No. 23-824

IN THE
Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

DAVID L. MILLER,

Respondent.

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

BRIEF OF 23 STATES AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does section 544(b)(1) of the Bankruptcy Code allow a bankruptcy trustee to avoid, under state fraudulent-transfer law, tax payments to the United States when no actual creditor could obtain such relief outside bankruptcy?

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INTEREST OF AMICI

Amici (the States of Alabama, Arkansas, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Indiana, Maine, Massachusetts, Minnesota, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Virginia, Washington, and the District of Columbia) have an interest in these proceedings because the issue—the extent to which sections 106 and 544(b)(1) of the Bankruptcy Code abrogate sovereign immunity—affects them as much as it affects the United States. Under the trustee's proposed interpretation of those statutes, in future cases the States may be required to return tax payments years after they have been collected, based on actions of a taxpayer that the government has no knowledge of or control over, and long after any right to a refund of overpaid taxes would expire under applicable law. In short, this case affects the States' ability to collect and retain their taxes—the "lifeblood of government," *Bull v. United States*, 295 U.S. 247, 259 (1935).

Further, *amici* have a distinct perspective on the meaning of section 106, which abrogates the sovereign immunity of both the state and federal governments. As explained below, the trustee's interpretation—if applied against a state in future cases—would raise difficult constitutional questions that can be avoided under the United States' competing interpretation. For that reason, and for the other reasons explained below, the court should adopt the United States' proposed interpretation and resulting rule of law.

SUMMARY OF ARGUMENT

Section 544(b)(1) allows a trustee to step into the shoes of an existing creditor and to assert for the benefit of the estate any fraudulent-transfer claim that the creditor could have raised successfully under state law outside of bankruptcy. The provision imports a state-law cause of action into bankruptcy rather than creating a substantive cause of action unique to bankruptcy. Because that provision requires an actual creditor with a viable state-law claim, any defenses that would be available outside of bankruptcy are also valid against a trustee pursuing a section 544(b)(1) claim.

So understood, section 544(b)(1) does not authorize the fraudulent-transfer claim that the trustee asserts against the United States here. Outside of bankruptcy, that claim would be barred by the United States' sovereign immunity. And section 106 of the Bankruptcy Code—which waives sovereign immunity "with respect to" various provisions of that code including section 544—does not abrogate the requirements that section 544(b)(1) imposes for a permissible avoidance action under that provision. Those requirements include, most importantly, an actual creditor who could pursue such a claim successfully outside of bankruptcy.

Moreover, as a waiver of sovereign immunity, section 106 is construed narrowly. That statute is plausibly read as waiving immunity only for causes of action that meet the substantive requirements of other bankruptcy provisions, not as modifying the substantive requirements of those other provisions. That

reading does not make section 106's reference to section 544 superfluous. Section 106(a) waives sovereign immunity "with respect to" section 544 as a whole, and that waiver has meaningful effect (in connection with other types of claims authorized under that provision) even without interpreting the waiver as abrogating any of section 544(b)(1)'s requirements. Thus, that waiver can plausibly be limited to claims that meet section 544's own requirements, and only an unnecessarily broad reading of that provision would abrogate section 544(b)(1)'s actual-creditor-with-a-viable-claim requirement.

Finally—and most importantly from the perspective of *amici*—the trustee's broader reading of section 544(b)(1) sets that statute on a collision course with the limits of Congress's power to abrogate state sovereign immunity under the Bankruptcy Clause of the Constitution. Although the trustee does not assert a section 544(b)(1) claim against any state here, allowing such claims to proceed over the United States' sovereign immunity likely means that such claims may also proceed over the sovereign immunity of individual states.

But this Court has held that the states, when they ratified the Constitution, agreed that their sovereign immunity could be abrogated by laws enacted under the Bankruptcy Clause only when such laws are "uniform." Section 544(b) does not constitute such a uniform law because it allows for application of state laws that differ in their most salient feature: the statute of limitations for bringing such actions. The states did not agree to subject themselves to such

varying laws that they have no ability to influence or control.

Given that constitutional concern, this Court should—under the doctrine of constitutional avoidance—read section 544(b)(1) to provide no authority for the trustee's avoidance action against the United States in this case, even in light of section 106(a).

