No. 23-824

IN THE

# Supreme Court of the United States

UNITED STATES,

*Petitioner,*

v.

DAVID L. MILLER,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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## INTERESTS OF *AMICUS CURIAE*[1]

The National Association of Bankruptcy Trustees is the largest organization in the country promoting the interests of Chapter 7 bankruptcy trustees. NABT is a nonprofit association formed in 1982 to address the needs of chapter 7 bankruptcy trustees throughout the country and to promote the effectiveness of the bankruptcy system. Since then, the focus of the organization has expanded to include Chapter 11 and Subchapter V trustees. Membership in NABT is open to chapter 7 and subchapter V trustees, their staff, judges, employees of the Office of the U.S. Trustee, and associated professionals and businesses.

NABT files *amicus curiae* briefs throughout the country on matters of national importance to bankruptcy trustees and the efficient administration of bankruptcy cases. A fundamental duty of bankruptcy trustees is to collect the assets of insolvent debtors for distribution to creditors. Frequently those assets have been dissipated for the benefit of the debtor's principals and the trustee must seek their return to effectuate a fair and equal distribution to all creditors. This case presents an avoidance and recovery action that seeks to redistribute pre-bankruptcy transfers to the allowed claims of the bankruptcy estate. This Court's decision will bear significantly upon the ability of NABT's members to avoid and recover a debtor's fraudulently conveyed assets and distribute those equally to all creditors, including taxing authorities.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than NABT, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief.

This Court's decision will also directly impact bankruptcy courts and NABT's members throughout the country. NABT also has an interest in the public policy implications of this case as the ability to avoid and recover a debtor's fraudulently transferred assets is key to achieving one of the core goals of the Bankruptcy Code: equal treatment of creditors.

Respectfully, NABT submits that it has an interest in the issues at the center of this appeal that warrants this Court's consideration of its position as *amicus curiae*.

## SUMMARY OF ARGUMENT

a. Bankruptcy is unique in that sovereign immunity has no place. This "exceptional" status of the bankruptcy laws traces its roots to the enactment of the Constitution. Congress has reinforced the lack of sovereign immunity in bankruptcy cases through 11 U.S.C. § 106(a). The current version of § 106(a)(1)[2] of the Bankruptcy Code was enacted by Congress in 1994 to create an unequivocal waiver of the United States' sovereign immunity with respect to certain causes of action. Included in § 106(a)(1), *inter alia*, is a waiver of sovereign immunity "with respect to" actions under § 544 of the Bankruptcy Code.

Section 544(b)(1) of the Bankruptcy Code allows, in pertinent part, for the trustee to avoid "any transfer…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." 11 U.S.C. § 544(b)(1).

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[2] Except within formal citations, references to the Bankruptcy Code, 11 U.S.C. § 101 *et seq*., appear by section number.

Additionally, § 106(c) provides that when a governmental unit files a proof of claim in a bankruptcy proceeding, it has waived any defense of sovereign immunity. 11 U.S.C. § 106(c). Through filing a proof of claim, the IRS has waived any and all claims to sovereign immunity, including its claim that the § 544(b)(1) derivative cause of action of the Trustee under the Utah Code is barred by sovereign immunity.

b. A circuit split exists on the issue set forth in this appeal. The Ninth Circuit[3] and the Fourth Circuit[4] have come out in favor of the Trustee's position, while the Seventh Circuit[5] has decided in favor of the USA.

The court in *In re Equip. Acquisition Res., Inc.* (*EAR*) misinterpreted multiple cases of this Court. More to the point, precedent of this Court directly conflicts with the holding in *EAR*. In *United States v. Mitchell*, 463 U.S. 206 (1983), this Court was clear: when Congress has waived sovereign immunity for a derivative cause of action, that derivative cause of action does not need to include a second waiver of sovereign immunity. *Mitchell*, 463 U.S. at 218. *EAR* was wrongly decided and should not be followed.

c. Avoidance actions are merely declaratory, *in rem* actions. Avoidance actions do not seek the recovery of property. Rather, a separate cause of action under § 550(a) of the Bankruptcy Code must be asserted to recover avoided property. An *in*

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[3] *Zazzali v. United States* (*In re DBSI, Inc.*), 869 F.3d 1004 (9th Cir. 2017).

