No. 23-824

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DAVID L. MILLER

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

Page

A. Section 106(a)'s waiver of sovereign immunity does not alter Section 544(b)'s actual-creditor requirement 3
B. Respondent's policy arguments lack merit 14
C. Sovereign immunity is not the only bar to the underlying state-law claim 17
D. Respondent's alternative argument is not properly presented and lacks merit in any event 18

TABLE OF AUTHORITIES

Cases:

Allen v. *Cooper*, 589 U.S. 248 (2020) 14
Buckman Co. v. *Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001) 18
Cameron v. *EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267 (2022) 19
Cybergenics Corp., *In re*, 226 F.3d 237 (3d Cir. 2000) 4
Davis v. *Willey*, 263 F. 588 (N.D. Cal. 1920) 22
Department of Agriculture Rural Development Rural Housing Service v. *Kirtz*, 601 U.S. 42 (2024) 7, 12
Dewsnup v. *Timm*, 502 U.S. 410 (1992) 24
Dubin v. *United States*, 599 U.S. 110 (2023) 6
Financial Oversight & Management Board for Puerto Rico v. *Centro de Periodismo Investigativo*, 598 U.S. 339 (2023) 20, 21
Genova v. *Gottlieb (In re Orange Cnty. Sanitation, Inc.)*, 221 B.R. 323 (Bankr. S.D.N.Y. 1997) 24
Lamar, Archer & Cofrin, LLP v. *Appling*, 584 U.S. 709 (2018) 5, 6

Cases—Continued: Page

Lee v. *Schweiker*, 739 F.2d 870 (3d Cir. 1984) 13
M. Fabrikant & Sons, Inc. v. *JP Morgan Chase Bank (In re M. Fabrikant & Sons, Inc.)*, 394 B.R. 721 (Bankr. S.D.N.Y. 2008) 24
Ohio Adjutant General's Department v. *FLRA*, 598 U.S. 449 (2023).. 20
Pattern Makers' League of N. Am. v. *NLRB*, 473 U.S. 95 (1985) 5
Presley v. *Etowah County Comm'n*, 502 U.S. 491 (1992)... 6
Securities Investor Prot. Corp. v. *Bernard L. Madoff Inv. Securities LLC*, 501 B.R. 26 (S.D.N.Y. 2013).. 24
United States v. *Nordic Village, Inc.*, 503 U.S. 30 (1992) 12
Yahweh Ctr., Inc., *In re*, 27 F.4th 960 (2022)...................... 15

Constitution and statutes:

U.S. Const.:
Appropriations Clause 2, 18
Supremacy Clause.. 2, 17
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1402(1), 119 Stat. 214 10
Fair Credit Reporting Act, Pub. L. No. 90-321, Tit. VI, 84 Stat. 1127 (15 U.S.C. 1681 *et seq.*)................... 12
Uniform Voidable Transactions Act § 7 (2014)................... 23
Internal Revenue Code (26 U.S.C.):
§ 164(e) 15
§ 3102(a) 15
§ 3402(a) 15
§ 6325(d) 9

Statutes—Continued: Page

§ 6502(a) 16
§ 7501(a) 15
5 U.S.C. 7103(a)(3) 20
11 U.S.C. 106 .... 12, 13
11 U.S.C. 106(a) 2, 3, 5-12, 14, 16-21
11 U.S.C. 106(a)(1) 3, 6-8
11 U.S.C. 106(a)(2) 3, 7
11 U.S.C. 106(a)(2)-(4) 3
11 U.S.C. 106(a)(5) 2, 3, 5-8
11 U.S.C. 362 8
11 U.S.C. 510 9
11 U.S.C. 510(a) 9
11 U.S.C. 510(c) 9
11 U.S.C. 522(c)(1) 9
11 U.S.C. 523(a)(1)(B)(ii) 8
11 U.S.C. 523(a)(19) 9
11 U.S.C. 524 8
11 U.S.C. 544 2
11 U.S.C. 544(a) 10, 11
11 U.S.C. 544(b) 1-5, 7, 8, 10-14, 16-19, 21-23
11 U.S.C. 544(b)(1) 4
11 U.S.C. 544(b)(2) 24
11 U.S.C. 547 9
11 U.S.C. 547(a)(2) 9
11 U.S.C. 547(b) 9
11 U.S.C. 547(c) 9
11 U.S.C. 548 .... 1, 8, 10
11 U.S.C. 548(a) 1, 10
11 U.S.C. 548(a)(2) 24
11 U.S.C. 549 8
11 U.S.C. 549(a) 13

Statutes—Continued: Page

11 U.S.C. 550 .... 20, 23, 24
11 U.S.C. 550(a) 23
11 U.S.C. 550(b) 24
11 U.S.C. 550(d) 16
11 U.S.C. 1141 8
11 U.S.C. 1227 8
11 U.S.C. 1327 8
28 U.S.C. 1346(a)(2) 9
28 U.S.C. 1491(a)(1) 9
28 U.S.C. 2201 17
28 U.S.C. 2410(a) 11
Utah Code Ann. (West):
§ 25-6-6(1) (2014) 21
§ 25-6-8(1) (2014) 21
§ 25-6-8(2) (2014) 18
§ 25-6-9 (2014) 21
§ 78B-6-403(1) (2024) 22

Miscellaneous:

