No. 23-824

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
PETITIONER,

v.

DAVID L. MILLER,
RESPONDENT.

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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

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

The questions presented are:

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

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

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STATUTORY PROVISIONS INVOLVED

Pertinent provisions are reproduced in an appendix to this brief, *infra*, App.1a-23a.

STATEMENT

Section 106(a) of the Bankruptcy Code waives sovereign immunity "with respect to" 59 sections of the Code, including section 544. Section 544(b), in turn, allows trustees to "avoid any transfer of an interest of the debtor … that is voidable under applicable law by a creditor." All agree that the debtor in this case made fraudulent, and

thus voidable, transfers to the United States in violation of applicable law—Utah's Uniform Fraudulent Transfer Act.

The government concedes that section 106(a) waives federal sovereign immunity with respect to the trustee's cause of action to avoid transfers under section 544(b). U.S. Br. 10-13, 19-20, 24, 34. But the government counter-intuitively asks this Court to hold that federal sovereign immunity bars all such claims against the United States. The government posits that, because sovereign immunity bars suit against the United States *outside* bankruptcy, trustees can never show that fraudulent transfers to the government are "voidable under applicable law" *inside* bankruptcy. To permit such claims, the government would require Congress to enact a *second* waiver directed to Utah's law.

That reading defies the plain text of section 106(a), which wholly abrogates sovereign immunity *inside* bankruptcy. Section 106(a)'s clear waiver "with respect to" section 544 applies equally to the trustee's section 544(b) cause of action and the applicable law that provides the elements of that cause of action. "With respect to" means regarding or concerning, and section 544(b)'s cause of action and its elements equally concern section 544. The government never disputes that the incorporated applicable law directly regards or concerns section 544(b).

Congress put governments and private parties on equal footing in bankruptcy by broadly waiving sovereign immunity. And Congress made that waiver even broader after this Court read the initial version of the waiver narrowly in a case, like this one, involving a voidable transfer to the Internal Revenue Service (IRS). When Congress

wanted to give governments special exemptions from ordinary bankruptcy rules, Congress wrote meticulous, limited exceptions into the Code's text. It is wholly implausible that Congress waived the defense of sovereign immunity for one of the trustee's most critical avoidance powers, but simultaneously preserved that defense if the trustee ever tried to exercise that power.

The government's theory also depends on the misapprehension that section 544(b) requires a creditor who could sue the United States to avoid the transfers in state court. The text only asks in the passive voice whether the transfer "is voidable under applicable law by a creditor." Here, all applicable Utah-law requirements for voidability are undisputedly met. And a creditor could have obtained a Utah-court decision avoiding the transfers to the United States without ever suing the United States. A creditor could have sued either the beneficiaries of the fraudulent transfers or the debtor, without implicating sovereign immunity. Section 544(b) asks for nothing more.

A. Statutory and Factual Background

1. This case involves a debtor's fraudulent transfers to the IRS before a chapter 7 bankruptcy. Under chapter 7, a disinterested trustee collects the bankrupt debtor's assets, liquidates them, and distributes the proceeds to creditors. *Law v. Siegel*, 571 U.S. 415, 417 (2014); 11 U.S.C. § 704(a). Trustees collect "all the debtor's assets and rights," creating "the pot out of which creditors' claims are paid." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 587 U.S. 370, 373 (2019); *see* 11 U.S.C. § 541. Trustees have "extensive" powers to fulfill their "duty to maximize the value of the estate." *CFTC v. Weintraub*, 471 U.S. 343, 352 (1985). In particular, trustees may avoid various liens or transfers of property out of the estate.

E.g., 11 U.S.C. §§ 363, 506, 522, 544, 545, 547–549, 553, 724, 749, 764. These provisions "promote equality of distribution" among creditors. *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 583 U.S. 366, 370 (2018) (citations omitted).

A fundamental avoidance power covers fraudulent transfers, *i.e.*, "something-for-nothing transfers that deplete the estate (and so cheat creditors)." *Mission Prod.*, 587 U.S. at 382. That power has been a feature of bankruptcy law since 1571. *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 355, 360-61 (2016). In today's Code, section 548(a)(1)(B) allows trustees to avoid transfers made within two years of bankruptcy by insolvent debtors for inadequate value. And, particularly relevant here, section 544(b) permits trustees to "avoid any transfer" that "is voidable under applicable law by a creditor holding an unsecured claim." Trustees usually do so by invoking one of the 45 State Uniform Fraudulent Transfer or Uniform Voidable Transactions Acts (UFTA and UVTA, respectively) or similar state statutes. *Collier on Bankruptcy* ¶ 544.06[2] (16th ed.) (Collier).[1]

Section 544(b) empowers trustees to "avoid" fraudulent transfers—that is, to obtain declaratory judgments that transfers are invalid. *See* 14 Bus. & Com. Litig. Fed. Cts. § 152:29 (5th ed. Nov. 2022 update). To recover money, trustees invoke section 550(a), which permits the trustee to "recover, for the benefit of the estate, the property transferred" or the value thereof. Sections 544 and

[1] The 2014 UVTA made "relatively minor" changes to the 1984 UFTA. UVTA § 15 cmt. 1. Among those changes, the drafters replaced the word "fraudulent" with "voidable" to avoid "confusion," without intending any "change in meaning." *Id.* § 15 cmts. 1, 4.

550 are among the 59 sections of the Code for which Congress expressly abrogated the United States' sovereign immunity. 11 U.S.C. § 106(a)(1). As to section 544, section 106(a)(1) states:

> 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 … Section[] … 544 ….

2. In December 2013, All Resort Group, Inc., a Utah-based transportation company, fell into insolvency. J.A.10, 20-22; *see* J.A.36-37. At the time, All Resort had mounting debts, including a $55,000 employment-discrimination settlement to a former employee, Robin Salazar. Pet.App.20a-21a.

Despite a cratering financial outlook, shareholders, officers, and directors Richard Bizzaro and Gordon "Gordo" Cummins withdrew hundreds of thousands of dollars in "dividend payments." J.A.24-25, 40-43, 52-54. They also raided the company's coffers for personal gain, making fraudulent transfers exceeding $2.2 million. J.A.44, 55. Bizzaro used over $200,000 in company money to pay personal caregivers. J.A.43-44. And both men took over $10,000 in off-the-books "walking around money." J.A.42-43, 53-54. At issue here are Bizzaro and Cummins' June 2014 fraudulent transfers of $145,138.78 in company funds to satisfy their personal federal-income-tax debts to the United States. J.A.2-3.

B. Procedural History

1. In April 2017, All Resort filed for chapter 11 bankruptcy in the District of Utah and converted that case to a chapter 7 liquidation in September 2017. Pet.App.19a-20a. Respondent was appointed as trustee. Pet.App.20a.

During the five months All Resort was in chapter 11 bankruptcy, approximately 300 employees continued to work without full pay. *See In re All Resort Grp.*, No. 17-23687 (Bankr. D. Utah Oct. 5, 2017), Dkt. 427, at 2 (No. 17-23687 Bankr. Ct. Dkt.). Those workers therefore hold post-petition claims for wages that are among the highest priority in bankruptcy. 11 U.S.C. §§ 503(b)(1)(A)(i), 507(a)(2). Absent additional recovery, these workers almost certainly will not receive full payment. *See* No. 17-23687 Bankr. Ct. Dkt. 758, at 11, 18-19.

After his appointment, the trustee sought to avoid and recover Bizzaro and Cummins' fraudulent transfers under sections 544(b) and 550, after section 548's two-year limitations period had expired. Between July 2018 and April 2019, the trustee filed adversary proceedings against Bizzaro, Cummins, and the United States, seeking to avoid and recover, *inter alia*, the $145,138.78 fraudulent tax payments to the United States. J.A.1-9, 38-57. As the "creditor," the trustee invoked Salazar—the former employee with the unpaid employment-discrimination settlement. Mot. for Summ. J. 3-4, Bankr. Ct. Dkt. 18; *see* Pet.App.26a. And as the "applicable law," the trustee invoked Utah's Uniform Fraudulent Transfer Act, Utah Code §§ 25-6-1 *et seq.* (2014).[2] J.A.4, 45, 56.

Utah law is materially identical to the laws in 44 other States adopting one of the uniform acts. A transfer is fraudulent, and thus voidable, when (1) "the debtor made the transfer … without receiving a reasonably equivalent value in exchange," and (2) "the debtor was insolvent." Utah Code § 25-6-6(1); UVTA § 5(a); UFTA § 5(a). If the transfer is voidable, creditors may obtain, *inter alia*, a

[2] All Utah Code citations refer to the applicable 2014 version. *Accord* U.S. Br. 5 n.2.

declaration of "avoidance of the transfer" or "an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property." Utah Code § 25-6-8(1); UVTA § 7(a); UFTA § 7(a). If the transfer is voidable, creditors may also "recover judgment for the value of the asset transferred" against the "transferee" or "the person for whose benefit the transfer was made." Utah Code § 25-6-9(2); UVTA § 8(b)(1); UFTA § 8(b). Creditors have four years to avoid fraudulent transfers. Utah Code § 25-6-10(2); UVTA § 9(b); UFTA § 9(b).

2. The trustee settled the claim against Bizzaro. No. 17-23687 Bankr. Ct. Dkt. 797, at 2-3 & Ex. 1, Dkt. 806. The trustee dismissed the case against Cummins after he filed for personal bankruptcy. *Miller v. Cummins*, No. 19-ap-2038 (Bankr. D. Utah Aug. 28, 2019), Dkt. 4, at 2.

As to the United States, the parties cross-moved for summary judgment, and the bankruptcy court granted the trustee's motion. Pet.App.48a, 50a-51a. The government "concede[d] that the Trustee has proved all the elements" required by Utah law because "All Resort did not receive reasonably equivalent value" for the transfers and "was insolvent." Pet.App.26a. But, the government argued, the trustee could not invoke section 544(b) because, outside bankruptcy, sovereign immunity and tax field preemption would prevent Salazar from suing the United States. Pet.App.26a, 43a-44a.

The bankruptcy court rejected both arguments. First, the court held that section 106(a) "eliminates sovereign immunity with respect to the underlying state law causes of action incorporated through § 544(b)." Pet.App.37a (cleaned up). By its "plain text," section 106(a) waives sovereign immunity "with respect to" section 544, signaling Congress' "intent that the waiver would

cover matters related to that Code section," including "the state law causes of action incorporated through § 544(b)." Pet.App.33a-34a. Thus, the court held, "the trustee need only identify an unsecured creditor who, *but for sovereign immunity*, could have brought the claim." Pet.App.39a (citation omitted).

