No. 23-824

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
PETITIONER,

v.

DAVID L. MILLER,
RESPONDENT.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Bankruptcy Code broadly waives federal sovereign immunity "with respect to" 59 sections of the Code, including sections 544 and 550. 11 U.S.C. § 106(a). Section 544 empowers bankruptcy trustees to avoid pre-bankruptcy transfers of debtors' property that are "voidable under applicable law," including state law, "by a creditor holding an unsecured claim." *Id.* § 544(b)(1). Section 550 then empowers trustees to "recover" such fraudulent transfers "for the benefit of the estate." *Id.* § 550(a).

The questions presented are:

1. Whether bankruptcy trustees may avoid fraudulent transfers to the United States under section 544(b), notwithstanding federal sovereign immunity.

2. Whether the United States may invoke federal-law preemption and Appropriations Clause defenses to a section 544(b) avoidance action.

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BRIEF IN OPPOSITION

INTRODUCTION

The government asks this Court to decide how Congress' waiver of sovereign immunity in bankruptcy cases applies to a specific type of fraudulent-transfer action. The shallow disagreement on that infrequently arising question does not warrant this Court's review.

Section 106(a) of the Bankruptcy Code, 11 U.S.C. § 106(a), broadly and unambiguously waives federal sovereign immunity "with respect to" 59 sections of the Code, including section 544. Section 544(b)(1), in turn, permits bankruptcy trustees to "avoid any transfer … by the debtor that is voidable under applicable law by a creditor

holding an unsecured claim." Here, an insolvent company fraudulently paid its officers' personal tax debts to the Internal Revenue Service (IRS). The bankruptcy trustee used section 544(b) to avoid those transfers, relying on Utah's Uniform Fraudulent Transfer Act as the "applicable law."

As the Fourth, Ninth, and Tenth Circuits recognize, sovereign immunity is no barrier to such avoidance actions against the United States. Section 106(a)'s broad waiver takes sovereign immunity out of the picture. If a transfer is voidable under state law, the federal government cannot invoke sovereign immunity. Only the Seventh Circuit disagrees. That court has held that because sovereign immunity would bar recovery from the IRS *outside* of bankruptcy, a trustee cannot sue the IRS *inside* of bankruptcy. *In re Equip. Acquisition Res., Inc.* (*EAR*), 742 F.3d 743, 747 (7th Cir. 2014).

That outlier decision has been overtaken by events. This Court in *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 601 U.S. 42 (2024), recently rejected a similar argument that would have effectively required two waivers of sovereign immunity—one general and one specific to the cause of action. And since the Seventh Circuit's decision, every other circuit to consider the question has rejected the Seventh Circuit's approach. Rather than wading in now, this Court should permit the Seventh Circuit to reconsider its holding in light of those subsequent decisions.

Even were the question fully aired, this case would not warrant the Court's intervention. Trustees may undisputedly avoid fraudulent transfers to the United States made within two years of bankruptcy under a different provision, 11 U.S.C. § 548(a). The question presented thus arises only when the transfer occurs more than two

years before bankruptcy, but within the look-back period allowed under state law—four years or less in 46 States and the District of Columbia. Given that narrow window, the government identifies only six reported cases in the last decade presenting this issue. The median amount involved is around $200,000—0.000003% of the federal budget. An issue arising less than once a year that implicates relatively modest sums does not warrant this Court's review.

Moreover, the government's expansive question presented smuggles in extraneous issues on which there is no split. The government (at 17-18) asks the Court to decide the availability of two other federal-law defenses in section 544(b) cases: field preemption and the Appropriations Clause. But the two circuits to rule on either question side with trustees; the Seventh Circuit's discussion favoring the government is dicta. The government's preemption argument would inject complicated, disputed issues that have little to do with bankruptcy law. And the government forfeited its Appropriations Clause argument below.

Moreover, the Tenth Circuit's decision is correct. Congress' waiver of immunity "with respect to" section 544 covers all aspects of section 544(b) claims, including the underlying state-law cause of action. Whether or not a creditor could recover from the IRS outside of bankruptcy, the transfers here are "voidable" under Utah law. That is all section 544(b) requires. This Court should deny the petition.

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 106(a)(1) provides:

(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.

11 U.S.C. § 544(b)(1) provides:

> Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 550(a) provides:

> Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—
>
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
>
> (2) any immediate or mediate transferee of such initial transferee.

STATEMENT

A. Statutory Background

In order to protect bankruptcy's "orderly and centralized debt-resolution process," the Bankruptcy Code contains an expansive waiver of sovereign immunity. *Lac*

du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 391 (2023) (citation omitted). Congress expressly abrogated the sovereign immunity of "governmental unit[s]," including the United States, "with respect to" 59 enumerated sections of the Code. 11 U.S.C. §§ 101(27), 106(a). Accordingly, the Code's "basic requirements generally apply to *all* creditors," including the United States. *See Lac du Flambeau*, 599 U.S. at 391.

