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

AMICI CURIAE BRIEF OF THE HON. EUGENE WEDOFF (RET.), AND LAW PROFESSORS GEORGE KUNEY, BRUCE A. MARKELL, LAWRENCE PONOROFF, RAY WARNER, JACK WILLIAMS AND DAVID KUNEY IN SUPPORT OF THE RESPONDENT

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September 20, 2024

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF THE AMICI[1]

Your amici are the Honorable Eugene Wedoff (ret.) (Bankruptcy Judge, Northern District of Illinois) and law professors George Kuney, (University of Tennessee College of Law, Professor Emeritus), Bruce A. Markell, (Northwestern Pritzker School of Law, and Bankruptcy Judge, District of Nevada (ret.)), Lawrence Ponoroff, Dean Emeritus & Mitchell Franklin Professor Emeritus,), Ray Warner (St. John's University School of Law), Jack Williams (Georgia State University) and David R. Kuney, Adjunct Professor of Law, Georgetown University Law Center.

Amici curiae are professors who have devoted their careers to teaching, studying and writing about bankruptcy law, complex litigation, federal courts, and constitutional law. They are nationally recognized scholars who have participated as *amici* in this Court in prior cases involving foundational issues of bankruptcy law. *Amici* have a strong interest in the correct interpretation of the Constitution and the Bankruptcy Code and in their sound and effective implementation.

INTRODUCTION

The question presented in this case is whether Congress's "abrogation" of sovereign immunity set forth in Bankruptcy Code § 106(a), which is specifically made applicable to fraudulent conveyance actions under Code § 544, permits a trustee or debtor to avoid a fraudulent transfer made to the Internal Revenue Service (the "government"). This amicus brief

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel contributed any money to fund its preparation or submission.

argues that the trustee may do so and supports affirmance of the decision of the Tenth Circuit, below.[2]

There is no fair dispute that when Congress adopted the 1978 Bankruptcy Code, and included the initial version of § 106(a), one of the specific goals of this section, as discussed by the Congressional sponsors of the bill, was to permit a trustee (or a debtor) to bring an avoidance action against any governmental unit that had received either a preference or a fraudulent conveyance.[3] The broader goal was to ensure that the government was treated the same as most other creditors in a bankruptcy case. This principal of equality of treatment among creditors is a bedrock principle of bankruptcy law.[4]

Two cases decided by this Court held that the initial statutory language was not sufficiently clear because of the high bar for a waiver of immunity. In response to these rulings, Congress then adopted the current version of § 106 which (a) changed the concept from a "waiver" to an "abrogation" (b) added that the abrogation was "with respect to" specifically identified sections including § 544. The phrase "respecting" is used throughout the Code to denote the statutory subject has a broad reach. These changes were consequential: this Court has recently held that "the Bankruptcy Code § 106(a) unequivocally abrogates the sovereign immunity of any and every government that

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[2] *Miller v. United States*, 71 F.4th 1247 (10th Cir. 2023).

[3] The term "debtor" and "trustee" are used interchangeably in this brief. A debtor in possession (Chapter 11) generally has the duties and rights of a trustee and can invoke the same avoidance actions as pertain here. *See* 11 U.S.C. § 1107.

[4] Lawrence Ponoroff, *The Resiliency of the Equality of Creditors Ethos in Bankruptcy*, 30 ABI Law Rev. 1 (2022).

possesses the power to assert such immunity."[5] And more recently, this Court noted that the Bankruptcy Code is an example of where there is a "clear waiver" of sovereign immunity.[6]

This clear waiver of sovereign immunity is expressly made applicable to § 544. Section 544(b)(1) states that a trustee (or debtor) may avoid (set aside) any transfer of an interest in property of the debtor that "is voidable under applicable law by a creditor holding an unsecured claim . . . ." The reference to "applicable law" includes both federal and state law; thus §544(b) permits a debtor or trustee to utilize state fraudulent conveyance law, and thus to have the benefit of the four-year statute of limitations used in most states.[7]

David Miller, as the trustee for the debtor, All Resort Group, Inc. initiated an action against the government to recover tax payments it made for the personal benefit of its two insiders, utilizing § 544. No one disputed that each of the elements required for a fraudulent conveyance under state law were satisfied. Miller argued that "abrogation" meant that the abrogation "covers all aspects of section 544(b), including the underlying state-law cause of action." (Resp. Br. 20).

The government contends the statutory abrogation of immunity was ineffective because state law does not waive sovereign immunity and hence there can *never*

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[5] *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 388 (2023).

[6] *Dept. of Agriculture Rural Development Rural Housing Ser. v. Kirtz*, 144 S. Ct. 457, 466 (2024).

[7] Most states have adopted the Uniform Fraudulent Transfer Act or Uniform Voidable Transactions Act, which have a four year statute of limitations. (Resp. Opp. Br. p. 6).

be an actual creditor who could have avoided the transfer under state law.[8] The government's principal argument looks mostly to the contention that § 544 requires an actual creditor who has a claim under state law *and* the right to avoid the transfer *prior* to bankruptcy.