Second, the court rejected the government's field-preemption argument. The court explained that section 544(b) "is a federal cause of action and therefore cannot be preempted." Pet.App.46a (cleaned up). Moreover, fraudulent-transfer claims do not fall "within the field of federal tax collection" and are not preempted outside bankruptcy. Pet.App.46a-47a.

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

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

The court "[r]einforc[ed]" that interpretation by looking to the "similarly broad language of § 106(a)(2)," which permits courts to "hear and determine *any* issue arising with respect *to* the application of" § 544." Pet.App.8a (quoting 11 U.S.C. § 106(a)(2)). That authority would be

"substantially curtailed" if the government could use sovereign immunity to defeat every section 544(b) claim. Pet.App.9a. The court declined to effectively "ban" section 544(b) claims against governments. Pet.App.10a.

The court also rejected the government's field-preemption argument. Pet.App.12a-14a. The court explained that section 544(b) "is a federal statute" that cannot be preempted. Pet.App.13a. Had Congress wanted to preempt the incorporated state law, the court added, "Congress surely would have added an express preemption provision." Pet.App.13a.

The Tenth Circuit denied rehearing en banc. Pet.App.52a-53a.

SUMMARY OF ARGUMENT

I. Section 106(a)'s clear waiver of sovereign immunity "with respect to" section 544 covers all aspects of section 544(b) claims, including the "applicable law" that forms the basis of the trustee's cause of action.

A. As the government agrees, section 106(a) "wholly abrogates sovereign immunity within the bankruptcy case." U.S. Br. 11; *accord* U.S. Br. 27. Because the trustee's section 544(b) claim occurs within the bankruptcy case, section 106(a)'s abrogation applies.

By waiving immunity "with respect to" section 544, Congress waived immunity for any subject with a direct relation to or impact on section 544. The applicable state law that provides the elements of section 544(b) claims within bankruptcy directly relates to section 544, and the government has never argued otherwise. As further confirmation, Congress instructed courts to proceed "[n]otwithstanding an assertion of sovereign immunity" and told

them to "hear and determine any issue arising with respect to the application of" section 544 to governments. 11 U.S.C. § 106(a), (a)(2). The only way to read those provisions together is to direct courts to adjudicate section 544(b) claims without regard to sovereign immunity.

In the government's world, no section 544(b) claims against governments can ever succeed. Nor, absent some second waiver of sovereign immunity, could trustees invoke against governments the many other bankruptcy provisions that equally incorporate nonbankruptcy law. Congress could not have possibly intended these results.

B. The government argues that Congress must pass two waivers of sovereign immunity: one for the federal cause of action in section 544(b) and another for the applicable law that supplies the elements of that cause of action. This Court rejected a similar two-waiver argument last Term in *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 601 U.S. 42 (2024), and should do the same here. The Code gives trustees both a waiver of sovereign immunity and a cause of action—nothing more is needed.

C. Congress enacted section 106(a) against a long backdrop of trustees using state law to avoid fraudulent transfers. By waiving immunity "with respect to" section 544, Congress authorized those actions against the United States. Indeed, Congress broadened section 106 to overrule the Court's narrow construction of section 106 in a case with strikingly similar facts. And this case involves an avoidance action in bankruptcy, where sovereign immunity, if present at all, is at its lowest ebb.

D. The government's case also depends on the faulty premise (at 14) that section 544(b) requires a creditor who

"could have sued the federal government under Utah fraudulent-transfer law." Section 544(b) is in the passive voice and simply asks whether a transfer "is voidable under applicable law by a creditor"—not whether the creditor could sue the section 544(b) defendant.

Here, the transfers are "voidable under applicable law by a creditor" because all Utah-law requirements for fraud and thus avoidance are undisputedly met. The creditor (Salazar) never needed to sue the United States to avoid these transfers. She could have done so by suing the beneficiaries (Bizzaro and Cummins) for a money judgment or the debtor (All Resort) for an injunction. Neither of those paths implicates sovereign immunity.

The government declines to respond, claiming that respondent forfeited this argument. But the government itself raised this issue in district court, and respondent engaged on the merits. Regardless, parties forfeit claims, not arguments in support of properly preserved claims. Were parties not allowed to offer statutory-interpretation arguments not developed below, merits briefing in this Court—especially by the Solicitor General—would look very different.

E. The government's position flouts Congress' careful judgment about when and how to provide exceptions to governments from bankruptcy's general rules. The government would elevate itself to super-creditor status by allowing it, and it alone, to keep ill-gotten windfalls. This case illustrates the point: Bizzaro and Cummins raided All Resort for personal gain. The IRS seeks to keep money it undisputedly should have never gotten in the first place rather than use its arsenal of powers to go after the delinquent taxpayers who actually owe this money.

Reversal would create a playbook for fraud: pay personal tax debts with corporate funds first and let the IRS hide behind sovereign immunity later. Creditors, like the All Resort employees here, would be shortchanged.

II. The government's preemption and Appropriations Clause arguments lack merit.

A. The government claims that the transfers are not "voidable under applicable law" because the Internal Revenue Code would preempt Utah-law fraudulent-transfer claims against the IRS, even if Congress waived sovereign immunity. But Utah law's only function is to supply the elements of section 544(b)'s *federal* cause of action. Congress did not plausibly preempt the elements of a federal claim. The government's preemption argument also rests on the same flawed premise that the transfers need to be voidable *against the United States* outside bankruptcy. Moreover, this Court has never applied field preemption to the Internal Revenue Code, and Utah's generally applicable law does not meet the ordinary criteria for field preemption.

B. The Appropriations Clause is irrelevant. Section 544(b) asks whether the transfer "is voidable," not whether a creditor could *recover from the IRS* outside bankruptcy. A declaration of avoidance has no impact on the Treasury.

ARGUMENT

I. Congress Waived Sovereign Immunity with Respect to Section 544(b) Claims in Their Entirety

The government eight times over agrees that section 106(a) unambiguously waives the United States' sovereign immunity from section 544(b) suits by trustees against the

United States. U.S. Br. 10-13, 19-20, 24, 34. But the government in the same breath insists that the United States' sovereign immunity bars all section 544(b) claims against it. The government theorizes that, because sovereign immunity would bar creditors from suing the United States outside bankruptcy, transfers are never "voidable under applicable law by a creditor." U.S. Br. 14.

As the Tenth Circuit correctly held, section 106(a) unambiguously waives the United States' sovereign immunity from all aspects of section 544(b) claims, including the state law that Congress incorporated into the federal cause of action. The government cannot defeat section 544(b) claims by invoking the one defense that Congress clearly waived with respect to those claims: sovereign immunity.

Moreover, the government's argument depends on a threshold misreading of section 544(b) under which trustees must show that a transfer "is voidable under applicable law by a creditor against the United States." Instead, section 544(b) asks whether a transfer "is voidable under applicable law by a creditor," and here all applicable Utah-law elements to avoid the transfers are undisputedly met.

A. Section 106(a) Clearly Applies to the Nonbankruptcy Law that Section 544(b) Incorporates

1. Section 106(a) provides a "clear waiver of sovereign immunity." *Kirtz*, 601 U.S. at 49. Congress directed that "sovereign immunity is abrogated" as to "governmental unit[s]," 11 U.S.C. § 106(a), and defined "governmental unit" to include the United States, *id.* § 101(27). And Congress abrogated that sovereign immunity "with respect to" 59 sections of the Bankruptcy Code, including every Code provision containing avoidance powers: sections

363, 506, 522, 545, 547, 548, 549, 553, 724, 749, 764—and, relevant here, section 544.

As the overwhelming majority of courts agree, that waiver clearly applies to all aspects of section 544(b) claims, including the nonbankruptcy law that section 544(b) incorporates. *See Zazzali v. United States (In re DBSI, Inc.)*, 869 F.3d 1004, 1013 n.11 (9th Cir. 2017) (collecting cases); *see also* Collier ¶ 544.01. Section 106(a)'s raison d'être is to render sovereign immunity that may otherwise apply outside bankruptcy wholly irrelevant inside bankruptcy with respect to the 59 listed provisions. As the government repeatedly states: Section 106(a) "broad[ly]" and "wholly abrogates sovereign immunity within the bankruptcy case as to dozens of Code provisions." U.S. Br. 11; *accord* U.S. Br. 27 (Section 106(a) "wholly abrogates sovereign immunity in the bankruptcy case as to dozens of identified sections of the Code."); *see also* U.S. Br. 10-11, 13, 19-22, 26-27 (all stating that section 106(a)'s waiver extends "in" or "within" "the bankruptcy case").

Congress' total abrogation of sovereign immunity inside bankruptcy with respect to the listed provisions resolves this case. The trustee brings this section 544(b) action in bankruptcy, relying on a federal cause of action for which Congress incorporated "applicable law" to define which transfers are "voidable." And Congress wrote section 544(b) in the present tense—asking whether the transfer "is voidable"—which focuses courts on "the time suit is filed." *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003). Courts thus apply state law to identify what transfers are voidable *within* bankruptcy—the setting where the government concedes that section 106(a)'s waiver applies. In short, the government cannot invoke

sovereign immunity to defeat the trustee's section 544(b) claim because sovereign immunity is "the very defense that is abrogated by § 106(a)(1)." Pet.App.39a (citation omitted).

Moreover, Congress abrogated sovereign immunity "*with respect to*" section 544. That broad phrase means "as regards," "insofar as concerns," or "with reference to" section 544. *Webster's Third New International Dictionary* 1934 (1993); *accord* U.S. Br. 25-26. "[W]ith respect to" is thus part of an "interconnected web" of words like "regarding," "concerning," and "relating to" that "generally ha[ve] a broadening effect." *See Lamar*, 584 U.S. at 717. These words "ensur[e] that the scope of a provision covers not only its subject but also matters relating to that subject." *Id.* As the government has said, phrases like "with respect to" "have long been understood as terms of breadth." U.S. Br. 13, *Lamar*, 584 U.S. 709 (No. 16-1215).

