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 *AMICUS CURIAE* NATIONAL CREDITORS BAR ASSOCIATION IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Statutes

Page

Rules

Treatises

INTEREST OF AMICUS CURIAE

The National Creditors Bar Association (NCBA) is the only nationwide, not-for-profit bar association for attorneys dedicated to practicing all areas of creditors' rights law. Its members include over 400 law firm and individual members, totaling over 2,500 attorneys, who are licensed to practice across the United States and bound by their bars' respective rules of professional conduct.[1]

As creditors' attorneys, NCBA members often represent creditors when debtors have sought protection under the United States Bankruptcy Code. The Bankruptcy Code empowers trustees to muster assets of bankruptcy estates for the fair and equitable distribution of proceeds among classes of creditors represented by NCBA members. As a result, NCBA has a strong interest in ensuring that Bankruptcy Code provisions are construed in a manner that maximizes the ability of bankruptcy trustees to gather assets for the ultimate distribution to the creditor-clients of NCBA members. NCBA seeks to ensure that Bankruptcy Code provisions are construed not only to keep all creditors on equal footing based on the status of their claims, but to also ensure all recipients of avoidable fraudulent conveyances are treated equally in being forced to return assets to bankruptcy estates for division among all creditors, regardless whether the recipient is a governmental entity.

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1. Pursuant to Rule 37.1, *Amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *Amicus* or its counsel contributed any money to fund its preparation or submission.

INTRODUCTION

This case implicates the extent to which Bankruptcy Code § 106(a) abrogates sovereign immunity as a bar to avoidance claims brought against the government pursuant to Bankruptcy Code § 544(b)(1). Specifically, § 106(a)(1) not only abrogates sovereign immunity in favor of a governmental entity under § 544(b)(1) but also abrogates any vestige of sovereign immunity that may attach when a state law provides the basis for the § 544(b) avoidance action.

The government's interpretation of §§ 106(a) and 544(b) would render the entirety of the § 106(a)(1) abrogation feckless as to § 544 claims by perpetuating a second-level governmental immunity bar of underlying state law claims that would frustrate any trustee right to recover on claims based on federal law in bankruptcy court. Such an interpretation offends the plain text of the statute and misapprehends that state law becomes a part of federal law for purposes of § 544(b)(1) claims, such that the announced abrogation of immunity under § 106(a) leaves no part of a § 544 avoidance claim subject to some theory that would defeat an avoidance claim. And it generates an absurd, impractical, and counter-productive result that contradicts and frustrates the very powers endowed upon trustees to muster assets for bankruptcy creditors, perpetuating an application of immunity that Congress expressly sought to abrogate. *See Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955) (noting courts should not import immunity back into a statute designed to limit it).

NCBA urges this Court to accept the construction of the competing Bankruptcy Code provisions in this case in a matter that generates an abrogation of otherwise available sovereign immunity in favor of governmental entities that receive the benefits of fraudulent transfers. The only way the congressional abrogation of immunity for § 544(b) claims can make any sense and have any effect is if that abrogation extends to the entirety of a § 544(b) claim, that is, to abrogate immunity not only to the trustee's ability to assert a § 544(b) claim but also to any immunity that may otherwise attach to a state law claim on which the § 544 claim relies. Otherwise, § 544 serves no purpose because it would empower a trustee to do nothing.

SUMMARY OF ARGUMENT

The Tenth Circuit's opinion correctly reconciled the Bankruptcy Code provisions abrogating sovereign immunity not only as related to adversary claims brought by trustees pursuant to § 544(b)(1) but also as to the underlying derivative state law fraudulent conveyance claims that become part of federal bankruptcy law upon the commencement of an adversary proceeding to claw back a fraudulent transfer.

The Bankruptcy Code has always been construed in a matter that affords protection to debtors but that empowers trustees tasked with mustering estate assets to maximize potential recoveries for creditors. The Tenth Circuit's construction of the scope of immunity abrogated by § 106 is not only demanded textually but is necessary and appropriate as a means to advance the goals of the Bankruptcy Code.