ARGUMENT

The Bankruptcy Code gives trustees various tools for recovering assets that ultimately should belong to the estate's creditors. This case involves one of those tools: a trustee's authority, under section 544(b)(1) of the Bankruptcy Code, to assert the same fraudulent transfer claims that the creditors themselves could have asserted under state law. That statute provides:

> 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.

11 U.S.C. § 544(b)(1). As explained below, the reference to "applicable" law authorizes a trustee to avoid transfers only to the extent that an actual creditor could do so outside of bankruptcy. But here, the trustee seeks to avoid a transfer to the United States by relying on a Utah fraudulent-transfer law that is not "applicable" in light of the United States' sovereign immunity. And section 106 of the Bankruptcy Code—

which waives sovereign immunity "with respect to" certain provisions of that code without "creat[ing] any substantive claim for relief or cause of action not otherwise existing under" under that code—does not change that analysis.

A. Section 544(b)(1) allows a trustee to avoid transfers only to the extent that an actual creditor could do so outside of bankruptcy.

Section 544(b)(1) is "unique" among the trustee's avoidance powers because it requires "the actual existence of an unsecured creditor that could have brought the state-law action itself." *In re Equip. Acquisition Res., Inc.*, 742 F.3d 743, 746 (7th Cir. 2014). "If 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); *In re DBSI, Inc.*, 869 F.3d 1004, 1009 (9th Cir. 2017) (similar, citing *Collier*); *see also Sender v. Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996) ("Before asserting applicable state law, however, the trustee must first show that there is an actual creditor holding an allowable unsecured claim who, under state law, could avoid the transfers in question." (internal quotation marks, ellipsis, and brackets omitted)); *In re Cybergenics Corp.*, 226 F.3d 237, 243 (3d Cir. 2000) ("The avoidance power provided in section 544(b) is distinct from others because a trustee or debtor in possession can use this power only if there is an unsecured creditor of the debtor that actually has the requisite nonbankruptcy cause of action.").

Thus, defenses that would defeat a creditor's claim under nonbankruptcy law apply equally to a trustee who asserts rights under section 544(b)(1). If the creditor would be estopped or barred from recovery, so is the trustee. That is, "the trustee stands in the shoes of an actual unsecured creditor," and "if the actual creditor 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." *In re Equip. Acquisition Res., Inc.*, 742 F.3d at 746; *In re DBSI, Inc.*, 869 F.3d at 1009 (same, citing *In re Equip. Acquisition Res., Inc.*).

B. Outside of bankruptcy, sovereign immunity would bar applying the Utah law invoked by the trustee against the United States.

Here, the trustee relies on Utah Code Ann. § 25-6-203(1) as the "applicable law" that a creditor could use to avoid the subject transfer, which was a tax payment to the United States. *Miller v. United States*, 71 F.4th 1247, 1251 (10th Cir. 2023). That law allows a "creditor" to void a "transfer made or obligation incurred by a debtor" under certain circumstances. Utah Code Ann. § 25-6-203(1).

But that law is not "applicable" to the subject transfer because it could not be applied against the United States, which enjoys sovereign immunity against claims under state law. *See In re Equip. Acquisition Res., Inc.*, 742 F.3d at 747 (observing that there is no dispute that "an unsecured creditor would have been barred from bringing an Illinois fraudulent-transfer action against the IRS outside of bank-

ruptcy"); *see also Price v. United States*, 174 U.S. 373, 375–76 (1899) ("The government is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it.").

Thus, the trustee cannot rely on Utah Code Ann. § 25-6-203(1) as an "applicable law" for the purposes of section 544(b)(1) unless Congress has waived sovereign immunity by consenting to such a suit. But the trustee cannot point to any congressional enactment by which Congress authorized courts outside of bankruptcy to void and recoup tax payments on state-law grounds.

C. Section 106 does not alter the actual-creditor-outside-of-bankruptcy requirement of section 544(b)(1).

Rather than point to some enactment by which Congress waived sovereign immunity against state-law transfer avoidance claims outside of bankruptcy, the trustee contends that section 106 of the Bankruptcy Code changes the analysis under section 544(b)(1). That section contains an express waiver of sovereign immunity, providing:

> sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to . . . Section[] . . . 544 . . . of this title.