This Court routinely gives phrases like "with respect to" their ordinary broad meaning. *Lamar* involved a Code provision that prohibits discharging debts obtained by written false statements "respecting the debtor's … financial condition." 11 U.S.C. § 523(a)(2)(B)(ii). *Lamar* held that "respecting" broadly extends the discharge bar to any remark with "a direct relation to or impact on the debtor's overall financial status." 584 U.S. at 719-20. Likewise, the Immigration and Nationality Act deems removable noncitizens convicted of offenses "relating to obstruction of justice." 8 U.S.C. § 1101(a)(43)(S). By using "relating to," Congress reached all "offenses that have 'a connection with' obstruction of justice," not just obstruction itself. *Pugin v. Garland*, 599 U.S. 600, 607 (2023). And Congress denied the Court of Federal Claims juris-

diction over "any claim for or in respect to which the plaintiff" has pending in another court. 28 U.S.C. § 1500. "[I]n respect to" creates a "broad prohibition" that strips jurisdiction whenever the plaintiff has another "related" action, even if not "identical." *United States v. Tohono O'odham Nation*, 563 U.S. 307, 312 (2011).

By contrast, Congress used different language in other provisions abrogating sovereign immunity. The Trademark Act waives federal sovereign immunity "for" trademark violations. 15 U.S.C. § 1122(a). The Individuals with Disabilities Education Act abrogates state sovereign immunity "for" violations of that Act. 20 U.S.C. § 1403(a). And the Foreign Sovereign Immunities Act waives foreign states' immunity "in" enumerated cases. 28 U.S.C. § 1605(a). Section 106(a) employs one of the broadest compound prepositions in the English language, waiving immunity "with respect to" section 544.

Under the ordinary meaning of "with respect to," section 106(a)'s waiver of sovereign immunity extends to all subjects that concern or regard section 544. "It simply does not matter how a sovereign immunity defense is invoked against [the] Trustee's claims because Section 106(a)(1) eliminates the obstacle wherever it appears 'with respect to' § 544." *DBSI*, 869 F.3d at 1010-11 (cleaned up). The waiver thus includes the "applicable law" that Congress incorporated into section 544(b)'s cause of action. As used within the bankruptcy case, state fraudulent-transfer statutes plainly concern or regard section 544; they provide the very elements that make up the trustee's section 544(b) claim in the first place.

The government (at 26) asserts that *Lamar*'s plain-meaning interpretation of "respecting" does not apply be-

cause *Lamar* is distinguishable on its facts: *Lamar* involved statements respecting financial condition while this case involves the Code's sovereign-immunity waiver respecting specified Code provisions. According to the government (at 26), the waiver cannot extend "beyond waiving sovereign immunity in the bankruptcy case." But of course, the trustee sued the United States only *inside* bankruptcy. And as a matter of plain English, the state law that provides the elements of the trustee's section 544(b) cause of action "respect[s]" section 544, *i.e.*, it has "a direct relation to or impact on" section 544. *See Lamar*, 584 U.S. at 719-20. The government never argues otherwise and fails to give any independent meaning to "with respect to," which alone means that the government's position "must be rejected." *See id.* at 719; *Patel v. Garland*, 596 U.S. 328, 343-44 (2022).

The government's insistence that Congress' waiver "with respect to" section 544 does not apply to the incorporated applicable law defies statutory structure, grammar, and common sense. Section 544(b)(1) is one sentence; the operative language spans just 34 words; and the text has only two subjects to which the waiver of sovereign immunity could apply, (1) the cause of action and (2) its elements:

> [1] the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor [2] that is voidable under applicable law by a creditor holding an unsecured claim.

The government admits—again, eight times—that "Congress has waived the United States' immunity *with respect to* Section 544(b) actions brought by the bank-

ruptcy trustee," *i.e.*, with respect to the first 21 words creating the trustee's claim. U.S. Br. 11-12 (emphasis added); *accord* U.S. Br. 10, 13, 19-20, 24, 34. That same waiver should likewise unambiguously apply with respect to the next 13 words that borrow nonbankruptcy law to define the cause of action's elements. Both the cause of action and its elements equally concern or regard section 544. It would make zero sense for Congress to waive sovereign immunity for a cause of action but preserve sovereign immunity as a complete bar. Yet in the government's view, Congress simultaneously waived and preserved the same defense.

The government (at 26-27) says that "with respect to" "need not be read expansively," citing *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), and *Pattern Makers' League of North America v. NLRB*, 473 U.S. 95 (1985). These cases just underscore that, contrary to the government's concern (at 28 n.6), "with respect to" has important limits—namely, that the subject must concern the listed topic. *Presley* thus held that a change in public officials' duties was not a "standard, practice, or procedure with respect to voting." 502 U.S. at 510 (citation omitted). And *Pattern Makers'* deferred to an agency's view that a ban on union resignations was not a policy "with respect to the … retention of membership." 473 U.S. at 108-10. By contrast, the nonbankruptcy law that defines section 544(b)'s substantive elements undisputedly directly concerns or regards section 544.

Another provision of section 106 confirms that the waiver extends here. After section 106(a) abrogates sovereign immunity "[n]otwithstanding an assertion of sovereign immunity" in the introductory clause, paragraph (a)(1) lists the covered sections and paragraph (a)(2)

states: "The court may hear and determine any issue arising with respect to the application of such sections to governmental units." That "broad language" (which again uses "with respect to") means that courts can hear the elements of the trustee's section 544(b) claim without regard to sovereign immunity. *See* Pet.App.8a-9a. The elements of the trustee's section 544(b) claim are undoubtably an "'issue arising with respect to' applying § 544 against the United States." *Cook v. United States (In re Yahweh Ctr., Inc.)*, 27 F.4th 960, 966 (4th Cir. 2022) (quoting 11 U.S.C. § 106(a)(2)). The court must therefore determine whether those elements are met without considering sovereign immunity.

The government (at 29) responds that section 106(a)(2) merely means that courts should "hear" and "determine" that sovereign immunity precludes relief under nonbankruptcy law. That retort divorces paragraph (a)(2) from section 106(a)'s waiver and instruction for courts to ignore "an assertion of sovereign immunity." The provisions read together dictate that courts "hear and determine any issue arising with respect to the application of [section 544(b)] to [the United States]" without regard to sovereign immunity.

2. The government's view renders section 106(a)'s waiver with respect to section 544(b) half-pregnant. Congress undisputedly waived sovereign immunity for section 544(b) cases, yet the government identifies no situation where a section 544(b) case against it could ever proceed. That result "essentially nullif[ies] Section 106(a)(1)'s effect on Section 544(b)(1)" as to the United States. *DBSI*, 869 F.3d at 1011; *see* Pet.App.10a.

The government (at 31) notes that other sovereigns might waive immunity from fraudulent-transfer claims.

Notably, the government identifies no waiver specific to fraudulent-transfer claims by any government whatsoever—federal, state, district, territorial, municipal, foreign, or tribal. *See* 11 U.S.C. § 101(27) (defining government units).

Instead, the government (at 31 n.8) collects four state statutes that generally waive state sovereign immunity (although Connecticut apparently objects to its inclusion in this footnote, *see* States' Br. 11 n.1). But those statutes all have limitations periods of two years or less. Conn. Gen. Stat. § 4-148(a); 705 Ill. Comp. Stat. 505/22(h); N.Y. Ct. Cl. Act § 10(4); Ohio Rev. Code Ann. § 2743.16(A). And, under section 548(a), trustees can already sue sovereigns to avoid fraudulent transfers within two years. Thus, the government's reading leaves section 544(b) with no function as to governments.

The government (at 30) asserts that "[t]here would be nothing unusual if the waiver's practical effect were limited to Section 544(a)"—the only other subsection in section 544. For example, the government (at 30 n.7) notes, Congress waived immunity as to all 11 subsections of section 303, even though involuntary bankruptcy petitions under section 303(a) can never be brought against governments. But it *would* be extraordinary were section 106(a)'s waiver to have no practical effect on pre-petition fraudulent transfers—one of only two subsections in 544 and one of the most foundational avoidance powers in bankruptcy law. *Supra* p. 4. Had Congress wanted to waive sovereign immunity respecting only section 544(a), Congress could have easily done so in section 106(a)(1) by cross-referencing just "544(a)," as Congress did elsewhere in the Code. 11 U.S.C. §§ 546(c)(1), (d), (h) (all

cross-referencing 544(a)), 541(b)(4)(A)(ii) (cross-referencing 544(a)(3)); *see DBSI*, 869 F.3d at 1012.

Regardless, section 544(a), like section 544(b), depends on nonbankruptcy law. Section 544(a) allows trustees to assert various hypothetical creditors' rights to "avoid any transfer of property of the debtor … that is voidable by" those creditors. Section 544(a) does not define what transfers are voidable by those creditors, requiring courts to look to "substantive nonbankruptcy law." Collier ¶ 544.02[1]. If section 106(a)'s waiver does not extend to the incorporated nonbankruptcy law, section 544(a) could never operate against sovereigns on the government's interpretation, absent some external waiver.

While the government (at 13, 30) emphasizes that section 544(a) requires a hypothetical creditor and section 544(b) requires an actual creditor, nothing in the government's argument turns on that distinction. Sections 544(a) and 544(b) both ask whether a transfer "is voidable" under nonbankruptcy law. Under either provision, the government's logic suggests that transfers are not "voidable" if sovereign immunity would bar suit against the United States outside bankruptcy. It does not matter whether the creditor is "actual" or "hypothetical"—neither one could obtain avoidance on the government's view, because sovereign immunity would always bar the substantive claim absent an additional waiver of sovereign immunity.

The government's sole example (at 30) does not show how section 106(a) "serves a function as to Section 544(a)." The government asserts that trustees need section 106(a) to use section 544(a) to avoid unrecorded federal tax liens. But Congress has separately waived federal sovereign immunity "in any civil action" (like a bankruptcy case) "to quiet title to … real or personal property on which the

United States has or claims a mortgage or other lien." 28 U.S.C. § 2410(a); *see United States v. Brosnan*, 363 U.S. 237, 244-46 (1960). Section 106(a) thus does no separate work in the government's example.

3. The government's contrary reading would restrict section 106(a)'s application with respect to numerous Code provisions. The government (at 3) mistakenly suggests that section 544 is "unique" in predicating liability "on law external to the Bankruptcy Code." In fact, the Code incorporates nonbankruptcy law in the form of "applicable" law or "State or local law" *over 50 times*, just counting the provisions for which section 106(a) abrogates sovereign immunity.[3]

Take section 510, with respect to which section 106(a) abrogates sovereign immunity. Section 510(a) incorporates nonbankruptcy law to permit trustees to enforce subrogation agreements (contracts ranking in which order debts will be paid). Such agreements are "enforceable" in bankruptcy "to the same extent that such agreement is enforceable under applicable nonbankruptcy law." 11 U.S.C. § 510(a). If section 106(a)'s waiver does not extend to applicable nonbankruptcy law, governments could always argue that the agreement is not "enforceable" because sovereign immunity would bar suit outside bankruptcy.