The Tenth Circuit below, as well as the Fourth and Ninth Circuit disagree with the position of the government, and as noted by the Seventh Circuit, so do "all of the bankruptcy and district courts to consider the issue in the context of the federal government."[9] The Ninth Circuit in *DBSI* correctly observed that the government's position renders § 106 largely "meaningless" and effectively nullifies Congress's intent to abrogate sovereign immunity with respect to avoidance actions.[10] Both the Tenth Circuit below[11] and the Ninth Circuit[12] held that the phrase in § 106(a) "with respect to" is "broadening" and "expansive" and fully reflects Congressional intent to abolish the government's sovereign immunity in an avoidance action under § 544(b)(1).[13] The Fourth Circuit is in accord, finding that the language in § 106(a)(2) which provides that "court may hear and determine any

[8] *Miller*, 71 F.4th at 1251.

[9] *In re Equipment Acquisitions Resources, Inc.*, 742 F.3d 743, 748 (7th. Cir. 2014).

[10] *In re DBSI, Inc.*, 869 F.3d 1004, 1011 (9th Cir. 2017).

[11] *Miller*, 71 F.4th 1247.

[12] *DBSI*, 869 F.3d 1004.

[13] *Miller*, 71 F.4th at 1253.

issue arising with respect to the application of such sections to governmental units" applies to state law.[14]

Our concern as amici is both textual and systemic. The text of §106(a) amply reflects a specific intent to abrogate immunity with respect to avoidance actions, both state and federal. This intent is embedded as well in the Congressional history where the Congressional hearings made it plain that one of the purposes in abrogating immunity was to provide trustees with an avoidance power against the government. Now the government has proposed a textual argument that reads this intent out of Code and renders the entire purpose of the abrogation with respect to avoidance powers to be nugatory. This flies squarely in the face of the long standing presumption against ineffectiveness.

We also write to address the systemic consequences of such an interpretation. One consequence is that insiders will now know that if they use corporate assets to pay their personal tax liability—while insolvent or facing large tort claims—and if they defer filing for bankruptcy for more than two years after making a voidable tax payment, they would have created an unrecoverable fraudulent conveyance. This strategy will not go unnoticed.

Purdue Pharma well illustrates how pernicious this can be.[15] The Department of Justice argued that the Sacklers were "keeping billions of dollars that they siphoned from Purdue in the years before these

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[14] *Cook v. United States (In re Yahweh Center)*, 27 F.4th 960, 966 (2022).

[15] *In re Purdue Pharma L.P.*, 633 B.R. 53, 91 (Bankr. S.D.N.Y. 2021).

Chapter 11 proceeding."[16] "Members of those families withdrew approximately $11 billion from Purdue in the eleven years before the company filed for bankruptcy."[17] And this: "the Sacklers drained Purdue's total assets by 75% and reduced Purdue's solvency cushion" by 82%."[18] Almost 40% of these transfers were to the IRS for the Sacklers' tax liabilities.[19]

The Sacklers then refused to return the transferred funds unless they received impermissible third-party releases. The return of these transfers to the government and others were held hostage until the Sacklers could negotiate a highly favorable third-party release, later found to be unlawful by this Court. Even then the Sacklers were alleged to have kept over 40% of what they had "siphoned" from Purdue.

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[16] Brief for the Petitioner, (*Harrington v. Purdue Pharma L.P.*, U.S. Supreme Court, No. 23-124) (Sept. 20, 2023), p. 2.

[17] Application for a Stay of the Mandate of the United States Court of Appeals, (*Harrington v. Purdue Pharma, L.P.,* U.S. Supreme Court, No. 23-124) (July 28, 2023), p. 2.

[18] Application for a Stay of the Mandate, p. 9

[19] "As described in the trial declaration of Carl Trompetta and as generally acknowledged, over 40 percent of the asserted avoidable transfers to the Sacklers or their related entities went to pay taxes associated with Purdue, including large amounts to the IRS and the states that continue to object to the plan and, of course, intend to keep the tax payments. The fact that these payments went to pay taxes obviously relieved the Sacklers of an obligation. I do, however, have uncontroverted testimony from Jennifer Blouin that if the partnership structure of Purdue, with the taxes running through the Sacklers, was not in place, Purdue itself would have been liable for taxes in almost all of the amount of the tax payments to or for the benefit of the Sacklers and, therefore, arguably received fair consideration for those tax payments." *In re Purdue Pharma L.P.*, 633 B.R. 53, 91 (Bankr. S.D.N.Y. 2021).

Applying the government's theory urged here, would give a roadmap on how to siphon off assets, including tax payments for insiders, who will know that if they wait for more than two years to file for bankruptcy a trustee or debtor will not be able to recover the funds under § 544. The Sacklers in *Purdue* used these fraudulent transfers, and the refusal to return the funds as the core leverage in its case. Not surprisingly, bankruptcy scholars Thomas Jackson and Douglas Baird "identify the protection of creditors against debtor misbehavior as the core principle of fraudulent conveyance law."[20]

This case is not *Purdue*, but the harm caused by insider transfers prior to bankruptcy, in terms of deterioration to the balance sheet and the inability to honor creditor obligations is the same. The ability to prevent pre-bankruptcy "siphoning" of assets, and to utilize the expanded statute of limitations under state law is vital.[21] The creditor constituency needs effective avoidance powers to recover the transfers, and a body of statutory and case law to serve as an effective

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[20] Charles J. Tabb, Bankruptcy Anthology, Chapter 7, Avoiding Power: Fraudulent Transfers, p. 331 (Anderson Pub., 2002) (citing Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 Stan. L. Rev. 725 (1984)).

