No. 23-824

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DAVID L. MILLER

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

The Bankruptcy Code, 11 U.S.C. 101 *et seq.*, permits a bankruptcy trustee to avoid any prepetition transfer of the debtor's property that would be voidable "under applicable law" outside of bankruptcy by an actual unsecured creditor of the estate. 11 U.S.C. 544(b)(1). The applicable law may be state law. Elsewhere, the Code abrogates the sovereign immunity of all governmental units "to the extent set forth in this section with respect to" various sections of the Code, including Section 544. 11 U.S.C. 106(a)(1). The question presented is as follows:

Whether a bankruptcy trustee may avoid a debtor's tax payment to the United States under Section 544(b) when no actual creditor could have obtained relief under the applicable state fraudulent-transfer law outside of bankruptcy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 71 F.4th 1247. The memorandum decision and order of the district court (Pet. App. 15a-17a) is not published in the Federal Supplement but is available at 2021 WL 5194698. The memorandum decision of the bankruptcy court (Pet. App. 18a-49a) is reported at 617 B.R. 375.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2023. A petition for rehearing was denied on September 1, 2023 (Pet. App. 52a-53a). On November 17, 2023, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including January 2, 2024. On December 19, 2023, Justice Gorsuch further extended the time to and including January 29, 2024, and the petition was filed on that date.

The petition for a writ of certiorari was granted on June 24, 2024. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions are set out in an appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

1. In 11 U.S.C. 544 through 549, Congress granted a trustee in a bankruptcy proceeding the authority to "set aside certain types of transfers and recapture the value of those avoided transfers for the benefit of the estate." *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 583 U.S. 366, 370 (2018) (alterations and citation omitted). Many of those provisions establish substantive criteria that authorize a trustee to "avoid"—that is, "set aside," *ibid.*—transfers of the debtor's property in the circumstances specified by federal law.

Section 547, for example, authorizes a trustee to avoid certain preferential transfers of the debtor's property made within specified time periods preceding the filing of the bankruptcy petition. 11 U.S.C. 547. Section 549 authorizes a trustee to avoid certain transfers made after the bankruptcy case commences. 11 U.S.C. 549. Section 548—the Bankruptcy Code's standalone fraudulent-transfer provision—authorizes a trustee to avoid a transfer made "within 2 years before the date of the filing of the petition," if the transfer was made with the actual intent to hinder, delay, or defraud creditors or for inadequate value when the debtor was insolvent. 11 U.S.C. 548(a). And Section 544(a) gives the trustee the avoidance rights of a hypothetical judgment lien creditor that extended credit on the petition date, "whether or not such a creditor exists." 11 U.S.C. 544(a). Section 544(a) is principally used to "avoid un-

recorded liens and conveyances." *Merit Mgmt.*, 583 U.S. at 371.

At issue here is Section 544(b), the second of the two avoidance powers described in Section 544, which authorizes a trustee to avoid transfers that are "voidable under applicable law by a creditor holding an unsecured claim." 11 U.S.C. 544(b)(1). Section 544(b) is "unique" among the Bankruptcy Code's avoidance provisions, *In re Equipment Acquisition Res., Inc.*, 742 F.3d 743, 746 (7th Cir. 2014) (*EAR*), because it "contains no substantive provisions indicating what transfers or obligations are avoidable," *Sender* v. *Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996)—none at all. Instead, Section 544(b) is predicated on law external to the Bankruptcy Code.

As the "applicable law," trustees most frequently invoke state laws authorizing creditors to avoid fraudulent transfers. See *In re Xonics Photochemical, Inc.*, 841 F.2d 198, 202 (7th Cir. 1988).[1] But "applicable law" can also include any state or federal law that bears upon a creditor's avoidance rights outside bankruptcy. 4 William L. Norton Jr. & William L. Norton III, *Norton Bankruptcy Law and Practice* § 63:7, at 63-46 to 63-47 (3d ed. 2019) (*Norton*) ("In addition to state fraudulent conveyance laws, [Section 544(b)] conveys potential rights under state bulk sales laws, state preference laws, as well as various federal avoidance laws."); cf. *Patterson* v. *Shumate*, 504 U.S. 753, 758 (1992) (the

[1] Forty-six States and the District of Columbia have adopted some version of the 1984 Uniform Fraudulent Transfer Act, or its successor, the 2014 Uniform Voidable Transactions Act. See 5 *Collier on Bankruptcy* ¶ 544.06[2A]-[2B], at 544-28 to 544-29 (Richard Levin & Henry J. Sommer eds., 16th ed. Apr. 2024) (collecting state statutes).

term "applicable nonbankruptcy law" in 11 U.S.C. 541(c)(2) includes both state and federal law).

Section 544(b) thus requires the trustee to identify an actual creditor that could have successfully brought an avoidance claim under such laws, had the debtor never filed for bankruptcy. See *Zazzali* v. *United States (In re DBSI, Inc.)* (*DBSI*), 869 F.3d 1004, 1009 (9th Cir. 2017) ("Section 544(b)(1) requires the existence of an actual creditor who could avoid the transfer."). And since the trustee's rights under Section 544(b) are derivative of the actual creditor's—that is, because the trustee "stand[s] in the shoes of [the] actual creditor"—he is "subject to the same defenses a transferee would have in a state fraudulent conveyance action brought by the actual creditor." *Mendelsohn* v. *Kovalchuk (In re APCO Merch. Servs., Inc.)*, 585 B.R. 306, 314 (Bankr. E.D.N.Y. 2018).

2. a. This case arises out of bankruptcy proceedings commenced by All Resort Group, Inc. (ARG) in 2017. Pet. App. 2a. In 2014, before it filed for bankruptcy, ARG paid $145,138.78 to the Internal Revenue Service to be applied to the personal tax obligations of two of its principals, both of whom were ARG shareholders, officers, and directors. *Ibid.* Although not reflected in ARG's 2014 financial statements, an analysis prepared during the subsequent bankruptcy proceedings revealed that ARG was insolvent when it made the tax payments in 2014. *Id.* at 26a. Among ARG's debts when it filed for bankruptcy was an unpaid judgment resulting from a discrimination lawsuit brought by a former employee. *Id.* at 20a-21a.

After the bankruptcy case was converted from Chapter 11 to Chapter 7, the trustee (respondent here) brought an adversary proceeding against the United

States under Sections 544(b) and 548(a), seeking to avoid and recover the payments that ARG made to the IRS in 2014. Pet. App. 18a. The trustee and the United States each moved for summary judgment. *Id.* at 19a.

The bankruptcy court held that because the tax payments were made more than two years before the filing of ARG's bankruptcy petition, the trustee could not avoid the payments under Section 548—the Bankruptcy Code's freestanding fraudulent-transfer provision. Pet. App. 24a n.26.

But the bankruptcy court granted summary judgment to the trustee on his Section 544(b) claim. Pet. App. 26a. That claim relied on the Utah Uniform Fraudulent Transfer Act (UUFTA), Utah Code Ann. §§ 25-6-1 *et seq.* (2014), as the "applicable law" under which the trustee argued that the federal tax payments were voidable.[2] Under the UUFTA, a transfer is constructively fraudulent if the transfer was made when the debtor was insolvent and the debtor did not receive reasonably equivalent value in return. Utah Code Ann. § 25-6-6(1). Because the UUFTA grants a creditor four years to bring a civil action to avoid a constructively fraudulent transfer, *id.* § 25-6-10(2), the trustee's Section 544(b) claim did not suffer from the same timing defect as his Section 548(a) claim.

