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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES,)

Petitioner,)

v.) No. 23-824

DAVID L. MILLER,)

Respondent.)

- - - - -

Washington, D.C.

Monday, December 2, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:24 a.m.

APPEARANCES:

YAIRA DUBIN, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:24 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 23-824, United States versus Miller.

Ms. Dubin.

ORAL ARGUMENT OF YAIRA DUBIN
ON BEHALF OF THE PETITIONER

MS. DUBIN: Mr. Chief Justice, and may it please the Court:

The Bankruptcy Code grants trustees an array of avoidance powers, including the power to avoid fraudulent transfers under Section 548, subject to a two-year federal lookback period. This trustee's claim is time-barred, so he's relied on a different code provision, Section 544(b). But 544(b) has no application here. That provision looks to whether a real-world creditor can avoid a transfer under state law with a longer lookback period.

Rather than leave that right to one creditor, Congress authorized the trustee to pull it into bankruptcy to benefit all creditors. But 544(b) doesn't come into play unless a transfer is already voidable under

1 state law; 544(b) simply allows the trustee to
2 piggyback off that existing vulnerability.

3 In practice, that means 544(b) has a
4 two-level structure. The trustee must first
5 identify a creditor with the right to avoid the
6 transfer under state law. If so, he can step
7 into the creditor's shoes and avoid the same
8 transfer under 544(b). But, if not, he has no
9 one's shoes to step into and he can't use 544(b)
10 to circumvent the code's two-year lookback
11 period.

12 Here, any creditor's attempt to avoid
13 these federal taxes under state law would
14 obviously be barred by sovereign immunity and
15 other obstacles. The trustee's parallel 544(b)
16 action should therefore fail on the merits.

17 Respondent's main argument is that
18 Section 106(a) alters that analysis. But 106(a)
19 waives immunity at the federal level for 59
20 bankruptcy code provisions. 106(a) plainly does
21 not waive immunity for a state law claim outside
22 bankruptcy. And 106(a) likewise does -- makes
23 clear that it does not alter the substance of
24 the identified code provisions. Rather, it
25 waives immunity so that those provisions can be

1 applied to sovereigns according to their terms.
2 And, here, 544(b) by its terms allows a trustee
3 to avoid a transfer if and only if a creditor
4 could avoid that transfer outside bankruptcy.

5 Nothing in 106(a) alters that
6 requirement. The trustee's contrary theory
7 misreads 106(a), and it misses the basic design
8 of 544(b).

9 I welcome the Court's questions.

10 JUSTICE THOMAS: Could 106 be written
11 in a -- in a way that you can get around the
12 immunity problem at merits level under 544?

13 MS. DUBIN: I think it could be, and I
14 think the way you would do it would be to say
15 something like, in actions under the identified
16 sections, governmental units should be treated
17 like private parties in like circumstances.

18 There actually is an analogous bar --
19 provision like that in the code under the
20 Federal Tort Claims Act. Congress did write
21 something like that to make sure that the United
22 States could be liable under state tort law
23 under the terms set forth in that Act.

24 But I think that sort of bakes in this
25 idea that Congress would have wanted that

1 result, that Congress would have wanted the
2 United States to be liable under a provision
3 like 544(b) on the merits.

4 And that goes to the fundamental
5 premise of 544(b), which is that 544(b) exists
6 in the code in order to mirror liability that
7 exists outside of bankruptcy. And I don't think
8 there's any reason to think that Congress would
9 have wanted to expose the IRS to liability under
10 state law through a provision that only does
11 what already exists outside of bankruptcy.

12 JUSTICE BARRETT: Counsel, what
13 federal causes of action, besides maybe the
14 FDCPA, might a trustee be able to assert via
15 545 -- 544(b)?

16 MS. DUBIN: That's probably the best
17 example of what the trustee could assert
18 vis-a-vis 544(b), but, usually, 544(b) isn't
19 used against the federal government, which I
20 think is where -- I take it that --

21 JUSTICE BARRETT: Yeah.

22 MS. DUBIN: -- that's where you're
23 going with this.

24 JUSTICE BARRETT: Yeah.

25 MS. DUBIN: But we don't think that's

1 a problem with our interpretation because 106(a)
2 waives immunity as to 59 sections by section,
3 not by subsection, and the waiver has an
4 important role to play as to 544(a) vis-a-vis
5 the United States.

6 And that's because, under 544(a),
7 waiving immunity allows the United States --
8 allows the trustee to prime a tax lien against
9 the United States if it's not properly filed.
10 And that can have a huge consequence for the
11 distribution of the estate to unsecured
12 creditors. So --

13 JUSTICE GORSUCH: Ms. --

14 JUSTICE BARRETT: Well, I was just --
15 okay. There's just one more.

16 JUSTICE GORSUCH: No. Go ahead,
17 please.

18 JUSTICE BARRETT: Let me ask you that
19 just about states. It's a slightly different
20 question but kind of the same realm. The state
21 amici say that if we construe this -- if we --
22 if we construe it as the trustee wants, it's
23 going to raise a constitutional question about
24 whether Congress can abrogate state sovereign
25 immunity under the bankruptcy clause.

1 Is Katz your answer to that?

2 MS. DUBIN: I think Katz is the answer
3 to that, but I also don't think that anything in
4 this case requires the Court to reach that
5 constitutional question. I think there are
6 various ways in which the code brings in state
7 law, and as long as it brings in state law
8 uniformly, in general, that is sufficient.

9 But, here, the problem isn't that
10 there's some constitutional obstacle to bringing
11 in state law. It's that the way in which 544(b)
12 operates is only to bring in state law when that
13 transfer was already vulnerable under state law.
14 So it's a problem on the merits.

15 JUSTICE BARRETT: Thank you.

16 JUSTICE GORSUCH: Ms. Dubin, I
17 actually wanted to follow up on the first
18 question that Justice Barrett asked you, and
19 I -- I understand your response is that the
20 waiver in 106 will still do work with respect to
21 544(a) even if it does no work with respect to
22 544(b).

23 Is that the gist of your -- your
24 answer?

25 MS. DUBIN: With a small correction.

1 It does -- definitely does work as to the United
2 States with respect to 544(a). It also does
3 work with respect to any sovereign that has
4 exposed itself to state law outside of
5 bankruptcy, and some states have done that under
6 544(b).

7 JUSTICE GORSUCH: Sure. Okay. But
8 106 waives sovereign immunity for the federal
9 government with respect to all of 544. It
10 doesn't single out (a). And I think the gist of
11 your argument is that, as you read 544(b), 106
12 is effectively rendered a nullity. What's --
13 what's your response to that?

14 MS. DUBIN: Sure. So two points on
15 that.

16 The first point is that the way that
17 106 operates with respect to 544(b) is defined
18 by the limitation in 106(a) and the nature of
19 544(b). So 106(a) is a waiver of immunity as to
20 those 59 code provisions that you referenced,
21 but it specifically says in 106(a)(5) that
22 nothing in this section shall create any
23 substantive claim for relief that doesn't
24 otherwise exist.

25 JUSTICE GORSUCH: No, it doesn't

1 create a new cause of action. I -- I grant you
2 that, but that's 544(b), is what your friends on
3 the other side would say, right?

4 MS. DUBIN: So it says both that it
5 doesn't create any substantive claim for relief
6 and it doesn't create any new cause of action.
7 But, critically, that takes us to 544(b), which
8 is, what does 544(b) do? And 544(b), what it
9 does is it says that the trustee can mirror an
10 existing state law right. So this transfer is
11 already vulnerable --

12 JUSTICE GORSUCH: Well, it doesn't say
13 that. It talks about voidable. It doesn't talk
14 about void. It says voidable. What do you do
15 with that?

16 MS. DUBIN: Sure. So voidable under
17 applicable law by an actual creditor means that
18 you look to the state law or to the law that's
19 being invoked and see whether that transfer
20 could be avoided under that law. And when you
21 look to Utah law here, the way that a transfer
22 is avoided, like in all states, is by bringing
23 an avoidance action against a particular
24 defendant.