This case involves a liquidation bankruptcy under chapter 7 of the Code. In chapter 7 bankruptcies, a disinterested, private individual called a trustee collects the debtor's assets, liquidates them, and distributes the proceeds to creditors. *Law v. Siegel*, 571 U.S. 415, 417 (2014); 11 U.S.C. § 704(a); *see* U.S. Courts, *Chapter 7 – Bankruptcy Basics*, https://tinyurl.com/5fhad2x4.

Trustees enjoy "extensive" powers to fulfill their "duty to maximize the value of the estate." *CFTC v. Weintraub*, 471 U.S. 343, 352 (1985). One of those powers is avoiding fraudulent transfers, *i.e.*, "something-for-nothing transfers that deplete the estate (and so cheat creditors)." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1663 (2019). Several provisions of the Code empower trustees to avoid fraudulent transfers, including two relevant here.

First, 11 U.S.C. § 548(a)(1), in relevant part, permits trustees to "avoid any transfer" for which the debtor "received less than a reasonably equivalent value" at a time when the debtor "was insolvent." That section applies to transfers made within two years of bankruptcy.

Second, 11 U.S.C. § 544(b)(1) permits trustees to "avoid any transfer" that "is voidable under applicable law by a creditor holding an unsecured claim." The trustee must identify "an actual creditor with an allowable claim

against the debtor"—a requirement that does not apply to section 548(a). *Collier on Bankruptcy* ¶ 544.06[1] (16th ed.). And the trustee must identify an "applicable law"—usually the relevant State's Uniform Fraudulent Transfer Act or Uniform Voidable Transactions Act. *Id.* ¶ 544.06[2]. Those uniform acts, like section 548(a), permit creditors to avoid transfers made "without receiving a reasonably equivalent value" at a time when "the debtor was insolvent." Unif. Fraudulent Transfer Act § 5(a) (1984); Unif. Voidable Transactions Act § 5(a) (2014). The uniform acts generally give creditors four years to avoid fraudulent transfers instead of the two years available under section 548(a). Unif. Fraudulent Transfer Act § 9; Unif. Voidable Transactions Act § 9; *see infra* p. 16 nn.1-2 (cataloging state look-back periods).

Only once a trustee has avoided a transfer under section 544, 548, or some other provision of the Code can the trustee "recover, for the benefit of the estate, the property transferred" or the value thereof. 11 U.S.C. § 550(a). Sections 544, 548, and 550 are among the 59 sections of the Code for which Congress has waived the United States' sovereign immunity. *Id.* § 106(a)(1).

B. Factual and Procedural Background

1. This case arises from the bankruptcy of All Resort Group, Inc.—a transportation and destination-management company based in Park City, Utah. *See* Insolvency Analysis 2-6, Bankr. Ct. Dkt. 14-1. All Resort and its subsidiaries offered limousine, car, and bus services in Utah and Las Vegas, Nevada. *Id.*

In December 2013, All Resort fell into insolvency. *Id.* at 8-9. All Resort had mounting debts, including a $55,000 employment-discrimination settlement owed to a former employee, Robin Salazar. Pet.App.20a-21a. And, despite

"decreasing revenues," All Resort paid "substantial dividends" to its shareholders and suffered from "poor management" that made worsening financial decisions. Insolvency Analysis 10-13.

All Resort's managers also used the company for personal financial benefit. In June 2014, All Resort paid the IRS $145,138.78 to satisfy the personal tax debts of two corporate officers. Pet.App.20a; Compl. ¶¶ 10-13, Bankr. Ct. Dkt. 1. All Resort paid those personal tax debts using corporate checks drawn on the company's corporate bank account. Compl. Exs. 1-2. All Resort received nothing reasonably equivalent in exchange. Pet.App.26a.

2. In April 2017, All Resort filed for chapter 11 bankruptcy in the District of Utah. Pet.App.19a. In September 2017, All Resort petitioned the bankruptcy court to convert the case to a chapter 7 liquidation. Pet.App.19a. The court granted the petition, and respondent was appointed as trustee. Pet.App.19a-20a.

In July 2018, the trustee filed this adversary proceeding to avoid All Resort's fraudulent tax payments to the United States. S*ee* Pet.App.20a. The trustee invoked both sections 544(b) and 548(a). Compl. ¶ 19; Pet.App.20a. As the "applicable law" for his section 544(b)(1) claim, the trustee cited Utah's Uniform Fraudulent Transfer Act, Utah Code §§ 25-6-1 *et seq.* (2014).

Utah permits creditors to bring "an action for relief against a transfer" to obtain "avoidance of the transfer." *Id.* § 25-6-8(1). A transfer is fraudulent and thus voidable when (1) "the debtor made the transfer … without receiving a reasonably equivalent value in exchange," and (2) "the debtor was insolvent" at the time. *Id.* § 25-6-6(1). If "a transfer is voidable," "the creditor may recover judgment for the value of the asset transferred" against the

transferee, any subsequent transferee who did not take in good faith, or "the person for whose benefit the transfer was made." *Id.* § 25-6-9(2). Like most States, Utah gives creditors four years to avoid fraudulent transfers. *Id.* § 25-6-10(2).