[4] *Cook v. United States (In re Yahweh Ctr., Inc.)*, 27 F.4th 960 (4th Cir. 2022).

[5] *In re Equip. Acquisition Res., Inc.*, 742 F.3d 743 (7th Cir. 2014).

*rem* declaratory action has no bearing on Federal tax collection and assessment. Bankruptcy avoidance actions have never been preempted by Federal tax law and should not be preempted now. The judgment of the Circuit Court should be affirmed.

## ARGUMENT

### I. Sovereign Immunity Does Not Apply to An Avoidance Action Under 11 U.S.C. § 544(b)(1)

#### A. The Bankruptcy Clause and Sovereign Immunity

Article I, § 8, cl. 4, of the Constitution provides that Congress shall have the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States." It is this clause, at the time it was adopted, that waives sovereign immunity in bankruptcy proceedings. *See, Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) ("the States had already agreed in the plan of the Convention not to assert any sovereign immunity defense in bankruptcy proceedings."); *see also, Torres v. Tex. Dep't of Pub. Safety*, 142 S.Ct. 2455, 2462 (2022). Bankruptcy is unique, indeed "exceptional," in that "sovereign immunity has no place." *Allen v. Cooper*, 140 S. Ct. at 1002.

Despite this Court clearly recognizing that there is no sovereign immunity in a bankruptcy case, *Amici* representing 23 states argue to the contrary. According to these states, waivers of sovereign immunity under the Bankruptcy Code are to be "construed narrowly." *Amici* Br. 8. Such an argument conflicts directly with this Court's finding to the contrary. *See e.g., Torres*, 142 S.Ct. at 2462 ("All that evidence led us to conclude that, by ratifying the Constitution, the States had agreed that their sovereignty would yield

to ensure the effectiveness of national bankruptcy policy."); *Central Va. Community College v. Katz*, 546 U.S. 356, 378 (2006) ("ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts.") (footnote omitted).

The states bolster their argument to limit scope of this waiver by stating § 106 is also to be "construed narrowly." *Amici* Br. 8-9. In doing so, they cite two cases of this Court that have since been overruled by Congress: *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96, 112-113 (1989), *overruled by* the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 113 (1994), *United States v. Nordic Village, Inc.*, 503 U.S. 30, 43-44 (1992), *overruled by* the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 113 (1994). *Amici*'s argument is misplaced, § 106 does not provide a narrow waiver of immunity, nor did Congress intend for it to provide a narrow waiver.

### B. Background of 11 U.S.C. § 106

Congress enacted the current version of § 106(a)(1) of the Bankruptcy Code to clearly and unequivocally abrogate the United States' sovereign immunity for certain provisions of the Bankruptcy Code. Today's version of § 106 was enacted as part of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 113, 108 Stat. 4106, 4117 (1994). This new § 106 was to overrule two Supreme Court decisions: *Hoffman v. Connecticut Dept. of Income Maintenance*, 492 U.S. 96 (1989), and *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992). These two cases used sovereign immunity to limit the ability of bankruptcy trustees to avoid

transfers made to the United States and individual states. *See*, H.R. Rep. 103-835, p. 42 (1994). According to the legislative history of the current § 106(a)(1),

> This amendment expressly provides for a waiver of sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief. It is the Committee's intent to make section 106 conform to the Congressional intent of the Bankruptcy Reform Act of 1978 waiving the sovereign immunity of the States and the Federal Government in this regard.