25 And Utah law, the applicable law being

1 invoked here, makes clear that the identity of
2 the transferee matters. You can't avoid a
3 transfer, for instance, against someone who
4 takes it in good faith. So it's critical to
5 understanding the applicable law --

6 JUSTICE GORSUCH: Yeah, but that --

7 MS. DUBIN: -- who the defendant is.

8 JUSTICE GORSUCH: -- that doesn't
9 apply -- the good-faith purchaser rule doesn't
10 apply here, right?

11 MS. DUBIN: Right, but I'm -- I'm
12 talking about what 544(b) does. And I think
13 what 544(b) makes clear, by looking to whether
14 someone actually had this right outside of
15 bankruptcy, is that what it's doing is saying
16 this transfer already could have been effected
17 outside of bankruptcy, so we'll allow the
18 trustee to invoke that for the benefit of all
19 creditors.

20 JUSTICE GORSUCH: If I understand what
21 you're saying -- and I'll let you go in a
22 second --

23 MS. DUBIN: No.

24 JUSTICE GORSUCH: -- I promise -- is
25 that essentially, the trustee steps into the

1 shoes of a -- of -- of a normal creditor, and
2 that's how you read 544(b).

3 I don't see that in -- in those --
4 that language isn't there. It does exist in
5 some other statutes, which is notable. And
6 we've got a very old case written by Oliver
7 Wendell Holmes no less, Moore versus Bay, that
8 says sometimes a trustee's powers to avoid
9 property transfers can transcend the rights of
10 the creditor in whose shoes he might otherwise
11 step. What do we do about that?

12 MS. DUBIN: Sure. I'd like to address
13 Moore versus Bay and then I'd like to return, if
14 I can for a minute, to the text of 544(b).

15 As to Moore versus Bay, that is a
16 venerable case, as you mentioned, and what it
17 means is that the trustee has the power to avoid
18 a -- when he is avoiding a transfer, to recover
19 more than just the amount that that creditor
20 could have avoided outside of bankruptcy.

21 JUSTICE GORSUCH: Exactly.

22 MS. DUBIN: That is an exception, but
23 it is an exception that's baked into 544(b).
24 544(b) was understood to incorporate that
25 exception, but when it did so, it made clear

1 that in every other way, the trustee's rights
2 are coterminous with that actual creditor's.

3 JUSTICE GORSUCH: Where do you get
4 that in the --

5 MS. DUBIN: And, critically, in the
6 Moore versus --

7 JUSTICE GORSUCH: Yeah. Where do you
8 get that in the language?

9 MS. DUBIN: In the Moore versus May --
10 in the Moore versus Bay situation, what you have
11 is a transfer that is already voidable and the
12 question is just the extent of recovery. Of
13 course, we don't have that here.

14 You get that from the language from
15 voidable under applicable law by a creditor
16 holding an unsecured claim. That creditor
17 holding an unsecured -- unsecured claim is
18 referring to an actual creditor.

19 What Congress was concerned about in
20 544(b) was a real right that exists outside of
21 bankruptcy. And there's a reason for that.
22 It's because the other federal avoidance powers
23 convey all the ways that Congress wanted to give
24 federal rights to avoidance.

25 544(b) does something different. It

1 recognizes that sometimes out there in the real
2 world, an actual creditor has that right. And
3 Congress picked that up with requiring an actual
4 creditor in 544(b).

5 But I wanted to also address the point
6 that you said where you said that we think that
7 this is what the text means. It's not what we
8 think the text means. It's how this provision,
9 544(b), has been interpreted for over a century.
10 It is uniform case law --

11 JUSTICE GORSUCH: Well, that -- that's
12 why we're here, right?

13 MS. DUBIN: No. We're here on the
14 106(a) question. We're here on --

15 JUSTICE GORSUCH: Well, how the two
16 interact, yeah.

17 MS. DUBIN: Well, kind of. All of the
18 cases in the split on 106(a) are all asking how
19 does 106(a) affect that actual creditor
20 requirement. None of them are challenging the
21 actual creditor requirement.

22 If you look at all those cases, for
23 instance, DBSI, the case that started this split
24 in the Ninth Circuit, everything about that case
25 acknowledges this. Everyone agrees 544(b)

1 operates by looking for an actual creditor.

2 The question is, when the -- when the
3 defendant is the United States, how does 106(a)
4 affect that analysis? Are you supposed to
5 disregard sovereign immunity that would exist in
6 an actual creditor's suit? Everyone accepted
7 that as a premise because that is how 544(b) has
8 always been understood.

9 JUSTICE GORSUCH: That's right. Thank
10 you.

11 JUSTICE JACKSON: Ms. Dubin, and --
12 and you -- you say this actual creditor
13 requirement, which everyone acknowledges exists
14 in 544(b), is there for a reason. And I've been
15 struggling with that, and I want your reaction
16 to -- to this.

17 Is it because Congress was making a
18 policy choice related to its concern about the
19 potential disruptive nature of avoidance? So
20 the general trustee avoidance power has a
21 two-year statute of limitations because, when
22 you come in and you void a previously existing
23 transaction involving innocent third parties,
24 that's like a big deal. That's causing a lot of
25 disruption in the market.

1 And so, ordinarily, a trustee can only
2 do that for two years after that transaction has
3 occurred. There's no such limitation in the
4 544(b) world in terms of timing, but maybe --
5 maybe -- this is my theory -- the -- the
6 relevant limitation is this actual creditor
7 requirement, that what's happening there is the
8 trustee gets the avoidance power but only to the
9 extent that an actual creditor could have
10 affected the same kind of disruption in the
11 market by bringing this kind of action on his
12 own.

13 What do you think about that?

14 MS. DUBIN: I think you have it
15 exactly right, but I would add one piece to it,
16 and it's why does Congress care that an actual
17 creditor has that right in the real world? And
18 it's because that transfer could be invalidated
19 in the real world as to that transferee.

20 So all Congress is doing is saying
21 that the trustee, instead of leaving that right
22 to one creditor alone, he is going to vindicate
23 the principle of equality among creditors,
24 equality of distribution, bring it into the
25 bankruptcy and that transfer can be avoided for

1 the benefit of all creditors.

2 But, absent that situation where this
3 transfer is already vulnerable, Congress's
4 policy judgments about repose, about who should
5 be able to avoid a transfer govern, and 548
6 governs, other than in that situation.

7 JUSTICE BARRETT: Counsel --

8 JUSTICE KAGAN: Can I take you --

9 JUSTICE BARRETT: -- you say in a
10 foot -- oh, go ahead. I think this will be
11 quick. You say in a footnote in your brief --
12 and this follows up on Justice Jackson's
13 question -- that the way this would work for the
14 actual creditor who actually had the claim in
15 the real world is that if the bankruptcy estate
16 is closed and that person is actually still
17 holding the claim, that they could then pursue
18 it, assuming that it was still available.

19 How often does that happen?

20 MS. DUBIN: I think it happens. I
21 don't know -- I can't give you exact numbers,
22 but it certainly can happen. It's not some
23 fantasy. Of course, if the actual creditor has
24 a right that the trustee can invoke and it's
25 used in 544(b), then there will --

1 JUSTICE BARRETT: Then it's gone.

2 MS. DUBIN: -- no longer be the right
3 outside of bankruptcy.

4 But, if, for instance, the trustee
5 doesn't take advantage of that right or runs the
6 statute of limitations within bankruptcy, then
7 the actual creditor will regain the right when
8 the bankruptcy closes.

9 JUSTICE BARRETT: And it's the same
10 for if that -- if the -- if the transferee has
11 the money and then someone at the actual
12 creditor runs and grabs it before the trustee
13 has a chance, then the trustee can't get it
14 because, presumably, there's preclusion that
15 would apply?