3.a. The parties cross-moved for summary judgment, and the bankruptcy court granted the trustee's motion. Pet.App.50a-51a. The court rejected the trustee's claim under section 548(a) because the transfers fell outside the statute's two-year look-back period. Pet.App.24a n.26. But, the court held, the trustee could avoid the fraudulent transfers under section 544(b). Pet.App.48a.

The government "concede[d] that the Trustee has proved all the elements" required by Utah law: "All Resort did not receive reasonably equivalent value" for the transfers and "was insolvent at the time." Pet.App.26a. The government also conceded the existence of an unsecured creditor: Salazar, the former employee with the employment-discrimination settlement. Pet.App.26a. But, the government argued that Salazar could not serve as the "creditor" under section 544(b) because, outside of bankruptcy, "sovereign immunity … would bar her suit against the United States" and the Internal Revenue Code would field preempt her cause of action. Pet.App.26a, 43a.

The bankruptcy court rejected the government's sovereign-immunity defense, holding that section 106(a) "eliminates sovereign immunity with respect to the underlying state law causes of action incorporated through § 544(b)." Pet.App.37a (cleaned up). By its "plain text," section 106(a) waives sovereign immunity "with respect to" section 544, signaling Congress' "intent that the waiver would cover matters related to that Code section,"

including "the state law causes of action incorporated through § 544(b)." Pet.App.33a-34a.

Thus, the court held, "the trustee need only identify an unsecured creditor who, *but for sovereign immunity*, could have brought the claim at issue." Pet.App.39a (citation omitted). The government cannot assert sovereign immunity—"the very defense that is abrogated by § 106(a)(1)"—against the trustee. Pet.App.39a (citation omitted).

The court also held that field preemption does not bar section 544(b) claims against the IRS. The court explained that section 544(b) "is a federal cause of action and therefore cannot be preempted." Pet.App.46a (cleaned up). Moreover, the court continued, fraudulent-transfer claims do not fall "within the field of federal tax collection" and are therefore not preempted even outside bankruptcy. Pet.App.46a-47a.

b. The district court affirmed, adopting the bankruptcy court's decision. Pet.App.15a-17a.

4. The Tenth Circuit affirmed. Pet.App.14a. As the court noted, section 106(a) waives sovereign immunity "with respect to" section 544. Pet.App.6a-7a. That "critical," "broadening" language reaches "any subject that has 'a connection with'" section 544 and "clearly expresses Congress's intent to abolish the Government's sovereign immunity in an avoidance proceeding arising under § 544(b)(1)." Pet.App.7a-8a (quoting *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 717-18 (2018)) (emphasis omitted). Section 106(a) thus waives sovereign immunity from both section 544(b) itself and "the Utah state law the Trustee invokes." Pet.App.8a.

The Tenth Circuit considered and rejected the Seventh Circuit's decision in *EAR*, 742 F.3d 743. Pet.App.9a-

11a. The Tenth Circuit explained that the Seventh Circuit erroneously demands "a second waiver of sovereign immunity … as to the underlying state law cause of action" based on a faulty analogy to *FDIC v. Meyer*, 510 U.S. 471 (1994). Pet.App.9a-10a. But the Seventh Circuit "never meaningfully addressed the scope of § 106(a) as reflected in its text," which broadly waives immunity "with respect to" section 544(b) claims. Pet.App.9a.

The Tenth Circuit also rejected the government's field-preemption argument. Pet.App.12a-14a. The court explained that section 544(b)(1) "is a federal statute" that expressly incorporates state law. Pet.App.13a. Had Congress wanted to preempt the application of state law under section 544(b), the court added, "Congress surely would have added an express preemption provision." Pet.App.13a.

The Tenth Circuit denied rehearing en banc without noted dissent. Pet.App.52a-53a.

REASONS FOR DENYING THE PETITION

The circuits' narrow disagreement over how federal sovereign immunity applies to section 544(b) fraudulent-transfer actions does not warrant this Court's review.

To start, the government's 3-1 split warrants further percolation. Only the Seventh Circuit has adopted the government's position that sovereign immunity bars section 544(b) actions against the United States. *EAR*, 742 F.3d at 747. But just this Term, the Court rejected a similar sovereign-immunity argument in *Kirtz*, 601 U.S. 42. And in the decade since the Seventh Circuit's decision, every circuit to consider the question has rejected the Seventh Circuit's approach. The Court should deny certiorari to permit the Seventh Circuit to consider these developments.

Regardless, sovereign immunity's application to section 544(b) actions is not an issue warranting this Court's review. Trustees can undisputedly sue the United States for fraudulent transfers made within two years of bankruptcy under section 548(a). The question presented thus matters only when the United States accepts a fraudulent transfer more than two years before bankruptcy, but less than the (usually) four years allowed under section 544(b). In the last decade, that narrow delta has apparently produced only six bankruptcy-court decisions nationwide. The amounts at stake are typically in the low six figures. Deciding a case that might save the federal government a few hundred thousand dollars a year would be a poor use of this Court's limited resources. That is especially true here where the government's overly broad question presented sweeps in field-preemption and Appropriations Clause arguments on which there is no split and which the government forfeited in part below.