*Id.*

This re-write of § 106 was a clarification of what Congress believed was the existing state of the law. For decades, prior to the current § 106(a), Congress stated that the United States, as a party, is not special in bankruptcy proceedings. Two of the sponsors of the legislation that created the Bankruptcy Code were clear in floor statements that "governmental units[6]" are subject to a trustee's avoiding powers under title 11. *See, Hoffman*, 492 U.S. at 112-113 (Stevens, J., dissenting) (citing 124 Cong. Rec. 32394 (1978) (statement of Rep. Edwards); *id*., at 33993 (statement of Sen. DeConcini)). It was fully understood when the Bankruptcy Code was adopted that the United States of America would be subject to a bankruptcy trustee's avoidance powers.

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[6] A definition that includes the United States of America; now found at 11 U.S.C. § 101(27).

Congress has unmistakenly adopted the position that in bankruptcy, "there is no reason why the Federal Government should be treated differently than any other [ ] creditor." *Nordic Village*, 503 U.S. at 43-44 (Stevens, J., dissenting) (footnote omitted). A major reason for why the USA is not special in bankruptcy is because the amount collected by the Federal Government on account of its liens and priority taxes in bankruptcy is "insignificant in the total federal budget,[7]" and a waiver of sovereign immunity in bankruptcy by the USA "would not result in significant costs to the federal government.[8]"

Section 106(a)(1) includes § 544—the avoidance statute at issue in this case. Included within § 544 is § 544(b)(1).[9] No exception was made in § 106(a)(1) for avoidance actions under § 544(b)(1). This rewrite by

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[7] *Id*. at 44. (citation omitted)

[8] H.R. Rep. 103-835, p. 62 (1994).

[9] *Amici* also argue that § 544(b)(1) is likely unconstitutional in that is violates the uniformity requirement of the Bankruptcy Clause. *Amici* Br. 17-19. Section 544(b)(1) is modeled after § 70e that was enacted in the Bankruptcy Act of 1898. Bankruptcy Act of 1898, Pub. L. 55–541, § 70e, 30 Stat. 544, 566 (July 1, 1898); *cf., Buffum v. Peter Barceloux Co*, 289 U.S. 227, 231, n. 1 (1933). Section 70e was also a derivative statute allowing a trustee to avoid a transfer that a creditor of the debtor might avoid. In the over one-hundred-and-twenty-five years since the Bankruptcy Act was passed, no court has upheld (much less entertained) an argument trying to make these provisions unconstitutional. This is likely the reason the USA has not raised such an argument in its appeal. A trustee seeking to recover fraudulently transferred property of a debtor is uniform—it is required in every bankruptcy case. 11 U.S.C. § 704(a)(1).

Congress in 1994 was to make crystal clear that any defense of sovereign immunity was waived with regards to nearly 60 different bankruptcy statutes (for the purposes of this brief, notably §§ 544 and 550 are included in § 106(a)(1)). As the Trustee in this case is pursuing an avoidance action under § 544(b)(1), the USA has no defense of sovereign immunity.

### C. Avoidance Actions Generally

One of the core tenets of bankruptcy in the United States is "equality of distribution among creditors." *Begier v. IRS*, 496 U.S. 53, 58 (1990). Bankruptcy trustees being able to avoid and recover certain transfers and payments made by a debtor prior to filing for bankruptcy helps to further this objective. *Id.* Chapter 7 bankruptcy trustees have a statutory obligation to "collect and reduce to money the property of the estate." 11 U.S.C. § 704(a)(1). The property of a bankruptcy estate includes property recovered by a trustee via an avoidance action. *See*, 11 U.S.C. §§ 541(a)(3), 550(a); *see also, Moore v. Bay*, 284 U.S. 4, 5 (1931) ("The trustee in bankruptcy gets the title to all property which has been transferred by the bankrupt in fraud of creditors."). No distinction is made in the relevant avoidance statutes as to what parties are the targets of such actions. *Cf. Katz*, 546 U.S. at 370 ("In bankruptcy, the court's jurisdiction is premised on the debtor and his estate, and not on the creditors.") (citation and quotations omitted); but *see*, 11 U.S.C. § 546 ("Limitations on avoidance powers").[10]

[10] Section 546 of the Bankruptcy Code has no application to this case; nor does it specifically reference or limit actions against the USA.