Garrard Glenn, *The Law of Fraudulent Conveyances* (1931) 22, 23
Random House Dictionary (2d ed. 1993) 21
Frederick Scott Wait, *A Treatise on Fraudulent Conveyances and Creditors' Bills, with a Discussion of Void and Voidable Acts* (1884) 22

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Respondent suggests (Br. 11, 32) that the IRS seeks to be "elevate[d]" to "super-creditor status" and made "immune from avoidance actions." But a trustee can indisputably avoid federal tax payments under 11 U.S.C. 548(a), the Bankruptcy Code's freestanding fraudulent-transfer provision. The dispute in this case is instead *temporal*—whether the trustee is limited to Section 548's two-year lookback period or can instead take advantage of longer state-law limitations periods by invoking 11 U.S.C. 544(b).

The Code answers that question against the trustee. A trustee cannot avoid tax payments made to the United States by invoking Section 544(b) because it is simply a mirroring provision: It clothes the trustee with the rights of an existing creditor, authorizing him to avoid a transfer *inside* bankruptcy only when an actual creditor could have obtained that relief *outside* bankruptcy. Section 544(b) takes a valuable right belonging

to one creditor and pulls it into the bankruptcy process to benefit all creditors. But the provision does not extend to transfers that are not otherwise vulnerable under nonbankruptcy law. Here, no actual creditor could have sued the United States to avoid the at-issue tax payments outside of bankruptcy, given sovereign immunity and other obstacles such as the Supremacy and Appropriations Clauses. Respondent thus cannot invoke Section 544(b) to avoid those payments in bankruptcy.

The waiver of sovereign immunity in 11 U.S.C. 106(a) does not alter that conclusion. That provision allows 59 Code sections, including Section 544, to be invoked and enforced against governmental entities. But it does not purport to take sovereign immunity "off the table" for "all subjects that concern or regard" the identified Code sections. Resp. Br. 16, 24. To the contrary, Congress instructed that "[n]othing" in Section 106(a) should be construed to create a "substantive claim for relief or cause of action" that does "not otherwise exist[]." 11 U.S.C. 106(a)(5). Section 106(a) therefore does not eliminate Section 544(b)'s central substantive limitation: A trustee cannot obtain relief in bankruptcy without identifying a creditor who could have done so outside of bankruptcy.

Respondent's contrary arguments lack merit. He minimizes Section 106(a)'s express limitations in trying to reconcile his sweeping interpretation with the text. He draws unjustified inferences from Section 106(a)'s enactment history. He overreads this Court's recent decisions, which did not rewrite the interpretive principles applicable to sovereign-immunity waivers. He devotes an entire section of his brief to a novel theory—neither pressed nor passed upon below—that has noth-

ing to do with Section 106(a). And he offers no reason to believe that Congress intended to expose the federal fisc to indeterminate liability predicated on state fraudulent-transfer law—particularly when Congress included a federal fraudulent-transfer provision, with a two-year lookback period, that applies to the IRS.

A. Section 106(a)'s Waiver Of Sovereign Immunity Does Not Alter Section 544(b)'s Actual-Creditor Requirement

1. Respondent's principal contention—that Section 106(a)'s waiver of sovereign immunity "extends to all subjects that concern or regard" the listed Code sections, including the state-law suit on which his Section 544(b) claim is predicated, Br. 16—cannot be reconciled with either Section 106(a) or Section 544(b).

Section 106(a) does not make sovereign immunity "wholly irrelevant inside bankruptcy with respect to the 59 listed provisions." Resp. Br. 14. Rather, Congress carefully demarcated the waiver's limits in Section 106(a) itself.

Section 106(a) waives sovereign immunity only "to the extent set forth in this section." 11 U.S.C. 106(a)(1). The court "may hear and determine any issue arising with respect to the application of such sections to governmental units," and may grant monetary relief and enforce judgments. 11 U.S.C. 106(a)(2)-(4). But that waiver does not "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). In other words, Section 106(a) authorizes courts to "appl[y]" the identified Code sections—as written—"to governmental units," and to hear and determine issues arising "with respect to" such "application," 11 U.S.C. 106(a)(2), but

it does not alter the substantive requirements of those sections. U.S. Br. 18-29.

That limitation is consistent with the longstanding distinction between a waiver of sovereign immunity and entitlement to substantive relief, U.S. Br. 20, 24—but it is fatal to respondent's theory. Importantly, Section 544(b) does not simply "incorporate[]" state law, Resp. Br. 16. Instead, it creates a federal cause of action that Congress designed to *mirror* an existing creditor's state-law cause of action, authorizing the trustee to avoid a transfer that is already "voidable under applicable law by a creditor." 11 U.S.C. 544(b)(1). Section 544(b) thus promotes equality of distribution among creditors, allowing a single creditor's nonbankruptcy avoidance rights to inure to "the benefit of all creditors"—but "only if there is an unsecured creditor of the debtor that actually has the requisite nonbankruptcy cause of action." *In re Cybergenics Corp.*, 226 F.3d 237, 243 (3d Cir. 2000).

That actual-creditor requirement is blackletter law, uniformly reflected in the caselaw interpreting Section 544(b) and its predecessor provisions, dating back to the nineteenth century. U.S. Br. 14-17. Indeed, it is the premise for the step-into-the-shoes metaphor often used to describe Section 544(b): A trustee can step into the shoes of an actual creditor to avoid a transfer for the benefit of the estate, but if no actual creditor could have avoided the transfer, the trustee has nobody's shoes to step into.