Finally, the decision below is correct. Section 106(a) unambiguously waives sovereign immunity "with respect to" section 544. That sweeping text reaches all aspects of section 544(b) claims, including the underlying state law cause of action. Even if it did not, nothing in section 544(b) requires that an actual creditor could *recover* from the IRS outside of bankruptcy, as the government insists. Section 544(b)(1) instead asks whether the transfer "is *voidable* under applicable law" (emphasis added). Here, all Utah-law requirements for voidability are undisputedly met, permitting the trustee to avoid the transfers.

I. Further Percolation Is Warranted

The government's petition blends two questions: (1) whether sovereign immunity precludes section 544(b) actions against the United States, and (2) whether the

government may invoke other federal-law defenses in section 544(b) cases—namely, field preemption and the Appropriations Clause. Further percolation on the first question is appropriate given this Court's recent decision in *Kirtz*, 601 U.S. 42, and the unanimous trend in the courts of appeals. There is no split on the second question.

1. As the government (at 18-21) catalogs, the Fourth, Ninth, and Tenth Circuits have all rejected the government's sovereign-immunity argument. *Cook v. United States* (*In re Yahweh Ctr., Inc.*), 27 F.4th 960, 966 (4th Cir. 2022); *Zazzali v. United States* (*In re DBSI, Inc.*), 869 F.3d 1004, 1009-13 (9th Cir. 2017); Pet.App.5a-9a. The government's 3-1 split (at 19) thus hinges on the Seventh Circuit's decision in *EAR*, 742 F.3d 743. But shortly after the government filed its petition for certiorari, this Court in *Kirtz*, 601 U.S. at 53, rejected a sovereign-immunity argument similar to the one the Seventh Circuit adopted in *EAR*. The Court should deny certiorari to permit the Seventh Circuit to reconsider its position in light of *Kirtz*.

The Seventh Circuit understood this Court's decision in *Meyer* to require "two analytically distinct inquiries" "when it comes to questions of a federal agency's liability." *EAR*, 742 F.3d at 746 (quoting 510 U.S. at 484). First, the plaintiff needs "a waiver of sovereign immunity." *Id.* (quoting 510 U.S. at 484). And second, the plaintiff needs a "source of substantive law" providing "an avenue for relief." *Id.* at 747(quoting 510 U.S. at 484). In *Meyer*, the second requirement was not met because the plaintiffs had no cause of action, and this Court declined to imply one under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). 510 U.S. at 483-86.

The Seventh Circuit, though, read the "substantive law" requirement to demand not just a generally applicable cause of action, but "an avenue for relief *against the IRS*." *EAR*, 742 F.3d at 747 (emphasis added). In other words, the Seventh Circuit thought that Congress must both waive sovereign immunity generally and create a cause of action that expressly runs against the government. In the section 544(b) context, the Seventh Circuit held, that second requirement is not met because sovereign immunity would bar state-law claims against the government outside of bankruptcy. *Id.*

Kirtz rejected a similar misreading of *Meyer*. In *Kirtz*, this Court held that the Fair Credit Reporting Act licenses suit against the United States for supplying false information to consumer reporting agencies. 601 U.S. at 50-51. By creating a cause of action against "[a]ny person" defined to include the government, Congress "explicitly permitted … claims for damages against the government." *Id.*

The government countered with reasoning that mirrored *EAR*'s: A cause of action was not enough because "a plaintiff must identify both a 'source of substantive law' that 'provide[d] an avenue for relief' *and* 'a waiver of sovereign immunity.'" *Id.* at 53 (quoting U.S. Br. 14 (quoting *Meyer*, 510 U.S. at 484)). In the government's view, the plaintiff needed *both* "a cause of action explicitly against the government" and "a separate provision addressing sovereign immunity." *Id.* This Court disagreed. Either "a separate waiver provision" *or* "a cause of action authorizing suit against the government may waive sovereign immunity." *Id.* Nothing in *Meyer*, which involved "an *implied* cause of action, say[s] anything to the contrary." *Id.*

Here, Congress authorized suit against the United States by coupling a cross-cutting waiver (in section

106(a)) with a generally applicable cause of action (in section 544(b)). Congress did not need to also create a government-specific cause of action. Given the similarity between the Seventh Circuit's two-step framework and the reasoning rejected in *Kirtz*, this Court should permit the Seventh Circuit to reconsider its position.

