- must engage in, in
9 order to waive sovereign immunity in a noncore matter, in those
10 matters not set forth in section 106- --
11 CHIEF JUSTICE ROBERTS: But I thought -- you're not
12 relying on 106(b) and 106(c).
13 MS. LEWIS: That's correct, Your Honor.
14 CHIEF JUSTICE ROBERTS: So, where is the waiver of
15 immunity on which you're relying?
16 MS. LEWIS: The waiver of sovereign immunity is the
17 jurisprudence of this Court, that Eleventh Amendment sovereign
18 immunity is not absolute, that a sovereign can waive that
19 sovereign immunity. And it did, in Gardner versus New Jersey.
20 And, again, this Court looked at that in the Lapides case.
21 CHIEF JUSTICE ROBERTS: But you have no argument
22 that Congress imposed a waiver.
23 MS. LEWIS: That's correct, Your Honor.
24 CHIEF JUSTICE ROBERTS: Okay.
25 JUSTICE SCALIA: And, again, I still don't see how

1 you distinguish (b) when you say "(b) doesn't apply here, it may
2 apply in other cases." If it doesn't apply here, why would it
3 apply in other cases?
4 MS. LEWIS: Your Honor --
5 JUSTICE SCALIA: I mean, if you are appealing to
6 this broader principle, that you either waive all of sovereign
7 immunity or you waive none of it at all, and you can't just
8 restrict it to the particular claim, which is what (b) says, I
9 don't know why, in any case, that wouldn't be true.
10 MS. LEWIS: Justice Scalia, again, it's because we
11 do not believe 106(b) governs here, because it deals with claims
12 that are not abrogated under 106(a) of the bankruptcy code.
13 JUSTICE STEVENS: Of course, if Congress had thought
14 it had successfully abrogated, there would be no reason to
15 provide for a waiver, I don't suppose.
16 MS. LEWIS: That's correct, Justice Stevens. And I
17 think this Court has recognized that bankruptcy is different in
18 other contexts. And I think that it's very important to talk
19 about bankruptcy differently. This Court has looked at, in --
20 just last term, in the Hood case, which was the debtor's
21 discharge. And the Court said that that constituted in rem
22 authority.
23 This Court, in Perez versus Campbell, said that
24 somebody cannot be denied a driver's license simply because they
25 failed to play a discharged obligation.

1 The Court, in the Irving Trust case, said that a
2 State is required to satisfy the procedure of bankruptcy if they
3 want to participate in the claims process.
4 In Van Huffel and Straton, this Court said that a
5 bankruptcy estate is permitted to sell property free and clear
6 of the State's tax liens.
7 In Whiting Pools, this Court said the IRS, who
8 seized property on the eve of bankruptcy on behalf of a -- of a
9 lien, had to return that in its in rem jurisdiction.
10 And I believe it was Justice O'Connor who asked the
11 question of Petitioner with respect to, How would this affect
12 the automatic stay? And how I've thought of that is, sometimes
13 the automatic stay, there may be an effect with respect to
14 monetary relief, and there may be an effect as far as an
15 injunctive relief. For example, if there was a judgment that a
16 State had, prior to bankruptcy, against the estate, and then
17 sought to enforce the judgment, executed on the debtor's bank
18 accounts post-petition, debtor didn't know about it, because, in
19 a -- in a debtor's reorganization, the first month of the
20 debtor's bankruptcy, you can't -- you're not following
21 everything that's happening the case. There is an execution on
22 the bank account, the money is taken into the State's coffers.
23 Does that mean that the State is bound by the automatic stay, or
24 is the State not bound by the automatic stay? It was money that
25 was transferred from one -- from the estate to the State.

