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Introduction

The sovereign immunity of the states, or the freedom of a state from suit by its citizens, became constitutionally protected in the late eighteenth century through the passage and ratification of the Eleventh Amendment.[1] In particular, the Eleventh Amendment protected states from suits "commenced or prosecuted…by Citizens of another State, or by Citizens or Subjects of any Foreign State."[2] Notwithstanding the plain language, the Supreme Court has held that the Eleventh Amendment also bars suits against a state that are commenced by citizens of its own state.[3] Moreover, the Eleventh Amendment also bars suits by municipalities brought against the state.[4]

Until recently, the general view was that sovereign immunity barred actions against states in bankruptcy proceedings because such immunity "restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[5] However, in 2004, the Supreme Court held that states could not assert sovereign

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[1] *See* U.S. Const. amend. XI; *See generally* Hans v. La., 134 U.S. 1 (1890) (deciding states are protected by Eleventh Amendment from suits of their own citizens).
[2] U.S. Const. amend. XI.
[3] *See Hans*, 134 U.S. at 15.
[4] *See generally* In re San Bernardino, Nos. 6:13–AP–01127–MJ, 2014 WL 2511096 (C.D. Cal. June 4, 2014).
[5] Cent. Va. Cmty. College v. Katz, 546 U.S. 356 (2006) (denying states Eleventh Amendment defense in bankruptcy proceedings) (quoting Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 72–73 (1996)).

immunity under the Eleventh Amendment as a defense in a bankruptcy proceeding to determine the dischargeability of a student loan debt because such proceeding was not a proceeding against the state for the purpose of the Eleventh Amendment.[6] Two years later in *Central Virginia Community College v. Katz*,[7] the Supreme Court overruled its prior decisions and held that under the powers granted to it by the Bankruptcy Clause of the Constitution, Congress may at its option, treat states in the same way as other creditors in bankruptcy proceedings or exempt them from such proceedings.[8] In particular, in *Katz*, the Supreme Court held that state sovereign immunity did not bar a preference action against a state under the Eleventh Amendment or otherwise.[9] Following *Hood* and *Katz*, lower courts held that sovereign immunity in the Eleventh Amendment was not an absolute defense in bankruptcy proceedings.[10]

Recently, however, in *In re City of San Bernardino*,[11] a district court held that the Eleventh Amendment barred a chapter 9 debtor's claim against certain state agencies, thereby carving out an exception that permits states to use the Eleventh Amendment to defend themselves in proceedings bought in connection with chapter 9 bankruptcy cases.[12] In so holding, the *San Bernardino* Court reversed the bankruptcy court, which initially held that the Eleventh Amendment was not a defense for California's State Agencies. [13]

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[6] Tennessee Student Assistance Corporation v. Hood, 541 U.S. 440 (2004) (refusing to reach question regarding applicability of Eleventh Amendment in bankruptcy cases since Eleventh Amendment was not implicated).
[7] *See* 546 U.S. 356 (2006).
[8] *Katz*, 546 U.S at 379.
[9] *See Id*. at 359.
[10] *See e.g.* Fla. Dep't of Revenue v. Diaz (*In re* Diaz), 647 F.3d 1073 (11th Cir. Fla. 2011) (reversing and remanding issue for dismissal based on lack of jurisdiction over contempt proceedings); Kids World of Am., Inc. v. Ga. (*In re* Kids World of Am., Inc.), 349 B.R. 152 (Bankr. W.D. Ky. Aug. 18, 2006) (preventing sovereign immunity defense and allowing debtor to sustain limited claim for turnover based on quantum meruit theory).
[11] 2014 WL 2511096.
[12] *Id*.
[13] *Id.*at *1; State Agencies include John Chiang in his official capacity as State Controller, the Office of the State Controller, the California Department of Finance, and Michael Cohen in his official capacity as Director of Finance.