Avoidance is merely a declaration that nullifies a specific transfer. *See e.g., Katz*, 546 U.S. at 371. Recovery of an avoided transfer is accomplished through a separate action under § 550(a). *Id*., at 371-372. When reasonably equivalent "value" is not provided to a debtor in consideration for a transfer of property, that transfer of property can be avoided by a trustee in bankruptcy pursuant to 11 U.S.C. §§ 544(b)(1) and 548(a)(1)(B). These types of avoidance actions are colloquially referred to as "constructively fraudulent." *See e.g., Anderson v. Architectural Glass Constr., Inc. (In re Pfister)*, 749 F.3d 294 (4th Cir. 2014).

Section 544(b)(1) of the Bankruptcy Code allows for a bankruptcy trustee to avoid "any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is avoidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502." 11 U.S.C. § 544(b)(1). In prosecuting this avoidance action against the USA, the Trustee is stepping into the shoes of certain creditor(s) of the bankruptcy estate, so called "golden creditors," pursuant to 11 U.S.C. § 544(b)(1). *See e.g., Ebner v. Kaiser (In re Kaiser)*, 525 B.R. 697, 704-705 (Bankr. N.D. Ill. 2014).

In the case *sub judice*, applicable law under § 544(b)(1) is Utah Code § 25-6-203(1). Under this provision, the transfer of property is avoidable if the debtor "made the transfer…without receiving a reasonably equivalent value in exchange for the… transfer…, and the debtor was insolvent at the time." Utah Code § 25-6-203(1). The Bankruptcy Code nearly mirrors this language of the Utah Code in that the transfer of property of a debtor is avoidable if the debtor "received less than a reasonably equivalent

value in exchange for such…transfer." 11 U.S.C. § 548(a)(1)(B)(i).

Congress has defined "value" in § 548(d)(2)(A), in pertinent part, to mean: "property, or satisfaction or securing of a present or antecedent debt of the debtor… ." Utah has followed this definition. Utah Code § 25-6-104(1) states, in pertinent part, "Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied."

Unlike the two-year statute of limitations in § 548(a)(1), under the Utah Code the statute of limitations for an avoidance action is 4-years. Utah Code § 25-6-305(2). Meaning, the trustee can seek to avoid any constructively fraudulent transfer by the debtor in the 4-years prior to the filing of a bankruptcy case.

Upon avoidance of a transfer, the trustee has 1-year to seek recovery of the avoided transfer pursuant to 11 U.S.C. § 550(a). 11 U.S.C. § 550(f)(1). This important distinction between avoidance and recovery will be further addressed below.

### D. The Plain Language of Sections 106 & 544(b)(1) Defeats the USA's Arguments

a. "It is well established that when the statute's language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (citations and quotation omitted).

Section 106(a)(1) states, in pertinent part,

(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…544…550… .

11 U.S.C. § 106(a)(1).

An initial reading of § 106(a)(1) shows that the USA has waived any claim of sovereign immunity with respect to the Trustee's § 544(b)(1) cause of action. A deeper reading of these statutes further supports this conclusion.

b. Section 106(a) states that sovereign immunity is waived "with respect to the following…" 11 U.S.C. § 106(a). This Court has been clear, Congress' use of the near identical term "respecting" is broad and all-encompassing. *See, Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 717-718 (2018) ("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...Indeed, 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."). By including the term "with respect to" Congress meant that all parts of § 544(b)(1) included a waiver of sovereign immunity. *See, Miller v. United States (In re All Resort Grp., Inc.)*, 617 B.R. 375, 386-387 (Bankr. Utah 2020).

