No. 23-824

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DAVID L. MILLER

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Bankruptcy Code permits a bankruptcy trustee to avoid any prepetition transfer of the debtor's property that would be voidable "under applicable law" outside bankruptcy by an actual unsecured creditor of the estate. 11 U.S.C. 544(b)(1). The applicable law may be state law. Elsewhere, the Code abrogates the sovereign immunity of all governmental units "to the extent set forth in this section with respect to" various sections of the Code, including Section 544. 11 U.S.C. 106(a)(1). The court of appeals below joined a circuit split in holding that Section 106(a)(1) permits a bankruptcy trustee to avoid a debtor's tax payment to the United States under Section 544(b), even though no actual creditor could have obtained relief outside of bankruptcy in light of sovereign immunity, the Supremacy Clause, and the Appropriations Clause. The question presented is as follows:

Whether a bankruptcy trustee may avoid a debtor's tax payment to the United States under Section 544(b) when no actual creditor could have obtained relief under the applicable state fraudulent-transfer law outside of bankruptcy.

RELATED PROCEEDINGS

United States Bankruptcy Court (D. Utah):

Miller v. *United States (In re All Resort Grp., Inc.)*, No. 18-2089 (Mar. 31, 2020)

United States District Court (D. Utah):

United States v. *Miller*, No. 20-cv-248 (Sept. 8, 2021)

United States Court of Appeals (10th Cir.):

Miller v. *United States*, No. 21-4135 (June 27, 2023)

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The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 71 F.4th 1247. The memorandum decision and order of the district court (App., *infra*, 15a-17a) is not published in the Federal Supplement but is available at 2021 WL 5194698. The opinion of the bankruptcy court (App., *infra*, 18a-49a) is reported at 617 B.R. 375.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2023. A petition for rehearing was denied on September 1, 2023 (App., *infra*, 52a-53a). On November 17, 2023, Justice Gorsuch extended the time within

which to file a petition for a writ of certiorari to and including January 2, 2024. On December 19, 2023, Justice Gorsuch further extended the time to and including January 29, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 11 U.S.C. 544 through 549, Congress has granted a trustee in a bankruptcy proceeding "general avoiding powers" that include the authority to "'set aside certain types of transfers and recapture the value of those avoided transfers for the benefit of the estate.'" *Merit Mgmt. Grp., LP* v. *FTI Consulting, Inc.*, 583 U.S. 366, 370 (2018) (alterations omitted). Many of those provisions establish the substantive criteria that authorize a trustee to avoid transfers in specified circumstances. For example, Section 548 authorizes a trustee to "avoid" a fraudulent transfer of property the debtor conveyed to a creditor in the run-up to bankruptcy—*i.e.*, "within 2 years before the date of the filing of the petition." 11 U.S.C. 548(a)(1).

By contrast, 11 U.S.C. 544(b)—the provision at issue here—is predicated on law external to the Bankruptcy Code, 11 U.S.C. 101 *et seq*. Section 544(b) authorizes a trustee to avoid transfers that are "voidable under applicable law by a creditor holding an unsecured claim" allowable in the bankruptcy. 11 U.S.C. 544(b)(1). As "applicable law," trustees most often invoke state laws authorizing creditors to avoid fraudulent transfers, many of which allow longer look-back periods than Section 548.[1] See *In re Xonics Photochemical, Inc.*, 841

[1] Forty-five States have adopted some version of the 1984 Uniform Fraudulent Transfer Act, or its successor, the 2014 Uniform Voidable Transactions Act. See 5 *Collier on Bankruptcy*

F.2d 198, 202 (7th Cir. 1988). Section 544(b) thus requires the trustee to identify an actual unsecured creditor that could have successfully brought an avoidance claim had no bankruptcy petition been filed. Since the trustee's rights under Section 544(b) are derivative of the actual creditor's—that is, because the trustee "stand[s] in the shoes of [the] actual creditor"—he is "subject to the same defenses a transferee would have in a state fraudulent conveyance action brought by the actual creditor." *Mendelsohn* v. *Kovalchuk (In re APCO Merch. Servs., Inc.)*, 585 B.R. 306, 314 (Bankr. E.D.N.Y. 2018). And "[i]f there is no creditor against whom the transfer is voidable under the applicable law, the trustee is powerless to act under section 544(b)(1)." 5 *Collier on Bankruptcy* ¶ 544.06[1], at 544-24 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. Apr. 2022).

2. a. This case arises out of a bankruptcy proceeding filed by All Resort Group, Inc. (ARG) in 2017. App., *infra*, 2a. In 2014, before it filed for bankruptcy, ARG paid $145,138.78 to the Internal Revenue Service (IRS) to cover the personal tax debts of two of its principals, both of whom were ARG shareholders, officers, and directors. *Id.* at 2a, 20a. At the time of the payments, ARG was insolvent. *Id.* at 26a. Among ARG's debts when it filed for bankruptcy was an unpaid judgment resulting from a discrimination lawsuit brought by a former employee. *Id.* at 20a-21a.

After the bankruptcy case was converted from Chapter 11 to Chapter 7, the Chapter 7 trustee brought an adversary proceeding against the United States under Sections 544(b) and 548(a), seeking to avoid the 2014 tax payments made on behalf of ARG's principals. App.,

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¶ 544.06[2A]-[2B], at 544-26 to 544-27 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. Apr. 2022) (collecting state statutes).

infra, at 18a. The trustee and the United States each moved for summary judgment. *Id.* at 19a.

The bankruptcy court held that because the tax payments were made more than two years before the filing of ARG's bankruptcy petition, the trustee's claim under Section 548—the Bankruptcy Code's freestanding fraudulent-transfer provision, see p. 2, *supra*—was untimely. App., *infra*, 24a n.26.

But the bankruptcy court granted summary judgment to the trustee on his Section 544(b) claim, which relied on the Utah Uniform Fraudulent Transfer Act (UUFTA), Utah Code Ann. §§ 25-6-1 *et seq.* (2014), as the "applicable law" under which the trustee argued that the tax payments were voidable. As relevant here, the UUFTA has a four-year limitations period on an action to recover a transfer that was constructively fraudulent, Utah Code Ann. § 25-6-10(2), so the trustee's Section 544(b) claim did not suffer from the same timeliness defect as his Section 548 claim.

Instead, the central dispute for purposes of Section 544(b) was whether the trustee could satisfy that provision's substantive requirements—more precisely, the requirement that there must exist an actual creditor who could, outside of bankruptcy, avoid the transfer at issue. App., *infra*, 26a. The trustee asserted that there existed an actual creditor (the former employee) who could bring a lawsuit under applicable law (the UUFTA). *Id.* at 26a-27a. But the trustee did not dispute that "outside bankruptcy, sovereign immunity would bar [the former employee's] suit against the United States" to recover federal tax payments. *Id.* at 26a. Accordingly, the government contended that the challenged payments were not "voidable under applicable law by a creditor holding an unsecured claim." 11 U.S.C. 544(b)(1).

The bankruptcy court rejected that contention, agreeing with the trustee that Section 106(a) of the Code "abrogates that sovereign immunity in the bankruptcy context." App., *infra*, 26a, 39a-40a. Section 106(a) states that "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to" 59 sections of the Bankruptcy Code, including Section 544. 11 U.S.C. 106(a). In the bankruptcy court's view, Section 106(a) not only abrogates the United States' sovereign immunity within the adversary bankruptcy proceeding in which a trustee asserts a Section 544(b) claim, but also "remove[s] the ability of [the United States] to interpose immunity as a defense to the underlying state law cause of action." App., *infra*, 39a. The court emphasized that Section 106(a) uses "broad language" and "contains no exceptions, qualifiers, or carve-outs in its language, 'indicating a clear legislative intent to be as broad as possible in abrogating sovereign immunity in the bankruptcy context.'" *Id.* at 33a-34a (citation omitted). The court thus believed that Section 106(a)'s "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 state-law claim at issue. *Id.* at 39a (citation omitted).

The bankruptcy court also rejected the government's argument that the Internal Revenue Code would "preempt a suit brought by a debtor's creditors under state law to recover as fraudulent transfers tax payments made to the IRS." App., *infra*, 43a. The court believed that the trustee's Section 544(b) claim is a "federal cause of action and therefore cannot be preempted." *Id.* at 46a (brackets and citation omitted). In

the court's view, moreover, the trustee's action sought to "collect a fraudulent transfer," not a "tax payment," and therefore did not "implicate th[e] field" of "federal tax collection." *Ibid.*

The bankruptcy court avoided the relevant tax payments and awarded the trustee a judgment against the United States in the amount of $145,138.78. App., *infra*, 49a.

b. The district court affirmed, adopting the bankruptcy court's reasoning in full. App., *infra*, 15a-17a.

3. The court of appeals also affirmed, holding that the waiver of sovereign immunity in Section 106(a) "reaches the underlying state law cause of action that § 544(b)(1) authorizes the Trustee to rely on in seeking to avoid the transfers." App., *infra*, 5a.

The court of appeals explained that Section 106(a)(1) waives sovereign immunity "with respect to" Section 544. App., *infra*, 7a-8a. That phrase, the court reasoned, generally has a "broadening effect," reflecting Congress's intent that the waiver "'reach any subject that has a connection with . . . the topics the statute enumerates.'" *Id.* at 7a (quoting *Lamar, Archer & Cofrin, LLP* v. *Appling*, 584 U.S. 709, 717-718 (2018)) (citation and emphasis omitted). The court believed that Section 106(a) "'has a connection with'" the state law invoked by the trustee in the context of a Section 544(b) action, and that Congress thus "clearly" intended "to abolish the Government's sovereign immunity in an avoidance proceeding arising under § 544(b)(1), regardless of the context in which the defense arises." *Id.* at 8a (citation omitted).

The court of appeals acknowledged (App., *infra*, 4a) that its decision conflicts with the Seventh Circuit's holding in *In re Equipment Acquisition Resources, Inc.*, 742

F.3d 743 (2014) (*EAR*). The Tenth Circuit believed, however, that *EAR* "never meaningfully addressed the scope of § 106(a) as reflected in its text," and that the Ninth Circuit's contrary decision in *Zazzali* v. *United States (In re DBSI, Inc.)*, 869 F.3d 1004 (2017), is more "faithful to the text of Code § 106(a)." App., *infra*, 9a, 11a. The court further noted that the Fourth Circuit has also adopted "the Ninth Circuit's view that § 106(a)(1)'s waiver of sovereign immunity extends to a state law cause of action underlying a trustee's § 544(b)(1) action." *Id.* at 12a n.1 (citing *Cook* v. *United States (In re Yahweh Ctr., Inc.)*, 27 F.4th 960, 966 (4th Cir. 2022)); see *id.* at 4a.

Finally, the court of appeals made "short work" of what it understood to be the government's "alternative argument that if sovereign immunity does not bar the Trustee's § 544(b)(1) action, field preemption * * * does so by way of the Internal Revenue Code's * * * interest in tax collection." App., *infra*, 12a-13a. The court explained that Section 544(b) is a federal statute, and if Congress thought Section 544(b) "posed an obstacle to its objectives," it "surely would have added an express preemption provision." *Id.* at 13a. The court further reasoned that "[t]he argument for field preemption * * * is surely rather weak where Congress is aware of the operation of state law in a field of federal interest * * * and has decided to place the policy of equal distribution and fairness among creditors on equal footing." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals held that a bankruptcy trustee may avoid tax payments made to the United States by invoking 11 U.S.C. 544(b) and state fraudulent-transfer law, even though no actual creditor could obtain such

relief outside of bankruptcy. That interpretation of the Bankruptcy Code is incorrect. And in adopting it, the Tenth Circuit expressly broke with the Seventh Circuit and sided with the Fourth and Ninth Circuits, joining an acknowledged conflict among the courts of appeals. The question presented is recurring and important: if left unreviewed, the rule embraced by the decision below threatens substantial consequences for the federal fisc. This Court's review is warranted.

A. The Decision Of The Court Of Appeals Is Wrong

Because no actual unsecured creditor could have avoided the federal tax payments at issue here under Utah fraudulent-transfer law, the Chapter 7 trustee had nobody's shoes to step into when seeking to avoid those tax payments under Section 544(b) by invoking that state law.

1. It is undisputed that a creditor ordinarily cannot sue the federal government under state fraudulent-transfer law to recoup a debtor's federal tax payment. Federal tax collection is a matter of federal law, U.S. Const. Art. I, § 8, Cl. 1, to which a contrary state law must yield under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2. A state-law right to set aside or disregard a payment does not bind the Internal Revenue Service. Cf. *United States* v. *Mitchell*, 403 U.S. 190, 204 (1971) (federal law, not state law, "governs what is exempt from federal levy"). And any creditor's state-law action against the United States to avoid a federal tax payment would be barred by principles of sovereign immunity. See *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 33-34 (1992) (actions against the federal government are prohibited absent an "unequivocally expressed" statutory waiver of immunity from suit) (citation omitted).

The courts below nonetheless held that because Section 106(a) of the Bankruptcy Code abrogates the United States' immunity "with respect to" Section 544, 11 U.S.C. 106(a), a trustee can recover a debtor's federal tax payment by invoking state fraudulent-transfer law as the predicate for a Section 544(b) claim. That is incorrect.

Section 106(a) states that "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following[] * * * Sections." 11 U.S.C. 106(a)(2). Section 106(a)(1) then enumerates 59 sections of the Bankruptcy Code by section number, including Section 544. Section 106(a)(5) cautions, however, that nothing in Section 106 "shall create any substantive claim for relief or cause of action not otherwise existing" under the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or non-bankruptcy law. 11 U.S.C. 106(a)(5). Section 106(a) thus authorizes the trustee to invoke certain provisions of the Bankruptcy Code against the government within the bankruptcy proceeding—but it does not purport to create a substantive claim for relief or a cause of action that would not otherwise exist.

Section 544(b), in turn, has a two-step structure: first, the trustee must show that the relevant transfer "is voidable under applicable law by a creditor holding an unsecured claim"; if so, the trustee "may avoid" the transfer within the bankruptcy proceeding. See 11 U.S.C. 544(b)(1); pp. 2-3, *supra*. Section 106(a) unambiguously waives the government's immunity at the second step—that is, sovereign immunity does not preclude a trustee from invoking Section 544 (or any other

provision identified in Section 106(a)(1)) against the federal government within the bankruptcy proceeding.

But critically, Section 106(a) has no bearing on the first step—that is, on whether an unsecured creditor's state-law avoidance action would be viable outside bankruptcy. As this Court has explained, the inquiry into "whether there has been a waiver of sovereign immunity" is "analytically distinct" from the inquiry into "whether the source of substantive law upon which the claimant relies provides an avenue for relief." *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994). The plain language of Section 544(b) requires a trustee "to show that a creditor exists who could use a state's 'applicable law' to recover the payment from the IRS." *In re Equipment Acquisition Res., Inc.*, 742 F.3d 743, 747 (7th Cir. 2014) (*EAR*). In other words, a trustee must prove that "there is an actual creditor * * * who, under state law, could avoid the transfers" outside of bankruptcy. *Sender* v. *Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996) (citation omitted). In applying that standard, a court must consider all legal rules that would have borne on the proper disposition of that suit by "a creditor holding an unsecured claim" to avoid the payments under state law. 11 U.S.C. 544(b)(1). If the creditor identified by the trustee "could not succeed for any reason—whether due to the statute of limitations, estoppel, res judicata, waiver, or any other defense—then the trustee is similarly barred and cannot avoid the transfer." *EAR*, 742 F.3d at 746.

Here, it is undisputed that an unsecured creditor would not have been able to bring a successful suit against the IRS to avoid the transfer under Utah law because sovereign immunity and the Supremacy Clause (and the Appropriations Clause to the extent the credi-

tor sought recovery) would have barred the suit. App., *infra*, 26a (noting the trustee's agreement that the employee's suit against the United States would have been barred if brought outside bankruptcy). Thus, while Section 106(a)'s abrogation of sovereign immunity "with respect to § 544" allows the trustee to assert a Section 544(b) claim against the United States in bankruptcy court, the trustee's claim should have failed on the merits because "outside of bankruptcy and apart from Code § 544(b)(1)," there is no creditor who could have avoided the debtor's payments to the IRS. *Id.* at 3a, 12a.

The relevant distinction would be quite clear if Utah's fraudulent-transfer law included an express exception stating that the law did not apply to transfers made to the federal government. Then, the trustee's Section 544(b) claim would plainly fail on the merits because the transfer would not be "voidable under applicable law"—even though Section 106(a) would waive the government's sovereign immunity from the trustee's adversary proceeding to avoid the payments. 11 U.S.C. 544(b)(1). The result should be no different when the barrier to the unsecured creditor's state-law avoidance action is imposed by fundamental principles of sovereign immunity and the Supremacy Clause rather than the express terms of the state fraudulent-transfer law. In both cases, the state law would not allow the unsecured creditor to avoid the transfer. Therefore, the trustee who stands in that creditor's shoes for purposes of Section 544(b) likewise cannot avoid the transfer.

2. The court of appeals' contrary reasoning is unpersuasive.

Most fundamentally, the decision below conflates the sovereign-immunity and merits issues—erroneously relying on the waiver in Section 106(a) as the basis for

finding that the trustee has a substantive claim against the United States under Section 544(b)(1), even though no unsecured creditor could have obtained relief against the United States under the applicable non-bankruptcy law that is incorporated by Section 544(b)(1). As explained above, see pp. 8-11, *supra*, that analysis cannot be reconciled with the plain text of the Code.

The court of appeals observed that Section 106(a)(1)'s waiver of sovereign immunity "with respect to" the specified provisions is phrased "broad[ly]," and thus concluded that it should be read to abrogate any immunity respecting a claim brought under Section 544(b)—including an assertion of immunity from the predicate state-law claim. App., *infra*, 7a (citation and emphasis omitted). But Section 106(a) abrogates sovereign immunity only "with respect to" the identified Bankruptcy Code provisions—*i.e.*, only insofar as such immunity would otherwise preclude the trustee from exercising against a governmental unit the powers granted by the identified Code provisions. That waiver is broad, insofar as it wholly abrogates sovereign immunity within the bankruptcy proceeding as to dozens of identified subsections. But nothing in Section 106(a) purports to alter any of the identified provisions' *substantive* requirements—here, that the disputed transfer actually be voidable under the applicable state law. Put another way, there is no apparent contextual justification for modifying the substantive requirements of Section 544(b)(1)—*i.e.*, that a transfer be voidable *by an unsecured creditor*—simply due to the waiver of immunity for a suit *by the trustee*. "An absence of immunity does not result in liability if the substantive law in question is not intended to reach the federal entity."

United States Postal Serv. v. *Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 744 (2004).

Importantly, the court of appeals ignored that Section 106(a) abrogates sovereign immunity "as to a governmental unit" only "*to the extent set forth in this section*." 11 U.S.C. 106(a) (emphasis added). And a subsequent paragraph states that "[n]othing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law." 11 U.S.C. 106(a)(5). The decision below runs contrary to that directive. Section 544(b)(1) authorizes relief only to the extent that an unsecured creditor could obtain relief outside bankruptcy. That is, Section 544(b) does not subject a transferee of estate property to any avoidance claim to which the transferee was not already subject; it simply takes one creditor's existing right to avoid transfers and authorizes a bankruptcy trustee to invoke that right for the benefit of all of the creditors. See *Official Comm. of Unsecured Creditors of Cybergenics Corp.* v. *Chinery (In re Cybergenics Corp.)*, 226 F.3d 237, 244 (3d Cir. 2000). Yet the court of appeals held that Section 106(a) modifies that rule so that—where the transferee is a governmental unit—the filing of a bankruptcy petition creates new liability for avoidance actions under state law, where such liability does not otherwise exist. That holding cannot be reconciled with Section 106(a)(5).

Three other paragraphs in Section 106(a) further confirm that it operates to waive governmental sovereign immunity *within* the bankruptcy proceeding in connection with the specified sections—but it does so without otherwise altering the substantive requirements of the identified provisions. Paragraph (2) states

that the bankruptcy court "may hear and determine any issue arising with respect to the application of such sections to governmental units"; paragraph (3) authorizes the bankruptcy court to grant monetary relief, not including punitive damages, against a governmental unit; and paragraph (4) authorizes the bankruptcy court to enforce any such order or judgment against a governmental unit. 11 U.S.C. 106(a)(2), (3), and (4). Each of those provisions focuses on the trustee's ability to invoke and effectuate the identified Code provisions against a governmental unit within the bankruptcy proceeding; none of them contemplates any alteration of the underlying substantive requirements of the relevant provisions.

The court of appeals' error is premised, at least in part, on the court's assumption that the government is raising a "sovereign immunity defense to the Utah state law the Trustee invokes." App., *infra*, 8a. But the government has not asserted sovereign immunity as a defense to *the trustee's* action; it has identified sovereign immunity as one reason why an *actual creditor* could not avoid the tax payments outside bankruptcy—as Section 544(b) requires before the trustee can have a viable claim.

The court of appeals also believed that the government's interpretation of Section 106(a) would render that provision "meaningless" as to Section 544. App., *infra*, 12a. That is incorrect. Section 106(a) indisputably serves a function as to Section 544(a), under which a trustee may exercise the powers of a *hypothetical* judgment lien creditor. The waiver of immunity in Section 106(a) permits the trustee to exercise that power against the federal government—for instance, by priming an unfiled federal tax lien under 26 U.S.C. 6323.

See, *e.g.*, *United States* v. *LMS Holding Co. (In re LMS Holding Co.)*, 50 F.3d 1526, 1527 (10th Cir. 1995). That alone gives meaning to Section 106(a)'s waiver "with respect to" Section 544. See *EAR*, 742 F.3d at 749. Contrary to the court of appeals' belief, App., *infra*, 12a, it is not necessary to infer a viable claim against the government in every subsection of Section 544. Section 106(a)(1) refers to Code provisions by section number, without identifying any specific subsections. Many of the 59 sections referenced in Section 106(a)(1) include subsections as to which the waiver of sovereign immunity is irrelevant. *EAR*, 742 F.3d at 749 & n.4. There would be nothing unusual if the waiver's practical effect were limited to Section 544(a).

In any event, Section 106(a) also serves an independent function as to Section 544(b). Some States, for example, have waived their own immunity such that, outside bankruptcy, they may be subject to a creditor's state-law avoidance claim.[2] Transfers to those States, therefore, can be "voidable under applicable law by a creditor," 11 U.S.C. 544(b)(1), and Section 106(a)(1) is necessary to allow bankruptcy trustees to bring avoidance actions against those state governments in bankruptcy.

The court of appeals also relied on the fact that the current version of Section 106(a) was enacted "in direct response to two Supreme Court decisions," *Nordic Village*, *supra*, and *Hoffman* v. *Connecticut Department of Income Maintenance*, 492 U.S. 96 (1989), which held that the prior version of Section 106 was not sufficiently clear to abrogate the government's immunity from

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[2] See, *e.g.*, Ohio Rev. Code Ann. § 2743.02 (West 2021); N.Y. Ct. Cl. Act § 8 (McKinney 2023); Conn. Gen. Stat. Ann. § 4-160 (West 2023); 705 Ill. Comp. Stat. Ann. 505/8 (West 2018).

money judgments in bankruptcy. App., *infra*, 8a. But there is no evidence that Congress intended to subject the federal fisc to novel state-law liabilities for avoidance actions by amending Section 106(a). Rather, the current version of Section 106(a) was designed to "make section 106 conform to the Congressional intent of the Bankruptcy Reform Act of 1978," by "expressly provid[ing] for a waiver of sovereign immunity by governmental units with respect to monetary recoveries." H.R. Rep. No. 835, 103d Cong., 2d Sess. 42 (1994). The waiver of sovereign immunity in the 1978 Act, in turn, was intended to "achieve approximately the same result that would prevail outside of bankruptcy." S. Rep. No. 989, 95th Cong., 2d Sess. 29 (1978). There is accordingly no reason to believe that Congress intended to create avoidance liability that did *not* exist outside of bankruptcy when it enacted and amended Section 106(a).

