

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES,)
 Petitioner,)
 v.) No. 23-824
DAVID L. MILLER,)
 Respondent.)
- - - - -

Pages: 1 through 66
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11 Monday, December 2, 2024

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

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

25

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1 P R O C E E D I N G S

2 (11:24 a.m.)

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

6 Ms. Dubin.

7 ORAL ARGUMENT OF YAIRA DUBIN

8 ON BEHALF OF THE PETITIONER

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

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

22 Rather than leave that right to one
23 creditor, Congress authorized the trustee to
24 pull it into bankruptcy to benefit all
25 creditors. But 544(b) doesn't come into play

1 unless a transfer is already voidable under
2 state law; 544(b) simply allows the trustee to
3 piggyback off that existing vulnerability.

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

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

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

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

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

10 I welcome the Court's questions.

11 JUSTICE THOMAS: Could 106 be written
12 in a -- in a way that you can get around the
13 immunity problem at merits level at -- under
14 544?

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

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

1 But I think that sort of bakes in this
2 idea that Congress would have wanted that
3 result, that Congress would have wanted the
4 United States to be liable under a provision
5 like 544(b) on the merits.

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

14 JUSTICE BARRETT: Counsel, what
15 federal causes of action, besides maybe the
16 FDCPA, might a trustee be able to assert via
17 545 -- 4 -- 544(b)?

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

23 JUSTICE BARRETT: Yeah.

24 MS. DUBIN: -- that's where you're
25 going with this.

1 JUSTICE BARRETT: Yeah.

2 MS. DUBIN: But we don't think that's
3 a problem with our interpretation because 106(a)
4 waives immunity as to 59 sections by section,
5 not by subsection, and the waiver has an
6 important role to play as to 544(a) vis-a-vis
7 the United States.

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

15 JUSTICE GORSUCH: Ms. --

16 JUSTICE BARRETT: Well, I was just --
17 oh, can I -- just one more.

18 JUSTICE GORSUCH: No. Go ahead,
19 please.

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

1 whether Congress can abrogate state sovereign
2 immunity under the bankruptcy clause.

3 Is Katz your answer to that?

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

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

17 JUSTICE BARRETT: Thank you.

18 JUSTICE GORSUCH: Ms. Dubin, I'm -- I
19 actually wanted to follow up on the -- the first
20 question that Justice Barrett asked you, and
21 I'm -- I understand your response is that the
22 waiver in 106 will still do work with respect to
23 544(a) even if it does no work with respect to
24 544(b).

25 Is -- is that the gist of your -- your

1 answer?

2 MS. DUBIN: With a small correction.
3 It does -- definitely does work as to the United
4 States with respect to 544(a). It also does
5 work with respect to any sovereign that has
6 exposed itself to state law outside of
7 bankruptcy, and some states have done that under
8 544(b).

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

16 MS. DUBIN: Sure. So two points on
17 that.

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

1 otherwise exist.

2 JUSTICE GORSUCH: No, it doesn't
3 create a new cause of action. I -- I grant you
4 that, but that's 544(b), is what your friends on
5 the other side would say, right?

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

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

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

1 defendant.

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

8 JUSTICE GORSUCH: Yeah, but that --

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

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

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

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

25 MS. DUBIN: No.

1 JUSTICE GORSUCH: -- I promise -- is
2 that essentially, the trustee steps into the
3 shoes of a -- of a -- of a normal creditor, and
4 that's how you read 544(b).

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

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

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

23 JUSTICE GORSUCH: Exactly.

24 MS. DUBIN: That is an exception, but
25 it is an exception that's baked into 544(b).

1 544(b) was understood to incorporate that
2 exception, but when it did so, it made clear
3 that in every other way, the trustee's rights
4 are coterminous with that actual creditor's.

5 JUSTICE GORSUCH: Where do you get
6 that in the --

7 MS. DUBIN: And, critically, in the
8 Moore versus --

9 JUSTICE GORSUCH: Yeah. Where do you
10 get that in the language?

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

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

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

1 federal rights to avoidance.

