No. _____

In the Supreme Court of the United States

STATE OF MICH. WORKERS' COMP. AGENCY AND STATE OF MICH. FUNDS ADMIN., PETITIONERS

v.

ACE AM. INS. CO. AND PAC. EMPLOYERS INS. CO.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition presents two jurisprudentially significant questions left open by this Court's decision in *Central Community College* v. *Katz*, 546 U.S. 356 (2006), regarding state sovereign immunity in a bankruptcy proceeding:

1. Whether a bankruptcy court's exercise of its *in rem* jurisdiction categorically abrogates state sovereign immunity, regardless of the governmental unit's role in the particular bankruptcy proceeding.

2. Whether the Bankruptcy Code's abrogation of sovereign immunity extends to a state-law statutory claim that does not involve the discharged debtor.

PARTIES TO THE PROCEEDING

The Petitioners are the State of Michigan Workers' Compensation Agency (the "Agency") and the State of Michigan Funds Administration (collectively, the "Michigan Defendants"). Petitioners were Defendant-Appellants in the United States Court of Appeals for the Second Circuit.

The Respondents, who were Plaintiff-Appellees below, are Ace American Insurance Company and Pacific Employers Insurance Company (collectively, the "Insurers").

DPH Holdings Corporation also was a Defendant-Appellee below.

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The United States Court of Appeals for the Second Circuit summary order, App. 1a–8a, is not reported but is available at 448 Fed. Appx. 134 (2d. Cir. 2011). The United States District Court for the Southern District of New York decision, App. 9a–33a, is available at 437 B.R. 88 (S.D.N.Y. 2010). The United States Bankruptcy Court for the Southern District of New York order, App. 39a–81a, is not reported.

JURISDICTION

The Court of Appeals entered its summary order on November 29, 2011, App. 1a–8a. It denied a petition for rehearing on January 12, 2012, App. 84a–85a. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Bankruptcy Clause of the United States Constitution, U.S. Const. art. 1, § 8, cl. 4, provides that Congress shall have power "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

The Eleventh Amendment of the United States Constitution, U.S. Const. amend. XI, provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Section 106 of the Bankruptcy Code, 11 U.S.C. § 106, provides in relevant part:

> (a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.
>
> (2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.
>
> (3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure . . . .
>
> * * *
>
> (5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

(b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

STATEMENT OF THE CASE

A. Nature of the dispute

Debtor Delphi Corporation was an automobile parts manufacturer with substantial operations in Michigan. Delphi held numerous insurance policies issued by Respondents Ace American Insurance Company and Pacific Employers Insurance Company (collectively, the "Insurers"). And for eight of the nine years preceding Delphi's bankruptcy, the Insurers filed with the State of Michigan what is known as a "Form 400," a notice-of-coverage certificate that established a statutory workers-compensation-insurance contract between the Insurers and Delphi employees. (Michigan law does not require the Insurers to file any policies with the State to prove coverage.) Yet the Insurers dispute their liability for tens of millions of dollars in claims filed by Delphi's former workforce for injuries suffered during the coverage period, whether based on the terms of its policies with Delphi or under the statutory contracts created by the Form 400 filings.

Petitioner State of Michigan Workers' Compensation Agency (the "Agency") notified the Insurers in July 2009 of their potential duty to pay the claims based on the Form 400 filings, but the Insurers refused to acknowledge coverage. Ordinarily, such a dispute would be resolved in a statutorily created Michigan administrative forum.

Instead, after hundreds of workers had filed claims, and the Insurers started to defend these cases in Michigan, the Insurers forum shopped and filed this adversary proceeding in the Delphi bankruptcy

proceeding against Delphi, and against the Agency and Petitioner State of Michigan Funds Administration (collectively, the "Michigan Defendants"), asking that court to determine the Insurers' liability under the policies. Because Delphi would have to reimburse the Insurers, dollar-for-dollar, on such claims, Delphi agrees with the Insurers that it did not intend for the insurance policies to provide coverage for Delphi's injured employees in Michigan.

The Bankruptcy Court denied the Michigan Defendants' motion to dismiss them from the adversary proceeding based on sovereign immunity. The Bankruptcy Court also held that it had subject-matter jurisdiction over the policy dispute, and it refused to sever the Form 400 claim. In so ruling, the Court concluded that the Bankruptcy Code abrogated the Michigan Defendants' sovereign immunity. The District Court and Second Circuit affirmed.