[21] The concern with fraudulent transfers has been at the epicenter of modern bankruptcy law and the devious strategies being used to both (a) siphon assets to individuals for tax payments as in *Purdue* and, (b) the use of the Texas Two Step Divisive Merger Act to spin off liabilities to a subsidiary while keeping the productive assets in the transferor. *See* Mark Roe and William Organek, *Texas Two-Step and the Future of Mass Tort Bankruptcy Series The Texas Two-Step: The Code Says it's a Transfer*, Harv. L. Sch.. Bankr. Roundtable (July 29, 2022), https://tinyurl.com/vct5trm8.

deterrent so that such conduct is not seen as readily available to failing companies and their insiders.

STATEMENT OF THE CASE

All Resort Group, Inc. ("ARG") initially filed for bankruptcy relief under Chapter 11 in April 2017. But within just a few months, the official creditors committee realized that ARG had, more than two years before the filing, paid the federal tax obligation of over $145,000 for two of its officers and directors, and that after filing for bankruptcy it was continuing to withdraw funds as salary and incurring substantial loses. The committee moved for the appointment of a chapter 7 trustee in order to remove the debtor's managers and replace them with a fiduciary. Later, the debtor itself moved to convert the case, which motion was granted.

David Miller was then appointed to serve as the Chapter 7 trustee. In June 2018 Miller filed a complaint seeking to avoid the tax payments ARG had made on behalf of the insiders. The payments to the government were "constructively fraudulent" transfers because the debtor did not receive reasonably equivalent value in exchange for the transfers. The trustee sought this remedy in accordance with § 544(b) of the U.S. Bankruptcy Code, which permits a trustee to avoid a constructively fraudulent transfer by invoking either federal bankruptcy law or state law which contains a similar fraudulent conveyance statute.

Miller argued, and the bankruptcy court agreed, that "Section 106(a) abrogates the United States' sovereign immunity within the adversary proceeding" and "removes the ability of the [the United States] to interpose immunity as a defense to the underlying

state law cause of action." (Pet. 5). Because of the use of the phrase "with respect to" this section plainly indicates Congressional intent that the abrogation was to be broadly applied to all aspects of § 544, such that the abrogation was effective as to any and all avoidance actions, whether state or federal.

The government however argued that Miller could not sue it. The government argues that the "central dispute for purposes of Section 544(b) was whether the trustee could satisfy . . . the requirement that there must exist an actual creditor, who could, outside of bankruptcy avoid the transfer at issue." (Pet. 4). Further, it argues that "outside bankruptcy, sovereign immunity would bar suit against the United States to recover the federal tax payments," and that accordingly the challenged payments were not "voidable under applicable law by a creditor holding an unsecured claim." (Pet. 4).

The Tenth Circuit court of appeals affirmed the ruling of the bankruptcy court, holding that the waiver of sovereign immunity under §106(a) "reaches the underlying state law cause of action that § 544(b)(1) authorizes the Trustee to rely on in seeking to avoid the transfers." (Pet 6). The court of appeals held that the phrase "with respect to" has a "broadening effect" reflecting Congress' intent that the waiver "reach any subject that has a connection with the . . . the topics the statute enumerates (quoting *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 717-718 (2018))." (Pet 6).

We urge this Court to affirm the decision of the Tenth Circuit.

SUMMARY OF ARGUMENT

First, as a matter of statutory interpretation, § 106(a) is controlling; it plainly states that "sovereign immunity is abrogated as to a governmental unit. . .with respect to the following. . . [section] 544." Section 106 was enacted by Congress to ensure that debtors could protect the bankruptcy estate by having the power to void wrongful transactions (including both preferences and fraudulent conveyances) and that the debtor or trustee could rely on *both* federal and state law to exercise the avoidance power. The Tenth Circuit correctly held that this clause has a "broad pre-emptive purpose." "[T]he critical phrase 'with respect to' in § 106(a) clearly expresses Congress's intent to abolish the government's sovereign immunity in an avoidance proceeding arising under § 544(b)(1) regardless of the context in which the defense arises."[22]

Second, the government's interpretation violates the long standing presumption against ineffectiveness. It argues there is no "actual creditor" who could have sued the government because of the existence of sovereign immunity which would have thereby precluded the avoidance action *outside of bankruptcy*. The government's argument would essentially render § 106 unenforceable as it pertains to § 544(b) because no state law can abrogate federal sovereign immunity. The government's argument is directly counter to the presumption against ineffectiveness which "provides that "a textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored.'" *Rodriguez v. Branch Banking & Tr. Co*., 46 F.4th 1247, 1257 (11th Cir. 2022).

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[22] *Miller*, 71 F.4th at 1253.

