No. 23-824

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DAVID L. MILLER

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

REPLY BRIEF FOR THE PETITIONER

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The court of appeals erred in determining that a bankruptcy trustee may avoid tax payments made to the United States by invoking 11 U.S.C. 544(b) and state fraudulent-transfer law, even though no actual creditor could obtain such relief outside of bankruptcy. Respondent concedes that in so holding, the Tenth Circuit broke with the Seventh Circuit and sided with the Fourth and Ninth Circuits, joining a square conflict among the courts of appeals. Respondent nonetheless argues that the Court should deny certiorari because the Seventh Circuit may reconsider its position in light of this Court's recent decision in *Department of Agriculture Rural Development Rural Housing Service* v. *Kirtz*, 601 U.S. 42 (2024). But *Kirtz* has no bearing on the correct resolution of the question presented here, and there is no reason to think the Seventh Circuit will reconsider its settled and correct position. Respondent's other reasons—such as his suggestion (Br. in Opp.

15) that the tax payments at stake in such cases are "trivial" sums to the federal government—are similarly mistaken. Certiorari is warranted.

A. This Court's Review Is Warranted

1. Respondent acknowledges (Br. in Opp. 12) that the courts of appeals are squarely divided on the question presented. But respondent contends (*id.* at 14) that further review is "premature" because the Seventh Circuit might revisit its decision in *In re Equipment Acquisition Resources, Inc.*, 742 F.3d 743 (2014) (*EAR*), in light of *Kirtz*. But nothing in *Kirtz* suggests that the Seventh Circuit will—or should—revisit its decade-old position.

In *Kirtz*, this Court held that a consumer may sue a federal agency for violating the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, because that statute "effects a clear waiver of sovereign immunity." 601 U.S. at 50. The Court noted that there are two situations in which it has found a clear waiver of sovereign immunity: first, when a statute says expressly that "'it is stripping immunity from a sovereign entity,'" and second, when "'a statute creates a cause of action' and explicitly 'authorizes suit against a government on that claim.'" *Id.* at 49 (citations omitted). The FCRA, the Court explained, fell into the second category by "explicitly permitt[ing] consumer claims for damages against the government," such that no "separate waiver provision" was required. *Id.* at 51, 53.

By contrast, the question presented here (and in *EAR*) does not involve "a cause of action explicitly against the government." *Kirtz*, 601 U.S. at 53. Just the opposite: As respondent does not dispute (Br. in Opp. 20-24), the relevant cause of action—the underlying state fraudulent-transfer law on which a trustee's

Section 544(b) action is predicated—does *not* ordinarily permit recovery against the government. But the Bankruptcy Code has a separate waiver provision, Section 106(a), which waives the United States' sovereign immunity "to the extent" it applies. 11 U.S.C. 106(a)(1) and (2); see *Kirtz*, 601 U.S. at 49 (identifying Section 106(a) as an example of the first category of waivers). And the question presented asks whether, as a matter of statutory construction, Section 106(a)'s waiver of immunity reaches the underlying state-law fraudulent-transfer action. Pet. I, 8-17. *Kirtz* has no bearing on that question.

Respondent suggests (Br. in Opp. 12-14, 21-22) that *Kirtz* somehow undermines the Seventh Circuit's reliance on *FDIC* v. *Meyer*, 510 U.S. 471 (1994). But the Seventh Circuit invoked *Meyer* only for the well-settled proposition that "the source of substantive law upon which the claimant relies" must "provide[] an avenue for relief" against the United States. *EAR*, 742 F.3d at 747 (quoting *Meyer*, 510 U.S. at 484); accord *United States Postal Serv.* v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 744 (2004) ("An absence of immunity does not result in liability if the substantive law in question is not intended to reach the federal entity."). Because "[o]rdinarily, a creditor cannot bring a[] [state-law] fraudulent-transfer claim against the IRS," and "[n]othing in [Section] 106(a)(1) gives the trustee greater rights to avoid transfers than the unsecured creditor would have under state law," the Seventh Circuit held that a trustee cannot rely on state fraudulent-transfer law to avoid a federal tax payment under Section 544(b). *EAR*, 742 F.3d at 744, 748. *Kirtz* does not cast any doubt on that analysis.

If anything, *Kirtz* reinforces the Seventh Circuit's position. In *Kirtz*, this Court once again emphasized that a "waiver of sovereign immunity must be 'unmistakably clear,'" and that "'any ambiguities in the statutory language are to be construed in favor of immunity.'" 601 U.S. at 49 (brackets and citations omitted). As the petition explained (at 16-17), that principle forecloses the trustee's contrary view.