11 U.S.C. § 106(a)(1). But nothing in that statute purports to change section 544(b)(1)'s requirement of an actual creditor who could successfully avoid a transfer under "applicable law" outside of bankruptcy. To the contrary, another subsection of that stat-

ute expressly disclaims "creat[ing] any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law." *Id.* § 106(a)(5).

Section 106 would matter here only if—contrary to its expressly stated intent *not* to create new substantive rights—it expanded the scope of the powers expressly granted to a trustee in section 544(b)(1), to include the power to bring avoidance actions *in bankruptcy* that could not be maintained outside of bankruptcy (by waiving the actual-creditor-with-a-viable-claim requirement when section 544(b)(1) is used against a governmental unit). That is essentially what the Tenth Circuit concluded when it held that section 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." *Miller*, 71 F.4th at 1253.

But, as explained below, waivers of sovereign immunity like section 106 are construed narrowly. Section 106 can plausibly be read to preserve immunity against avoidance actions that would be barred outside of bankruptcy. And most importantly, this Court should adopt that plausible view because the contrary view sets the Bankruptcy Code on course to collide with limits on Congress' constitutional authority.

1. As a waiver of sovereign immunity, section 106 is construed narrowly.

The standard for construing waiver or abrogation of sovereign immunity is a stringent one. *See United States v. Nordic Village Inc.*, 503 U.S. 30, 33–34

(1982) ("Waivers of the Government's sovereign immunity, to be effective, must be unequivocally expressed," and "are not generally to be liberally construed." (internal quotation marks omitted)); *Hoffman v. Conn. Dep't of Income Maintenance*, 492 U.S. 96, 101 (1989) ("[T]o abrogate the States' Eleventh Amendment immunity from suit in federal court, which the parties do not dispute would otherwise bar these actions, Congress must make its intention unmistakably clear in the language of the statute." (internal quotation marks omitted)); *see also Sossamon v. Texas*, 563 U.S. 277, 285 n.4 (2011) (similar).

That stringent standard applies not only to the threshold question of whether there is a waiver at all, but also to the scope of a waiver. *Sossamon*, 563 U.S. at 285 ("[A] waiver of sovereign immunity will be strictly construed, *in terms of its scope*, in favor of the sovereign." (emphasis added; internal quotation marks omitted)); *see also id.* at 288–89 (asking "whether Congress has given clear direction that it intends to include a damages remedy" in a statute authorizing only "appropriate relief" (emphasis omitted)).

As a corollary to that rule, this Court has explained that "where a statute is susceptible of multiple plausible interpretations, including one preserving immunity," it "will not consider a State to have waived its sovereign immunity." *Id.* at 287 (applying that same principle when interpreting federal legislation); *see also Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 388 (2023) ("If there is a plausible interpretation of the statute that preserves sovereign immunity, Congress

has not unambiguously expressed the requisite intent." (internal quotation marks omitted)).

2. Section 106 can plausibly be read to preserve immunity against avoidance actions that would be barred outside of bankruptcy.

Although section 106 expressly waives sovereign immunity "with respect to" section 544, that waiver can plausibly be read as applying only to avoidance suits that satisfy the requirements of section 544, rather than eliminating requirements such as an actual creditor who could successfully avoid a transfer under "applicable law" outside of bankruptcy. A contrary reading would depart not only from the obligation to construe such waivers narrowly, but would also incorrectly treat a waiver as changing the substantive elements of a claim.

That reading does not make the reference to section 544 superfluous. To start, the focus of the waiver could plausibly be the other half of section 544: subsection (a), which is known as "the strong-arm power." *In re Equip. Acquisition Res., Inc.*, 742 F.3d at 749. Subsection (a) allows the trustee to assume the rights of certain creditors or that of a bona fide purchaser. 11 U.S.C. § 544(a). But unlike subsection (b), subsection (a) does not require that such creditors or a bona fide purchaser "'actually exist.'" *In re Equip. Acquisition Res., Inc.*, 742 F.3d at 749 (quoting 5 Collier on Bankruptcy ¶ 544.01; emphasis omitted). Because section 544(a) does not require an actual creditor who could successfully maintain an action outside of bankruptcy, an avoidance action could meet the requirements of that provision even if brought against

the United States. In that circumstance, then, section 106's waiver of sovereign immunity has a meaningful effect without creating a new kind of claim that would not otherwise meet the express requirements of section 544.