The proper construction of the Bankruptcy Code provisions as set forth in the Tenth Circuit's opinion, *U.S. v. Miller*, 71 F.4th 124 (10th Cir. 2023), not only makes sense from a statutory construction standpoint, but it also makes sense from a practical one as well. Such a construction advances the congressional goal of maximizing assets for distribution to creditors without frustrating other protections and priorities conferred elsewhere in the Bankruptcy Code to governmental claims, such as the priority given to tax claims. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983).

STATEMENT OF CASE

Section 106(a) of the Bankruptcy Code provides: "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to . . . Section[] 544." 11 U.S.C. § 106(a) In turn, section 544(b)(1) provides: "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]." 11 U.S.C. § 544(b)(1).

In the underlying converted Chapter 7 bankruptcy here, the United States Trustee (trustee) brought an adversary proceeding against the Internal Revenue Service (government) pursuant to § 544(b)(1), invoking provisions of the then-effective Utah Uniform Fraudulent Transfer Act, part of the state's Unform Voidable Transactions Act. *Miller* 71 F.4th at 1251. In that adversary proceeding, the trustee sought to avoid payments made by the debtor to the government for the benefit of several insiders.

In response to the § 544(b)(1) claim, the government did not contest that the trustee satisfied the substantive elements of the fraudulent transfer claim arising under applicable Utah law. *Miller*, 71 F.4th at 1251. And the government further acknowledged that § 106(a) abrogated sovereign immunity as a defense to the trustee's claim under § 544(b)(1) and rendered the government amenable to the trustee's claims. *Id.*

Instead, the government took the position that the trustee could not satisfy the "actual creditor" requirement of its claim under § 544(b)(1). *Id.* It argued the trustee could not do so because the trustee could not demonstrate the existence of an "actual creditor" who could succeed in prosecuting a claim under Utah law against the government in a suit outside of bankruptcy because any such claim would be barred by sovereign immunity. *Id.* In other words, the government contended that § 106(a) only waived immunity from suit by a trustee pursuant to § 544(b)(1), but that it did not purport to waive immunity for the underlying elements of the § 544(b)(1) claim, that is, liability under a state law Uniform Fraudulent Transfer Act claim. To the extent an actual creditor would be barred by sovereign immunity from bringing such a claim outside of bankruptcy, the government argued, then so too is a trustee bringing a § 544(b) claim because § 106(a) does not purport to also waive immunity for the underlying state claim. *Id.*

The trustee responded by stating that the abrogation of sovereign immunity in § 106(a) extended not just to the § 544(b)(1) adversary proceeding but also to the underlying state law fraudulent conveyance provision giving rise to the federal avoidance action. *Id.* It further argued that any

abrogation of immunity under § 544 necessarily extended to abrogate immunity for any derivative laws on which the § 544 claim relied, leaving no impediment to the trustee's claim. *Id.*

The bankruptcy court held that the trustee satisfied the actual creditor requirements of § 544(b)(1), concluding that § 106(a)(1) waived sovereign immunity for the underlying applicable state law claims as incorporated into a cause of action pursuant to section 544(b). *Miller v. United States (In re All Resorts Group, Inc.)*, 617 B.R. 375, 386 (Bankr. D. Utah 2020). And the Tenth Circuit affirmed, holding that § 106(a)'s abrogation extended to waive any immunity bar that would otherwise preclude an underlying state law Uniform Fraudulent Transfer Act claim on which the § 544(b) claim was based. *Miller*, 71 F.4th at 1252.

ARGUMENT

I. Complete abrogation of sovereign immunity for § 544 avoidance claims advances the objectives of the Bankruptcy Code.

The Tenth Circuit's reconciliation of § 106(a) with § 544 advances the competing congressional goals of maximizing debtor estates to be administered and distributed by trustees while preserving the status of all creditors to obtain equitable recoveries from the estate based on their status.