Finally, even if the court of appeals' interpretation of Section 106(a) were plausible—which it is not—the clear-statement rule protecting the federal government's sovereign immunity forecloses that interpretation. "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC*, 510 U.S. at 475. This Court has "said on many occasions that a waiver of sovereign immunity must be 'unequivocally expressed' in statutory text," *FAA* v. *Cooper*, 566 U.S. 284, 290 (2012) (citation omitted), and that any ambiguities must be construed "in favor of immunity," *United States* v. *Williams*, 514 U.S. 527, 531 (1995), "so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires," *Cooper*, 566 U.S. at 290. That principle applies not only where the question is whether the government has

"consented to be sued" at all, but also to "any ambiguities in the scope of a waiver." *Id.* at 291.

Here, the trustee seeks monetary recovery from the federal government, so sovereign immunity would ordinarily bar this suit. Any ambiguity in the scope of Section 106(a)'s waiver should therefore be construed strictly "in favor of immunity." *Williams*, 514 U.S. at 531. And while Congress has waived the United States' immunity with respect to Section 544(b) actions brought by the trustee within the bankruptcy proceeding, nothing in Section 106(a) suggests—let alone clearly states—that such a waiver extends to the underlying state-law suit on which Section 544(b) is predicated. *EAR*, 742 F.3d at 750-751 ("[T]he [Supreme] Court's insistence that Congress be unmistakably clear when opening the federal government to suit is further reason why we cannot find that Congress did so implicitly. If Congress intends to eliminate § 544(b)'s actual-creditor requirement in actions against the federal government, it must say so.").

3. In any event, even if the court of appeals were correct that Section 106(a) eliminates any sovereign immunity obstacle to the underlying state-law claim in a Section 544(b) action brought by the trustee, it still does not follow that the tax payments at issue are "voidable under applicable law by an unsecured creditor." 11 U.S.C. 544(b)(1). As the Seventh Circuit noted in *EAR*, a creditor who attempted to use state fraudulent-transfer laws to avoid payments to the IRS outside of bankruptcy "would face significant constitutional obstacles." 742 F.3d at 747-748. Most obviously, "the Supremacy Clause prevents states from enabling their residents to recover tax payments directly from the United States." *Id.* at 748 (citing *McCulloch* v. *Mary-*

land, 17 U.S. (4 Wheat.) 316, 436 (1819)). Moreover, the Appropriations Clause means that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Ibid.* (quoting *OPM* v. *Richmond*, 496 U.S. 414, 424 (1990)). Accordingly, "sovereign immunity is just one reason why there is no applicable state law that would enable a creditor to recover from the IRS outside of bankruptcy"; even "if Congress eliminated the sovereign-immunity problem" through Section 106(a)—which it did not—those other obstacles do not "disappear[]." *Ibid.*

The Tenth Circuit disagreed, reasoning that Section 544(b)(1) "is a federal statute, enacted by * * * the same legislative body that the Government now asserts has preempted its operation." App., *infra*, 13a. But the proper question, as explained above, see pp. 11-14, *supra*, is not whether *the trustee's* Section 544(b) claim is preempted; it is whether an actual unsecured creditor's attempt to avoid these federal tax payments outside bankruptcy would be preempted. Because a state-law action to avoid a federal tax payment would indisputably be preempted outside bankruptcy, the trustee cannot prove that the tax payments are "voidable under applicable law by a creditor," as Section 544(b)(1) requires. That is true regardless of how Section 106(a)—which addresses only the sovereign-immunity bar—is interpreted. The Tenth Circuit's rejection of the government's preemption argument was therefore independently flawed.

B. The Decision Below Is Part Of An Acknowledged Circuit Conflict

Four courts of appeals have considered whether a bankruptcy trustee may avoid a tax payment to the United States under Section 544(b) and state fraudulent-

transfer law when there is no creditor who could have obtained such relief outside of bankruptcy. In ruling in the trustee's favor, the Tenth Circuit expressly broke with the Seventh Circuit and sided with the Fourth and Ninth Circuits. App., *infra*, 4a.

1. As noted above, see pp. 6-7, *supra*, the Seventh Circuit in *EAR* held that a trustee cannot "bring an action under § 544(b)(1) of the Bankruptcy Code to recoup a debtor's federal tax payment." 742 F.3d at 744. The Seventh Circuit reasoned that the plain language of Section 544(b) requires a trustee "to show that a creditor exists who could use a state's 'applicable law' to recover the payment from the IRS," and that Section 106(a) "does not displace th[at] actual creditor requirement." *Id.* at 744, 747. "Congress," the court explained, "did not alter § 544(b)'s substantive requirements merely by stating that the federal government's immunity was abrogated 'with respect to' this provision." *Id.* at 747. Because "[n]othing in § 106(a)(1) gives the trustee greater rights to avoid transfers than the unsecured creditor would have under state law," and "[o]rdinarily, a creditor cannot bring a[] [state-law] fraudulent-transfer claim against the IRS," "neither can the [trustee]." *Id.* at 744.

The Seventh Circuit further noted that "sovereign immunity is just one reason why there is no applicable state law that would enable a creditor to recover from the IRS outside of bankruptcy": the Supremacy Clause and the Appropriations Clause would likely pose "significant constitutional obstacles" to any such state-law action. *EAR*, 742 F.3d at 747-748; see pp. 17-18, *supra*.

2. As the decision below acknowledged, App., *infra*, 4a, two other circuits had already expressly disagreed with *EAR*. In *Zazzali* v. *United States (In re DBSI,*

Inc.), 869 F.3d 1004 (9th Cir. 2017), the court acknowledged that it faced a "nearly identical situation" as the Seventh Circuit in *EAR*, "but reached the opposite result," holding that "Section 106(a)(1) is unambiguous and clearly abrogates sovereign immunity as to Section 544(b)(1), including the underlying state law cause of action." *Id.* at 1013. In the Ninth Circuit's view, "Section 544(b)(1) can only mean one thing: a trustee need only identify an unsecured creditor, who, but for sovereign immunity, could bring an avoidance action against the IRS." *Id.* at 1010.

The Ninth Circuit likewise rejected the argument that the "result [it] reach[ed] * * * runs afoul not only of sovereign immunity, but also potentially of the Appropriations Clause and the Supremacy Clause." *DBSI*, 869 F.3d at 1014. While the court recognized that "it may be true that an unsecured creditor who seeks to bring such claims against the IRS in state court would face constitutional obstacles," the court deemed that "irrelevant" because its "holding [wa]s limited only to the rights of a trustee to bring fraudulent transfer actions in bankruptcy." *Id.* at 1015.

Similarly, in *Cook* v. *United States (In re Yahweh Center)*, 27 F.4th 960 (4th Cir. 2022), the court "generally agree[d] with the Ninth Circuit's conclusion" in *DBSI*, rejecting the government's theory that the trustee had "failed to present an 'applicable law' that an unsecured creditor could rely on to void a fraudulent transfer or obligation against the United States in a § 544(b)(1) lawsuit." *Id.* at 966 & n.5. The Fourth Circuit held that Section 106(a) "forecloses the govern-

ment's position that sovereign immunity bars any action by an unsecured creditor under the Act." *Id.* at 966.[3]

By following the Fourth and Ninth Circuits, App., *infra*, 4a, the decision below has joined that acknowledged conflict within the circuits.

C. The Question Presented Is Recurring And Important

The question presented has arisen repeatedly. In addition to the four court of appeals decisions discussed above, see pp. 18-21, *supra*, bankruptcy courts have frequently addressed this question over the last two decades, disagreeing on the correct resolution and thoroughly airing the relevant legal issues.[4]

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[3] The *Yahweh* court ultimately ruled for the government on other grounds, holding that a debtor's payment of its *own* tax penalty liability is not a fraudulent transfer that is "voidable under applicable law by a creditor." 27 F.4th at 967-968.

[4] Compare, *e.g.*, *Bauer* v. *General Electric Capital Corp. (In re Oncology of Ocean County, LLC)*, 510 B.R. 463, 469-470 (Bankr. D.N.J. 2014) (agreeing with the Seventh Circuit in *EAR* that "the United States is protected from the Trustee's § 544(b)(1) claim, by virtue of its sovereign immunity from [state] fraudulent transfer law, which * * * is not abrogated by 11 U.S.C. § 106(a)(1)"); *Pyfer* v. *Katzman (In re National Pool Constr., Inc.)*, No. 09-34394, 2015 WL 394507, at *1-*2 (Bankr. D.N.J. Jan. 29, 2015) (similar); *United States* v. *Field (In re Abatement Envtl. Res., Inc.)*, 301 B.R. 830, 832-836 (D. Md. 2003) (similar), aff'd on other grounds, 102 Fed. Appx. 272 (4th Cir. 2004), with *VMI Liquidating Trust Dated Dec. 16, 2011* v. *United States (In re Valley Mortg., Inc.)*, No. 10-19101, 2013 WL 5314369, at *3-*4 (Bankr. D. Colo. Sept. 18, 2013) (holding that Section 106(a) abrogates the United States' sovereign immunity as to the state-law cause of action underlying a Section 544(b)(1) claim); *Furr* v. *Dep't of Treasury Internal Revenue Serv. (In re Pharmacy Distrib. Servs., Inc.)*, 455 B.R. 817, 820-821 (Bankr. S.D. Fla. 2011) (similar); *Menotte* v. *United States (In re Custom Contractors, LLC)*, 439 B.R. 544, 548-549 (Bankr. S.D. Fla. 2010) (similar); *Sharp* v. *United States (In re SK Foods, L.P.)*, No. 09-29162,

Moreover, the question presented has important consequences for the federal government. The Internal Revenue Code generally imposes a two- or three-year limitations period on claims to recover taxes already paid. See 26 U.S.C. 6511(a). And the Bankruptcy Code's own fraudulent-transfer provision imposes a two-year limitations period on such actions. See 11 U.S.C. 548(b); pp. 2, 4, *supra*. But absent this Court's intervention, trustees in the Fourth, Ninth, and Tenth Circuits will be able to invoke longer, state-law limitations periods for recovery of constructively fraudulent transfers, requiring the federal government to disgorge tax payments that would not otherwise be recoverable. See *EAR*, 742 F.3d at 750 & n.5 (collecting state fraudulent-transfer laws with limitations periods extending beyond four years). Indeed, the decision below would require the IRS in 2024 to reimburse taxes that were paid in 2014 on the basis of an avoidance action that was not filed until 2018.

2010 WL 6431702, at *2 (Bankr. E.D. Cal. July 14, 2010) (similar); *Tolz* v. *United States (In re Brandon Overseas, Inc.)*, No. 08-11035, 2010 WL 2812944, at *3-*4 (Bankr. S.D. Fla. July 16, 2010) (similar); *Liebersohn* v. *IRS (In re C.F. Foods, L.P.)*, 265 B.R. 71, 84-86 (Bankr. E.D. Pa. 2001) (similar); see also *McClarty* v. *Hatchett (In re Hatchett)*, 588 B.R. 472, 481-482 (Bankr. E.D. Mich. 2018) (similar), vacated as moot, No. 17-95163, 2021 WL 5882076 (Bankr. E.D. Mich. Dec. 21, 2021). Several bankruptcy courts have also held that Section 106(a) does not eliminate a *state* taxing authority's sovereign immunity for the underlying state-law claim in a Section 544(b) action. See *Dillworth* v. *Ginn III (In re Ginn-La St. Lucie Ltd., LLLP),* No. 10-2976, 2010 WL 8756757, at *5-*7 (Bankr. S.D. Fla. Dec. 10, 2010); *Grubbs Constr. Co.* v. *Florida Dep't of Revenue (In re Grubbs Const. Co.)*, 321 B.R. 346, 350-352 (Bankr. M.D. Fla. 2005); *Field* v. *Montgomery County (In re Anton Motors, Inc.)*, 177 B.R. 58, 64-67 (Bankr. D. Md. 1995).

The federal government's liability in this action—and in similar actions—is premised on state laws not passed by Congress that would not operate on the United States outside of bankruptcy. And the amount at stake will often be significant: Many of the cases presenting this question involve efforts by trustees to recover significant tax payments. *DBSI*, for instance, involved $17 million. 869 F.3d at 1007; see also, *e.g.*, *Liebersohn* v. *IRS (In re C.F. Foods, L.P.)*, 265 B.R. 71, 79 (Bankr. E.D. Pa. 2001) (approximately $1.6 million at issue); *Tolz* v. *United States (In re Brandon Overseas, Inc.)*, No. 08-11035, 2010 WL 2812944, at *3-*4 (Bankr. S.D. Fla. July 16, 2010) (approximately $1 million at issue). It is unlikely that Congress contemplated those risks to the federal fisc when it enacted the relevant sections of the Bankruptcy Code. See *EAR*, 742 F.3d at 750 (explaining that Congress likely did not intend to "expose federal agencies to suit based on 'applicable' state law, the dimensions of which Congress cannot control," particularly given the IRS's "'exceedingly strong interest in financial stability'") (quoting *United States* v. *Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 12 (2008)). The disagreement among the courts of appeals on this important interpretive question warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2024

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 21-4135

DAVID L. MILLER, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Filed: June 27, 2023

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. 2:20-CV00248-BSJ)

Before CARSON, BALDOCK, and EBEL, Circuit Judges.

BALDOCK, Circuit Judge.

"All our work . . . is a matter of semantics."

Justice Frankfurter

As apposite here, § 544(b)(1) of the United States Bankruptcy Code provides that "the trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under" the Code. 11 U.S.C. § 544(b)(1). Subsection (b)(1) empowers a trustee to step into the shoes, so to speak, of an actual creditor with an unsecured claim and invoke the state law applicable to the transfer the trustee seeks

to avoid. *Sender v. Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996). At the same time, § 106(a) of the Bankruptcy Code provides in relevant part that "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit . . . with respect to," among 58 other sections of the Code, "Section[ ] . . . 544[.]" 11 U.S.C. § 106(a)(1). Subsection (a) further provides "[t]he court may hear and determine any issue arising with respect to the application of such section[ ] to governmental units." *Id.* § 106(a)(2). The phrase "governmental unit" includes the "United States," a "department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under [Title 11])," and "a State." *Id.* § 101(27). In this appeal, we construe the scope of § 106(a)'s waiver of sovereign immunity as it bears upon the Trustee's avoidance powers under § 544(b)(1), and more particularly "under applicable law." Our jurisdiction arises under 28 U.S.C. § 158(d). Our review is de novo. *Scarlett v. Air Methods Corp.*, 922 F.3d 1053, 1060 (10th Cir. 2019).

I.

This appeal arises out of a converted Chapter 7 bankruptcy filed in 2017. In 2014, the debtor, All Resorts Group, Inc., paid personal tax debts of two of its principals totaling $145,138.78 to the Internal Revenue Service. Plaintiff, the United States Trustee, brought an adversary proceeding in the bankruptcy court against the United States pursuant to Code § 544(b)(1) to avoid these transfers. The "applicable law" on which the Trustee relied was now-former § 25-6-6(1) of Utah's Uniform Fraudulent Transfer Act (amended 2017), presently codified at Utah Code Ann. § 25-6-203(1) as

part of Utah's Uniform Voidable Transactions Act. The United States (Government) did not contest the substantive elements required for the actual creditor (in this case, an individual with an employment discrimination claim against the debtor) to establish a voidable transfer under § 25-6-6(1). The Government acknowledged that (1) the debtor had made the transfers, (2) an actual creditor had an unsecured claim against the debtor arising before the transfers, (3) the debtor did not receive a reasonably equivalent value in exchange for the transfers, and (4) the debtor was insolvent at the time of the transfers. The Government further acknowledged that the sovereign immunity waiver contained in Code § 106(a) made it amenable to the Trustee's § 544(b)(1) action. What the Government did contest was § 544(b)(1)'s "actual creditor requirement," *i.e.*, that an actual creditor could succeed against the Government in a suit brought under § 25-6-6(1) outside of bankruptcy.

According to the Government, the actual creditor could not avoid the debtor's tax payments made on behalf of its principals to the IRS because sovereign immunity would bar such creditor's action against the Government outside of bankruptcy. Therefore, the Trustee could not satisfy § 544(b)(1)'s actual creditor requirement and avoid the debtor's tax payments. The Trustee did not disagree that outside of bankruptcy and apart from Code § 544(b)(1), sovereign immunity would bar the actual creditor's suit against the Government. But, according to the Trustee, the waiver contained in Code § 106(a) abrogated sovereign immunity not only as to his § 544(b)(1) adversary proceeding against the Government, but also as to the underlying Utah state law

cause of action he invoked under subsection (b)(1) to avoid the transfers.

On cross-motions for summary judgment, the bankruptcy court, in a thorough opinion, ruled in favor of the Trustee and avoided the transfers. The court held the Trustee had satisfied Code § 544(b)(1)'s actual creditor requirement because "§ 106(a)(1) unequivocally waives the federal government's sovereign immunity with respect to the underlying state law cause of action incorporated through § 544(b)[.]" *In re All Resort Group, Inc.*, 617 B.R. 375, 394 (Bankr. D. Utah 2020). Accordingly, the bankruptcy court awarded the Trustee a judgment against the Government pursuant to 11 U.S.C. §§ 106(a)(3) and 550(a) in the amount of $145,138.78. On appeal to the district court, the court adopted the bankruptcy court's decision and affirmed its judgment. *United States v. Miller*, No. 20-CV-248-BSJ, Order (D. Utah Sept. 8, 2021). The Government subsequently appealed to this Court to address an issue—the scope of Code § 106(a)'s waiver of sovereign immunity as it bears on Code § 544(b)(1)—that has split our sister circuits. *Compare In re Equip. Acquisition Res., Inc.* ("*EAR*"), 742 F.3d 743 (7th Cir. 2014) (holding § 106(a)'s waiver did not extend to an Illinois state law cause of action under § 544(b)(1)), *with In re DBSI, Inc.*, ("*DBSI*") 869 F.3d 1004 (9th Cir. 2017) (holding § 106(a)'s waiver extended to an Idaho state law cause of action under § 544(b)(1)), *and In re Yahweh Ctr., Inc.*, ("*Yahweh*") 27 F.4th 960 (4th Cir. 2022) (holding in the alternative that § 106(a)'s waiver extended to a North Carolina state law cause of action under § 544(b)(1)). For reasons that follow, we too rule in favor of the Trustee and affirm.

II.

That Congress may waive the sovereign immunity of the Government is beyond dispute. Therefore, we turn to an interpretation of the Bankruptcy Code that necessarily begins—and for the most part ends where sovereign immunity is at stake—with the wording of the statutes at issue. *FAA v. Cooper*, 566 U.S. 284, 290, 132 S. Ct. 1441, 182 L. Ed. 2d 497 (2012). Although the Government discusses Code § 544(b)(1) at length in its briefing, both parties agree as to what § 544(b)(1) means and how it operates—at least in a vacuum. Rather, notwithstanding the Government's insistence to the contrary, the present dispute is about the scope of the waiver of sovereign immunity contained in Code § 106(a), and more specifically, whether such waiver reaches the underlying state law cause of action that § 544(b)(1) authorizes the Trustee to rely on in seeking to avoid the transfers at issue. And so it is that we focus our attention on § 106(a).

Before turning to the text of § 106(a) itself, a brief background discussion about Congressional waivers of sovereign immunity that informs our statutory construction is in order. The Supreme Court has oft repeated, most recently just this Term, that "[t]o abrogate sovereign immunity, Congress must make its intent unmistakably clear in the language of the statute." *LAC du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. __, __, (2023) (slip. op. at 3) (internal ellipses and quotation marks omitted). "This clear-statement rule is a demanding standard." *Id.* at __ (slip op. at 4). Thus, we must construe ambiguities regarding the waiver's scope in favor of the sovereign. *Cooper*, 566 U.S. at 291. A waiver is ambiguous if a

plausible interpretation of the statute's text exists that would not authorize suit against the sovereign. *Id.* at 290-91. In such case, "Congress has not unambiguously expressed the requisite intent" to waive immunity. *Coughlin*, 599 U.S. at __ (slip op. at 4). Moreover, though many inferior federal courts have been unable to withstand the temptation, we should not, the Supreme Court says, rely on legislative history to assist us in construing a congressional waiver of sovereign immunity. "Legislative history cannot supply a waiver that is not clearly evident from the language of the statute." *Cooper*, 566 U.S. at 290.

Notably, however, "the clear-statement rule is not a magic-words requirement." *Coughlin*, 599 U.S. at __ (slip op. at 10). "[T]he sovereign immunity canon is a tool for interpreting the law and . . . does not displace the other traditional tools of statutory construction." *Cooper*, 566 U.S. at 291 (internal brackets and quotation marks omitted). The Supreme Court has "never required that Congress use magic words" or "state its intent in any particular way" to establish that it intended to waive a sovereign's immunity from suit. *Id.* What the Supreme Court does require is that "the scope of Congress' waiver be clearly discernible from the statutory text in light of traditional interpretive tools" of statutory construction. *Id.* "As long as Congress speaks unequivocally, it passes the clear-statement test—regardless of whether it articulated its intent in the *most* straightforward way." *Coughlin*, 599 U.S. at __ (slip op. at 10).

Turning to the text of Code § 106(a), its relevant language says that "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is *abrogated* as

to a governmental unit . . . *with respect to* . . . Section[ ] . . . 544 . . . of this title." 11 U.S.C. § 106(a)(1) (emphasis added). Because the Bankruptcy Code does not define the key word "abrogated" or the key phrase "with respect to," we look to their ordinary meanings. *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759 (2018). Webster defines "abrogate" as "to abolish by authoritative, official, or formal action," "to put an end to," or "do away with." Webster's Third New Int'l Dictionary 6 (1981); *see also* Black's Law Dictionary 8 (10th ed. 2014). But for our purpose, to what extent has subsection (a)(1) abolished or done away with sovereign immunity?

Supreme Court precedent, by which we are bound, answers the question. The Court has told us that Congress's use of the word "respecting"—a synonym for the phrase "with respect to" according to Word Office 365's friendly thesaurus—"generally has a broadening effect, ensuring that the scope of a [statutory] provision covers not only its subject but also matters relating to that subject." *Appling*, 138 S. Ct. at 1760 (interpreting Code § 523(a)(2)(B) which prohibits a debtor from discharging a debt obtained by a materially false "statement . . . respecting the debtor's . . . financial condition," if made in writing). In *Appling*, the Court observed that Congress "characteristically employs" words and phrases with similarly "expansive" meanings such as "concerning," "with reference to," "relating to" and the like "*to reach any subject that has 'a connection with' . . . the topics the statute enumerates*." *Id.* at 1759-60 (emphasis added) (quoting *Coventry Health Care v. Nevils*, 581 U.S. 87, 96 (2017)); *see also Nevils*, 581 U.S. at 95-96, 137 S. Ct. 1190 ("We have repeatedly recognized that the phrase 'relate to' in a preemptive clause

expresses a broad pre-emptive purpose." (internal brackets and quotation marks omitted)).