Here, under Utah fraudulent-transfer law, no actual creditor could have sued the IRS to avoid the federal tax payments at issue. U.S. Br. 17-18. And Section 544(b) does not authorize the trustee to avoid any transfer in bankruptcy that an actual creditor could not avoid out-

side bankruptcy. Respondent's interpretation of Section 106(a)—permitting the trustee to avoid federal tax payments under Section 544(b), without satisfying the actual-creditor requirement—thus contravenes Section 106(a)(5), by creating a "substantive claim for relief" that does not "otherwise exist[]" under Utah law or Section 544(b).

2. Respondent's contrary interpretation lacks merit.

a. Seeking a textual hook, respondent asserts that the phrase "with respect to" expands Section 106(a)'s waiver to "*all subjects that concern or regard section 544*," including the "state fraudulent-transfer statutes" that "make up the trustee's section 544(b) claim." Br. 16 (emphasis added). Respondent emphasizes *Lamar, Archer & Cofrin, LLP* v. *Appling*, 584 U.S. 709 (2018), which noted that "the word 'respecting' * * * generally has a broadening effect," *id.* at 717. But *Lamar* held only that a single-asset financial statement, while not a complete financial snapshot, is a statement "respecting the debtor's financial condition." *Id.* at 720. Nothing in *Lamar* supports respondent's far-more-expansive position: that the phrase "with respect to" extends the Code's waiver of sovereign immunity to the *merits* of the trustee's Section 544(b) claim, allowing him to prevail without identifying an actual creditor who could have prevailed outside bankruptcy.

Respondent is also wrong that the phrase "with respect to" carries the same broad meaning wherever it appears. U.S. Br. 26-27. He characterizes (Br. 18) cases endorsing narrower readings as involving "subject[s]" that did not "concern the listed topic[s]." But a union's ban on member resignations plainly "concerns" the "retention of membership." *Pattern Makers' League of N. Am.* v. *NLRB*, 473 U.S. 95, 110 (1985). And a resolution

transferring powers from elected to non-elected officials plainly concerns "voting." *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 506-507 (1992).

The upshot is that the meaning of "with respect to" depends on context. As explained in *Lamar*, phrases like "respecting," "concerning," and "in relation to" form an "interconnected web" with "overlapping" definitions that "belie[] * * * clear distinction[s]." 584 U.S. at 717. And as the Court subsequently explained in interpreting the phrase "in relation to," such phrases "cannot be 'considered in isolation' "; although they "refer[] to a relationship or nexus of some kind," "the kind of relationship required, its nature and strength, will be informed by context." *Dubin* v. *United States*, 599 U.S. 110, 118-119 (2023) (citations omitted).

Here, context refutes respondent's expansive construction. The immediately preceding phrase specifies that sovereign immunity is waived only "to the extent set forth in this section." 11 U.S.C. 106(a)(1). And Section 106(a)(5) sets important limitations that respondent's interpretation would contravene. Although Section 106(a) permits the application of 59 different sections of the Code to governmental units, and even monetary recovery, there is no indication that Congress intended to alter those sections' substantive requirements. See pp. 3-4, *supra*.

Read in context, the phrase "with respect to" functions to identify the Code provisions for which immunity is waived—*i.e.*, the objects of Section 106(a)'s waiver. U.S. Br. 26. It establishes a close "relationship or nexus," *Dubin,* 599 U.S. at 119, between Section 106(a)'s waiver and the specified provisions. But it does not indicate Congress's intent to expand the waiver to "all subjects that concern or regard section 544," including the actual

creditor's state-law action. Such a broad reading would flout the principle that, when waiving sovereign immunity, Congress must make its intent "unmistakably clear." *Department of Agriculture Rural Development Rural Housing Service* v. *Kirtz*, 601 U.S. 42, 49 (2024) (citation omitted).

b. Respondent's attempts to minimize the limitation in Section 106(a)(5) fall short. He says (Br. 24) that Section 106(a)(5) simply "prevents parties from using section 106(a)'s waiver as a sword against sovereigns outside bankruptcy," while reinforcing that "sovereign immunity is off the table" inside bankruptcy. But he does not even try to reconcile that reading with Section 106(a)'s text, which emphasizes that—when a court "appli[es]" the identified Code sections to governmental units—"[n]othing" in Section 106(a) should be construed to "create any substantive claim for relief or cause of action" that does "not otherwise exist[]." 11 U.S.C. 106(a)(1)-(2), (5).

Respondent similarly errs in suggesting (Br. 24) that the liability he urges already "exist[s]" under Section 544(b). Again, Section 544(b) allows the trustee to assert an avoidance right belonging to an actual creditor outside bankruptcy. Nothing about the actual creditor's right changed in 1994, when Congress enacted Section 106(a): Outside bankruptcy, a creditor could not and still cannot avoid a debtor's federal tax payments. Respondent's reading of Section 106(a) would therefore create a *new* substantive claim—an avoidance right under Section 544(b) that does not mirror any creditor's right outside bankruptcy.