As a result of the lower courts' rulings, the Michigan Defendants are now forced to do precisely what sovereign immunity would normally prevent: litigate in federal bankruptcy court the meaning of the Insurer-Delphi insurance policies and their relevance to workers-compensation claims being asserted by Michigan residents. At the same time, the Bankruptcy Court's refusal to sever the Form 400 issue means the Michigan Defendants are barred from applying Michigan statutes to the non-bankrupt Insurers who freely consented to participate in the Michigan workers-compensation framework and who have no claim to any special rights conferred on debtors under the Bankruptcy Clause.

The Michigan Defendants respectfully request that the Court grant their Petition and hold that a bankruptcy court's exercise of its *in rem* jurisdiction does not categorically abrogate state sovereign immunity, regardless of the governmental unit's role in the particular bankruptcy proceeding. Thus, the Michigan Defendants should be dismissed from the Insurers' adversary proceeding in its entirety. At a bare minimum, the Michigan Defendants ask the Court to hold that the Bankruptcy Code does not abrogate state sovereign immunity for a claim that is solely between a governmental unit and a third party. Such a ruling will allow the Michigan Defendants to litigate the Form 400 issue with the Insurers in a Michigan administrative forum.

B. State sovereign immunity in bankruptcy

The sovereign-immunity doctrine originated before the Constitution. As to states, the Constitution recognizes this pre-existing and retained sovereignty, as exemplified by the Eleventh Amendment. *Ex parte State of New York No. 1*, 256 U.S. 490, 498 (1921). State sovereign immunity protects the States from the indignity of being haled into federal court by private parties. *In re Ayers*, 123 U.S. 443, 505 (1887); *Puerto Rico Aqueduct & Sewer Auth*. v. *Metcalf & Eddy*, *Inc.*, 506 U.S. 139, 145–46 (1993).

But in *Central Virginia Community College* v. *Katz*, 546 U.S. 356 (2006), this Court said that in giving the federal government the power to enact uniform bankruptcy legislation, the states understood they were giving Congress power to subordinate state sovereignty "within a limited sphere." *Katz*, 546 U.S. at

377. The states' agreement was limited to waiving any sovereign-immunity defense in proceedings brought pursuant to "Laws on the subject of Bankruptcies." *Ibid*. This limit has two facets applicable here.

First, the Court has defined "bankruptcy" as the "subject of relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief." *Katz*, 546 U.S. at 371 (quotation omitted). Accordingly, state sovereign immunity is abrogated only in bankruptcy proceedings between a debtor and governmental agency acting as a creditor, not in proceedings involving third-party non-debtors.

Second, abrogation of sovereign immunity is not automatic, even in those cases involving both a governmental actor and a debtor. The *in rem* conceptualization of the scope of bankruptcy immunity set out in *Katz* was based on the Court's discussion in *Tennessee Student Assistance Corporation* v. *Hood*, 541 U.S. 440 (2004), which distinguished between the effect of Eleventh Amendment immunity in *in rem* and *in personam* cases. But as the Court noted in *Hood*, even in the field of *in rem* jurisdiction there is no categorical elimination of state sovereign immunity: "Nor do we hold that every exercise of a bankruptcy court's *in rem* jurisdiction will not offend the sovereignty of the State. No such concerns are present here, and we do not address them." *Hood*, 541 U.S. at 451. This Court in *Hood* suggested that such abrogation is limited to instances where (1) the state entity actually had a claim against the estate *res*, or (2) the debtor was asserting a right to the *in rem* relief of a discharge. 541 U.S. at 448–51. This case squarely presents both of the limitations this Court articulated in *Katz* and *Hood*.

C. Michigan's statutory workers-compensation framework

An employer seeking to conduct business in Michigan must provide for workers-compensation coverage, either by seeking authorization to be a self-insurer and/or by purchasing insurance from an insurer authorized to transact workers-compensation insurance in Michigan. MICH. COMP. LAWS § 418.611(1)(a), (b). Michigan law does not prohibit an employer from being self-insured while also purchasing insurance coverage through an authorized insurer in the event of employer bankruptcy.