Instead, the question was whether the trustee could satisfy Section 544(b)'s substantive requirements—more precisely, the requirement that there must exist an actual creditor who, outside of bankruptcy, could avoid the

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[2] The Uniform Voidable Transactions Act is applicable to transfers made after May 9, 2017. See 2017 Utah Laws ch. 204 (S.B. 58); Utah Code Ann. § 25-6-406 (West 2017). This brief refers to the provisions of Utah law in effect when the relevant transfers were made in 2014.

transfer at issue. Pet. App. 26a. The trustee asserted that there existed an actual creditor (the former employee) who could bring a lawsuit under applicable law (the UUFTA). *Id.* at 26a-27a. Because ARG had paid its principals' taxes, not its own, the government did not dispute that the challenged tax payments satisfied the UUFTA's fraudulent-transfer definition. *Id.* at 3a, 26a. But as even the trustee conceded, "outside bankruptcy, sovereign immunity would bar [the former employee's] suit against the United States." *Id.* at 26a. Accordingly, the government contended that the challenged payments were not "voidable under applicable law by a creditor holding an unsecured claim," 11 U.S.C. 544(b)(1); instead, sovereign immunity "would bar [the former employee's] suit against the United States under the UUFTA," Pet. App. 26a.

The bankruptcy court rejected that contention, agreeing with the trustee that 11 U.S.C. 106(a) of the Code "abrogates that sovereign immunity in the bankruptcy context." Pet. App. 26a, 39a-40a. Under Section 106(a), "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to" 59 enumerated sections of the Bankruptcy Code, including Section 544. 11 U.S.C. 106(a)(1). The court believed that Section 106(a) not only abrogates the United States' sovereign immunity within the bankruptcy proceeding in which a trustee asserts a Section 544(b) claim, but also "remove[s] the ability of [the United States] to interpose immunity as a defense to the underlying state law cause of action." Pet. App. 39a. The court emphasized that Section 106(a) uses "broad language," "'indicating a clear legislative intent to be as broad as possible in abrogating sovereign immunity in the bankruptcy context.'" *Id.* at 33a-34a (citation omit-

ted). The court thus believed that Section 106(a)'s "abrogation of sovereign immunity means that in order to bring a § 544(b) claim, the trustee need only identify an unsecured creditor who, *but for sovereign immunity*, could have brought" a state-law avoidance claim. *Id.* at 39a (citation omitted).

The bankruptcy court also rejected the government's argument that the Internal Revenue Code would "preempt a suit brought by a debtor's creditors under state law to recover as fraudulent transfers tax payments made to the IRS." Pet. App. 43a. The court stated that the trustee's Section 544(b) claim is a "federal cause of action and therefore cannot be preempted." *Id.* at 46a (brackets and citation omitted). In the court's view, moreover, the trustee's action sought to "collect a fraudulent transfer," not a "tax payment," and therefore did not "implicate th[e] field" of "federal tax collection." *Ibid.*

The bankruptcy court avoided the relevant tax payments and awarded the trustee a judgment against the United States in the amount of $145,138.78. Pet. App. 4a, 49a.

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

3. The court of appeals also affirmed, holding that the waiver of sovereign immunity in Section 106(a) "reaches the underlying state law cause of action that § 544(b)(1) authorizes the [t]rustee to rely on in seeking to avoid the transfers." Pet. App. 5a.

The court of appeals explained that Section 106(a)(1) waives sovereign immunity "with respect to" Section 544. Pet. App. 7a-8a. That phrase, the court reasoned, "generally has a broadening effect," reflecting Congress's intent that the waiver "reach any subject that

has 'a connection with' . . . the topics the statute enumerates." *Id.* at 7a (quoting *Lamar, Archer & Cofrin, LLP* v. *Appling*, 584 U.S. 709, 717-718 (2018)) (emphasis and internal quotation marks omitted). The court believed that Section 106(a) "has a connection with" the state law invoked by the trustee in the context of a Section 544(b) action, and that Congress therefore "clearly" intended "to abolish the [g]overnment's sovereign immunity in an avoidance proceeding arising under § 544(b)(1), regardless of the context in which the defense arises." *Id.* at 8a.

The court of appeals acknowledged (Pet. App. 4a) that its decision conflicts with the Seventh Circuit's holding in *EAR*, 742 F.3d 743. But it concluded that *EAR* "never meaningfully addressed the scope of § 106(a) as reflected in its text," and that the Ninth Circuit's contrary decision in *DBSI*, 869 F.3d at 1009, was more "faithful to the text of Code § 106(a)." Pet. App. 9a, 11a.

Finally, the court of appeals rejected the government's "argument that if sovereign immunity does not bar the [t]rustee's § 544(b)(1) action, field preemption * * * does so by way of the Internal Revenue Code's * * * interest in tax collection." Pet. App. 12a-13a. The court explained that Section 544(b) is a federal statute, and if Congress thought Section 544(b) "posed an obstacle to its objectives," it "surely would have added an express preemption provision." *Id.* at 13a. The court further reasoned that "[t]he argument for field preemption * * * is surely rather weak where Congress is aware of the operation of state law in a field of federal interest * * * and has decided to place the policy of equal distribution and fairness among creditors on equal footing." *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals held 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. That interpretation of the Bankruptcy Code is incorrect.

A. Under Section 544(b), the bankruptcy trustee "may avoid" a previous transfer by bringing an adversary proceeding, but only if the trustee can show that the relevant transfer "is voidable under applicable law by a creditor holding an unsecured claim." 11 U.S.C. 544(b)(1).

When a trustee has identified an actual creditor who could have avoided the relevant transfer outside of bankruptcy, the trustee can step into that creditor's shoes and avoid the transfer for the benefit of the estate. But the trustee invoking Section 544(b) is subject to the same limitations that would have applied to the existing creditor who could have sought relief outside of bankruptcy; the trustee's action mirrors the creditor's potential action. If the actual creditor on whose rights the trustee depends could not have "succeed[ed] for any reason—whether due to the statute of limitations, estoppel, res judicata, waiver, or any other defense—then the trustee is similarly barred and cannot avoid the transfer." *Zazzali* v. *United States (In re DBSI, Inc.)*, 869 F.3d 1004, 1009 (9th Cir. 2017) (citation and internal quotation marks omitted).

Here it is undisputed that, under Utah fraudulent-transfer law, no actual creditor could have brought a successful suit against the IRS to avoid the federal tax payments at issue. And because no actual unsecured creditor could have avoided the payments, the trustee

had nobody's shoes to step into under Section 544(b). That should have doomed the trustee's Section 544(b) claim.

B. The courts below believed that the Bankruptcy Code's waiver of sovereign immunity means that the trustee need only "identify an unsecured creditor who, *but for sovereign immunity*, could have brought the [avoidance] claim at issue." Pet. App. 39a (citation and internal quotation marks omitted). That approach fundamentally misunderstands how Section 544(b) and Section 106(a) operate.

1. Section 106(a)(1) waives the government's sovereign immunity within the bankruptcy case as to 59 specified provisions of the Bankruptcy Code, including Section 544. 11 U.S.C. 106(a). That waiver allows a trustee to bring an adversary proceeding to assert a Section 544(b) claim against the government.

But the bankruptcy court must actually adjudicate the merits of the trustee's claim—just as it would under other provisions identified in Section 106(a). In doing so, the court must determine "whether the source of substantive law upon which the [trustee] relies provides an avenue for relief." *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994). As this Court has emphasized, that question is "'analytically distinct'" from the inquiry into "whether there has been a waiver of sovereign immunity." *Ibid.* (citation omitted). Nothing in Section 106(a) suggests that Congress intended to affect that separate inquiry —for Section 544(b) or any of the other specified provisions.