Congress understood that its waiver of sovereign immunity "with respect to" § 544(b)(1) would extend to state law as this subsection uses the term "applicable law." *Cf. Patterson v. Shumate*, 504 U.S. 753, 758-759 (1992) (term "applicable nonbankruptcy law" includes state law). A state law cause of action cannot include a waiver of the United States' sover-

eign immunity. *See*, Article VI, cl. 2, of the Constitution (Supremacy Clause); *see also, In re Equip. Acquisition Res., Inc*., 742 F.3d 743, 748 (7th Cir. 2014). Understanding this reality, it is absurd to include or require a second waiver of sovereign immunity for the derivative state law cause of action when such an action could never itself include a waiver of the USA's sovereign immunity. *Cf. Zazzali v. United States (In re DBSI, Inc.)*, 869 F.3d 1004, 1014 (9th Cir. 2017) ("It would defy logic to waive sovereign immunity as to a claim which could not be brought against the government."). Congress knew that by waiving the sovereign immunity of the USA "with respect to" a cause of action under § 544(b)(1), an action that only exists derivatively and can exist under state law, it was waiving any and all claims of sovereign immunity by the USA.

c. Congress' use of terms in the present tense: "is avoidable" and "holding" in § 544(b)(1) support the Trustee's interpretation of the statute. The USA focuses its argument on the fact that no creditor could prevail in a lawsuit against it before the bankruptcy. This argument is a red herring. A bankruptcy case *has* been filed. Once a bankruptcy case is filed, § 106(a)(1) becomes applicable. It is during a bankruptcy case that the language of § 544(b)(1) must be analyzed. As soon as a bankruptcy case is filed is when we look at whether a creditor of the debtor could avoid a constructively fraudulent transfer of the debtor. The use of the present tense "is avoidable," instead of the past tense "was avoidable," shows that the USA's argument of "outside of bankruptcy" fails.

Use of the term "holding an unsecured claim that is allowable under section 502 of this title," also supports this present tense—during the bankruptcy—ability of

an unsecured creditor to avoid against the USA. The word "holding" connotes the present tense. This means that—today, right now in the bankruptcy case, this is the time for analyzing when that party can avoid a transfer of the debtor. Right now, a creditor could avoid a transfer to the USA because of § 106(a)(1). If Congress wanted the analysis to be "outside of bankruptcy," then it could have easily used the past tense and the term "held."

Another reason as to why "outside of bankruptcy" is the improper starting point for an action under § 544(b)(1), just look to a related statute: 28 U.S.C. § 1409(c)[11]. Nowhere in § 544(b)(1) does Congress refer to a bankruptcy case not being filed. However, in the bankruptcy venue statute of 28 U.S.C. § 1409(c), Congress has clearly shown that it knows how to write a statute—this one specifically dealing with § 544(b)—that speaks to if a bankruptcy case "had not been commenced." If Congress wanted the analysis of § 544(b)(1) to be avoidablity if the case had not been commenced, then it clearly knew how to do so and could have said so. *Cf. Bartenwerfer v. Buckley*, 143 S. Ct. 665, 669 (2023) ("when Congress includes particular language in one section but omits it in another section of the same Act, the Court generally takes the

[11] The relevant language of 28 U.S.C. § 1409(c) states, "a trustee in a case under title 11 may commence a proceeding arising in or related to such case as statutory successor to the debtor or creditors under section 541 or 544(b) of title 11 in the district court for the district where the State or Federal court sits in which, under applicable nonbankruptcy venue provisions, the debtor or creditors, as the case may be, may have commenced an action on which such proceeding is based *if the case under title 11 had not been commenced*." (emphasis added).

choice to be deliberate.") (citation and quotations omitted).

d. Other portions of § 106 support Congress' understanding that the USA could be sued for the avoidance of constructively fraudulent transfers under state law. Section 106(a)(3) states, in pertinent part, "The court may issue against a governmental unit an order, process, or judgment under such sections." 11 U.S.C. § 106(a)(3). The Trustee is seeking a declaration under § 544(b)(1) that the payments by the debtor are avoidable; such a declaration is clearly allowed by § 106(a)(3).