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

7 JUSTICE GORSUCH: Thank you.

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

14 JUSTICE GORSUCH: Well, that -- that's
15 why we're here, right?

16 MS. DUBIN: No. We're here on the
17 106(a) question. We're here on --

18 JUSTICE GORSUCH: Well, how the two
19 interact, yeah -- yeah.

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

25 If you look at all those cases, for

1 instance, DBSI, the case that started this split
2 in the Ninth Circuit, everything about that case
3 acknowledges this. Everyone agrees 544(b)
4 operates by looking for an actual creditor.

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

12 JUSTICE GORSUCH: That's right. Thank
13 you.

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

20 Is it because Congress was making a
21 policy choice related to its concern about the
22 potential disruptive nature of avoidance? So
23 the general trustee avoidance power has a
24 two-year statute of limitations because, when
25 you come in and you void a previously existing

1 transaction involving innocent third parties,
2 that's like a big deal. That's causing a lot of
3 disruption in the market.

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

16 What do you think about that?

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

23 So all Congress is doing is saying
24 that the trustee, instead of leaving that right
25 to one creditor alone, he is going to vindicate

1 the principle of equality among creditors,
2 equality of distribution, bring it into the
3 bankruptcy and that transfer can be avoided for
4 the benefit of all creditors.

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

10 JUSTICE BARRETT: Counsel --

11 JUSTICE KAGAN: Can I take you --

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

22 How often does that happen?

23 MS. DUBIN: I think it happens. I
24 don't know -- I can't give you exact numbers,
25 but it certainly can happen. It's not some

1 fantasy. Of course, if the actual creditor has
2 a right that the trustee can invoke and it's
3 used in 544(b), then there will --

4 JUSTICE BARRETT: Then it's gone.

5 MS. DUBIN: -- no longer be the right
6 outside of bankruptcy.

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

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

19 MS. DUBIN: That's right.

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

1 Why wouldn't sovereign immunity play
2 similarly with respect to both those provisions?
3 So, to the extent that sovereign immunity is
4 always going to bar a 544(b) action, why
5 wouldn't it do the exact same thing with the
6 hypothetical creditor in a 544(a) action?

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

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

19 The trustee is allowed to step into
20 that shoes of that judgment lien creditor under
21 544(a). So he now has that -- the lien is not
22 valid against him. How does 106(a) help him?
23 106(a) helps him enforce that.

24 He can now prime the United States.
25 He now has priority over that tax lien. There's

1 no issue of immunity outside the bankruptcy
2 proceeding, and 106(a) removes the immunity
3 within the bankruptcy proceeding.

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

11 JUSTICE KAGAN: Got it.

12 JUSTICE SOTOMAYOR: Just curious, why
13 did the trustee not act within the two years
14 under 548 here?

15 MS. DUBIN: He was too late by the
16 time he was appointed. It was too -- it was
17 more than --

18 JUSTICE SOTOMAYOR: Oh, it was too
19 late.

20 MS. DUBIN: And it wasn't just the
21 appointment. At the time the bankruptcy was
22 filed in 2017, these transfers were in 2014, the
23 two-year lookback period had already expired.

24 And that goes to the concerns Justice
25 Jackson was talking about, which is this repose

1 that the federal statute bakes into it.

2 JUSTICE SOTOMAYOR: All right. Thank
3 you.

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

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

24 The trustee can do so if an actual
25 creditor could have done so outside of

1 bankruptcy because that transfer was vulnerable,
2 but he can't do so where no actual creditor
3 already had that right. Then he's stuck with
4 548 and he would be stuck with 548 in this case.

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

12 So what -- what was the point of the
13 thing?

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

16 On the first point, he loses because
17 of the nature of 544(b) because of the merits.
18 I understand your --

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

1 MS. DUBIN: Yeah. So this goes to my
2 second point. 106(a) is not a waiver about
3 544(b). 106(a) waives immunity with respect to
4 59 code provisions. It is a general waiver.