To the contrary, Section 106(a) waives the government's sovereign immunity only "to the extent set forth in this section." 11 U.S.C. 106(a). And Section 106(a)(5) includes a critical limitation, directing that "[n]othing in

this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law." 11 U.S.C. 106(a)(5). Here, Section 544(b) does not ordinarily subject a transferee of estate property to any avoidance claim to which the transferee was not already vulnerable; it simply authorizes the trustee to invoke one creditor's existing right and avoid a transfer for the benefit of all creditors. By holding that Section 106(a) modifies Section 544(b)'s ordinary rule, the decision below flouts the limitation in Section 106(a)(5).

2. The court of appeals' reasoning does not withstand scrutiny. Most fundamentally, the court conflated sovereign-immunity and merits issues, reasoning that because Section 106(a)(1) waives sovereign immunity "with respect to" various sections, including Section 544(b)(1), that waiver must be construed "broad[ly]." Pet. App. 7a. But the phrase "[w]ith respect to" simply identifies the provisions as to which Section 106(a) waives immunity—*i.e.*, the provisions to which the waiver pertains, concerns, or refers. And even assuming that the phrase "with respect to" connotes breadth, no one disputes that Section 106(a)(1) *is* broad in an important sense: It wholly abrogates sovereign immunity within the bankruptcy case as to dozens of Code provisions. But nothing in Section 106(a)(1) suggests that Congress intended the waiver to be "broad" in the way the trustee urges—extending so far as to alter Section 544(b)'s *substantive* requirements.

The clear-statement rule protecting the federal government's sovereign immunity eliminates any doubt. While Congress has waived the United States' immunity with respect to Section 544(b) actions brought by the

bankruptcy trustee, nothing in Section 106(a) suggests —let alone clearly states—that such a waiver extends to the underlying state-law suit on which Section 544(b) is predicated.

C. Even beyond sovereign immunity, a creditor who attempted to use state fraudulent-transfer law to avoid payments to the IRS outside of bankruptcy would face additional constitutional difficulties. Most obviously, federal tax collection is a matter of federal law, U.S. Const. Art. I, § 8, Cl. 1, to which any contrary state law must yield under the Supremacy Clause. A state-law fraudulent-transfer action brought by a creditor to avoid and recover the payment of a third party's taxes would thus be preempted. That is true regardless of how Section 106(a)—which addresses only the sovereign-immunity bar—is interpreted.

D. In his brief opposing certiorari, the trustee argued, for the first time, that Section 544(b) is satisfied even if Section 106(a)'s waiver of sovereign immunity does not affect the viability of the underlying state-law suit. According to the trustee, as long as a creditor could avoid a transfer against *some other defendant* (here, presumably the beneficiary shareholders) 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). That argument—which raises distinct interpretive questions under both federal and state law—was neither pressed nor passed upon below. Indeed, *no* court of appeals has ever addressed, let alone endorsed, the trustee's alternative argument. This Court should not be the first.

ARGUMENT

A BANKRUPTCY TRUSTEE CANNOT AVOID TAX PAYMENTS MADE TO THE UNITED STATES BY INVOKING 11 U.S.C 544(b) AND STATE FRAUDULENT-TRANSFER LAW

To successfully avoid a transfer under 11 U.S.C. 544(b), a trustee must identify a "so-called[] 'golden creditor,'" *e.g.*, *Ebner* v. *Kaiser (In re Kaiser)*, 525 B.R. 697, 703 (Bankr. N.D. Ill. 2014)—not just a hypothetical creditor, as under 11 U.S.C. 544(a), but an actual creditor who could have avoided that very transfer based on nonbankruptcy law. The trustee cannot identify any such actual creditor here. It is undisputed that no creditor could have sued the United States under Utah law to avoid the federal tax payments at issue here outside of bankruptcy. The courts below thus should have rejected the trustee's Section 544(b) claim on the merits.

Section 106(a) of the Bankruptcy Code does not affect that analysis. Section 106(a) waives sovereign immunity in the bankruptcy case, allowing a trustee to bring an adversary proceeding against the United States based on Section 544 (or other identified provisions). It does not, however, otherwise alter the substantive requirements of any of the listed provisions. Here, the trustee cannot satisfy Section 544(b)'s actual-creditor requirement; that is, he cannot show that the United States would have been vulnerable to an avoidance claim to recover the at-issue tax payments under applicable nonbankruptcy law. Because Section 106(a) does not remedy that defect in the trustee's claim, this Court should reverse the decision below.

A. No Actual Creditor Could Have Avoided The Federal Tax Payments At Issue Here By Bringing A Claim Against The United States Under Utah Fraudulent-Transfer Law

Section 544(b)'s basic substantive requirement—that there must exist an actual creditor who could have avoided the relevant transfer outside of bankruptcy—is not satisfied here. No creditor could have sued the federal government under Utah fraudulent-transfer law to recoup the tax payments at issue. The trustee's Section 544(b) claim, which is predicated on the validity of an actual creditor's claim, thus fails on the merits.

1. Under Section 544(b), the trustee must show that the relevant transfer "is voidable under applicable law by a creditor holding an unsecured claim"; if so, the trustee "may avoid" the transfer by bringing an adversary proceeding under Section 544(b). 11 U.S.C. 544(b)(1); see pp. 3-4, *supra*.

By its plain terms, then, Section 544(b) does not itself contain any "substantive provisions indicating what transfers or obligations are avoidable." *Sender* v. *Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996). Instead, Section 544(b) "allows a trustee to step into the shoes of an actual creditor who could have avoided the transfer outside bankruptcy using a state-law cause of action." *In re Equipment Acquisition Res., Inc.*, 742 F.3d 743, 744 (7th Cir. 2014) (*EAR*). In authorizing a trustee to assume the right of an existing creditor to avoid a transfer, Section 544(b)(1) serves a "central policy of the Bankruptcy Code"—*i.e.*, "equality of distribution among creditors," *Begier* v. *IRS*, 496 U.S. 53, 58 (1990)—by ensuring that a single creditor's avoidance rights will in-

ure to the benefit of all.[3] But Section 544(b) does not reach a transfer that is not otherwise vulnerable under nonbankruptcy law.

Section 544(b) is thus "distinct from" other avoidance provisions in the Bankruptcy Code in that "a trustee * * * can use this power only if there is an unsecured creditor of the debtor that actually has the requisite nonbankruptcy cause of action." *The Official Comm. of Unsecured Creditors of Cybergenics Corp.* v. *Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 243 (3d Cir. 2000); see 5 *Collier on Bankruptcy* ¶ 544.06[1] (Richard Levin & Henry J. Sommer eds., 16th ed. Apr. 2024) ("If there are no creditors against whom the transfer is voidable under the applicable law, the trustee is powerless to act under section 544(b)(1)."); see also pp. 2-4, *supra* (describing other provisions). And to determine whether such a golden creditor exists, a court must consider all legal rules that would have borne on the proper disposition of a suit to avoid the transfer under state law by the "creditor holding an unsecured claim." 11 U.S.C. 544(b)(1).