Sections 106(b) and 106(c) also contemplate the IRS being subject to suit when it files a proof of claim in a bankruptcy case. Under § 106(b), the filing of a proof of claim is, in and of itself, an unlimited waiver of sovereign immunity to all compulsory counterclaims. *See, U.S. v. Nordic Village, Inc*., 503 U.S. at 34 (addressing § 106(a) that is now § 106(b)). By filing a proof of claim in this case, as it did, the IRS could be subjected to suit by the bankruptcy estate for claims related to its proof of claim. Such was the case in *Cook v. United States (In re Yahweh Ctr., Inc.)*, 27 F.4th 960, 966 (4th Cir. 2022). Because the IRS filed a proof of claim in the Yahweh Center, Inc. Chapter 11 case, the USA waived its claim to sovereign immunity for the derivative state law counterclaim under § 544(b)(1). *Id.; see also, Gardner v. New Jersey*, 329 U.S. 565, 573–74 (1947) ("It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court…must abide the consequences…. When the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim.").

Most importantly, as the IRS filed a proof of claim in this case,[12] under § 106(c) "any assertion of sovereign immunity by a governmental unit" is "plainly waive[d]." *U.S. v. Nordic Village, Inc*., 503 U.S. at 34 (addressing § 106(b) that is now 106(c)). The current § 106(c) provides that once the IRS files a proof of claim, it is subject to "any claim against such governmental unit that is property of the estate." 11 U.S.C. § 106(c). The Trustee's claims under § 550 (recovery after avoidance under § 544) are property of the bankruptcy estate. 11 U.S.C. § 541(a)(3). By filing a claim against the bankruptcy estate in this case, the IRS is entitled to an offset of the amount owed to it against the claims of the trustee. 11 U.S.C. § 106(c). However, any assertion of sovereign immunity by the IRS (this would include its claim of sovereign immunity for the derivative state law action) is waived once it filed its proof of claim. *Id*.; *see also, Nordic Village*, 503 U.S. at 34. Because the USA filed a proof of claim in the Chapter 7 case of All Resort Group, Inc., it holds no defense of sovereign immunity against the bankruptcy trustee.

## II. The Seventh Circuit Opinion of *In re Equip. Acquisition Res., Inc.*, Conflicts with this Court's Precedent and is Wrong[13]

a. *In re Equip. Acquisition Res.* (EAR) adopts a two-part test for determining whether the federal

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[12] Neither the courts below, the brief of the USA, nor the Trustee address the fact that the IRS filed a proof of claim in the All Resort Group, Inc. chapter 7 case.

[13] As noted by the Ninth Circuit in *DBSI*, the United States' argument is in the minority and might be supported by only one reported opinion: *In re Equip. Acquisition Res., Inc*. *See*, *DBSI*, 869 F.3d at 1013, footnote 11.

government is liable for a claim under § 544(b)(1). *Id.*, 742 F.3d at 746-747. This test was set forth in *FDIC v. Meyer*, 510 U.S. 471, 484 (1994). *Id.* Under the two-part test in *Meyer*, we first look to "whether there has been a waiver of sovereign immunity." *Meyer*, 510 U.S. at 484. If there has been a waiver, the second question is "whether the source of substantive law upon which the claimant relies provides an avenue for relief." *Id.*

In *Meyer*, the claimant was proceeding against the Federal Deposit Insurance Corporation with an implied "constitutional tort claim." *Id.* at 474. Mr. Meyer had sued the FDIC for violating his right to continued employment without due process, as called for under the Fifth Amendment. *Id*. According to Mr. Meyer, such a constitutional tort action was implied because of this Court's prior holding in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). *Id.*

In *Meyer*, this Court found that the FDIC's predecessor-in-interest (Federal Savings and Loan Insurance Corporation or FSLIC) waived any claim to sovereign immunity as the statute that created it allowed it to "sue and be sued." *Id*. at 483. However, the Court also held that the Fifth Amendment to the Constitution did not provide a cause of action to Mr. Meyer as the holding in *Bivens* did not extend to this case. *Id.* at 486.