Applying *Appling*'s teachings here, the Government's sovereign immunity defense to the Utah state law the Trustee invokes under Code § 544(b)(1) seems to us a "subject" that Code § 106(a)(1) has "a connection with" because a "topic" that § 106(a)(1) "enumerates" is the waiver of the Government's sovereign immunity "with respect to . . . Section[ ] . . . 544," a federal statute authorizing the Trustee's reliance on state law. In other words, the critical phrase "with respect to" in § 106(a)(1) clearly expresses Congress's intent to abolish the Government's sovereign immunity in an avoidance proceeding arising under § 544(b)(1), regardless of the context in which the defense arises. This is not surprising considering that Congress enacted the current and entirely new version of Code § 106(a)(1) in 1994 in direct response to two Supreme Court decisions that decided Congress, in the respective contexts presented, had not expressly declared its intent in the prior version of § 106 to abrogate sovereign immunity. *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 361 n.2 (2006) (citing *Hoffman v. Connecticut Dept. of Income Maint.*, 492 U.S. 96 (1989) and *United States v. Nordic Vill., Inc.*, 503 U.S. 30 (1992)).

Reinforcing our interpretation of § 106(a)(1)'s waiver of sovereign immunity is the similarly broad language of § 106(a)(2). Subsection (a)(2) tells us a court "may hear and determine *any* issue arising with respect *to* the application of" § 544. 11 U.S.C. 106(a)(2) (emphasis added). That Congress would authorize a court to "hear and determine any issue arising with respect to" § 544's application as part of a statute waiving the Government's sov-

ereign immunity surely presumes subject-matter jurisdiction. But sovereign immunity deprives a court of subject-matter jurisdiction. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."). The authority which subsection (a)(2) plainly confers would be substantially curtailed if Congress had intended an assertion of sovereign immunity to preclude a bankruptcy court from considering whether a trustee has satisfied the substantive elements of an underlying state law cause of action invoked pursuant to § 544(b)(1).

III.

In *EAR*, the Seventh Circuit was the first federal appeals court to address the interplay between Code §§ 106(a) and 544(b)(1). The court, however, never meaningfully addressed the scope of § 106(a) as reflected in its text. In deciding that § 106(a)(1) does not modify the actual creditor requirement of § 544(b)(1), the court took a two-tiered approach adopted from the Supreme Court's contextually distinct decision in *Meyer*. *See Meyer*, 510 U.S. at 480-87 (deciding a statutory waiver of sovereign immunity as to the FSLIC in a "sue-and-be-sued" clause extended to plaintiff's constitutional tort claim but refusing to extend a federal common law *Bivens* action to federal agencies). The court first acknowledged that § 106(a)(1) constituted a waiver of sovereign immunity as to the § 544(b)(1) proceeding brought by EAR, a Chapter 11 debtor-in-possession exercising the powers of a trustee, against the Government. *See* 11 U.S.C. § 1107(a). The court then asked whether the source of the substantive law upon which EAR relied, namely the Illinois Uniform Fraudulent Transfer Act, provided EAR an avenue for relief against

the Government. According to the Seventh Circuit, "[*t*]*hat* question is the crux of this appeal." *EAR*, 742 F.3d at 747.

The Seventh Circuit summarily concluded that "Congress did not alter § 544(b)'s substantive requirements merely by stating that the federal government's immunity was abrogated 'with respect to' this provision." *Id.* But "[t]o be clear," the court explained: "we do not need to rely on the presumption against waiver [of sovereign immunity] to resolve this dispute. We find the substantive requirements of § 544(b)(1) unambiguous, and those requirements are simply not met with respect to EAR's action." *Id.* at 750-51. What the Seventh Circuit's decision in *EAR* effectively accomplishes is a total ban on actions under Code § 544(b)(1) to set aside avoidable transfers against a "governmental entity" as defined in Code § 101(27) absent a second waiver of sovereign immunity by way of Congress or a state legislature as to the underlying state law cause of action.

Perhaps the Seventh Circuit's decision may be explained at least in part based on its view of federal tax policy. The court *hypothesized* that if the trustee's view prevailed, the states could "render[ ] federal tax revenue . . . more vulnerable to unexpected recovery actions" by extending the applicable statute of limitations (typically four years) or relaxing criteria for what constitutes an avoidable transfer under state law. *Id.* at 750. Of course, any such policy rationale, especially where based on a fictitious scenario unlikely to come to fruition, runs head on into the Supreme Court's admonition that when a court asks whether Congress intended to waive the Government's sovereign immunity, references to policy, like legislative history, are unavail-

ing. *Hoffman*, 492 U.S. at 104, *superceded by amendment to* 11 U.S.C. § 106. Policy rationales are "not based in the text of the statute and so, too, are not helpful in determining" whether the statute satisfies the Supreme Court's command that to abrogate sovereign immunity Congress "must make its intention 'unmistakably clear in the language of the statute.'" *Id.* at 101, 104.

Unlike the Seventh Circuit's decision in *EAR*, the Ninth Circuit's decision in *DBSI* is faithful to the text of Code § 106(a). In *DBSI*, the court held "Section 106(a)(1)'s abrogation of sovereign immunity is absolute with respect to Section 544(b)(1) and thus necessarily includes the derivative state law claim on which a Section 544(b)(1) claim is based." *DBSI*, 869 F.3d at 1010. Consistent with Supreme Court precedent, *see supra* at 5-7, the Ninth Circuit began its analysis by relying on "well-settled canons of statutory interpretation that inform [an] understanding of the interplay between Section 106(a)(1) and Section 544(b)(1)." *DBSI*, 869 F.3d at 1010. The court looked to the language of Code § 106(a) as well as to the design of the statute as a whole and concluded: "[W]e cannot read the plain text of Section 544(b)(1)—i.e., the [actual] creditor requirement—devoid of the declaration in Section 106(a)(1) that "'sovereign immunity is abrogated as to a governmental unit . . . with respect to . . . Section[ ] . . . 544.'" *Id.*

The Ninth Circuit next made two additional observations based on established canons of statutory construction. The court observed that Congress enacted § 106(a)(1) subsequent to § 544(b)(1). And that "when Congress waived sovereign immunity with respect to

Section 544, Congress understood that Section 544(b)(1) codified a trustee's power to invoke state law." *Id.* at 1011; *see Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume our elected representatives . . . know the law."). The court also observed, as we have, that adopting 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.'"[1] DBSI, 869 F.3d at 1011-12; *see also id.* at 1011 ("[T]he interpretation offered by the government would essentially nullify Section 106(a)(1)'s effect on Section 544(b)(1), an interpretation we should avoid.").

IV.

We conclude by making short work of the Government's alternative argument that if sovereign immunity does not bar the Trustee's § 544(b)(1) action, field preemption, a subset of implied preemption, does so by way of the Internal Revenue Code's (IRC) interest in tax col-

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[1] In *Yahweh*, the Fourth Circuit adopted the Ninth Circuit's view that § 106(a)(1)'s waiver of sovereign immunity extends to a state law cause of action underlying a trustee's § 544(b)(1) action. 27 F.4th at 966. The court further reasoned that § 106(b) waived the Government's sovereign immunity in that case. *Id.* Subsection (b) provides "[a] governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose." 11 U.S.C. § 106(b). Suffice to say that in our case, the Trustee does not rely on § 106(b) to support its waiver argument.

lection. As the Trustee points out, the obvious problem is that § 544(b)(1) is a federal statute, enacted by the United States Congress, the same legislative body that the Government now asserts has preempted its operation. If Congress believed a trustee's invocation of a state law cause of action under § 544(b)(1) posed an obstacle to its objectives under the IRC, Congress surely would have added an express preemption provision to § 544(b) exempting the Government from its operation just as it provided an exemption for a transfer of charitable contributions in subsection (b)(2). 11 U.S.C. § 544(b)(2) (stating that § 544(b)(1) has no application to a defined charitable contribution and "[a]ny claim to recover [such] contribution . . . under Federal or State law . . . shall be preempted[.]"). As the Supreme Court recently recognized, the Bankruptcy Code "is finely tuned to accommodate essential governmental functions like tax administration and regulation." *Coughlin*, 599 U.S. at __, (slip op. at 8). Congress's silence on this question, coupled with its certain awareness of § 106(a)'s ramifications when it broadened the statute's reach in 1994 is "powerful evidence" that Congress did not intend what the Government now says. *Wyeth v. Levine*, 555 U.S. 555, 575 (2009). The argument for field pre-emption based on federal tax collection policy is surely rather weak where Congress is aware of the operation of state law in a field of federal interest, *i.e.*, bankruptcy law, and has decided to place the policy of equal distribution and fairness among creditors on equal footing and tolerate whatever tension exists between the two policies. *Id.* at 574-75, 129 S. Ct. 1187. Where Congress has announced consent to suit in the plain language of a statute, the Supreme Court has never permitted us to add to the rigor of sovereign

immunity by refinement of construction based upon improper policy considerations. *See Block v. Neal*, 460 U.S. 289, 298 (1983).

* * *

We hold that Code § 106(a) waives the Government's sovereign immunity both as to the Trustee's proceeding under Code § 544(b)(1) and the underlying Utah state law cause of action subsection (b)(1) authorizes the Trustee to rely on to avoid the debtor's tax transfers made on behalf of its principals in this case. The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

Case No. 2:20-CV-00248-BSJ
DISTRICT JUDGE BRUCE S. JENKINS

USA, APPELLANT

v.

DAVID L. MILLER, APPELLEE

[Filed: Sept. 8, 2021]

MEMORANDUM DECISION AND ORDER ON APPEAL FROM UNITED STATES BANKRUPTCY COURT

Before the Court is Appellant United States' appeal of the bankruptcy court's memorandum decision and order. The Court heard oral argument on August 28, 2020.[1] Mr. Landon M. Yost appeared on behalf of United States. Mr. Reid W. Lambert appeared on behalf of Appellee David L. Miller. The Court reserved on the matter. Having considered the parties' briefs, the arguments of counsel, and the relevant law, the Court hereby AFFIRMS and ADOPTS the bankruptcy court's memorandum decision and order.

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[1] Min. Entry, ECF No. 13.

This case concerns the interplay between two provisions of the bankruptcy code—§ 106, which abrogates sovereign immunity with respect to certain code sections, and § 544(b), which allows a Trustee in a chapter 7 bankruptcy to step into a creditor's shoes and avoid transfers under applicable law. Applicable law includes state law outside of bankruptcy. The question before the Court is whether Congress abrogated sovereign immunity as to the underlying state law, in this case, the Utah Uniform Fraudulent Transfer Act. Specifically, the Court must determine whether the bankruptcy court erred when it determined "§ 106(a)(1)'s waiver reached the underlying state law causes of action incorporated through § 544(b)."

In the Bankruptcy process, the Trustee has a duty to recover and assemble assets so that entitled creditors may share therein. In that constitutionally footed process,[2] the United States is as vulnerable to disgorge inappropriate payment received as any other creditor so that all entitled creditors may share appropriately as Congress has directed.

For the reasons set forth in the bankruptcy court's memorandum decision and order, the ruling of the bankruptcy court is AFFIRMED and ADOPTED by this Court.

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[2] U.S. CONST. art. I, § 8, cl. 4. "The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

IT IS SO ORDERED.

DATED this [8th] day of Sept., 2021.

/s/ BRUCE S. JENKINS
BRUCE S. JENKINS
United States Senior District judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

Bankruptcy Case No. 17-23687
Chapter 7
Adversary Proceeding No. 18-2089

IN RE: ALL RESORT GROUP, INC., DEBTOR

DAVID L. MILLER, AS CHAPTER 7 TRUSTEE
OF THE BANKRUPTCY ESTATE OF ALL RESORT GROUP,
INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Dated: Mar. 31, 2020

MEMORANDUM DECISION

Hon. R. KIMBALL MOSIER

More than two years before it filed bankruptcy, All Resort Group, Inc. (All Resort) paid personal tax debts of two of its principals. After All Resort's case converted to chapter 7, David Miller, the trustee of its bankruptcy estate (Trustee), commenced this adversary proceeding against the United States to avoid those payments as fraudulent transfers and recover them for the benefit of the estate. Neither party has disputed any of the facts concerning the payments. Since all that re-

mains is to apply the law to the facts, both parties have appropriately asked the Court to resolve this adversary proceeding on summary judgment. The particular legal question framed by the parties' cross-motions is whether sovereign immunity or preemption preclude a bankruptcy trustee from using 11 U.S.C. § 544(b) to recover payments made to the Internal Revenue Service (IRS).

After considering the relevant filings in this adversary proceeding, including the parties' motions and memoranda, after considering the parties' oral arguments, and after conducting an independent review of applicable law, the Court issues the following Memorandum Decision denying the United States' motion and granting the Trustee's motion.

I. JURISDICTION

The Court's jurisdiction over this adversary proceeding is properly invoked pursuant to 28 U.S.C. § 1334 and § 157(b)(1). This matter is a core proceeding within the definition of 28 U.S.C. § 157(b)(2)(H), and the Court may enter a final order. Venue is appropriate under 28 U.S.C. § 1409.

II. FACTUAL BACKGROUND

The Court finds that there is no genuine dispute as to the following facts. All Resort filed a voluntary chapter 11 petition in this Court on April 28, 2017. After the necessary debtor-in-possession financing failed to materialize, All Resort itself sought conversion of its case to one under chapter 7.[1] The Court converted the case on

[1] Docket No. 336 in Case No. 17-23687. All Resort amended that motion to change the statutory basis for conversion from

September 14, 2017,[2] and the United States Trustee appointed David Miller as chapter 7 trustee.

On June 23, 2014 All Resort made two payments to the IRS that are the focus of this adversary proceeding. Both payments came from All Resort's bank account at Zions Bank and consisted of funds belonging to All Resort. The first was in the amount of $71,829.68 and it satisfied a personal federal tax debt owed by Gordon Cummins, who was an officer and director of All Resort and a shareholder in the company. The second was in the amount of $73,309.10 and it satisfied a personal federal tax debt of Richard Bizzaro, who was also an officer and director of All Resort and a shareholder in the company. The Trustee filed a complaint to avoid those payments as fraudulent transfers under 11 U.S.C. §§ 544(b) and 548(a),[3] the former of which incorporates a claim under the Utah Uniform Fraudulent Transfer Act (UUFTA),[4] and recover them under § 550.

Prior to the payments at issue, Robin Salazar filed a charge of employment discrimination against All Resort on August 15, 2011. She subsequently commenced a civil proceeding against All Resort in the United States District Court for the District of Utah on November 25,

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11 U.S.C. § 1112(b) to § 1112(a). *See* Docket No. 341 in Case No. 17-23687.

[2] Docket No. 343 in Case No. 17-23687.

[3] All subsequent statutory references are to title 11 of the United States Code unless otherwise indicated.

[4] The UUFTA is now known as the Utah Uniform Voidable Transactions Act after the Utah Legislature amended it in 2017, but because the Trustee's claim is based on the version of the law in effect at the time of the transfers in 2014, the Court will refer to the law as it was called at that time.

2014. Salazar later settled that lawsuit but did not receive the full amount of the settlement before All Resort filed bankruptcy. All Resort scheduled the remaining obligation to Salazar as a $55,000 unsecured claim,[5] and she later filed a claim for that amount.[6] Neither All Resort nor the Trustee have objected to Salazar's claim.[7]

III. DISCUSSION

A. Legal Standard Under Rule 56

Under Federal Rule of Civil Procedure 56(a), made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7056, the Court is required to "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[8] Substantive law determines which facts are material and which are not. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[9] Whether a dispute is "genuine" turns on whether "the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party."[10] In sum, the Court's function at the summary judgment stage is to "determine whether there is a genuine issue for trial."[11]

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[5] Docket No. 73 in Case No. 17-23687, at 115.

[6] Claim No. 71-1 in Case No. 17-23687.

[7] Salazar filed her claim on September 1, 2017, when the case was still in chapter 11.

[8] Fed. R. Civ. P. 56(a).

[9] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[10] *Id.*

[11] *Id.* at 249.

The moving party bears the burden to show that it is entitled to summary judgment,[12] including the burden to properly support its summary judgment motion as required by Rule 56(c).[13] If the moving party has failed to meet its burden, "summary judgment must be denied," and the nonmoving party need not respond because "no defense to an insufficient showing is required."[14] Once the moving party meets its initial burden, "the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter."[15] The nonmoving party may not rely solely on allegations in the pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial."[16] The nonmoving party also "must do more than simply show that there is some metaphysical doubt as to the material facts."[17]

When considering a motion for summary judgment, the Court views the record and draws all reasonable inferences therefrom in the light most favorable to the nonmoving party,[18] but the Court does not weigh the ev-

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[12] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[13] *See Murray v. City of Tahlequah, Okla.*, 312 F.3d 1196, 1200 (10th Cir. 2002).

[14] *Reed v. Bennett*, 312 F.3d 1190, 1194-95 (10th Cir. 2002).

[15] *Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1518 (10th Cir. 1994).

[16] *Celotex,* 477 U.S. at 324.

[17] *Matsushida Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

[18] *E.g., City of Herriman v. Bell*, 590 F.3d 1176, 1181 (10th Cir. 2010) (citation omitted).

idence or make credibility determinations.[19] "On cross-motions for summary judgment, each motion must be considered independently."[20]

The Court notes that the United States has characterized its motion, though captioned and presented as one for summary judgment, as "more in the nature of" a Rule 12(b)(1) or 12(b)(6) motion.[21] Failure of Congress to waive sovereign immunity with respect to a particular claim deprives a court of subject-matter jurisdiction over that claim,[22] and a Rule 12(b)(1) motion is a common method to challenge jurisdiction based on the defense of sovereign immunity. As a general rule, a motion challenging subject-matter jurisdiction under Rule 12(b)(1) cannot be treated as one for summary judgment.[23] An exception to that rule exists that requires a

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[19] *Nat'l Am. Ins. Co. v. Am. Re-Insurance Co.*, 358 F.3d 736, 742-43 (10th Cir. 2004) (citing *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 533 (10th Cir. 1994)).

[20] *Hofmann v. Drabner (In re Baldwin)*, 514 B.R. 646, 650 (Bankr. D. Utah 2014) (citing *Rajala v. U.S. Bank (In re Christenson)*, 483 B.R. 743, 746 (Bankr. D. Kan. 2012)).

[21] Docket No. 16 in Adv. No. 18-2089, at 1.

[22] *See Normandy Apartments, Ltd. v. U.S. Dep't of Haus. & Urban Dev.*, 554 F.3d 1290, 1295 (10th Cir. 2009) ("The defense of sovereign immunity is jurisdictional in nature, depriving courts of subject-matter jurisdiction where applicable." (citing *Robbins v. U.S. Bureau of Land Mgmt.*, 438 F.3d 1074, 1080 (10th Cir. 2006))); *Franklin Sav. Corp. v. United States (In re Franklin Sav. Corp.)*, 385 F.3d 1279, 1289 (10th Cir. 2004) ("The United States, as sovereign, is immune from suit save as it consents to be sued and the te1ms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." (quoting *Lehman v. Nakashian*, 453 U.S. 156, 160 (1981))).

[23] *Bell v. United States*, 127 F.3d 1226, 1228 (10th Cir. 1997) (citation omitted).

court to "convert a Rule 12(b)(1) motion to one under Rule 12(b)(6), or for summary judgment, 'if the jurisdictional question is intertwined with the merits of the case.'"[24] That intertwining occurs "when subject matter jurisdiction is dependent upon the same statute which provides the substantive claim in the case."[25] The Court concludes that its subject-matter jurisdiction is inextricably intertwined with the merits in this case. The Trustee's substantive claim is under § 544(b),[26] and the Court's ability to hear this case depends entirely on whether Congress's waiver of sovereign immunity encompasses such a claim, including the underlying state substantive law incorporated through § 544(b). Accordingly, the Court will treat the United States' motion as it has been presented: as one for summary judgment.

B. Legal Standard Under § 544(b)

Section 544(b)(1) provides that a "trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor

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[24] *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1129 (10th Cir. 1999) (quoting *Bell,* 127 F.3d at 1228).

[25] *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976,978 (10th Cir. 2002) (citation and internal quotation marks omitted).

[26] While the Trustee's complaint seeks avoidance of All Resort's payments to the IRS under §§ 544(b) and 548(a), the Trustee has not moved for summary judgment on the § 548 claim. The United States' motion does not expressly argue for summary judgment on that claim either, though it does argue that § 548 is unavailing to avoid the payments since they occurred more than two years before All Resort's petition date. The Trustee did not contest that argument in his Response to United States' Motion for Summary Judgment. The Court agrees with the United States that the Trustee's § 548 claim fails because the transfers at issue did not fall within the statute's two-year look-back period. *See* § 548(a).

holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title."[27] Unlike §§ 547, 548, and 549, which are wholly bankruptcy law causes of action created by the Code, § 544(b) permits a trustee to assert claims that are "available to a debtor's creditors outside of a bankruptcy case" under applicable non-bankruptcy law.[28] In order to invoke that law, however, a trustee "must first show that there is an actual creditor holding an allowable unsecured claim who, under state law, could avoid the transfer[] in question," but "if there are not creditors within the terms of section 544(b) against whom the transfer is voidable under the applicable law, the trustee is powerless to act so far as section 544(b) is concerned."[29] Since the trustee's rights under § 544(b) are derivative of the actual creditor's, the trustee is often metaphorically described as standing in the shoes of the actual creditor and is therefore "subject to the same defenses a transferee would have in a state fraudulent conveyance action brought by the actual creditor."[30]

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[27] § 544(b)(1).

[28] *Kohut v. Wayne Cty. Treasurer (In re Lewiston)*, 528 B.R. 387, 389 (Bankr. E.D. Mich. 2015). For purposes of § 544(b), "applicable law" typically means state fraudulent transfer law. *Sender v. Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996).

[29] *Sender,* 84 F.3d at 1304 (citations and internal quotation marks omitted); *see also Lewiston,* 528 B.R. at 389 ("[A] trustee can only bring a fraudulent transfer claim under§ 544(b)(1) if the trustee can show that an actual creditor holding an unsecured claim against the debtor could have brought the fraudulent transfer claim outside of a bankruptcy case under applicable non-bankruptcy law.").

[30] *Mendelsohn v. Kovalchuk (In re APCO Merch. Servs., Inc.)*, 585 B.R. 306, 314 (Bankr. E.D.N.Y. 2018) (citing *Smith v. Am. Founders Fin., Corp.*, 365 B.R. 647, 658-59 (S.D. Tex. 2007)).

Absent waiver, one defense available to transferees that are governmental units in such actions is sovereign immunity.

The United States does not dispute that All Resort paid $71,829.68 and $73,309.10 from its own funds to the IRS on June 23, 2014 in satisfaction of the personal federal tax debts of Cummins and Bizzaro, respectively; that All Resort did not receive reasonably equivalent value in exchange for those transfers; and that All Resort was insolvent at the time of the transfers. In short, the United States concedes that the Trustee has proved all the elements of his § 544(b) and UUFTA claim, save one: that there be an actual creditor who could avoid the transfers at issue. With respect to the actual creditor requirement, the United States admits that Robin Salazar was a creditor of All Resort prior to June 23, 2014 and that she filed a claim in this case. But the United States argues that Salazar cannot serve as the actual creditor because sovereign immunity, asserted as a defense, would bar her suit against the United States under the UUFTA to recover All Resort's payments for the tax debts of Cummins and Bizzaro. As a consequence, the Trustee cannot satisfy the actual creditor requirement and his § 544(b) claim fails as a matter of law.