Nor is there any other reason to think the Seventh Circuit will reconsider *EAR*. Respondent suggests (Br. in Opp. 14) that the Seventh Circuit might revisit this issue in light of the court of appeals decisions adopting a contrary rule. But the Ninth Circuit expressly disagreed with *EAR* seven years ago. See *Zazzali* v. *United States (In re DBSI, Inc.)*, 869 F.3d 1004, 1013 (2017) (*DBSI*). And the Seventh Circuit has never suggested any interest in revisiting *EAR*. For good reason: *EAR* was correctly decided, and the reasoning of the courts of appeals that have adopted a contrary rule is unpersuasive. Pet. 8-16.

At this point, there is a persistent and acknowledged conflict on the question presented, and the relevant legal arguments on both sides have been fully aired in the lower courts, including in the decisions below. Further percolation is unwarranted.

2. The question presented is recurring and important.

a. Respondent asserts (Br. in Opp. 17) that the "question presented appears to arise infrequently." The fact that four courts of appeals have addressed the issue in published decisions over the past decade belies that assertion—particularly because bankruptcy appeals are, as a general rule, relatively rare. See Admin. Office of the U.S. Courts, *Federal Judicial Caseload*

Statistics 2023, Tbl. B-1: Cases Commenced, Terminated, and Pending by Circuit and Nature of Proceeding, During the 12-Month Period Ending March 31, 2023, https://www.uscourts.gov/statistics/table/b-1/federal-judicial-caseload-statistics/2023/03/31 (bankruptcy appeals constituted less than 2.5% of the appellate docket).

Even apart from cases involving Section 544(b) claims against the IRS that did not result in a decision, at least ten district courts and bankruptcy courts across the country have likewise addressed the precise question presented here. See Pet. 21 n.4 (collecting cases); *Affiliated Physicians & Emp'rs Master Trust* v. *IRS (In re Affiliated Physicians & Emp'rs Master Trust)*, No. 21-14286, 2022 WL 16953555, at *6 (Bankr. D.N.J. Nov. 15, 2022). And now that another court of appeals has sided with the bankruptcy trustee, the trustees who operate in jurisdictions with a favorable rule—or no rule (yet)—will have even more incentive to seek to recoup federal tax payments under Section 544(b). Respondent notes (Br. in Opp. 17) that "[b]ankruptcy courts in the Seventh Circuit have never applied *EAR*'s holding," but that is unsurprising. *EAR* clearly precludes trustees from recovering federal tax payments by invoking Section 544(b) and state fraudulent-transfer law. Thus, the only trustee who attempted that maneuver in bankruptcy proceedings in the Seventh Circuit voluntarily dismissed his claim following the government's motion to dismiss. See Stipulation to Dismiss, *Peterson* v. *IRS (In re Mack Indus., Ltd.)*, No. 19-00552 (Bankr. N.D. Ill. Jan. 14, 2020).

b. Respondent suggests (Br. in Opp. 18) that the amounts at stake can be "relatively modest," emphasizing that the "median amount at stake has been around

$200,000." Respondent does not show his math, nor does he explain why the "median" amount is a relevant benchmark in the certiorari calculus. More to the point, it is undisputed that cases presenting this issue often have million-dollar consequences for the federal fisc. See Pet. 23 (collecting cases); *Sharp* v. *United States (In re SK Foods, L.P.)*, No. 09-29162, 2010 WL 6431702, at *1 (Bankr. E.D. Cal. July 14, 2010) (approximately $5.2 million at issue); *Equipment Acquisition Res., Inc.* v. *United States (In re Equipment Acquisition Res., Inc.)*, 451 B.R. 454, 457 (Bankr. N.D. Ill. 2011) (approximately $2.3 million at issue), rev'd, 742 F.3d 743 (7th Cir. 2014); *Affiliated Physicians*, 2022 WL 16953555, at *6 (approximately $3.2 million at issue). And there is no cap on the government's potential liability; in *DBSI*, for example, the Ninth Circuit held that a trustee could avoid $17 million in federal tax payments. 869 F.3d at 1007. A square conflict over an interpretation of the Bankruptcy Code that regularly costs the federal fisc millions does not have "limited practical importance." Br. in Opp. 15; see, *e.g.*, *United States* v. *Quality Stores, Inc.*, 572 U.S. 141, 145 (2014) (resolving dispute over $1,000,125 in federal taxes).