Third, the government's interpretation of the Code is inconsistent with the long-standing bankruptcy axiom of "equality of distribution" which has "consistently been recognized as a foundational value of Anglo-American bankruptcy law."[23] *See Beiger v. IRS*, 496 U.S. 53, 58 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code.") Equality of distribution should also embrace the notion that when a corporation or business entity upstreams money to insiders or makes dividend payments while insolvent, that such funds are properly recoverable in order to ensure both a fair and efficient distribution to creditors. When *only* the distributions to the government are immune from avoidance, then the distribution system becomes unequal, and is thus inconsistent with the foundational principles of bankruptcy law.

Fourth, the government's position would encourage abuse of the bankruptcy system. As in this case, ARG was a failing company whose insiders not only engaged in pre-bankruptcy transfers but continued to cause loss and diminution during the case by making payments to themselves. Insiders of failing companies would be aware that if the insolvent pre-debtor paid the tax liabilities of its insiders, that the statute of limitations would expire in two years, and that the longer statute of limitations available in over 40 states could not be the basis for an avoidance action.

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[23] Lawrence Ponoroff, *The Resiliency of the Equality of Creditors Ethos in Bankruptcy*, 30 ABI Law Rev. 1 (2022).

LEGAL ARGUMENT

I. THE GOVERNMENT'S INTERPRETATION OF §§ 106 AND 544 IS INCONSISTENT WITH THE PLAIN MEANING OF THE STATUTE AND CONGRESS'S PURPOSE IN ABROGATING SOVEREIGN IMMUNITY.

A. The phrase "with respect to" in § 106(a) signifies that governmental sovereign immunity was broadly abrogated and waived.

The Tenth Circuit held that the "critical phrase" in this case is "with respect to" found in § 106(a)(1).[24] Section 106(a) states that "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. . . [Code section] 544." As Respondent Miller correctly argues, this phrase is not ambiguous and sets forth the Congressional purpose of ensuring that when the government engages in certain conduct, such as the receipt of fraudulent conveyances under state law, a trustee or debtor in possession may seek to avoid the transfer and recover the amount transferred.

This Court often looks first to the ordinary meaning of words as found in the dictionary.[25] "Respecting" is defined as "with respect to; with reference to; as regards." Respecting, *Oxford English Dictionary*;[26] "Respecting" is also defined to mean "[i]n relation to;

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[24] *Miller*, 71 F.4th at 1253.

[25] *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 716 (2018).

[26] *Available* online at https://www.oed.com/dictionary/respecting_prep?tab=meaning_and_use.

regarding." *Funk & Wagnalls, Standard Encyclopedic Dictionary*, 567 (1968). This means that the term "respecting" expands upon subsequent terms in the phrase or sentence. "Respecting" embraces notions of being "related to."[27]

The phrases "with respect to" or "respecting" and similar words and phrases, such as "related to" appear with regularity in the Code and have acquired an accepted meaning. "This Court has interpreted the phrase "relate[d] to" as being "deliberately expansive." *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 129 (1992). ("We have repeatedly stated that a law 'relate[s] to' a covered employee benefit plan for purposes of [ERISA] 'if it has a connection with or reference to such a plan' . . . and thus gives effect to the 'deliberately expansive' language chosen by Congress."); *Shaw v. Delta Airlines, Inc*., 463 U.S.85, 96–97 (1983) (same).

This Court recently interpreted the word "respecting" in the context of the exceptions to discharge. *Lamar, v. Appling*, 584 U.S. at 716, and as noted first looked to the ordinary meaning of the word:

> For our purposes, then, the key word in the statutory phrase is the preposition "respecting," which joins together "statement" and "financial condition." As a matter of ordinary usage, "respecting" means "in view of: considering; with regard or relation to: regarding; concerning." Webster's 1934; see also American Heritage Dictionary 1107 (1969) ("[i]n relation to; concerning"); Random House Dictionary of the English Language

[27] *Lamar*, 584 U.S. at 716.

> 1221 (1966) ("regarding; concerning"); Webster's New Twentieth Century Dictionary 1542 (2d ed. 1979) ("concerning; about; regarding; in regard to; relating to").

The Court then considered how the term had been interpreted in various contexts holding that it has a "broadening effect."

> Use of the word "respecting" in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." Cf. *Kleppe v. New Mexico*, 426 U.S. 529, 539, 96 S. Ct. 2285, 49 L.Ed.2d 34 (1976) (explaining that the Property Clause, "in broad terms, gives Congress the power to determine what are 'needful' rules 'respecting' the public lands," and should receive an "expansive reading").[28]

Similarly, this Court stated in *Lamar* that "when asked to interpret statutory language including the phrase "relating to" which is one of the meanings of 'respecting' this Court has typically read the relevant text expansively."[29] "Congress characteristically employs the phrase to reach any subject that has 'a connection with, or reference to' the topics that the statute enumerates."[30]

The Tenth Circuit below correctly looked to *Lamar* to answer the interpretive question: "to what extent has subsection (a)(1) abolished or done away with

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[28] *Id.* at 710.