Moreover, the Seventh Circuit's 2014 decision in *EAR* predates every other court-of-appeals case addressing this issue. In 2017, the Ninth Circuit rejected *EAR*'s analysis, *DBSI*, 869 F.3d at 1013-14, followed by the Fourth Circuit in 2022, *Yahweh*, 27 F.4th at 966 n.5, and the Tenth Circuit below, Pet.App.9a-12a. Yet the Seventh Circuit has never had the opportunity to respond to other circuits' criticisms. The government cites no Seventh Circuit case applying *EAR*, and respondent is aware of none.

Further percolation is therefore appropriate, even setting aside *Kirtz*. The Seventh Circuit could resolve the split by adopting the majority position, obviating any reason for this Court's review. Or the Seventh Circuit could reaffirm its position and address other circuits' counterarguments, providing a fuller airing of the issue. Either way, this Court's consideration of the sovereign-immunity question would be premature.

2. The government (at 19-20) suggests that the circuits are also divided over whether the government can invoke field preemption and the Appropriations Clause in section 544(b) cases. That is incorrect. While the Ninth Circuit has rejected both arguments, *DBSI*, 869 F.3d at 1014-15, and the Tenth Circuit rejected a preemption argument below, Pet.App.12a-14a, no circuit has held that the government may invoke these defenses in section 544(b) cases.

The government (at 19) again points to *EAR*, where the Seventh Circuit "note[d] that there may be other reasons why § 544(b)'s actual-creditor requirement is not satisfied" and spent a sentence each discussing preemption and the Appropriations Clause. 742 F.3d at 747-48. As the Ninth Circuit has observed, that discussion is dicta. *DBSI*, 869 F.3d at 1015. The Seventh Circuit had already held that sovereign immunity barred the suit, making the brief discussion of other issues unnecessary to the disposition. There is no circuit split on the government's alternative arguments.

II. This Case Does Not Warrant the Court's Review

Even were the split entrenched, this case would not warrant review. The sovereign-immunity question has produced less than one bankruptcy-court decision per year and implicates trivial amounts within the $6.1 trillion federal budget. And the government's overly broad question presented muddies this case as a vehicle for review.

1. The sovereign-immunity question has limited practical importance. As the government (at 2, 22) recognizes, section 548(a) permits bankruptcy trustees to avoid fraudulent transfers to the United States within two years of the bankruptcy petition. At bottom then, this case is not about *whether* bankruptcy trustees can avoid fraudulent transfers to the government but *when* they can do so.

The timing difference between the two years available under section 548(a) and the state-law look-back periods incorporated by section 544(b) is narrow. Forty-six States plus the District of Columbia provide a four-year window or less to avoid constructively fraudulent

transfers.[1] Only four States offer additional time—with six years as the outer bound.[2] Given that bankruptcy cases must almost always be filed in the debtor's home district, 28 U.S.C. § 1408(1), there is virtually no risk of

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[1] Forty States and the District of Columbia provide four years. Ala. Code § 8-9B-10(c); Ariz. Rev. Stat. Ann. § 44-1009(2); Ark. Code Ann. § 4-59-209(b); Cal. Civ. Code § 3439.09(b); Colo. Rev. Stat. § 38-8-110(1)(b); Conn. Gen. Stat. § 52-552j(2); Del. Code Ann. tit. 6, § 1309(2); D.C. Code § 28-3109(2); Fla. Stat. § 726.110(2); Ga. Code Ann. § 18-2-79(2); Haw. Rev. Stat. § 651C-9(2); Idaho Code § 55-918(2); 740 Ill. Comp. Stat. 160/10(b); Ind. Code § 32-18-2-19(2); Iowa Code § 684.9(2); Kan. Stat. Ann. § 33-209(b); Ky. Rev. Stat. Ann. § 378A.090(2); Mass. Gen. Laws ch. 109A, § 10(b); Mo. Rev. Stat. § 428.049(2); Mont. Code Ann. § 31-2-341(2); Neb. Rev. Stat. § 36-810(2); Nev. Rev. Stat. § 112.230(1)(b); N.H. Rev. Stat. Ann. § 545-A:9(II); N.J. Stat. Ann. § 25:2-31(b); N.M. Stat. Ann. § 56-10-23(B); N.Y. Debt. & Cred. Law § 278(b); N.C. Gen. Stat. § 39-23.9(2); N.D. Cent. Code § 13-02.1-09(2); Ohio Rev. Code Ann. § 1336.09(B); Okla. Stat. tit. 24, § 121(2); Or. Rev. Stat. § 95.280(2); 12 Pa. Cons. Stat. § 5109(2); 6 R.I. Gen. Laws § 6-16-9(2); S.D. Codified Laws § 54-8A-9(b); Tenn. Code Ann. § 66-3-310(2); Tex. Bus. & Com. Code Ann. § 24.010(a)(2); Utah Code Ann. § 25-6-305(2); Vt. Stat. Ann. tit. 9, § 2293(2); Wash. Rev. Code § 19.40.091(2); W. Va. Code § 40-1A-9(b); Wis. Stat. § 893.425(2). Four States provide three years. La. Civ. Code Ann. art. 2041; Md. Code Ann., Cts. & Jud. Proc. § 5-101; Miss. Code Ann. § 15-3-115(b); S.C. Code Ann. § 15-3-530. Wyoming provides two years. Wyo. Stat. Ann. § 34-14-210(a)(ii). Alaska does not permit avoidance of constructively fraudulent transfers at all. *See* Alaska Stat. § 34.40.010 (actual fraud only).