To simplify administration, Michigan does not ask carriers to file an actual insurance policy with the State of Michigan Workers' Compensation Agency. Rather, the insurer must file with the Agency an "Insurer's Notice of Issuance of Policy," known as a "Form 400." MICH. COMP. LAWS § 418.625. To terminate coverage, the insurer must file with the Agency a "Notice of Termination of Liability," known as a "Form 401." MICH. COMP. LAWS § 418.621(4)(g); MICH. ADMIN. CODE r 408.41 (1980).

It is not possible to overstate the importance of Forms 400 and 401 to Michigan's regulatory and enforcement mechanisms. An insurer's Form 400 makes the determination of an employer's compliance with the workers-compensation-coverage requirement simple and clear cut. Thus, Michigan's statutory system resolves eligibility and liability for workers-compensation claims efficiently and quickly based solely and squarely on the commitment set out in the Form 400. The regime illustrates "the semi-public character" of Michigan's compensation insurance, for

"if a compensation policy is written at all, an insurer will find that the scope of its liability to employees is taken completely out of the hands of the parties to the insurance policy and dictated by the law of the state." 9 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION, § 151.01, p 151–1 (2011).

The Insurers argue that their Delphi policies did not include workers-compensation coverage, and that the Insurers' filing of eight separate Form 400s in eight separate years was merely accidental. But under Michigan law, the issue of intent does not apply to statutory workers-compensation contracts. "Instead, the *statute* requires such insurance and fixes the conditions of liability. To hold otherwise in ordinary workmen's compensation cases would greatly jeopardize the rights of employees for whose benefit insurance is required by law." *New Amsterdam Casualty* v. *Moss*, 20 N.W.2d 272, 278 (Mich. 1945) (emphasis added).

Thus, the Agency's records determine the insurer at risk on the date of injury, and this process "makes for orderly procedure in accordance with the law." *Zielke* v. *A.J. Marshall Co.*, 11 N.W.2d 209, 210 (Mich. 1943). In fact, insurer-employer contract terms are null and void to the extent they conflict with the workers-compensation statutes. MICH. COMP. LAWS § 418.621(4)(h). Accordingly, once an insurance company files a Form 400, giving assurance of coverage of the employees, it is irrelevant whether or not the underlying policy spells out the intent to provide such coverage.

D. The Insurers and their Form 400s

Both Insurers are authorized to do business as workers-compensation carriers in Michigan. Respondent Pacific filed with the Agency two Form 400 notices of insurance for Delphi covering the period October 1, 2000, to October 1, 2002. Pacific filed one Form 401 notice of termination effective October 1, 2002. Accordingly, Pacific created a statutory contract to insure Delphi's workers during the effective period.

Respondent Ace filed six Form 400s reflecting insurance coverage for Delphi from October 1, 2003, through October 1, 2009, and five Form 401s reflecting termination of such coverage for each year, typically followed by filing another Form 400. Ace likewise created a statutory contract to insure Delphi's workers during the effective period.

When the Insurers filed these Form 400s, they became liable for workers-compensation benefits under Michigan law to the injured Delphi employees. Through this litigation, the Insurers seek to shift this cost to the State of Michigan Funds Administration.

E. The Debtor

Delphi Corporation filed for Chapter 11 in the Bankruptcy Court on October 8, 2005. On January 6, 2006, the Bankruptcy Court approved Delphi's motion to assume the retention and deductible insurance policies with the Insurers. The Bankruptcy Court confirmed Delphi's modified reorganization plan in July 2009. App. 14a. Delphi emerged from bankruptcy (and the bankruptcy court discharged Delphi's

workers-compensation obligation) in October 2009. App. 14a. Delphi no longer exists and will no longer be available to pay Michigan workers-compensation benefits as a self-insured entity. Delphi's successor-in-interest, DPH, the holding company liquidating the trust, is a party to the Insurers' adversary proceeding, but only with respect to the policies' interpretation. Delphi and DPH could not be parties to the Form 400 litigation.