[29] *Id.*

[30] *Id*.

sovereign immunity?"[31] After noting that respecting is a broadening term and has an expansive effect, it found the key notion to be that such words are typically used by Congress "*to reach any subject that has a connection with. . . the topics the statute enumerates* (quoting *Coventry Health Care v. Nevils*, 581 U.S. 87, 96 (2017)).[32]

Applying this Court's interpretation in *Lamar* to the question of how to understand section 106(a)(1) the Tenth Circuit stated, "the critical phrase 'with respect to' in § 106(a)(1) clearly expresses Congress's intent to abolish the Government's sovereign immunity in an avoidance proceeding arising under § 544(b)(1), regardless of the context in which the defense arises."[33]

This Court "need look no further to resolve this case," given that the two relevant statutory provisions "effect[] a clear waiver of sovereign immunity." *See e.g., Dept. of Ag. Rural Dev. Rural Housing Service*, 144 S. Ct. 457, 467 (2024).

B. The purpose of abrogating sovereign immunity in section 106(a) was to enhance the ability of a debtor to maximize the value of the estate and to utilize the avoidance sections of the bankruptcy code.

Congressional purpose further corroborates the plain meaning of the two statutory provisions.[34] This

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[31] *Miller*, at 717-718.

[32] *Id*.

[33] *Id.*

[34] While a court need not consider legislative history, this Court will, at times, look to statutory history to "corroborate" the text. In *Lamar* this Court corroborated the meaning of "respecting" by

history confirms that the purpose of Congress, since 1978, has been to abrogate sovereign immunity with respect to avoidance powers, among other rights. Because of this long-standing history, the government's position here, that the abrogation is ineffective, thus disregards over 40 years of well-recognized congressional purpose.

Section 106(c), as initially promulgated in the 1978 Code, stated that, "A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose."[35]

This initial version of § 106(c) had as one of its purposes, the goal of enabling a bankruptcy trustee or debtor to be able to set aside and avoid preferential payments made to the U.S. Government. Thus, floor statements were made to the effect "that section 106(c) permits a trustee or debtor in possession to assert avoiding powers under title 11 against a governmental unit."[36] Justice Stevens and Blackmun in their dissent

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looking to the purpose of the Code provision and its statutory history. ("Lastly, the statutory history of the phrase "statement respecting the debtor's financial condition" corroborates our reading of the text.") 584 U.S. at 710. In addition, the Tenth Circuit noted that its interpretation was supported by the statutory history, with the focus being on Congress's enactment in 1994 in direct response to two decisions by this Court that stated that the prior version of § 106 had not sufficiently expressed its intent to abrogate immunity. *Miller*, 71 F.4th at 1253.

[35] *See Hoffman v. Conn. Dept. of Income*, 492 U.S. 96, 100 for the prior version of § 106.

[36] H.R. REP. 95-595, 549, 1978 U.S.C.C.A.N. 5963, 6440. *See also Hoffman*, 492 U.S. 96, 112-113 (1989) (citing 124 Cong. Rec.

in *Hoffman* stated that former section 106(c) was intended to cover avoidance actions (even before the specific reference to § 544 was added in 1994). [37] This same point was made again in *Nordic Village.*[38]

This Court's decisions in *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989) and *United States v. Nordic Village Inc.*, 503 U.S. 30 (1992) held that Congress had failed to make "sufficiently clear" its intent to either "abrogate" state sovereign immunity or to waive the Federal Government's immunity."[39] Further, "this holding had the effect of providing that preferences could not be recovered from the States."[40]

Congress then amended § 106 in 1994, enlarged the provision, changing the text from "waiver" to "abrogation."[41] There is a distinction between these terms. Abrogation means "the abolition of a law, custom or the like." BLACK'S LAW DICTIONARY, (10th ed. 1990). Unlike waiver, which assumes that the immunity still persists in some fashion, abrogation

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32394 (1978) statement of Rep. Edwards: *id.* at 33993 (statement of Sen. DeConcini)).

[37] *Hoffman* at 113. "[T]he legislative history thus indicates that the provision was also intended to cover 'other matters as well,' including specifically the avoidance of preferential transfers." (Stevens, J., and Blackman, J., dissenting).

[38] *Nordic Village*, 503 U.S. at 41, n.3.

[39] *Central Virginia Community College v. Katz*, 546 U.S. 356, 361, n. 2 (2006).

[40] Section 106 was amended in its entirety by Pub. L. No. 103-394 (1994). *See* Collier Pamphlet Ed. Bankruptcy Code (2020) Legislative History to section 106, p. 73.

[41] Pub. L. No. 103-394 (1994), 108 Stat. 4106.

signifies that all aspects of the immunity are, and thus abrogates all aspects at the state and federal level.

Revised §106(a) was meant to address these two cases and to make plain that sovereign immunity was abrogated including with respect to avoidance actions, as here. "Congress has now clearly and unambiguously stated its intent to abrogate the states' and the federal government's sovereign immunity in numerous bankruptcy proceedings."[42] And, "There is no question that § 106(c) effects a waiver of sovereign immunity."[43]

Despite the well-documented efforts of Congress to plainly and unequivocally state that the government has waived sovereign immunity with respect to § 544, the government argues in essence that § 544(b) has no function as to governments. Thus, it says repeatedly, "No creditor could have sued the federal government under Utah fraudulent-transfer law to recoup the tax payments at issue." (Pet. Br. 14). And again, "here it is undisputed that, under fraudulent-transfer law, no actual creditor could have brought a successful suit against the IRS to avoid the federal tax payments at issue." (Pet. 10).