16 MS. DUBIN: That's right.

17 JUSTICE KAGAN: Can I take you back to
18 the distinction between 544(b) and 544(a) that
19 you're drawing? And as I understand the
20 difference between the two sections, it's 544(b)
21 concerns an actual creditor and 544(a) concerns
22 a hypothetical creditor.

23 Why wouldn't sovereign immunity play
24 similarly with respect to both those provisions?
25 So, to the extent that sovereign immunity is

1 always going to bar a 544(b) action, why
2 wouldn't it do the exact same thing with the
3 hypothetical creditor in a 544(a) action?

4 MS. DUBIN: Sovereign immunity will
5 operate in the same fashion whenever what the
6 Bankruptcy Code provision is asking you to look
7 to is whether an action could be viable outside
8 of bankruptcy in the real world. But 544(a)
9 doesn't require that.

10 And I think a really good example of
11 that is the tax lien that we've been talking
12 about. 26 U.S.C. 6323 says that a -- that a tax
13 lien that isn't properly recorded isn't valid
14 against a judgment lien creditor. It simply
15 isn't valid. No immunity required.

16 The trustee is allowed to step into
17 that shoes of that judgment lien creditor under
18 544(a). So he now has that -- the lien is not
19 valid against him. How does 106(a) help him?
20 106(a) helps him enforce that.

21 He can now prime the United States.
22 He now has priority over that tax lien. There's
23 no issue of immunity outside the bankruptcy
24 proceeding, and 106(a) removes the immunity
25 within the bankruptcy proceeding.

1 This is done quite a lot. Really, the
2 way it manifests in -- in practical terms is,
3 usually, when we have a tax lien that's not
4 properly recorded, we will file as an unsecured
5 creditor because we know the trustee can prime
6 the lien. Of course, if 106(a) wasn't there,
7 that wouldn't be the case.

8 JUSTICE KAGAN: Got it.

9 JUSTICE SOTOMAYOR: Just curious, why
10 did the trustee not act within the two years
11 under 548 here?

12 MS. DUBIN: He was too late by the
13 time he was appointed. It was too -- it was
14 more than --

15 JUSTICE SOTOMAYOR: Oh, it was too
16 late.

17 MS. DUBIN: It wasn't just the
18 appointment. At the time the bankruptcy was
19 filed in 2017, these transfers were in 2014, the
20 two-year lookback period had already expired.

21 And that goes to the concerns Justice
22 Jackson was talking about, which is this repose
23 that the federal statute bakes into it.

24 JUSTICE SOTOMAYOR: All right. Thank
25 you.

1 JUSTICE BARRETT: And, as a practical
2 matter, is that what 544(b) gets you that you
3 don't get under 548, that, you know, the
4 two-year statute of limitation and the -- in 548
5 versus some state -- states have longer lookback
6 periods?

7 MS. DUBIN: That's exactly right. In
8 most situations, the terms of 548 are basically
9 very similar to the terms in the state law and
10 the Uniform Fraudulent Transfer Act and its
11 successors. You're basically looking for
12 whether a transfer was given for a reasonably
13 equivalent value and whether the debtor was
14 insolvent. And those terms are essentially very
15 similar in 548 and in the state laws being
16 incorporated through 544(b), but, as you say,
17 several states -- many states have adopted
18 longer lookback periods or longer limitations
19 periods, four years or even six years. So that
20 would be why the trustee is using 544(b).

21 The trustee can do so if an actual
22 creditor could have done so outside of
23 bankruptcy because that transfer was vulnerable,
24 but he can't do so where no actual creditor
25 already had that right. Then he's stuck with

1 548 and he would be stuck with 548 in this case.

2 JUSTICE KAGAN: I mean, just taking a
3 step back, Ms. Dubin, there is something a
4 little bit peculiar about the argument, right,
5 saying 106 waives sovereign immunity and what
6 happens as a result of that is you can hale the
7 trustee into court, and then the trustee gets to
8 court and it turns out he always loses.

9 So what was the point of the thing?

10 MS. DUBIN: Sure. So two points on
11 that.

12 On the first point, he loses because
13 of the nature of 544(b) because of the merits.
14 I understand your --

15 JUSTICE KAGAN: I get that. It's just
16 like, why does that matter to him or why would
17 it have mattered to Congress, more to the point?
18 Like, why would Congress have gone to this
19 trouble of waiving sovereign immunity if the
20 trustee was always going to lose anyway as a
21 result of the substantive question in the suit?

22 MS. DUBIN: Yeah. So this goes to my
23 second point. 106(a) is not a waiver about
24 544(b). 106(a) waives immunity with respect to
25 59 code provisions. It is a general waiver.

1 JUSTICE KAGAN: Yeah. Do you think
2 you would have the same argument if it was just
3 a 544 waiver?

4 MS. DUBIN: I think this would be a
5 much harder case if it was just a 544(b) waiver.
6 I don't think it would be a hard case if it was
7 a 544 waiver because of the work that it does in
8 544(a).

9 I think, if you had the same waiver
10 written with respect only to 544(b), you would
11 have this question as to why Congress wrote a
12 waiver that doesn't have practical effect as to
13 the federal government.

14 JUSTICE KAGAN: I mean, but, if I
15 understand the argument that you're making,
16 you're saying, well, because Congress included
17 so many things, we don't have to take any one of
18 them particularly seriously.

19 MS. DUBIN: That is not at all our
20 position. Our position is --

21 JUSTICE KAGAN: Because it doesn't
22 sound all that good.

23 (Laughter.)

24 MS. DUBIN: Yes. That's -- so that is
25 not our position, and let me explain why.

1 First of all, 106(a) identifies each
2 of the 59 provisions not by subsection but by
3 section. So it has to have meaningful effect as
4 to each section, and it certainly does have
5 meaningful effect as to 544(a). When Congress
6 was identifying sections for which the waiver of
7 immunity would operate, of course, it would
8 include Section 544.

9 But I think it is also crystal-clear
10 that Congress would not have thought that that
11 waiver of immunity would expose the IRS to
12 substantive state liability under 544(b), and
13 that's because Congress specifically said in the
14 waiver that nothing in this section creates any
15 substantive claim for relief that doesn't
16 otherwise exist.

17 And everyone has always known that the
18 way 544(b) operates is only by pulling in
19 existing state law liability, and everyone knows
20 that the IRS is not subject to existing state
21 law liability.

22 So, when Congress wrote -- wrote a
23 waiver that included 544, I think it is very
24 clear that Congress did not think that that
25 waiver would have the effect of altering

1 substantive liability as to IRS that could never
2 exist outside of bankruptcy.

3 JUSTICE KAVANAUGH: On -- on what
4 Congress might have been thinking, the other --
5 the other side says that your position will
6 create a playbook for fraud, that you pay your
7 personal tax debts with corporate funds and let
8 the IRS then, in their words, hide behind
9 sovereign immunity that would short-change
10 creditors. I just want to make sure you respond
11 to that.

12 MS. DUBIN: Thanks. I appreciate the
13 opportunity to do that. I think that argument
14 and those considerations cut the opposite
15 direction. The trustee's position here would
16 allow these insiders, the wrongdoers here, to go
17 free. In his world, he recovers this -- this
18 money from the IRS. He then cannot go after the
19 insiders because he's entitled to only a single
20 satisfaction under the bankruptcy's provision --
21 Bankruptcy Code's provision. Meanwhile, we
22 can't go after the insiders either because the
23 statute of limitations has expired. And that
24 will be ever more likely when you're using a
25 longer limitations period to go after these

1 transfers.

2 By contrast, under our view of the
3 world and how this is supposed to work, when
4 you're outside the lookback period, you should
5 be going after the insiders. And you have
6 claims to do that because they are the
7 wrongdoers here. They used corporate funds to
8 pay their own debts. So you should be able to
9 go after them for corporate misappropriation,
10 breach of fiduciary duty, and all of the --
11 those claims that come from insiders taking
12 corporate money.