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[3] *E.g.*, 11 U.S.C. §§ 106(a)(4), 108(a)-(c), 346(a)-(d), (f)-(k), 362(b)(2)(F), (b)(12), (b)(26), (d), (*l*)(1)-(2), 363(b)(1)(B)(ii), (d)(1), (f)(1), (*l*), 364(f), 365(c)(1)(A), (e)-(f), (h), (n), 502(b)(1), 505(a)(2)(C), (c), 510(a), 522(b)(2)-(4), (c)(1), 523(a)(1)(B)(ii), (a)(19), 524(c), 525(c)(2), 543(c)(3), 545(2), 546(b)(1), (i)(2), 547(a)(2), (e)(1)(A), 548(d)(1), 549(c), 552(b)(1), 1142(a).

Consider also section 547, another provision with respect to which section 106(a) waives immunity. Section 547(b) allows trustees to avoid preferential transfers to creditors on the eve of bankruptcy, unless the creditor gave "new value" for the debt. *Id.* § 547(b)-(c). Congress defined "new value" with reference to nonbankruptcy law, asking whether the creditor gave money or property "in a transaction that is neither void nor voidable by the debtor or the trustee under *any applicable law*." *Id.* § 547(a)(2) (emphasis added). Under the government's interpretation, governments could always argue that a transaction is not "voidable" if sovereign immunity would bar suit outside bankruptcy.

To be sure, not every provision listed in section 106(a)(1) incorporates nonbankruptcy law, U.S. Br. 28, and not every provision incorporating nonbankruptcy law implicates sovereign immunity. But on the government's view, Congress needed to parse the entire Code subsection-by-subsection, clause-by-clause, in search of every incorporated nonbankruptcy law that might potentially implicate sovereign immunity. Instead, Congress logically extended section 106(a) "with respect to" all the listed provisions because Congress wanted to waive sovereign immunity—full stop. That language was meant to "be as broad as possible," "reaching all of the statutory nooks and crannies where [the waiver] could possibly apply." Pet.App.35a-36a.

4. The government (at 10-11, 20-22, 28-29) notes that section 106(a) waives immunity only "to the extent set forth in this section," and that section 106(a)(5) provides that "[n]othing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title." According to the government (at 21), the

decision below impermissibly creates an "avoidance claim to which the [government] was not already vulnerable."

The government is incorrect that section 106(a) cannot impose new liability on the government. The entire point of abrogating sovereign immunity is to make governments liable in cases where they could not otherwise be sued. Absent section 106(a), the government would be immune from suits under section 548 to avoid fraudulent transfers within two years of bankruptcy, under section 547 to avoid preferential transfers, and under section 549 to avoid post-petition transfers. Section 106(a) waives the immunity that the government would otherwise enjoy from all of those suits. Section 106(a)'s waiver operates the same way with respect to section 544(b).

Nor does section 106(a)(5) limit section 106(a)'s waiver where it otherwise applies under the Code. To the contrary, section 106(a)(5) prevents parties from using section 106(a)'s waiver as a sword against sovereigns *outside* bankruptcy. If anything, section 106(a)(5) reinforces that, within the confines of bankruptcy, sovereign immunity is off the table. Section 106(a)(5) bars new liability "not otherwise existing under this title." With respect to the liability created and thus "existing" under the 59 Code provisions listed in section 106(a)(1), sovereign immunity is not an obstacle.

5. Finally, the government (at 33-34) notes that sovereign-immunity waivers are narrowly construed. That principle "is not a magic-words requirement" and does not require Congress to "articulate[] its intent in the *most* straightforward way." *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 394 (2023). Instead, courts "apply[] traditional tools of statutory interpretation" to ask whether Congress' intent

to waive sovereign immunity "is clearly discernable from the statute itself." *Id.* at 388 (citation omitted). For the reasons stated, Congress unambiguously waived immunity in toto with respect to section 544(b) claims.

For their part, amici States (notably excluding Utah) invoke a different clear-statement rule. The States (at 13-20) claim that state fraudulent-transfer statutes are disuniform, so Congress could not have constitutionally abrogated state sovereign immunity for those statutes, and this Court should read section 106(a) to avoid that constitutional problem.

The federal government does not make that argument—presumably because it would render large swaths of the Bankruptcy Code unconstitutional. The uniformity requirement applies to all laws "on the subject of Bankruptcies," not just those against States. *Siegel v. Fitzgerald*, 596 U.S. 464, 473 (2022) (quoting U.S. Const. art. I, § 8, cl. 4). If section 544(b) is disuniform because it incorporates 50 States' nonbankruptcy law, then it is unconstitutional in all applications, including as to private parties. The many other Code provisions that incorporate nonbankruptcy law would likewise be unconstitutional. *See supra* pp. 22-23 & n.3.

The uniformity requirement does not compel that surprising result. Congress may not impose "arbitrary geographically disparate treatment of debtors." *Siegel*, 596 U.S. at 476. But "Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different states." *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918). For instance, bankruptcy law "recognizes and enforces the laws of the States affecting dower, exemptions, the validity of mortgages, priori-

ties of payment and the like" without constitutional problems. *Id.* Here too, Congress permissibly imposed a uniform rule on all bankruptcy cases: define the trustee's federal cause of action by looking to state law on voidability. If a State thinks that section 544(b) is unconstitutional, it is free to raise an as-applied challenge.

B. The Government's Two-Waiver Theory Lacks Merit

1. Invoking one court-of-appeals decision, the government (at 19) argues that, although section 106(a) clearly waives sovereign immunity with respect to section 544(b), section 544(b)'s "substantive requirements" are not met because sovereign immunity would bar suits by creditors outside of bankruptcy. *See* U.S. Br. 14, 16-18, 34, 37 (citing *In re Equip. Acquisition Res., Inc.* (*EAR*), 742 F.3d 743 (7th Cir. 2014)). On that theory, Congress should have enacted separate waivers for every conceivable fraudulent-transfer statute enacted by any sovereign anywhere. Or Congress should have written section 544(b) to contain *two* sovereign-immunity waivers: one for the trustee's cause of action that the government agrees is already read into section 544(b), and one for the applicable law that provides the elements of the trustee's cause of action. Section 544(b)(1) would thus have to read:

> [T]he trustee may avoid any transfer of an interest of the debtor in property, notwithstanding the United States' sovereign immunity, … that is voidable under applicable law, notwithstanding the United States' sovereign immunity, by a creditor holding an unsecured claim.

Nothing in this Court's precedent or ordinary principles of statutory interpretation requires that nonsensical

approach. Where Congress has "supplie[d] a waiver of immunity" for a category of claims, Congress "need not provide a second waiver of sovereign immunity" for each specific claim. *United States v. Mitchell*, 463 U.S. 206, 218-19 (1983). Congress had no reason to waive immunity in the first place unless the waiver applied to the elements of the cause of action. Unsurprisingly, the government identifies no waiver of sovereign immunity by any sovereign that employs a double waiver like the one the government seeks here.

This Court rebuffed the government's similar demand for a double waiver just last Term in *Kirtz*. *Kirtz* held that the Fair Credit Reporting Act waives federal sovereign immunity by authorizing suit against any "person," defined to include the government. 601 U.S. at 45. The government had argued otherwise, insisting that plaintiffs need "both a 'source of substantive law' that 'provides an avenue for relief' *and* 'a waiver of sovereign immunity.'" *Id.* at 53 (quoting *Kirtz* U.S. Br. 14, in turn quoting *FDIC v. Meyer*, 510 U.S. 471, 484 (1994)). While the Act provided "a cause of action explicitly against the government," the plaintiff, in the government's view, *also* needed "a separate provision addressing sovereign immunity." *Id.* That contention was "incorrect" because Congress can waive sovereign immunity *either* by "say[ing] in so many words that it is stripping immunity" *or* by creating a cause of action explicitly against the government. *Id.* at 49-50, 53.

The government's argument here parallels its argument in *Kirtz*. There, the plaintiff had a cause of action that explicitly ran against the government but no express waiver of sovereign immunity. Here, the plaintiff has an

express waiver of sovereign immunity and a generally applicable cause of action that undisputedly applies to the government. Either way, Congress does not need to make its intent to waive immunity clear twice over.

2. Similarly, the government (at 20) improperly contends that, under *Meyer*, 510 U.S. at 484, Congress needs to pass both "a waiver of sovereign immunity" and a "source of substantive law … provid[ing] an avenue for relief." Again, Congress did both with section 106(a) (the waiver) and section 544(b) (the substantive law authorizing relief). *Meyer* held only that the waiver of sovereign immunity in the Federal Deposit Insurance Corporation's sue-and-be-sued clause did not authorize an entirely new implied cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). 510 U.S. at 483-84. The government (at 20) similarly invokes *USPS v. Flamingo Industries (USA) Ltd.*, which held that the Postal Service's sue-and-be-sued clause, while waiving sovereign immunity, did not make the Postal Service a "person" covered by the antitrust laws. 540 U.S. 736, 743-46 (2004). But here, section 544(b) creates the trustee's cause of action against the United States, and there is no dispute that Utah's fraudulent-transfer law reaches governments.

The government's "illustrations" (at 22-24) of the difference between section 544(b)'s federal- and state-law requirements do not advance its argument. The government (at 22-23) notes that a trustee might meet the federal-law filing deadline for section 544(b) claims but fail the state-law limitations period if the transfers were too old. And, the government (at 23) posits, a State could theoretically exclude its statute's application to the federal government. Similarly, the government (at 13, 15-17) notes that

other defenses which apply to the creditor, like res judicata and estoppel, apply to trustees.

But in all of those examples, the trustee's claim fails based on obstacles imposed by *state* law. Here, the government's objection is the *federal* defense of sovereign immunity—the one defense that section 106(a) abrogated with respect to section 544. The government (at 18, 23-24) thus erroneously relies on the fact that Utah law is "supplement[ed]" by "invalidating cause[s]" under "principles of law and equity," Utah Code § 25-6-11, which the government argues includes sovereign immunity. But section 106(a) waives sovereign immunity under applicable law, so sovereign immunity is not an "invalidating cause" barring the claim.

As proof that the avoidance action must be "actually viable outside of bankruptcy," the government (at 17 n.5) also cites the bankruptcy venue provision. But that provision presumes the existence of districts where creditors "may have *commenced* an action" outside bankruptcy, 28 U.S.C. § 1409(c) (emphasis added)—not a case that would have ultimately succeeded on the merits. Here, regardless of sovereign immunity, Salazar could have commenced a case against the United States (or Bizzaro, Cummins, or All Resort, *infra* pp. 35-36) in Utah where the transfers occurred.