A. The trustee is tasked with mustering assets.

A recognized role of the bankruptcy process is to provide for the efficient administration and management

of a debtor's estate for the benefit of the debtor's creditors. *See Bailey v. Glover*, 88 U.S. 342, 346 (1874). At the very highest level, to advance that role, trustees are tasked with mustering estate assets and then ensuring their equitable distribution pursuant to the priorities of various claimants to the bankruptcy estate. *See generally id.*

An essential part of the mustering process arises from powers conferred on bankruptcy trustees to bring actions in the name of the bankruptcy estate against recipients of transfers and conveyances that are avoidable under state and federal law. Those powers are conferred by chapter 5, subchapter III of the Bankruptcy Code. *See* 11 U.S.C. §§ 541 *et seq.* Those powers include the authority to assert claims created by federal law to avoid transfers pursuant to 11 U.S.C. § 548 (fraudulent transfers) as well as 11 U.S.C. § 549 (post-petition transfers). 11 U.S.C. § 548; 11 U.S.C. § 549. And those powers also authorize a trustee to avoid transactions under state fraudulent transfer laws pursuant to 11 U.S.C. § 544(b)(1). 11 U.S.C. § 544(b)(1); *see* 5-544 COLLIER ON BANKRUPTCY ¶ 544.06[2] (Allan J Resnick & Henry J. Sommers eds., 16th ed. 2015) ("The state law most frequently used by trustees under section 544(b)(1) is the Uniform Fraudulent Transfer Act ('UFTA')").

The reason for allowing trustees to avoid transactions through Chapter 5 proceedings is to maximize the value of the bankruptcy estate ultimately to be distributed to creditors. "[S]ince unsecured creditors typically are not fully repaid, they benefit if property previously transferred is returned to the bankruptcy estate because that means the debtor's assets increase. If the debtor's assets increase, there are more assets to pay unsecured creditors." *Cook v. United States*, 27 F.4th 960, 965 (4th Cir. 2022).

Thus, as the trustee's task is to maximize the return of assets to the estate for distribution to creditors, construction of rules allowing or limiting the trustee in that regard are of vital importance to NCBA members' creditor-clients.

B. Sovereign immunity does not impede trustee authority to avoid transactions involving the government.

The authority conferred by Chapter 5 of the Bankruptcy Code to empower a trustee to pursue such claim is not constrained by the identity of the recipient of the transfer to be avoided. That is, a trustee is authorized to pursue chapter 5 claims against governmental entities, including the United States.

To resolve any doubt about its previous intent to waive sovereign immunity as expressed by this Court, *see Hoffman v. Conn. Dep't of Income Maint.*, 492 U.S. 96, 101 (1989); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 39 (1992), Congress amended 11 U.S.C. § 106(a) in 1994 to confirm the abrogation of sovereign immunity that may otherwise arise under fifty-nine sections of the Bankruptcy Code. 11 U.S.C. § 106(a). In light of this Court's earlier concerns, Congress amended §106(a), using the term "abrogate" instead of "waive" as it related to sovereign immunity as it may arise in connection with fifty-nine sections of the Bankruptcy Code. *Id.*

As to claims arising under Chapter 5, abrogation pursuant to § 106(a) applies not only to avoidance claims based exclusively on federal law (such as claims pursuant to 11 U.S.C. §§ 548 and 549) but also to avoidance claims

arising under federal law that incorporate avoidance theories derived from state law (such as claims pursuant to 11 U.S.C. § 544). *See* 11 U.S.C. § 106(a)(1) (identifying 11 U.S.C. § 544, 548, and 549, among others as being subject to the abrogation of sovereign immunity).

Avoidance claims authorized by § 544 differ in an important respect from other Chapter 5 avoidance claims. As examples, §§ 548 and 549 of the Bankruptcy Code create claims under federal bankruptcy law to recover for certain transactions. 11 U.S.C. § 548; 11 U.S.C. § 549. The elements of those claims are defined exclusively by federal law. In contrast, § 544 empowers trustees to avoid conveyances that are subject to avoidance under other applicable laws, most notably state fraudulent transfer laws. 11 U.S.C. § 544; *see also* 5-544 COLLIER ON BANKRUPTCY at ¶ 544.06(2) (noting state UFTA laws form the basis for the majority of § 544(b)(1) actions).