13 Here -- and we find this a little bit
14 inexplicable -- the trustee did go after the
15 insiders, but one case was dismissed for failure
16 to prosecute, and one was settled, and we assume
17 that settled for this because that would
18 obviously violate the double satisfaction rule.

19 CHIEF JUSTICE ROBERTS: Justice
20 Thomas, anything?

21 Justice Alito?

22 Justice Gorsuch?

23 JUSTICE GORSUCH: One quick question.
24 Let's suppose that the money didn't go to the
25 U.S. Government but to a private party. Along

1 the way, the trustee, in your view, could
2 recover for that?

3 MS. DUBIN: If there was an action
4 against the private party. Obviously, private
5 parties also have defenses. Let's assume,
6 instead of the United States here, it was a bank
7 and the bank took in good faith for a mortgage
8 that it was owed, then you wouldn't have a claim
9 against the bank. You might have a claim
10 against an insider that arranged that for some
11 benefit --

12 JUSTICE GORSUCH: Yeah.

13 MS. DUBIN: -- to himself, and you
14 would be limited --

15 JUSTICE GORSUCH: That's what I'm
16 talking about. Yeah.

17 MS. DUBIN: -- in bankruptcy.

18 JUSTICE GORSUCH: Yeah. You could --
19 you could pursue that person?

20 MS. DUBIN: So long as he doesn't have
21 a defense outside of bankruptcy.

22 JUSTICE GORSUCH: Yeah.

23 CHIEF JUSTICE ROBERTS: Justice
24 Kavanaugh?

25 JUSTICE BARRETT: Just one question

1 about what work 106(a) does for 544(b) if -- if
2 you prevail. I mean, your position would be,
3 well, it's still doing work vis-à-vis the
4 states, right? And is it odd -- I mean, just
5 kind of walk me through this double layer thing.
6 I mean, as I understand your argument, it's that
7 544(b) has a nested cause of action in it under
8 applicable law, so you're standing in the shoes
9 of the creditor pursuing someone under state
10 law.

11 If under state law you could recover
12 that money from a governmental entity that would
13 otherwise have state sovereign immunity, then
14 you have a claim that's been nested by virtue of
15 the under applicable law, but because the
16 vehicle through which the trustee is asserting
17 that cause of action is 544(b), you still need a
18 separate abrogation of the state sovereign
19 immunity to move forward and that's the work
20 that 106(a) is doing?

21 MS. DUBIN: Yes. That's right. Let
22 me try to say it back to you and see if you
23 think that you agree.

24 JUSTICE BARRETT: Okay.

25 MS. DUBIN: The work that 106(a) is

1 doing as to 544(b) in that situation is the same
2 work it's doing as to the other avoidance
3 provisions that are referenced in 106(a), which
4 is these are federal code provisions. They
5 would not normally apply to a sovereign absent a
6 waiver, abrogation of immunity, so you would,
7 let's say, take 548, the federal fraudulent
8 transfer provision. Normally, you could bring
9 that against a private party, but there's no
10 indication you could bring that against the
11 United States or against that state sovereign.

12 106(a) allows the trustee to assert
13 that cause of action against a sovereign,
14 absolutely, the federal --

15 JUSTICE BARRETT: Yeah.

16 MS. DUBIN: -- cause of action.
17 You're right to say that the way 544(b) works is
18 by looking to what would have happened under
19 state law, whether there's a viable avoidance
20 action outside state law. And that's where that
21 state's waiver of sovereign immunity comes into
22 being, which is that that state has exposed
23 itself to fraudulent transfer liability in its
24 own courts. The trustee can now mirror that
25 inside the bankruptcy.

1 JUSTICE BARRETT: But, absent 106(a),
2 under the way that you're viewing this, the
3 trustee could not proceed under 544(b)?

4 MS. DUBIN: That's right, and that's
5 the purpose of 106(a)'s waiver as to the 59
6 provisions. It's to allow those federal code
7 provisions to be applied, invoked, enforced
8 against sovereign entities. That's the work
9 it's doing.

10 JUSTICE BARRETT: So the other side
11 says, well, that's pretty weird because then
12 you're looking for two waivers of sovereign
13 immunity or an abrogation of sovereign -- two
14 abrogations of waiver and an abrogation that you
15 have to double-team in order to go. You want to
16 respond to that?

17 MS. DUBIN: Yes. Thanks. I don't
18 think that our position is asking for two
19 waivers. To the contrary, what our position is
20 resting on the premise of is that when Congress
21 made a provision like 544(b), which turns on
22 liability that exists outside the code, it
23 doesn't mean to affect that by waiving immunity
24 inside the bankruptcy proceeding. So we
25 disagree with the premise that Congress wanted

1 to accomplish this thing.

2 But you're right to say that if
3 Congress wanted to accomplish it, the way to do
4 it would be it has to do something about 544(b).
5 And the answer would be to alter -- the most
6 obvious answer would be to alter the way 544(b)
7 operates. And instead of operating on the basis
8 of an action that's actually viable outside
9 bankruptcy, which, again, is not our
10 interpretation -- it is the uniform
11 understanding for over a hundred years of 544(b)
12 and its predecessor provisions -- would be,
13 instead of requiring that, it would say
14 something like, in 544(b), transfers to the
15 United States are avoidable to the same manner
16 and the same extent as transfers to a private
17 party, similar to what Congress did in the FTCA
18 context.

19 CHIEF JUSTICE ROBERTS: Justice
20 Jackson?

21 JUSTICE JACKSON: I think the thing I
22 found interesting in the exchange you just had
23 with Justice Barrett is that she approached the
24 analysis by starting with 544 and you started
25 with 106(a). And I wonder if that might be the

1 sort of -- to the extent there's any disconnect,
2 and I don't think there is, but the framing is
3 slightly different.

4 You say we need the waiver of
5 sovereign immunity to start to allow for the
6 trustee to bring an action. And then, to
7 determine whether or not that action can proceed
8 or is successful or whatnot, you go to 544,
9 which says you have to allow -- the trustee can
10 proceed only to the extent that he could -- that
11 an actual creditor could outside of bankruptcy,
12 and sovereign immunity there can do the work to
13 prevent the trustee from proceeding.

14 Is that how you're viewing this?

15 MS. DUBIN: I actually don't think it
16 matters where you start. I think where --

17 JUSTICE JACKSON: Okay.

18 MS. DUBIN: -- where Justice Barrett
19 started was perfectly fine too.

20 JUSTICE JACKSON: Okay.

21 MS. DUBIN: This is more just
22 conceptually trying to understand what's going
23 on here as sort of the whole code, what is
24 Congress doing here. And 106(a) absolutely
25 waives immunity as to these federal code

1 provisions. It doesn't matter whether you do
2 that at the end of the analysis or at the
3 beginning of the analysis.

4 But, when it does that, it
5 specifically says it's not altering the
6 substance of those provisions. So what do you
7 do as a court adjudicating an action brought
8 under one of these provisions? You go look at
9 what are the substantive terms. For most of
10 them, the substantive terms don't implicate
11 something happening outside of bankruptcy.

12 But 544(b) works differently, and it's
13 long been understood to work differently. You
14 have to go look at what's happening outside of
15 bankruptcy. And nothing in 106(a) suggests that
16 Congress meant to affect what's happening
17 outside of bankruptcy or that requirement that
18 you look to what's happening outside of
19 bankruptcy.

20 Essentially, what the trustee is
21 asking for here, and it's a little hard to put
22 it into words, but we both agree that 106(a)
23 waives sovereign immunity at the federal level.
24 We also both agree that 106(a) does not waive
25 immunity at the state law level. So what she's

1 asking for is that when you look at 544(b)'s
2 actual creditor requirement, you close your eyes
3 or you disregard sovereign immunity that hasn't
4 been waived, that continues to exist. And
5 that's where the theory is wrong and it's why
6 the 544(b) claim fails on the merits.