In that regard, Section 544(b) shares a key attribute of the avoidance power that trustees had under bank-

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[3] Section 544(b) does not strip the actual creditor of his own cause of action; rather, Section 544(b) creates a parallel cause of action for the benefit of all creditors, and the Bankruptcy Code's automatic stay provision, 11 U.S.C. 362, temporarily prohibits the actual creditor from prosecuting her own fraudulent-transfer claim. See *In re Colonial Realty*, 980 F.2d 125, 130-131 (2d Cir. 1992) (adopting the reasoning of *In re Saunders*, 101 B.R. 303, 304-306 (Bankr. N.D. Fla. 1989)). If the bankruptcy case closes without the trustee's pursuit of a Section 544(b) claim premised on the creditor's right, the creditor may pursue her state-law claim, insofar as any relevant debt has not been discharged. See *Norton* § 63.7, at 63-41 n.1.

ruptcy law since 1898.[4] It was "well established" that the power did not "clothe the trustee" with any "new or additional right * * * but simply put[] him in the shoes of the [creditor]," making him "subject to the same limitations and disabilities that would have beset the creditor in the prosecution of the action on his own behalf." *Davis* v. *Willey*, 263 F. 588, 589 (N.D. Cal. 1920). Accordingly, "if, for any reason arising under the laws of the state, the action could not be maintained by the creditor, the same disability w[ould] bar the trustee." *Ibid.* As amended by the Bankruptcy Act of 1938, the provision further specified that the bankruptcy court "shall have concurrent jurisdiction with" "any State court which would have had jurisdiction" over the avoidance action "if bankruptcy had not intervened." Ch. 575, § 70e(3), 52 Stat. 882. That language—underscoring the need for an avoidance right that was actually viable outside of bankruptcy—was virtually unchanged until 1978, when Congress enacted Section 544(b).

Under Section 544(b), it remains the case that whenever the actual creditor on whose rights the trustee depends "could not succeed for any reason—whether due

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[4] Some version of the trustee's avoidance power has existed since the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544. Section 70e of the 1898 act provided that "[t]he trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value[.]" 30 Stat. 566. The Bankruptcy Act of 1938 revised that language to provide that "[a] transfer made * * * by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee[.]" § 70e(1), 52 Stat. 882.

to the statute of limitations, estoppel, res judicata, waiver, or any other defense—then the trustee is similarly barred and cannot avoid the transfer." *Zazzali* v. *United States (In re DBSI, Inc.)*, 869 F.3d 1004, 1009 (9th Cir. 2017) (quoting *EAR*, 742 F.3d at 746). "Like Prometheus bound, the trustee is chained to the rights of [such] creditors." *Acequia, Inc.* v. *Clinton (In re Acequia, Inc.)*, 34 F.3d 800, 809 (9th Cir. 1994). "[A]pplicable nonbankruptcy law" will thus "determine the rights that accrue" to the trustee. *Norton* § 63.7, at 63-42.[5]

2. Here, the trustee has identified a former employee of ARG as the actual creditor for purposes of Section 544(b). Pet. App. 26a-27a. But there is no dispute that the former employee could not have avoided ARG's tax payments to the IRS by bringing suit against the government under the UUFTA, for multiple reasons.

To start, as the trustee conceded (Pet. App. 3a, 26a), any creditor's state-law action against the United States to avoid a federal tax payment would be barred by principles of sovereign immunity. See *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992) (actions against the federal government are prohibited absent an "unequivocally expressed" statutory waiver of immunity from suit) (citation omitted). Further, as ex-

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[5] The venue provision applicable to modern bankruptcy proceedings takes as a given that same premise—namely, that Section 544(b) contemplates an avoidance right that is actually viable outside of bankruptcy. See 28 U.S.C. 1409 (authorizing a trustee to commence proceedings "under section * * * 544(b)" "in the district court for the district where the State or Federal court sits in which, under applicable nonbankruptcy venue provisions, the * * * creditors * * * may have commenced an action on which such proceeding is based if the case under title 11 had not been commenced").

plained below in more detail, see pp. 34-38, *infra*, federal tax collection is a matter of federal law, U.S. Const. Art. I, § 8, Cl. 1, to which a contrary state law must yield under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2. Congress has not authorized a state-law action by a creditor to avoid or recover federal tax payments, and a state-law right to set aside or disregard a payment does not bind the Internal Revenue Service. See *United States* v. *Mitchell*, 403 U.S. 190, 204 (1971) (federal law, not state law, "governs what is exempt from federal levy"). A creditor's suit would likewise run afoul of the Appropriations Clause to the extent it sought recovery of funds already in the Treasury without statutory authorization. U.S. Const. Art. I, § 9, Cl. 7. Finally, Utah law itself recognizes that its provisions are supplemented by the effects of any "invalidating cause" under "principles of law and equity," Utah Code Ann. § 25-6-11, thus confirming that a creditor cannot prevail under the UUFTA in contravention of federal legal principles such as sovereign immunity and the Supremacy Clause.

The Section 544(b) analysis should end there: Because no actual creditor exists who could have brought a claim against the United States to avoid the challenged tax payments outside of bankruptcy, the trustee cannot prevail in invoking Section 544(b) to avoid those transfers within the bankruptcy proceeding. See *EAR*, 742 F.3d at 746-747.

B. The Waiver Of Sovereign Immunity In Section 106(a) Cannot Remedy The Substantive Defect In The Trustee's Section 544(b) Claim

The trustee has contended, and the courts below agreed, that because Section 106(a) of the Bankruptcy Code waives sovereign immunity "with respect to" dozens of Code provisions, including Section 544, see 11

U.S.C. 106(a)(1), the trustee need only "identify an unsecured creditor who, *but for sovereign immunity*, could have brought [the avoidance] claim at issue." Pet. App. 39a (citation and internal quotation marks omitted). That interpretation cannot be reconciled with the statutory text and fundamentally misunderstands how both Section 106(a) and Section 544(b) operate.

1. Section 106(a) does not alter the substantive requirements for avoiding a transfer under Section 544(b)

Section 106(a) waives the government's sovereign immunity within the bankruptcy case as to dozens of specified provisions, including Section 544(b). That waiver allows a trustee to invoke Section 544(b) in a proceeding against the United States within the bankruptcy case. But Section 106(a) does not otherwise alter the substantive requirements of the listed provisions. Here, that means that the trustee could bring an adversary proceeding asserting a Section 544(b) claim against the government, and the government could not assert a sovereign-immunity defense against the trustee's own action. Nevertheless, the trustee's failure to satisfy Section 544(b)'s requirements on the merits—specifically, his failure to identify an actual creditor who could have avoided the transfers to the IRS under nonbankruptcy law—remains fatal to his claim.

a. Section 106(a) states that "[n]otwithstanding 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[] * * * Sections." 11 U.S.C. 106(a). Section 106(a)(1) then enumerates 59 sections of the Bankruptcy Code by section number, including Section 544.

Under Section 544(b), a trustee seeking to avoid a transfer must show that the transfer "is voidable under

applicable law by a creditor holding an unsecured claim"; if so, the trustee "may avoid" the transfer by initiating an adversary proceeding within the bankruptcy case. See 11 U.S.C. 544(b)(1). All agree that Section 106(a) waives the government's immunity for purposes of the second step: Sovereign immunity does not preclude a trustee from invoking Section 544—or other provisions listed in Section 106(a)—against the federal government within the bankruptcy case.

But that does not guarantee that the trustee's claim will succeed. The bankruptcy court must adjudicate the *merits* of the trustee's claim—just as it would for any of the other provisions identified in Section 106(a)(1). The court must determine "whether the source of substantive law upon which the [trustee] relies provides an avenue for relief." *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994). As this Court has explained, such merits questions are "'analytically distinct'" from the inquiry into "whether there has been a waiver of sovereign immunity." *Ibid.* (citation omitted); see also *United States Postal Serv.* v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 743 (2004) (explaining that, even though sovereign immunity is waived, whether the government is subject to substantive liability is a "further, separate question"). And here, nothing in Section 106(a) suggests that Congress intended to change that separate inquiry —for Section 544(b) or the dozens of other provisions listed in Section 106(a)(1).

Just the opposite. Section 106(a) does not simply waive the government's sovereign immunity, full stop. Rather, it states that "sovereign immunity is abrogated as to a governmental unit *to the extent set forth in this section* with respect to" 59 sections of the Bankruptcy Code. 11 U.S.C. 106(a)(1) (emphasis added). Thus, the

statutory text directs the reader to look to other parts of Section 106 to determine the "extent" to which sovereign immunity is abrogated.