But even for subsection (b), the waiver of sovereign immunity need not change the substantive requirements of subsection (b) to have a meaningful effect. When a state has itself waived sovereign immunity in at least some nonbankruptcy forum, section 544(b)(1)'s actual-creditor requirement can be met and "the interplay of sections 106(a)(1) and 544(b)(1) would enable the trustee to bring the same action in the bankruptcy court." [1] *In re Equip. Acquisition Res., Inc.*, 742 F.3d at 749.

Because section 106's waiver of sovereign immunity can have meaningful effect on certain actions brought under section 544 without changing the substantive requirements for such actions, it can plausibly be read as limited to such actions. And under that reading, a section 544(b) action against the United States is not authorized because such an action fails to satisfy the requirement of an actual creditor who could successfully proceed against the United States under applicable law.

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[1] For example, the states of Illinois, New York, and Ohio have enacted waivers of their own immunity. 705 Ill. Comp. Stat. § 505/8(a) (allowing limited claims under Illinois state law to be brought against the state in its court of claims); N.Y. Ct. Cl. Act § 8 (suits authorized if brought in court of claims); Ohio Rev. Code Ann. § 2743.02(A)(1) (same).

That reading of section 106 is also more consistent with its structure as a whole. Congress deliberately chose not to enact the broad-brush waiver of sovereign immunity, opting instead for a tailored approach limited to specific sections of the Bankruptcy Code. Under that tailored approach, for example, section 106 does not abrogate immunity with respect to section 541, the provision establishing the property of the estate. The omission of section 541 was intended to "allow[] the assertion of bankruptcy causes of action, *but specifically exclude[] causes of action belonging to the debtor that become property of the estate under section 541*." House Judiciary Committee, Bankruptcy Reform Act of 1994, Section-By-Section Description, 140 Cong. Rec. H10764 (daily ed. Oct. 4, 1994) (emphasis added). The effect of that legislative choice is to preclude a debtor from expanding its right to sue governments on state-created causes of action merely by filing for bankruptcy, consistently with the clarification in section 106(a)(5) that section 106 does not create new substantive rights.

So too with section 106's reference to section 544. Nothing in the statutory text suggests that Congress intended to expand the right to sue governments on state-created causes of action merely by filing for bankruptcy. Section 106 provides only that if such a claim could otherwise be brought, it can be brought in the bankruptcy court.

Put differently, if Congress did not intend to extend section 106's waiver of sovereign immunity to claims in which a *debtor* asserted private rights against the government, it likewise was unlikely to have intended that the waiver should extend to

claims in which a *creditor* is asserting a private right against the government. Both limitations are equally consistent with the Bankruptcy Code's "finely tuned" accommodation of "essential governmental functions" like "tax administration and regulation." *Lac du Flambeau*, 599 U.S. at 391–92. For that reason as well, section 106's waiver of sovereign immunity can plausibly be read as inapplicable to fraudulent-transfer claims against the United States.

3. The contrary view raises serious questions about Congress' authority to abrogate state sovereign immunity.

Finally—and most importantly for the States—a narrow view of section 106 finds support in the canon of constitutional avoidance. That canon instructs that, when a court is confronted with two plausible statutory interpretations, one of which would raise constitutional problems, the court should adopt the other interpretation. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005). That rule rests on the "reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Id.* at 381. Unless Congress gave a "clear indication" that it intended to press the outer limits of its power, a court should resort to any alternative interpretation that is "fairly possible" to avoid confronting the constitutional problems. *INS v. St. Cyr*, 533 U.S. 289, 299–300 (2001) (internal quotation marks omitted).

Here, the constitutional problem involves the limits of Congress's power to abrogate state sovereign immunity under the Bankruptcy Clause of the Con-

stitution. The Bankruptcy Clause grants Congress the power to pass "uniform" laws of bankruptcy. U.S. Const. Art. I, § 8, cl. 4; *Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 359 (2006). In *Katz*, this Court held that the Bankruptcy Clause authorizes "limited subordination of state sovereign immunity in the bankruptcy arena." 546 U.S. at 363. More specifically, it held that the States had agreed, in ratifying the Constitution, that they could be sued on matters such as preference actions brought under section 547—claims created by the federal bankruptcy laws and applied uniformly to all entities. *Id*. at 371–73. But *Katz* cautioned that not every section of the Bankruptcy Code infringing on state sovereign immunity would automatically pass muster. *Id*. at 378 n.15.