7 JUSTICE JACKSON: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Ms. Blatt.

11 ORAL ARGUMENT OF LISA S. BLATT

12 ON BEHALF OF THE RESPONDENT

13 MS. BLATT: Mr. Chief Justice, and may
14 it please the Court:

15 106 waiver with respect to 544 means
16 that trustees can avoid fraudulent transfers
17 inside bankruptcy even though sovereign immunity
18 applies outside bankruptcy. "With respect to,"
19 even read very narrowly, means directly relating
20 to 544. And the waiver that concededly applies
21 to the trustee's claim has the same direct
22 relationship to the incorporated state law
23 elements. No textual or logical distinction
24 exists between the two.

25 106(a)(2) also lets courts hear any

1 issue respecting 544's application to
2 governments, so courts can thus hear these
3 claims without regard to sovereign immunity.

4 Congress waived immunity knowing that
5 544 has always required trustees to step into
6 creditors' shoes under state law. By waiving
7 immunity, Congress clearly expected trustees to
8 sue governments by relying on state law.
9 Congress could not have plausibly intended to
10 waive immunity only to see it smuggled in
11 through the back door under the guise of
12 applying state law.

13 Nor is it plausible that Congress has
14 ever waived immunity but only contingent on a
15 second waiver. No such statute exists in the
16 U.S. Code, nor does any statute contain a double
17 waiver.

18 Congress spoke expressly when it
19 wanted to give the IRS special treatment and to
20 make exceptions for fraudulent transfers, but it
21 did neither for the IRS in 544. The
22 government's position overrides these choices
23 and allows the IRS to keep assets that every
24 other transferor would have to return.

25 That result would prevent the trustee

1 from recouping this money and paying it to the
2 bus drivers and the mechanics and the vendors,
3 who certainly gave All Resort more value than
4 the IRS did. All -- the government's position
5 finally -- destroys creditor equality. Where
6 governments are creditors, like they are here,
7 the government gets to keep the fraudulent
8 transfer and its share of a much smaller pie.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: What do you do with
11 your analysis -- under your analysis with
12 106(a)(5)?

13 MS. BLATT: (a)(5)? Well, I think it
14 says on its face that it doesn't create
15 liability that doesn't otherwise exist under
16 this title. And the government concedes that
17 the trustee, I think it said it six times, the
18 trustee has a cause of action to which sovereign
19 immunity has been waived under 544. It's just
20 contesting whether it went to the incorporated
21 elements.

22 And there's no logical distinction how
23 105 is not implicated to that waiver, but
24 somehow it's implicated to the waivers extending
25 to the elements. It also just says otherwise

1 existing under this title or non-bankruptcy law,
2 and everyone concedes that the trustee has a
3 cause of action but for one defense and one
4 defense only, and that's sovereign immunity,
5 which is the very defense that 106 waives.

6 And I wanted to get to the 544(a)
7 point because the government does not dispute
8 that 106(a) does absolutely no more work under
9 544(a) than it does under 544(b), meaning 544(a)
10 incorporates state law. Absent a second waiver
11 of immunity, which the government says
12 accurately exists under -- I don't know if it's
13 28 U.S.C. but 2610, the -- the quiet title,
14 there is no state law where a bona fide
15 purchaser or bon -- a bona fide creditor could
16 avoid the lien.

17 So both under (a) and (b), the
18 government has its two-waiver theory. 106(a) is
19 just kind of irrelevant. And in terms of the
20 idea that this applies to 59 sections, if you
21 could put your shoes, pun intended, in the form
22 of Congress, who overruled the Supreme Court's
23 decisions in two of them, you're asking Congress
24 to go back again. And in Hoffman, you said to
25 Congress: You were too scattershot because you

1 didn't list the code provisions. It just would
2 have applied to a hundred. Here, Congress
3 listed all 59.

4 And another thing that's interesting
5 just about making Congress do this again, the
6 government doesn't dispute that its position
7 would make Congress have to go through and add a
8 second waiver on all the provisions to which the
9 state law is incorporated -- and we identified
10 many -- and they don't dispute that one of them
11 is 547(b). And that's the very same issue in
12 Hoffman.

13 So, if you rule against us, you're
14 really telling Congress after all, they still
15 need to go back and do it a third time and maybe
16 a fourth time because, in the government's view,
17 the state sovereign immunity will always creep
18 in.

19 JUSTICE JACKSON: But, Ms. Blatt --

20 MS. BLATT: Yes?

21 JUSTICE JACKSON: -- I guess I -- I
22 mean, I understand the need for two waivers
23 here, but isn't that a function of Congress's
24 policy choice to incorporate state law as the
25 requirement of 544(b)?

1 MS. BLATT: That's --

2 JUSTICE JACKSON: You seem to be
3 accepting that Congress was, in 544(b), allowing
4 for the trustee to stand in the shoes of the
5 actual creditor, but you started off by saying
6 the trustee can do more, essentially, by virtue
7 of 106(a) than the actual creditor. And I feel
8 like those two things are inconsistent.

9 MS. BLATT: With respect, no. So, as
10 Justice -- first of all, the waiver of sovereign
11 immunity with respect to 544 just on its face
12 textually applies to the elements, to the same
13 extent grammatically, logically that it applies
14 to the claim. You can't waive a claim without
15 waiving the elements.

16 But, in terms of what Justice Gorsuch
17 said, there's two very important caveats to this
18 actual --

19 JUSTICE JACKSON: No. No, no, no, I'm
20 sorry. Sorry. Before you go to the second
21 part, I don't understand that.

22 I mean, I thought the waiver of
23 sovereign immunity was a threshold issue that
24 didn't tell us anything about the merits of
25 whether or not you win the action underlying it.

1 So we have this initial question, can
2 you even bring this action? And then, when you
3 bring it, the court goes on to adjudicate the
4 merits, which is what the elements go to.

5 MS. BLATT: Right, without regard to
6 sovereign immunity, which is 106. In the
7 government's view, Congress --

8 JUSTICE JACKSON: But there's a --
9 there's a theory in which sovereign immunity is
10 just doing the work of allowing you to bring the
11 lawsuit to begin with.

12 MS. BLATT: Only to lose.

13 JUSTICE JACKSON: Well, sometimes that
14 happens.

15 MS. BLATT: Always it will happen
16 because no law, tribal, foreign, federal, no law
17 anywhere waives sovereign immunity with respect
18 to fraudulent transfers.

19 JUSTICE JACKSON: But 544(b) is bigger
20 than the government. So, you know, there could
21 be other --

22 MS. BLATT: Well, 106 only relates to
23 the government.

24 JUSTICE JACKSON: Yeah.

25 MS. BLATT: You're just saying 106 was

1 a way -- 106 application to 544 in all of its
2 applications, (a) and (b) was a waste of time
3 because sovereign immunity will always be
4 incorporated under state law.

5 And the point I was trying -- which is
6 just a -- with respect, it's a dumb statute.
7 Why would Congress waive immunity only to see
8 that there's no way to bring it, unless --

9 JUSTICE JACKSON: Ms. Dubin says that
10 (a), they -- those -- those claims go forward
11 all the time.

12 MS. BLATT: They can't go forward,
13 which she concedes, without a second waiver of
14 immunity. And there's only two. There's the
15 federal government and then the four states'
16 generic waiver -- four states --

17 JUSTICE SOTOMAYOR: I'm sorry, there's
18 an action against the -- the people who engaged
19 in the fraudulent transfer. So 544(a) -- (b) is
20 not useless.

21 MS. BLATT: It's useless as to
22 governments.

23 JUSTICE SOTOMAYOR: Well, but why does
24 that matter?

25 MS. BLATT: Because 106 is a statute.

1 JUSTICE SOTOMAYOR: It's not -- it's
2 not useless. You agree that under 544(b)
3 incorporates some state law defenses, like the
4 statute of limitations.