And Congress added a limitation:

> Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

11 U.S.C. 106(a)(5). Congress thus authorized the trustee to invoke the identified provisions of the Bankruptcy Code against the government within the bankruptcy case—but at the same time, directed that Section 106(a)'s waiver should not be construed to create a "substantive claim for relief" that would not otherwise exist.

The decision below runs contrary to that directive. As explained, see pp. 14-18, *supra*, Section 544(b) authorizes avoidance of a transfer by a trustee inside bankruptcy only if an unsecured creditor could have obtained that relief outside bankruptcy. That is, Section 544(b) does not ordinarily subject a transferee of estate property to any avoidance claim to which the transferee was not already vulnerable; it simply authorizes the trustee to invoke one creditor's existing right and avoid a transfer for the benefit of all creditors. See pp. 14-17, *supra*. And here, as already explained, it is undisputed that no actual creditor would have been able to bring a successful suit against the IRS to avoid the tax payments under Utah law. See pp. 17-18, *supra*. Yet the court of appeals held that Section 106(a) modifies Section 544(b)'s ordinary rule, so that the filing of a bankruptcy petition allows the trustee to avoid tax payments against the federal government—even though that avoidance right does "not otherwise exist[]," 11 U.S.C. 106(a)(5), in an action brought by a creditor under ap-

plicable state law. The court did not—and could not—reconcile that holding with Section 106(a)(5).

Three other paragraphs in Section 106(a) reinforce that it operates to waive sovereign immunity *within* the bankruptcy case as to the specified sections—without otherwise altering the substantive requirements associated with those provisions. Paragraph (2) states that the bankruptcy court "may hear and determine any issue arising with respect to the application of such sections to governmental units"; paragraph (3) authorizes the court to grant monetary relief, not including punitive damages, against a governmental unit; and paragraph (4) authorizes the court to enforce any such order or judgment against a governmental unit, but expressly requires the enforcement to be "consistent with appropriate nonbankruptcy law applicable to such governmental unit." 11 U.S.C. 106(a)(2)-(4). Each of those provisions focuses on the court's ability to interpret and effectuate the identified Code provisions against a governmental unit in the bankruptcy case; none of them contemplates any alteration of the underlying substantive requirements of the relevant provisions.

b. Two illustrations point up the relevant distinction.

Consider first the time limits for an avoidance action brought under Utah law, contrasted with those applicable to a trustee's Section 544(b) claim in bankruptcy. If a trustee brings a Section 544(b) claim within a year after his appointment or within two years after the petition or other order for relief (whichever is later), his claim is timely. 11 U.S.C. 546(a)(1). But under the UUFTA, a creditor must bring an action to avoid a constructively fraudulent transfer within four years after the transfer. Utah Code Ann. §§ 25-6-6, 25-6-10(2). Had the trustee here, for example, brought a Section 544(b)

action in 2018 to avoid payments made by ARG to private parties in 2012, *his* Section 544(b) claim would have been timely since he was appointed in 2017. But he would lose on that claim on the merits because *no actual creditor* could have avoided the payments under applicable law six years after they were made. Likewise, in this case, *the trustee's* claim is not barred at the outset by sovereign-immunity (or Supremacy Clause) principles, but he still cannot prevail on the merits because *no actual creditor* has the power to avoid the tax payments under applicable law.

The same holds true when the limitation on the state-law avoidance action is governmental immunity, rather than timeliness. Utah's fraudulent-transfer law could have included an express exception stating that the law does not apply to transfers made to the federal government. Then, the trustee's Section 544(b) claim would plainly fail on the merits because the transfer would not be "voidable under applicable law," 11 U.S.C. 544(b)(1)—even though Section 106(a) would waive the government's immunity in the trustee's adversary proceeding seeking to avoid the payments. The result should be no different when the barrier to the actual creditor's state-law avoidance action is imposed by fundamental principles of sovereign immunity or the Supremacy Clause rather than the express terms of the state fraudulent-transfer law; in either case, the state law would not allow the unsecured creditor to avoid the transfer. That is particularly clear when Utah law expressly confirms that its provisions are "supplement[ed]" by any "invalidating cause" under "principles of law and equity"—like the Supremacy Clause or sovereign immunity, which would doom the employee's

avoidance claim against the federal government. Utah Code Ann. § 25-6-11; see pp. 17-18, *supra*.

The decision below conflates the sovereign-immunity and merits aspects of the trustee's Section 544(b) claim —erroneously assuming that because Section 106(a) waives the United States' immunity in an adversary proceeding brought under Section 544(b) within the bankruptcy proceeding, it necessarily also waives the immunity that the United States would have in a predicate state-law suit brought by a creditor under Utah law. As explained above, that analysis cannot be reconciled with the ordinary operation of Section 544(b), which requires an actual creditor who could bring a viable avoidance action. And it is inconsistent with the text of Section 106(a) and the longstanding distinction between a waiver of sovereign immunity and the claimant's entitlement to substantive relief. While Section 106(a)'s abrogation of sovereign immunity "with respect to" Section 544 allows the trustee to assert a Section 544(b) claim against the United States in bankruptcy court, that claim should have failed on the merits because there is no creditor who could have avoided the debtor's payments to the IRS outside of bankruptcy.

2. The court of appeals' contrary reasoning lacks merit

The court of appeals' error was premised, at least in part, on the court's assumption that the government is raising a "sovereign immunity defense to the Utah state law the Trustee invokes." Pet. App. 8a. But the government has not asserted sovereign immunity as a defense to *the trustee's* action; it has identified sovereign immunity as one reason why an *actual creditor* could not avoid the tax payments outside bankruptcy—as Section 544(b) requires before the trustee can prevail

on his claim. The rest of the court's reasoning likewise lacks merit.

a. The court of appeals believed that because Section 106(a)(1) waives sovereign immunity "with respect to" various sections, including Section 544(b)(1), that waiver must be construed "broad[ly]." Pet. App. 7a (citation omitted). The court reasoned that the phrase "with respect to" generally has a "'broadening effect,'" reflecting Congress's intent that the waiver "reach any subject that has 'a connection with' . . . the topics the statute enumerates." *Ibid.* (citation and emphases omitted). And the court concluded that because Section 106(a) "has a connection with" the state law invoked by the trustee in the context of a Section 544(b) action, Congress "clearly" intended "to abolish the Government's sovereign immunity in an avoidance proceeding arising under § 544(b)(1), regardless of the context in which the defense arises." *Id.* at 8a.

That argument fails on its own terms. The phrase "[w]ith respect to" simply identifies the provisions as to which Section 106(a) waives immunity—*i.e.*, the provisions to which the waiver pertains, concerns, or refers. See, *e.g.*, *Muldrow* v. *City of St. Louis*, 144 S. Ct. 967, 974 (2024) (treating the statutory term "with respect to" to mean "pertain to") (citation omitted); *Random House Unabridged Dictionary* 1639-1640 (2d ed. 1993) (defining "respect (with respect to)" to mean "referring to; concerning"); *Webster's Third New International Dictionary* 1934 (1989) (defining "with respect to" to mean "as regards : insofar as concerns : with reference to"); 13 *Oxford English Dictionary* 732 (2d ed. 1989) (def. 7.b: defining "with respect" to mean "[w]ith reference or regard *to* something"); *Black's Law Dictionary* 793 (6th ed. 1990) (defining "[i]n regard to" to mean

"[c]oncerning; relating to; in respect of; with respect to; about").