1 JUSTICE BREYER: I thought (b) and (c) -- tell if
2 I'm right about this -- but suppose an individual bankruptcy,
3 and sometime prior to the bankruptcy the individual got into an
4 automobile accident and ran into a State building and wrecked
5 it. All right? Now, I take it that, in a State that hasn't
6 waived sovereign immunity, that individual, were he not
7 bankrupt, might not be able to bring a lawsuit for his damages
8 caused by a claim that the wall was too high or something. Each
9 is claiming the other is negligent. I guess the person wouldn't
10 be able to file. And the fact that he's bankrupt, he couldn't,
11 either. Okay. Now, in (b), I guess it's saying that if the
12 State happens to come in, after he's gone bankrupt, and brought
13 his negligent suit against him, he can respond.
14 MS. LEWIS: That's correct, Your Honor. That --
15 JUSTICE BREYER: So, if, in fact, you were to lose
16 on (a), I guess the whole section would fall, because it
17 wouldn't make any sense anymore, and we'd just wipe out the
18 whole thing, (a), (b), and (c).
19 MS. LEWIS: That's correct, Your Honor. It was --
20 it was a --
21 JUSTICE BREYER: All right. So, then the case
22 really turns on the extent to which the Government can -- sorry,
23 the extent to which Congress can waive sovereign immunity, as
24 they seem to have waived it in (a), whether the Constitution
25 permits them to do what they did in (a).

1 MS. LEWIS: Right, to abrogate sovereign immunity.
2 JUSTICE BREYER: And if you win on that, you win.
3 And if you lose on that, the whole section 106 would probably
4 fall.
5 MS. LEWIS: I believe 106 would fall, but, if 106
6 falls, doesn't mean that Respondent would lose, as far as the
7 waiver argument, because --
8 JUSTICE BREYER: I'm not sure, because if you lose
9 on the whole thing -- suppose you were to say Congress doesn't
10 have the power to do anything there. I just wonder if (b) and
11 (c) would survive, because they may have had something else in
12 mind. But maybe that's too complicated to go into now.
13 MS. LEWIS: Well, Justice Breyer, I think that (b)
14 and (c), as pointed out by another one of the Justices, may be a
15 limitation on the general concept of common law waiver. So, to
16 the extent that 106 would be -- this Court were to rule (b) that
17 would -- unconstitutional, you would look to the general common
18 law waiver of sovereign immunity, which would be the Gardner
19 versus New Jersey case and the Lapides case.
20 The --
21 CHIEF JUSTICE ROBERTS: Well, how do you -- how do
22 you have an informed waiver if the argument is over the
23 authority to abrogate? In other words, the Federal Government
24 is saying, under your theory, that we're abrogating your
25 immunity. And the State's saying, "You don't have that

1 authority." And how do you get an informed waiver, simply
2 because the State participates in a bankruptcy proceeding, on
3 the basis of the legal theory that they're asserting here today,
4 that Congress doesn't have the authority to abrogate the
5 immunity?
6 MS. LEWIS: We believe, obviously, Congress had the
7 right to abrogate sovereign immunity --
8 CHIEF JUSTICE ROBERTS: I understand that. But your
9 theory, as I read in your brief, as an alternative argument, is
10 that there was a --
11 MS. LEWIS: That's correct.
12 CHIEF JUSTICE ROBERTS: -- waiver. The State waived
13 its immunity by participating through -- in the --
14 MS. LEWIS: That's correct.
15 CHIEF JUSTICE ROBERTS: -- bankruptcy proceeding.
16 How is there an informed waiver if the argument is over the
17 authority to abrogate?
18 MS. LEWIS: Well, Your Honor, I believe, because
19 this Court has recognized, in Gardner versus New Jersey, that if
20 a State files a proof of claim, it constitutes a waiver, that
21 the State had to have to been informed, it had to know that the
22 actual conduct of filing a proof of claim would have a
23 consequence of a waiver.
24 CHIEF JUSTICE ROBERTS: Yes, but all the -- all the
25 statute does is abrogate.

1 MS. LEWIS: All --

2 CHIEF JUSTICE ROBERTS: In 106(a). It's --

3 MS. LEWIS: That's correct --

4 CHIEF JUSTICE ROBERTS: -- an attempt to --

5 MS. LEWIS: -- Your Honor.

6 CHIEF JUSTICE ROBERTS: -- abrogate.

7 MS. LEWIS: That's correct.

8 CHIEF JUSTICE ROBERTS: And if it turns out that

9 Congress doesn't have that authority, I don't see how you can

10 say the State has made an informed waiver, when their theory is,

11 "Guess what? You don't have that authority to abrogate."