Section 544 contains no substantive provisions to determine whether a conveyance is voidable, and instead incorporates state law to do so. *See SIPC v. Oakmont, Inc,*, 234 B.R. 293, 311 (Bankr. S.D.N.Y. 1999). Thus, the underlying state law provisions to be enforced become a part of the federal cause of action under § 544(b).

II. The Tenth Circuit's interpretation remains faithful to the text, congressional intent, and the purposes served by Chapter 5.

NCBA urges this Court to adopt the construction of § 106(a) put forth by the Tenth Circuit extending the abrogation of sovereign immunity not just to the ability to assert a § 544(b) avoidance claim but to the underlying

state law claim giving rise to the avoidance. That construction is textually correct in light of all applicable methods of statutory construction. It gives full effect to the entirety of the statute and to Congress's intent to abrogate sovereign immunity in a matter that will allow trustees to maximize recoveries for creditors. From a practical standpoint, the construction remains true to the purposes behind the abrogation by confirming a scheme for administering bankruptcies that maximizes the estate available to be distributed among creditors while at the same time ensuring that, upon distribution of estate assets, all creditorsare treated equally in light of the priority of their claims, one of the most basic goals of bankruptcy. *In re C.F. Foods, L.P.* , 265 B.R. 71, 86 (Bankr. E.D. Pa. 2001).

A. The Tenth Circuit's construction remains true to congressional intent as expressed in the terms of the provisions.

1. The congressional modification of § 106 to "abrogate" rather than merely "waive" sovereign immunity demonstrates a clear expression of intent to waive immunity for all aspects of § 544 claims.

As noted, given historical skepticism from this Court about congressional intent to waive sovereign immunity for claims under the Bankruptcy Code, Congress amended section 106(a) in 1994 to not just express an intent to "waive" sovereign immunity, but to "abrogate" it outright. The distinction was emphatic. *See* Bryan A. Garner, A Dictionary of Modern Legal Usage, 6 (1987) ("to abolish (a law or established usage) by authoritative or formal

action; annul; repeal."); *see also Miller*, 71 F.4th at 1258 (construing "abrogate" as meaning to abolish or do away with).

Section 106(a) abrogated the defense of sovereign immunity with respect to § 544. The Tenth Circuit's construction of § 106(a) gives effect to that abrogation by treating sovereign immunity as abolished, annulled and repealed as to the entirety of § 544 claims. That abrogation eliminates any sovereign immunity that would otherwise impede enforcement of a § 544 claim.

The government's position disregards the import of the use of the term "abrogate" by contending that the only thing "abrogated" was the ability to assert a § 544 claim if a claim asserted by an underlying creditor outside of bankruptcy would not otherwise be precluded by sovereign immunity. But that interpretation would render the § 106(a) abrogation of sovereign immunity feckless.

Under the government's view, absent a bankruptcy an actual creditor could never prevail on a state law UFTA claim against the government because such claims would always be barred by sovereign immunity. Taking the next step, though the government may not invoke sovereign immunity to preclude a trustee from bringing a § 544(b) avoidance action based on a state UFTA ground, the government argues such a claim is futile because nothing in section 106(a) waives the government's sovereign immunity for the state law claim, such that had an actual creditor brought an action outside of bankruptcy it could not prevail. Because no unsecured creditor could ever prevail in the face of sovereign immunity from liability for the state law claim, the government argues that without

separate waiver of immunity for the state law portion of the claim, § 106(a) has no effect in terms of authorizing claims under § 544 as those claims will always be barred.

Under that interpretation, section 106(a)'s abrogation of sovereign immunity as to 544(b) claims does nothing and can do nothing. Section 106(a) amounts to nothing more than an ineffective waste of ink, conferring no authority on the trustee to pursue any remedies on behalf of the estate (and indirectly the estate's unsecured creditors), and exposes the government to no peril other than the need to move to dismiss potential claims brought by the trustee for which the trustee has no remedy.