This Article discusses the applicability of the Eleventh Amendment to chapter 9 bankruptcy cases. Part I of this article discusses the State's rights under the Eleventh Amendment and the case law reexamining the Amendment generally. Part II examines the applicability of the Eleventh Amendment in bankruptcy cases. In particular, Part II discusses two landmark Supreme Court cases on the issues (i.e. *Hood*[14] and *Katz)*.[15] Part III considers the applicability of the Eleventh Amendment in chapter 9 bankruptcy cases. In particular, Part III discusses the exception created by the *San Bernardino* Court, which held that the Eleventh Amendment barred a municipal debtor commencing an adversary proceeding against a state agency in chapter 9 bankruptcy case. Part IV examines the future ramifications and applicability of the *San Bernardino* decision.

I. The Eleventh Amendment Generally

Dual sovereignty is a hallmark of the American federal system.[16] When the states ratified the Constitution in 1787, they were not only agreeing to become parts of the larger federal government.[17] These states formed the United States of America with "their sovereignty intact."[18] As James Madison pointed out, the states retained a protection from private suits, which he described as "an integral component of that 'residuary and inviolable sovereignty.'"[19]

While ratifying the Constitution, the States yielded their immunity from suits brought by other states or by the federal government.[20] The Convention, however, left alone a state's immunity from private suits.[21] This principle was threatened after the Supreme Court held that

[14] 541 U.S. 440.
[15] 546 U.S. 356.
[16] FMC v. S.C. State Port Auth., 535 U.S. 743, 751 (2002) (barring private claim against state agency because state had not consented to be sued).
[17] *Id*.
[18] *Id*. (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991)).
[19] *Id*. (quoting "THE FEDERALIST NO. 39, at 245 (C. Rossiter ed. 1961).
[20] *Id*. at 752.
[21] *Id*.

Article III permitted citizens of one state to sue another state in federal court.[22] Seeking to abrogate this ruling, Congress quickly passed the Eleventh Amendment, which was subsequently ratified by the states.[23] Although the Eleventh Amendment protects states from suits by citizen states and foreign states, the Eleventh Amendment offers no explicit protection for states from suits by their own citizens.[24] The Supreme Court addressed this question by reviewing the historical approach to the adoption of the Eleventh Amendment and concluded that the states would not have adopted an amendment that would only offer partial protection from suits by private individuals.[25]

Cases addressing, the specific issue of the Eleventh Amendment barring suits, brought by municipalities against the state are not as common. For the purposes of the Eleventh Amendment, both counties and cities have been historically considered to be more like private citizens or private corporations, respectively, and therefore, suits brought by such entities against states are barred under the Eleventh Amendment.[26] For example, in *Kelley v. Metropolitan County Board of Education*,[27] the Sixth Circuit held that the Eleventh Amendment barred Nashville's board of education, from filing a lawsuit against the State of Tennessee to require Tennessee to pay for desegregation programs mandated by a court from a decision entered twenty-six years ago.[28] The district court initially held that Tennessee was liable for sixty

[22] *Id.*; *See generally* Chisolm v. Ga., 2 U.S. 419 (1793) (allowing service on state's governor and attorney general).
[23] *S.C. State Port Auth.*, 535 U.S. at 752; U.S. Const. amend. XI. ("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.").
[24] *Hans*, 134 U.S. at 9–10.
[25] *Id*. at 11, 15.
[26] St. Charles Co. v. Wis., 447 F.3d 1055, 1058 (8th Cir. 2006) (preventing St. Charles County from suing Wisconsin under Federal Extradition Act because Congress never abrogated state immunity); William A. Fletcher, "A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Action Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction" 35 STAN. L. REV. 1033, 1100–01 (1983) (providing historical analysis of developments in understanding sovereign immunity).
[27] 836 F.2d 986 (6th Cir. 1987).
[28] *Id.* at 987.

percent of the money.[29] The Sixth Circuit, however, reversed the ruling based on Supreme Court doctrine that stated, 'when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.'[30] While the suit was against Robert L. McElrath, Commissioner of Education and State Board of Education for Tennessee, the Sixth Circuit held that the Eleventh Amendment still barred the third-party suit. Therefore, as the *Kelly* decision demonstrates, the Eleventh Amendment bars suits brought by municipalities against states.