5 JUSTICE KAGAN: Yeah. Do you think
6 you would have the same argument if it was just
7 a 544 waiver?

8 MS. DUBIN: I think this would be a
9 much harder case if it was just a 544(b) waiver.
10 I don't think it would be a hard case if it was
11 a 544 waiver because of the work that it does in
12 544(a).

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

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

23 MS. DUBIN: That is not at all our
24 position. Our position is --

25 JUSTICE KAGAN: Because it doesn't

1 sound all that good.

2 (Laughter.)

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

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

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

21 And everyone has always known that the
22 way 544(b) operates is only by pulling in
23 existing state law liability, and everyone knows
24 that the IRS is not subject to existing state
25 law liability.

1 So, when Congress wote -- wrote a
2 waiver that included 544, I think it is very
3 clear that Congress did not think that that
4 waiver would have the effect of altering
5 substantive liability as to IRS that could never
6 exist outside of bankruptcy.

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

16 MS. DUBIN: Thanks. I appreciate the
17 opportunity to do that. I think that argument
18 and those considerations cut the opposite
19 direction. The trustee's position here would
20 allow these insiders, the wrongdoers here, to go
21 free. In his world, he recovers this -- this
22 money from the IRS. He then cannot go after the
23 insiders because he's entitled to only a single
24 satisfaction under the bankruptcy's provision --
25 Bankruptcy Code's provision. Meanwhile, we

1 can't go after the insiders either because the
2 statute of limitations has expired. And that
3 will be ever more likely when you're using a
4 longer limitations period to go after these
5 transfers.

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

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

23 CHIEF JUSTICE ROBERTS: Just --
24 Justice Thomas, anything?

25 Justice Alito?

1 Justice Gorsuch?

2 JUSTICE GORSUCH: One quick question.

3 Let -- let's suppose that the money didn't go to
4 the U.S. Government to but -- but to a private
5 party. Along the way, the trustee, in your
6 view, could recover for that?

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

16 JUSTICE GORSUCH: Yeah.

17 MS. DUBIN: -- to himself, and you
18 would be limited --

19 JUSTICE GORSUCH: That's what I'm
20 talking about. Yeah.

21 MS. DUBIN: -- in bankruptcy.

22 JUSTICE GORSUCH: Yeah. You could --
23 you could pursue that person?

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

1 JUSTICE GORSUCH: Yeah. Okay.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh?

4 JUSTICE BARRETT: Just one question
5 about what work 106(a) does for 544(b) if the --
6 if you prevail. I mean, your position would be,
7 well, it's still doing work vis-à-vis the
8 states, right? And is it odd -- I mean, just
9 kind of walk me through this double layer thing.
10 I mean, as I understand your argument, it's that
11 544(b) has a nested cause of action in it under
12 applicable law, so you're standing in the shoes
13 of the creditor pursuing someone under state
14 law.

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

25 MS. DUBIN: Yes. That's right. Let

1 me try to say it back to you and see if you
2 think that you agree.

3 JUSTICE BARRETT: Okay.

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

16 JUSTICE BARRETT: Mm-hmm.

17 MS. DUBIN: 106(a) allows the trustee
18 to assert that cause of action against a
19 sovereign, absolutely, the federal --

20 JUSTICE BARRETT: Yeah.

21 MS. DUBIN: -- cause of action.
22 You're right to say that the way 544(b) works is
23 by looking to what would have happened under
24 state law, whether there's a viable avoidance
25 action outside state law. And that's where that

1 state's waiver of sovereign immunity comes into
2 being, which is that that state has exposed
3 itself to fraudulent transfer liability in its
4 own courts. The trustee can now mirror that
5 inside the bankruptcy.