12 MS. LEWIS: Well, Your Honor, 106(a) certainly

13 didn't exist back in Gardner versus New Jersey in 1947 either.

14 And I think that the -- the fact that -- if sovereign immunity

15 exists, sovereign immunity can be waived. I'm not sure --

16 JUSTICE BREYER: No, no, no, he's -- so, I'm wrong.

17 What I said is wrong. The answer has to be that -- we're only

18 talking about (a) at the moment. And what Congress tried to do

19 in (a) is abrogate sovereign immunity insofar as it is

20 constitutional to do so. So, then, you say, if you lose on it,

21 it's unconstitutional for it to do so here, but it could -- it

22 is constitutional for it to do so insofar as there is this

23 situation that the State brings a case against the estate, and

24 you can do an offset, et cetera. But it would have nothing to

25 do with (b) and (c). It would have to do with reading that into

1 (a), I guess.

2 MS. LEWIS: I believe that's correct --

3 JUSTICE BREYER: All right.

4 MS. LEWIS: -- Justice Breyer.

5 JUSTICE GINSBURG: In -- I don't follow that,

6 because I thought the theory of the cases were that you can

7 waive something by conduct. And so, when you ask a court for

8 relief against a party, then it's reasonable to say, "If you're

9 coming in and asking the court to give you something, then it's

10 only fair that your adversary should be able to" --

11 JUSTICE O'CONNOR: A light bulb exploded. A light

12 bulb exploded.

13 CHIEF JUSTICE ROBERTS: I think we're -- I think

14 it's safe.

15 JUSTICE BREYER: A light bulb went out.

16 CHIEF JUSTICE ROBERTS: It's a trick they play on

17 new Chief Justices all the time.

18 [Laughter.]

19 JUSTICE SCALIA: Happy Halloween.

20 [Laughter.]

21 JUSTICE GINSBURG: Let me ask this --

22 JUSTICE KENNEDY: Take your time. We're interested

23 --

24 CHIEF JUSTICE ROBERTS: We're even -- yeah, we're

25 even more in the dark now than before.

1 [Laughter.]

2 JUSTICE GINSBURG: If you lose on the abrogation

3 notion, and the Court holds that there is no authority in

4 Congress to abrogate sovereign immunity, still the bankruptcy

5 code codifies what is, across the board, the law. That is, if

6 you come to a court and say, "Give me X against D," that D

7 should be able to come back and say, "Either I want full relief

8 because it's a compulsory type counterclaim. I have to bring it

9 here. I can't bring it separately. Or at least a setoff." I

10 mean, that was understood, that a party over whom the court

11 would not have jurisdiction otherwise, is amendable to the

12 court's jurisdiction to the extent of a counterclaim or a

13 setoff. So, I don't see why (b) and (c) are not discrete from

14 (a). (b) and (c) are implementing the idea of a setoff. You

15 come to court for a claim, you are deemed to have waived any

16 jurisdictional objection to the counterclaim or the setoff.

17 MS. LEWIS: I understand that argument, Justice

18 Ginsburg, but I believe when Congress enacted 106(a), (b), and

19 (c), that they enacted it -- (a), being those actions which were

20 abrogated, (b) were those actions that remained. And those

21 actions that remained, there were limitations to that waiver.

22 Because this is not -- there was nothing to waive on sovereign

23 immunity on 106(b) as to preference actions, for example.

24 Contract claims are different. Contract claims would have --

25 are not abrogated under 106(a), so, therefore, the only way they

1 can be waived is under 106(b).

2 JUSTICE KENNEDY: Well, it's the same question. But

3 let's say that the court thinks there might be merit to the

4 argument of waiver, that the State entity comes in asking to be

5 treated as a creditor, and its preference is then before the

6 bankruptcy court. How is that issue preserved in the question

7 you raise? You say, maybe the Congress used Article 1 to

8 abrogate the State's sovereign immunity.

9 MS. LEWIS: Did you ask how it's preserved? We

10 raised the --

11 JUSTICE KENNEDY: It just seems to -- seem to me to

12 be part of the question presented.

13 MS. LEWIS: Your Honor, I think, to the extent that

14 this Court can avoid addressing the Constitution about

15 constitutionality of a statute -- and, in the situation of

16 waiver, we believe that it can -- then we believe that's the

17 appropriate jurisprudence.