[2] Va. Code Ann. § 8.01-253 (five years); Me. Stat. tit. 14, § 3580(2) (six years); Mich. Comp. Laws § 600.5813 (six years); Minn. Stat. § 541.05(1)(2) (six years). The government (at 22) cites *EAR*, 742 F.3d at 750 & n.5, which identifies Iowa, Kentucky, and New York as also having longer look-back windows. Those States have since shortened their windows to four years. 2016 Iowa Acts ch. 1040; 2015 Ky. Acts ch. 37; 2019 N.Y. Laws ch. 580.

forum-shopping to take advantage of slightly longer look-back periods.

Accordingly, the question presented appears to arise infrequently. There are over 460,000 new bankruptcy cases filed annually. U.S. Courts, *Bankruptcies Rise 16 Percent Over Previous Year* (Apr. 25, 2024), https://tinyurl.com/2cvurbt3. Yet it took almost two decades between Congress' enactment of section 106's operative text in 1994 and the first court of appeals decision addressing this issue. *EAR*, 742 F.3d 743. Bankruptcy courts in the Seventh Circuit have never applied *EAR*'s holding. And bankruptcy courts in the circuits adopting respondent's rule have never applied their circuit's holding either. To respondent's knowledge, this issue has arisen in only six bankruptcy-court decisions nationwide in the last decade.[3]

That lack of cases makes sense given the narrow circumstances in which this issue arises: (1) A debtor must fraudulently transfer money to the federal government. (2) The transfer must occur between two and (usually) four years before the bankruptcy petition is filed. (3) There must be some actual creditor with a claim against the debtor at the time of the transfer. And (4) all state-law conditions for avoidance must be met (typically,

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[3] The three cases underlying the Fourth, Ninth, and Tenth Circuit decisions plus *McClarty v. Hatchett* (*In re Hatchett*), 588 B.R. 472 (Bankr. E.D. Mich. 2018), *vacated as moot*, 2021 WL 5882076 (Bankr. E.D. Mich. Dec. 12, 2021); *Pyfer v. Katzman* (*In re Nat'l Pool Constr., Inc.*), 2015 WL 394507 (Bankr. D.N.J. Jan. 29, 2015); and *Bauer v. United States* (*In re Oncology Assocs. of Ocean Cnty. LLC*), 510 B.R. 463 (Bankr. D.N.J. 2014). One other case notes the issue but concludes that the court lacked subject-matter jurisdiction. *Affiliated Physicians & Emps. Master Tr. v. Dep't of Treasury* (*In re Affiliated Physicians & Emps. Master Tr.*), 2022 WL 16953555, at *6 (Bankr. D.N.J. Nov. 15, 2022).

the debtor's insolvency and the lack of reasonably equivalent value for the transfer). That lack of recurrence significantly diminishes any need for certiorari.

Moreover, the amounts at stake are relatively modest. While the government (at 23) cherry-picks three cases involving over $1 million, typical section 544(b) cases, like this one, involve smaller amounts.[4] In the six reported cases raising the issue over the last decade, the median amount at stake has been around $200,000—hardly an unmanageable "risk[] to the federal fisc" (Pet. 23) within the $6.1 trillion federal budget.

The government (at 22 n.4) identifies three older section 544(b) cases where States raised sovereign immunity. But federal and state sovereign immunity can present distinct questions. *See United States v. Nordic Vill. Inc.*, 503 U.S. 30, 33 (1992). No circuit has addressed section 544(b)'s application to States, and that issue falls outside the government's question presented (at I). Any potential effect on cases involving other sovereigns does not strengthen the case for review.

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[4] *E.g.*, *Nat'l Pool*, 2015 WL 394507, at *1 ($47,700); Compl. ¶ 38, *Hatchett*, 588 B.R. 472 (No. 17-ap-4700) ($104,096.14); Pet.App.20a ($145,138.78); *VMI Liquidating Tr. v. United States* (*In re Valley Mortg., Inc.*), 2013 WL 5314369, at *1 (Bankr. D. Colo. Sept. 18, 2013) ($161,131.40); *Menotte v. United States* (*In re Custom Contractors, LLC*), 439 B.R. 544, 545-46 (Bankr. S.D. Fla. 2010) ($199,956.25); Compl. ¶ 343, *Cook v. Roberts* (*In re Yahweh Ctr., Inc.*), 2019 WL 1325032 (Bankr. E.D.N.C. Mar. 22, 2019) (No. 18-ap-82) ("over $260,000"); Compl. ¶ 9, *Furr v. IRS* (*In re Pharmacy Distrib. Servs.*), 455 B.R. 817 (Bankr. S.D. Fla. 2011) (No. 11-ap-1844) ($264,026); Compl. ¶ 26, *Oncology Assocs.*, 510 B.R. 463 (No. 14-ap-1094) ($471,938.02).