5 MS. BLATT: All of them. And this is
6 my second point.

7 JUSTICE SOTOMAYOR: That's all of
8 them.

9 MS. BLATT: No, to state law --

10 JUSTICE SOTOMAYOR: Except you're
11 saying all of them --

12 MS. BLATT: Except for one.

13 JUSTICE SOTOMAYOR: State sovereign
14 immunity?

15 MS. BLATT: No, because that's waived
16 by 106. If I -- that would be even weirder to
17 have Congress --

18 JUSTICE SOTOMAYOR: That -- that
19 brings us to the constitutional -- that -- that
20 brings us to the constitutional question. But,
21 if 544(b) requires an actual creditor, correct,
22 who can bring the claim, so if there's no
23 creditor who can bring the claim because the
24 statute of limitations has passed, correct?

25 MS. BLATT: Correct, that the actual

1 creditor requirement assumes that all state law
2 elements are met --

3 JUSTICE SOTOMAYOR: So --

4 MS. BLATT: -- with the exception of
5 one. And the other thing I was going to make --
6 because the -- it is conceded under state law,
7 Robin Salazar here, the actual creditor, could
8 not recover more than her \$55,000, so there's an
9 absolute state law bar.

10 JUSTICE SOTOMAYOR: So he can -- he
11 can -- he can --

12 MS. BLATT: The trustee can get --

13 JUSTICE SOTOMAYOR: -- sue the people,
14 the insiders, who made this fraudulent transfer,
15 correct?

16 MS. BLATT: Right, and he tried. It
17 was not dismissed for failure to prosecute until
18 it settled.

19 JUSTICE SOTOMAYOR: Well, I don't know
20 why, but he could have.

21 MS. BLATT: He did.

22 JUSTICE SOTOMAYOR: He did? One of
23 them he settled with. The other, I don't know
24 what he did --

25 MS. BLATT: He went bankrupt.

1 JUSTICE SOTOMAYOR: He went bankrupt.

2 MS. BLATT: They took over --

3 JUSTICE SOTOMAYOR: But I'm not -- I'm
4 not --

5 MS. BLATT: -- 2 million out of the
6 estate.

7 JUSTICE SOTOMAYOR: -- sure why we're
8 going to have to incorporate 106(b) into the
9 state law defenses and say that --

10 MS. BLATT: I think we're saying
11 incorporate the waiver of sovereign immunity
12 into the only way the trustee can bring this
13 claim, which was relying on state law. The
14 other just --

15 JUSTICE SOTOMAYOR: All right. Thank
16 you, Ms. Blatt.

17 JUSTICE GORSUCH: Ms. -- Ms. Blatt,
18 if -- if I might just turn us to 544(b), where I
19 think, you know, the rubber meets the road, and
20 the view on -- I think it's common ground that
21 you -- the trustee steps into the shoes of -- of
22 the creditor.

23 And then the question is, what does
24 this voidability language mean? And one view
25 is, well, you've got to look at to whom the

1 transfer was made. I think that's the
2 government's view, that -- that that matters.

3 MS. BLATT: Yeah, I don't -- the
4 statute doesn't say that.

5 JUSTICE GORSUCH: If I might.

6 MS. BLATT: Yeah.

7 JUSTICE GORSUCH: We're almost there.

8 The government says: Well, okay, you
9 step into the shoes of the creditor and you look
10 at the identity of the transferee. And, here,
11 because the transferee is the government, you're
12 out of luck.

13 Your argument, as I take it, is the
14 statute doesn't say that. It says you ask
15 whether the transfer is voidable by the
16 creditor --

17 MS. BLATT: Correct.

18 JUSTICE GORSUCH: -- by the -- by the
19 debtor here, whoever he is, and is it voidable.
20 And that transfer is voidable because it was
21 done unlawfully, fraudulently.

22 And when Congress wants to identify
23 the -- the transferee and make a difference
24 there, it does so. For example, it protects
25 good-faith purchasers in some other statutes.

1 Have I got the gist of the dispute
2 accurately there?

3 MS. BLATT: That's correct.

4 And, Justice Sotomayor, what's
5 critical to understand is the government's view
6 is that the trustee illegally went after the
7 insiders because they too would be able to
8 assert sovereign immunity.

9 Their view is the trustee, because
10 this went to the United States, it will always
11 block any transfer because the United States,
12 there's no way to ever get at this money.

13 JUSTICE BARRETT: Ms. Blatt, am I --

14 MS. BLATT: So a trustee, if it ever
15 goes to the IRS, which has over 10 years to
16 seek -- 10 years, which is a lot longer than the
17 four-year statute of limitations to go after tax
18 liability and is a lot more capable than I would
19 say the bus -- the bus drivers and the workers
20 who work for this estate, the trustee is not
21 here for his personal benefit --

22 JUSTICE BARRETT: Ms. -- Ms. Blatt,
23 may I ask --

24 MS. BLATT: -- but to get money to
25 people who need it.

1 JUSTICE BARRETT: -- can I ask you a
2 follow-up to Justice Gorsuch's question?

3 How is it -- so I -- I -- I get that
4 the statute doesn't mention the transferee, but
5 how is -- does that make 544(b) different from
6 544(a)? Because isn't the suit you're asserting
7 somewhat hypothetical rather than actual if
8 you're just imagining the claim existing kind of
9 in the ether?

10 MS. BLATT: Yes. So the actual --
11 because that's the -- the creditor, there has to
12 be an actual creditor, but it doesn't matter
13 that -- who the transferee was.

14 So the transferor here was All -- All
15 Resort, the debtor, but the statute just
16 requires by the creditor. It doesn't say as to
17 who the defendant would be. And so -- and just
18 because there's got to be a way under state law
19 to go after all the wrong parties, a creditor in
20 Robin Salazar's shoes could always go after both
21 All Resort that was bleeding assets, the
22 wrongdoers, Bizarro and Cummins, and also the
23 United States.

24 JUSTICE BARRETT: But don't --
25 doesn't -- I mean, you -- you concede, right,

1 that other defenses would be available?

2 MS. BLATT: State law defenses.

3 JUSTICE BARRETT: State law defenses.

4 And how can you know what those defenses would
5 be if you weren't considering who the transferee
6 was?

7 MS. BLATT: Well, so the -- because
8 they -- the defenses that I know of and that the
9 cases are talking about are things like stuff
10 that runs to Robin Salazar, like collateral
11 estoppel, like if she had already brought the
12 claim, or res judicata or laches.

13 So it's not the -- there are statutory
14 defenses about good-faith transferees, and those
15 would be actual defenses that would go to
16 recovery. But, in just pure voidability under
17 Utah law, and this works with all fraudulent
18 conveyance, you're just looking at the elements,
19 whether the transfer is voidable. The recovery
20 is a separate issue both under state law and
21 federal law, like how you go and get the money.
22 But the actual voidability just goes to the
23 transfer. That's why we -- and this Court has
24 recognized it's in the nature of an in rem
25 proceeding.

1 JUSTICE GORSUCH: So you can have --

2 JUSTICE BARRETT: Okay. Last --

3 JUSTICE GORSUCH: I'm sorry. Please.

4 JUSTICE BARRETT: Oh, sorry. Just --

5 just last question. You said before that when
6 you're thinking about whether 106(a) has any
7 work to do for 544(b), that there is no state
8 that you're aware of that has waived sovereign
9 immunity in these -- in this fraudulent transfer
10 context.