18 JUSTICE KENNEDY: Well, you asked -- you framed the

19 question.

20 JUSTICE GINSBURG: No. No.

21 JUSTICE KENNEDY: Oh, no, you -- you're right.

22 You're right. You're exactly right.

23 CHIEF JUSTICE ROBERTS: Well, to what extent was

24 this argument raised below, I guess is a --

25 MS. LEWIS: Chief Justice, it was raised, to the

1 extent of VMI's sovereign immunity. And the reason that it was
2 is, at the time that the motion to dismiss was filed, as
3 recognized by the Petitioner in their brief, and as recognized
4 by the court, at the bankruptcy court level, the Hood decision
5 at the Sixth Circuit had been a decision. And so, there was no
6 necessity for the court to engage into any other proceedings,
7 other than to deal with the Hood decision.
8 JUSTICE STEVENS: May I ask a question on another
9 subject, just talking for a minute about your in rem theory of
10 the case? And I understand you would contend that assets have
11 been subject to a fraudulent transfer or a preference should be
12 deemed to be part of the estate. But is it not true that this
13 case also involves a claim on the accounts receivable? And do
14 you contend they also should be treated as part of the estate?
15 MS. LEWIS: Justice Stevens, we did seek to dismiss
16 the causative action with respect to the accounts receivable and
17 the causative action that we --
18 JUSTICE STEVENS: Is that because you concede, in
19 effect, that they would not be part of the estate if we adopted
20 an in rem theory that included the preferential transfers?
21 MS. LEWIS: They would not be part of the estate --
22 JUSTICE STEVENS: Okay.
23 MS. LEWIS: -- in a situation of -- if this adopt --
24 Court adopted an in rem theory, that's correct.
25 JUSTICE BREYER: Which would not? I'm sorry.

1 MS. LEWIS: Any recoveries on behalf of State
2 contract claims, account receivable as collections.
3 JUSTICE BREYER: And you have some of those.
4 MS. LEWIS: We do, Your -- Justice Breyer.
5 JUSTICE BREYER: Are you trying to get those in this
6 case?
7 MS. LEWIS: No, we are not.
8 JUSTICE BREYER: Oh, okay.
9 MS. LEWIS: We sought to dismiss them.
10 JUSTICE SCALIA: Well, you were, but you're not.
11 MS. LEWIS: That's correct, Justice --
12 JUSTICE SCALIA: I mean, you're --
13 MS. LEWIS: -- Scalia.
14 JUSTICE SCALIA: -- trying to get rid of that,
15 right?
16 MS. LEWIS: That's correct, Justice Scalia.
17 JUSTICE STEVENS: Now, that doesn't fit into your in
18 rem theory, but why wouldn't you have been able to recover that
19 on a waiver theory? If you -- and I understand your waiver
20 argument is, you can defend the judgment on the ground not --
21 you know, any ground to uphold the judgment is okay for the
22 Respondent. But why wouldn't you have tried to defend that part
23 of your case on the waiver theory?
24 MS. LEWIS: It would have been the waiver with
25 respect to just VMI's contract claims. And, I apologize, off

1 the top of my head I don't recall what the value of just the VMI
2 contract claims would have been. But that's what we believe the
3 waiver would have been limited to. It would have not included
4 the contract claims of Central Virginia Community College, Blue
5 Ridge.
6 JUSTICE SCALIA: Would you explain to me again why
7 it's okay that your waiver argument below was only directed to
8 the claims against VMI?
9 MS. LEWIS: At the --
10 JUSTICE SCALIA: I'm not -- I didn't understand your
11 answer to that. You made a much narrower argument there than
12 you're making here.
13 MS. LEWIS: I --
14 JUSTICE SCALIA: You didn't -- you didn't assert
15 that all the sovereign immunity for the entire State and all of
16 its institutions had been waived simply because of the claim by
17 VMI. You didn't make that argument.
18 MS. LEWIS: At the time of that decision, Justice --
19 JUSTICE SCALIA: Yes.
20 MS. LEWIS: -- Scalia, the Sixth Circuit Hood
21 decision had already been decided, and, just as it was
22 acknowledged in the --
23 JUSTICE SCALIA: What -- which said what?
24 MS. LEWIS: Which said that sovereign immunity is
25 waived, or abrogated, for preference actions in -- it was