F. The underlying workers-compensation claims

Before the confirmation date, the Agency notified the Insurers of any workers-compensation claims that injured Delphi employees had filed during the coverage period. Before the confirmation, the Michigan Defendants also notified the Bankruptcy Court of the Insurers' potential liability once Delphi was discharged from its Michigan workers-compensation obligations. Delphi Docket No. 18264, 7/14/09 Joint Objection ¶ 9. By August 30, 2009, the Insurers' attorneys began filing appearances in Michigan and answers denying coverage. On October 6, 2009, Delphi discontinued paying workers-compensation benefits not arising from injuries incurred post-petition. As of October 24, 2009, 176 cases had been filed against the Insurers in Michigan's workers-compensation system. And the Insurers concede that the complaint they filed against the Michigan Defendants in the Bankruptcy Court stems from these pending and future claims.

As of November 2009, 332 injured Delphi employees had not received any workers-compensation benefits, including wage losses and medical expenses,

and this number has continued to increase. Accordingly, the Agency began considering ways to consolidate the claims' common question: whether coverage existed under the Form 400s. Counsel for the Funds and the Insurers discussed initiating Rule 5 proceedings, a statutory administrative vehicle for accomplishing such resolution across the hundreds of asserted claims. See generally MICH. COMP. LAWS §§ 418.222; 418.847. The Agency Director invoked Rule 5 to hear the Form 400 claim on hearing scheduled for January 5, 2010. Threatened with injunctive relief by the Bankruptcy Court, the Agency was forced to adjourn the Rule 5 hearing.

G. Proceedings below

When Delphi finally emerged from Chapter 11 reorganization as DPH Holdings Corp. on October 6, 2009, the Insurers filed the instant adversary proceeding against the Michigan Defendants and Delphi. According to the Bankruptcy Court, the Insurers' complaint contended that "by the policies' express terms, as intended by the parties, the insurers are not liable for the claims now being asserted against the insurers in the Michigan proceedings under the Agency's legal theory as previously communicated to the insurers." App. 50a, 61a. And in the alternative, the Insurers asked the Bankruptcy Court to "find the policies do so inadvertently through mutual mistake or scrivener's error" and therefore reform the insurance policies to reflect the parties' actual intent. *Id*.

The Michigan Defendants moved to dismiss on several grounds, including lack of subject-matter jurisdiction and sovereign immunity. The Bankruptcy

Court denied the motion. App. 40a–82a. But in doing so, the Bankruptcy Court declared jurisdiction over not only the insurance contracts but also the Form 400 claims against the Insurers. App. 49a–50a, 61a–62a, 79a, 81a.

The District Court affirmed the Bankruptcy Court's decision on both subject matter jurisdiction and sovereign immunity, App. 10a–34a, as did the Second Circuit, App. 1a–9a, both courts following essentially the same analysis as the Bankruptcy Court. Citing *Katz* and *Hood*, the Second Circuit summarily rejected the Michigan Defendants' sovereign immunity because the Insurers' adversary proceeding "is an *in rem* proceeding (or, at least is otherwise necessary to effectuate the *in rem* jurisdiction of the Bankruptcy Court)." App. 7a. The Second Circuit failed even to consider that the Insurers' adversary proceeding did not involve a state claim against the estate *res* or a proceeding relating to the debtor's status, *Hood*, 541 U.S. at 448–51, nor that the Form 400 dispute did not involve the debtor, Delphi, at all, *Katz*, 546 U.S. at 371. The Second Circuit also denied the Michigan Defendants' petition for rehearing, App. 85a–86a.

Based on the Second Circuit's acknowledgment that "'[t]here is no Form 400-based claim in the Insurers' adversary complaint," App. 8a, the Michigan Defendants then filed a motion to lift the Bankruptcy Court stay preventing litigation of the Form 400 issue in a Michigan administrative proceeding. The Bankruptcy Court denied that motion on March 26, 2012, App. 83a–84a, and stated that its ruling on the policies between the Insurers and Delphi will be a defense for the insurers in the Michigan forum and

collaterally estop Michigan in those proceedings. *Ace v. Delphi Corp*. U.S. Bankr. Ct. March 22, 2012 Transcript pp 22-23, 34-35. As a result, not only must the Michigan Defendants litigate Michigan's policy-interpretation issue against their will in federal court, they are barred for the foreseeable future from pursuing their Form 400 claim against the Insurers.

REASONS FOR GRANTING THE PETITION

I. The Court should grant the petition and clarify that a bankruptcy court's exercise of its *in rem* jurisdiction does not categorically abrogate state sovereign immunity, regardless of the governmental unit's role in the particular bankruptcy proceeding.