Finally, respondent suggests (Br. 18, 24) that Section 106(a)(5)'s limitation cannot mean what it says because Section 106(a) is designed "to make governments

liable * * * where they could not otherwise be sued." But all agree that Section 106(a) *does* make governments liable where they otherwise would not be, by allowing the identified provisions to be invoked against governments. Section 106(a)(5) makes clear that the waiver does not go further and alter those provisions' substantive requirements—here, by modifying Section 544(b)'s actual-creditor requirement.

c. Respondent also emphasizes (Br. 22-23) other provisions identified in Section 106(a)(1), but those provisions only reinforce that Section 106(a)'s central function is to waive sovereign immunity as to the application of the identified Code sections to governmental units—not to alter their substantive requirements.

For instance, 11 U.S.C. 548 authorizes the trustee to avoid a fraudulent transfer under specified conditions; Section 106(a) allows him to invoke Section 548 against the government, if he satisfies those same conditions. So too for 11 U.S.C. 549, which authorizes the trustee to avoid certain postpetition transactions; Section 106(a) allows the trustee to invoke Section 549 against the government, if the statutory criteria are met. Similarly, beyond the avoidance provisions, Section 106(a) ensures that the automatic stay imposed by 11 U.S.C. 362 extends to the government; that discharges under 11 U.S.C. 524 are effective against the government; that plans confirmed under 11 U.S.C. 1141, 1227, and 1327 will bind the government; and so on.

Respondent gestures (Br. 22 n.3) at other references to nonbankruptcy law, but many are inapposite to the interpretive dispute here. For example, 11 U.S.C. 523(a)(1)(B)(ii) provides that a tax debt cannot be discharged if the return was not timely filed "under applicable law"; sovereign immunity is irrelevant to that

timeliness requirement. And 11 U.S.C. 523(a)(19) says that a debt for violating "State securities laws" cannot be discharged; again, sovereign immunity is irrelevant. See also, *e.g.*, 11 U.S.C. 522(c)(1) (certain property can be liable for specific debts "notwithstanding any provision of applicable nonbankruptcy law").

Respondent identifies only two provisions (Br. 22-23) that he believes the government's reading of Section 106(a) would improperly "restrict," but neither supports his theory. He first emphasizes (Br. 22) that "Section 510(a) incorporates nonbankruptcy law to permit trustees to enforce subrogation agreements." But Section 510 governs "subordination agreements" (which alter priority for a debt or lien), not subrogation agreements (which substitute one creditor for another). 11 U.S.C. 510(a). And the government's reading does not unduly restrict Section 510 because relevant subordination agreements will ordinarily be enforceable against the United States under applicable nonbankruptcy law. See 26 U.S.C. 6325(d); 28 U.S.C. 1346(a)(2), 1491(a)(1). Moreover, Section 106(a) undoubtedly serves an important function as to Section 510(c), which allows the bankruptcy court to equitably subordinate claims (including government claims).

Second, respondent emphasizes (Br. 23) a reference to "applicable law" in 11 U.S.C. 547. Section 547(b) authorizes the trustee to avoid transfers made shortly before bankruptcy, but Section 547(c) protects creditors to the extent any transfer is in exchange for "new value." 11 U.S.C. 547(b) and (c). "[N]ew value" includes property previously transferred in a transaction that is not "voidable * * * under any applicable law." 11 U.S.C. 547(a)(2). To the extent a trustee relies on state fraudulent-transfer law to defeat the new-value de-

fense, it makes sense that Section 106(a)'s waiver does not extend to the "applicable law"; if the previous transfer could not have been avoided against the government outside bankruptcy, then the governmental creditor that returns the transferred property truly gave "new value."

Meanwhile, respondent offers no limiting principle for his preferred construction. Many other "subjects" can be said to "concern or regard" the 59 sections identified in Section 106(a), beyond express references to "applicable law." Endorsing respondent's boundless reading would invite further attempts to expand the Code's waiver of sovereign immunity to ever-more-distant subjects.

d. Respondent also contends (Br. 19) that "[t]he government's view renders section 106(a)'s waiver with respect to section 544(b) half-pregnant." But Section 106(a) allows a trustee to bring a Section 544(b) action against States that have waived their own immunity, including from state-law avoidance actions. U.S. Br. 31 & n.8. Respondent observes (Br. 20) that those waivers "all have limitations periods of two years or less," and Section 548(a) already grants trustees a two-year lookback period for fraudulent-transfer actions. But Congress extended Section 548's lookback period from one to two years in 2005—long after Section 106(a)'s enactment. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 1402(1), 119 Stat. 214. And the meaning of Section 106(a)'s waiver cannot turn on the length of state-law limitations periods currently on the books.

Moreover, Section 106(a) serves an important function as to Section 544(a), which permits the trustee to exercise the powers of a hypothetical judgment-lien

creditor—such as priming an unfiled federal tax lien or avoiding an untimely government-held mortgage. U.S. Br. 30. Respondent suggests that Congress might have limited the waiver to subsection (a). But Section 106(a) uniformly refers to Code provisions by section number, even where that includes subsections for which the waiver is plainly irrelevant. U.S. Br. 30 & n.7.