Respondent also portrays (Br. in Opp. 15-17) as minimal the "timing difference" permitted by the decision below. But as respondent recognizes (*id.* at 15-16), the most common state-law limitations period for a fraudulent-transfer action is four years—twice as long as the two-year lookback period that Congress authorized in 11 U.S.C. 548(a)(1), the Bankruptcy Code's own fraudulent-transfer provision, which would otherwise govern a trustee's attempt to avoid federal tax payments. See Pet. 2, 22. *DBSI* well illustrates the practical import of that distinction. The trustee there was able to recover only

$56,000 within the two-year federal lookback period, but he was able to pursue nearly $17 million within Idaho's four-year limitations period. 869 F.3d at 1008. Moreover, Section 548(a) does not incorporate a discovery rule, but most States have codified a one-year (or longer) discovery rule for cases of actual fraud—which, under the Tenth Circuit's rule, could subject the federal fisc to even greater liability.*

B. The Decision Below Is Incorrect

1. Respondent repeats the Tenth Circuit's errors in contending (Br. in Opp. 20-22) that Section 106(a) waives the United States' sovereign immunity in connection with the state-law fraudulent-transfer action on which the trustee's Section 544(b) action is predicated.

Respondent emphasizes that Section 106(a) is a "paradigmatic 'clear waiver of sovereign immunity.'" Br. in Opp. 20 (citation omitted). But all agree that Section 106(a) waives the United States' sovereign immunity where it applies, see Pet. 9-10; the relevant question is whether that waiver clearly reaches the underlying state-law fraudulent-transfer action.

On that question, respondent principally argues that "Section 106(a)'s waiver covers all aspects of section 544(b) claims, including the underlying state-law cause of action," because Section 106 broadly "waiv[es] immunity 'with respect to' section 544." Br. in Opp. 20 (ci-

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* Respondent likewise minimizes (Br. in Opp. 18) the consequences of the decision below for the States, but he offers no plausible basis to cabin the Tenth Circuit's rule to the federal fisc. Notably, in *DBSI*, seven States—including Idaho, the source of the "applicable law" on which the trustee relied—filed an amicus brief in the Ninth Circuit supporting the United States. See States Amici Br., 2016 WL 6298704, at *5 (Oct. 18, 2016), *DBSI*, *supra* (No. 16-35597).

tation omitted). But as already explained (Pet. 12-13), Section 106(a)'s waiver is broad in the sense that it wholly abrogates sovereign immunity *within* the bankruptcy proceeding as to dozens of subsections, including Section 544. Nothing in Section 106(a), however, purports to modify Section 544(b)'s requirement that a viable avoidance claim must exist *outside* bankruptcy in order for the trustee to rely on that claim as the predicate for a Section 544(b) action.

Respondent further contends that "when Congress wanted to give the government a 'limited exception' from ordinary bankruptcy rules, Congress said so expressly." Br. in Opp. 21 (quoting *Lac du Flambeau Band of Lake Superior Chippewa Indians* v. *Coughlin*, 599 U.S. 382, 391 (2023)) (brackets omitted). But *Lac du Flambeau* held only that there is "no indication" that Congress meant "to carve out a subset of governments from the definition of 'governmental unit'" in the Code. 599 U.S. at 391-392. Nothing in *Lac du Flambeau* suggested that Congress intended to turn the ordinary clear-statement rule protecting the federal government's immunity on its head by putting a thumb on the scale *against* the government when interpreting the scope of Section 106(a)'s waiver.

2. In the alternative, respondent argues (Br. in Opp. 23) that "even setting aside [S]ection 106(a)," Section 544(b)'s requirements are met. According to respondent, "nothing in [S]ection 544(b) requires that an actual creditor could recover *from the IRS* outside of bankruptcy"; instead, so long as a creditor could avoid a transfer against *some other defendant* outside of bankruptcy, the transfer is "voidable under applicable law" within the meaning of Section 544(b), and the trustee can then recover the payment from the IRS under a

separate Code provision, 11 U.S.C. 550(a). *Id.* at 11 (emphases altered).

That argument was neither pressed nor passed upon in any of the three courts below. To the contrary, this case to date has centered on whether Section 106(a)'s waiver of sovereign immunity extends to the underlying state-law action on which the trustee's Section 544(b) claim is predicated; respondent has never claimed that he can recover the at-issue federal tax payments regardless of the scope of Section 106(a)'s waiver. Indeed, respondent expressly declined to rely on the alternative argument in the district court. See D. Ct. Doc. 10, at 15 n.6 (July 24, 2020) (characterizing the alternative argument as "beyond the scope of the issues presented on appeal"). This Court should not be the first to address the argument.