1 actually across the board -- an abrogation of State sovereign
2 immunity. And, at that point, there was notice --
3 JUSTICE SCALIA: Well, then why didn't you make the
4 argument? I mean, if Hood said, when you make a partial -- or
5 one institution -- if I understand what you're saying, Hood said
6 that a waiver by one institution waives for the whole State. Is
7 that -- is that what Hood said?
8 JUSTICE GINSBURG: No. Hood said --
9 MS. LEWIS: No.
10 JUSTICE GINSBURG: -- that Congress could abrogate
11 --
12 MS. LEWIS: That's correct. Congress could --
13 JUSTICE GINSBURG: -- through the Bankruptcy Clause.
14 The -- what -- and then when the case came to this Court, we
15 didn't --
16 JUSTICE SCALIA: Yes.
17 JUSTICE GINSBURG: -- address that issue.
18 JUSTICE SCALIA: But if you're making a separate
19 waiver argument, apart from the abrogation argument, I don't see
20 why you would not make that waiver argument as broadly as
21 possible. It's a separate argument from the abrogation
22 argument.
23 MS. LEWIS: We --
24 JUSTICE SCALIA: And you're making it as a separate
25 argument here. But here, you're making it as to all claims

1 against all State institutions; whereas, below you made it only
2 as to the claims against VMI. I don't understand that.
3 MS. LEWIS: At the time, 106(a), in the Sixth
4 Circuit, it was determined that that was constitutional. So, at
5 the time, the only thing left for the States to waive was the
6 contract actions. And the contract actions of VMI were the only
7 things that could be waived as part of the --
8 JUSTICE SCALIA: I see.
9 MS. LEWIS: -- underlying --
10 JUSTICE SCALIA: I see.
11 CHIEF JUSTICE ROBERTS: So, the -- so, the long and
12 short of it is, for good and sufficient reasons you did not make
13 the same waiver below that you're making here today.
14 MS. LEWIS: That's correct, Chief --
15 CHIEF JUSTICE ROBERTS: Okay.
16 MS. LEWIS: -- Justice.
17 JUSTICE KENNEDY: And the proof of claim in VMI was
18 $43,000, and the preference was $25,000.
19 MS. LEWIS: That's correct.
20 JUSTICE O'CONNOR: Now, on your in rem argument, how
21 do you distinguish Nordic Village's case?
22 MS. LEWIS: In the Nordic Village case, the trustee
23 in that case focused on the money damages. They didn't focus on
24 the portion of the preference statute that says you can get the
25 transfer back, you can get the property back. And as this Court

1 recognized in Bowen versus Massachusetts, just because it is
2 monetary relief doesn't mean that it's money damages. And
3 that's how we distinguished the Nordic Village case, Your Honor.
4 The -- this Court, I believe, would be extending the
5 Article -- its jurisprudence if it permitted the bankruptcy
6 estate not to be able to sue the States. This Court has
7 recognized that a private citizen, Indian tribes, and foreign
8 sovereigns cannot be sued. But this Court's never recognized a
9 Federal entity cannot pursue a State. And this Court -- this is
10 a situation where there is no alternative remedy. We aren't in
11 a situation where we have the ADA, the ADEA, where the EEOC can
12 bring an action on behalf of the Government and on behalf of the
13 individuals to enforce a Federal law. We have no other
14 enforcement in bankruptcy, other than the collective bankruptcy
15 process, the bankruptcy code. And the bankruptcy code assigns
16 to the debtor in possession, or to the trustee, the ability to
17 collect on behalf of the estate.
18 Bankruptcy is unique in its very in rem application
19 and its very narrow and specialized enforcement of the
20 bankruptcy system. The framers recognized the critical nature
21 of binding the States in a uniform scheme. The decision below
22 ought to be affirmed on the basis of in rem, on the basis of the
23 Constitution, and on the basis that Virginia, the Commonwealth
24 of Virginia, waived its sovereign immunity.
25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
2 Apologize for the fireworks.
3 [Laughter.]
4 CHIEF JUSTICE ROBERTS: Mr. Thro, you have three and
5 a half minutes left.
6 REBUTTAL ARGUMENT OF WILLIAM E. THRO
7 ON BEHALF OF PETITIONERS
8 MR. THRO: Thank you, Mr. Chief Justice.
9 The question presented is whether or not Congress
10 may use the Article 1 Bankruptcy Clause to abrogate sovereign
11 immunity.
12 In Alden versus Maine, this Court held that there
13 was a presumption that the States had retained their immunity
14 unless it could be shown by conclusive evidence that the States
15 surrendered their immunity in the plan of convention. If
16 Congress can use the Article 1 bankruptcy power to abrogate
17 sovereign immunity, then one would expect there to be
18 discussions to that effect at the constitutional convention, in
19 the federalist and antifederalist writings, and in the ratifying
20 conventions. Yet, as the Sixth Circuit conceded in its version
21 of Hood, there is no compelling evidence. There is, at best,
22 silence. Silence cannot equal the compelling evidence.
23 Therefore, the Article 1 bankruptcy power cannot be used to
24 abrogate sovereign immunity.
25 JUSTICE GINSBURG: That's the question you've