2. Moreover, the government's overly broad question presented risks muddying this case as a vehicle for reviewing the sovereign-immunity question. As noted, the government's petition blends two issues: (1) whether sovereign immunity precludes section 544(b) claims against the United States, and (2) whether the government may invoke other federal-law defenses, namely field preemption and the Appropriations Clause. There is no split on the second question, which invites tangential briefing on distinct questions. *See* Pet. 18 (describing preemption as "independent[]" of sovereign immunity).

The government (at 8, 10-11) claims "it is undisputed" that field preemption would bar the actual creditor's recovery outside of bankruptcy. That is incorrect. The bankruptcy court rejected the government's field-preemption argument, holding that fraudulent-transfer actions "do[] not implicate" "the field of federal tax collection" and therefore are not preempted—even setting aside the Bankruptcy Code. Pet.App.46a-47a. The government's attempt to inject field preemption into this case thus risks wide-ranging briefing that has little to do with bankruptcy law.

As for the Appropriations Clause, the government did not press this argument below and the court of appeals did not address it, as the government's statement (at 7) implicitly recognizes. This Court should not grant certiorari on a question that encompasses a forfeited issue.

To the extent the Court wants to address these additional arguments, it should await a case where the government preserved both. *E.g.*, *DBSI*, 869 F.3d at 1014-15. In the alternative, the Court might rephrase the question presented to limit briefing to the sovereign-immunity issue. *Cf. Warner Chappell Music, Inc. v. Nealy*,

144 S. Ct. 478 (2023) (narrowing question presented to issue implicating split); *Muldrow v. City of St. Louis*, 143 S. Ct. 2686 (2023) (similar). Respondent's first question presented, *supra* p. I, offers one proposed framing. But given the need for percolation and the issue's limited impact, the better course is to deny certiorari outright.

III. The Decision Below Is Correct

1. The Tenth Circuit correctly concluded that section 106(a) waives the United States' sovereign immunity from avoidance actions under section 544(b). The leading bankruptcy treatise agrees. *Collier* ¶ 544.01.

a. Section 106(a) is a paradigmatic "clear waiver of sovereign immunity." *Kirtz*, 601 U.S. at 49. Congress "abrogated" "sovereign immunity … as to a governmental unit" (including "the United States") "with respect to" section 544. 11 U.S.C. §§ 101(27), 106(a). By waiving immunity "with respect to" section 544, Congress waived immunity "insofar as [a claim] concerns" section 544. *See Webster's Third New International Dictionary* 1934 (1993). "With respect to" thus "has a broadening effect," reaching not only the listed subject but also "matters relating to that subject." Pet.App.7a (quoting *Appling*, 584 U.S. at 717).

Section 106(a)'s waiver covers all aspects of section 544(b) claims, including the underlying state-law cause of action. Section 544(b) allows a trustee to avoid any transfer "voidable under applicable law"—here, Utah's Uniform Fraudulent Transfer Act. Section 544(b) therefore incorporates the actual creditor's Utah-law claim, which "concern[s]" or "relat[es] to" that section. Pet.App.7a (quoting *Appling*, 584 U.S. at 716-18). The waiver thus covers the underlying state-law claim.

Applying that waiver here "facilitate[s] the Code's orderly and centralized debt-resolution process" by subjecting "all creditors (including governmental units)" to the same "overarching requirements." *Lac du Flambeau*, 599 U.S. at 391 (citation omitted). Under the government's interpretation, it alone could keep fraudulent transfers received two to four years before bankruptcy. Yet when Congress wanted to give the government a "limited exception[]" from ordinary bankruptcy rules, Congress said so expressly. *Id.* Congress, for example, exempted government fines from discharge and permitted the government to assess taxes notwithstanding bankruptcy's usual automatic stay. *Id.* Implying an additional, unwritten exception for fraudulent transfers would undermine Congress' "meticulous and carefully calibrated scheme." *See id.* at 392 (citation omitted).

b. The government (at 9) accepts that section 106(a) "unambiguously waives" immunity. But, the government (at 9, 12) asserts, that admittedly "broad" waiver does not apply because section 544(b) "has a two-step structure"—the trustee must show both a waiver *and* "that a creditor exists who could use a state's 'applicable law' to recover the payment from the IRS." Pet. 9-10 (quoting *EAR*, 742 F.3d at 747). Here, the government (at 10-11) says, that second requirement is not met because sovereign immunity would preclude recovery outside bankruptcy.

That reasoning rests on the same false dichotomy rejected in *Kirtz* between waivers of sovereign immunity and express causes of action against the government. 601 U.S. at 53; *supra* pp. 12-14. Parties suing the United States do not need a waiver *and* an express cause of action against the United States. A waiver plus a generally applicable cause of action suffices. Here, section 106(a)'s

unequivocal waiver applies to all aspects of section 544(b) actions. Trustees do not need a second waiver specific to the underlying state law.