The government's interpretation would render parts of § 106 as inoperative and devoid of any purpose. As the Tenth Circuit below held, the government's position would "render § 106(a) alone largely meaningless with respect to 544(b)(1) because a trustee would *always* need to demonstrate that a 'governmental unit'. . . provided for a separate waiver of sovereign

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[42] S. Elizabeth Gibson, *Congressional Response to Hoffman and Nordic Village: Amended Section 106 and Sovereign Immunity*, 69 Am. Bankr. L. J. 311, 346 (1995).

[43] *Hoffman*, at 113 (Stevens, J., and Blackman, J., dissenting).

immunity" which is not available.[44] Thus, "this interpretation offered by the government would essentially nullify Section 106(a)(1)'s effect on Section 544(b)(1)."[45]

The well-recognized presumption against ineffectiveness safeguards against such outcomes. "That presumption weighs against interpretations of a statute that would "rende[r] the law in a great measure nugatory and enable offenders to elude its provisions in the most easy manner." *The Emily*, 9 Wheat. 381, 389, 22 U.S. 381, 6 L. Ed. 116 (1824); *Garland v. Cargill*, 602 U.S. 406, 427, 144 S. Ct. 1613, 1626 (2024). "A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored."[46] *See e.g.*, *In re Davis*, 960 F.3d 346, 354 (6th Cir. 2020). "The [presumption against ineffectiveness] reflects "the idea that Congress presumably does not enact useless laws." *United States v. Castleman*, 572 U.S. 157, 178, 134 S. Ct. 1405, 188 L.Ed.2d 426 (2014) (Scalia, J., concurring)."

As the Ninth Circuit stated, "It would defy logic to waive sovereign immunity as to a claim which could not be brought against the government. In general, a government defendant does not need immunity from a suit which cannot be brought."[47]

This Court should reject the government's contention that the abrogation was wholly ineffective and affirm the decision of the Tenth Circuit.

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[44] *Miller*, 71 F.4th at 1255.

[45] *Id*.

[46] ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, p.63 (West, 2012).

[47] *DBSI*, 869 F.3d at 1014.

C. The "inside/outside" dichotomy is false; the actual creditor test was satisfied because § 544 is written in the present tense, signifying that the test is applied when the fraudulent conveyance action is initiated.

The government focuses almost entirely on § 544, insisting that the "actual creditor" test is determinative, when in fact the controlling test is found in § 106 which has broad preemptive effect. (Pet. 10, arguing that § 106(a) has "no bearing" on the issue of viability outside of bankruptcy).

A principal defect with the government's argument is that it has created a temporal test for when the avoidability is to be determined and does so using its incorrect version of the actual creditor test. The government argues that the *time* to determine if the creditor has an avoidance action is pre-bankruptcy, or as it frames it, one looks to a time period outside of bankruptcy. The government argues that § 544 "requires the trustee to identify an actual unsecured creditor *that could have* successfully brought an avoidance claim had no bankruptcy petition been filed." (Pet. 3; emphasis added). "Could have" means that the test the government is urging is retrospective. "Could have" means the test requires one to examine if the avoidance was actionable before the case was filed. By this assertion, it is evident that the government has added a concept that is entirely missing from § 544 and indeed contradicted by it.

But Section 544(b) does not have the temporal test found in § 544(a) which gives a trustee powers that exist "as of the commencement of the case." This phrase appears three times in § 544(a), but not at all in § 544(b). Clearly, when Congress wanted the test for

avoidability to exist "as of the commencement of the case" it knew how to say so. The absence of this phrase is telling. While various cases take the opposite view, and say the test is to be met *as of the petition* date, there are no words in § 544 which express that view.

Further, the test for the eligible creditor is one who holds a claim allowable under section 502 of the Code—which mostly deals with filed claims—and thus is a test which by its terms looks to the post-bankruptcy time frame, and not pre-bankruptcy.

Section 544 is deliberately written in the present tense, and thus plainly means that the action *is* avoidable when asserted—not at some hypothetical earlier time. Section 544 does not require that the actual creditor *could have* brought the avoidance action outside of bankruptcy. Instead, it requires that the actual creditor identify a transfer or obligation *that is voidable under applicable law.*[48] That is, the voidability is determined when the avoidance action is asserted. Nothing in § 544 compels the trustee to rely on a time period *prior to* or *outside* of bankruptcy. The test is not *before* bankruptcy; it is a test measured in the present tense and looks to when the avoidance action is initiated.

The use of the present tense verb "is" means the statutory orientation is both present and prospective. The federal definition of present tense means present and prospective. *See* 1 U.S.C. § 1. Definition: "words used in the present tense include the future as well as the present." "This Court has previously described a statute's "undeviating use of the present tense" as a

[48] "Applicable law" means both state and federal law, as this Court has held in *Patterson v. Shumate*, 504 U.S. 753, 758 (1992), and as the government expressly acknowledged.