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

9 MS. DUBIN: That's right, and that's
10 the purpose of 106(a)'s waiver as to the 59
11 provisions. It's to allow those federal code
12 provisions to be applied, invoked, enforced
13 against sovereign entities. That's the work
14 it's doing.

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

22 MS. DUBIN: Yes. Thanks. I don't
23 think that our position is asking for two
24 waivers. To the contrary, what our position is
25 resting on the premise of is that when Congress

1 made a provision like 544(b), which turns on
2 liability that exists outside the code, it
3 doesn't mean to affect that by waiving immunity
4 inside the bankruptcy proceeding. So we
5 disagree with the premise that Congress wanted
6 to accomplish this thing.

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

24 CHIEF JUSTICE ROBERTS: Justice
25 Jackson?

1 JUSTICE JACKSON: I think the thing I
2 found interesting in the exchange you just had
3 with Justice Barrett is that she approached the
4 analysis by starting with 544 and you started
5 with 106(a). And I wonder if that might be the
6 sort of -- to the extent there's any disconnect,
7 and I don't think there is, but the framing is
8 slightly different.

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

19 Is that how you're viewing this?

20 MS. DUBIN: I actually don't think it
21 matters where you start. I think that where --

22 JUSTICE JACKSON: Okay.

23 MS. DUBIN: -- where Justice Barrett
24 started was perfectly fine too.

25 JUSTICE JACKSON: Okay.

1 MS. DUBIN: This is more just
2 conceptually trying to understand what's going
3 on here as sort of the whole code, what is
4 Congress doing here. And 106(a) absolutely
5 waives immunity as to these federal code
6 provisions. It doesn't matter whether you do
7 that at the end of the analysis or at the
8 beginning of the analysis.

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

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

25 Essentially, what the trustee is

1 asking for here, and it's a little hard to put
2 it into words, but we both agree that 106(a)
3 waives sovereign immunity at the federal level.
4 We also both agree that 106(a) does not waive
5 immunity at the state law level. So what she's
6 asking for is that when you look at 544(b)'s
7 actual creditor requirement, you close your eyes
8 or you disregard sovereign immunity that hasn't
9 been waived, that continues to exist. And
10 that's where the theory is wrong and it's why
11 the 544(b) claim fails on the merits.

12 JUSTICE JACKSON: Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Ms. Blatt.

16 ORAL ARGUMENT OF LISA S. BLATT

17 ON BEHALF OF THE RESPONDENT

18 MS. BLATT: Mr. Chief Justice, and may
19 it please the Court:

20 106 waiver with respect to 544 means
21 that trustees can avoid fraudulent transfers
22 inside bankruptcy even though sovereign immunity
23 applies outside bankruptcy. "With respect to,"
24 even read very narrowly, means directly relating
25 to 544. And the waiver that concededly applies

1 to the trustee's claim has the same direct
2 relationship to the incorporated state law
3 elements. No textual or logical distinction
4 exists between the two.

5 106(a)(2) also lets courts hear any
6 issue respecting 5 -- 544's application to
7 governments, so courts can thus hear these
8 claims without regard to sovereign immunity.

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

18 Nor is it plausible that Congress has
19 ever waived immunity but only contingent on a
20 second waiver. No such statute exists in the
21 U.S. Code, nor does any statute contain a double
22 waiver.

23 Congress spoke expressly when it
24 wanted to give the IRS special treatment and to
25 make exceptions for fraudulent transfers, but it

1 did neither for the IRS in 544. The
2 government's position overrides these choices
3 and allows the IRS to keep assets that every
4 other transferor would have to return.

5 That result would prevent the trustee
6 from recouping this money and paying it to the
7 bus drivers and the mechanics and the vendors,
8 who certainly gave All Resort more value than
9 the IRS did. All -- the government's position
10 finally destores -- destroys creditor equality.
11 Where governments are creditors, like they are
12 here, the government gets to keep the fraudulent
13 transfer and its share of a much smaller pie.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: What do you do with
16 your analysis -- under your analysis with
17 106(a)(5)?