If sections 544(b)(1) and 106 were read as waiving sovereign immunity on state-law fraudulent-transfer claims raised against the United States, then those statutes would also allow such claims raised against a state. *See* 11 U.S.C. § 106(a) (abrogating sovereign immunity of any "government unit"). But when applied against a state, as an abrogation of the state's sovereign immunity, that rule likely would exceed the constitutional limits contemplated in *Katz*.

While the States may have agreed, when ratifying the Constitution, to subordinate their sovereign immunity to "uniform" laws, they did not agree to subordinate their sovereign immunity to the fraudulent transfer laws of any one of their 49 sister states when a trustee stepped into the shoes of a private creditor under section 544(b)(1). *See Dillworth v. Ginn (In re Gin-La St. Lucie Ltd.)*, 2010 WL 8756757, at *3–*5 (Bankr. S.D. Fla. Dec. 10, 2010) (reasoning along

those lines). That regime would not create the sort of uniform law of bankruptcy—that is, one based on federally defined rights of action—to which the States acquiesced when they ratified the Constitution.

States agreed to subordinate themselves only to uniform laws because such laws are easier to influence and control. The Seventh Circuit made the same point with respect to the United States, stating that while Congress might allow suit under the Code's own terms, "it is quite another [thing] for Congress to expose federal agencies to suit based on 'applicable' state law, the dimensions of which Congress cannot control." *In re Equipment Acquisition Resources, Inc.*, 742 F.3d at 750. The Seventh Circuit explained that state laws used in section 544(b)(1) actions are non-uniform in their most important aspect—the length of time within which a prior payment may be clawed back—and so undermine the government's interest in "'financial stability.'"[2] *Id.* Neither the States nor the

[2] State lookback periods vary meaningfully from state to state. They can be as short as one year from the time a creditor/obligee "learned or should have learned of the act, or the result of the failure to act, of the obligor that the obligee seeks to annul, but never after three years from the date of that act or result." La. Civ. Code Ann. art. 2041. Four years is more "typical," but some states have limitation periods as long as five or six years. *In re Equip. Acquisition Res., Inc.*, 742 F.3d at 750 & n.5. On the other hand, Virginia's rule is that "a fraudulent conveyance has no specific statute of limitation" and "is governed by the concept of laches." *In re Porter*, 37 B.R. 56, 66 (Bankr. E.D. Va. 1984) (also noting that "under Virginia law a voluntary conveyance has a statute of limitation of five years"). And under the "discovery rule" used in many statutes, the time can stretch even longer. *See, e.g.*, *Phillips v. Levie*, 593 F.2d 459,

Footnote continued…

United States would plausibly have agreed to subject their tax revenues to uncertainty not only during a limited period set by a uniform federal law but also during the varying periods set by other states' laws. Such varying and potentially lengthy limitation periods—unlike the shorter and certain periods contemplated by the Bankruptcy Code's substantive avoidance provisions, *see, e.g.*, 11 U.S.C. §§ 547, 548—reach beyond bankruptcy law's legitimate goal of preventing creditors from "dismembering the estate" on the path to and in the wake of a bankruptcy filing. *See Lac du Flambeau*, 599 U.S. at 390 (internal quotation marks and brackets omitted).

Indeed, nothing suggests that, at the time of the Constitution's ratification, either Congress or the States anticipated attempts to sue governmental entities under state fraudulent transfer laws. Although those laws (which derived from the 1570 Statute of Elizabeth in England, *see BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 541 (1994)) existed in most states when the Constitution was ratified, reported decisions present no evidence of any attempt to apply the laws to governments as of 1787 or before—or, indeed, for many years thereafter. To the contrary, it was well settled at that time that laws of general application did not normally apply to the sovereign. *See generally United States v. Herron*, 87 US 251, 263 (1873);

(...continued)
462 n.12 (2d Cir. 1979); *In re Momentum Development, LLC*, 649 B.R. 333, 338 (B.A.P. 9th Cir. 2023) (discussing *Cortez v. Vogt*, 52 Cal. App. 4th 917 (1997)).

see also Connecticut v. Shelton, 47 Conn. 400, 405–06 (1879) (citing cases).