"striking indic[ator]" of its "prospective orientation." *Carr v. United States*, 560 U.S. 438, (2010). The D.C. Circuit has reached the same result. *Att'y Gen. of United States v. Wynn*, 104 F.4th 348, 354 (D.C. Cir. 2024): "Congress's use of the present tense indicates that it meant to refer to present and future acts, not past ones."

The notion that the relevant time for determining whether the creditor has a right to challenge a transfer which "is voidable" is to be determined when the avoidance action is filed is consistent with the principle that sovereign immunity is considered to be an issue of subject matter jurisdiction, and that subject matter jurisdiction is determined at the time a suit is filed. "Sovereign immunity is jurisdictional in nature, so a claim barred by sovereign immunity lacks subject matter jurisdiction." *Edwards v. United States*, 211 F. Supp.3d 234, 236 (D.D.C. 2016). Subject matter jurisdiction is determined based on the state of affairs at the time the action is brought. *Grupo Dataflux v. Atlas Global Group, L.P.*, 541 U.S. 567, 570 (2004) ("It has long been the case that "the jurisdiction of the court depends upon the state of things at the time of the action brought.")

Accordingly the test of "is voidable" means as of the time the trustee seeks to invoke state law.

In addition, the notion that the invocation of § 544 means the trustee stands in the shoes of the actual creditor and has no greater rights is not consistent with the long standing view of this Court in *Moore v. Bay*, 52 S. Ct. 3 (1931). This Court has held that the use of § 544 state law remedies may result in outcomes which vary from what an actual creditor would receive. Most notably, even if state law holds that the actual creditor can only recover the amount of its

claim, the use of state law under § 544 means that the entire fraudulent conveyance can be recovered.[49]

II. THE GOVERNMENT'S INTERPRETATION OF § 106 VIOLATES THE FOUNDATIONAL PRINCIPLE OF EQUALITY OF DISTRIBUTION

While this Court looks to the plain meaning of a statute, there are important and long-standing principles that underlie the statutory text. One of the guiding principles of the Ninth Circuit decision in *DBSI* was its recognition of the foundational notion of equality of treatment and fairness of distribution:

> [The Ninth Circuit] noted that prior to the enactment of Section 106(b), the Bankruptcy Code's treatment of governmental entities was inherently inequitable because the government was able to participate in the distribution of a bankruptcy case but was shielded from liability via sovereign immunity. Thus, in the Ninth Circuit's view, Congress enacted Section 106 so as to place governmental creditors on *more equal footing* with all other bankruptcy creditors. Therefore, the Ninth Circuit's holding, at least in its view, more properly aligned with Congressional intent and the underlying principles of bankruptcy law by ensuring

[49] Emil A. Kleinhaus, *Let's Rethink Moore v. Bay*, Am. Bankr. Inst. J., September 2015, at 28, 29.

> *more equitable* distribution of the debtor's property among all entitled creditors."[50]

As its core, the government's position is grounded on the notion that it should be treated differently than other unsecured creditors; that it should be able to retain admittedly fraudulent transfers as defined in both state and federal law on the grounds that it is immune from recovery despite the Congressional abrogation of sovereign immunity. It is an interpretation that is counter-intuitive and wrongly implies that Congress failed to achieve the equality of distribution that it so plainly was endeavoring to accomplish. Its view shields wrong-doers from restoring money received from an insolvent entity and distorts the basic goals of bankruptcy.

Beyond the distortion of the plain language, the government's position violates one of the foundational purposes of bankruptcy law, namely, to achieve equality of distribution among similarly situated creditors; a goal that is designed among other things, to level the financial playing field and to disincentivize participation in the "grab theory" of state law collection. As a leading bankruptcy scholar noted, "equality of distribution is consistently described as an important, even the most important, purpose of bankruptcy."[51] This Court said much the same in *Bailey v. Glover*, 88 U.S. 342 (1874) (emphasis added). "It is obviously one of the purposes of the Bankruptcy law, that there

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[50] Collin Hart, *EAR v. DBSI: A Battle Royale Over Sovereign Immunity and 11 U.S.C. § 544(b)(1)*, 88 U. Cin. L. Rev. 615, 627 (2019).

[51] David G. Epstein, Casey Ariail & David M. Smith, *Not Just Anna Nicole Smith: Cleavage in Bankruptcy*, 31 Emory Bankr. Deve. J. 15, 22 (2014).

should be a speedy disposition of the bankrupt's assets. This is *only second in importance* to securing equality of distribution."[52]

Professor Lawrence Ponoroff writes that the concept of "equality among creditors. . . has long dominated Anglo-American bankruptcy jurisprudence" and that the canon of equality is now well engrained in the interpretation of the Code.[53] Professor Adam J. Levitin writes that bankruptcy policy is "built around the distributional norm … that similar creditors should have similar recoveries."[54]

Professor Deborah L. Thorne writes that the axiom supporting equality of distribution is an "ancient norm—grounded in both justice and efficiency—that appears explicitly throughout the Code and authoritative case law."[55] Although Professor Thorne favors a different outcome she acknowledges that this axiom of equality of distribution "encourages the broadest possible reading of section 106 to allow both the IRS and Tribes to be sued in bankruptcy because

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[52] *See also*, *id*. at 22.