Somehow, the court in *EAR* believed that the cause of action in *Meyer* that does not exist in statute or anywhere else (it was an implied cause of action based upon a prior holding of this Court), is the same as a cause of action that exists under a well-defined state statutory scheme (the derivative avoidance action pursued by the trustee in *EAR*). According to the court

in *EAR*, a state law avoidance action that could possibly be barred by an affirmative defense, and a constitutionally implied cause of action that does not exist—and has never existed—are the same for purposes of "whether the source of substantive law…provides an avenue for relief." We know this false equivalence by the court in *EAR* to be erroneous.

The opinion in *Meyer* pulls its two-part test from *United States v. Mitchell*, 463 U.S. 206, 218 (1983). *Meyer*, 510 U.S. at 484. *Mitchell* is very clear, when Congress waives sovereign immunity for a derivative cause of action, "a court need not find a separate waiver of sovereign immunity in the substantive provision." *Mitchell*, 463 U.S. at 218. Two separate waivers of sovereign immunity (the second waiver for the derivative, applicable law, cause of action) are not necessary. *Id.* at 218-219. ("If a claim falls within this category [the applicable law where immunity is waived], the existence of a waiver of sovereign immunity is clear…***the separate statutes and regulations need not provide a second waiver of sovereign immunity***…") (emphasis added). As *Mitchell* shows us, when Congress waives sovereign immunity for a statute that includes a derivative cause of action, that derivative statute does not need to include a second waiver of sovereign immunity. The court in *EAR* failed to address *Mitchell*, or its holding.

*EAR* also cites the case of *Postal Service v. Flamingo Industries (USA) Ltd.*, 540 U.S. 736 (2004) for the proposition that a state law avoidance action cannot be brought against the USA in bankruptcy. *EAR*, 742 F.3d at 748. The plaintiff, Flamingo Industries, brought a Sherman Act antitrust case against the Postal Service. *Flamingo Industries*, 540 U.S. at 738. Such a cause of action does not exist against the Postal

Service as it is not a "person[14]" under the Sherman Act. *Id.* at 746. As the Supreme Court noted, the Federal Government has never been subject to the provisions of the Sherman Act. *Id.* at 745-746. By equating causes of action that have never existed (*Meyer*, and *Flamingo Industries*), with carefully crafted state law avoidance statutes, the court in *EAR* erred in determining that the USA could not be subject to liability under § 544(b)(1) of the Bankruptcy Code.

b. The court in *EAR* justified its finding that the USA is never subject to liability under § 544(b)(1) by highlighting the fact that § 106(a)(1) also includes a waiver for § 544(a). *EAR*, 742 F.3d at 749. What the court in *EAR* fails to understand is that § 544(a) is also a derivative statute. Causes of action under § 544(a) derive from state law. *See e.g., Virginia Beach Federal Sav. and Loan Ass'n v. Wood*, 901 F.2d 849, 852 (10th Cir. 1990). These state statutes (the basis of an action under § 544(a)) don't—and cannot—include a waiver of the USA's sovereign immunity. Under the logic of *EAR*, a bankruptcy trustee still could not prevail in an action under § 544(a) against the USA. If the reasoning of *EAR* is followed to its logical conclusion—that a derivative statute must include a separate waiver of sovereign immunity—then the entirety of § 544 has been deleted from § 106(a)(1). A removal that cannot be what Congress meant. *See, TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall

[14] It should be noted that under the Utah Code provisions at issue here, the term "person" includes "…government or governmental subdivision, agency, …," Utah Code § 25-6-102(11).

be superfluous, void, or insignificant.") (quotation omitted).