That construction must be avoided. First, this Court abhors interpretations of statutes that render them ineffective. *See United States v. Castleman*, 572 U.S. 157, 178 (2014) (Scalia, J., concurring). Second, such a construction makes no practical sense. What would be the point of eliminating sovereign immunity to bring a § 544 claim in the abstract if all § 544 claims are destined to fail in the absence of a separate abrogation of immunity for state law claims? *See In re Pharmacy Distrib. Servs., Inc.*, 455 B.R. 817, 821 (S.D. Fla. 2011) (raising same question). The answer is that no articulable point could be so served. The trustee's § 544 powers as to claims involving the government would be nonexistent despite the congressional abrogation of governmental immunity. Thus, a court posing the question raised above noted "[t]he argument offered by the United States defies logic. Section 106 and 544 together, lead to the inescapable conclusion that Congress intended to waive sovereign immunity for any action that may be brought under section 544." *Id.* (citations omitted).

The Tenth Circuit's opinion properly recognized the deficiencies inherent to the government's argument. As the court noted, the government's position "would render § 106(a)(1) alone largely meaningless with respect to § 544(b)(1) because a trustee would *always* need to demonstrate that a 'governmental unit' as defined in Code § 101(27) provided for a separate waiver of sovereign immunity with respect to any 'applicable law.'" *Miller*, 71 F.4th at 1255 (citing *In DBSI*, 869 F.3d 1004, 1011-12 (9th Cir. 2017).

2. The presence of the phrase "with respect to" in § 106(a) demands a broad application of its abrogation language.

The Tenth Circuit's opinion also gives proper respect to the inclusion in § 106(a) of the phrase "with respect to". That phrase denotes an intended broad application of the term "abrogation" so as to capture all related matters. *See Lamer, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 717-18 (2018) (noting the term "respecting", synonymous with "with respect to," "generally has a broadening effect, ensuring that a [statutory] provision covers not only its subject but also matters relating to that subject."). (quoted in *Miller*, 71 F.4th at 1273 (cleaned up)). Thus, as used in § 106(a), the abrogation of sovereign immunity "with respect to" § 544 means the abrogation extends to *all* respects of the claim to which sovereign immunity could attach, including any sovereign immunity implicating a state law component of such a claim.

The Tenth Circuit correctly ruled that the state law claim underpinning the trustee's § 544(b) claim is a subject with which § 106(a) shows a "connection", and

as such, the state law claim is intended to be included in the abrogation of sovereign immunity. *Miller*, 71 F.4th at 1253. Thus, by using the phrase "with respect to," Congress clearly expressed its intent that the abrogation of sovereign immunity imposed by § 106(a) includes not just the trustee's procedural power to bring an avoidance action pursuant to § 544(b) but also to the underlying state law claims on which the § 544(b) claim is based. As sovereign immunity is abolished "with respect to" § 544(b), it is abolished as to state law claims on which the § 544(b) claim is based.

3. The abrogation of immunity under § 544 does not require a showing that an actual creditor could have prevailed in an avoidance claim lawsuit brought outside of bankruptcy.

The Tenth Circuit rejected the government's contention that the text of § 544 requires the existence of an unsecured creditor who could have prevailed on an avoidance claim had it been brought outside bankruptcy, and that because sovereign immunity would defeat such a creditor's claim, a trustee cannot satisfy the "actual creditor" requirement of § 544.

The bankruptcy court and the Tenth Circuit both correctly concluded that § 106(a)'s broad abrogation of sovereign immunity waives sovereign immunity as to the state law claims on which the trustee's § 544 claim is based. Accordingly, whether a creditor bringing a standalone cause of action could ever face a sovereign immunity defense is immaterial to whether the trustee may maintain an action pursuant to § 544(b). *See All*

Resorts Group, Inc., 617 B.R. at 394; *Miller*, 71 F.4th at 1251. As the bankruptcy court explained:

> [T]he waiver of sovereign immunity did remove the ability of a governmental unit to interpose immunity to the underlying state law cause of action when a bankruptcy trustee asserts that cause of action standing in the actual creditor's shoes. In other words, the "abrogation of sovereign immunity means that in order to bring a § 544(b) claim, the trustee need only identify an unsecured creditor who, *but for sovereign immunity*, could have brought" the claim at issue.