The court of appeals believed itself "bound" by precedent from this Court holding that the word "respecting" "generally has a broadening effect, ensuring that the scope of a [statutory] provision covers not only its subject but also matters relating to that subject." Pet. App. 7a (quoting *Lamar, Archer & Cofrin, LLP* v. *Appling*, 584 U.S. 709, 717 (2018) (brackets in original). But the Court in *Lamar* confronted an entirely different question—namely, whether a statement regarding a single asset qualifies as a "statement respecting the debtor's * * * financial condition" under 11 U.S.C. 523(a)(2)(A), or if instead that provision refers only to a "statement * * * about the debtor's overall financial status." 584 U.S. at 712. The Court held that a single-asset statement qualifies as a statement "'respecting'" a debtor's financial condition because such a statement has a "direct relation to or impact on the debtor's overall financial status," *id.* at 720, allowing the associated debt to be discharged, *id.* at 712.

Nothing in *Lamar* supports the much more expansive position urged by respondent and adopted by the courts below: that the phrase "with respect to" in the Bankruptcy Code's waiver of sovereign immunity indicates that Congress intended to go beyond waiving sovereign immunity in the bankruptcy case as to the identified Code provisions to expose the federal fisc to substantive liability predicated on state laws that would not otherwise apply to the federal government. And this Court has previously recognized that the phrase "with respect to" need not be read expansively. See, *e.g.*, *Presley* v. *Etowah Cnty. Comm'n*, 502 U.S. 491, 506-507, 509 (1992) (rejecting argument that resolution transfer-

ring powers from electable to non-electable officials was a change in "practice or procedure with respect to voting"); *Pattern Makers' League of N. Am.* v. *NLRB*, 473 U.S. 95, 110 (1985) (rejecting argument that labor union's policy that forbade members from resigning was a "rule with respect to the retention of membership").

The court of appeals also cited (Pet. App. 7a) this Court's decision in *Coventry Health Care of Missouri., Inc.* v. *Nevils*, 581 U.S. 87 (2017), but there this Court simply recognized—as it often has—that "the phrase 'relate to' in a preemption clause 'expresses a broad preemptive purpose.'" *Id.* at 96 (citation and brackets omitted). That conclusion, the Court explained, was animated by the "[s]trong and 'distinctly federal interests * * * involved'" and the federal government's "significant financial stake," which favored broad preemption in the context of federal employees' health insurance. *Ibid.* (citation omitted). Here, of course, such considerations point in exactly the opposite direction: Waivers of sovereign immunity are strictly construed, given the important federal interests involved, see pp. 33-34 *infra*, and the court of appeals' broad construction of Section 106(a) would expose the federal fisc to significant financial liability.

But even assuming that the term "with respect to" does connote breadth, no one disputes that Section 106(a) *is* broad in an important sense: It wholly abrogates sovereign immunity in the bankruptcy case as to dozens of identified sections of the Code—including as to monetary recovery (a contested aspect of earlier waivers, see pp. 31-33, *infra*). There is nothing in the text of Section 106(a)(1), however, that suggests Congress intended the waiver to be "broad" in the way that

the court of appeals here contemplated, such that it would alter Section 544(b)'s *substantive* requirements.

Indeed, the court of appeals' interpretation of the phrase "with respect to" is particularly strained given the nature of the other provisions identified in Section 106(a)(1). As noted, Section 106(a)(1) does not just waive sovereign immunity in a proceeding under Section 544(b); it waives sovereign immunity for dozens of other provisions of the Bankruptcy Code. Many of those provisions do not predicate liability on law external to the Bankruptcy Code. Yet Congress waived immunity "with respect to" all of those provisions too, making clear that the core function of that phrase is to waive the government's immunity *within* the bankruptcy case as to dozens of bankruptcy provisions.[6]

In any event, the court of appeals omitted a key part of the relevant statutory language. As already explained, see pp. 20-22, *supra*, Section 106(a) states that "sovereign immunity is abrogated as to a governmental unit *to the extent set forth in this section* with respect to" 59 sections of the Bankruptcy Code. 11 U.S.C. 106(a) (emphasis added). And Section 106(a)(5) specifies that "[n]othing in this section shall create any sub-

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[6] At the same time, the court of appeals' reasoning also proves too much. The court believed that Congress's use of the phrase "with respect to" evinced an intent "to reach any subject that has 'a connection with' . . . the topics the statute enumerates." Pet. App. 7a (citing *Lamar*, 584 U.S. at 718) (emphases omitted). But there are an almost limitless number of "subject[s]" that could be said to "ha[ve] 'a connection with'" the "topics" enumerated in the 59 sections of the Code identified in Section 106(a). *Lamar*, 584 U.S. at 718. The court's construction of the waiver of sovereign immunity in Section 106(a) has no clear outer boundary, and instead runs headlong into the black-letter principle that waivers of sovereign immunity are to be construed strictly. See pp. 33-34, *infra*.

stantive claim for relief" that does "not otherwise exist[] under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law." 11 U.S.C. 106(a)(5). The court's interpretation of Section 106(a)(1) directly contradicts that instruction. Any remaining doubt as to the scope of Section 106(a)(1) is thus conclusively answered by Section 106(a)(5).

The court of appeals also believed that the "similarly broad language" in Section 106(a)(2)—which states that a court "may hear and determine any issue arising with respect to the application of" Section 544—"[r]einforc[ed]" its interpretation of Section 106(a)(1). Pet. App. 8a. The court reasoned that "[t]he authority which subsection (a)(2) plainly confers would be substantially curtailed" if "an assertion of sovereign immunity" would "preclude a bankruptcy court from considering whether a trustee has satisfied the substantive elements of an underlying state law cause of action invoked pursuant to § 544(b)(1)." *Id.* at 9a. Again, the court of appeals erred. Sovereign immunity does not preclude the bankruptcy court from considering whether the trustee has satisfied Section 544(b)'s substantive requirements, including whether there exists an actual creditor who could avoid the transfer under nonbankruptcy law. To the contrary, that is precisely what Section 106(a)(2) authorizes courts to do—namely, to resolve an "issue" that "arise[s] with respect to the application of" the identified sections "to governmental units." 11 U.S.C. 106(a)(2). Sovereign immunity is simply a reason why the trustee's claim fails on the merits, as there is no creditor who could have avoided the debtor's payments to the IRS outside of bankruptcy.

b. The court of appeals also emphasized that the government's interpretation of Section 106(a) would

render that provision "meaningless" as to Section 544. Pet. App. 12a. But that is plainly wrong. Section 106(a) indisputably serves a function as to Section 544(a), under which a trustee may exercise the powers of a *hypothetical* judgment lien creditor, without relying on otherwise "applicable law." The waiver of immunity in Section 106(a) permits the trustee to exercise that power against the federal government—for instance, by priming an unfiled federal tax lien under 26 U.S.C. 6323. See, *e.g.*, *United States* v. *LMS Holding Co. (In re LMS Holding Co.)*, 50 F.3d 1526, 1527 (10th Cir. 1995). That alone gives meaning to Section 106(a)'s waiver "with respect to" Section 544. See *EAR*, 742 F.3d at 749.

Contrary to the court of appeals' assertion, Pet. App. 12a, it is not necessary to infer a viable claim against the government in every subsection of Section 544. Section 106(a)(1) refers to Code provisions by section number, without identifying any specific subsections. Many of the 59 sections referenced in Section 106(a)(1) include subsections as to which the waiver of sovereign immunity is irrelevant. *EAR*, 742 F.3d at 749 & n.4.[7] There would be nothing unusual if the waiver's practical effect were limited to Section 544(a).