II. The Eleventh Amendment in Bankruptcy Proceeding

Until *Katz*, it was considered "settled doctrine that neither substantive federal law nor attempted congressional abrogation under Article I bars a state from raising a constitutional defense of sovereign immunity in federal court."[31] For example, in *Hoffman v. Connecticut Department of Income Maintenance*,[32] the Supreme Court, in a plurality decision, held that Congress did not abrogate the Eleventh Amendment by enacting § 106 of the Bankruptcy Code.[33] It was only until recently that the Supreme Court held the Eleventh Amendment not to apply in bankruptcy proceedings against states.[34] The theory rests on assumption that by ratifying the Constitution, states subsumed their rights somewhat, specifically in the area of bankruptcy.[35]

A. *Tennessee Student Assistance Corp. v. Hood*

[29] *Id.*at 988.
[30] *Id*. at 988–89 (quoting Ford Motor Co. v. Dep't of Treasury of Ind., 323 U.S. 459, 464 (1945)).
[31] 546 U.S. 356 (Thomas, J., dissenting) (quoting Alden v. Me., 527 U.S. 706, 748 (1999)).
[32] 492 U.S. 96 (1989) (concluding 11 U.S.C. § 106(c) does not abrogate state sovereignty).
[33] 492 U.S. at 104.
[34] *See Hood*, 541 U.S. 440; *See also Katz*, 546 U.S. 356.
[35] *Katz*, 546 U.S. at 373.

In *Hood*, the Supreme Court held that a proceeding to determine the dischargeability of a student loan debt was not a suit against the state for the purposes of the Eleventh Amendment. In so holding, the Supreme Court emphasized that a bankruptcy court's "exercise of its *in rem* jurisdiction to discharge a debt does not infringe state sovereignty" because the bankruptcy proceeding is centered on the debtor's estate not the creditor's (in that case the state's) interests.[36] In 1999, the debtor in *Hood* filed a "no asset" chapter 7 bankruptcy petition.[37] The debtor was granted a general discharge in June of 1999 but reopened her case in September of that year in order to seek relief from her student loans.[38] TSAC moved to dismiss her, asserting sovereign immunity, which the bankruptcy court denied.[39] The Bankruptcy Appellate Panel for the Sixth Circuit and the Sixth Circuit both affirmed, holding that in ratifying the Constitution states yielded their immunity to private suits in bankruptcy.[40] The Supreme Court granted *certiorari* to determine whether the Bankruptcy Clause grants Congress the authority to abrogate the State sovereign immunity in private suits.[41] The Court did not reach such question because the Court held that the debtor's adversary proceeding was not a suit against the state within the wording of the Eleventh Amendment.

In its discussion, the *Hood* Court cited to several admiralty cases where the Court rejected Eleventh Amendment defenses raised by states because the salvage and shipwrecks at issue were not under state control.[42] Based on these past admiralty decisions, the *Hood* Court reasoned that a bankruptcy court's "exercise of its *in rem* jurisdiction to discharge a debt does

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[36] 541 U.S. at 448.
[37] *Hood*, 541 U.S. at 444.
[38] *Id*.; *See* 11 U.S.C. § 523(a)(8)A) (2012).
[39] *Hood*, 541 U.S. at 445.
[40] *Id*.
[41] *Id*. at 443.
[42] *Id*. at 446–47; *See generally* Cal. v. Deep Sea Research, Inc., 523 U.S. 491 (1998) (explaining that sovereign immunity cannot be invoked to bar federal jurisdiction when state does not have possession of *res*) *and* Fla. Dep't of State v. Treasure Salvors, 458 U.S. 670 (1982) (ruling where there is no claim of possession of res, Eleventh Amendment cannot be raised in defense).