A defining feature of our constitutional system is dual sovereignty. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 457 (1991). Upon ratifying the Constitution, States did not consent to become mere appendages of the federal government; they entered "with their sovereignty intact." *Federal Maritime Comm'n* v. *South Carolina State Ports Auth*., 535 U.S. 743, 751 (2002) (quoting *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 779 (1991)). And an integral component of that sovereignty is immunity from private suits. *Ibid*.

In *Katz*, this Court concluded that the States subordinated their immunity from private suit in granting Congress the power to make laws "subject to bankruptcy." U.S. Const. art. 1, § 8, cl. 4. This was a controversial limitation on state sovereignty. See 546 U.S. at 379–393 (Thomas, J., joined by Robert, C.J.,

and Scalia and Kennedy, J.J., dissenting).[1] But tempering the shock of the *Katz* opinion's holding was the ruling's limited scope.

The *Katz* majority held that, in drafting the Bankruptcy Clause, the Framers "would have understood [the Clause] to give Congress the power to authorize courts to avoid preferential transfers and to recover the transferred property." 546 U.S. at 372. Accordingly, the Court's holding was limited to its determination that "proceedings to recover preferential transfers" were within the power to enact "Laws on the subject of Bankruptcies" and thus were part of the abrogation of sovereign immunity that occurred when the Constitution was ratified. *Id*. at 379.

In sharp contrast here, the Insurers' adversary proceeding has nothing to do with preferences or any other right created or provided to the Debtor against the Michigan Defendants by the Bankruptcy Code, nor does it involve any state claim on the estate *res*. Instead, the proceeding asks only for the Bankruptcy Court to interpret the contractual policies between Delphi and the Insurers, based on the Insurers' desire to obtain relief from Delphi should liability be imposed on it in a wholly separate proceeding between itself and the Michigan Defendants.

To be sure, no one would contest that the Bankruptcy Court has *in rem* jurisdiction to resolve

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[1] The decision rejected the view taken by all members of the Court in *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), that the decision would apply to bankruptcy, and it singled out bankruptcy as the sole area of Congress' Article I powers that was not protected under *Seminole* holding.

such a proceeding as between the Insurers and the Debtor. App. 8a–9a. But it is a *non sequitur* to say that because the Bankruptcy Court has *in rem* jurisdiction over such a dispute, which involves the Debtor's own contracts, that it also has the much greater and intrusive power to assert jurisdiction over governmental entities who are not even parties to the disputed contracts and who have sought nothing from the estate *res* in this adversary proceeding.

This situation appears to be precisely the type that this Court contemplated when conditioning the scope of its holding in *Hood*: "Nor do we hold that every exercise of a bankruptcy court's *in rem* jurisdiction will not offend the sovereignty of the State." 541 U.S. at 451. State sovereignty is offended by a court order that forces the Michigan Defendants to participate in a New York bankruptcy proceeding involving the proper construction of contracts to which the Michigan Defendants are not even parties.

The Second Circuit's error flowed from its unexamined assumption that every action falling within the Bankruptcy Court's *in rem* jurisdiction with respect to the *debtor* necessarily abrogates state sovereign immunity as to any other litigation that relates to that *in rem* proceeding, even when the governmental entities are not parties to the contracts at issue, and the rights being determined all arise under state law. App. 7a–9a. Such a situation differs radically from the precedents this Court discussed in *Hood*, each of which involved proceedings where a state entity asserted a claim against the estate *res* or the debtor asserted a claim against the state based on rights under the bankruptcy laws. See *Hood*, 541 U.S.

at 448–51, citing *New York* v. *Irving Trust Co.*, 288 U.S. 329 (1933) (New York asserted a tax claim against the estate); *Gardner* v. *New Jersey*, 329 U.S. 565, 574 (1974) (New Jersey filed a proof of claim against the estate); *Van Huffel* v. *Harkelrode*, 284 U.S. 225, 228–29 (1931) (state tax lien against estate property); *Hoffman* v. *Connecticut Dep't of Income Maint.*, 492 U.S. 96, 102 (1989) (debtor sought to bring Code-created avoidance action seeking money judgment against a non-consenting state).