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[7] For instance, Section 106(a)(1) abrogates sovereign immunity "with respect to" 11 U.SC. 303. Section 303(a) authorizes an involuntary bankruptcy petition to be commenced against a "person"—a term that is defined to exclude governmental units (except in circumstances not relevant to Section 303). 11 U.S.C. 101(41), 303(a). Because Section 303(a), by its terms, does not authorize the filing of an involuntary bankruptcy petition against the government, a waiver of immunity "with respect to" Section 303 has no practical effect for purposes of that subsection. Congress likely had other subsections in mind—for instance, Section 303(i), addressing the dismissal of a bankruptcy petition—when it included Section 303 among the 59 sections listed in Section 106(a)(1).

In any event, Section 106(a) also serves an independent function as to Section 544(b). Some States, for example, have waived their own immunity such that, outside of bankruptcy, they may be subject to a creditor's state-law avoidance claim.[8] Transfers to those States, therefore, can be "voidable under applicable law by a creditor." 11 U.S.C. 544(b)(1). And Section 106(a)(1) allows bankruptcy trustees to bring avoidance actions against those state governments.

c. The court of appeals also emphasized (Pet. App. 8a) that the current version of Section 106(a) was enacted in 1994 "in direct response to two Supreme Court decisions," *Nordic Village*, *supra*, and *Hoffman* v. *Connecticut Department of Income Maintenance*, 492 U.S. 96 (1989) (plurality opinion). But that history offers no support for respondent's construction of Section 106(a).

As the bankruptcy court recognized, "neither *Nordic Village* nor *Hoffman* involved [Section] 544(b)." Pet. App. 42a. Nor did they consider the question of sovereign immunity in connection with any other Bankruptcy Code provision that incorporates law external to the Code to establish when a transfer can be avoided. Rather, *Nordic Village* and *Hoffman* concerned a different issue: whether the prior version of Section 106(a) was sufficiently clear to abrogate the government's immunity from money judgments in bankruptcy in circumstances where the Code's own conditions for avoidance were otherwise met.

Specifically, in *Nordic Village*, the trustee sought to avoid an unauthorized postpetition transfer to the IRS

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[8] See, *e.g.*, Conn. Gen. Stat. Ann. § 4-160 (West Supp. 2024); 705 Ill. Comp. Stat. Ann. 505/8 (West Supp. 2024); N.Y. Ct. Cl. Act § 8 (McKinney 2019); Ohio Rev. Code Ann. § 2743.02 (LexisNexis Supp. 2024).

under Section 549(a), which allows a trustee to avoid a transfer of property of the estate "that occurs after the commencement of the case." 11 U.S.C. 549(a). In this Court, no one disputed that the relevant transfer had in fact taken place after the commencement of the bankruptcy case, or that the prior version of Section 106 applied to a claim under Section 549(a). See *Nordic Vill.*, 503 U.S. at 31. Instead, the only question was whether the prior version of Section 106(a) specifically authorized "monetary recovery." *Ibid.* The Court held that because other readings of the prior statute were "plausible," "a reading [of the statute] imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." *Id.* at 38. In *Hoffman*, the trustee sought to recover Medicaid payments from a State for services rendered by a bankrupt convalescence home under 11 U.S.C. 542(b), and to avoid payment of state taxes as a preference under 11 U.S.C. 547(b). Again, the sole issue before the Court was whether the prior version of Section 106(a) authorizes "monetary recovery from the States." *Hoffman*, 492 U.S. at 102 (opinion of White, J.). The Court held that it did not, because Congress had not made its intent to abrogate the States' immunity from such actions "unmistakably clear." *Id.* at 104.

In amending Section 106 in response to *Nordic Village* and *Hoffman*, Congress clearly manifested its intent to allow monetary recovery from the government when the substantive requirements of the relevant Bankruptcy Code section are met. See H.R. Rep. No. 835, 103d Cong., 2d Sess. 42 (1994) (explaining that the current version of Section 106(a) was designed to "make section 106 conform to the Congressional intent of the Bankruptcy Reform Act of 1978," by "expressly pro-

vid[ing] for a waiver of sovereign immunity by governmental units with respect to monetary recoveries"). But there is no reason to believe that Congress also intended to expand the universe of transfers that are "voidable under applicable law" when it amended Section 106 in response to *Nordic Village* and *Hoffman*. See S. Rep. No. 989, 95th Cong., 2d Sess. 29 (1978) (noting that "the policy followed" in the 1978 Act was "designed to achieve approximately the same result that would prevail outside of bankruptcy").

d. Finally, the clear-statement rule protecting the federal government's sovereign immunity eliminates any remaining uncertainty. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC*, 510 U.S. at 475. To waive sovereign immunity, "Congress must make its intent . . . unmistakably clear in the language of the statute." *Lac du Flambeau Band of Lake Superior Chippewa Indians* v. *Coughlin*, 599 U.S. 382, 387 (2023) (citation and internal quotation marks omitted); *Department of Agric. Rural Dev. Rural Hous. Serv.* v. *Kirtz*, 601 U.S. 42, 49 (2024) ("[A] waiver of sovereign immunity must be 'unmistakably clear,'" and "'any ambiguities in the statutory language are to be construed in favor of immunity.'") (brackets and citations omitted); *FAA* v. *Cooper*, 566 U.S. 284, 290 (2012) ("[A] waiver of sovereign immunity must be 'unequivocally expressed' in statutory text.") (citations omitted); *Nordic Vill.*, 503 U.S. at 34 (such waivers are to be "construed strictly in favor of the sovereign") (citation omitted).

"This clear-statement rule is a demanding standard," *Lac du Flambeau*, 599 U.S. at 388, and "if there is a plausible interpretation of the statute that would" preserve immunity, then the statute must be "construed in

favor of immunity," *Cooper*, 566 U.S. at 290. Moreover, the principle that any ambiguities must be construed "in favor of immunity," *United States* v. *Williams*, 514 U.S. 527, 531 (1995), "so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires," *Cooper*, 566 U.S. at 290, applies not only to the question whether the government has "consented to be sued" at all, but also to "any ambiguities in the scope of a waiver," *id.* at 291.

Here, the trustee seeks monetary recovery from the federal government, so sovereign immunity would ordinarily bar this suit. Any ambiguity in the scope of Section 106(a)'s waiver should therefore be construed strictly "in favor of immunity." *Williams*, 514 U.S. at 531. And while Congress has waived the United States' immunity with respect to Section 544(b) actions brought by the trustee within the bankruptcy proceeding, nothing in Section 106(a) suggests—let alone clearly states—that such a waiver extends to the underlying state-law suit on which Section 544(b) is predicated. *EAR*, 742 F.3d at 750-751 ("[T]he [Supreme] Court's insistence that Congress be unmistakably clear when opening the federal government to suit is further reason why we cannot find that Congress did so implicitly. If Congress intends to eliminate § 544(b)'s actual-creditor requirement in actions against the federal government, it must say so.").

C. Section 106(a) Concerns Only Sovereign Immunity, But Sovereign Immunity Is Not The Only Bar To The Creditor's Underlying State-Law Claim

Even if the court of appeals had been correct in concluding that Section 106(a) eliminates any sovereign-immunity obstacle to the underlying state-law claim in a Section 544(b) action brought by the trustee, the deci-

sion below would still be unsound because the creditor's avoidance action would face other "significant constitutional obstacles," *EAR*, 742 F.3d at 747-748, that could not be obviated by a waiver of sovereign immunity.

Most obviously, "the Supremacy Clause prevents states from enabling their residents to recover tax payments directly from the United States." *EAR*, 742 F.3d at 748 (citing *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819)). Federal tax collection is a matter of federal law, U.S. Const. Art. I, § 8, Cl. 1, and federal law governs the circumstances under which the IRS receives, forcibly collects, refunds, or relinquishes payments of taxes, whether to third parties or to the taxpayers themselves.