not infringe state sovereignty"[43] and therefore, does not implicate the Eleventh Amendment. In comparing bankruptcy and admiralty law, the *Hood* Court recognized that both are specialty areas of law.[44] Accordingly, the *Hood* Court concluded if one does not infringe state sovereignty neither should the other.[45] The *Hood* Court also noted regardless of whether it choose to participate in the bankruptcy proceedings, a state is "bound by a bankruptcy court's discharge order no less than other creditors."[46] Ultimately, the *Hood* Court rejected the TSAC's argument holding that debtor's adversary proceeding seeking determination that the student loan debt was dischargeable was not a suit against the TSAC for the purposes of the Eleventh Amendment.[47] In so holding, the *Hood* Court relied on its established principle that in exercising its *in rem* jurisdiction the bankruptcy court does not infringe a state's sovereignty because the bankruptcy proceeding is centered on the debtor's estate not the creditor's or in this case the state's interests.[48] The *Hood* Court left open the question of whether sovereign immunity had been abrogated in bankruptcy claims paving the way for the Supreme Court decision in *Katz*.[49]

B. *Central Valley Community College v. Katz*

In *Katz*, the Supreme Court again held that the Eleventh Amendment does not bar a proceeding brought by bankruptcy trustee to avoid and recover preferential transfers made by the debtor to the states or state agencies.[50] In *Katz*, state agencies were institutions of higher education in Virginia that claim as agencies they were "arms of the state" and immune to suit.[51] The debtor was a bookstore that did business with the state before filing for relief under chapter

[43] 541 U.S. at 448.
[44] *Id*. at 451.
[45] *Id*. at 452.
[46] *Id*. at 448.
[47] *See Id*. at 443.
[48] *Id*. at 447–48, 452.
[49] *Id*. at 454.
[50] 546 U.S. at 360.
[51] *Id*. (citing *Alden*, 527 U.S. at 756).

11 of the Bankruptcy Code.[52] After the debtor filed, the court appointed a liquidating supervisor of the bankruptcy estate commend proceedings in the Bankruptcy Court to avoid and recover.[53] The state agencies then moved to dismiss the proceedings against that the preference claims against the state agencies were barred under the Eleventh Amendment.[54] The bankruptcy court denied the motion to dismiss.[55] The district court and the Sixth Circuit affirmed denial, with both courts reasoning that Congress abrogated state immunity to private suits in the bankruptcy field.[56]

The *Katz* Court held that the Eleventh Amendment did not bar preference actions against the state agencies because exercising the power to abrogate state sovereignty to Congress under the Bankruptcy Clause, elected to treat states the same way as other creditors under the Bankruptcy Code.[57] Referring back to *Hood*, the *Katz* Court reiterated that state sovereignty is not infringed by the bankruptcy court's *in rem* jurisdiction.[58] More over, the *Katz* Court held "history strongly supports the view that the Bankruptcy Clause of Article I, the source of Congress' authority to effect this intrusion upon state sovereignty, simply did not contravene the norms this Court has understood to exemplify."[59] In particular, the *Katz* Court noted that legislation passed soon after the ratification of the Constitution that included a provision guaranteeing Federal courts the authority to release debtors from state prisons, the Court indicated that "the power to enact bankruptcy legislation was understood to carry with it the power to subordinate state sovereignty" at least to some extent.[60] Moreover, the Court noted that

[52] *Id*.
[53] *Id*.; *See* 11 U.S.C. § 547 (2012); *see also* 11 U.S.C. § 550 (2012).
[54] *Katz,* 546 U.S. at 360.
[55] *Id*. at 360–61.
[56] *Id*. at 361.
[57] *Id.* at 360.
[58] *Id*. at 362.
[59] *Id*. at 375.
[60] *Id*. at 377.