For his part, the Trustee acknowledges that, outside bankruptcy, sovereign immunity would bar Salazar's suit against the United States.[31] His contention, however, is that § 106(a)(1) abrogates that sovereign immunity in the bankruptcy context, eliminating the United States' ability to use it as a defense in this adversary

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[31] *See* Docket No. 25 in Adv. No. 18-2089, at 3.

proceeding, and thereby permitting Salazar to satisfy the actual creditor requirement.

C. Sovereign Immunity and § 106(a)(1)

To promote the goals of maximization of a debtor's estate and equality of distribution among the estate's creditors, the Bankruptcy Code endows the bankruptcy trustee with powers—found in chapter 5 of the Code—to unwind certain transactions and transfers involving the debtor or its property.[32] When the United States is the party against whom the trustee seeks recovery of such transfers, however, those goals run headlong into the principle that "the United States, as sovereign, is immune from suit save as it consents to be sued."[33] Congress attempted to reconcile these concepts when it codified a waiver of sovereign immunity provision in § 106 of the Bankruptcy Code, which was promulgated by the Bankruptcy Reform Act of 1978.[34]

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[32] *E.g., Begier v. IRS*, 496 U.S. 53, 58 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code. . . . Section 547(b) furthers this policy by permitting a trustee in bankruptcy to avoid certain preferential payments made before the debtor files for bankruptcy."); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985) ("The powers and duties of a bankruptcy trustee are extensive. . . . The trustee . . . has the duty to maximize the value of the estate. . . . and is empowered to sue officers, directors, and other insiders to recover, on behalf of the estate, fraudulent or preferential transfers of the debtor's property." (citations omitted)).

[33] *United States v. Murdock Mach. & Eng'g Co. of Utah*, 81 F.3d 922, 929 (10th Cir. 1996) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)).

[34] The Bankruptcy Act of 1898, the predecessor to the Bankruptcy Reform Act of 1978, contained no express provision concerning waiver of sovereign immunity. S. Elizabeth Gibson, *Con-*

The Supreme Court subsequently held in two cases that that provision was insufficiently clear to waive sovereign immunity.[35] In response to *Hoffman* and *Nordic Village,* Congress rewrote § 106 entirely as part of the Bankruptcy Reform Act of 1994.[36] The intent of the amendment was to overrule *Hoffman* and *Nordic Village* and to "expressly provide[] for a waiver of sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief,"[37] thereby conforming § 106 to the legal standard that waivers of sovereign immunity be "unequivocally expressed" in order to be effective.[38] Importantly, Congress thought it had already achieved this

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gressional Response to Hoffman and Nordic Village: Amended Section 106 and Sovereign Immunity, 69 Am. Bankr. L.J. 311,311 n.2 (1995).

[35] *Rescia v. E. Conn. State Univ. (In re Harnett)*, 558 B.R. 655, 658 (Bankr. D. Conn. 2016); *see also Hoffman v. Conn. Dep't of Income Maint.,* 492 U.S. 96, 101 (1989) ("[T]o abrogate the States' Eleventh Amendment immunity from suit in federal court, . . . Congress must make its intention 'unmistakably clear in the language of the statute.' In our view, § 106(c) does not satisfy this standard." (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 39 (1992) ("Neither § 106(c) nor any other provision of law establishes an unequivocal textual waiver of the Government's immunity from a bankruptcy trustee's claims for monetary relief. . . . Congress has not empowered a bankruptcy court to order a recovery of money from the United States[.]").

[36] *In re Equip. Acquisition Res., Inc. (EAR)*, 742 F.3d 743, 749-50 (7th Cir. 2014) (citing H.R. Rep. No. 103-835, at 42 (1994), *reprinted in* 1994 U.S.C.A.A.N. 3340).

[37] H.R. Rep. No. 103-835, at 42 (1994), *reprinted in* 1994 U.S.C.A.A.N. 3340, 3350-51.

[38] *Nordic Vill.*, 503 U.S. at 33 (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)).

standard in 1978, noting in floor statements that former § 106(c) was "included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective."[39]

As relevant here, § 106(a)(1) now provides that "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to" fifty-nine sections of title 11, including § 544. The task before the Court is to analyze the effect and scope of the waiver as applied to § 544, particularly § 544(b). While certain interpretive rules apply in the sovereign immunity context,[40] the starting point of the analysis remains the same. As with all matters of statutory construction, the inquiry begins "with the language of the statute itself."[41] Where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'"[42]

The additional interpretive rules regarding sovereign immunity provide shape and guidance to the analysis. Those rules include the command that a "waiver of

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[39] 124 Cong. Rec. H11,091 (Sept. 28, 1978) (statement of Rep. Edwards); 124 Cong. Rec. S17,407 (Oct. 6, 1978) (statement of Sen. DeConcini).

[40] *See Burch v. Sec'y of Health & Human Servs.*, No. 99-946V, 2010 WL 1676767, at *2 (Fed. Cl. Apr. 9, 2010) ("From [the doctrine of sovereign immunity], the federal courts have derived certain principles of *statutory construction* that have been applied in interpreting legislation that is alleged to have *waived* that immunity with respect to a particular type of suit against the United States.").

[41] *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)).

[42] *Id.* (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

the Federal Government's sovereign immunity must be unequivocally expressed in statutory tex1 and will not be implied,"[43] and that a waiver "must be strictly construed in favor of the Government."[44] If the statutory language contains ambiguities, they must "be construed in favor of immunity."[45] "Ambiguity exists if there is a plausible interpretation of the statute that would not authorize [suit] against the Government."[46] These rules fall under the sovereign immunity canon, which is a "canon of construction" that courts can use in tandem with other tools of construction to interpret the law.[47] But the Supreme Court has "never held that [the sovereign immunity canon] displaces the other traditional tools of statutory construction."[48] Moreover, it is unnecessary "to resort to the sovereign immunity canon [where] there is no ambiguity" in the statute at issue.[49] In short, when faced with an assertion of sovereign immunity, courts must ask whether "Congress'[s] waiver [is] clearly discernable from the statutory text in light

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[43] *Lane v. Peña*, 518 U.S. 187, 192 (1996) (citing *Nordic Vill.*, 503 U.S. at 33-34, 37 *and Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)).

[44] *FAA v. Cooper,* 566 U.S. 284, 289 (2012).

[45] *Id.* at 290 (citing *United States v. Williams*, 514 U.S. 527, 531 (1995)).

[46] *Id.* at 290-91 (citing *Nordic Vill.*, 503 U.S. at 34, 37); *see also Marathon Oil Co. v. United States*, 374 F.3d 1123, 1127 (Fed. Cir. 2004) ("If a statute is susceptible to a plausible reading under which sovereign immunity is not waived, the statute fails to establish an unambiguous waiver and sovereign immunity therefore remains intact." (citing *Nordic Vill.*, 503 U.S. at 37)).

[47] *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008).

[48] *Id.*

[49] *Id.* at 590.

of traditional interpretive tools. If it is not, then [courts] take the interpretation most favorable to the Government."[50]

In construing § 106(a)(1), the Court is mindful of its charge to give effect to the law as written[51] and to eschew adopting an interpretation that deviates from Congress's intent by either expanding or constricting the meaning of the written text. Put succinctly, courts must avoid an outcome where "attempted interpretation of legislation becomes legislation itself."[52] The Supreme Court has cautioned courts in the sovereign immunity context to "not enlarge the waiver beyond the purview of the statutory language."[53] By the same measure, however, courts should also not "import immunity back into a statute designed to limit it."[54]

Section 106(a)(1) unequivocally abrogates sovereign immunity as to a governmental unit with respect to the

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[50] *Cooper*, 566 U.S. at 291.

[51] *See Richards v. Comm'r*, 37 F.3d 587, 588 n.3 (10th Cir. 1994) ("[The courts'] function is limited to interpreting the laws as written. . . .").

[52] *King v. Burwell*, 576 U.S. —, —, 135 S. Ct. 2480, 2495-96 (2015) (quoting *Palmer v. Mass.*, 308 U.S. 79, 83 (1939)).

[53] *Williams,* 514 U.S. at 531 *(citing Dep't of Energy v. Ohio*, 503 U.S. 607, 614-16 (1992)); *see also Nordic Vill.*, 503 U.S. at 34 (sovereign immunity waivers must not be "enlarged beyond what the language requires" (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983)).

[54] *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955); *see also Block v. Neal*, 460 U.S. 289, 298 (1983) ("The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." (quoting *United States v. Aetna Surety Co.*, 338 U.S. 366, 383 (1949))).

fifty-nine Code sections listed therein, including § 544. While the United States concedes that point and asserts that it does not contest the meaning of § 106(a)(1),[55] it is apparent that what § 106(a)(1) means, at least regarding § 544(b), is a matter of distinct dispute between the parties and among courts nationwide. The nature of the dispute has to do with the peculiar characteristics of a § 544(b) claim. Its statutory neighbors, such as §§ 547, 548, and 549, are entirely federal law claims. In cases similar to this one, the United States has declined to assert sovereign immunity as a defense to a § 548 claim, acknowledging that § 106(a)(1) has rendered it unavailable.[56] But, as noted previously, § 544(b) employs nonbankruptcy law in furtherance of avoiding transfers of a debtor's property. The question presented in this case is therefore whether, "by including [§] 544 in the list of Bankruptcy Code sections set forth in [§] 106(a), Congress knowingly included state law causes of action within the category of suits to which a sovereign immunity defense could no longer be asserted."[57] Put another way, the Court must determine whether § 106(a)(1) "ab-

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[55] Docket No. 16 in Adv. No. 18-2089, at 5.

[56] *See, e.g.*, *EAR*, 742 F.3d at 746 ("Because § 548 is included in § 106(a)(1)'s list of Code provisions for which sovereign immunity is abrogated—and because the cause of action is a creature of the Code itself—the United States does not assert immunity as a defense to [Plaintiff's] recovery under that provision."); *Zazzali v. United States (In re DBSI, Inc.) (DBSI)*, 869 F.3d 1004, 1008 (9th Cir. 2017) (noting that the United States did not contest the trustee's § 548 claim).

[57] *VMI Liquidating Tr. Dated December 16, 2011 v. United States (In re Valley Mortg., Inc.)*, Adv. No. 12-01277-SBB, 2013 WL 5314369, at *4 (Bankr. D. Colo. Sept. 18, 2013) *(quoting Liebersohn v. IRS (In re C.F. Foods, L.P.)*, 265 B.R. 71, 85 (Bankr. E.D. Pa. 2001)).

rogates sovereign immunity as to [§] 544(b)(1), including the underlying state law cause of action," or whether the waiver does not apply to that underlying law.[58] There is no question that Congress can waive the government's sovereign immunity with respect to the underlying state law causes of action incorporated through § 544(b); the dispute concerns whether § 106(a)(1) accomplished that result. If it did not, Congress would have to provide "for a separate waiver of sovereign immunity with respect to any 'applicable law,'"[59] and there is also no question that Congress has not done so. Courts have split on this issue,[60] including two circuit courts—the Ninth Circuit has determined that § 106(a)(1)'s waiver applies to the underlying "applicable law,"[61] while the Seventh Circuit has held that it does not.[62]

The Court concludes that the plain text of § 106(a)(1) unequivocally abrogates sovereign immunity as to the underlying state law cause of action. The statute contains no exceptions, qualifiers, or carve-outs in its language, "indicating a clear legislative intent to be as broad as possible in abrogating sovereign immunity in the bankruptcy context."[63] Of particular importance,

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[58] *DBSI*, 869 F.3d at 1013.

[59] *Id.* at 1011-12.

[60] *See Lewiston*, 528 B.R. at 391-94 (collecting cases); *McClarty v. Hatchett (In re Hatchett)*, 588 B.R. 472, 479-80 (Bankr E.D. Mich. 2018) (same).

[61] *DBSI*, 869 F.3d at 1013.

[62] *EAR*, 742 F.3d at 747.

[63] *Jamestown S'Klallam Tribe v. McFarland*, 579 B.R. 853, 857 (E.D. Cal. 2017); *see also Lewiston*, 528 B.R. at 397 ("There is no limitation or restriction on the abrogation accomplished by [§ 106(a)(1)].").

Congress placed marked emphasis on the breadth of the statute by choosing the critical phrase "with respect to." The Supreme Court has held, as a matter of statutory construction, that the use of the word "respecting," a synonym of that phrase,[64]

> in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject *but also matters relating to that subject.*
>
> Indeed, when asked to interpret statutory language including the phrase "relating to," which is one of the meanings of "respecting," this Court has typically read the relevant text expansively.[65]

Even the United States conceded at oral argument that "with respect to" is broad language. By abrogating sovereign immunity "with respect to" § 544, Congress signaled its intent that the waiver would cover matters related to that Code section—i.e., the state law causes of action incorporated through § 544(b).

Other aspects of the language and structure of § 106(a) support that conclusion. Many of the analyses of the interplay between §§ 106(a)(1) and 544 have noted that § 106(a)(1) does not distinguish between § 544(a) and (b), offering that as textual evidence that the waiver applies to § 544(b) and the underlying causes of action.[66] The United States, no stranger to this argument, has a

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[64] *See Respecting*, The American Heritage Dictionary (2d College ed. 1982) (defining "respecting" as "[w]ith respect to; concerning").

[65] *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. —, —, 138 S. Ct. 1752, 1760 (2018) (emphasis added) (citations omitted).

[66] *E.g.*, *DBSI*, 869 F.3d at 1012 ("[H]ad Congress intended to limit Section 106(a)(1)'s application to Section 544(a), as opposed to all of Section 544, it knew how to do so.").

rebuttal ready at hand: Many of the sections listed in § 106(a)(1) "have subsections that do not implicate sovereign immunity," such as § 524(f).[67] The intended deduction from this fact is that the inclusion of § 544(b) within § 106(a)(1) says little, if anything, meaningful about congressional intent to have the waiver apply to it when Congress saw fit to include other subsections "to which sovereign immunity has no application at all."[68]

Upon closer examination, however, the United States' rebuttal, rather than undermining the Trustee's position, ends up supporting it. The failure to remove certain subsections from § 106(a)(1) to which sovereign immunity cannot apply offers additional textual proof, not of sloppy draftsmanship, but instead of Congress's intent that the waiver be as broad as possible. Congress's approach to § 106(a)(1) can perhaps be described as casting a wide net, but certainly not as scattershot. Congress included fifty-nine sections within § 106(a)(1), but deliberately omitted many others, evincing a careful legislative choice about where sovereign immunity would be waived. The way in which Congress included those sections also shows a careful legislative choice. As the *DBSI* court noted, "Congress has demonstrated that it knows how to make a specific provision only applicable to a subsection of [§] 544."[69] Given that demonstrated knowledge, the presumption is that Congress acted intentionally when it included whole, undivided sections within § 106(a)(1). The inference to be drawn from that choice is that Congress wanted the waiver of sovereign immunity to apply broadly to those sections,

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[67] *EAR*, 742 F.3d at 749.

[68] *Id.* at 749 n.4.

[69] *DBSI*, 869 F.3d at 1012 (citing § 546(c)(1), (d), (h) *and* § 541(b)(4)).

reaching all of the statutory nooks and crannies where it could possibly apply.[70] In short, Congress appears to have used this principle in enacting § 106(a)(1): Wherever the waiver can apply to the named sections, it ought to apply. And the relevant difference between § 524(f) and § 544(b) is that a waiver of sovereign immunity can apply to the latter and the state law causes of action incorporated therein. In this way, Congress's choice not to distinguish between § 544(a) and (b) does provide meaningful evidence of legislative intent, even though subsections such as § 524(f) are caught within § 106(a)(1)'s reach.

Section 106(a)(3) offers analogous support. That paragraph permits courts to "issue against a governmental unit an order, process, or judgment under such sections[—i.e., the sections listed in § 106(a)(1)—]or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery . . . ."[71] On its face, § 106(a)(3) applies to all of § 544. It would be a strange exercise in legislative drafting if, in § 106(a)(3), Congress expressly authorized courts to issue orders and judgments against governmental units to avoid fraudulent transfers under § 544(b)—§ 550 permits the monetary recovery—but in § 106(a)(1), an expressly-related paragraph within the same subsection, failed to waive sovereign immunity for § 544(b) claims. Such a result would render § 106(a)(3) surplusage as applied to § 544(b), and "[i]t is 'a cardinal princi-

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[70] *See EAR*, 742 F.3d at 749 ("[T]he better conclusion is that Congress simply listed undivided Code sections if any part of that section included something for which sovereign immunity should be waived.").

[71] § 106(a)(3).

ple of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"[72] Similarly, "statutes should be construed so that their provisions are harmonious with each other."[73] While it is true that § 106(a)(3) may not apply to some of the subsections listed in § 106(a)(1), the important distinction, as before, is that it can apply to § 544(b). As a result, the statutory interpretation that allows it to apply and avoids it becoming insignificant, thereby achieving the most harmonious result between § 106(a)(1) and (a)(3), ought to be favored. To hold otherwise would be to disregard the apparent congressional design to hold governmental units liable for fraudulent transfers under § 544(b).[74] The Court concludes, after examining the plain language and structure of § 106(a) using traditional interpretive tools, that "[t]here is no sovereign immunity 'tie' in this case. . . . The statute is susceptible to only one interpretation: it simply eliminates sovereign immunity"[75] with respect to the underlying state law causes of action incorporated through § 544(b).

The Court believes that this analysis does not minimize, overlook, or eliminate the actual creditor require-

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[72] *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

[73] *Negonsott v. Samuels*, 933 F.2d 818,819 (10th Cir. 1991) (citation omitted), *aff'd*, 507 U.S. 99 (1993).

[74] *See C.F. Foods*, 265 B.R. at 85 ("Congress amended § 106(a) by setting forth specific Bankruptcy Code sections, including § 544, to express, clearly and unequivocally, its intent that governmental units be subject to monetary judgments under those sections.").

[75] *Lewiston*, 528 B.R. at 395.

ment of § 544(b). The United States has responded in a consistent and standard way to § 544(b) claims over the years by emphasizing that courts must "take seriously the requirement that there must exist an actual creditor who could avoid the transfers at issue outside of bankruptcy. . . . If there is no actual unsecured creditor who could bring a claim against the IRS outside of bankruptcy, then [the Trustee] cannot move forward under § 544(b)."[76] In a 2001 case, the court framed the United States' position in similar terms:

> An unsecured creditor could not bring a suit against the IRS under [applicable state fraudulent transfer law] outside of bankruptcy court because the unsecured creditor would be barred from doing so by the sovereign immunity doctrine (unless it could show that the government waived sovereign immunity). Without the existence of an unsecured creditor who has the right to commence such an action, the IRS argues, there is no cause of action that the trustee can pursue through the use of § 544 of the Bankruptcy Code.[77]

And in *EAR*, the Seventh Circuit emphasized that "Congress did not alter § 544(b)'s substantive requirements merely by stating that the federal government's immun-

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[76] Docket No. 26 in Adv. No. 18-2089, at 2.

[77] *C.F. Foods*, 265 B.R. at 82-83; *see also Valley Mortg.*, 2013 WL 5314369, at *4 ("[T]he [United States] argues that if sovereign immunity prohibits an unsecured creditor from bringing a non-bankruptcy state law claim against [it], then sovereign immunity similarly prohibits a trustee who steps into the shoes of an unsecured creditor from brining [sic] the same non-bankruptcy state law claim under section 544(b)(1).").

ity was abrogated 'with respect to' this provision."[78] This Court agrees that Congress did not dispose of the actual creditor requirement when it enacted § 106(a)(1), and neither party disputes that the Trustee must still show the existence of an actual creditor. But the waiver of sovereign immunity did remove the ability of a governmental unit to interpose immunity as a defense to the underlying state law cause of action when a bankruptcy trustee asserts that cause of action standing in the actual creditor's shoes.[79] 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.[80] "The fact that the IRS could assert the *defense* of sovereign immunity *outside* of bankruptcy against an unsecured creditor has no bearing on the availability of that defense against a trustee *inside* bankruptcy."[81] Here, the United States concedes that Salazar fulfills the actual creditor requirement, except that sovereign immunity would bar any suit she could bring against the United States under the UUFTA. But "[s]overeign immunity is the very defense that is abrogated by § 106(a)(1)."[82] Because the Trustee, standing in Salazar's shoes, need not defeat the

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[78] *EAR*, 742 F.3d at 747.

[79] *See C.F. Foods*, 265 B.R. at 85 ("By including § 544 in the list of Bankruptcy Code sections set forth in § 106(a), Congress knowingly included state law causes of action within the category of suits to which a sovereign immunity defense could no longer be asserted.").

[80] *Jamestown S'Klallam Tribe*, 579 B.R. at 857 (emphasis added).

[81] *Hatchett*, 588 B.R. at 481.

[82] *Lewiston*, 528 B.R. at 396.

defense of sovereign immunity, he has satisfied the actual creditor requirement of § 544(b).[83]

Although not necessary to this decision, the Court notes that the Code's goal of estate maximization supports its conclusion. When enacting the Code, "Congress carefully considered [its] effect . . . on tax collection"[84] and, as a general rule, elected to treat the IRS and other taxing authorities on par with other creditors.[85] When Congress did seek to "provide protection to tax collectors," it did so expressly, "through grants of enhanced priorities for unsecured tax claims and by the nondischarge of tax liabilities."[86] There is nothing in

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[83] *Franklin Savings* does not compel a different result. In that case, the Tenth Circuit held that § 106 did not waive the statute of limitations contained in 28 U.S.C. § 2401(b), which is part of the Federal Tott Claims Act. In making that determination, the Tenth Circuit stated that "[§] 106 requires a plaintiff seeking to use its waiver to demonstrate that a source outside of § 106 entitles it to the relief sought, and does not evidence any intent to exempt the plaintiff from satisfying any time-bar condition or requirement contained within that outside source." *Franklin Sav. Corp.*, 385 F.3d at 1290. This Court's holding does not exempt the Trustee from satisfying the actual creditor requirement, i.e., the "requirement contained within [the] outside source." As the Court has made clear, the Trustee must still satisfy that requirement.

[84] *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983) (citations omitted).

[85] *See Nordic Vill.*, 503 U.S. at 43-44 (Stevens, J., dissenting) ("In the bankruptcy context, the Court has noted that there is no reason why the Federal Government should be treated differently from any other secured creditor." (citing *Whiting Pools*, 462 U.S. at 209)).

[86] *Whiting Pools*, 462 U.S. at 209 (citations omitted); *see also Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006) ("[P]referential treatment of a class of creditors is in

§ 106 that suggests that Congress intended that the IRS, or governmental units more generally, be treated differently from other creditors with respect to fraudulent transfer claims under § 544(b). Permitting trustees to recover such transfers from governmental units and non-governmental units alike helps fulfill the Code's goal "to maximize the value of the estate" for creditors.[87]

While the legislative history of § 106 is also not necessary to this decision, it supports the Court's conclusion as well. As noted previously, Congress thought it had created an express waiver of sovereign immunity in bankruptcy matters when it passed the Bankruptcy Reform Act of 1978, but the Supreme Court disagreed. In response, Congress amended § 106 to meet the standard demanded by the Supreme Court and achieve its original intent.[88] Notably, Congress drafted § 106(a)(1) to "specifically list[] those sections of title 11 with respect to which sovereign immunity is abrogated" at the suggestion of the Supreme Court.[89] In the ongoing dialogue between the legislative branch and the judiciary, these actions can only be viewed as Congress's attempt to have its intent heard clearly by the courts. In fact, Justice Stevens characterized the 1994 amendment as a "legislative clarification" undertaken for the Supreme

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order only when clearly authorized by Congress." (citations omitted)).