Respondent also posits (Br. 21-22) that Section 106(a)'s waiver "does no separate work" as to priming an unfiled federal tax lien because Congress has "separately waived" sovereign immunity for quiet-title actions in 28 U.S.C. 2410(a). That gets things backward. The waiver of sovereign immunity for purposes of the Bankruptcy Code *is* Section 106(a); there is no indication that Congress omitted any Code provisions because some other federal statute might provide the requisite waiver. In any event, Section 2410(a) is not co-extensive with Section 106(a). Section 106(a) ensures a bankruptcy forum, beyond the courts identified in Section 2410(a). Moreover, Section 2410(a) requires a plaintiff with an actual property interest; Section 106(a)'s waiver, as applied to Section 544(a), authorizes the trustee to rely on a *hypothetical* creditor. Further, Section 544(a) gives the trustee the "rights" of that hypothetical creditor—like priming an unfiled lien—without any adversary process; Section 2410(a) applies only to "civil action[s]." And Section 544(a) provides the trustee with remedies (like avoidance) that Section 2410(a) does not.

e. Respondent's remaining textual arguments—relating to Section 544(b)—are makeweight. That Section 544(b) "spans just 34 words," Resp. Br. 17, is irrelevant. A trustee's ability to prevail on the merits of a Section 544(b) action depends on identifying a creditor who could have prevailed outside of bankruptcy, and

Section 106(a) does not alter that requirement. That Section 544(b) is written "in the present tense" is likewise irrelevant; there is no dispute that the question is whether the transfer is voidable under nonbankruptcy law at "the time [the bankruptcy] suit is filed." Resp. Br. 14 (citation omitted).

3. Respondent fares no better in departing from the text altogether.

a. Respondent again emphasizes this Court's recent decision in *Kirtz*, but *Kirtz* held only that the Fair Credit Reporting Act, which "explicitly permit[s] consumer claims for damages against the government," did not require a "separate waiver provision" to effect a clear waiver of sovereign immunity. 601 U.S. at 51, 53. Here, by contrast, the relevant cause of action under Utah law cannot ordinarily be invoked against the federal government. The question presented thus asks whether Section 106(a)'s waiver of immunity extends to that underlying state-law action, such that the trustee can prevail on the merits of his Section 544(b) claim. Nothing in *Kirtz* bears on that question—or suggests that interpretive questions about the scope of a sovereign-immunity waiver are now obsolete.

b. Respondent's reliance on Section 106(a)'s enactment history is likewise misplaced. As we have already explained (U.S. Br. 31-33), *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992), concerned a distinct issue: whether the prior version of Section 106(a) abrogated the government's immunity from monetary recovery when the Code's own conditions for avoidance were undisputedly satisfied. In amending Section 106 after *Nordic Village*, Congress clearly authorized monetary recovery in those circumstances. But there is no reason to think that Congress also intended to modify the sub-

stantive terms of the Code's avoidance provisions—here, to make it possible, for the first time, to prevail on a Section 544(b) claim without satisfying the actual-creditor requirement.

Respondent elides the critical distinction in asserting (Br. 32) that the "only difference" between this case and *Nordic Village* is that "the tax payment there happened post-petition." The relevant difference is instead that those payments were voidable under the terms of Section 549(a), a federal avoidance power that undisputedly applies to the IRS; the only question was monetary relief. Here, by contrast, the tax payments are not voidable under the terms of Section 544(b), which requires a trustee to identify an actual creditor who could avoid the transfer outside bankruptcy.

Respondent also observes (Br. 10) that "Congress enacted [S]ection 106(a) against a long backdrop of trustees using state law to avoid fraudulent transfers." But that historical practice cuts in the opposite direction. In all that time, Section 544(b) and its predecessors were never invoked against the federal government where it could have asserted immunity outside bankruptcy. That remained true even after 1978, when Congress enacted the prior version of Section 106, which most courts held *did* allow monetary recovery against the government, *e.g.*, *Lee* v. *Schweiker*, 739 F.2d 870, 873 (3d Cir. 1984). There is no reason to think that Congress intended the 1994 amendments to overturn that settled understanding of Section 544(b), which had not been at issue in *Nordic Village*.

c. Finally, respondent makes the radical claim (Br. 32-33) that given "bankruptcy's historically *in rem* nature," "serious questions exist about whether sovereign immunity even applies to bankruptcy avoidance ac-

tions." But respondent's authorities address only *state* sovereign immunity; they are premised on "the Bankruptcy Clause['s] embrace[]" of "the idea that federal courts could impose on state sovereignty." *Allen* v. *Cooper*, 589 U.S. 248, 258 (2020). This Court has never suggested that the *federal* government lacks sovereign immunity in bankruptcy. Respondent's contrary theory would seemingly render Section 106(a) unnecessary not just as to Section 544(b), but also as to all the other identified avoidance provisions.

B. Respondent's Policy Arguments Lack Merit

Respondent invokes various policy considerations, loosely premised on Congress's supposed intent. But the best evidence of Congress's intent is the text of Section 106(a)—which does not support respondent's interpretation. That is particularly so given that any ambiguities in the scope of a waiver of sovereign immunity must be construed in favor of immunity, an interpretive principle that is itself grounded in Congress's likely intent. U.S. Br. 33-34.