11 MS. BLATT: Correct.

12 JUSTICE BARRETT: So that it would be
13 a dead letter? You're sure about that?

14 MS. BLATT: It's not a dead letter as
15 to the four states that waived immunity
16 generically. So -- but it is a dead letter
17 because those are a two-year period, and they
18 can already be sued under 548. So the
19 government concedes --

20 JUSTICE BARRETT: Well, but there was
21 a difference about when the statute was enacted?

22 MS. BLATT: For sure.

23 JUSTICE BARRETT: Yeah.

24 MS. BLATT: But, today, it's a dead
25 letter as to all governments.

1 JUSTICE BARRETT: Except for the four?
2 And -- and -- and that's only because of the way
3 --

4 MS. BLATT: Except for --

5 JUSTICE BARRETT: Put aside the -- but
6 let's see. The timing issue, we're talking
7 about a question of statutory interpretation.
8 The time --

9 MS. BLATT: Yeah, it had a one-year
10 impact for -- you know, until it was amended --

11 JUSTICE BARRETT: Okay.

12 MS. BLATT: -- to -- to two years.

13 JUSTICE BARRETT: But, during that one
14 year, there were four states?

15 MS. BLATT: There were four states.

16 JUSTICE BARRETT: Okay.

17 MS. BLATT: But, boy, Congress did a
18 lot for -- so it did a lot of work for so little
19 effort, and it's only because there's a generic
20 waiver. But, as a practical matter, which I was
21 saying is so ironic, is that Congress would say
22 we are abrogating, abrogating very clearly
23 sovereign immunity, but it's only contingent on
24 the sovereigns who we just abrogated for them
25 agreeing to our waiver.

1 And that is a -- just a case I've
2 never heard of that says that --

3 JUSTICE BARRETT: Well, I mean, states
4 could do it in the future too.

5 MS. BLATT: Yes. It's like a statute
6 with a contingent remainder. I just don't know
7 of many statutes that are like here's a waiver
8 and we hope that everyone else will -- will --
9 will get on, you know -- just there's no statute
10 like that that's contingent. It's bad enough to
11 try to get a waiver when you have a clear and
12 ambiguous waiver and Congress acted to say,
13 notwithstanding, it's abrogated, and then they
14 list all 59 case -- 59 sections and the
15 government says, yeah, but you need a second
16 waiver if you ever have to rely on state law.

17 And I do think it's significant that
18 no case of a century is talking about a federal
19 defense. And I think their preemption argument
20 kind of shows how strange it is because they're
21 saying Congress wanted the trustee to rely on
22 state law, but we incorporate a federal law
23 defense when, normally, the government -- your
24 cases would just say you look at that as implied
25 repeal. You're in a -- you're interpreting a

1 federal cause of action and everyone concedes
2 all elements of state law are met, hook, line,
3 and sinker. The only defense that's lacking is
4 the one defense that was waived in the statute,
5 sovereign immunity.

6 JUSTICE KAGAN: I guess I'm not sure
7 about the nature of the argument, if -- if
8 you're conceding that there were these four
9 states and that there could have been more in
10 the future and Congress wants zero states, why
11 Congress wouldn't have done exactly this. Like,
12 well, four states is four states too many. It's
13 not 50 states, but it's more than zero states.
14 And who knows, the four might go up to 10. And
15 we're -- you know, so we're concerned about
16 this.

17 MS. BLATT: I -- I mean, I just -- I
18 feel bad for Congress that they tried to do the
19 best they could and you're going to say it's not
20 good enough when they said "with respect to" in
21 the broadest -- the government doesn't even have
22 an argument that the immunity, the waiver, is
23 not with respect to the state law elements.
24 They don't even have an argument. They just
25 say, well, sovereign immunity would block the

1 claim even though sovereign immunity is waived
2 with respect to the claim.

3 It -- literally, the statute says
4 sovereign immunity is waived with respect to
5 544(b). It has a claim. It has an elements.

6 JUSTICE KAGAN: But this waiver of
7 sovereign immunity is not supposed to affect the
8 substance.

9 MS. BLATT: It's not supposed to
10 affect the substance unless the claim otherwise
11 exists. And, again, the only thing lacking here
12 is sovereign immunity. They're not -- we're not
13 talking about a defect under state law.

14 JUSTICE JACKSON: But -- but, Ms. --
15 Ms. --

16 MS. BLATT: We have a fraudulent
17 transfer.

18 JUSTICE JACKSON: -- Ms. Blatt, I
19 guess just conceptually, here -- here's what I'm
20 struggling with, and maybe you can help. It
21 seems to me that the result of your view is that
22 the trustee can recover money from the estate
23 under this particular circumstance in a way that
24 no actual creditor could because you concede
25 that all actual creditors bringing a lawsuit

1 against the United States for recovery for these
2 fraud -- this fraudulent transfer would be
3 barred by -- by sovereign immunity. So --

4 MS. BLATT: No. If --

5 JUSTICE JACKSON: No?

6 MS. BLATT: No. Just if you -- if
7 you're just putting aside -- remember, we have
8 that alternative argument that you never had to
9 sue the United States. You could --

10 JUSTICE JACKSON: No, I understand.

11 MS. BLATT: But putting aside that --

12 JUSTICE JACKSON: Putting aside the
13 alternative argument --

14 MS. BLATT: -- you would -- we -- of
15 course, we agree that sovereign immunity applies
16 outside of bankruptcy, which is why it makes it
17 so strange for you to hold that --

18 JUSTICE JACKSON: No, but let me tell
19 you what I think is strange, and then you can
20 respond.

21 MS. BLATT: Okay.

22 (Laughter.)

23 JUSTICE JACKSON: All right. So -- so
24 we have a situation in which the trustee is
25 recovering this money, putting it in under

1 circumstances in which no actual creditor could.
2 Ms. Dubin says: But think about the work of
3 544. What 544 was really about, she says, is
4 making sure that an actual creditor who would
5 otherwise be able to get this money for himself
6 is actually essentially barred from doing so and
7 the money goes into the estate and split -- is
8 split up among creditors, that the work of 544
9 is to give the trustee the ability to execute
10 the claim that the actual creditor would
11 otherwise have been able to in a way that
12 undermines bankruptcy principles.

13 So why isn't she right about that? If
14 we think about what 544 is really about, then it
15 seems to me to undermine your view that we
16 should be reading 106 to allow for the trustee
17 to recover money that an actual creditor would
18 not have been able to recover.

19 MS. BLATT: I -- I think you're just
20 saying Congress didn't pass 106. There's a
21 waiver of sovereign immunity --

22 JUSTICE JACKSON: No, no, no. I'm
23 talking about the principles behind --

24 MS. BLATT: Okay, but 5 -- 544 has --
25 has a waiver of sovereign immunity that the

1 government concedes six ways to Sunday is
2 written into 544(b).

3 JUSTICE JACKSON: And what Ms. Dubin
4 says --

5 MS. BLATT: If I could just finish my
6 answer. I know what Ms. Dubin said.

7 JUSTICE JACKSON: Okay.

8 MS. BLATT: If I can just finish my
9 answer.

10 JUSTICE JACKSON: All right.

11 MS. BLATT: Ms. Dubin agrees that
12 540 -- 544(b) has the words in there sovereign
13 immunity is hereby abrogated. I think she's
14 saying either Congress didn't put it in the
15 right place -- I don't know where she should
16 have put it --

17 JUSTICE JACKSON: She's saying --

18 MS. BLATT: -- or that it was a poor
19 choice.

20 JUSTICE JACKSON: -- that it's with
21 respect to a subsection of 544, not the whole
22 thing. We're --

23 MS. BLATT: Oh, no. She thinks it's
24 in 544(b) too because she just says it's sitting
25 there and waiting to be, I don't know,

1 impregnated by another waiver of sovereign
2 immunity.

3 JUSTICE JACKSON: No, no, no. 106(a)
4 absolutely refers to the Section 544. It's in
5 there.

6 MS. BLATT: Correct.

7 JUSTICE JACKSON: We see it. She says
8 the work that that's doing is with respect to
9 544(a), not (b). And, in fact, when you think
10 about what 544(b) is actually doing, it is
11 inconsistent with an argument that sovereign
12 immunity is supposed to be not taken into
13 account and that the actual creditor bar is not
14 supposed to apply to the trustee.

15 So she -- she's -- she's giving work
16 to 544 in 106(a). It -- she says it relates to
17 544(a) and that it really can't logically apply
18 to 544(b) when we understand what 544(b) is
19 doing.