18 MS. BLATT: (a)(5)?

19 JUSTICE THOMAS: Yeah.

20 MS. BLATT: Well, I think it says on
21 its face that it doesn't create liability that
22 doesn't otherwise exist under this title. And
23 the government concedes that the trustee, I
24 think it said it six times, the trustee has a
25 cause of action to which sovereign immunity has

1 been waived under 544. It's just contesting
2 whether it went to the incorporated elements.

3 And there's no logical distinction how
4 105 is not implicated to that waiver, but
5 somehow it's implicated to the waivers extending
6 to the elements. It also just says otherwise
7 existing under this title or non-bankruptcy law,
8 and everyone concedes that the trustee has a
9 cause of action but for one defense and one
10 defense only, and that's sovereign immunity,
11 which is the very defense that 106 waives.

12 And I wanted to get to the 544(a)
13 point because the government does not dispute
14 that 106(a) does absolutely no more work under
15 544(a) than it does under 544(b), meaning 544(a)
16 incorporates state law. Absent a second waiver
17 of immunity, which the government says
18 accurately exists under -- I don't know if it's
19 28 U.S.C. but 2610, the -- the quiet title,
20 there is no state law where a bona fide
21 purchaser or bon -- a bona fide creditor could
22 avoid the lien.

23 So both under (a) and (b), the
24 government has its two-waiver theory. 106(a) is
25 just kind of irrelevant. And in terms of the

1 idea that this applies to 59 sections, if you
2 could put your shoes, pun intended, in the form
3 of Congress, who overruled the Supreme Court's
4 decisions in two of them, you're asking Congress
5 to go back again. And in Hoffman, you said to
6 Congress: You were too scattershot because you
7 didn't list the code provisions. It just would
8 have applied to a hundred. Here, Congress
9 listed all 59.

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

19 So, if you rule against us, you're
20 really telling Congress after all, they still
21 need to go back and do it a third time and maybe
22 a fourth time because, in the government's view,
23 the state sovereign immunity will always creep
24 in.

25 JUSTICE JACKSON: But, Ms. Blatt --

1 MS. BLATT: Yes?

2 JUSTICE JACKSON: -- I guess I -- I
3 mean, I understand the need for two waivers
4 here, but isn't that a function of Congress's
5 policy choice to incorporate state law as the
6 requirement of 544(b)?

7 MS. BLATT: That's --

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

15 MS. BLATT: With respect, no. So,
16 as -- as Justice -- first of all, the waiver of
17 sovereign immunity with respect of 544 just on
18 its face textually applies to the elements, to
19 the same extent grammatically, logically that it
20 applies to the claim. You can't waive a claim
21 without waiving the elements.

22 But, in terms of what Justice Gorsuch
23 said, there's two very important caveats to this
24 actual --

25 JUSTICE JACKSON: No. No, no, no, I'm

1 sorry. Sorry. Before you go to the second
2 part, I don't understand that.

3 I mean, I thought the waiver of
4 sovereign immunity was a threshold issue that
5 didn't tell us anything about the merits of
6 whether or not you win the action underlying it.

7 So we have this initial question, can
8 you even bring this action? And then, when you
9 bring it, the court goes on to adjudicate the
10 merits, which is what the elements go to.

11 MS. BLATT: Right, without regard to
12 sovereign immunity, which is 106. In the
13 government's view, Congress --

14 JUSTICE JACKSON: But -- but there's
15 a -- there's a theory in which sovereign
16 immunity is just doing the work of allowing you
17 to bring the lawsuit to begin with.

18 MS. BLATT: Only to lose.

19 JUSTICE JACKSON: Well, sometimes that
20 happens.

21 MS. BLATT: Always it will happen
22 because no law, tribal, foreign, federal, no law
23 anywhere waives sovereign immunity with respect
24 to fraudulent transfers.