C. Section 106(a)'s Historical Backdrop Confirms that Congress Intended to Waive Immunity

Historical context can "make[] it more than clear that Congress understood the consequences of its actions" and intentionally waived sovereign immunity. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 76 (2000). Here, context confirms that, when Congress abrogated sovereign immunity

with respect to section 544(b), Congress knew that the United States would be subject to suit based on state fraudulent-transfer laws.

1. As the government (at 15-16 & n.4) recognizes, the trustee's power to invoke state fraudulent-transfer laws is deeply rooted, having existed since at least the Bankruptcy Act of 1898. *See DBSI*, 869 F.3d at 1011. The 1898 Act permitted trustees to "avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided." Act of July 1, 1898, ch. 541, § 70e, 30 Stat. 544, 566. Throughout the twentieth century, it was "common-place for the trustee to invoke the applicable state Uniform Fraudulent Conveyance Act" (the predecessor to today's UFTA and UVTA) to avoid fraudulent transfers. Paul J. Hartman, *A Survey of the Fraudulent Conveyance in Bankruptcy*, 17 Vand. L. Rev. 381, 413 (1964). In 1978, Congress incorporated that power into section 544(b), under which trustees continued to invoke state fraudulent-transfer statutes. *See* Collier ¶ 544.06[2].

In 1994, Congress enacted section 106(a)'s operative text, undisputedly subjecting the United States to suit under section 544(b). At the time, Congress presumably knew that section 544(b) suits were based on state law. "Congress knowingly included state law causes of action within the category of suits to which a sovereign immunity defense could no longer be asserted." *DBSI*, 869 F.3d at 1011 (citation omitted); *accord* Pet.App.11a-12a. By waiving immunity from suits based on the trustee's longstanding power to invoke nonbankruptcy law, Congress plainly intended to subject the United States to those state laws inside bankruptcy even if sovereign immunity continues to protect the government outside bankruptcy.

The government (at 16) notes that, under the 1898 Act, trustees faced "the same limitations and disabilities" as actual creditors (citation omitted). And, the government adds, state courts enjoyed concurrent jurisdiction over these proceedings, suggesting "the need for an avoidance right that was actually viable outside of bankruptcy." But the 1898 Act contained no waiver of sovereign immunity. Section 106(a)'s waiver now removes that "limitation[] and disabilit[y]" within the confines of bankruptcy.

2. The context of the 1994 amendments renders it highly implausible that Congress' unambiguous waiver with respect to section 544(b) was an empty gesture. As originally enacted in 1978, section 106 permitted bankruptcy courts to "bind[] governmental units" (including the United States) when making "a determination … of an issue arising under" a provision containing "creditor," "entity," or "governmental unit." 11 U.S.C. § 106(c)(1)-(2) (Supp. III 1980).

That language indisputably stripped sovereign immunity for declaratory and injunctive relief. The United States thus represented to this Court that the original section 106 permitted bankruptcy courts, for example, "to declare that [a tax] transfer to [the] IRS was voidable." U.S. Br. 24, *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992) (No. 90-1629). But this Court held that the original section 106 was insufficiently clear to permit *monetary* relief against governments. In *Hoffman v. Connecticut Department of Income Maintenance*, a plurality rejected a trustee's effort to recover payment owed for services rendered and preferential tax payments. 492 U.S. 96, 102 (1989). And in *Nordic Village*, this Court held that the original section 106 did not permit a trustee to recover a company's fraudulent post-petition payment of personal

federal income taxes to the IRS. 503 U.S. at 37. Congress in 1994 overhauled section 106 to "effectively overrule" those decisions, "clearly manifest[ing] its intent to allow monetary recovery from the government," and "'conform[ing] to the Congressional intent of'" the original 1978 Code. H.R. Rep. No. 103-835, at 42 (1994); U.S. Br. 32 (quoting same); *accord* Pet.App.42a.

The facts here—a trustee seeking to avoid the debtor's fraudulent payments of a shareholder's personal income taxes to the IRS—are virtually identical to the facts of *Nordic Village*, 503 U.S. at 31. The only difference is that the tax payment there happened post-petition. It would be passing strange if Congress overruled *Nordic Village*, making section 106(a)'s waiver *broader*, only to leave the IRS immune from avoidance actions for extremely similar wrongdoing.

The government (at 31-33) observes that "neither *Nordic Village* nor *Hoffman* involved [Section] 544(b)" (citation omitted). But had Congress wanted to restrict its sovereign-immunity waiver to the provisions in *Hoffman* (sections 542(b) and 547(b)) and *Nordic Village* (section 549(a)), it could have said so. Instead, Congress unambiguously waived federal sovereign immunity "with respect to" 59 provisions, including sections 542, 547, 549, *and* 544.

3. Moreover, serious questions exist about whether sovereign immunity even applies to bankruptcy avoidance actions, making it especially implausible that Congress gave the government a special exemption from ordinary bankruptcy rules here. As this Court has said in the context of lawsuits against States, "[i]n bankruptcy, … sovereign immunity has no place." *Allen v. Cooper*, 589 U.S.

248, 257 (2020). That "bankruptcy exceptionalism" reflects bankruptcy's historically *in rem* nature. *Id.* at 257-58. *In rem* proceedings "do[] not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction." *Id.* at 258 (quoting *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362 (2006)).

Thus, an adversary proceeding against a State to discharge "a student loan debt does not implicate a State's Eleventh Amendment immunity." *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 445 (2004). And state sovereign immunity would not bar a trustee's suit to avoid and recover preferential transfers to a State even had Congress never enacted section 106. *Katz*, 546 U.S. at 359.

As this Court observed in *Katz*, "a mere declaration of avoidance," like the section 544(b) proceeding here, is a "purely *in rem* proceeding." *Id.* at 371. *Katz* left open whether a *recovery* action is *in rem*, instead relying on the plan of the Convention to hold that States cannot assert sovereign immunity against recovery claims. *Id.* at 371-72 & n.10. But the avoidance action itself (there, a preferential-transfer claim under section 547) was a quintessential *in rem* action where sovereign immunity did not apply in the first place. *Id.* at 371-72. Thus, it is far from clear that Congress even needed to waive sovereign immunity for the trustee to *avoid* the transfers under section 544(b). And here, there is no dispute that section 106 permits *recovery* against the United States under section 550(a).

D. Section 544(b) Does Not Require that the Creditor Could Sue the United States Outside Bankruptcy

1. The government's case hinges on its assumption that section 544(b) requires the trustee to show that Salazar (the creditor) "could have sued the federal government

under Utah fraudulent-transfer law to recoup the tax payments at issue." U.S. Br. 14; *accord* U.S. Br. 9-10, 13, 17-19, 21-22, 24, 29; States' Br. 6-7. That assumption is demonstrably incorrect.

Section 544(b) requires the trustee to show that the transfer "is voidable under applicable law by a creditor," not—as the government asserts—that a creditor could sue the specific transferee that the trustee named as a defendant in the adversary proceeding (here, the United States). "Avoidability is an attribute of the transfer and not the party." *Woods & Erickson, LLP v. Leonard (In re AVI, Inc.)*, 389 B.R. 721, 733 (B.A.P. 9th Cir. 2008). Congress wrote section 544(b) in the passive voice, which focuses "on the thing being acted on." *See* Bryan A. Garner, *Garner's Modern English Usage* 676 (4th ed. 2016). That choice reflects Congress' "agnosticism" about the actors involved. *See Watson v. United States*, 552 U.S. 74, 81 (2007); *Bartenwerfer v. Buckley*, 598 U.S. 69, 75-76 (2023).

Section 544(b) identifies one actor only, a creditor, requiring the trustee to show that a transfer "is voidable … by a creditor." Section 544(b) does not ask whether the transfer "is voidable … by a creditor as to the defendant the trustee is suing." When Congress wanted to make avoidance turn on the identity of the transferee, Congress said so explicitly and repeatedly.[4] This Court has no license to "add words … to the statute Congress enacted." *See Muldrow v. City of St. Louis*, 601 U.S. 346, 355 (2024).

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[4] For example, section 545(2) permits trustees to avoid statutory liens that are "not perfected … against a bona fide purchaser." Section 547 covers preferential transfers "to … a creditor," "surety," or "entity that is not an insider for the benefit of a creditor that is an insider." 11 U.S.C. § 547(b), (d), (i). And section 548 permits avoidance of fraudulent transfers "to … an insider," "general partner in the debtor," or

2. Here, all Utah-law requirements for fraud, and thus voidability, are undisputedly met. U.S. Br. 6. All Resort did not receive "reasonably equivalent value" for the tax transfers and "was insolvent." Utah Code § 25-6-6(1); Pet.App.3a. The transfers are therefore "voidable under applicable [Utah] law" by creditors. *See* 11 U.S.C. § 544(b)(1).

Moreover, in two independent ways, Salazar could have secured a Utah-law judgment confirming that the transfers to the IRS are voidable without suing the United States or otherwise implicating sovereign immunity. *First*, Salazar could have sought monetary recovery from Bizzaro and Cummins as "the person[s] for whose benefit the transfer[s] [were] made." Utah Code § 25-6-9(2)(a). That is precisely why the trustee invoked Utah law when he sued Bizzaro and Cummins under section 544(b). J.A.45, 56; *supra* p. 6. *Second*, Salazar could have sought an injunction against All Resort to prevent "further disposition by the debtor [*i.e.*, All Resort] … of other property." Utah Code § 25-6-8(1)(c)(i).[5]

The government (at 40) questions whether it would have been an indispensable party to those proceedings. But creditors in Salazar's shoes always can, and routinely

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"self-settled trust or similar device." *Id.* § 548(a)(1)(B)(ii)(IV), (b), (e)(1).