[87] *Weintraub*, 471 U.S. at 352.

[88] *See* H.R. Rep. No. 103-835, at 42 (1994), *reprinted in* 1994 U.S.C.A.A.N. 3340, 3351 ("It is the Committee's intent to make section 106 conform to the Congressional intent of the Bankruptcy Reform Act of 1978 . . . .").

[89] House Judiciary Committee, Bankruptcy Reform Act of 1994-Section-By-Section Description, Cong. Rec. H 10764, 10766 (103d Cong., 2d Sess., Oct. 4, 1994).

Court's benefit.[90] Congress took prompt legislative action to overrule two Supreme Court cases that it perceived as thwarting its intent-which it thought was already clear enough-and incorporated the Supreme Court's suggestions into its major revision of § 106 to ensure that the legislation withstood legal challenges. It is true that neither *Nordic Village* nor *Hoffman* involved § 544(b), so Congress's intent to overrule those cases may not speak specifically to how the waiver of sovereign immunity affects § 544(b).[91] But when viewed in conjunction with the text, scope, and structure of the § 106(a)(1) waiver, Congress's actions in 1978 and 1994 unequivocally evince an intent to achieve a durable and broad waiver of sovereign immunity in the bankruptcy context. Having demonstrated such an intent, this Court will not second guess it.

The Court believes that its conclusion on sovereign immunity does "not enlarge the waiver beyond the purview of the statutory language,"[92] while at the same time avoiding "import[ing] immunity back into a statute

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[90] *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 90 n.12 (1996) (Stevens, J., dissenting).

[91] This case does bear certain factual similarities to *Nordic Village,* however. In that case, an officer and shareholder of the debtor used corporate funds to pay his personal federal tax debt, and the trustee of the debtor's bankruptcy estate sued to get that money back from the IRS. *Nordic Vill.*, 503 U.S. at 31. The crucial distinguishing fact is that the payment was made after the debtor filed bankruptcy, and the *Nordic Village* trustee sought to avoid the payment as an unauthorized, post-petition transfer under § 549(a). *Id.* Had All Resort paid Cummins's and Bizzaro's tax debts post-petition, sovereign immunity would offer no defense to a claim under § 549(a).

[92] *Williams*, 514 U.S. at 531.

designed to limit it."[93] In holding that § 106(a)(1)'s waiver reaches the underlying state law causes of action incorporated through § 544(b), the Court concludes, as a matter of law, that sovereign immunity does not preclude the Trustee from satisfying the actual creditor requirement.

D. Preemption Under the Internal Revenue Code

The United States also contends that the Trustee cannot satisfy the actual creditor requirement because the provisions of the Internal Revenue Code[94] (IRC) preempt a suit brought by a debtor's creditors under state law to recover as fraudulent transfers tax payments made to the IRS. Because the Trustee stands in Salazar's shoes for purposes of § 544(b), and because Salazar's UUFTA claim would be preempted by the IRC, the United States concludes that preemption also bars the Trustee's recovery.

Under the Supremacy Clause of the Constitution "Congress has the power to enact statutes that preempt state law."[95] Federal preemption can be divided into two categories, express or implied, and express preemption "occurs when Congress 'defines explicitly the extent to which its enactments pre-empt state law.'"[96] An example of express preemption can be found, coinci-

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[93] *Indian Towing Co.*, 350 U.S. at 69.

[94] Title 26 of the United States Code.

[95] *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1324 (10th Cir. 2010) (citing *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989)).

[96] *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007) (quoting *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 792 (10th Cir. 2000)).

dentally, within § 544 itself. Section 544(b)(2) renders § 544(b)(1) inapplicable to certain qualifying charitable contributions and states that "[a]ny claim by any person to recover a transferred contribution [that meets the applicable definition] under Federal or State law in a Federal or State court shall be preempted by the commencement of the case."[97] The United States' argument is not based on express preemption, however, but on field preemption, a species of implied preemption that "occurs when 'the scope of a statute indicates that Congress intended federal law to occupy a field exclusively.'"[98] The "basic premise of field preemption [is] that States may not enter, in any respect, an area the Federal Government has reserved for itself."[99] In determining whether field preemption applies, the Court "must first identify the legislative field that the state law at issue implicates," then "evaluate whether Congress intended to occupy the field to the exclusion of the states."[100] "[P]reemption is ultimately a question of congressional intent,"[101] and Congress's intent to occupy the field may

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[97] § 544(b)(2).

[98] *Emerson*, 503 F.3d at 1129 (quoting *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002)); *see also Arizona v. United States*, 567 U.S. 387, 401 (2012) ("Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249 (1984))).

[99] *Arizona*, 567 U.S. at 402.

[100] *O'Donnell*, 627 F.3d at 1325 (citing *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 808-09 (9th Cir. 2009)).

[101] *Id.* at 1324 (citing *Altria Grp., Inc. v. Good*, 555 U.S. 70, 129 S. Ct. 538, 543 (2008)); *see also Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("[T]he purpose of Congress is the ultimate touchstone in

be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, or where an Act of Congress touches a field in which the interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.[102]

The United States argues that the UUFTA implicates the field of federal tax collection and that Congress's intent to occupy that field exclusively is implied by the scope of the IRC, "a comprehensive integrated scheme that . . . controls, to the exclusion of any state laws, the circumstances under which the IRS receives payment, forcibl[y] collects, refunds, repays, or releases amounts collected, including to third parties."[103] In support of this argument, the United States notes that 26 U.S.C. § 7426 permits a person to sue the United States in federal court if the IRS wrongfully levies on that person's property,[104] but the IRC does not provide a remedy to recover funds from the IRS voluntarily paid on someone else's behalf using state fraudulent transfer law. Since Congress has not created such a remedy, and since the IRC occupies the field of federal tax collection, the United States reasons that Salazar could not sue under the UUFTA to recover the Cummins and Biz-

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every preemption case." (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996))).

[102] *O'Donnell,* 627 F.3d at 1325 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990)).

[103] Docket No. 16 in Adv. No. 18-2089, at 7.

[104] A levy, at least in the context of federal tax collection, "is a legally sanctioned seizure and sale of property" to collect unpaid taxes. *EC Term of Years Tr. v. United States*, 550 U.S. 429, 430-31 (2007) (citations and internal quotation marks omitted).

zaro tax payments and, consequently, neither can the Trustee.

The Court disagrees and concludes that there is no federal preemption issue here for three reasons. First, the Trustee's § 544(b) claim is a "federal cause[] of action and therefore cannot be preempted."[105] Second, even if the Trustee's claim were considered a state law cause of action because it relies on the UUFTA, it would not be preempted by the IRC. While it is self-evident, as a definitional matter, that Congress intended to occupy the field of federal tax collection, the UUFTA, as incorporated through § 544(b), does not implicate that field. The Trustee is not suing to collect a tax payment; he is suing to collect a fraudulent transfer.[106] "What the Trustee seeks to recover is property of [All Resort] (and [All Resort's] estate), which was given to the IRS to pay *someone else's* tax obligations."[107] Stated succinctly, the Trustee's invocation of the UUFTA to avoid the Cummins and Bizzaro tax payments does not place him within the field of federal tax collection; therefore, the

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[105] *DBSI*, 869 F.3d at 1015 n.14; *see also Hatchett*, 588 B.R. at 483 ("Since § 544(b)(l) is a federal cause of action to recover property fraudulently transferred by a debtor, there is no conflict between state and federal law which might give rise to a preemption argument. The Trustee's cause of action under § 544(b)(1) is not preempted by the IRC.").

[106] *See Valley Mortg.*, 2013 WL 5314369, at *5 ("In pursuing the present claims against the IRS, the trustee is not standing in the shoes of the debtors, as taxpayers, seeking to recover tax refunds, but rather, in the shoes of a creditor seeking to recover property fraudulently transferred . . . ." (quoting *Sharp v. United States (In re SK Foods, L.P.)*, Adv . No. 10-2117-D, 2010 WL 6431702, at *4 (Bankr. E.D. Cal. July 14, 2010))).

[107] *Hatchett*, 588 B.R. at 483.

UUFTA and the IRC do not conflict. It is for this reason that the United States' citation to 26 U.S.C. § 7426—and indeed the IRC itself—misses the mark. Since the IRC does not conflict with the UUFTA, the alleged absence of a remedy in the IRC to recover from the IRS, as a fraudulent transfer, funds voluntarily paid on someone else's behalf is not indicative of congressional intent to preempt claims of the kind the Trustee is asserting in this case.

Third, the Court can find no evidence in § 544 of congressional intent to preempt such claims. By writing an express preemption provision into § 544(b)(2) concerning the avoidance of certain charitable contributions, Congress demonstrated its ability to make its preemptive intent clear. But it is silent on whether the IRC preempts state law fraudulent transfer claims incorporated through § 544(b) to avoid payments made to the IRS. Of course, it is true that "the existence of an 'express preemption provision does *not*' . . . impose a 'special burden' that would make it more difficult to establish the preemption of laws falling outside the clause,"[108] but the Supreme Court has also made it clear that "[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them."[109] Here, Congress drafted § 544 to incorporate applicable non-bankruptcy law, aware that it could be invoked to

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[108] *Arizona*, 567 U.S. at 406 (quoting *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 869-72 (2000)).

[109] *Wyeth*, 555 U.S. at 575 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989)).

bring suit against governmental agencies, including the IRS. Even if the UUFTA operates in the field of federal tax collection, which the Court holds it does not, it stretches credulity to conclude that Congress would expressly draw non-bankruptcy law into a section of title 11 only to have that law's application circumscribed by title 26 through implied preemption. Congress knew how to expressly preempt such law, but did not do so. Its silence on the issue indicates an intent to tolerate that law's operation there rather than an intent to preempt its operation impliedly. Accordingly, the Court concludes that the Trustee's claim under § 544(b) and the UUFTA is not preempted by the IRC.

IV. CONCLUSION

The United States has conceded that the Trustee has established all of the elements of his § 544(b) claim except for the actual creditor requirement, and it contests that requirement on the grounds that sovereign immunity and preemption would bar Salazar's suit against it outside of bankruptcy under the UUFTA. Here, the Court determines as a matter of law that § 106(a)(1) unequivocally waives the federal government's sovereign immunity with respect to the underlying state law causes of action incorporated through § 544(b) and that the IRC does not preempt such claims. Accordingly, the Trustee has satisfied the actual creditor requirement and has carried his burden to show that he is entitled to judgment as a matter of law on his § 544(b) claim. The Court will therefore grant summary judgment to the Trustee under § 544(b) avoiding the Cummins and Bizzaro tax payments and, as a consequence, will deny the United States' motion for summary judgment. In addition, because § 106(a)(1) abrogates the govern-

ment's sovereign immunity with respect to § 550, the Court will award the Trustee a judgment in the amount of $145,138.78, representing the combined amount of the Cummins and Bizzaro tax payments. A separate Order and Judgment will be issued in accordance with this Memorandum Decision.

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

Bankruptcy Case No. 17-23687
Chapter 7
Adversary Proceeding No. 18-2089

IN RE: ALL RESORT GROUP, INC., DEBTOR

DAVID L. MILLER, AS CHAPTER 7 TRUSTEE
OF THE BANKRUPTCY ESTATE OF ALL RESORT GROUP,
INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Dated: Mar. 31, 2020

ORDER AND JUDGMENT GRANTING TRUSTEE'S MOTION FOR SUMMARY JUDGMENT, DENYING THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT, AVOIDING TRANSFERS, AND AWARDING JUDGMENT IN FAVOR OF THE TRUSTEE

Hon. R. KIMBALL MOSIER

David Miller, the chapter 7 trustee (Trustee) of the bankruptcy estate of Debtor All Resort Group, Inc. (All Resort) commenced this adversary proceeding against the United States to avoid as fraudulent trans-

fers two payments All Resort made to the IRS (Transfers) and recover the Transfers for the benefit of the All Resort estate. The Transfers are more particularly described in the Court's Memorandum Decision.

The Trustee and the United States filed cross-motions for summary judgment, and the Court conducted a hearing on those motions. After considering the relevant filings in this adversary proceeding, including the parties' motions and memoranda, after considering the parties' oral arguments, and after conducting an independent review of applicable law, the Court issued its Memorandum Decision of even date. For the reasons set forth in the Memorandum Decision, which the Court incorporates herein by reference, the Court hereby **ORDERS:**

1. The United States' Motion for Summary Judgment is DENIED.
2. The Trustee's Motion for Summary Judgment is GRANTED.
3. The Transfers are avoided under 11 U.S.C. § 544(b).
4. The Trustee is awarded a judgment against the United States pursuant to 11 U.S.C. § 550(a) in the amount of $145,138.78.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 21-4135
(D.C. No. 2:20-CV-00248-BSJ)
(D. Utah)

DAVID L. MILLER, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES,
AMICUS CURIAE

[Filed: Sept. 1, 2023]

ORDER

Before CARSON, BALDOCK, and EBEL, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ CHRISTOPHER M. WOLPERT
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX F

1. U.S. Const. Art. VI, Cl. 2 provides:

Supremacy Clause

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. 11 U.S.C. 106 provides:

Waiver of sovereign immunity

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 504, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmen-tal unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of sec-tion 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

(b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

3. 11 U.S.C. 544 provides:

Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debt-or at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debt-or at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of

this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

4. Utah Code Ann. §§ 25-6-1 through 25-6-10 (2014) provided:

26-6-1 Short title

This chapter is known as the "Uniform Fraudulent Transfer Act."

25-6-2 Definitions

In this chapter:

(1) "Affiliate" means:

(a) a person who directly or indirectly owns, controls, or holds with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) as a fiduciary or agent without sole discretionary power to vote the securities; or

(ii) solely to secure a debt, if the person has not exercised the power to vote;

(b) a corporation 20% or more of whose outstanding voting securities are directly or indirectly

owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) as a fiduciary or agent without sole power to vote the securities; or

(ii) solely to secure a debt, if the person has not exercised the power to vote;

(c) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(d) a person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but does not include:

(a) property to the extent it is encumbered by a valid lien;

(b) property to the extent it is generally exempt under nonbankruptcy law; or

(c) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:

(a) if the debtor is an individual:

(i) a relative of the debtor or of a general partner of the debtor;

(ii) a partnership in which the debtor is a general partner;

(iii) a general partner in a partnership described in Subsection (7) (a) (ii);

(iv) a corporation of which the debtor is a director, officer, or person in control; or

(v) a limited liability company of which the debtor is a member or manager;

(b) if the debtor is a corporation:

(i) a director of the debtor;

(ii) an officer of the debtor;

(iii) a person in control of the debtor;

(iv) a partnership in which the debtor is a general partner

(v) a general partner in a partnership described in Subsection (7) (b) (iv);

(vi) a limited liability company of which the debtor is a member or manager; or

(vii) a relative of a general partner, director, officer, or person in control of the debtor;

(c) if the debtor is a partnership:

(i) a general partner in the debtor;

(ii) a relative of a general partner in, a general partner of, or a person in control of the debtor;

(iii) another partnership in which the debtor is a general partner;

(iv) a general partner in a partnership described in Subsection (7)(c)(iii);

(v) a limited liability company of which the debtor is a member or manager; or

(vi) a person in control of the debtor;

(d) if the debtor is a limited liability company:

(i) a member or manager of the debtor;

(ii) another limited liability company in which the debtor is a member or manager;

(iii) a partnership in which the debtor is a general partner;

(iv) a general partner in a partnership described in Subsection (7)(d)(iii);

(v) a person in control of the debtor; or

(vi) a relative of a general partner, member, manager, or person in control of the debtor;

(e) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(f) a managing agent of the debtor.

(8) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by

agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(9) "Person" means an individual, partnership, limited liability company, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(10) "Property" means anything that may be the subject of ownership.

(11) "Relative" means an individual or an individual related to a spouse, related by consanguinity within the third degree as determined by the common law, or a spouse, and includes an individual in an adoptive relationship within the third degree.

(12) "Transfer" means every mode, direct or indirect, absolute or conditional, or voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(13) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

25-6-3 Insolvency.

(1) In this chapter: A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.

(2) A debtor who is generally not paying his debts as they become due is presumed to be insolvent.

(3) A partnership is insolvent under Subsection (1) if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(4) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this chapter.

(5) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

25-6-4 Value—Transfer.

(1) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied. However, value does not include an unperformed promise made other than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(2) Under Subsection **25-6-5** (1) (b) and Section **25-6-6**, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(3) A transfer is made for present value if the exchange between the debtor and the transferee is in-

tended by them to be contemporaneous and is in fact substantially contemporaneous.

25-6-5 Fraudulent transfer—Claim arising before or after transfer.

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

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

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

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

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

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

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

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

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

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

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

(f) the debtor absconded;

(g) the debtor removed or concealed assets;

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

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

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

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

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

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

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

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

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

25-6-7 Transfer—When made.

In this chapter:

(1) A transfer is made:

(a) with respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and

(b) with respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien other than under this chapter that is superior to the interest of the transferee.

(2) If applicable law permits the transfer to be perfected as provided in Subsection (1) and the transfer is not so perfected before the commencement of an action for relief under this chapter, the transfer is deemed made immediately before the commencement of the action.

(3) If applicable law does not permit the transfer to be perfected as provided in Subsection (1), the transfer is made when it becomes effective between the debtor and the transferee.

(4) A transfer is not made until the debtor has acquired rights in the asset transferred.

(5) An obligation is incurred:

(a) if oral, when it becomes effective between the parties; or

(b) if evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

25-6-8 Remedies of creditors.

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

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

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

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

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

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

(iii) any other relief the circumstances may require.

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

25-6-9 Good faith transfer.

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

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

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

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

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

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

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

(b) enforcement of any obligation incurred; or

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

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

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

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

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

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

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

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

25-6-10 Claim for relief—Time limits.

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

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

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

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

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 21-4135

DAVID L. MILLER, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Filed: June 27, 2023

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. No. 2:20-CV00248-BSJ)

Before CARSON, BALDOCK, and EBEL, Circuit Judges.

BALDOCK, Circuit Judge.

"All our work . . . is a matter of semantics."

Justice Frankfurter

As apposite here, § 544(b)(1) of the United States Bankruptcy Code provides that "the trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under" the Code. 11 U.S.C. § 544(b)(1). Subsection (b)(1) empowers a trustee to step into the shoes, so to speak, of an actual creditor with an unsecured claim and invoke the state law applicable to the transfer the trustee seeks

to avoid. *Sender v. Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996). At the same time, § 106(a) of the Bankruptcy Code provides in relevant part that "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit . . . with respect to," among 58 other sections of the Code, "Section[ ] . . . 544[.]" 11 U.S.C. § 106(a)(1). Subsection (a) further provides "[t]he court may hear and determine any issue arising with respect to the application of such section[ ] to governmental units." *Id.* § 106(a)(2). The phrase "governmental unit" includes the "United States," a "department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under [Title 11])," and "a State." *Id.* § 101(27). In this appeal, we construe the scope of § 106(a)'s waiver of sovereign immunity as it bears upon the Trustee's avoidance powers under § 544(b)(1), and more particularly "under applicable law." Our jurisdiction arises under 28 U.S.C. § 158(d). Our review is de novo. *Scarlett v. Air Methods Corp.*, 922 F.3d 1053, 1060 (10th Cir. 2019).

I.

This appeal arises out of a converted Chapter 7 bankruptcy filed in 2017. In 2014, the debtor, All Resorts Group, Inc., paid personal tax debts of two of its principals totaling $145,138.78 to the Internal Revenue Service. Plaintiff, the United States Trustee, brought an adversary proceeding in the bankruptcy court against the United States pursuant to Code § 544(b)(1) to avoid these transfers. The "applicable law" on which the Trustee relied was now-former § 25-6-6(1) of Utah's Uniform Fraudulent Transfer Act (amended 2017), presently codified at Utah Code Ann. § 25-6-203(1) as

part of Utah's Uniform Voidable Transactions Act. The United States (Government) did not contest the substantive elements required for the actual creditor (in this case, an individual with an employment discrimination claim against the debtor) to establish a voidable transfer under § 25-6-6(1). The Government acknowledged that (1) the debtor had made the transfers, (2) an actual creditor had an unsecured claim against the debtor arising before the transfers, (3) the debtor did not receive a reasonably equivalent value in exchange for the transfers, and (4) the debtor was insolvent at the time of the transfers. The Government further acknowledged that the sovereign immunity waiver contained in Code § 106(a) made it amenable to the Trustee's § 544(b)(1) action. What the Government did contest was § 544(b)(1)'s "actual creditor requirement," *i.e.*, that an actual creditor could succeed against the Government in a suit brought under § 25-6-6(1) outside of bankruptcy.

According to the Government, the actual creditor could not avoid the debtor's tax payments made on behalf of its principals to the IRS because sovereign immunity would bar such creditor's action against the Government outside of bankruptcy. Therefore, the Trustee could not satisfy § 544(b)(1)'s actual creditor requirement and avoid the debtor's tax payments. The Trustee did not disagree that outside of bankruptcy and apart from Code § 544(b)(1), sovereign immunity would bar the actual creditor's suit against the Government. But, according to the Trustee, the waiver contained in Code § 106(a) abrogated sovereign immunity not only as to his § 544(b)(1) adversary proceeding against the Government, but also as to the underlying Utah state law

cause of action he invoked under subsection (b)(1) to avoid the transfers.

On cross-motions for summary judgment, the bankruptcy court, in a thorough opinion, ruled in favor of the Trustee and avoided the transfers. The court held the Trustee had satisfied Code § 544(b)(1)'s actual creditor requirement because "§ 106(a)(1) unequivocally waives the federal government's sovereign immunity with respect to the underlying state law cause of action incorporated through § 544(b)[.]" *In re All Resort Group, Inc.*, 617 B.R. 375, 394 (Bankr. D. Utah 2020). Accordingly, the bankruptcy court awarded the Trustee a judgment against the Government pursuant to 11 U.S.C. §§ 106(a)(3) and 550(a) in the amount of $145,138.78. On appeal to the district court, the court adopted the bankruptcy court's decision and affirmed its judgment. *United States v. Miller*, No. 20-CV-248-BSJ, Order (D. Utah Sept. 8, 2021). The Government subsequently appealed to this Court to address an issue—the scope of Code § 106(a)'s waiver of sovereign immunity as it bears on Code § 544(b)(1)—that has split our sister circuits. *Compare In re Equip. Acquisition Res., Inc.* ("*EAR*"), 742 F.3d 743 (7th Cir. 2014) (holding § 106(a)'s waiver did not extend to an Illinois state law cause of action under § 544(b)(1)), *with In re DBSI, Inc.*, ("*DBSI*") 869 F.3d 1004 (9th Cir. 2017) (holding § 106(a)'s waiver extended to an Idaho state law cause of action under § 544(b)(1)), *and In re Yahweh Ctr., Inc.*, ("*Yahweh*") 27 F.4th 960 (4th Cir. 2022) (holding in the alternative that § 106(a)'s waiver extended to a North Carolina state law cause of action under § 544(b)(1)). For reasons that follow, we too rule in favor of the Trustee and affirm.

II.

That Congress may waive the sovereign immunity of the Government is beyond dispute. Therefore, we turn to an interpretation of the Bankruptcy Code that necessarily begins—and for the most part ends where sovereign immunity is at stake—with the wording of the statutes at issue. *FAA v. Cooper*, 566 U.S. 284, 290, 132 S. Ct. 1441, 182 L. Ed. 2d 497 (2012). Although the Government discusses Code § 544(b)(1) at length in its briefing, both parties agree as to what § 544(b)(1) means and how it operates—at least in a vacuum. Rather, notwithstanding the Government's insistence to the contrary, the present dispute is about the scope of the waiver of sovereign immunity contained in Code § 106(a), and more specifically, whether such waiver reaches the underlying state law cause of action that § 544(b)(1) authorizes the Trustee to rely on in seeking to avoid the transfers at issue. And so it is that we focus our attention on § 106(a).