25 JUSTICE JACKSON: But 544(b) is bigger

1 than the government. So, you know, it -- it --
2 there could be other --

3 MS. BLATT: Well, 106 only relates to
4 the government.

5 JUSTICE JACKSON: Yeah.

6 MS. BLATT: You're just saying 106 was
7 a way -- 106 application to 544 in all of its
8 applications, (a) and (b) was a waste of time
9 because sovereign immunity will always be
10 incorporated under state law.

11 And the point I was trying -- which is
12 just a -- a -- a -- with respect, it's a dumb
13 statute. Why would Congress waive immunity only
14 to see that there's no way to bring it,
15 unless --

16 JUSTICE JACKSON: Ms. Dubin says that
17 (a), they -- those -- those claims go forward
18 all the time.

19 MS. BLATT: They can't go forward,
20 which she concedes, without a second waiver of
21 immunity. And there's only two. There's the
22 federal government and then the four states'
23 generic waiver -- four states --

24 JUSTICE SOTOMAYOR: I -- I'm sorry,
25 there's an action against the -- the people who

1 engaged in the fraudulent transfer. So
2 544(a) -- (b) is not useless.

3 MS. BLATT: It's useless as to
4 governments.

5 JUSTICE SOTOMAYOR: Well, but why does
6 that matter?

7 MS. BLATT: Because 106 is a statute.

8 JUSTICE SOTOMAYOR: It's not -- it's
9 not useless. You agree that under 544(b)
10 incorporates some state law defenses, like the
11 statute of limitations.

12 MS. BLATT: All of them. And this is
13 my second point.

14 JUSTICE SOTOMAYOR: That's all -- all
15 of them.

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

17 JUSTICE SOTOMAYOR: Except you're
18 saying all of them --

19 MS. BLATT: Except for one.

20 JUSTICE SOTOMAYOR: State sovereign
21 immunity?

22 MS. BLATT: No, because that's waived
23 by 106. If I -- that would be even weirder to
24 have Congress --

25 JUSTICE SOTOMAYOR: That -- that

1 brings us to the constitutional -- that --
2 that's brings us to the constitutional question.
3 But, if 544(b) requires an actual creditor,
4 correct, who can bring the claim, so if there's
5 no creditor who can bring the claim because the
6 statute of limitations has passed, correct?

7 MS. BLATT: Correct, that the actual
8 creditor requirement assumes that all state law
9 elements are met --

10 JUSTICE SOTOMAYOR: So --

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

17 JUSTICE SOTOMAYOR: So he can -- he
18 can -- he can --

19 MS. BLATT: The trustee can get --

20 JUSTICE SOTOMAYOR: -- sue the people,
21 the insiders, who made this fraudulent transfer,
22 correct?

23 MS. BLATT: Right, and he tried. It
24 was not dismissed for failure to prosecute until
25 it settled.

1 JUSTICE SOTOMAYOR: Well, it -- it --
2 I'm -- I -- I don't know why, but he could have.
3 MS. BLATT: He did.
4 JUSTICE SOTOMAYOR: He did? One of
5 them he settled with. The other, I don't know
6 what he didn't do --
7 MS. BLATT: He went bankrupt.
8 JUSTICE SOTOMAYOR: He went bankrupt.
9 MS. BLATT: They took over --
10 JUSTICE SOTOMAYOR: But it -- I'm
11 not -- I'm not --
12 MS. BLATT: -- 2 million out of the
13 estate.
14 JUSTICE SOTOMAYOR: -- sure why we're
15 going to have to incorporate 106(b) into the
16 state law defenses and say that --
17 MS. BLATT: I think we're saying
18 incorporate the waiver of sovereign immunity
19 into the only way the trustee can bring this
20 claim, which was relying on state law. The
21 other just --
22 JUSTICE SOTOMAYOR: All right. Thank
23 you, Ms. Blatt.
24 JUSTICE GORSUCH: Ms. -- Ms. --
25 Ms. Blatt, if -- if -- if -- if I might just

1 turn us to 544(b), where I think, you know, the
2 rubber meets the road, and the view on -- and I
3 think it's common ground that you -- the trustee
4 steps into the shoes of -- of the creditor.