[5] *See* UVTA § 7 cmt. 3; *Wells Fargo Bank v. Akanan*, 2021 WL 12203532, at *8 (W.D. Pa. June 15, 2021) (injunction under Pennsylvania UVTA); *Sargeant v. Al Saleh*, 512 S.W.3d 399, 414 (Tex. Ct. App. 2016) (same under Texas UFTA); *Oliphant v. Moore*, 293 S.W. 541, 542 (Tenn. 1927) (same under Tennessee Uniform Fraudulent Conveyances Act).

do, pursue monetary recovery from beneficiaries like Bizzaro and Cummins without joining the transferee. *See, e.g.*, *Georgelas v. Desert Hill Ventures, Inc.*, 45 F.4th 1193, 1200-01 (10th Cir. 2022); *Hafen v. Taylor*, 2021 WL 3194367, at *3-4 (D. Utah July 28, 2021) (both permitting recovery from beneficiaries under Utah UFTA without joining transferee); *see Sugartown Worldwide LLC v. Shanks*, 2015 WL 1312572, at *13 (E.D. Pa. Mar. 24, 2015) (same under Pennsylvania UFTA). And an injunction barring All Resort from dispersing *other* property by definition "would not impact" the IRS's interests in the transfers, so the United States would not be an indispensable party to that suit either. *See Armed Forces Bank NA v. Dragoo*, 2018 WL 8621584, at *3 (D. Ariz. Sept. 28, 2018) (Arizona UFTA). Were Utah law otherwise, wrongdoers like Bizzaro, Cummins, and All Resort could inexplicably use the United States' sovereign immunity to shield *themselves* from liability for fraudulent transfers.

The government (at 39) also questions whether, independent of sovereign immunity, trustees can recover from listed transferees under section 550(a) only if they avoid the transfers against the same transferee under section 544(b). *See* Cert. Reply 10. The government thus reads section 550(a) to authorize recovery only "to the extent that a transfer is avoided in a lawsuit against this transferee." The government cites no case (and we are not aware of any) endorsing that reading. To the contrary, "to the extent" simply reflects that some transfers may be avoided only in part. *In re Int'l Admin. Servs.*, 408 F.3d 689, 706 (11th Cir. 2005); William L. Norton III, *Norton Bankruptcy Law and Practice* § 70:2 n.3 (3d ed. July 2024 update); *e.g.*, 11 U.S.C. §§ 548(c), 549(b) (both permitting partial avoidance); *cf. Tabor v. Davis (In re Davis)*, 2016

WL 11696269, at *16-17 (Bankr. W.D. Tenn. June 15, 2016) (same for parallel language in Tennessee UFTA). Nor is it clear (outside its pecuniary interest here) why the United States would want to restrict trustees' recovery powers under section 550(a).

3. Despite having 2,000 words to spare in its brief, knowing that this argument was coming from the brief in opposition (at 22-23), and responding in the certiorari-stage reply (at 9-10), the government now demurs, claiming (at 38-40) that respondent forfeited this threshold statutory-interpretation argument. That assertion is puzzling given that the *government* in district court raised whether the trustee could "avoid the IRS payments against [Bizzaro and Cummins] as alleged 'person[s] for whose benefit the [tax payments were] made'" under Utah law. J.A.64 (citation omitted). The trustee responded that this issue was "*perhaps* beyond the scope of the issues presented on appeal," but, in any event, section 544(b) asks only "whether a transfer is voidable." J.A.69 n.6 (emphasis added); *cf.* Cert. Reply 9 (quoting this passage but omitting the "perhaps"); U.S. Br. 38-39 (citing this passage without quotation).

Regardless, parties forfeit "claim[s]," not "argument[s]." *Hemphill v. New York*, 595 U.S. 140, 149 (2022). Below, the trustee consistently urged that the transfers to the United States are voidable under Utah law. Bankr. Ct. Br. 2, 4-6, 8; D. Ct. Br. 1-3, 11-12, 15; C.A. Br. 4-8, 16, 24-27. In support of that claim, the trustee in this Court is "not limited to the precise arguments … made below." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 (2008) (citation omitted); *accord Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

The government routinely asserts it can "'make any argument in support of [a] claim' without being 'limited to the precise arguments [it] made below.'" U.S. Br. 24 n.10, *Glover v. United States*, 531 U.S. 198 (2001) (No. 99-8576) (quoting *Lebron*, 513 U.S. at 379). For instance, in *Ohio Adjutant General's Department v. FLRA*, the government argued in the court of appeals that state National Guards "are federal executive agencies" covered by the Federal Service Labor-Management Relations Statute. *See* Resp. Br. 34-35, 21 F.4th 401 (6th Cir. 2021) (No. 20-3908) (citation omitted). Before this Court, however, the government proposed—and this Court adopted—an entirely new theory. *See* 598 U.S. 449 (2023). The government argued that the U.S. Army is a component of a federal executive agency, with state National Guards acting as "*representatives*" of that agency. *See* U.S. Br. 19, 27-33, *Ohio Adjutant*, 598 U.S. 449 (No. 21-1454) (emphasis added).

In response to allegations of forfeiture, the government acknowledged (with characteristic understatement) that its new argument "may vary somewhat from the legal arguments it advanced" below. *Id.* at 37. But the government urged this Court to "affirm[] the judgment in this case on the basis of the argument presented in this brief" regardless. *Id.* The government explained that its new argument was "previewed in its brief in opposition[,] … is directly responsive to the question presented," and "a respondent in particular is entitled to rely on any legal argument in support of the judgment below." *Id.* (cleaned up). All three points equally apply here.

Ohio Adjutant is hardly an aberration. In *United States v. Taylor*, the government "abandon[ed] the legal

theory it advanced in the courts of appeals" and "elaborat[ed] two new theories" that this Court considered as to why Hobbs Act robbery was a crime of violence. 596 U.S. 845, 854, 860 (2022). In *Burwell v. Hobby Lobby Stores, Inc.*, the government raised and the Court considered two new compelling interests for a contraceptive mandate. 573 U.S. 682, 733-34 (2014). In *Cleveland v. United States*, the government pressed and the Court again considered "an argument not raised below … as an alternate ground for affirmance" that the mail-fraud statute contains two separate offenses. 531 U.S. 12, 25-26 (2000). And in this very case, the United States presses an Appropriations Clause argument that no court below passed on and which the United States did not develop. *Cf.* C.A. U.S. Br. 28 (briefly mentioning the Clause without elaboration).

Moreover, the trustee is making a *defensive* argument. The government's merits brief depends on its claim (at 13) that section 544(b) requires a creditor who "could have sued the United States under Utah law to avoid the federal tax payments at issue here outside of bankruptcy." *Accord* U.S. Br. 9-10, 13, 17-19, 21-22, 24, 29. For the reasons above, section 544(b) requires no such thing. This Court should not enshrine the government's erroneous reading in the U.S. Reports without asking if the government is misreading section 544(b)'s text.

E. The Government's Reading Eviscerates Equal Treatment in Bankruptcy and Encourages Fraud

1. The "purpose" of bankruptcy has long been to "place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors." *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300, 307 (1911). Then, as

now, the trustee's duty is "[t]o maximize the funds available for, and ensure equity in, the distribution to creditors." *Merit Mgmt.*, 583 U.S. at 369.

The government's position would thwart that objective by putting an entire class of the estate's rightful property—fraudulent transfers to governments that occurred more than two years before bankruptcy—outside the trustee's reach. As a creditor, the government would then recover its share of the remaining assets *plus* the ill-gotten proceeds of fraud—undermining the Code's central policy of equal treatment.

Those losses would be borne by other creditors. In bankruptcy, "the debtor is almost always unable to fully repay unsecured creditors." *Yahweh*, 27 F.4th at 965. Creditors directly "benefit if property previously transferred is returned to the bankruptcy estate," resulting in more money for the trustee to distribute. *Id.* Exempting the United States from section 544(b) claims would diminish the pot for everyone else, thereby "cheat[ing] creditors." *See Mission Prod.*, 587 U.S. at 382.

This case illustrates the consequences. The workers who stayed at their posts in 2017 to keep All Resort operational during chapter 11 bankruptcy have yet to be fully paid. *See supra* p. 6. Those workers—including bus drivers, mechanics, and administrative assistants—plus other chapter 11 administrative claimants, have claims near the front of the line for repayment if this money is recovered. *See* No. 17-23687 Bankr. Ct. Dkt. 758, at 11. Unless the United States returns the money fraudulently taken, those flesh-and-blood creditors will be shortchanged.

2. Giving the government a special exemption from section 544(b) claims would defy Congress' judgment that,

to further bankruptcy's "orderly and centralized debt-resolution process," the Code's "basic requirements generally apply to *all* creditors," including the United States. *Lac du Flambeau*, 599 U.S. at 391 (citation omitted). Congress provided governments with only "limited exceptions," which are "finely tuned to accommodate essential governmental functions." *Id.* at 391-92. Bankruptcy's automatic stay, for example, generally does not limit governments' "police or regulatory power[s]." 11 U.S.C. § 362(b)(4). Congress exempted most government fines, penalties, and forfeitures from discharge. *Id.* § 523(a)(7). And Congress imposed careful guardrails on section 106(a)'s waiver, prohibiting punitive damages and capping fee awards against governments. *Id.* § 106(a)(3).

Congress gave special consideration to the tax context. Governments may "pursu[e] specific tax-related activities," notwithstanding the Code's automatic stay on collection. *Lac du Flambeau*, 599 U.S. at 391 (citing 11 U.S.C. § 362(b)(9), (18), (26)). Congress "provide[d] protection to tax collectors, such as the IRS, through grants of enhanced priorities for unsecured tax claims … and by the nondischarge of tax liabilities." *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983) (citing 11 U.S.C. §§ 507(a)(6), 523(a)(1)). And Congress categorized taxes incurred during bankruptcy as "administrative expenses" with high payment priority. 11 U.S.C. § 503(b)(1)(B).

Congress also spoke expressly when it wanted to make exceptions from the Code's avoidance provisions. Section 546 contains various "policy-based exceptions" to avoidance for goods sold in the ordinary course of business, grain storage, fish-processing facilities, and securities purchased on margin. *See Merit Mgmt.*, 583 U.S. at 372; 11 U.S.C. § 546(c)-(e). And sections 544(b)(2) and

548(a)(2) exempt "transfer[s] of a charitable contribution" from avoidance. Those provisions reflect Congress' desire to protect religious tithing. *See* H.R. Rep. No. 105-556, at 3 (1998). In all of those reticulated provisions, Congress never saw fit to exempt governments or tax payments from section 544(b). This Court is especially loath to imply additional unwritten exceptions in the bankruptcy context to avoid interfering with Congress' "meticulous," "mind-numbingly detailed" scheme. *Law*, 571 U.S. at 424.

3. The government's interpretation would also create an unjustified loophole to the Code's "basic policy … of affording relief only to an *honest* but unfortunate debtor." *Lamar*, 584 U.S. at 715 (citation omitted) (emphasis added). Fraudsters cannot discharge debts procured by fraud. *See* 11 U.S.C. § 523(a)(2). But, as this case illustrates, the government's reading offers a blueprint for fraud: use corporate assets to pay personal liabilities to the government and then let the government hide behind sovereign immunity.