Before turning to the text of § 106(a) itself, a brief background discussion about Congressional waivers of sovereign immunity that informs our statutory construction is in order. The Supreme Court has oft repeated, most recently just this Term, that "[t]o abrogate sovereign immunity, Congress must make its intent unmistakably clear in the language of the statute." *LAC du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. __, __, (2023) (slip. op. at 3) (internal ellipses and quotation marks omitted). "This clear-statement rule is a demanding standard." *Id.* at __ (slip op. at 4). Thus, we must construe ambiguities regarding the waiver's scope in favor of the sovereign. *Cooper*, 566 U.S. at 291. A waiver is ambiguous if a

plausible interpretation of the statute's text exists that would not authorize suit against the sovereign. *Id.* at 290-91. In such case, "Congress has not unambiguously expressed the requisite intent" to waive immunity. *Coughlin*, 599 U.S. at __ (slip op. at 4). Moreover, though many inferior federal courts have been unable to withstand the temptation, we should not, the Supreme Court says, rely on legislative history to assist us in construing a congressional waiver of sovereign immunity. "Legislative history cannot supply a waiver that is not clearly evident from the language of the statute." *Cooper*, 566 U.S. at 290.

Notably, however, "the clear-statement rule is not a magic-words requirement." *Coughlin*, 599 U.S. at __ (slip op. at 10). "[T]he sovereign immunity canon is a tool for interpreting the law and . . . does not displace the other traditional tools of statutory construction." *Cooper*, 566 U.S. at 291 (internal brackets and quotation marks omitted). The Supreme Court has "never required that Congress use magic words" or "state its intent in any particular way" to establish that it intended to waive a sovereign's immunity from suit. *Id.* What the Supreme Court does require is that "the scope of Congress' waiver be clearly discernible from the statutory text in light of traditional interpretive tools" of statutory construction. *Id.* "As long as Congress speaks unequivocally, it passes the clear-statement test—regardless of whether it articulated its intent in the *most* straightforward way." *Coughlin*, 599 U.S. at __ (slip op. at 10).

Turning to the text of Code § 106(a), its relevant language says that "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is *abrogated* as

to a governmental unit . . . *with respect to* . . . Section[ ] . . . 544 . . . of this title." 11 U.S.C. § 106(a)(1) (emphasis added). Because the Bankruptcy Code does not define the key word "abrogated" or the key phrase "with respect to," we look to their ordinary meanings. *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759 (2018). Webster defines "abrogate" as "to abolish by authoritative, official, or formal action," "to put an end to," or "do away with." Webster's Third New Int'l Dictionary 6 (1981); *see also* Black's Law Dictionary 8 (10th ed. 2014). But for our purpose, to what extent has subsection (a)(1) abolished or done away with sovereign immunity?

Supreme Court precedent, by which we are bound, answers the question. The Court has told us that Congress's use of the word "respecting"—a synonym for the phrase "with respect to" according to Word Office 365's friendly thesaurus—"generally has a broadening effect, ensuring that the scope of a [statutory] provision covers not only its subject but also matters relating to that subject." *Appling*, 138 S. Ct. at 1760 (interpreting Code § 523(a)(2)(B) which prohibits a debtor from discharging a debt obtained by a materially false "statement . . . respecting the debtor's . . . financial condition," if made in writing). In *Appling*, the Court observed that Congress "characteristically employs" words and phrases with similarly "expansive" meanings such as "concerning," "with reference to," "relating to" and the like "*to reach any subject that has 'a connection with' . . . the topics the statute enumerates*." *Id.* at 1759-60 (emphasis added) (quoting *Coventry Health Care v. Nevils*, 581 U.S. 87, 96 (2017)); *see also Nevils*, 581 U.S. at 95-96, 137 S. Ct. 1190 ("We have repeatedly recognized that the phrase 'relate to' in a preemptive clause

expresses a broad pre-emptive purpose." (internal brackets and quotation marks omitted)).

Applying *Appling*'s teachings here, the Government's sovereign immunity defense to the Utah state law the Trustee invokes under Code § 544(b)(1) seems to us a "subject" that Code § 106(a)(1) has "a connection with" because a "topic" that § 106(a)(1) "enumerates" is the waiver of the Government's sovereign immunity "with respect to . . . Section[ ] . . . 544," a federal statute authorizing the Trustee's reliance on state law. In other words, the critical phrase "with respect to" in § 106(a)(1) clearly expresses Congress's intent to abolish the Government's sovereign immunity in an avoidance proceeding arising under § 544(b)(1), regardless of the context in which the defense arises. This is not surprising considering that Congress enacted the current and entirely new version of Code § 106(a)(1) in 1994 in direct response to two Supreme Court decisions that decided Congress, in the respective contexts presented, had not expressly declared its intent in the prior version of § 106 to abrogate sovereign immunity. *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 361 n.2 (2006) (citing *Hoffman v. Connecticut Dept. of Income Maint.*, 492 U.S. 96 (1989) and *United States v. Nordic Vill., Inc.*, 503 U.S. 30 (1992)).

Reinforcing our interpretation of § 106(a)(1)'s waiver of sovereign immunity is the similarly broad language of § 106(a)(2). Subsection (a)(2) tells us a court "may hear and determine *any* issue arising with respect *to* the application of" § 544. 11 U.S.C. 106(a)(2) (emphasis added). That Congress would authorize a court to "hear and determine any issue arising with respect to" § 544's application as part of a statute waiving the Government's sov-

ereign immunity surely presumes subject-matter jurisdiction. But sovereign immunity deprives a court of subject-matter jurisdiction. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."). The authority which subsection (a)(2) plainly confers would be substantially curtailed if Congress had intended an assertion of sovereign immunity to preclude a bankruptcy court from considering whether a trustee has satisfied the substantive elements of an underlying state law cause of action invoked pursuant to § 544(b)(1).

III.

In *EAR*, the Seventh Circuit was the first federal appeals court to address the interplay between Code §§ 106(a) and 544(b)(1). The court, however, never meaningfully addressed the scope of § 106(a) as reflected in its text. In deciding that § 106(a)(1) does not modify the actual creditor requirement of § 544(b)(1), the court took a two-tiered approach adopted from the Supreme Court's contextually distinct decision in *Meyer*. *See Meyer*, 510 U.S. at 480-87 (deciding a statutory waiver of sovereign immunity as to the FSLIC in a "sue-and-be-sued" clause extended to plaintiff's constitutional tort claim but refusing to extend a federal common law *Bivens* action to federal agencies). The court first acknowledged that § 106(a)(1) constituted a waiver of sovereign immunity as to the § 544(b)(1) proceeding brought by EAR, a Chapter 11 debtor-in-possession exercising the powers of a trustee, against the Government. *See* 11 U.S.C. § 1107(a). The court then asked whether the source of the substantive law upon which EAR relied, namely the Illinois Uniform Fraudulent Transfer Act, provided EAR an avenue for relief against

the Government. According to the Seventh Circuit, "[*t*]*hat* question is the crux of this appeal." *EAR*, 742 F.3d at 747.

The Seventh Circuit summarily concluded that "Congress did not alter § 544(b)'s substantive requirements merely by stating that the federal government's immunity was abrogated 'with respect to' this provision." *Id.* But "[t]o be clear," the court explained: "we do not need to rely on the presumption against waiver [of sovereign immunity] to resolve this dispute. We find the substantive requirements of § 544(b)(1) unambiguous, and those requirements are simply not met with respect to EAR's action." *Id.* at 750-51. What the Seventh Circuit's decision in *EAR* effectively accomplishes is a total ban on actions under Code § 544(b)(1) to set aside avoidable transfers against a "governmental entity" as defined in Code § 101(27) absent a second waiver of sovereign immunity by way of Congress or a state legislature as to the underlying state law cause of action.

Perhaps the Seventh Circuit's decision may be explained at least in part based on its view of federal tax policy. The court *hypothesized* that if the trustee's view prevailed, the states could "render[ ] federal tax revenue . . . more vulnerable to unexpected recovery actions" by extending the applicable statute of limitations (typically four years) or relaxing criteria for what constitutes an avoidable transfer under state law. *Id.* at 750. Of course, any such policy rationale, especially where based on a fictitious scenario unlikely to come to fruition, runs head on into the Supreme Court's admonition that when a court asks whether Congress intended to waive the Government's sovereign immunity, references to policy, like legislative history, are unavail-

ing. *Hoffman*, 492 U.S. at 104, *superceded by amendment to* 11 U.S.C. § 106. Policy rationales are "not based in the text of the statute and so, too, are not helpful in determining" whether the statute satisfies the Supreme Court's command that to abrogate sovereign immunity Congress "must make its intention 'unmistakably clear in the language of the statute.'" *Id.* at 101, 104.

Unlike the Seventh Circuit's decision in *EAR*, the Ninth Circuit's decision in *DBSI* is faithful to the text of Code § 106(a). In *DBSI*, the court held "Section 106(a)(1)'s abrogation of sovereign immunity is absolute with respect to Section 544(b)(1) and thus necessarily includes the derivative state law claim on which a Section 544(b)(1) claim is based." *DBSI*, 869 F.3d at 1010. Consistent with Supreme Court precedent, *see supra* at 5-7, the Ninth Circuit began its analysis by relying on "well-settled canons of statutory interpretation that inform [an] understanding of the interplay between Section 106(a)(1) and Section 544(b)(1)." *DBSI*, 869 F.3d at 1010. The court looked to the language of Code § 106(a) as well as to the design of the statute as a whole and concluded: "[W]e cannot read the plain text of Section 544(b)(1)—i.e., the [actual] creditor requirement—devoid of the declaration in Section 106(a)(1) that "'sovereign immunity is abrogated as to a governmental unit . . . with respect to . . . Section[ ] . . . 544.'" *Id.*

The Ninth Circuit next made two additional observations based on established canons of statutory construction. The court observed that Congress enacted § 106(a)(1) subsequent to § 544(b)(1). And that "when Congress waived sovereign immunity with respect to

Section 544, Congress understood that Section 544(b)(1) codified a trustee's power to invoke state law." *Id.* at 1011; *see Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume our elected representatives . . . know the law."). The court also observed, as we have, that adopting 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.'"[1] DBSI, 869 F.3d at 1011-12; *see also id.* at 1011 ("[T]he interpretation offered by the government would essentially nullify Section 106(a)(1)'s effect on Section 544(b)(1), an interpretation we should avoid.").

IV.

We conclude by making short work of the Government's alternative argument that if sovereign immunity does not bar the Trustee's § 544(b)(1) action, field preemption, a subset of implied preemption, does so by way of the Internal Revenue Code's (IRC) interest in tax col-

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[1] In *Yahweh*, the Fourth Circuit adopted the Ninth Circuit's view that § 106(a)(1)'s waiver of sovereign immunity extends to a state law cause of action underlying a trustee's § 544(b)(1) action. 27 F.4th at 966. The court further reasoned that § 106(b) waived the Government's sovereign immunity in that case. *Id.* Subsection (b) provides "[a] governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose." 11 U.S.C. § 106(b). Suffice to say that in our case, the Trustee does not rely on § 106(b) to support its waiver argument.

lection. As the Trustee points out, the obvious problem is that § 544(b)(1) is a federal statute, enacted by the United States Congress, the same legislative body that the Government now asserts has preempted its operation. If Congress believed a trustee's invocation of a state law cause of action under § 544(b)(1) posed an obstacle to its objectives under the IRC, Congress surely would have added an express preemption provision to § 544(b) exempting the Government from its operation just as it provided an exemption for a transfer of charitable contributions in subsection (b)(2). 11 U.S.C. § 544(b)(2) (stating that § 544(b)(1) has no application to a defined charitable contribution and "[a]ny claim to recover [such] contribution . . . under Federal or State law . . . shall be preempted[.]"). As the Supreme Court recently recognized, the Bankruptcy Code "is finely tuned to accommodate essential governmental functions like tax administration and regulation." *Coughlin*, 599 U.S. at __, (slip op. at 8). Congress's silence on this question, coupled with its certain awareness of § 106(a)'s ramifications when it broadened the statute's reach in 1994 is "powerful evidence" that Congress did not intend what the Government now says. *Wyeth v. Levine*, 555 U.S. 555, 575 (2009). The argument for field pre-emption based on federal tax collection policy is surely rather weak where Congress is aware of the operation of state law in a field of federal interest, *i.e.*, bankruptcy law, and has decided to place the policy of equal distribution and fairness among creditors on equal footing and tolerate whatever tension exists between the two policies. *Id.* at 574-75, 129 S. Ct. 1187. Where Congress has announced consent to suit in the plain language of a statute, the Supreme Court has never permitted us to add to the rigor of sovereign

immunity by refinement of construction based upon improper policy considerations. *See Block v. Neal*, 460 U.S. 289, 298 (1983).

* * *

We hold that Code § 106(a) waives the Government's sovereign immunity both as to the Trustee's proceeding under Code § 544(b)(1) and the underlying Utah state law cause of action subsection (b)(1) authorizes the Trustee to rely on to avoid the debtor's tax transfers made on behalf of its principals in this case. The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

Case No. 2:20-CV-00248-BSJ
DISTRICT JUDGE BRUCE S. JENKINS

USA, APPELLANT

v.

DAVID L. MILLER, APPELLEE

[Filed: Sept. 8, 2021]

MEMORANDUM DECISION AND ORDER ON APPEAL FROM UNITED STATES BANKRUPTCY COURT

Before the Court is Appellant United States' appeal of the bankruptcy court's memorandum decision and order. The Court heard oral argument on August 28, 2020.[1] Mr. Landon M. Yost appeared on behalf of United States. Mr. Reid W. Lambert appeared on behalf of Appellee David L. Miller. The Court reserved on the matter. Having considered the parties' briefs, the arguments of counsel, and the relevant law, the Court hereby AFFIRMS and ADOPTS the bankruptcy court's memorandum decision and order.

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[1] Min. Entry, ECF No. 13.

This case concerns the interplay between two provisions of the bankruptcy code—§ 106, which abrogates sovereign immunity with respect to certain code sections, and § 544(b), which allows a Trustee in a chapter 7 bankruptcy to step into a creditor's shoes and avoid transfers under applicable law. Applicable law includes state law outside of bankruptcy. The question before the Court is whether Congress abrogated sovereign immunity as to the underlying state law, in this case, the Utah Uniform Fraudulent Transfer Act. Specifically, the Court must determine whether the bankruptcy court erred when it determined "§ 106(a)(1)'s waiver reached the underlying state law causes of action incorporated through § 544(b)."

In the Bankruptcy process, the Trustee has a duty to recover and assemble assets so that entitled creditors may share therein. In that constitutionally footed process,[2] the United States is as vulnerable to disgorge inappropriate payment received as any other creditor so that all entitled creditors may share appropriately as Congress has directed.

For the reasons set forth in the bankruptcy court's memorandum decision and order, the ruling of the bankruptcy court is AFFIRMED and ADOPTED by this Court.

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[2] U.S. CONST. art. I, § 8, cl. 4. "The Congress shall have Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."

IT IS SO ORDERED.

DATED this [8th] day of Sept., 2021.

/s/ BRUCE S. JENKINS
BRUCE S. JENKINS
United States Senior District judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

Bankruptcy Case No. 17-23687
Chapter 7
Adversary Proceeding No. 18-2089

IN RE: ALL RESORT GROUP, INC., DEBTOR

DAVID L. MILLER, AS CHAPTER 7 TRUSTEE
OF THE BANKRUPTCY ESTATE OF ALL RESORT GROUP,
INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Dated: Mar. 31, 2020

MEMORANDUM DECISION

Hon. R. KIMBALL MOSIER

More than two years before it filed bankruptcy, All Resort Group, Inc. (All Resort) paid personal tax debts of two of its principals. After All Resort's case converted to chapter 7, David Miller, the trustee of its bankruptcy estate (Trustee), commenced this adversary proceeding against the United States to avoid those payments as fraudulent transfers and recover them for the benefit of the estate. Neither party has disputed any of the facts concerning the payments. Since all that re-

mains is to apply the law to the facts, both parties have appropriately asked the Court to resolve this adversary proceeding on summary judgment. The particular legal question framed by the parties' cross-motions is whether sovereign immunity or preemption preclude a bankruptcy trustee from using 11 U.S.C. § 544(b) to recover payments made to the Internal Revenue Service (IRS).

After considering the relevant filings in this adversary proceeding, including the parties' motions and memoranda, after considering the parties' oral arguments, and after conducting an independent review of applicable law, the Court issues the following Memorandum Decision denying the United States' motion and granting the Trustee's motion.

I. JURISDICTION

The Court's jurisdiction over this adversary proceeding is properly invoked pursuant to 28 U.S.C. § 1334 and § 157(b)(1). This matter is a core proceeding within the definition of 28 U.S.C. § 157(b)(2)(H), and the Court may enter a final order. Venue is appropriate under 28 U.S.C. § 1409.

II. FACTUAL BACKGROUND

The Court finds that there is no genuine dispute as to the following facts. All Resort filed a voluntary chapter 11 petition in this Court on April 28, 2017. After the necessary debtor-in-possession financing failed to materialize, All Resort itself sought conversion of its case to one under chapter 7.[1] The Court converted the case on

[1] Docket No. 336 in Case No. 17-23687. All Resort amended that motion to change the statutory basis for conversion from

September 14, 2017,[2] and the United States Trustee appointed David Miller as chapter 7 trustee.

On June 23, 2014 All Resort made two payments to the IRS that are the focus of this adversary proceeding. Both payments came from All Resort's bank account at Zions Bank and consisted of funds belonging to All Resort. The first was in the amount of $71,829.68 and it satisfied a personal federal tax debt owed by Gordon Cummins, who was an officer and director of All Resort and a shareholder in the company. The second was in the amount of $73,309.10 and it satisfied a personal federal tax debt of Richard Bizzaro, who was also an officer and director of All Resort and a shareholder in the company. The Trustee filed a complaint to avoid those payments as fraudulent transfers under 11 U.S.C. §§ 544(b) and 548(a),[3] the former of which incorporates a claim under the Utah Uniform Fraudulent Transfer Act (UUFTA),[4] and recover them under § 550.

Prior to the payments at issue, Robin Salazar filed a charge of employment discrimination against All Resort on August 15, 2011. She subsequently commenced a civil proceeding against All Resort in the United States District Court for the District of Utah on November 25,

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11 U.S.C. § 1112(b) to § 1112(a). *See* Docket No. 341 in Case No. 17-23687.

[2] Docket No. 343 in Case No. 17-23687.

[3] All subsequent statutory references are to title 11 of the United States Code unless otherwise indicated.

[4] The UUFTA is now known as the Utah Uniform Voidable Transactions Act after the Utah Legislature amended it in 2017, but because the Trustee's claim is based on the version of the law in effect at the time of the transfers in 2014, the Court will refer to the law as it was called at that time.

2014. Salazar later settled that lawsuit but did not receive the full amount of the settlement before All Resort filed bankruptcy. All Resort scheduled the remaining obligation to Salazar as a $55,000 unsecured claim,[5] and she later filed a claim for that amount.[6] Neither All Resort nor the Trustee have objected to Salazar's claim.[7]

III. DISCUSSION

A. Legal Standard Under Rule 56

Under Federal Rule of Civil Procedure 56(a), made applicable in adversary proceedings by Federal Rule of Bankruptcy Procedure 7056, the Court is required to "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[8] Substantive law determines which facts are material and which are not. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[9] Whether a dispute is "genuine" turns on whether "the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party."[10] In sum, the Court's function at the summary judgment stage is to "determine whether there is a genuine issue for trial."[11]

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[5] Docket No. 73 in Case No. 17-23687, at 115.

[6] Claim No. 71-1 in Case No. 17-23687.

[7] Salazar filed her claim on September 1, 2017, when the case was still in chapter 11.

[8] Fed. R. Civ. P. 56(a).

[9] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[10] *Id.*

[11] *Id.* at 249.

The moving party bears the burden to show that it is entitled to summary judgment,[12] including the burden to properly support its summary judgment motion as required by Rule 56(c).[13] If the moving party has failed to meet its burden, "summary judgment must be denied," and the nonmoving party need not respond because "no defense to an insufficient showing is required."[14] Once the moving party meets its initial burden, "the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter."[15] The nonmoving party may not rely solely on allegations in the pleadings, but must instead designate "specific facts showing that there is a genuine issue for trial."[16] The nonmoving party also "must do more than simply show that there is some metaphysical doubt as to the material facts."[17]

When considering a motion for summary judgment, the Court views the record and draws all reasonable inferences therefrom in the light most favorable to the nonmoving party,[18] but the Court does not weigh the ev-

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[12] *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

[13] *See Murray v. City of Tahlequah, Okla.*, 312 F.3d 1196, 1200 (10th Cir. 2002).

[14] *Reed v. Bennett*, 312 F.3d 1190, 1194-95 (10th Cir. 2002).

[15] *Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1518 (10th Cir. 1994).

[16] *Celotex,* 477 U.S. at 324.

[17] *Matsushida Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

[18] *E.g., City of Herriman v. Bell*, 590 F.3d 1176, 1181 (10th Cir. 2010) (citation omitted).

idence or make credibility determinations.[19] "On cross-motions for summary judgment, each motion must be considered independently."[20]

The Court notes that the United States has characterized its motion, though captioned and presented as one for summary judgment, as "more in the nature of" a Rule 12(b)(1) or 12(b)(6) motion.[21] Failure of Congress to waive sovereign immunity with respect to a particular claim deprives a court of subject-matter jurisdiction over that claim,[22] and a Rule 12(b)(1) motion is a common method to challenge jurisdiction based on the defense of sovereign immunity. As a general rule, a motion challenging subject-matter jurisdiction under Rule 12(b)(1) cannot be treated as one for summary judgment.[23] An exception to that rule exists that requires a

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[19] *Nat'l Am. Ins. Co. v. Am. Re-Insurance Co.*, 358 F.3d 736, 742-43 (10th Cir. 2004) (citing *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 533 (10th Cir. 1994)).

[20] *Hofmann v. Drabner (In re Baldwin)*, 514 B.R. 646, 650 (Bankr. D. Utah 2014) (citing *Rajala v. U.S. Bank (In re Christenson)*, 483 B.R. 743, 746 (Bankr. D. Kan. 2012)).

[21] Docket No. 16 in Adv. No. 18-2089, at 1.

[22] *See Normandy Apartments, Ltd. v. U.S. Dep't of Haus. & Urban Dev.*, 554 F.3d 1290, 1295 (10th Cir. 2009) ("The defense of sovereign immunity is jurisdictional in nature, depriving courts of subject-matter jurisdiction where applicable." (citing *Robbins v. U.S. Bureau of Land Mgmt.*, 438 F.3d 1074, 1080 (10th Cir. 2006))); *Franklin Sav. Corp. v. United States (In re Franklin Sav. Corp.)*, 385 F.3d 1279, 1289 (10th Cir. 2004) ("The United States, as sovereign, is immune from suit save as it consents to be sued and the te1ms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." (quoting *Lehman v. Nakashian*, 453 U.S. 156, 160 (1981))).