1 presented, Mr. Thro, but it was the same question that was
2 presented to us in Hood. And in Hood, we decided that we were
3 not going to answer the question presented, we were going to
4 decide the case on a lesser ground. So, the Court, certainly if
5 our venture in Hood was proper, here, too, we could decide the
6 case on some other ground than the one you presented in your
7 question.
8 MR. THRO: Yes, you could, Your Honor. But you
9 should not address any of the alternative arguments raised by
10 Mr. Katz.
11 JUSTICE SCALIA: We couldn't decide it in your
12 favor, on some alternative ground, though, could we?
13 [Laughter.]
14 MR. THRO: Well --
15 JUSTICE SCALIA: Well, I mean, that distinguishes it
16 --
17 MR. THRO: Yes, absolutely, Your Honor --
18 JUSTICE SCALIA: The difference between this and
19 Hood.
20 MR. THRO: -- Your Honor, but I believe that the
21 proper exercise of judicial restraint is to decide the question
22 presented, and only the question presented, and do the other
23 grounds for perhaps another day.
24 All of Katz's -- all of Katz's novel arguments raise
25 complex constitutional issues and, quite frankly, ask for

1 radical alteration of this Court's jurisprudence.

2 JUSTICE STEVENS: May I ask if you think, within the

3 text of the question presented, we could decide whether the

4 sovereign immunity was abrogated by the convention itself, not

5 by Congress? There is that argument out there, you know.

6 MR. THRO: Yes. Within -- I think, in effect, if

7 you were to decide -- if you decided that the convention itself

8 had intended --

9 JUSTICE STEVENS: Abrogated.

10 MR. THRO: -- for the States not to have sovereign

11 immunity in bankruptcy, then you would conclude that the Article

12 1 Bankruptcy Clause includes the abrogation power. So, I think

13 it's, sort of, two sides of the same question.

14 Returning to Justice Ginsburg's question, a second

15 reason for not addressing Katz's arguments were, they were not

16 passed on below. As this Court noted in Granfinanciera, where

17 --

18 JUSTICE GINSBURG: Well, then that would be a ground

19 to allow them to present it below. They had a total winner --

20 MR. THRO: Yes. Yes.

21 JUSTICE GINSBURG: -- on that hands below.

22 MR. THRO: Yes, absolutely. You -- it -- you can --

23 you should decide the question presented. And if you decide the

24 question presented in our favor -- that is, that Congress has --

25 does not have the power to abrogate sovereign immunity -- you

1 would presumably remand to the Sixth Circuit for further
2 proceedings, consistent with your opinion. At that time, Katz
3 could attempt to present these other defenses. We would, of
4 course, argue that some of those defenses had not been properly
5 preserved. But it has not been briefed below.
6 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
7 MR. THRO: Thank you.
8 CHIEF JUSTICE ROBERTS: The case is submitted.
9 [Whereupon, at 11:58 a.m., the case in the
10 above-entitled matter was submitted.]
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