the Framers, in adopting the Bankruptcy Clause, plainly intended to redress the rampant injustice refusing to respect one another's discharge orders.[61] Accordingly, the *Katz* Court held that a bankruptcy trustee could avoid preferential transfers to state agencies as the Court concluded that, in accordance with the power to abrogate state sovereignty guaranteed to Congress by the Bankruptcy Clause, Congress intended "that states should be amenable to such proceedings…."[62]

C. Post *Hood* and *Katz* Case Law

While the *Hood* and *Katz* line of cases may have upturned the previously established case law, the lower courts generally have had adhered to the Supreme Court when holding that the Eleventh Amendment does not bar suits against states in bankruptcy.[63] While it is generally understood that states cannot raise the Eleventh Amendment as a defense in bankruptcy actions, if the "litigation waiver" theory or the "consent by ratification" theory does not apply, then there may be an exception, which does not bar states or their agencies from the Eleventh Amendment's protections.[64] Therefore, even after *Katz*, it is still possible for a court to determine that the Eleventh Amendment bars a claim brought by a debtor against the state.[65]

For example the Eleventh Circuit in *In re Diaz* reasoned, the *Katz* decision stood for the principle that some suits that may fall under the Bankruptcy Code lack a meaningful enough connection to a court's *in rem* jurisdiction and consequently laid outside the realm of consent by the states.[66] The *Diaz* Court held that the bankruptcy court's jurisdiction to hear the Eleventh Amendment barred a debtor's contempt motion for alleged violations of the automatic stay.[67] The *Diaz* decision rested on the "litigation waiver" theory and the "consent by ratification"

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[61] *Id*. at 377.
[62] *Id*. at 379.
[63] *See* 541 U.S. 440; *See also* 546 U.S. 356.
[64] *See generally In re* Diaz, 647 F.3d 1073.
[65] *See Id*. at 1084.
[66] *Id*.
[67] *Id*. at 1093.

theory.[68] In the "litigation waiver" theory, the *Diaz* Court explained that a state waives its sovereign immunity when it invokes the jurisdiction of the federal courts, which it does by filing a proof of claim.[69] Relying on the *Katz* decision, the *Diaz* Court's "consent by ratification" theory "will generally allow a bankruptcy court to exercise jurisdiction over a state in such proceedings"[70] when as the *Katz* Court noted such 'proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts.'[71] *Diaz* probes the limits of the *Katz* decision suggesting that it is still possible for the Eleventh Amendment to apply in bankruptcy proceedings but only in a limited way.

III. The Eleventh Amendment and Chapter 9

In decisions following *Hood* and *Katz*, most lower courts have held that the Eleventh Amendment does not bar claims brought by against its state agencies to state parties in bankruptcy cases.[72] None of these cases considered how the Eleventh Amendment defense might fair in chapter 9 cases where the municipality is suing the state.

In *San Bernardino*, the district court held for the first time that the Eleventh Amendment prevented a municipal debtor suit against state agencies.[73] The City of San Bernardino (the "City") sought to protect funds, which certain agencies demanded that the City remit to them.[74] The funds at issue had been parceled out to the City's redevelopment agency ("RDA") earmarked for redeveloping urban neighborhoods.[75] Following World War II, California had

[68] *See generally Id*.
[69] *Id*. at 1082.
[70] *Id*. at 1086.
[71] *Id*. (citing *Katz*, 546 U.S. at 378).
[72] *See generally In re* Diaz, 647 F.3d 1073, *In re* Kids World of Am., Inc., 349 B.R. 152.
[73] *In re* City of San Bernardino, 2014 WL 2511096, at *1.
[74] *Id*.
[75] *Id*.