In any event, respondent's policy arguments fail on their own terms. He says (Br. 11) that Congress would not have wanted a transferee—here, the IRS—to keep "ill-gotten windfalls." But even under respondent's theory, Congress did not grant the trustee freewheeling power to right perceived wrongs. He remains bound by any state-law limitations period applicable to the triggering creditor's claim (most commonly, four years). There is no reason to think Congress intended that limitations period—rather than the two-year limitations period it codified in the standalone federal fraudulent-transfer provision—to govern avoidance actions affecting the federal fisc.

Nor is the IRS retaining ill-gotten windfalls. As the Fourth Circuit has observed, applying fraudulent-transfer law to tax collection is like "cramming a square peg into a round hole." *In re Yahweh Ctr., Inc.*, 27 F.4th 960, 968 (2022). The IRS is an involuntary creditor, required to collect taxes imposed by Congress. *Ibid.* And the rationale for imposing liability on initial transferees of insolvent debtors—that the transferee is best-positioned to suss out fraud—does not obtain where, as here, the IRS receives third-party tax payments. Third-party payments are common in the hundreds of millions of tax returns processed each year—including where (as here) corporations pay shareholder taxes, parents pay minors' taxes, or taxes are paid under power of attorney. See 26 U.S.C. 164(e), 3102(a), 3402(a), 7501(a). And they are not "something-for-nothing" transactions, Resp. Br. 4; the IRS applies such payments against the liabilities designated by the payors.

Respondent nonetheless asserts (Br. 42) that "the government's interpretation would incentivize future corporate officers with personal debts to the United States to raid corporate coffers," invoking the Sackler family's prebankruptcy siphoning of corporate funds. But it is *respondent's* theory that makes such insiders more likely to receive a windfall—at the public's expense.

A trustee has several bases for holding officers liable for misappropriating corporate funds to pay personal taxes, even beyond fraudulent-transfer law—including breach of fiduciary duty, conversion, and unjust enrichment. Those mechanisms place liability for misappropriation on the insider, where it belongs. And as respondent recognizes (Br. 42), such debts cannot be discharged if the shareholder declares personal bank-

ruptcy. But if the trustee is permitted to recover from the federal treasury, he cannot then proceed against the insiders; he is entitled to only a "single satisfaction," 11 U.S.C. 550(d). That means the insiders—the actual "wrongdoers"—pay nothing.

On the other hand, if the government is required to disgorge the taxes the debtor paid (and the insiders owed), the government is unlikely to be made whole. Here, for example, the payments were made in 2014 for taxes dating back to 2008 or 2009, J.A. 3, so the ten-year collection period has almost certainly expired, 26 U.S.C. 6502(a). And that problem is more likely to arise if trustees can invoke longer state-law limitations periods under Section 544(b).

Respondent's remaining arguments likewise lack merit. He suggests (Br. 2) that Section 106(a) reflects Congress's intent to "put governments and private parties on equal footing." But Congress carefully limited Section 106(a)'s waiver of immunity. Respecting those limits effectuates Congress's intent. Moreover, the trustee's reading treats governments *differently* from private parties: It subjects governments alone to liability under Section 544(b) that does not exist outside bankruptcy.

Respondent also argues that the government's interpretation would thwart the Code's objective of "ensur[ing] equity in[] the distribution to creditors." Br. 40 (citation omitted). But the IRS is not a creditor of the debtor (All Resort Group) with respect to these income-tax obligations, which third-party shareholders owed. The payments did not give the IRS any advantage in collecting from the debtor and, if the trustee prevails, the IRS could not recoup the avoided payments through bankruptcy distributions, as other creditors could.

In any event, Section 544(b) ensures equity among creditors by ensuring that one creditor's right to avoid a transfer outside bankruptcy benefits all creditors, not just one. See p. 4, *supra*. But here, respondent seeks avoidance of payments that were not voidable by *any* creditor.

C. Sovereign Immunity Is Not The Only Bar To The Underlying State-Law Claim

As our opening brief explained (Br. 34-38), even if respondent were correct that Section 106(a) eliminates any sovereign-immunity obstacle to the underlying state-law claim in a Section 544(b) action, that suit would still run afoul of the Supremacy and Appropriations Clauses.

Respondent maintains (Br. 45) that the Supremacy Clause is irrelevant because "one federal law (the Internal Revenue Code) cannot preempt another (section 544(b))." But again, that ignores Section 544(b)'s basic operation: To prevail, the trustee must identify an actual creditor who could have prevailed outside of bankruptcy. The proper question, accordingly, is not whether some aspect of *the trustee's* Section 544(b) claim is preempted; it is whether, in the state-law action being mirrored, *an actual creditor's* attempt to avoid federal tax payments outside bankruptcy would be preempted. And it would.

Respondent contends (Br. 46-48) that the Supremacy Clause has no bearing on state-law actions to avoid federal tax payments because the Internal Revenue Code does not explicitly bar such suits. But the Code specifies particular circumstances in which private parties can, in accordance with federal law, restrain tax collection and recover taxes paid. U.S. Br. 35-36. And 28 U.S.C. 2201 limits federal courts' authority to issue de-

claratory judgments—including judgments of avoidance —"with respect to Federal taxes." A state-law action to avoid long-since-collected federal taxes conflicts with that reticulated federal scheme. See *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 348, 353 (2001) (state-law causes of action that "exert an extraneous pull on the scheme established by Congress" or interfere with the "delicate balance of statutory objectives" are preempted).