Had Bizzaro and Cummins filed for personal bankruptcy (as Cummins in fact did), those personal tax debts may have been nondischargeable. *See id.* § 523(a)(1). But because All Resort paid their tax debts, those liabilities were wiped out. The Sackler family appears to have attempted a similar maneuver on a far larger scale, transferring over $4 billion from Purdue Pharma to pay personal taxes, "including large amounts to the IRS." *In re Purdue Pharma L.P.*, 633 B.R. 53, 91 (Bankr. S.D.N.Y. 2021), *rev'd*, 144 S. Ct. 2071 (2024). For every company in dire straits, the government's interpretation would incentivize future corporate officers with personal debts to the United States to raid corporate coffers.

The consequences of the government's reading are even more far-reaching. As noted, *supra* pp. 6-7, the trustee also brought section 544(b) actions against Bizzaro and Cummins; he received a partial recovery from Bizzaro, and Cummins filed for bankruptcy. Yet the government (at 40) suggests that the United States may be an indispensable party to those fraudulent-transfer actions, in which case the trustee would have no such recourse. *See* Cert. Reply 9-10. The upshot would be disturbing and remarkable: Future fraudsters in Bizzaro and Cummins' shoes could use sovereign immunity as a shield for their own fraud. *See supra* pp. 35-36. All they would need to do is say, exactly as the government does here, that the trustee's claims fail on the merits because, outside of bankruptcy, sovereign immunity would bar suit under applicable law.

4. The government (at 37-38) implausibly contends that respondent's position would imperil the federal fisc. Bankruptcy courts "have nearly uniformly adopted" respondent's rule, without apparent hardship to the United States. *See DBSI*, 869 F.3d at 1013 n.11. And the government is undisputedly subject to every avoidance power in the Code that does not incorporate nonbankruptcy law, including fraudulent transfers within two years of bankruptcy (section 548) and post-petition transfers (section 549). The government does not claim that those provisions impose undue burdens on the fisc or "explain why the Code would draw such a line in the sand" between section 544(b) and other avoidance powers. *See Lac du Flambeau*, 599 U.S. at 397.

Moreover, the IRS remains free to collect from the actual wrongdoers—the delinquent taxpayers. The IRS enjoys "considerable power to go after unpaid taxes."

Polselli v. IRS, 598 U.S. 432, 434 (2023). The IRS can obtain liens on taxpayers' property, 26 U.S.C. § 6321, levy that property, *id.* § 6331, or fine and imprison taxpayers, *id.* § 7202. And the IRS can typically recover even if the delinquent taxpayer has filed for bankruptcy, since federal tax debts are generally nondischargeable. *See* 11 U.S.C. § 523(a)(1). This issue arises only because the government got an unexpected windfall due to gross misconduct: payment from someone who never owed the IRS in the first place—All Resort—to line the pockets of Bizzaro and Cummins.

The government (at 37) questions why Congress would have subjected the federal government "to the vagaries of applicable state law" (citation omitted). But the Code routinely incorporates state law in provisions for which Congress waived immunity, suggesting that Congress saw no problem with making the government play by the same rules as everyone else. *See supra* pp. 22-23 & n.3. In any event, the state laws here are remarkably uniform with 45 States adopting virtually parallel uniform acts. *Supra* p. 4.

The government (at 38) also claims that Congress would not have wanted the United States to face four-year lookback periods for fraudulent-transfer claims. *See* BIO 16 n.1 (cataloging 46 States and the District of Columbia with lookback periods of four years or less).[6] But those

[6] The government (at 38) notes that Utah has a discovery rule but omits that this provision requires that the debtor act "with actual intent to hinder, delay or defraud" its creditors. Utah Code §§ 25-6-5(1)(a), 25-6-10(1). Fraudulent transfers to the government, as here, virtually always involve constructive fraud where no discovery rule applies.

lookback periods apply to all private parties, and Congress has not seen fit to grant the government a special exemption. Moreover, the United States enjoys a *six-year* limitations period for its own fraudulent-transfer actions to collect debt to the United States with an additional two-year discovery period for actual fraud. 28 U.S.C. § 3306(b). And the IRS has a *ten-year* window to bring an action to collect unpaid taxes. 26 U.S.C. § 6502(a).

II. The Government's Preemption and Appropriations Clause Arguments Lack Merit

The government (at 34-38) claims that, even accepting that Congress unambiguously waived sovereign immunity for the nonbankruptcy law incorporated into section 544(b), preemption and the Appropriations Clause bar the trustee's claim. Those contentions are meritless.

A. Preemption Does Not Apply

The government (at 35-36) argues that the fraudulent transfers are not "voidable under applicable law" because the Internal Revenue Code would preempt Utah-law fraudulent-transfer claims against the IRS (again, even accepting that Congress waived immunity). That argument fails for three reasons.

First, Utah law applies here only as incorporated into section 544(b), and one federal law (the Internal Revenue Code) cannot preempt another (section 544(b)). The government (at 36) responds that the question is whether an actual creditor's lawsuit "outside bankruptcy would be preempted." But this Court typically asks whether state laws are preempted "as applied," not in the abstract. *E.g.*, *Kansas v. Garcia*, 589 U.S. 191, 208 (2020); *Gobeille v. Lib-*

erty Mut. Ins. Co., 577 U.S. 312, 315 (2016). Utah law functions only to define what transactions are "voidable" for a *federal* cause of action.

The proper question is thus whether Congress intended the state law it expressly incorporated into section 544(b) to be preempted as applied to fraudulent tax payments. Answer: definitely not. "[T]he purpose of Congress is the ultimate touchstone in every pre-emption case." *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 163 (2016) (citation omitted). It would make no sense for Congress to incorporate state law into a federal cause of action, waive sovereign immunity for that very law when invoked within bankruptcy, but then impliedly preempt it. If Congress wanted to preempt section 544(b)'s application to fraudulent tax payments, Congress could have said so, just as it preempted section 544(b)'s application to "charitable contribution[s]" in a neighboring subsection. 11 U.S.C. § 544(b)(2); Pet.App.47a-48a; *supra* pp. 41-42.

Second, the government's argument reprises its flawed premise that the trustee must show that a creditor could avoid the transfer in a suit against *the United States*. Whether or not a creditor could sue the IRS, the transfers are still voidable under Utah law in actions against Bizzaro, Cummins, or All Resort. *Supra* pp. 35-36. Those defendants could not invoke federal preemption to escape state-law liability just because the fraud involved federal tax payments.

Third, as the bankruptcy court correctly held, the government's preemption argument would fail even outside bankruptcy. Pet.App.46a-48a. The government appears to argue that the Internal Revenue Code field preempts fraudulent-transfer actions, although the government studiously avoids saying "field preemption" in

this Court. *See* U.S. Br. 36 (citing *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 630 (2012), a railroad field-preemption case); U.S. Br. 8 (noting field-preemption argument below). This Court has never applied field preemption to the Internal Revenue Code, and the Internal Revenue Code contains no field-preemption clause—a setting where some have questioned whether field preemption would ever apply. *See Garcia*, 589 U.S. at 214 n.* (Thomas, J., concurring). It would be odd to endorse an ill-defined, novel category of tax field preemption in a bankruptcy/sovereign-immunity case.

Regardless, field preemption usually "consider[s] the *target* at which the state law *aims*," distinguishing between "broad[ly] applicabl[e]" state laws (not preempted) and those "directed at … precisely the things over which [federal law] has comprehensive authority" (preempted). *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 385-87 (2015) (citation omitted). Utah's UFTA is not "directed at" federal taxation or the IRS; it applies generally to all fraudulent transfers. That Utah's law could "incidentally affect" federal taxation does not require preemption. *See Hughes*, 578 U.S. at 164.

The government (at 35-36) invokes three provisions of Title 26 that it says, without elaboration, "plainly" preempt state-law fraudulent transfer claims against the IRS. Section 7421 bars suits to "restrain[] the assessment or collection of any tax" or transferee liability. Section 7422(a) bars suits "for the recovery" of any tax "erroneously or illegally assessed or collected." And section 7426(a)(3)-(4) authorizes suits against the United States to recover the proceeds of tax sales or discharged liens. The government (at 36 n.9) also footnotes two court-of-appeals

cases applying section 7422(a) to expressly preempt suits to recover unlawfully collected taxes.

The government does not claim that any of those provisions directly apply here, and rightly so. Section 7426(a)(3)-(4) *authorizes* suit against the government without preempting anything. And sections 7421 and 7422 do not apply because any Utah-law suit to *avoid* the fraudulent payments here would not "restrain[]" tax collection or seek "recovery" of illegally assessed taxes. *See DBSI*, 869 F.3d at 1015 n.14. Again, any recovery against the United States here occurs by virtue of section 550(a), a federal law. And the claim under Utah law is that the transfers from All Resort to the IRS are tainted by fraud—not that there is anything illegal about their collection or assessment against the taxpayers, Bizzaro and Cummins.

B. The Appropriations Clause Does Not Apply

The government (at 36-38) raises the Appropriations Clause as an additional "reason why there is no applicable state law that would enable a creditor to recover from the IRS outside of bankruptcy" (quoting *EAR*, 742 F.3d at 748). Once more, that argument hinges on the mistaken view that the trustee needs to show that a creditor could have sued *the IRS* outside bankruptcy. *Supra* pp. 33-34.

That argument contains another fundamental flaw because section 544(b) undisputedly does not require that the transfer be *recoverable* from anyone.[7] Section 544(b)

[7] The petition for certiorari repeated the Seventh Circuit's erroneous claim that section 544(b) requires that an actual creditor could "*recover* the payment from the IRS," but the government's merits brief largely drops that assertion. Pet. 10, 19 (quoting *EAR*, 742 F.3d at 747); *see* BIO 22; *but see* U.S. Br. 12-13, 18, 36 (occasionally asking

simply asks whether the transfer "is *voidable*." Again, the government's argument here assumes that it has no sovereign-immunity defense. Salazar therefore could have obtained a declaratory judgment of avoidance in a lawsuit against the United States. Utah Code § 25-6-8(1)(a). The Appropriations Clause by its own force poses no barrier to that state-law claim.

Because the transfers are voidable under Utah law, the trustee can obtain recovery using section 550(a), which empowers trustees to "recover, for the benefit of the estate, the property transferred" or its value. No one disputes that section 550(a)—which authorizes a money judgment against the United States payable out of the judgment fund—complies with the Appropriations Clause. *See* 11 U.S.C. §§ 106(a)(1), (3)-(4), 550(a); 28 U.S.C. § 2414; 31 U.S.C. § 3104.