The Internal Revenue Code, for example, provides that, except in circumstances not applicable here, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. 7421(a). Section 7421(b) states that "[n]o suit shall be maintained in any court for the purpose of restraining the assessment or collection [of] * * * the amount of the liability, at law or in equity, of a transferee of property * * * in respect of any internal revenue tax." 26 U.S.C. 7421(b). Section 7422(a) prohibits any suit for the recovery of "any internal revenue tax," "any penalty," or "any sum alleged to have been excessive or in any manner wrongfully collected" by the IRS except in accordance with federal law. 26 U.S.C. 7422(a). And a neighboring provision limits the circumstances under which third parties can recover amounts wrongfully collected, and does not permit recovery of voluntary payments, except under circumstances not applicable here.

See 26 U.S.C. 7426(a)(3) and (4). As a result, a state-law fraudulent-transfer action brought by a creditor to avoid and recover the payment of a third party's taxes would plainly be preempted. See *Kurns* v. *Railroad Friction Prods. Corp.*, 565 U.S. 625, 630 (2012).[9]

The court of appeals disagreed, reasoning that Section 544(b)(1)) "is a federal statute, enacted by * * * the same legislative body that the Government now asserts has preempted its operation." Pet. App. 13a. But the proper question, as explained above, see pp. 18-25, *supra*, is not whether *the trustee's* Section 544(b) claim is preempted; it is whether, in the underlying action being mirrored by the trustee, an *actual creditor's* attempt to avoid federal tax payments outside bankruptcy would be preempted. Because a state-law action to avoid a federal tax payment would indisputably be preempted outside bankruptcy, the trustee cannot prove that the tax payments are "voidable under applicable law by a creditor," as Section 544(b)(1) requires. That is true regardless of how Section 106(a)—which addresses only the sovereign-immunity bar—is interpreted. The court's rejection of the government's preemption argument was therefore independently flawed.

Moreover, the very purpose of a creditor's action to avoid a transfer is to obtain a declaration that "confers upon the creditor the right to disregard the conveyance and realize his debt out of the affected asset as though the transfer had not been made." Garrard Glenn, *The*

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[9] See also, *e.g.*, *Umland* v. *PLANCO Fin. Servs., Inc.*, 542 F.3d 59, 67 (3d Cir. 2008) (state-law unjust-enrichment claim preempted by statute governing tax refunds); *Sigmon* v. *Southwest Airlines Co.*, 110 F.3d 1200, 1204 (5th Cir.) (federal tax-refund statute preempts state-law claims against airlines for erroneous collection of excise taxes), cert. denied, 522 U.S. 950 (1997).

Law of Fraudulent Conveyances § 2, at 3 (1931). In an action against the IRS to avoid a tax payment, the "affected asset" is money that was paid into the federal Treasury. Absent statutory authorization, a creditor cannot, under state law, "realize his debt" out of the federal Treasury without running afoul of the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, because "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Office of Pers. Mgmt.* v. *Richmond*, 496 U.S. 414, 424 (1990) (citation omitted). Accordingly, "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"; even "if Congress eliminated the sovereign-immunity problem" through Section 106(a), those other obstacles do not "disappear[]." *EAR*, 742 F.3d at 748.

Such obstacles also further undermine the court of appeals' 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.

And given the federal government's "exceedingly strong interest in financial stability" when it comes to matters of federal tax collection, *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 12 (2008) (citation and internal quotation marks omitted), it is especially unlikely that Congress would have silently subordinated the federal government's right to tax payments to the vagaries of "'applicable' state law, the dimensions of which Congress cannot control," *EAR*, 742 F.3d at 750; see *Bull* v. *United States*, 295 U.S. 247, 259 (1935)

("[T]axes are the life-blood of government, and their prompt and certain availability an imperious need.").

Indeed, the effect of allowing Utah law to govern the avoidance of the federal tax payments in this case would be to double the two-year lookback period that Congress provided in 11 U.S.C. 548 for setting aside transfers. And in other circumstances, the recovery period permitted by state law could be much longer. For example, the UUFTA (like most state fraudulent-transfer statutes) has a "discovery rule" that can extend the recovery period indefinitely. Utah Code Ann. § 25-6-10(1). There is no reason to think that Congress intended to expose the federal fisc to such wide-ranging and indeterminate liability—particularly when it has required any federal claim to recover taxes paid to be made within three years of the return or two years of the payment, whichever is later. See 26 U.S.C. 6511(a), 6532, 7426.

D. Respondent's Alternative Argument—That Section 544(b) Is Satisfied Even If Section 106(a) Does Not Affect The Viability Of The Underlying State-Law Suit—Was Neither Pressed Nor Passed Upon Below

At the certiorari stage, respondent argued, for the first time, that "even setting aside section 106(a), section 544(b)'s 'substantive requirements' * * * are met." Br. in Opp. 23 (citation omitted). According to the trustee's new alternative argument, "nothing in section 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* (here, presumably the beneficiary shareholders) 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 provision of the Bankruptcy Code, 11 U.S.C. 550(a). Br. in Opp. 11 (emphases altered). As already explained (Cert. Reply 8-9), that argument was neither pressed nor passed upon in any of the three courts below.

To the contrary, the trustee's position was that, even though "outside bankruptcy, sovereign immunity would bar [the former employee's] suit against the United States" under the UUFTA, "§ 106(a)(1) abrogates that sovereign immunity in the bankruptcy context." Pet. App. 26a (citing 18-2089, Bankr. D. Utah Doc. 25, at 3 (Nov. 15, 2019)). In other words, the trustee's Section 544(b) claim was premised on a UUFTA avoidance action brought by the former creditor *against the United States*—not against some other defendant. Consistent with the trustee's argument, the courts below considered only whether Section 106(a)'s waiver of sovereign immunity "remove[s] the ability of [the United States] to interpose immunity as a defense to the underlying state law cause of action." *Id.* at 39a; see *id.* at 3a-4a, 16a.

The trustee never claimed that he could recover the at-issue federal tax payments regardless of the scope of Section 106(a)'s waiver—and no court addressed that question. Indeed, the trustee expressly declined to rely on the alternative argument in the district court. See J.A. 69 n.6.

Moreover, the trustee's new argument implicates several interpretive questions never addressed by the courts below. For one thing, it depends on the premise that the Bankruptcy Code authorizes the trustee to recover funds *from party A* (here, the United States) under Section 550(a) by showing that a creditor could have avoided the transfer under state law *against party B*

(here, presumably a beneficiary shareholder) in a state-law predicate action under Section 544(b). No court of appeals has addressed that argument—let alone in a context where, notwithstanding background principles of sovereign immunity and federal supremacy, such an interpretation would require the United States to turn over federal tax payments based on a potential state-law avoidance action to which it was not a party. The trustee's argument also implicates several state-law questions, including (i) whether the relevant transfers could be avoided in a fraudulent-transfer action brought against the shareholders under Utah law; (ii) whether the consequence of any such avoidance would also be to avoid the transfers as against the United States; and (iii) whether the United States would be an indispensable party to that state-law avoidance action. None of the courts below considered those questions, which were irrelevant to those on which the parties joined issue.

More broadly, no court of appeals has ever addressed, let alone endorsed or rejected, respondent's proposed maneuver. See *DBSI*, 869 F.3d at 1010 n.7 (specifically declining to decide the case on that basis). Respondent's late-breaking alternative argument should not be adjudicated for the first time in this Court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

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APPENDIX

1. 11 U.S.C. 106 provides:

Waiver of sovereign immunity

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of

a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

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

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

2. 11 U.S.C. 544 provides:

Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a

simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)(1) 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.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.