### III. Avoidance Actions are *In Rem* Proceedings Not Subject to Preemption

With its argument that the Internal Revenue Code preempts § 544(b)(1), the USA conflates the avoiding of a transfer with the recovery of a transfer. The Trustee is seeking, in his § 544(b)(1) action, to avoid the transfer of property of the debtor. What is not included in a § 544(b)(1)[15] action against the USA is a claim to *recover* those avoided transfers. A separate cause of action under § 550(a) must be prosecuted to recover avoided transfers. *See*, 11 U.S.C. § 550(f)(1) (trustee has one-year to bring an action under § 550(a) to recover transfers once those transfers are avoided under § 544). As the USA will readily concede, it has no defense to a trustee's action under § 550 of the Bankruptcy Code. *See*, §§ 106(a)(1), and 106(c) (by filing a proof of claim, USA is subject to liability in cause of action that is property of the bankruptcy estate).

Section 544(b)(1) merely states that the trustee can *avoid* a transfer under applicable law. What § 544(b)(1) does not address is the *recovery* of that avoided transfer. *Cf., Farrey v. Sanderfoot*, 500 U.S. 291, 296 (1991) ("'avoid' mean[s] 'annul' or 'undo'"). This distinction is crucial. As this Court has recog-

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[15] The pertinent text of § 544(b)(1) reads, "the trustee may avoid any transfer of an interest of the debtor in property…that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title."

No reference to "recovery" is made in § 544(b)(1); rather, only whether certain transfers are avoidable.

nized, it is possible to avoid a transfer and not move to recover that avoided transfer, "The § 547 determination, standing alone, *operates as a mere declaration of avoidance*. That declaration may be all that the trustee wants; for example, if the [creditor] has a claim against the bankrupt estate, the avoidance determination operates to bar that claim until the preference is turned over. *See* § 502(d)." *Katz*, 546 U.S. at 371 (emphasis added). As recognized by this Court in *Katz*, an avoidance action is an *in rem* action, and thus does not implicate sovereign immunity to the same degree as other actions. *Id.* at 362.[16] A separate action must be brought under § 550(a)—a section where sovereign immunity has also been waived by the USA under § 106(a)(1)—to recover the avoided transfer.

Another reason why Congress cannot have intended for the Internal Revenue Code to preempt bankruptcy court avoidance actions is that bankruptcy courts have been granted specific authority to determine tax liability since 1966. H.R. Rep. No. 95-595, 95th Cong. 1st Sess. at 356 (1978); 11 U.S.C. § 505. Section 505 ("Determination of tax liability"), states in pertinent part, "the court may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid." 11 U.S.C. § 505(a)(1). By seeking

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[16] Indeed, Congress has limited Federal agencies' claims of sovereign immunity in cases where the only claim for relief is declaratory. *See*, 5 U.S.C. § 702; *see also*, *Bowen v. Massachusetts*, 487 U.S. 879 (1988). With the Trustee seeking only declaratory relief under § 544(b)(1) (the same declaratory relief that would be sought by the "golden creditor" of this debtor), it is unclear that a creditor could not prosecute such a declaratory action against the USA "outside of bankruptcy."

avoidance of the tax payments of this debtor, the Trustee is seeking a determination as to the "amount" and "legality" of these payments to the IRS—actions that are specifically allowed to be heard by a bankruptcy court.

Because the trustee is seeking to avoid the transfer of specific property, such an action has nothing to do with the field of federal tax collection. *See, DBSI*, 869 F.3d at 1004, n. 14. The statute cited by the USA in the Internal Revenue Code deals with a party filing suit to "recover" payments made to the IRS. *See*, 26 U.S.C. § 7422(a) ("No suit… for recovery of…"). The trustee, in his § 544(b)(1) claim for relief, is not seeking to recover any property from the IRS. Moreover, the declaratory avoidance action under § 544(b)(1) does not "restrain[ ] the assessment or collection of any tax" as prohibited by 26 U.S.C. §§ 7421(a) and 7421(b).

A bankruptcy court determining an avoidance action by a bankruptcy trustee poses no conflicts to the collection efforts, assessment, and other taxing abilities of the IRS. Actions under § 544(b)(1) of the Bankruptcy Code are not preempted by the Internal Revenue Code.

## CONCLUSION

The judgment of the Tenth Circuit should be affirmed.

Respectfully submitted,

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