Moreover, the government's Appropriations Clause argument yet again treats Congress as inexplicably destroying its own handiwork. By hypothesis, Congress would have incorporated state law into a federal cause of action, waived sovereign immunity for that cause of action, yet made that cause of action subject to a federal-law defense that would defeat every such claim against the United States. This Court should not assume that Congress wrote such a pointlessly self-defeating statute.

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whether creditor could "avoid and recover" or bring "an avoidance claim to recover" outside bankruptcy).

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

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SEPTEMBER 19, 2024

STATUTORY APPENDIX

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11 U.S.C. § 106. 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.

11 U.S.C. § 544. 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.

11 U.S.C. § 550. Liability of transferee of avoided transfer

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(b) The trustee may not recover under section[1] (a)(2) of this section from—

(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided; or

(2) any immediate or mediate good faith transferee of such transferee.

(c) If a transfer made between 90 days and one year before the filing of the petition—

(1) is avoided under section 547(b) of this title; and

(2) was made for the benefit of a creditor that at the time of such transfer was an insider;

the trustee may not recover under subsection (a) from a transferee that is not an insider.

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[1] So in original. Probably should be "subsection".

(d) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(e)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of—

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by or accruing to such transferee from such property; and

(B) any increase in the value of such property as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes—

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien on such property that is superior or equal to the rights of the trustee; and

(E) preservation of such property.

(f) An action or proceeding under this section may not be commenced after the earlier of—

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; or

(2) the time the case is closed or dismissed.

Utah Uniform Fraudulent Transfer Act (2014)

§ 25-6-5. Fraudulent Transfer—Claims arising before or after transfer.

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) without receiving a reasonably equivalent value in exchange for the transfer or obligation; and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

(2) To determine "actual intent" under Subsection (1)(a), consideration may be given, among other factors, to whether:

(a) the transfer or obligation was to an insider;

(b) the debtor retained possession or control of the property transferred after the transfer;

(c) the transfer or obligation was disclosed or concealed;

(d) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(e) the transfer was of substantially all the debtor's assets;

(f) the debtor absconded;

(g) the debtor removed or concealed assets;

(h) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(i) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(j) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(k) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

§ 25-6-6. Fraudulent Transfer—Claim arising before transfer.

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if:

(a) the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation; and

(b) the debtor was insolvent at the time or became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at the time, and the insider had reasonable cause to believe that the debtor was insolvent.

§ 25-6-8. Remedies of creditors.

(1) In an action for relief against a transfer or obligation under this chapter, a creditor, subject to the limitations in Section 25-6-9, may obtain:

(a) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(b) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by the Utah Rules of Civil Procedure;

(c) subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) any other relief the circumstances may require.

(2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court orders, may levy execution on the asset transferred or its proceeds.

§ 25-6-9. Good faith transfer.

(1) A transfer or obligation is not voidable under Subsection 25-6-5(1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under Subsection 25-6-8(1)(a), the creditor may recover judgment for the value of the asset transferred, as adjusted under Subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(a) the first transferee of the asset or the person for whose benefit the transfer was made; or

(b) any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

(3) If the judgment under Subsection (2) is based upon the value of the asset transferred, the judgment shall be for an amount equal to the value of the asset at the time of the transfer, subject to an adjustment as equities may require.

(4) Notwithstanding voidability of a transfer or an obligation under this chapter, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(a) a lien on or a right to retain any interest in the asset transferred;

(b) enforcement of any obligation incurred; or

(c) a reduction in the amount of the liability on the judgment.

(5) A transfer is not voidable under Subsection 25-6-5(1)(b) or Section 25-6-6 if the transfer results from:

(a) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(b) enforcement of a security interest in compliance with Title 70A, Chapter 9a, Uniform Commercial Code - Secured Transactions.

(6) A transfer is not voidable under Subsection 25-6-6(2):

(a) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(b) if made in the ordinary course of business or financial affairs of the debtor and the insider; or

(c) if made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

§ 25-6-10. Claim for relief—Time limits.

A claim for relief or cause of action regarding a fraudulent transfer or obligation under this chapter is extinguished unless action is brought:

(1) under Subsection 25-6-5(1)(a), within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(2) under Subsection 25-6-5(1)(b) or 25-6-6(1), within four years after the transfer was made or the obligation was incurred; or

(3) under Subsection 25-6-6(2), within one year after the transfer was made or the obligation was incurred.

§ 25-6-11. Legal principles applicable to chapter.

Unless displaced by this chapter, the principles of law and equity, including merchant law and the law relating to principal and agent, equitable subordination, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement this chapter's provisions.

Uniform Fraudulent Transfer Act (1984)

§ 4. Transfers Fraudulent as to Present and Future Creditors.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining

assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that he [or she] would incur, debts beyond his [or her] ability to pay as they became due.

(b) In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

§ 5. Transfers Fraudulent as to Present Creditors.

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

§ 7. Remedies of Creditors.

(a) In an action for relief against a transfer or obligation under this [Act], a creditor, subject to the limitations in Section 8, may obtain:

(1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

[(2) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by [ ];]

(3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure,

(i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

§ 8. Defenses, Liability, and Protection of Transferee.

(a) A transfer or obligation is not voidable under Section 4(a)(1) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under Section 7(a)(1), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(1) the first transferee of the asset or the person for whose benefit the transfer was made; or

(2) any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

(c) If the judgment under subsection (b) is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this [Act], a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to

(1) a lien on or a right to retain any interest in the asset transferred;

(2) enforcement of any obligation incurred; or

(3) a reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under Section 4(a)(2) or Section 5 if the transfer results from:

(1) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(2) enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

(f) A transfer is not voidable under Section 5(b):

(1) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was made unless the new value was secured by a valid lien;

(2) if made in the ordinary course of business or financial affairs of the debtor and the insider; or

(3) if made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

§ 9. Extinguishment of [Claim for Relief] [Cause of Action].

A [claim for relief] [cause of action] with respect to a fraudulent transfer or obligation under this [Act] is extinguished unless action is brought:

(a) under Section 4(a)(1), within 4 years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(b) under Section 4(a)(2) or 5(a), within 4 years after the transfer was made or the obligation was incurred; or

(c) under Section 5(b), within one year after the transfer was made or the obligation was incurred.

§ 10. Supplementary Provisions.

Unless displaced by the provisions of this [Act], the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

Uniform Voidable Transactions Act (2014)

§ 4. Transfer or Obligation Voidable as to Present or Future Creditor

(a) A transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

(b) In determining actual intent under subsection (a)(1), consideration may be given, among other factors, to whether:

(1) the transfer or obligation was to an insider;

(2) the debtor retained possession or control of the property transferred after the transfer;

(3) the transfer or obligation was disclosed or concealed;

(4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

(5) the transfer was of substantially all the debtor's assets;

(6) the debtor absconded;

(7) the debtor removed or concealed assets;

(8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and

(11) the debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor.

(c) A creditor making a claim for relief under subsection (a) has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

§ 5. Transfer or Obligation Voidable as to Present Creditor.

(a) A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange

for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(b) A transfer made by a debtor is voidable as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

(c) Subject to Section 2(b), a creditor making a claim for relief under subsection (a) or (b) has the burden of proving the elements of the claim for relief by a preponderance of the evidence.

§ 7. Remedies of Creditor.

(a) In an action for relief against a transfer or obligation under this [Act], a creditor, subject to the limitations in Section 8, may obtain:

(1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

(2) an attachment or other provisional remedy against the asset transferred or other property of the transferee if available under applicable law; and

(3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

(i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;

(ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

§ 8. Defenses, Liability, and Protection of Transferee or Obligee.

(a) A transfer or obligation is not voidable under Section 4(a)(1) against a person that took in good faith and for a reasonably equivalent value given the debtor or against any subsequent transferee or obligee.

(b) To the extent a transfer is avoidable in an action by a creditor under Section 7(a)(1), the following rules apply:

(1) Except as otherwise provided in this section, the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

(i) the first transferee of the asset or the person for whose benefit the transfer was made; or

(ii) an immediate or mediate transferee of the first transferee, other than:

(A) a good-faith transferee that took for value; or

(B) an immediate or mediate good-faith transferee of a person described in clause (A).

(2) Recovery pursuant to Section 7(a)(1) or (b) of or from the asset transferred or its proceeds, by levy or otherwise, is available only against a person described in paragraph (1)(i) or (ii).

(c) If the judgment under subsection (b) is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this [Act], a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to:

(1) a lien on or a right to retain an interest in the asset transferred;

(2) enforcement of an obligation incurred; or

(3) a reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under Section 4(a)(2) or Section 5 if the transfer results from:

(1) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or

(2) enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code, other than acceptance of collateral in full or partial satisfaction of the obligation it secures.

(f) A transfer is not voidable under Section 5(b):

(1) to the extent the insider gave new value to or for the benefit of the debtor after the transfer was

made, except to the extent the new value was secured by a valid lien;

(2) if made in the ordinary course of business or financial affairs of the debtor and the insider; or

(3) if made pursuant to a good-faith effort to rehabilitate the debtor and the transfer secured present value given for that purpose as well as an antecedent debt of the debtor.

(g) The following rules determine the burden of proving matters referred to in this section:

(1) A party that seeks to invoke subsection (a), (d), (e), or (f) has the burden of proving the applicability of that subsection.

(2) Except as otherwise provided in paragraphs (3) and (4), the creditor has the burden of proving each applicable element of subsection (b) or (c).

(3) The transferee has the burden of proving the applicability to the transferee of subsection (b)(1)(ii)(A) or (B).

(4) A party that seeks adjustment under subsection (c) has the burden of proving the adjustment.

(h) The standard of proof required to establish matters referred to in this section is preponderance of the evidence.

§ 9. Extinguishment of Claim for Relief.

A claim for relief with respect to a transfer or obligation under this [Act] is extinguished unless action is brought:

(a) under Section 4(a)(1), not later than four years after the transfer was made or the obligation was incurred or, if later, not later than one year after the transfer or obligation was or could reasonably have been discovered by the claimant;

(b) under Section 4(a)(2) or 5(a), not later than four years after the transfer was made or the obligation was incurred; or

(c) under Section 5(b), not later than one year after the transfer was made.

§ 12. Supplementary Provisions.

Unless displaced by the provisions of this [Act], the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.