[23] *Bell v. United States*, 127 F.3d 1226, 1228 (10th Cir. 1997) (citation omitted).

court to "convert a Rule 12(b)(1) motion to one under Rule 12(b)(6), or for summary judgment, 'if the jurisdictional question is intertwined with the merits of the case.'"[24] That intertwining occurs "when subject matter jurisdiction is dependent upon the same statute which provides the substantive claim in the case."[25] The Court concludes that its subject-matter jurisdiction is inextricably intertwined with the merits in this case. The Trustee's substantive claim is under § 544(b),[26] and the Court's ability to hear this case depends entirely on whether Congress's waiver of sovereign immunity encompasses such a claim, including the underlying state substantive law incorporated through § 544(b). Accordingly, the Court will treat the United States' motion as it has been presented: as one for summary judgment.

B. Legal Standard Under § 544(b)

Section 544(b)(1) provides that a "trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor

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[24] *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1129 (10th Cir. 1999) (quoting *Bell,* 127 F.3d at 1228).

[25] *Trainor v. Apollo Metal Specialties, Inc.*, 318 F.3d 976,978 (10th Cir. 2002) (citation and internal quotation marks omitted).

[26] While the Trustee's complaint seeks avoidance of All Resort's payments to the IRS under §§ 544(b) and 548(a), the Trustee has not moved for summary judgment on the § 548 claim. The United States' motion does not expressly argue for summary judgment on that claim either, though it does argue that § 548 is unavailing to avoid the payments since they occurred more than two years before All Resort's petition date. The Trustee did not contest that argument in his Response to United States' Motion for Summary Judgment. The Court agrees with the United States that the Trustee's § 548 claim fails because the transfers at issue did not fall within the statute's two-year look-back period. *See* § 548(a).

holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title."[27] Unlike §§ 547, 548, and 549, which are wholly bankruptcy law causes of action created by the Code, § 544(b) permits a trustee to assert claims that are "available to a debtor's creditors outside of a bankruptcy case" under applicable non-bankruptcy law.[28] In order to invoke that law, however, a trustee "must first show that there is an actual creditor holding an allowable unsecured claim who, under state law, could avoid the transfer[] in question," but "if there are not creditors within the terms of section 544(b) against whom the transfer is voidable under the applicable law, the trustee is powerless to act so far as section 544(b) is concerned."[29] Since the trustee's rights under § 544(b) are derivative of the actual creditor's, the trustee is often metaphorically described as standing in the shoes of the actual creditor and is therefore "subject to the same defenses a transferee would have in a state fraudulent conveyance action brought by the actual creditor."[30]

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[27] § 544(b)(1).

[28] *Kohut v. Wayne Cty. Treasurer (In re Lewiston)*, 528 B.R. 387, 389 (Bankr. E.D. Mich. 2015). For purposes of § 544(b), "applicable law" typically means state fraudulent transfer law. *Sender v. Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996).

[29] *Sender,* 84 F.3d at 1304 (citations and internal quotation marks omitted); *see also Lewiston,* 528 B.R. at 389 ("[A] trustee can only bring a fraudulent transfer claim under§ 544(b)(1) if the trustee can show that an actual creditor holding an unsecured claim against the debtor could have brought the fraudulent transfer claim outside of a bankruptcy case under applicable non-bankruptcy law.").

[30] *Mendelsohn v. Kovalchuk (In re APCO Merch. Servs., Inc.)*, 585 B.R. 306, 314 (Bankr. E.D.N.Y. 2018) (citing *Smith v. Am. Founders Fin., Corp.*, 365 B.R. 647, 658-59 (S.D. Tex. 2007)).

Absent waiver, one defense available to transferees that are governmental units in such actions is sovereign immunity.

The United States does not dispute that All Resort paid $71,829.68 and $73,309.10 from its own funds to the IRS on June 23, 2014 in satisfaction of the personal federal tax debts of Cummins and Bizzaro, respectively; that All Resort did not receive reasonably equivalent value in exchange for those transfers; and that All Resort was insolvent at the time of the transfers. In short, the United States concedes that the Trustee has proved all the elements of his § 544(b) and UUFTA claim, save one: that there be an actual creditor who could avoid the transfers at issue. With respect to the actual creditor requirement, the United States admits that Robin Salazar was a creditor of All Resort prior to June 23, 2014 and that she filed a claim in this case. But the United States argues that Salazar cannot serve as the actual creditor because sovereign immunity, asserted as a defense, would bar her suit against the United States under the UUFTA to recover All Resort's payments for the tax debts of Cummins and Bizzaro. As a consequence, the Trustee cannot satisfy the actual creditor requirement and his § 544(b) claim fails as a matter of law.

For his part, the Trustee acknowledges that, outside bankruptcy, sovereign immunity would bar Salazar's suit against the United States.[31] His contention, however, is that § 106(a)(1) abrogates that sovereign immunity in the bankruptcy context, eliminating the United States' ability to use it as a defense in this adversary

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[31] *See* Docket No. 25 in Adv. No. 18-2089, at 3.

proceeding, and thereby permitting Salazar to satisfy the actual creditor requirement.

C. Sovereign Immunity and § 106(a)(1)

To promote the goals of maximization of a debtor's estate and equality of distribution among the estate's creditors, the Bankruptcy Code endows the bankruptcy trustee with powers—found in chapter 5 of the Code—to unwind certain transactions and transfers involving the debtor or its property.[32] When the United States is the party against whom the trustee seeks recovery of such transfers, however, those goals run headlong into the principle that "the United States, as sovereign, is immune from suit save as it consents to be sued."[33] Congress attempted to reconcile these concepts when it codified a waiver of sovereign immunity provision in § 106 of the Bankruptcy Code, which was promulgated by the Bankruptcy Reform Act of 1978.[34]

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[32] *E.g., Begier v. IRS*, 496 U.S. 53, 58 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code. . . . Section 547(b) furthers this policy by permitting a trustee in bankruptcy to avoid certain preferential payments made before the debtor files for bankruptcy."); *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985) ("The powers and duties of a bankruptcy trustee are extensive. . . . The trustee . . . has the duty to maximize the value of the estate. . . . and is empowered to sue officers, directors, and other insiders to recover, on behalf of the estate, fraudulent or preferential transfers of the debtor's property." (citations omitted)).

[33] *United States v. Murdock Mach. & Eng'g Co. of Utah*, 81 F.3d 922, 929 (10th Cir. 1996) (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)).

[34] The Bankruptcy Act of 1898, the predecessor to the Bankruptcy Reform Act of 1978, contained no express provision concerning waiver of sovereign immunity. S. Elizabeth Gibson, *Con-*

The Supreme Court subsequently held in two cases that that provision was insufficiently clear to waive sovereign immunity.[35] In response to *Hoffman* and *Nordic Village,* Congress rewrote § 106 entirely as part of the Bankruptcy Reform Act of 1994.[36] The intent of the amendment was to overrule *Hoffman* and *Nordic Village* and to "expressly provide[] for a waiver of sovereign immunity by governmental units with respect to monetary recoveries as well as declaratory and injunctive relief,"[37] thereby conforming § 106 to the legal standard that waivers of sovereign immunity be "unequivocally expressed" in order to be effective.[38] Importantly, Congress thought it had already achieved this

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gressional Response to Hoffman and Nordic Village: Amended Section 106 and Sovereign Immunity, 69 Am. Bankr. L.J. 311,311 n.2 (1995).

[35] *Rescia v. E. Conn. State Univ. (In re Harnett)*, 558 B.R. 655, 658 (Bankr. D. Conn. 2016); *see also Hoffman v. Conn. Dep't of Income Maint.,* 492 U.S. 96, 101 (1989) ("[T]o abrogate the States' Eleventh Amendment immunity from suit in federal court, . . . Congress must make its intention 'unmistakably clear in the language of the statute.' In our view, § 106(c) does not satisfy this standard." (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985))); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 39 (1992) ("Neither § 106(c) nor any other provision of law establishes an unequivocal textual waiver of the Government's immunity from a bankruptcy trustee's claims for monetary relief. . . . Congress has not empowered a bankruptcy court to order a recovery of money from the United States[.]").

[36] *In re Equip. Acquisition Res., Inc. (EAR)*, 742 F.3d 743, 749-50 (7th Cir. 2014) (citing H.R. Rep. No. 103-835, at 42 (1994), *reprinted in* 1994 U.S.C.A.A.N. 3340).

[37] H.R. Rep. No. 103-835, at 42 (1994), *reprinted in* 1994 U.S.C.A.A.N. 3340, 3350-51.

[38] *Nordic Vill.*, 503 U.S. at 33 (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)).

standard in 1978, noting in floor statements that former § 106(c) was "included to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective."[39]

As relevant here, § 106(a)(1) now provides that "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to" fifty-nine sections of title 11, including § 544. The task before the Court is to analyze the effect and scope of the waiver as applied to § 544, particularly § 544(b). While certain interpretive rules apply in the sovereign immunity context,[40] the starting point of the analysis remains the same. As with all matters of statutory construction, the inquiry begins "with the language of the statute itself."[41] Where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'"[42]

The additional interpretive rules regarding sovereign immunity provide shape and guidance to the analysis. Those rules include the command that a "waiver of

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[39] 124 Cong. Rec. H11,091 (Sept. 28, 1978) (statement of Rep. Edwards); 124 Cong. Rec. S17,407 (Oct. 6, 1978) (statement of Sen. DeConcini).

[40] *See Burch v. Sec'y of Health & Human Servs.*, No. 99-946V, 2010 WL 1676767, at *2 (Fed. Cl. Apr. 9, 2010) ("From [the doctrine of sovereign immunity], the federal courts have derived certain principles of *statutory construction* that have been applied in interpreting legislation that is alleged to have *waived* that immunity with respect to a particular type of suit against the United States.").

[41] *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)).

[42] *Id.* (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

the Federal Government's sovereign immunity must be unequivocally expressed in statutory tex1 and will not be implied,"[43] and that a waiver "must be strictly construed in favor of the Government."[44] If the statutory language contains ambiguities, they must "be construed in favor of immunity."[45] "Ambiguity exists if there is a plausible interpretation of the statute that would not authorize [suit] against the Government."[46] These rules fall under the sovereign immunity canon, which is a "canon of construction" that courts can use in tandem with other tools of construction to interpret the law.[47] But the Supreme Court has "never held that [the sovereign immunity canon] displaces the other traditional tools of statutory construction."[48] Moreover, it is unnecessary "to resort to the sovereign immunity canon [where] there is no ambiguity" in the statute at issue.[49] In short, when faced with an assertion of sovereign immunity, courts must ask whether "Congress'[s] waiver [is] clearly discernable from the statutory text in light

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[43] *Lane v. Peña*, 518 U.S. 187, 192 (1996) (citing *Nordic Vill.*, 503 U.S. at 33-34, 37 *and Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)).

[44] *FAA v. Cooper,* 566 U.S. 284, 289 (2012).

[45] *Id.* at 290 (citing *United States v. Williams*, 514 U.S. 527, 531 (1995)).

[46] *Id.* at 290-91 (citing *Nordic Vill.*, 503 U.S. at 34, 37); *see also Marathon Oil Co. v. United States*, 374 F.3d 1123, 1127 (Fed. Cir. 2004) ("If a statute is susceptible to a plausible reading under which sovereign immunity is not waived, the statute fails to establish an unambiguous waiver and sovereign immunity therefore remains intact." (citing *Nordic Vill.*, 503 U.S. at 37)).

[47] *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008).

[48] *Id.*

[49] *Id.* at 590.

of traditional interpretive tools. If it is not, then [courts] take the interpretation most favorable to the Government."[50]

In construing § 106(a)(1), the Court is mindful of its charge to give effect to the law as written[51] and to eschew adopting an interpretation that deviates from Congress's intent by either expanding or constricting the meaning of the written text. Put succinctly, courts must avoid an outcome where "attempted interpretation of legislation becomes legislation itself."[52] The Supreme Court has cautioned courts in the sovereign immunity context to "not enlarge the waiver beyond the purview of the statutory language."[53] By the same measure, however, courts should also not "import immunity back into a statute designed to limit it."[54]

Section 106(a)(1) unequivocally abrogates sovereign immunity as to a governmental unit with respect to the

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[50] *Cooper*, 566 U.S. at 291.

[51] *See Richards v. Comm'r*, 37 F.3d 587, 588 n.3 (10th Cir. 1994) ("[The courts'] function is limited to interpreting the laws as written. . . .").

[52] *King v. Burwell*, 576 U.S. —, —, 135 S. Ct. 2480, 2495-96 (2015) (quoting *Palmer v. Mass.*, 308 U.S. 79, 83 (1939)).

[53] *Williams,* 514 U.S. at 531 *(citing Dep't of Energy v. Ohio*, 503 U.S. 607, 614-16 (1992)); *see also Nordic Vill.*, 503 U.S. at 34 (sovereign immunity waivers must not be "enlarged beyond what the language requires" (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983)).

[54] *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955); *see also Block v. Neal*, 460 U.S. 289, 298 (1983) ("The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." (quoting *United States v. Aetna Surety Co.*, 338 U.S. 366, 383 (1949))).

fifty-nine Code sections listed therein, including § 544. While the United States concedes that point and asserts that it does not contest the meaning of § 106(a)(1),[55] it is apparent that what § 106(a)(1) means, at least regarding § 544(b), is a matter of distinct dispute between the parties and among courts nationwide. The nature of the dispute has to do with the peculiar characteristics of a § 544(b) claim. Its statutory neighbors, such as §§ 547, 548, and 549, are entirely federal law claims. In cases similar to this one, the United States has declined to assert sovereign immunity as a defense to a § 548 claim, acknowledging that § 106(a)(1) has rendered it unavailable.[56] But, as noted previously, § 544(b) employs nonbankruptcy law in furtherance of avoiding transfers of a debtor's property. The question presented in this case is therefore whether, "by including [§] 544 in the list of Bankruptcy Code sections set forth in [§] 106(a), Congress knowingly included state law causes of action within the category of suits to which a sovereign immunity defense could no longer be asserted."[57] Put another way, the Court must determine whether § 106(a)(1) "ab-

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[55] Docket No. 16 in Adv. No. 18-2089, at 5.

[56] *See, e.g.*, *EAR*, 742 F.3d at 746 ("Because § 548 is included in § 106(a)(1)'s list of Code provisions for which sovereign immunity is abrogated—and because the cause of action is a creature of the Code itself—the United States does not assert immunity as a defense to [Plaintiff's] recovery under that provision."); *Zazzali v. United States (In re DBSI, Inc.) (DBSI)*, 869 F.3d 1004, 1008 (9th Cir. 2017) (noting that the United States did not contest the trustee's § 548 claim).

[57] *VMI Liquidating Tr. Dated December 16, 2011 v. United States (In re Valley Mortg., Inc.)*, Adv. No. 12-01277-SBB, 2013 WL 5314369, at *4 (Bankr. D. Colo. Sept. 18, 2013) *(quoting Liebersohn v. IRS (In re C.F. Foods, L.P.)*, 265 B.R. 71, 85 (Bankr. E.D. Pa. 2001)).

rogates sovereign immunity as to [§] 544(b)(1), including the underlying state law cause of action," or whether the waiver does not apply to that underlying law.[58] There is no question that Congress can waive the government's sovereign immunity with respect to the underlying state law causes of action incorporated through § 544(b); the dispute concerns whether § 106(a)(1) accomplished that result. If it did not, Congress would have to provide "for a separate waiver of sovereign immunity with respect to any 'applicable law,'"[59] and there is also no question that Congress has not done so. Courts have split on this issue,[60] including two circuit courts—the Ninth Circuit has determined that § 106(a)(1)'s waiver applies to the underlying "applicable law,"[61] while the Seventh Circuit has held that it does not.[62]

The Court concludes that the plain text of § 106(a)(1) unequivocally abrogates sovereign immunity as to the underlying state law cause of action. The statute contains no exceptions, qualifiers, or carve-outs in its language, "indicating a clear legislative intent to be as broad as possible in abrogating sovereign immunity in the bankruptcy context."[63] Of particular importance,

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[58] *DBSI*, 869 F.3d at 1013.

[59] *Id.* at 1011-12.

[60] *See Lewiston*, 528 B.R. at 391-94 (collecting cases); *McClarty v. Hatchett (In re Hatchett)*, 588 B.R. 472, 479-80 (Bankr E.D. Mich. 2018) (same).

[61] *DBSI*, 869 F.3d at 1013.

[62] *EAR*, 742 F.3d at 747.

[63] *Jamestown S'Klallam Tribe v. McFarland*, 579 B.R. 853, 857 (E.D. Cal. 2017); *see also Lewiston*, 528 B.R. at 397 ("There is no limitation or restriction on the abrogation accomplished by [§ 106(a)(1)].").

Congress placed marked emphasis on the breadth of the statute by choosing the critical phrase "with respect to." The Supreme Court has held, as a matter of statutory construction, that the use of the word "respecting," a synonym of that phrase,[64]

> in a legal context generally has a broadening effect, ensuring that the scope of a provision covers not only its subject *but also matters relating to that subject.*
>
> Indeed, when asked to interpret statutory language including the phrase "relating to," which is one of the meanings of "respecting," this Court has typically read the relevant text expansively.[65]

Even the United States conceded at oral argument that "with respect to" is broad language. By abrogating sovereign immunity "with respect to" § 544, Congress signaled its intent that the waiver would cover matters related to that Code section—i.e., the state law causes of action incorporated through § 544(b).

Other aspects of the language and structure of § 106(a) support that conclusion. Many of the analyses of the interplay between §§ 106(a)(1) and 544 have noted that § 106(a)(1) does not distinguish between § 544(a) and (b), offering that as textual evidence that the waiver applies to § 544(b) and the underlying causes of action.[66] The United States, no stranger to this argument, has a

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[64] *See Respecting*, The American Heritage Dictionary (2d College ed. 1982) (defining "respecting" as "[w]ith respect to; concerning").

[65] *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. —, —, 138 S. Ct. 1752, 1760 (2018) (emphasis added) (citations omitted).

[66] *E.g.*, *DBSI*, 869 F.3d at 1012 ("[H]ad Congress intended to limit Section 106(a)(1)'s application to Section 544(a), as opposed to all of Section 544, it knew how to do so.").

rebuttal ready at hand: Many of the sections listed in § 106(a)(1) "have subsections that do not implicate sovereign immunity," such as § 524(f).[67] The intended deduction from this fact is that the inclusion of § 544(b) within § 106(a)(1) says little, if anything, meaningful about congressional intent to have the waiver apply to it when Congress saw fit to include other subsections "to which sovereign immunity has no application at all."[68]

Upon closer examination, however, the United States' rebuttal, rather than undermining the Trustee's position, ends up supporting it. The failure to remove certain subsections from § 106(a)(1) to which sovereign immunity cannot apply offers additional textual proof, not of sloppy draftsmanship, but instead of Congress's intent that the waiver be as broad as possible. Congress's approach to § 106(a)(1) can perhaps be described as casting a wide net, but certainly not as scattershot. Congress included fifty-nine sections within § 106(a)(1), but deliberately omitted many others, evincing a careful legislative choice about where sovereign immunity would be waived. The way in which Congress included those sections also shows a careful legislative choice. As the *DBSI* court noted, "Congress has demonstrated that it knows how to make a specific provision only applicable to a subsection of [§] 544."[69] Given that demonstrated knowledge, the presumption is that Congress acted intentionally when it included whole, undivided sections within § 106(a)(1). The inference to be drawn from that choice is that Congress wanted the waiver of sovereign immunity to apply broadly to those sections,

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[67] *EAR*, 742 F.3d at 749.

[68] *Id.* at 749 n.4.

[69] *DBSI*, 869 F.3d at 1012 (citing § 546(c)(1), (d), (h) *and* § 541(b)(4)).

reaching all of the statutory nooks and crannies where it could possibly apply.[70] In short, Congress appears to have used this principle in enacting § 106(a)(1): Wherever the waiver can apply to the named sections, it ought to apply. And the relevant difference between § 524(f) and § 544(b) is that a waiver of sovereign immunity can apply to the latter and the state law causes of action incorporated therein. In this way, Congress's choice not to distinguish between § 544(a) and (b) does provide meaningful evidence of legislative intent, even though subsections such as § 524(f) are caught within § 106(a)(1)'s reach.

Section 106(a)(3) offers analogous support. That paragraph permits courts to "issue against a governmental unit an order, process, or judgment under such sections[—i.e., the sections listed in § 106(a)(1)—]or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery . . . ."[71] On its face, § 106(a)(3) applies to all of § 544. It would be a strange exercise in legislative drafting if, in § 106(a)(3), Congress expressly authorized courts to issue orders and judgments against governmental units to avoid fraudulent transfers under § 544(b)—§ 550 permits the monetary recovery—but in § 106(a)(1), an expressly-related paragraph within the same subsection, failed to waive sovereign immunity for § 544(b) claims. Such a result would render § 106(a)(3) surplusage as applied to § 544(b), and "[i]t is 'a cardinal princi-

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[70] *See EAR*, 742 F.3d at 749 ("[T]he better conclusion is that Congress simply listed undivided Code sections if any part of that section included something for which sovereign immunity should be waived.").

[71] § 106(a)(3).

ple of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'"[72] Similarly, "statutes should be construed so that their provisions are harmonious with each other."[73] While it is true that § 106(a)(3) may not apply to some of the subsections listed in § 106(a)(1), the important distinction, as before, is that it can apply to § 544(b). As a result, the statutory interpretation that allows it to apply and avoids it becoming insignificant, thereby achieving the most harmonious result between § 106(a)(1) and (a)(3), ought to be favored. To hold otherwise would be to disregard the apparent congressional design to hold governmental units liable for fraudulent transfers under § 544(b).[74] The Court concludes, after examining the plain language and structure of § 106(a) using traditional interpretive tools, that "[t]here is no sovereign immunity 'tie' in this case. . . . The statute is susceptible to only one interpretation: it simply eliminates sovereign immunity"[75] with respect to the underlying state law causes of action incorporated through § 544(b).

The Court believes that this analysis does not minimize, overlook, or eliminate the actual creditor require-

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[72] *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

[73] *Negonsott v. Samuels*, 933 F.2d 818,819 (10th Cir. 1991) (citation omitted), *aff'd*, 507 U.S. 99 (1993).

[74] *See C.F. Foods*, 265 B.R. at 85 ("Congress amended § 106(a) by setting forth specific Bankruptcy Code sections, including § 544, to express, clearly and unequivocally, its intent that governmental units be subject to monetary judgments under those sections.").

[75] *Lewiston*, 528 B.R. at 395.

ment of § 544(b). The United States has responded in a consistent and standard way to § 544(b) claims over the years by emphasizing that courts must "take seriously the requirement that there must exist an actual creditor who could avoid the transfers at issue outside of bankruptcy. . . . If there is no actual unsecured creditor who could bring a claim against the IRS outside of bankruptcy, then [the Trustee] cannot move forward under § 544(b)."[76] In a 2001 case, the court framed the United States' position in similar terms:

> An unsecured creditor could not bring a suit against the IRS under [applicable state fraudulent transfer law] outside of bankruptcy court because the unsecured creditor would be barred from doing so by the sovereign immunity doctrine (unless it could show that the government waived sovereign immunity). Without the existence of an unsecured creditor who has the right to commence such an action, the IRS argues, there is no cause of action that the trustee can pursue through the use of § 544 of the Bankruptcy Code.[77]

And in *EAR*, the Seventh Circuit emphasized that "Congress did not alter § 544(b)'s substantive requirements merely by stating that the federal government's immun-

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[76] Docket No. 26 in Adv. No. 18-2089, at 2.