established a process to prevent urban decay by shunting property tax revenue to RDAs.[76] After California's financial emergency in 2011, the state legislature replaced RDAs with "successor agencies" to finalize all remaining matters of the RDAs, including returning the funds that had not already been committed to a project to the county auditor-controller.[77] The City commenced adversary proceedings against the various state agencies seeking injunctive and declaratory relief to, among other things, prevent them from withholding tax revenue from the City's successor agency (and the City itself), or face a possible withholding of tax money by the State.[78] The state agencies moved to dismiss the City's complaint on several grounds, including that the claims were barred under the Eleventh Amendment.[79] While the bankruptcy court granted the motion to dismiss with leave to amend, believing that the City could show imminent injury if the state agencies withheld the tax money, the bankruptcy court rejected the state agencies' Eleventh Amendment defense.[80] In particular, the bankruptcy court ruled that when the subject of the dispute is unquestionably within its control state sovereign immunity cannot impede the *res*.[81] On appeal, the district court reversed the bankruptcy court holding the Eleventh Amendment applied to protect the rights of the State of California to run its own finances.[82]

The *San Bernardino* Court grounded its reasoning on the fact that bankruptcy jurisdiction depends on the debtor and its estate and that Congress can limit state authority at least somewhat in the bankruptcy area because the Framers included the Bankruptcy Clause in the Constitution.[83] In holding that the Eleventh Amendment barred the City's suit against the state agencies, the *San*

[76] *Id*. (RDAs could 'acquire real property, including by the power of eminent domain, dispose of property by lease or sale without public bidding, clear land and construct infrastructure necessary for building on project sites, and undertake certain improvements to other public facilities in the project area').
[77] *Id*.
[78] *Id*. at *2.
[79] *Id*. at *3.
[80] *Id*.
[81] *Id*. at *4.
[82] *Id*. at *15.
[83] *Id*. at *11.

Bernardino Court reasoned that the suit did not implicate the bankruptcy court's *in rem* jurisdiction because the funds at issue were never part of the bankruptcy estate.[84] In particular, the *San Bernardino* Court emphasized that "[t]he disputed property … is not, was not, and will not be the property of the City, and the Court will never have exclusive *in rem* jurisdiction over it."[85] As the state agencies' threats against the City were not credible, the court could not exercise exclusive *in rem* jurisdiction over claims with respect to such threats because the city lacked standing to obtain relief from these threats.[86] Such exclusive *in rem* jurisdiction over the disputed funds did not apply.

Next, the *San Bernardino* Court noted that while the debtors in *Hood* and *Katz* were private individuals[87] the debtor *San Bernardino* was a municipality.[88] Accordingly, Congress did not pass the first municipal bankruptcy law until 150 years after the Bankruptcy Clause was ratified.[89] The Framers not consider municipal bankruptcies at the Constitutional Convention.[90] Therefore, the *San Bernardino* Court concluded that the Framers could not have considered waiving state sovereign immunity in the municipal bankruptcy context.[91] Moreover, the *San Bernardino* Court noted that Congress was forced to redraft federal municipal bankruptcy legislation to ensure that it did not impede state sovereignty.[92] As noted in *Katz*, the Bankruptcy Clause was established to ensure all states would recognize a citizen's discharge from bankruptcy.[93] The District Court noted that 'the state may withhold, grant or withdraw powers

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[84] *Id*. at *6.
[85] *Id*. at *14.
[86] *Id*.
[87] *Compare* 541 U.S. 440 *and* 546 U.S. 356 *with* 2014 WL 2511096.
[88] 2014 WL 2511096, at *12.
[89] *Id*.
[90] *Id*.
[91] *Id*. at 13.
[92] 2014 WL 2511096, at *12.
[93] *Katz*, 546 U.S. at 377.

and privileges [of a municipality] as it sees fit'[94] because "[t]he City 'has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.'"[95] Accordingly, the *San Bernardino* Court stated, "[a]llowing the City to proceed risks inviting the sort of inference with the State's control of its fiscal affairs that the Supreme Court sought to avoid when it allowed municipal bankruptcies."[96] In addition, the *San Bernardino* Court noted there are special rules under the Bankruptcy Code that protect state sovereignty in Chapter 9 municipal bankruptcies.[97]