5 And then the question is, what does
6 this voidability language mean? And one view
7 is, well, you've got to look at to whom the
8 transfer was made. I think that's the
9 government's view, that -- that that matters.

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

12 JUSTICE GORSUCH: If I might.

13 MS. BLATT: Yeah.

14 JUSTICE GORSUCH: We're almost there.

15 The government says: Well, okay, you
16 step into the shoes of the creditor and you look
17 at the identity of the transferee. And, here,
18 because the transferee is the government, you're
19 out of luck.

20 Your argument, as I take it, is the
21 statute doesn't say that. It says you ask
22 whether the transfer is voidable by the
23 creditor --

24 MS. BLATT: Correct.

25 JUSTICE GORSUCH: -- and -- and -- by

1 the -- by the debtor here, whoever he is, and is
2 it voidable. And that transfer is voidable
3 because it was done unlawfully, fraudulently.

4 And if when Congress wants to identify
5 the -- the transferee and make a difference
6 there, it does so. For example, it protects
7 good-faith purchasers in some other statutes.

8 Have I got the gist of the dispute
9 accurately there?

10 MS. BLATT: That's correct.

11 And, Justice Sotomayor, what's
12 critical to understand is the government's view
13 is that the trustee illegally went after the
14 insiders because they too would be able to
15 assert sovereign immunity.

16 Their view is the trustee, because
17 this went to the United States, it will always
18 block any transfer because -- the United States,
19 there's no way to ever get at this money.

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

21 MS. BLATT: So a trustee, if it ever
22 goes to the IRS, which has over 10 years to
23 seek -- 10 years, which is a lot longer than the
24 four-year statute of limitations to go after tax
25 liability and is a lot more capable than I would

1 say the bus -- the -- the -- the bus drivers and
2 the workers who work for this estate, the
3 trustee is not here for his personal benefit --

4 JUSTICE BARRETT: Ms. -- Ms. Blatt,
5 can I ask --

6 MS. BLATT: -- but to get money to
7 people who need it.

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

10 How is it -- so I -- I -- I get that
11 the statute doesn't mention the transferee, but
12 how is -- does that make 544(b) different from
13 544(a)? Because isn't the suit you're asserting
14 somewhat hypothetical rather than actual if
15 you're just imagining the claim existing kind of
16 in the ether?

17 MS. BLATT: Yes. So the actual --
18 because that's the -- the creditor, there has to
19 be an actual creditor, but it doesn't matter
20 that -- who the transferee was.

21 So the transferor here was All -- All
22 Resort, the debtor, but the statute just
23 requires by the creditor. It doesn't say as to
24 who the defendant would be. And so -- and just
25 because there's got to be a way under state law

1 to go after all the wrong parties, a creditor in
2 Robin Salazar's shoes could always go after both
3 All Resort that was bleeding assets, the
4 wrongdoers, Bizarro and Cummins, and also the
5 United States.

6 JUSTICE BARRETT: But don't --
7 doesn't -- I mean, you -- you concede, right,
8 that other defenses would be available? Besides
9 sovereign immunity.

10 MS. BLATT: State law defenses.

11 JUSTICE BARRETT: State law defenses.
12 And how can you know what those defenses would
13 be if you weren't considering who the transferee
14 was?

15 MS. BLATT: Well, so the -- because
16 they -- the defenses that I know of and that the
17 cases are talking about are things like stuff
18 that runs to Robin Salazar, like collateral
19 estoppel, like if she had already brought the
20 claim, or res judicata or laches.