Respondent protests (Br. 46) that Section 544(b) asks only whether a creditor can avoid tax payments, not recover them. But federal law speaks to such declaratory relief too. And in any event, the ultimate objective of avoiding tax payments is to recover those funds from the federal treasury. Indeed, under Utah law, the right to recovery goes hand-in-hand with avoidance. Utah Code Ann. § 25-6-8(2) (2014). The avoidance action thus conflicts with federal law.

That also answers respondent's attempt (Br. 48-49) to treat the Appropriations Clause as irrelevant: Because avoidance and recovery go hand-in-hand and the money to be recovered here would be paid from the federal treasury, the Appropriations Clause is yet another obstacle to the creditor's state-law suit.

D. Respondent's Alternative Argument Is Not Properly Presented And Lacks Merit In Any Event

1. In the alternative, respondent argues (Br. 13) that it does not matter whether Section 106(a) extends to the predicate state-law suit because Section 544(b) does not require him to rely on a state-law suit "*against the United States*." The advantage of this novel argument, respondent announces (Br. 35), is that it does not "implicate[] sovereign immunity."

As already explained, that argument was neither pressed nor passed upon by any court below. U.S. Br. 39-40. To the contrary, respondent's Section 544(b) claim was premised on a Utah fraudulent-transfer action brought *against the United States*—not some other defendant.[1] His theory was that although "sovereign immunity would bar [that] suit" under Utah law, Section "106(a)(1) abrogates that sovereign immunity in the bankruptcy context." Pet. App. 26a. That was accordingly the only question addressed by the courts below.[2]

This Court should not address respondent's new theory in the first instance. The Court often declines to address new arguments—not just "claims," Resp. Br. 11—neither pressed nor passed upon below, including by respondents. *Cameron* v. *EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 275 (2022) ("[I]f a non-jurisdictional argument was not raised below, we generally will not consider it as an alternative ground for affirmance."). That is the better course here, where respondent's new argument (i) has nothing to do with Section 106(a), the provision on which the circuits are divided and the focus of this litigation; (ii) would require

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[1] Resp. C.A. Br. 1 ("[T]he principal issue before the Court is whether a Chapter 7 Trustee can, under 11 U.S.C. § 544(b), recover transfers to the IRS that *would be* avoidable transfers 'under applicable law,' *but for sovereign immunity*.") (emphases added); D. Ct. Doc. 10, at 3 ("[O]utside of bankruptcy * * * sovereign immunity likely would bar Robin Salazar's hypothetical claim"); Bankr. Ct. Doc. 36, at 7 ("[U]nder * * * Utah law, * * * the employee creditor that we identify, * * * her claim would have been barred by sovereign immunity").

[2] Respondent says (Br. 37) he preserved this argument in the district court, but the footnote he cites pointedly *declined* to rely on this argument. And respondent does not even try to argue that he raised it in the Tenth Circuit.

this Court to address a novel interpretation of a different Code provision, 11 U.S.C. 550; and (iii) would require the Court to resolve novel questions of state law. See pp. 21-24, *infra*.

As respondent notes (Br. 38-39), the government sometimes asks the Court to consider arguments that vary from those presented below. But his principal example bears no resemblance to this case; there, the government simply offered a variation of the central statutory argument on which it prevailed below, arguing that in certain capacities, state national guards act "on behalf of—and exercise the authority of—a covered federal agency," rather than that such guards "are" executive agencies under 5 U.S.C. 7103(a)(3). Gov't Br. at 15, *Ohio Adjutant General's Dep't* v. *FLRA*, 598 U.S. 449 (2023) (No. 21-1454). In the other cited cases, the Court briefly addressed a closely related but unpreserved argument only to *reject* it—not to rule in a party's favor on an argument not pressed below.

Respondent also says (Br. 39) that the Court should not "enshrine the government's erroneous reading in the U.S. Reports" without addressing respondent's alternative theory. But the Court routinely resolves cases on properly presented grounds, while declining to reach new arguments. In *Financial Oversight & Management Board for Puerto Rico* v. *Centro de Periodismo Investigativo*, 598 U.S. 339 (2023), for example, the Court held that Congress had not abrogated the Oversight Board's immunity through legislation—while "assum[ing] without deciding that Puerto Rico is immune from suit in federal district court, and that the Board partakes of that immunity." *Id.* at 346. Although respondent "urge[d]" the Court to "extend [its] review to the underlying immunity issue," the Court explained

that "the lower courts barely addressed the question" and respondent had "never argued" the theory below. *Id.* at 345, 346 n.2.

Here, moreover, it is not even necessary to assume a point without deciding it. To reverse the judgment below, the Court need not address whether Section 544(b) always requires identification of "a creditor who could have sued the United States" under applicable state law. Resp. Br. 39. The Court can simply resolve the question that has divided the lower courts—namely, whether Section 106(a) waives sovereign immunity in the state-law predicate suit against the United States on which *this* trustee has based his Section 544(b) claim—without addressing the availability of alternative paths to recovery.