IV. Implications of *San Bernardino*

While limited to the municipal bankruptcy context, the *San Bernardino* decision importantly revives the doctrine of sovereign immunity under the Eleventh Amendment in bankruptcy cases. As such, *San Bernardino* represents a departure from recent case law that seemingly eviscerated the doctrine in bankruptcy cases.[98] Indeed, the *San Bernardino* Court itself emphasized that while the Supreme Court's reasoning in *Hood* and *Katz* was broad, it "[wa]s not all encompassing."[99] Part of the reasoning for the apparent change in direction was that the funds at issue in *San Bernardino* were not part of the bankruptcy estate, and therefore were not under the bankruptcy court's *in rem* jurisdiction.[100]

Even if the bankruptcy estate included the funds, the City's status as a municipal debtor suing its own state was the more important reason for allowing the state agencies to assert Eleventh Amendment defense. It may stand to reason that even if the funds were property of the

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[94] *In re* City of San Bernardino, 2014 WL 2511096, at *12 (quoting City of Trenton v. N.J., 262 U.S. 182, 187 (1923)).
[95] *Id*. (quoting Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 362 (2009)).
[96] *Id*. at *13 (citing *U.S. v. Bekins*, 304 U.S. 27, 51–52 (1938)).
[97] *Id.* at *12.
[98] *See, e.g.*, *Hood*, 541 U.S. 440; *Katz*, 546 U.S. 356; *In re* G-1 Holdings Inc, 420 B.R. 216 (Bankr. D. N.J. 2009) (confirming that a settlement plan met 11 U.S.C.S. § 1126(f) over I.R.S. objections that sovereign immunity could be claimed under Anti-Injunction Act); *In re* Diaz, 647 F.3d 1073.
[99] 2014 WL 2511096, at *11.
[100] *Id*. at *13.

estate, the court would have decided the case in the same way based on the theory that the municipality was an instrument of the state. While the *San Bernardino* decision may relate to municipal bankruptcies, its impact may be localized to California, since it was California's unique tax scheme to fund the original RDAs that gave rise to the issue. Moreover, given the limited number chapter 9 cases filed each year, it is unlikely that the issue of whether the Eleventh Amendment applies in chapter 9 cases will arise with any frequency.[101] As the *San Bernardino* Court noted, the main difference between *San Bernardino* and *Hood* and *Katz* was the nature of the debtor.[102]

Indeed, while a municipality suing a state is uncommon, a municipality suing a state in a bankruptcy proceeding seems even rarer. Ultimately, the *San Bernardino* decision demonstrated that the Eleventh Amendment has not been completely abrogated in bankruptcy proceedings. As such, *San Bernardino* should serve as a warning to other distressed California municipalities that California and it taxing authorities will now be able to use the Eleventh Amendment defense to protect themselves from suits brought by municipalities in bankruptcy.

Conclusion

The Eleventh Amendment preserves immunity from private suit.[103] Despite being considered such an important state right, the Supreme Court in *Hood* and *Katz* ruled that the Eleventh Amendment does not always apply in private bankruptcy proceedings.[104] The *Diaz* Court suggested that there were limits to the *Katz* theory and even allowed Florida to assert the Eleventh Amendment against a private debtor based on the "litigation waiver" and the consent

[101] Mike McCaig, *How Rare Are Municipal Bankruptcies?* BY THE NUMBERS (January 24, 2013), http://www.governing.com/blogs/by-the-numbers/municipal-bankruptcy-rate-and-state-law-limitations.html (exploring recent history on municipal bankruptcies).
[102] 2014 WL 2511096, at *11.
[103] *S.C. State Port Auth.*, 535 U.S. at 751–52.
[104] *Hood*, 541 U.S. 440; *Katz*, 546 U.S. 356.

ratification theory." Until *San Bernardino*, a court had never addressed whether the Eleventh Amendment applied in municipal bankruptcies. In particular, the *San Bernardino* Court held that the Eleventh Amendment barred a chapter 9 debtor's claim against various state agencies because states have not waived their sovereign immunity in the municipal bankruptcy context.