Because the Insurers' adversary proceeding does not implicate either of those scenarios, it was wrong for the Second Circuit to abrogate the Michigan Defendants' immunity and force them to participate in any litigation of the contracts between Delphi and the Insurers in the Bankruptcy Court. This conclusion is particularly clear given the Bankruptcy Court's own acknowledgment that the Michigan Defendants have no claims or administrative expenses against the estate *res* or the Insurers arising from the adversary proceeding. App. 66a ("no one in this proceeding is looking for a monetary recovery or setoff from the applicable Fund"); 67a (the Agency is not "acting in a creditor role or as a potential payor to the debtor's estate"). See *In re Charter Oak Assocs.* v. *Dep't of Social Services*, 361 F.3d 760, 769 (2d Cir. 2004). (where governments agencies have not "voluntarily submitted [themselves] to the court's jurisdiction by filing a proof of claim with a view to reaping financial benefit," they should not be subject to the "indignity of being haled into court—which is the primary concern of the Eleventh Amendment."). This Court should grant the Petition and reject the categorical abrogation of sovereign immunity that the Second Circuit applied to

the Michigan Defendants in contravention of this Court's express language in *Hood*.

II. The Court should grant the petition and hold that a third-party adversary proceeding does not abrogate state sovereign immunity on any issue where the debtor is not a party.

The case for state sovereign immunity is even stronger on the issue of whether the Insurers' Form 400s created a statutory obligation to provide coverage. The Debtor, Delphi, has no role to play in this dispute and would not even be a party to the pending Michigan administrative proceedings once initiated. Moreover, because Delphi has no responsibility for the Insurers' decision to file the Form 400s, success in the Michigan litigation would result in no claim by the Insurers that would affect the Debtor's estate. (If this liability arises solely by virtue of the Form 400s filed by the Insurers, it would create no right of contribution or indemnity for the Debtor and, hence, would have no conceivable bearing on the Debtor's estate.) As such, the Insurers' adversary proceeding is not even "related to" the Debtor's case, and the Bankruptcy Court has no jurisdiction to hear it under 28 U.S.C. § 1334(b). Compare *Travelers Indem. Co.* v. *Bailey*, 557 U.S. 137, 129 S. Ct. 2195, 2203–05 (2009) (while bankruptcy court would not have jurisdiction to bar litigation solely between third parties that did not affect the estate, the plan's language, to the contrary, would bar any collateral attack on scope of the injunction granted there).

Here, there is no such collateral attack; the State has raised this issue at every point and consistently

argued that the Bankruptcy Court has no power to hear this matter. That would be true if the State was merely a private party. It is immeasurably more significant where the State has not waived its immunity so as to allow this action to be litigated in the Bankruptcy Court.

In *Katz*, this Court emphasized that the Bankruptcy Clause "encompasses the entire 'subject of Bankruptcies.'" 546 U.S. at 370. The Court then reiterated the historical meaning of the term "bankruptcy" as the "subject of relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief." *Id*. at 371 (quoting *Wright* v. *Union Central Life Ins. Co.*, 304 U.S. 502, 513–14 (1938)). Accordingly, state sovereign immunity is abrogated only in bankruptcy-court proceedings between a governmental agency and the debtor.

Here, it is undisputed that Delphi has no interest in the Form 400 litigation between the Insurers and the Michigan Defendants. The Michigan Defendants' success in that litigation does not even raise the specter of estate liability, because such liability would flow from the actions of the Insurers alone. Due respect for state sovereigns requires that the Michigan Defendants be allowed to proceed with Michigan administrative proceedings free of interference from the Bankruptcy Court.

This conclusion is supported by three additional points. First, Congress has made clear that even the bankruptcy automatic stay, one of bankruptcy law's most fundamental tenets, does not operate to stay the commencement or continuation of a governmental

unit's policy and regulatory power. 11 U.S.C. § 362(b)(4). This exception to the automatic stay demonstrates that Congress "never intended" that bankruptcy proceedings "be used to disrupt the orderly administration of the workers' compensation laws by the state." *In re Mansfield Tire & Rubber Co.*, 660 F.2d 118, 113–14 (6th Cir. 1981). Yet such disruption is precisely what the Insurers are seeking, the Bankruptcy Court allowed, and the Second Circuit affirmed.