20 MS. BLATT: And the government's reply
21 brief is completely silent on our argument that
22 106 has the -- sorry, state law has the exact
23 same relationship under (a), under (b). It's
24 incorporated. And absent a second waiver of
25 sovereign immunity, there is nothing -- there is

1 no work that 106(a) does except as operate as a
2 venue provision. It does no work as to waiving
3 sovereign immunity as to the underlying claim,
4 because she concedes 544(a) can never be used by
5 a hypothetical creditor without a second waiver
6 of sovereign immunity.

7 So, under all of 544, it operates as a
8 contingent waiver.

9 JUSTICE JACKSON: Isn't that what
10 she's also saying with respect to (b)? She's
11 saying there's no second waiver here, and you
12 need it.

13 MS. BLATT: Correct.

14 JUSTICE JACKSON: So you have to --
15 no, but, I mean, I think that makes her argument
16 consistent. She's saying --

17 MS. BLATT: It's definitely
18 consistent.

19 JUSTICE JACKSON: Right. She's saying
20 544(a) can go forward despite 106 because
21 there's a second waiver. Here, there's not, so
22 there shouldn't be.

23 MS. BLATT: And all I'm saying is that
24 there's no case nor any statute that has a
25 waiver of sovereign immunity, certainly not with

1 respect to a section, that's -- can -- that says
2 we waive it as to the claim, but if you can --
3 you can only bring the claim and succeed on it
4 if there's a second waiver.

5 And after Congress made this very
6 broad after this Court twice narrowed it, it
7 just would be a strange thing, especially when
8 state law's also incorporated in the very
9 provision at issue in Hoffman, the preferential,
10 which also relies -- it's the same -- it's the
11 same thing. It wasn't --

12 JUSTICE JACKSON: Thank you.

13 MS. BLATT: Okay. I'm -- if there are
14 no questions --

15 JUSTICE KAVANAUGH: You can continue.

16 MS. BLATT: Oh, I -- oh, the one thing
17 on the 548 and 544, it's true this is beyond the
18 two-year period, but let's just not forget that
19 544 is supposed to apply to everybody. It
20 applies to every transferee.

21 And it would be particularly odd to
22 say: Well, Congress waived sovereign immunity
23 with respect to both the two-year period under
24 548 and the generally four-year period under
25 548, except for the IRS, that they are -- they

1 are except, even though every other transferee,
2 and I guess with respect to all other
3 governments, tribes, et cetera, don't get that
4 two-year lookback period.

5 And, as here, the -- the trustee had
6 no choice because it had already -- the --
7 the -- the -- the -- the bankruptcy petition was
8 filed after the two-year period had expired, and
9 so the trustee acted promptly going after all --
10 all available assets.

11 In terms of your question about how
12 often are there creditors left over, if the
13 trustee's doing his job, the answer should be
14 none because the trustee is taking whatever
15 claim, even if it's \$5, and going after every
16 single transferee within the time period. And
17 every transferee would have to give back this
18 money.

19 And just in terms of the equities, the
20 notion that this is not a roadmap for fraud, if
21 the IRS had just given back the money, they
22 would have had six years to go after these
23 people. They just fought the case under
24 sovereign immunity, but they will always have 10
25 years. And this has a four-year statute of

1 limitations.

2 The IRS -- excuse me. The government
3 itself has a six-year fraudulent transfer
4 statute, so they have two years longer than all
5 the states does.

6 I think that's all I have if there are
7 no --

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas?

11 Justice Sotomayor?

12 Thank you, counsel.

13 MS. BLATT: Thank you.

14 CHIEF JUSTICE ROBERTS: Rebuttal,
15 Ms. Dubin?

16 REBUTTAL ARGUMENT OF YAIRA DUBIN

17 ON BEHALF OF THE PETITIONER

18 MS. DUBIN: Thank you, Mr. Chief
19 Justice.

20 Justice Jackson and Justice Barrett,
21 you were both asking about 544(a), and I just
22 want to clarify something. 544(a) does not
23 require a second waiver of sovereign immunity.

24 26 U.S.C. 6323 gives the trustee --
25 gives a hypothetical judgment lien creditor the

1 right to prime a federal tax lien that isn't
2 properly recorded. There's no suit required to
3 do that. It just means that that tax lien is
4 not valid against that hypothetical judgment
5 lien creditor.

6 The trustee can then step into the
7 shoes of that judgment lien creditor. Again, no
8 waiver of immunity required. And that is all
9 encompassed within 544(a) and 26 U.S.C. 6323.

10 Where 106(a) comes into being is to
11 allow the trustee to effectuate that right
12 within the bankruptcy proceeding to bring an
13 adversary proceeding to do things to make sure
14 that it is enforcing the priority of that lien.

15 Second, I wanted to come back to
16 Justice Barrett's question about the defenses
17 that a transferee could raise. This is in the
18 red brief appendix at 9a, which is also Utah
19 Code 2569. Those, the good-faith defense is a
20 defense to a transfer, not -- to avoidance, not
21 to recovery.

22 The third thing is that the trustee
23 said that, in our view, you can't go after the
24 insiders.

25 That is not correct. You absolutely

1 should go after the insiders and can go after
2 the insiders. Our point is that going after the
3 insiders in an avoidance action doesn't affect
4 the rights of the United States. It just
5 affects the transfer vis-à-vis the insiders.

6 Justice Gorsuch, you asked a few times
7 about the argument that 544(b) looks and
8 requires an actual creditor.

9 That is the trustee's alternative
10 argument, but on the primary argument, everyone
11 agrees, all the circuits have agreed, it is the
12 uniform practice for over a hundred years. And,
13 in fact, this trustee has always pointed to a
14 suit against the United States as the predicate
15 for the 544(b) action. We don't think there's
16 any reason to reach the alternative argument in
17 this case, but if you do, for the reasons we
18 explained in our reply brief, it's wrong.

19 Finally, stepping back and moving to
20 the primary argument, there's been a bunch of
21 questions about 544(b) and, like, what Congress
22 would have wanted here. And the point that
23 we've been making is that 544(b) has always been
24 understood as a provision that brings liability
25 that already exists into the Bankruptcy Code.

1 There's no reason to think that when
2 Congress generally waived immunity as to 544 and
3 specifically said that it was not affecting the
4 substance of those provisions that what it
5 actually was doing was creating new liability
6 that had never existed against the United States
7 under state fraudulent transfer law.

8 Finally, on 106(a), we think we have
9 the much better reading of the text of 106(a).
10 The trustee's reading essentially hinges on the
11 words "with respect to," which cannot bear that
12 weight. And if you -- if you add in the clear
13 statement rule, we think we certainly should
14 prevail on the text. But we have obviously been
15 losing. We've lost this case in three courts,
16 and I think the reason is that there's some
17 intuition that there's something strange about
18 what's going on here, that somehow our reading
19 renders 106(a) an empty gesture as to 544.

20 But that's not right for the reasons
21 we've discussed today. Under our reading,
22 544(a) has meaning, important meaning, as to the
23 United States, and 544(b) has meaning as to any
24 sovereign that's waived its sovereign immunity
25 from a fraudulent transfer action, as four

1 states have done.

2 But the trustee is right that his
3 reading would mean that 544(b) would have more
4 effect as to the United States. But I submit
5 that that's a bug, not a feature, of the
6 trustee's reading. I don't think that Congress
7 wanted to expose the United States to fraudulent
8 transfer liability based on the terms set by
9 state law, and I think we know that from the
10 text of 106(a).

11 But Congress also passed a federal
12 fraudulent transfer provision in Section 548,
13 and it selected a two-year lookback period. And
14 there's every reason to think that Congress
15 intended that lookback period to apply to the
16 IRS, not indeterminate limitations periods set
17 by 50 states.

18 We ask that you reverse the judgment
19 below.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 The case is submitted.

23 (Whereupon, at 12:18 p.m., the case
24 was submitted.)

25

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