[53] Ponoroff, *supra* at n.4, p. 3.

[54] Adam J. Levitin, *Bankrupt Politics and the Politics of Bankruptcy*, 97 Cornell L. Rev. 1399, 1454 (2012).

[55] Deborah L. Thorne & Luke L. Sperduto, *Sovereign Immunity Tests Bankruptcy's Least Contested Axioms*, 39 Emory Bankr. Dev. J. 1, 8 (2023). Professor Thorne cites Aristotle, *Nicomachean Ethics in* THE BASIC WORKS OF ARISTOTLE 935, 1006 (Richard McKeon ed., Random House 1941 ("[T]his is the origin of quarrels and complaints—when either equals have and are awarded unequal shares, or unequals equal shares."

that is required to treat them as similar creditors are treated."[56]

This Court's recent decision in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 391, (2023) also noted the importance of treating the government on an equal footing: "[T]he Code generally subjects all creditors (including governmental units) to certain overarching requirements, [but] under petitioners' reading, some government creditors would be immune from key enforcement proceedings while others would face penalties for their noncompliance."

The ability to recover tax payments which are constructively fraudulent under state and federal law preserves this core value of equality of treatment, and as noted below, serves to prevent abusive tactics to siphon off assets that should be used to treat all creditors equally.

III. THE GOVERNMENT'S INTERPREATION OF § 106 ENCOURAGES ABUSIVE CONDUCT BY INSIDERS OF BANKRUPT ENTITIES.

Bankruptcy scholars Thomas Jackson and Douglas Baird "identify the protection of creditors against debtor misbehavior as the core principle of fraudulent

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[56] *Id*. at 8. Professor Thorne favors a narrower reading of equality, but she expressed these views before this Court's opinion in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382 (2023), which applied an interpretation consistent with the broader view and the circuit court majority view as set forth in the Tenth Circuit.

conveyance law."[57] Fraudulent conveyance law serves to provide a fair, comprehensive collective system that does not permit insiders to siphon funds prior to bankruptcy, nor payments to be made to any creditor which injure the balance sheet of the debtor. "The essence of fraudulent conveyance law, therefore, is to prevent manipulative activities of the debtor."[58] Unsurprisingly, it has been a core feature of insolvency law since at least 1571 when Parliament passed a statute "making illegal and void any transfer made for the purpose of hindering, delaying or defrauding creditors."[59]

Congress has been aware that this avoidance power must include the ability to avoid and recover payments from state and federal governmental entities which, as with many creditors, are transferees of significant payments that permit them to unfairly gain advantage over the bankruptcy system, and to obtain unwarranted favoritism that the law seeks to prevent. With the adoption of the Bankruptcy Reform Act of 1978 Congress sought to address the Code's applicability to "governmental units" and "the circumstances under which sovereign immunity of governmental parties was deemed to be waived. Codified at § 106 of the Bankruptcy Code, this sovereign immunity provision

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[57] Charles J. Tabb, Bankruptcy Anthology, Chapter 7, Avoiding Powers: Fraudulent Transfers, p. 331 (Anderson Pub., 2002) (citing Thomas H. Jackson, *Avoiding Powers in Bankruptcy*, 36 Stan. L. Rev. 725 (1984).

[58] *Id*. at 337, citing Thomas Jackson.

[59] Tabb, at p. 338 (abstracting Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and its Proper Domain*, 38 Vand. L. Rev. 829 (1985)).

attempted to treat governmental entities much like private parties involved in a bankruptcy."[60]

This goal was sought by providing, in essence that the government, as potential creditor of the estate, was "subject to recoveries against it by the bankruptcy estate."[61] This was a change from the Bankruptcy Act of 1898 which "contained no provisions expressly indicating the extent to which its provisions applied to governmental entities or expressly addressing the question of sovereign immunity."[62] This goal of treating the government as creditor was consistent with the overarching goal of equality of treatment for all creditors. The like-treatment is also key because the government is not infrequently the single largest creditor in a bankruptcy case.[63]

The *Purdue Pharma* bankruptcy case, described above, illustrates well the potential for abuse if insiders are aware that tax payments made to the IRS out of corporate funds cannot be recovered if the troubled corporation is able to defer filing for bankruptcy until the expiration of the two-year statute of limitations under federal law. As noted, the Sacklers deployed this strategy as part of their siphoning of over $10 billion, of which about 40% was for tax payments.

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[60] S. Elizabeth Gibson, *Congressional Response to Hoffman and Nordic Village: Amended Section 106 and Sovereign Immunity*, 69 Am. Bankr. L. J. 311 (1995).

[61] *Id*. at 311

[62] *Id*. at 311, n.2.

[63] "The government, particularly the Internal Revenue Service ("IRS") is the largest creditor, filing a proof of claim for over $6 million dollars." *In re Cent. Processing Servs., L.L.C.*, No. 2:19-CV-13427, 2020 WL 1333318, at *1 (E.D. Mich. Mar. 23, 2020).

The government in this case has not provided either a textual rationale nor a policy reason for why such abusive conduct should be encouraged.

CONCLUSION

We therefore respectfully request that this Court affirm the decision of the Tenth Circuit below.

Respectfully submitted,

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September 20, 2024