Second, the prospective Michigan litigation goes to the very heart of state sovereign interests. Michigan's workers-compensation system establishes broad regulatory policy for the benefit of its citizens' safety, health, and welfare. The Michigan Workers' Compensation Act represents a regulatory regime that balances Michigan employers' and employees' rights. The issue of the Insurers' statutory obligations as a result of filing the Form 400s should be litigated expeditiously in the administrative and judicial framework that the Michigan Legislature established, and in the administrative forum that specializes in the intricacies of the Act.

Third, the Michigan Defendants' analysis is supported by the language of Section 106 and the Court's recent limitation on a bankruptcy court's authority to enter a final judgment in an adversary proceeding. In this regard, Section 106(a)(1) lists a number of Code sections with respect to which Congress has purported to abrogate state immunity. Congress did *not*, though, list Section 541. The reasons for that was clear: "As suggested by the Supreme Court, section 106(a)(1) specifically lists those sections

of title 11 with respect to which sovereign immunity is abrogated. This allows the assertion of bankruptcy causes of action, *but specifically excludes causes of action belonging to the debtor that become property of the estate under section 541*." 11 U.S.C. § 106(a) at H. 10766 (emphasis added). Thus, the mere fact that a debtor has filed bankruptcy does not allow it to bring affirmative, non-Code created litigation against a state. (That limitation is further underscored by Section 106(a)(5), which makes clear that the abrogation language in Section 106(a)(1) is not itself intended to create any new causes of action against a state not already existing outside of bankruptcy or created by the Code itself.)

That distinction between Code-created rights and state-law rights was also present in *Stern* v. *Marshall*, 131 S. Ct. 2594 (2011). As in *Stern*, the Form 400 issue is a "state law action independent of the federal bankruptcy law," and the Bankruptcy Court lacks "the constitutional authority to enter a final judgment" on a state law claim that is not resolved in the process of ruling on a creditor's bankruptcy proof of claim. *Id*. at 2611, 2620. In addition, the Form 400 issue is not derived from a federal regulatory scheme but from a fundamental state regulatory scheme, *id*. at 2598, and thus even further removed from federal jurisdiction, much less the Bankruptcy Court's jurisdiction. If it is clear that Congress did not intend to allow bankruptcy to be used as a way for a *debtor* to bring affirmative litigation against a state in violation of its sovereign immunity, it is even more obvious that Congress did not intend to allow a *non-debtor* to bring such a suit.

This Court has repeatedly emphasized that the standard for finding abrogation is extremely stringent, most recently in *Federal Aviation Administration* v. *Cooper*, 2012 WL 1019969, at *5 (U.S. March 28, 2012) ("We have said on many occasions that a waiver of sovereign immunity must be 'unequivocally expressed' in statutory text. Legislative history cannot supply a waiver that is not clearly evident from the language of the statute. Any ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires. Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government.") (citations omitted).

While *Katz* said that the states had given Congress full authority to deal with their immunity in bankruptcy cases as it chose, that is no different from the scope of the authority that this Court had accorded to Congress under *Pennsylvania* v. *Union Gas*, 491 U.S. 1, 22–23 (1989), which was in effect at the time Congress drafted Section 106(a)'s current language. And, it was under that same analytical scheme that this Court decided *Hoffman,* which held that statutory language dealing with immunity must be read narrowly. The same approach must be taken here and, if so, it is clear that nothing in Section 106 purports to allow a bankruptcy court to litigate a matter between two third parties that does not "relate to" the bankruptcy proceeding before it, or conversely to preclude the state from proceeding elsewhere.

It is also the Michigan administrative process—something the Insurers voluntary chose pre-petition—

which is the "'expert and inexpensive' method for dealing with a class of questions of fact which are particularly suited to examination and determination by an administrative agency specially assigned to that task." *Stern*, 131 S. Ct. at 2615. The Michigan Defendants' discretion to pursue the Form 400 litigation should not be cabined by a New York Bankruptcy Court's decision that it would prefer to resolve the policy issue before allowing Michigan administrative proceedings to begin.