In any event, respondent's new argument is wrong. Whether a transfer can be avoided under state law is not a yes-or-no proposition; rather, whether and to what extent a transfer can be avoided depends upon who is the defendant. Importantly, under the Utah Uniform Fraudulent Transfer Act (as in other States with similar laws, see Pet. 2 n.1), transfers can be avoided against some parties but not others. See Utah Code Ann. § 25-6-9(1) (West 2014) (fraudulent transfer not voidable against a good-faith transferee); *id.* § 25-6-9(6)(b) (fraudulent transfer not voidable against recipient in the ordinary course of business); see generally 1 Garrard Glenn, *Fraudulent Conveyances and Preferences* § 114, at 225, § 128, at 246 (rev. ed. 1940). As a general rule, if a fraudulent-transfer suit will affect a transferee's title or interest, the transferee is an indispensable party to the suit. 5 *Collier on Bankruptcy* ¶¶ 548.10[2] n.3, 548.11[1][a][i] (Richard Levin & Henry

J. Sommer eds., 16th ed. Apr. 2022); Glenn § 127, at 243-244, § 128, at 246-247. Thus, even if a creditor could invoke state law to avoid a transfer against some defendant (for example, the beneficiary shareholder), the salient point is that the creditor still could not avoid the transfer against the United States. Pet. 8.

Section 550(a), in turn, authorizes the trustee to recover transferred property only "to the extent that a transfer is avoided under [S]ection 544." 11 U.S.C. 550(a). If the transfer could not be avoided against the IRS, the trustee cannot recover from the IRS. Unsurprisingly, then, no court of appeals has endorsed respondent's proposed maneuver, under which the trustee could recover funds under Section 550(a) from party A by showing that a creditor could have avoided the transfer under state law against party B. See *DBSI*, 869 F.3d at 1010 n.7 (specifically declining to decide the case on that basis). Background principles of sovereign immunity and federal supremacy, moreover, counsel against an interpretation that would force the United States to turn over property based on a potential state-law avoidance action to which it was not a party. Cf. *United States* v. *Alabama*, 313 U.S. 274, 282 (1941) ("A proceeding against property in which the United States has an interest is a suit against the United States.").

3. As we have explained (Pet. 17-18), even if Section 106(a) did eliminate the sovereign-immunity bar to the underlying state-law action, the decision below would still be unsound because that action would be inconsistent with the Supremacy Clause, which Section 106(a) does not address. Respondent again echoes the Tenth Circuit, asserting (Br. in Opp. 24) that "[o]ne federal law" (presumably, the Internal Revenue Code) "cannot preempt another" (presumably, Section 544(b)).

But as already explained (Pet. 18), that misses the mark. The relevant question is not whether the trustee's Section 544(b) claim is preempted; it is whether a creditor's *state-law* action to avoid these federal tax payments outside bankruptcy would be preempted. Respondent also argues (Br. in Opp. 24) that "regardless of whether an actual creditor could *recover* from the United States, the transfer is still *voidable* under Utah law." Again, respondent failed to press that argument below, and that distinction finds no support in the Code. See pp. 8-9, *supra*.

Respondent also contends (Br. in Opp. 19) that there is "no split" on the preemption question. But the Tenth Circuit directly addressed and rejected the argument, Pet. App. 12a-13a, as did the bankruptcy court below, see *id.* at 46a-47a. Meanwhile, the Seventh Circuit has explained that "sovereign immunity is just one reason why there is no applicable state law that would enable a creditor to recover from the IRS outside of bankruptcy," because "the Supremacy Clause prevents states from enabling their residents to recover tax payments directly from the United States." *EAR*, 742 F.3d at 748. There is no sound reason to exclude that aspect of the decision below from the Court's review.

In *EAR*, the Seventh Circuit observed that the Appropriations Clause would likewise pose a "significant constitutional obstacle[]" to a state-law suit by a creditor attempting to obtain relief from the IRS. 742 F.3d at 747-748. As we have explained, that additional difficulty confirms the error in the decision below. See Pet. 18; see also Gov't C.A. Br. 27-28; Gov't Mot. for Summ. J. 7-8. Again, there is no reason to exclude that part of the Section 544(b) analysis from the Court's review, especially because it also reinforces the Seventh Circuit's

interpretation of Section 106(a). It is unlikely that Congress intended Section 106(a)'s waiver of sovereign immunity to extend to the underlying state-law action, when that suit would nonetheless be barred for other reasons.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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