2. But if this Court addresses respondent's new argument, it lacks merit. It is unclear precisely how respondent intends to operationalize his avoid-against-a-private-party-to-recover-against-the-United-States maneuver—but, however understood, it fails.

a. Respondent first insists (Br. 34-35) that a transfer is "voidable" for purposes of Section 544(b) so long as it satisfies the criteria in Utah Code Ann. § 25-6-6(1) (2014)—even if the trustee fails to identify *any* avoidance action that *any* actual creditor could bring against *any* particular defendant. That is incorrect. Those criteria establish when a transfer is "fraudulent," not "voidable." A fraudulent transfer may be avoided only by a qualifying creditor "[i]n an action for relief," *id.* § 25-6-8(1), which is subject to various limitations and may be brought only against particular transferees, *id.* § 25-6-9. Absent a viable action for relief, the transfer is not "voidable"—*i.e.*, "capable of being adjudged void." *Random House Dictionary* 2130 (2d ed. 1993). The

body of case law interpreting Section 544(b) and its predecessors confirms that the trustee must identify a creditor who could have actually "prosecut[ed]" a state-law "action on his own behalf." *Davis* v. *Willey*, 263 F. 588, 589 (N.D. Cal. 1920); U.S. Br. 14-17.

b. Respondent next argues (Br. 35-37) that even if a transfer must be voidable in a state-law suit against *some* defendant to avoid the transfer against the United States under Section 544(b), that defendant need not be the United States.

Respondent's premise seems to be that because an avoided transfer is "invalid," Br. 4, avoiding the at-issue tax payments against *any* defendant necessarily avoids them against the United States, Br. 3, 35. But if that is right, then the United States is an indispensable party to the state-law avoidance action. A creditor cannot affect a transferee's rights to property allegedly fraudulently conveyed, without joining that transferee—here, the United States—to an avoidance action. See Frederick Scott Wait, *A Treatise on Fraudulent Conveyances and Creditors' Bills* § 131, at 200 (1884); Garrard Glenn, *The Law of Fraudulent Conveyances* § 128, at 178-179 (1931). Indeed, Utah law mandates that "[w]hen declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and a declaration may not prejudice the rights of persons not parties to the proceeding." Utah Code Ann. § 78B-6-403(1). A creditor thus cannot "obtain declaratory judgments that transfers [to the United States] are invalid," Resp. Br. 4, without involving the United States. And again, any such state-law action would be barred by sovereign immunity and other obstacles.

Moreover, respondent's premise—that an avoided transfer is wholly "invalid"—is itself debatable. The Uniform Voidable Transactions Act (UVTA), for instance, explains that "'[a]voidance' is a term of art in this Act, for it does not mean that the transfer or obligation is simply rendered void," UVTA § 7 cmt. 7; rather, a transfer may be avoided as to some parties but not others, Glenn § 114, at 163-164, § 128, at 178-179. So understood, a creditor's state-law action against the shareholders would avoid the transfer *only against those shareholders*—not against the United States. And under Section 544(b), the trustee's rights are limited to those of the actual creditor; if the actual creditor cannot avoid the transfer as against the United States under nonbankruptcy law, neither can the trustee under Section 544(b). See pp. 3-5, *supra*.[3]

c. Finally, respondent suggests (Br. 37) that he may recover from Party A (the United States) under Section 550(a) by avoiding a transfer as to Party B (the shareholders) under Section 544(b). That theory is purely academic here because the trustee never avoided the tax payments in a Section 544(b) action against the shareholders.

But that maneuver also fails. Section 550 permits recovery only "to the extent that a transfer is avoided" under one of the Code's avoidance provisions. 11 U.S.C. 550(a). A trustee thus "cannot recover a transfer unless

[3] Respondent also suggests (Br. 35) that a creditor could sue the debtor under Utah law to prevent disposition of "other property." But he never explains why that would "confirm[] that the transfers to the IRS are voidable." *Ibid.* Similarly, he cites (Br. 35-36) two cases permitting monetary recovery under Utah law from beneficiaries of an allegedly fraudulent transfer, but neither suggests that the transfer was thereby avoided against an unjoined transferee.

that transfer is proved able to be 'avoided' against the relevant transferee." *Securities Investor Prot. Corp.* v. *Bernard L. Madoff Inv. Securities LLC*, 501 B.R. 26, 33 (S.D.N.Y. 2013); see *M. Fabrikant & Sons, Inc.* v. *JP Morgan Chase Bank (In re M. Fabrikant & Sons, Inc.)*, 394 B.R. 721, 746 (Bankr. S.D.N.Y. 2008) (collecting cases). Respondent's contrary theory leads to untenable results. For example, Congress exempted religious tithing from avoidance actions. 11 U.S.C. 544(b)(2), 548(a)(2). But Section 550 includes no such exception, so under respondent's approach, a trustee could circumvent Congress's tithing protections by first avoiding the relevant transfer against a different transferee, then seeking recovery from the church.

The trustee does not identify any case authorizing recovery from an initial transferee (here, the IRS) without avoiding the transfer as to that transferee. The absence of historical support for the maneuver is strong evidence that the Code does not permit it. See *Dewsnup* v. *Timm*, 502 U.S. 410, 417-420 (1992).[4]

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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[4] Some courts have held that insiders who pay personal taxes from corporate funds are themselves "initial transferees," making the IRS a mediate transferee. *E.g.*, *Genova* v. *Gottlieb (In re Orange County Sanitation, Inc.)*, 221 B.R. 323, 328 (Bankr. S.D.N.Y. 1997). On that view, the IRS could preclude recovery by invoking the good-faith defense in Section 550(b).