All Resorts Group, Inc., 617 B.R. at 389.

B. The Tenth Circuit's interpretation advances important policy interests relevant to NCBA, its members and ist creditor-clients.

1. The interpretation advances the congressional goal of maximizing estate recovery.

First, as bankruptcies result in the distribution of estate assets among creditors, an important goal is to provide trustees the tools necessary to maximize the size of the estate to be divided. The Tenth Circuit's construction of § 106(a) advances that goal by ensuring the power of trustees to recoup avoidable transactions from all recipients regardless whether they are governmental entities. As it relates to § 544(b) actions against governmental entities, the abrogation of sovereign immunity as recognized by the Tenth Circuit will allow for the recovery of voidable transactions for the ultimate

benefit of all creditors. "Permitting trustees to recover [avoidable] transfers from governmental units and non-governmental units alike helps fulfill the Code's goal 'to maximize the value of the estate' for creditors." *All Resorts Group, Inc.*, 617 B.R. at 390 (quoting *Kohut v. Wayne Cty. Treasurer (In re Lewiston)*, 528 B.R. 387, 396 (Bankr. E.D. Mich, 2015)).

2. The interpretation avoids the absurd "total ban" on § 544(b) that would follow the government's interpretation.

Though Congress clearly evinced its intent to abrogate sovereign immunity to allow § 544(b) avoidance actions against governmental entities, the government's interpretation would frustrate if not outright defeat that intent. In fact, the government's interpretation would generate a total ban on § 544 claims against governmental entities by perpetuating an otherwise insurmountable bar of recovery – sovereign immunity – as to an element of the § 544(b) claim – a showing of a voidable transaction under applicable (state) law if asserted by an actual creditor.

If the underlying state law derivative portion of a § 544(b) claim remains barred by sovereign immunity, then a § 544(b) claim could never proceed against a governmental entity. It was thus not hyperbolic for the Tenth Circuit to describe it as a "total ban" if the position urged by the government (and adopted by the Seventh Circuit in *In re Equipment Acquisition Res. Inc.*, 742 F.3d 743 (7th Cir. 2014)) were accepted. *See Miller*, 71 F.4th at 1254 (describing the second level immunity theory as generating a "total ban" on § 544(b) actions involving the government); *compare In re DBSI*, 869 F.3d at 1011 (the preservation of sovereign immunity as prohibiting

the state-law components of a § 544(b) claim "would essentially nullify Section 106(a)(1)'s effect of Section 54(b)(1)."").

The result urged by the government should be rejected. Section 544(b) must serve some purpose and the abrogation of sovereign immunity as to that section conferred by § 106(a) must mean something. At a minimum it demonstrates Congress clearly intended to provide a remedy against the government through § 544(b) and that it meant the remedy should be a real one. Only by applying the waiver of sovereign immunity to the entirety of the claim can that be accomplished.

3. The interpretation ensures equal treatment among the classes of creditors regardless of their status as governmental entities.

The Tenth Circuit's interpretation also ensures that the bankruptcy process operates fairly in terms of treating all similarly-situated creditors on consistent and equal bases. Independent of § 106(a) and Chapter 5, governmental entities already receive preferential status as creditors as to tax obligations. *See, e.g. United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983) (granting preferential priorities to tax collectors). Were § 106(a) construed to immunize governmental entities from § 544 claims, then the government would be treated far more preferentially than any other creditor. For instance, it could dodge liability under 11 U.S.C. § 550 for a judgement under § 544 on the front end of a bankruptcy case by defeating an avoidance claim on sovereign immunity grounds, and then could also proceed to the head of the line at the back end ahead of most creditors for distribution of estate assets based on claims for tax liabilities.

The Tenth Circuit's interpretation ensures governmental entities do not receive such preferential treatment to the detriment of other creditors. While governmental entities may have their immunity abrogated for fraudulent conveyance claims, the government still has the right to line up with other creditors and seek recovery of a portion of any amounts it paid back to the estate.

CONCLUSION

Amicus respectfully requests that this Court affirm the decision of the Tenth Circuit.

Respectfully submitted,

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