[77] *C.F. Foods*, 265 B.R. at 82-83; *see also Valley Mortg.*, 2013 WL 5314369, at *4 ("[T]he [United States] argues that if sovereign immunity prohibits an unsecured creditor from bringing a non-bankruptcy state law claim against [it], then sovereign immunity similarly prohibits a trustee who steps into the shoes of an unsecured creditor from brining [sic] the same non-bankruptcy state law claim under section 544(b)(1).").

ity was abrogated 'with respect to' this provision."[78] This Court agrees that Congress did not dispose of the actual creditor requirement when it enacted § 106(a)(1), and neither party disputes that the Trustee must still show the existence of an actual creditor. But the waiver of sovereign immunity did remove the ability of a governmental unit to interpose immunity as a defense to the underlying state law cause of action when a bankruptcy trustee asserts that cause of action standing in the actual creditor's shoes.[79] 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.[80] "The fact that the IRS could assert the *defense* of sovereign immunity *outside* of bankruptcy against an unsecured creditor has no bearing on the availability of that defense against a trustee *inside* bankruptcy."[81] Here, the United States concedes that Salazar fulfills the actual creditor requirement, except that sovereign immunity would bar any suit she could bring against the United States under the UUFTA. But "[s]overeign immunity is the very defense that is abrogated by § 106(a)(1)."[82] Because the Trustee, standing in Salazar's shoes, need not defeat the

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[78] *EAR*, 742 F.3d at 747.

[79] *See C.F. Foods*, 265 B.R. at 85 ("By including § 544 in the list of Bankruptcy Code sections set forth in § 106(a), Congress knowingly included state law causes of action within the category of suits to which a sovereign immunity defense could no longer be asserted.").

[80] *Jamestown S'Klallam Tribe*, 579 B.R. at 857 (emphasis added).

[81] *Hatchett*, 588 B.R. at 481.

[82] *Lewiston*, 528 B.R. at 396.

defense of sovereign immunity, he has satisfied the actual creditor requirement of § 544(b).[83]

Although not necessary to this decision, the Court notes that the Code's goal of estate maximization supports its conclusion. When enacting the Code, "Congress carefully considered [its] effect . . . on tax collection"[84] and, as a general rule, elected to treat the IRS and other taxing authorities on par with other creditors.[85] When Congress did seek to "provide protection to tax collectors," it did so expressly, "through grants of enhanced priorities for unsecured tax claims and by the nondischarge of tax liabilities."[86] There is nothing in

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[83] *Franklin Savings* does not compel a different result. In that case, the Tenth Circuit held that § 106 did not waive the statute of limitations contained in 28 U.S.C. § 2401(b), which is part of the Federal Tott Claims Act. In making that determination, the Tenth Circuit stated that "[§] 106 requires a plaintiff seeking to use its waiver to demonstrate that a source outside of § 106 entitles it to the relief sought, and does not evidence any intent to exempt the plaintiff from satisfying any time-bar condition or requirement contained within that outside source." *Franklin Sav. Corp.*, 385 F.3d at 1290. This Court's holding does not exempt the Trustee from satisfying the actual creditor requirement, i.e., the "requirement contained within [the] outside source." As the Court has made clear, the Trustee must still satisfy that requirement.

[84] *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209 (1983) (citations omitted).

[85] *See Nordic Vill.*, 503 U.S. at 43-44 (Stevens, J., dissenting) ("In the bankruptcy context, the Court has noted that there is no reason why the Federal Government should be treated differently from any other secured creditor." (citing *Whiting Pools*, 462 U.S. at 209)).

[86] *Whiting Pools*, 462 U.S. at 209 (citations omitted); *see also Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 655 (2006) ("[P]referential treatment of a class of creditors is in

§ 106 that suggests that Congress intended that the IRS, or governmental units more generally, be treated differently from other creditors with respect to fraudulent transfer claims under § 544(b). Permitting trustees to recover such transfers from governmental units and non-governmental units alike helps fulfill the Code's goal "to maximize the value of the estate" for creditors.[87]

While the legislative history of § 106 is also not necessary to this decision, it supports the Court's conclusion as well. As noted previously, Congress thought it had created an express waiver of sovereign immunity in bankruptcy matters when it passed the Bankruptcy Reform Act of 1978, but the Supreme Court disagreed. In response, Congress amended § 106 to meet the standard demanded by the Supreme Court and achieve its original intent.[88] Notably, Congress drafted § 106(a)(1) to "specifically list[] those sections of title 11 with respect to which sovereign immunity is abrogated" at the suggestion of the Supreme Court.[89] In the ongoing dialogue between the legislative branch and the judiciary, these actions can only be viewed as Congress's attempt to have its intent heard clearly by the courts. In fact, Justice Stevens characterized the 1994 amendment as a "legislative clarification" undertaken for the Supreme

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order only when clearly authorized by Congress." (citations omitted)).

[87] *Weintraub*, 471 U.S. at 352.

[88] *See* H.R. Rep. No. 103-835, at 42 (1994), *reprinted in* 1994 U.S.C.A.A.N. 3340, 3351 ("It is the Committee's intent to make section 106 conform to the Congressional intent of the Bankruptcy Reform Act of 1978 . . . .").

[89] House Judiciary Committee, Bankruptcy Reform Act of 1994-Section-By-Section Description, Cong. Rec. H 10764, 10766 (103d Cong., 2d Sess., Oct. 4, 1994).

Court's benefit.[90] Congress took prompt legislative action to overrule two Supreme Court cases that it perceived as thwarting its intent-which it thought was already clear enough-and incorporated the Supreme Court's suggestions into its major revision of § 106 to ensure that the legislation withstood legal challenges. It is true that neither *Nordic Village* nor *Hoffman* involved § 544(b), so Congress's intent to overrule those cases may not speak specifically to how the waiver of sovereign immunity affects § 544(b).[91] But when viewed in conjunction with the text, scope, and structure of the § 106(a)(1) waiver, Congress's actions in 1978 and 1994 unequivocally evince an intent to achieve a durable and broad waiver of sovereign immunity in the bankruptcy context. Having demonstrated such an intent, this Court will not second guess it.

The Court believes that its conclusion on sovereign immunity does "not enlarge the waiver beyond the purview of the statutory language,"[92] while at the same time avoiding "import[ing] immunity back into a statute

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[90] *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 90 n.12 (1996) (Stevens, J., dissenting).

[91] This case does bear certain factual similarities to *Nordic Village,* however. In that case, an officer and shareholder of the debtor used corporate funds to pay his personal federal tax debt, and the trustee of the debtor's bankruptcy estate sued to get that money back from the IRS. *Nordic Vill.*, 503 U.S. at 31. The crucial distinguishing fact is that the payment was made after the debtor filed bankruptcy, and the *Nordic Village* trustee sought to avoid the payment as an unauthorized, post-petition transfer under § 549(a). *Id.* Had All Resort paid Cummins's and Bizzaro's tax debts post-petition, sovereign immunity would offer no defense to a claim under § 549(a).

[92] *Williams*, 514 U.S. at 531.

designed to limit it."[93] In holding that § 106(a)(1)'s waiver reaches the underlying state law causes of action incorporated through § 544(b), the Court concludes, as a matter of law, that sovereign immunity does not preclude the Trustee from satisfying the actual creditor requirement.

D. Preemption Under the Internal Revenue Code

The United States also contends that the Trustee cannot satisfy the actual creditor requirement because the provisions of the Internal Revenue Code[94] (IRC) preempt a suit brought by a debtor's creditors under state law to recover as fraudulent transfers tax payments made to the IRS. Because the Trustee stands in Salazar's shoes for purposes of § 544(b), and because Salazar's UUFTA claim would be preempted by the IRC, the United States concludes that preemption also bars the Trustee's recovery.

Under the Supremacy Clause of the Constitution "Congress has the power to enact statutes that preempt state law."[95] Federal preemption can be divided into two categories, express or implied, and express preemption "occurs when Congress 'defines explicitly the extent to which its enactments pre-empt state law.'"[96] An example of express preemption can be found, coinci-

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[93] *Indian Towing Co.*, 350 U.S. at 69.

[94] Title 26 of the United States Code.

[95] *US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1324 (10th Cir. 2010) (citing *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989)).

[96] *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1129 (10th Cir. 2007) (quoting *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 792 (10th Cir. 2000)).

dentally, within § 544 itself. Section 544(b)(2) renders § 544(b)(1) inapplicable to certain qualifying charitable contributions and states that "[a]ny claim by any person to recover a transferred contribution [that meets the applicable definition] under Federal or State law in a Federal or State court shall be preempted by the commencement of the case."[97] The United States' argument is not based on express preemption, however, but on field preemption, a species of implied preemption that "occurs when 'the scope of a statute indicates that Congress intended federal law to occupy a field exclusively.'"[98] The "basic premise of field preemption [is] that States may not enter, in any respect, an area the Federal Government has reserved for itself."[99] In determining whether field preemption applies, the Court "must first identify the legislative field that the state law at issue implicates," then "evaluate whether Congress intended to occupy the field to the exclusion of the states."[100] "[P]reemption is ultimately a question of congressional intent,"[101] and Congress's intent to occupy the field may

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[97] § 544(b)(2).

[98] *Emerson*, 503 F.3d at 1129 (quoting *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002)); *see also Arizona v. United States*, 567 U.S. 387, 401 (2012) ("Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249 (1984))).

[99] *Arizona*, 567 U.S. at 402.

[100] *O'Donnell*, 627 F.3d at 1325 (citing *Martin ex rel. Heckman v. Midwest Express Holdings, Inc.*, 555 F.3d 806, 808-09 (9th Cir. 2009)).

[101] *Id.* at 1324 (citing *Altria Grp., Inc. v. Good*, 555 U.S. 70, 129 S. Ct. 538, 543 (2008)); *see also Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("[T]he purpose of Congress is the ultimate touchstone in

be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, or where an Act of Congress touches a field in which the interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.[102]

The United States argues that the UUFTA implicates the field of federal tax collection and that Congress's intent to occupy that field exclusively is implied by the scope of the IRC, "a comprehensive integrated scheme that . . . controls, to the exclusion of any state laws, the circumstances under which the IRS receives payment, forcibl[y] collects, refunds, repays, or releases amounts collected, including to third parties."[103] In support of this argument, the United States notes that 26 U.S.C. § 7426 permits a person to sue the United States in federal court if the IRS wrongfully levies on that person's property,[104] but the IRC does not provide a remedy to recover funds from the IRS voluntarily paid on someone else's behalf using state fraudulent transfer law. Since Congress has not created such a remedy, and since the IRC occupies the field of federal tax collection, the United States reasons that Salazar could not sue under the UUFTA to recover the Cummins and Biz-

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every preemption case." (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996))).

[102] *O'Donnell,* 627 F.3d at 1325 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990)).

[103] Docket No. 16 in Adv. No. 18-2089, at 7.

[104] A levy, at least in the context of federal tax collection, "is a legally sanctioned seizure and sale of property" to collect unpaid taxes. *EC Term of Years Tr. v. United States*, 550 U.S. 429, 430-31 (2007) (citations and internal quotation marks omitted).

zaro tax payments and, consequently, neither can the Trustee.

The Court disagrees and concludes that there is no federal preemption issue here for three reasons. First, the Trustee's § 544(b) claim is a "federal cause[] of action and therefore cannot be preempted."[105] Second, even if the Trustee's claim were considered a state law cause of action because it relies on the UUFTA, it would not be preempted by the IRC. While it is self-evident, as a definitional matter, that Congress intended to occupy the field of federal tax collection, the UUFTA, as incorporated through § 544(b), does not implicate that field. The Trustee is not suing to collect a tax payment; he is suing to collect a fraudulent transfer.[106] "What the Trustee seeks to recover is property of [All Resort] (and [All Resort's] estate), which was given to the IRS to pay *someone else's* tax obligations."[107] Stated succinctly, the Trustee's invocation of the UUFTA to avoid the Cummins and Bizzaro tax payments does not place him within the field of federal tax collection; therefore, the

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[105] *DBSI*, 869 F.3d at 1015 n.14; *see also Hatchett*, 588 B.R. at 483 ("Since § 544(b)(l) is a federal cause of action to recover property fraudulently transferred by a debtor, there is no conflict between state and federal law which might give rise to a preemption argument. The Trustee's cause of action under § 544(b)(1) is not preempted by the IRC.").

[106] *See Valley Mortg.*, 2013 WL 5314369, at *5 ("In pursuing the present claims against the IRS, the trustee is not standing in the shoes of the debtors, as taxpayers, seeking to recover tax refunds, but rather, in the shoes of a creditor seeking to recover property fraudulently transferred . . . ." (quoting *Sharp v. United States (In re SK Foods, L.P.)*, Adv . No. 10-2117-D, 2010 WL 6431702, at *4 (Bankr. E.D. Cal. July 14, 2010))).

[107] *Hatchett*, 588 B.R. at 483.

UUFTA and the IRC do not conflict. It is for this reason that the United States' citation to 26 U.S.C. § 7426—and indeed the IRC itself—misses the mark. Since the IRC does not conflict with the UUFTA, the alleged absence of a remedy in the IRC to recover from the IRS, as a fraudulent transfer, funds voluntarily paid on someone else's behalf is not indicative of congressional intent to preempt claims of the kind the Trustee is asserting in this case.

Third, the Court can find no evidence in § 544 of congressional intent to preempt such claims. By writing an express preemption provision into § 544(b)(2) concerning the avoidance of certain charitable contributions, Congress demonstrated its ability to make its preemptive intent clear. But it is silent on whether the IRC preempts state law fraudulent transfer claims incorporated through § 544(b) to avoid payments made to the IRS. Of course, it is true that "the existence of an 'express preemption provision does *not*' . . . impose a 'special burden' that would make it more difficult to establish the preemption of laws falling outside the clause,"[108] but the Supreme Court has also made it clear that "[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them."[109] Here, Congress drafted § 544 to incorporate applicable non-bankruptcy law, aware that it could be invoked to

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[108] *Arizona*, 567 U.S. at 406 (quoting *Geier v. Am. Honda Motor Co.,* 529 U.S. 861, 869-72 (2000)).

[109] *Wyeth*, 555 U.S. at 575 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 166-67 (1989)).

bring suit against governmental agencies, including the IRS. Even if the UUFTA operates in the field of federal tax collection, which the Court holds it does not, it stretches credulity to conclude that Congress would expressly draw non-bankruptcy law into a section of title 11 only to have that law's application circumscribed by title 26 through implied preemption. Congress knew how to expressly preempt such law, but did not do so. Its silence on the issue indicates an intent to tolerate that law's operation there rather than an intent to preempt its operation impliedly. Accordingly, the Court concludes that the Trustee's claim under § 544(b) and the UUFTA is not preempted by the IRC.

IV. CONCLUSION

The United States has conceded that the Trustee has established all of the elements of his § 544(b) claim except for the actual creditor requirement, and it contests that requirement on the grounds that sovereign immunity and preemption would bar Salazar's suit against it outside of bankruptcy under the UUFTA. Here, the Court determines as a matter of law that § 106(a)(1) unequivocally waives the federal government's sovereign immunity with respect to the underlying state law causes of action incorporated through § 544(b) and that the IRC does not preempt such claims. Accordingly, the Trustee has satisfied the actual creditor requirement and has carried his burden to show that he is entitled to judgment as a matter of law on his § 544(b) claim. The Court will therefore grant summary judgment to the Trustee under § 544(b) avoiding the Cummins and Bizzaro tax payments and, as a consequence, will deny the United States' motion for summary judgment. In addition, because § 106(a)(1) abrogates the govern-

ment's sovereign immunity with respect to § 550, the Court will award the Trustee a judgment in the amount of $145,138.78, representing the combined amount of the Cummins and Bizzaro tax payments. A separate Order and Judgment will be issued in accordance with this Memorandum Decision.

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

Bankruptcy Case No. 17-23687
Chapter 7
Adversary Proceeding No. 18-2089

IN RE: ALL RESORT GROUP, INC., DEBTOR

DAVID L. MILLER, AS CHAPTER 7 TRUSTEE
OF THE BANKRUPTCY ESTATE OF ALL RESORT GROUP,
INC., PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

Dated: Mar. 31, 2020

ORDER AND JUDGMENT GRANTING TRUSTEE'S MOTION FOR SUMMARY JUDGMENT, DENYING THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT, AVOIDING TRANSFERS, AND AWARDING JUDGMENT IN FAVOR OF THE TRUSTEE

Hon. R. KIMBALL MOSIER

David Miller, the chapter 7 trustee (Trustee) of the bankruptcy estate of Debtor All Resort Group, Inc. (All Resort) commenced this adversary proceeding against the United States to avoid as fraudulent trans-

fers two payments All Resort made to the IRS (Transfers) and recover the Transfers for the benefit of the All Resort estate. The Transfers are more particularly described in the Court's Memorandum Decision.

The Trustee and the United States filed cross-motions for summary judgment, and the Court conducted a hearing on those motions. After considering the relevant filings in this adversary proceeding, including the parties' motions and memoranda, after considering the parties' oral arguments, and after conducting an independent review of applicable law, the Court issued its Memorandum Decision of even date. For the reasons set forth in the Memorandum Decision, which the Court incorporates herein by reference, the Court hereby **ORDERS:**

1. The United States' Motion for Summary Judgment is DENIED.
2. The Trustee's Motion for Summary Judgment is GRANTED.
3. The Transfers are avoided under 11 U.S.C. § 544(b).
4. The Trustee is awarded a judgment against the United States pursuant to 11 U.S.C. § 550(a) in the amount of $145,138.78.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 21-4135
(D.C. No. 2:20-CV-00248-BSJ)
(D. Utah)

DAVID L. MILLER, PLAINTIFF-APPELLEE

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES,
AMICUS CURIAE

[Filed: Sept. 1, 2023]

ORDER

Before CARSON, BALDOCK, and EBEL, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ CHRISTOPHER M. WOLPERT
CHRISTOPHER M. WOLPERT, Clerk

APPENDIX F

1. U.S. Const. Art. VI, Cl. 2 provides:

Supremacy Clause

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. 11 U.S.C. 106 provides:

Waiver of sovereign immunity

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 504, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmen-tal unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of sec-tion 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

(b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

3. 11 U.S.C. 544 provides:

Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debt-or at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debt-or at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of

this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

4. Utah Code Ann. §§ 25-6-1 through 25-6-10 (2014) provided:

26-6-1 Short title

This chapter is known as the "Uniform Fraudulent Transfer Act."

25-6-2 Definitions

In this chapter:

(1) "Affiliate" means:

(a) a person who directly or indirectly owns, controls, or holds with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) as a fiduciary or agent without sole discretionary power to vote the securities; or

(ii) solely to secure a debt, if the person has not exercised the power to vote;

(b) a corporation 20% or more of whose outstanding voting securities are directly or indirectly

owned, controlled, or held with power to vote, by the debtor or a person who directly or indirectly owns, controls, or holds, with power to vote, 20% or more of the outstanding voting securities of the debtor, other than a person who holds the securities:

(i) as a fiduciary or agent without sole power to vote the securities; or

(ii) solely to secure a debt, if the person has not exercised the power to vote;

(c) a person whose business is operated by the debtor under a lease or other agreement, or a person substantially all of whose assets are controlled by the debtor; or

(d) a person who operates the debtor's business under a lease or other agreement or controls substantially all of the debtor's assets.

(2) "Asset" means property of a debtor, but does not include:

(a) property to the extent it is encumbered by a valid lien;

(b) property to the extent it is generally exempt under nonbankruptcy law; or

(c) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(3) "Claim" means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(4) "Creditor" means a person who has a claim.

(5) "Debt" means liability on a claim.

(6) "Debtor" means a person who is liable on a claim.

(7) "Insider" includes:

(a) if the debtor is an individual:

(i) a relative of the debtor or of a general partner of the debtor;

(ii) a partnership in which the debtor is a general partner;

(iii) a general partner in a partnership described in Subsection (7) (a) (ii);

(iv) a corporation of which the debtor is a director, officer, or person in control; or

(v) a limited liability company of which the debtor is a member or manager;

(b) if the debtor is a corporation:

(i) a director of the debtor;

(ii) an officer of the debtor;

(iii) a person in control of the debtor;

(iv) a partnership in which the debtor is a general partner

(v) a general partner in a partnership described in Subsection (7) (b) (iv);

(vi) a limited liability company of which the debtor is a member or manager; or

(vii) a relative of a general partner, director, officer, or person in control of the debtor;

(c) if the debtor is a partnership:

(i) a general partner in the debtor;

(ii) a relative of a general partner in, a general partner of, or a person in control of the debtor;

(iii) another partnership in which the debtor is a general partner;

(iv) a general partner in a partnership described in Subsection (7)(c)(iii);

(v) a limited liability company of which the debtor is a member or manager; or

(vi) a person in control of the debtor;

(d) if the debtor is a limited liability company:

(i) a member or manager of the debtor;

(ii) another limited liability company in which the debtor is a member or manager;

(iii) a partnership in which the debtor is a general partner;

(iv) a general partner in a partnership described in Subsection (7)(d)(iii);

(v) a person in control of the debtor; or

(vi) a relative of a general partner, member, manager, or person in control of the debtor;

(e) an affiliate, or an insider of an affiliate as if the affiliate were the debtor; and

(f) a managing agent of the debtor.

(8) "Lien" means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by

agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(9) "Person" means an individual, partnership, limited liability company, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(10) "Property" means anything that may be the subject of ownership.

(11) "Relative" means an individual or an individual related to a spouse, related by consanguinity within the third degree as determined by the common law, or a spouse, and includes an individual in an adoptive relationship within the third degree.

(12) "Transfer" means every mode, direct or indirect, absolute or conditional, or voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(13) "Valid lien" means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

25-6-3 Insolvency.

(1) In this chapter: A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.

(2) A debtor who is generally not paying his debts as they become due is presumed to be insolvent.

(3) A partnership is insolvent under Subsection (1) if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts.

(4) Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this chapter.

(5) Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

25-6-4 Value—Transfer.

(1) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied. However, value does not include an unperformed promise made other than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(2) Under Subsection **25-6-5** (1) (b) and Section **25-6-6**, a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(3) A transfer is made for present value if the exchange between the debtor and the transferee is in-

tended by them to be contemporaneous and is in fact substantially contemporaneous.

25-6-5 Fraudulent transfer—Claim arising before or after transfer.

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

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

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

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

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

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

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

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

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

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

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

(f) the debtor absconded;

(g) the debtor removed or concealed assets;

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

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

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

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

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

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

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

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

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

25-6-7 Transfer—When made.

In this chapter:

(1) A transfer is made:

(a) with respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and

(b) with respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien other than under this chapter that is superior to the interest of the transferee.

(2) If applicable law permits the transfer to be perfected as provided in Subsection (1) and the transfer is not so perfected before the commencement of an action for relief under this chapter, the transfer is deemed made immediately before the commencement of the action.

(3) If applicable law does not permit the transfer to be perfected as provided in Subsection (1), the transfer is made when it becomes effective between the debtor and the transferee.

(4) A transfer is not made until the debtor has acquired rights in the asset transferred.

(5) An obligation is incurred:

(a) if oral, when it becomes effective between the parties; or

(b) if evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

25-6-8 Remedies of creditors.

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

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

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

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

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

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

(iii) any other relief the circumstances may require.

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

25-6-9 Good faith transfer.

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

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

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

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

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

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

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

(b) enforcement of any obligation incurred; or

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

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

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

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

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

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

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

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

25-6-10 Claim for relief—Time limits.

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

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

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

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