Even spotting the government its two-step framework, the government misreads section 544(b). The government demands an actual creditor who could "recover the payment from the IRS." Pet. 10 (quoting *EAR*, 742 F.3d at 747). But section 544(b) asks only whether the transfer "is *voidable* under applicable law" (emphasis added). That passive-voice phrasing focuses on the transfer's voidability, not whether the creditor could actually *recover* from this defendant. Section 544(b)(1) never uses the word "recovery."

Avoidance and recovery are distinct concepts under both federal bankruptcy law and state fraudulent-transfer law. *Collier* ¶ 550.01; *see Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 583 U.S. 366, 370-72 (2018); *Acequia, Inc. v. Clinton* (*In re Acequia, Inc.*), 34 F.3d 800, 809 (9th Cir. 1994). In the Bankruptcy Code, Congress gave trustees various powers to avoid transfers. *See* 11 U.S.C. §§ 544, 545, 547–549, 553(b), 724(a). Section 550(a) then identifies when the trustee can recover for "a transfer [that] is avoided"—at which point the basis for avoidance is, "for all intents and purposes, irrelevant." *Collier* ¶ 550.01. Congress thus understood avoidance and recovery as distinct and, in section 544(b), asked only whether the transfer was "voidable."

Utah draws that same avoidance/recovery distinction. Utah law identifies "fraudulent" transfers and permits "avoidance of [such] transfer[s]." Utah Code §§ 25-6-5, 25-6-6, 25-6-8(1) (2014). Only after the "transfer is voidable" may the creditor "recover judgment for" its "value." *Id.* § 25-6-9(2). Notably, recovery is not limited to the initial transferee. "[T]he person for whose benefit the

transfer was made" and secondary transferees who did not take in good faith are also fair game. *Id.*

Thus, even setting aside section 106(a), section 544(b)'s "substantive requirements" (Pet. 12) are met. Section 544(b)(1) asks only whether the "transfer … is voidable under applicable law by a creditor holding an unsecured claim." The government (at I, 2, 9-10, 12) agrees that the "applicable law" here is "applicable state law," *i.e.*, Utah's Uniform Fraudulent Transfer Act. Under that Act, a transfer "is fraudulent" and voidable when the debtor (1) did not receive "reasonably equivalent value," and (2) "was insolvent." Utah Code § 25-6-6(1) (2014). The government agrees those requirements are met. Pet.App.3a. The transfers are thus voidable under applicable Utah law.

The government is incorrect that the decision below impermissibly creates a "substantive claim for relief or cause of action" or "alter[s] the substantive requirements of" bankruptcy. Pet. 13-14 (citing 11 U.S.C. § 106(a)(2)-(5)). Section 544(b) creates a cause of action, which incorporates state law on what transfers are "voidable." Nothing in the decision below alters those requirements. To the extent the government (at 13) suggests that waivers of sovereign immunity cannot "create[] new liability" against the United States, that is plainly incorrect. The entire point of waiving sovereign immunity is to make the United States liable where it would otherwise be immune. The government (at 22) accepts that it must return fraudulent transfers under section 548(a)—even though the United States would not be liable without a waiver of sovereign immunity. The same is true here.

The government (at 16-17) urges that courts should narrowly construe ambiguities in sovereign-immunity waivers. But the government identifies no ambiguity in

section 106(a), instead insisting (at 10) that "Section 106(a) has no bearing on" this case's outcome.

2. The Tenth Circuit correctly rejected the government's alternative argument (at 17-18) that field preemption bars the trustee's claim. Pet.App.12a-14a. Section 544(b) is a *federal* law creating a "*federal* cause of action in bankruptcy court." *DBSI*, 869 F.3d at 1015. One federal law cannot preempt another.

Further, the government's preemption argument again conflates avoidance with recovery. The government asserts that States cannot "enabl[e] their residents to recover tax payments directly from the United States." Pet. 17 (quoting *EAR*, 742 F.3d at 748). But regardless of whether an actual creditor could *recover* from the United States, the transfer is still *voidable* under Utah law. Plus, as the bankruptcy court recognized, the government's field-preemption argument is dubious even outside of bankruptcy. Nothing suggests Congress would want to preempt state fraudulent-transfer laws when a debtor fraudulently pays *someone else*'s taxes. Pet.App.46a-47a.

Finally, the government fleetingly suggests that the Appropriations Clause bars the trustee's claim because a state-law creditor could not "recover from the IRS outside of bankruptcy" absent a congressional appropriation. Pet. 18 (quoting *EAR*, 742 F.3d at 748). Putting aside forfeiture, *supra* p. 19, that argument is meritless. Again, the question under section 544(b) is whether the transfer "is voidable," not whether a creditor could actually recover from the IRS. Utah provides various remedies for voidable transfers, many of which would not require the IRS to pay a dime. Utah Code § 25-6-8 (2014). The Appropriations Clause poses no barrier here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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