III. The Second Circuit's sovereign-immunity ruling has serious consequences for the States.

It is a reality of the modern world that state agencies and institutions face the possibility of litigation not only in their own state, but everywhere in the United States. This case is illustrative. Although the Michigan Defendants did little more than regulate Delphi and the Insurers to ensure that Delphi's employees were adequately protected in the case of a workplace injury, the Michigan Defendants now find themselves embroiled in litigation in a New York Bankruptcy Court, stymied from enforcing Michigan's statutory workers-compensation system in an appropriate Michigan administrative proceeding. This situation presents precisely the "indignity" that sovereign immunity is supposed to prevent. *Ayers*, 123 U.S. at 505; *Puerto Rico*, 506 U.S. at 145–46. And the seriousness of that indignity is magnified by the fact that it has been imposed by a federal circuit that

oversees Bankruptcy Courts processing some 60,000 claims per year.[2]

Moreover, this case provides an excellent vehicle for this Court to clarify the questions left open by *Katz*. As explained in the *Katz* dissent, see 546 U.S. at 379–393 (Thomas, J., joined by Robert, C.J., and Scalia and Kennedy, J.J., dissenting), the *Katz* majority's decision to abrogate state sovereign immunity based on the Bankruptcy Clause is textually and historically problematic. If so, that makes it all the more important to enforce the "limited" scope of the states' purported "consent" to suit in bankruptcy proceedings and to carefully construe the limits Congress chose to place on the states' immunity. In sum, this Court's resolution of the issue is necessary for uniform settlement of bankruptcy disputes and the preservation of state sovereign immunity.

IV. The importance of state sovereign immunity counsels strongly in favor of this Court's immediate review.

By statute, federal appellate courts have jurisdiction over "final decisions" of the lower courts. 28 U.S.C. § 1291. A final decision is typically one that terminates a case. See generally *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 42 (1996). But this Court has long given § 1291 a "practical rather than a technical construction," *Mohawk Indus.* v. *Carpenter*, 130 S. Ct. 599, 605 (2009) (quoting *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)),

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[2] http://www.abiworld.org/AM/TemplateRedirect.cfm?template=/CM/ContentDisplay.cfm&ContentID=65211.

interpreting the statute to include collateral rulings that "are conclusive," "resolve important questions separate from the merits," and "are effectively unreviewable on appeal from the final judgment in the underlying action." *Id.* (quoting *Swint*, 514 U.S. at 42). This so-called collateral-order doctrine encompasses lower-court orders denying a claim of Eleventh Amendment immunity, *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy*, *Inc.*, 506 U.S. 139 (1993), like the one the Michigan Defendants challenge here.

Indeed, this Court's review of an order denying state sovereign immunity presents one of the most compelling situations warranting this Court's interlocutory review. The Eleventh Amendment protects two ideals that are fundamental to the American system: "first, that each State is a sovereign entity in our federal system; and second, that 'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" *Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44, 54 (1996) (quoting *Hans* v. *Louisiana*, 134 U.S. 1, 13 (1890)). The *Katz* decision clarified a small exception to the Eleventh Amendment pertaining specifically to the *in rem* jurisdiction of the bankruptcy courts. But the decision did not lessen the fundamental importance of state sovereign immunity in general. Accordingly, to wait for a final decision would serve to further compound the offenses against state sovereign immunity and compel the very thing sovereign immunity is supposed to protect against: forcing a state to litigate against its will in a foreign jurisdiction.

The instant dispute has already been in litigation since October 2009, through three levels of courts. It

has forced the Michigan Defendants to expend significant resources over an issue that should never have been in federal court in the first instance. The scope of state sovereign immunity after *Katz* is sufficiently important to warrant resolution on an interlocutory basis, just as this Court has done in countless other cases presenting questions of arguably lesser jurisprudential significance. See, e.g., *United States* v. *Grubbs*, 547 U.S. 90 (2006) (certiorari granted on an interlocutory basis to determine whether anticipatory search warrants violate the Fourth Amendment); *Cooper Indus.*, *Inc.* v. *Aviall Servs.*, *Inc.*, 543 U.S. 157 (2004) (certiorari granted on an interlocutory basis to determine whether a private party not sued in a CERCLA action could obtain contribution from other liable parties); *Portuondo* v. *Agard*, 529 U.S. 61 (2000) (certiorari granted on an interlocutory basis to determine whether a prosecutor's comments to a jury denied a criminal defendant his due-process rights). The Michigan Defendants respectfully request that the Court grant their Petition and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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