In its lack of uniformity, section 544(b)(1) stands in contrast with other provisions of the Bankruptcy Code (such as sections 547 and 548) that create powers that a trustee can assert without relying on the rights of any creditors in the case—uniform powers of the kind this Court has described as "public rights." *See Stern v. Marshall*, 564 U.S. 462, 488–90 (2011). The States can seek to protect themselves from those powers by exerting political influence over the federal legislation creating those "public rights." *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–53 (1985).

States have no similar ability, however, to influence legislatures in other states that could create different fraudulent transfer actions without their input. Leaving aside variations in limitation periods, state fraudulent transfer law also varies in substance. For example, four states have yet to enact any uniform law on the subject, while the rest are fairly evenly split between the original Uniform Fraudulent Transfer Act and the more modern Uniform Voidable Transactions Act. *See* Uniform Law Commission, Voidable Transactions Act, Enactment Map, https://www.uniformlaws.org/committees/community-home?CommunityKey=64ee1ccc-a3ae-4a5e-a18f-a5ba8206bf49 (last visited July 24, 2024). The two uniform laws have substantive differences. *See generally Uniform Voidable Transactions Act Approved by Uniform Law Commission to Replace UFTA* (Jones Day Publications, Sept./Oct. 2014), *available at* https://www.jonesday.com/en/insights/2014/10/unifor

m-voidable-transactions-act-approved-by-uniform-law-commission-to-replace-ufta (last visited July 24, 2024). Of particular concern are differences in choice-of-law rules under those laws. *See* Peter D. Russin et. al., *Implications of Wholesale Adoption of UVTA Choice-of-Law Provisions*, Am. Bankr. Inst. J. 30 (2015).

Such varying avoidance rules are not the kind of "orderly and centralized" procedures contemplated by the Bankruptcy Clause. *See Lac du Flambeau*, 599 U.S. at 391. Thus, a sovereign's decision to subject itself to uniform federal laws does not also imply agreement to being held liable under the law of 50 different states under any provision that those entities might choose to include.

Indeed, this Court has held—consistently with the States' argument here—that departures from uniformity are permissible only in limited circumstances not present in this case. *See Siegel v. Fitzgerald*, 596 U.S. 464, 476–77 (2022). *Siegel* identified only two situations where geographically variable bankruptcy laws are permissible. One is when Congress enacts "geographically limited bankruptcy laws" in response "to a geographically limited problem." *Id*. at 477. But fraudulent transfers are not a geographically limited problem. The other situation identified in *Siegel* involves state exemptions, by which the Bankruptcy Code permissibly allows geographic variation in the kinds of property that enters the bankruptcy estate. *Id*. at 476 (discussing the holding of *Hanover Nat. Bank v. Moyses*, 186 U.S. 181 (1902)). But *Moyses* reasoned that such geographically variable exemptions were permissible only because they confined the

reach of bankruptcy law "to such property as other legal process could reach," which amounted to a kind of uniformity. 186 U.S. at 190. Under *Moyses*, then, uniformity can be found in geographically varying bankruptcy procedures only when those procedures preserve the *status quo* that would prevail outside of bankruptcy. The States' argument here echoes that rule: There is no uniformity in a law that subjects States to geographically variable avoidance actions regardless whether those actions could proceed under non-bankruptcy law.

In short, state fraudulent-transfer laws cannot be deemed "uniform" under any reasonable definition of that word, and certainly not under any definition reasonably contemplated when the States ratified the Constitution. Thus, viewing section 106 as waiving sovereign immunity against state-law fraudulent-transfer claims raises a serious constitutional question, because it is doubtful that Congress has the power under the Bankruptcy Clause to subject States to non-uniform fraudulent-transfer laws. By contrast, the more limited interpretation advanced by the United States here raises no such question, because it leaves in place the States' authority to assert their sovereign immunity against those non-uniform laws. Although that constitutional problem is not presented in this case, this Court should adopt the more limited reading to avoid setting itself on a nearly certain path towards confronting that problem. *See Clark*, 543 U.S. at 380–81 (if one of two interpretations would raise constitutional problems, "the other should prevail—whether or not those constitutional

problems pertain to the particular litigant before the Court”).

CONCLUSION

The Court should reverse the court of appeals' decision.

Respectfully submitted,

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