21 So it's not the -- there are statutory
22 defenses about good-faith transferees, and those
23 would be actual defenses that would go to
24 recovery. But, in just pure voidability under
25 Utah law, and this works with all fraudulent

1 conveyance, you're just looking at the elements,
2 whether the transfer is voidable. The recovery
3 is a separate issue both under state law and
4 federal law, like how you go and get the money.
5 But the actual voidability just goes to the
6 transfer. That's why we -- and this Court has
7 recognized it's in the nature of an in rem
8 proceeding.

9 JUSTICE GORSUCH: So you can have --

10 JUSTICE BARRETT: Okay. Last --

11 JUSTICE GORSUCH: I'm sorry. No,
12 please.

13 JUSTICE BARRETT: Oh, sorry. Just --
14 just last question. You said before that when
15 you're thinking about whether 106(a) has any
16 work to do for 544(b), that there is no state
17 that you're aware of that has waived sovereign
18 immunity in these -- in this fraudulent transfer
19 context.

20 MS. BLATT: Correct.

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

23 MS. BLATT: It's not a dead letter as
24 to the four states that waived immunity
25 generically. So -- but it is a dead letter

1 because those are a two-year period, and they
2 can already be sued under 548. So the
3 government concedes --

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

6 MS. BLATT: For sure.

7 JUSTICE BARRETT: Yeah.

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

10 JUSTICE BARRETT: Except for the four?
11 And -- and -- and that's only because of the
12 way --

13 MS. BLATT: Except for --

14 JUSTICE BARRETT: Put aside the -- but
15 let's see. The timing issue, we're talking
16 about a question of statutory interpretation.
17 The time --

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

20 JUSTICE BARRETT: Okay.

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

22 JUSTICE BARRETT: But, during that one
23 year, there were four states?

24 MS. BLATT: There were four states.

25 JUSTICE BARRETT: Okay.

1 MS. BLATT: But, boy, Congress did a
2 lot for so and so it did a -- a lot of work for
3 so little effort, and it's only because there's
4 a generic waiver. But, as a practical matter,
5 which I was saying is so ironic, is that
6 Congress would say we are abrogating, abrogating
7 very clearly sovereign immunity, but it's only
8 contingent on the sovereigns who we just
9 abrogated for them agreeing to our waiver.

10 And that is a -- just a case I've
11 never heard of that says that --

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

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

1 And I do think it's significant that
2 no case of a century is talking about a federal
3 defense. And I think their preemption argument
4 kind of shows how strange it is because they're
5 saying Congress wanted the trustee to rely on
6 state law, but we incorporate a federal law
7 defense when, normally, the government -- your
8 cases would just say you look at that as implied
9 repeal. You're in a -- you're interpreting a
10 federal cause of action and everyone concedes
11 all elements of state law are met, hook, line,
12 and sinker. The only defense that's lacking is
13 the one defense that was waived in the statute,
14 sovereign immunity.

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

1 MS. BLATT: I -- I mean, I just -- I
2 feel bad for Congress that they tried to do the
3 best they could and you're going to say it's not
4 good enough when they said "with respect to" in
5 the broadest -- the government doesn't even have
6 an argument that the immunity, the waiver, is
7 not with respect to the state law elements.
8 They don't even have an argument. They just
9 say, well, sovereign immunity would block the
10 claim even though sovereign immunity is waived
11 with respect to the claim.

12 It -- literally, the statute says
13 sovereign immunity is waived with respect to
14 544(b). It has a claim. It has an elements.

15 JUSTICE KAGAN: But this waiver of
16 sovereign immunity is not supposed to affect the
17 substance.

18 MS. BLATT: It's not supposed to
19 affect the substance unless the claim otherwise
20 exists. And, again, the only thing lacking here
21 is sovereign immunity. They're not -- we're not
22 talking about a defect under state law.

23 JUSTICE JACKSON: But -- but, Ms. --
24 Ms. --

25 MS. BLATT: We have a fraudulent

1 transfer.

2 JUSTICE JACKSON: -- Ms. Blatt, I
3 guess just conceptually, here -- here's what I'm
4 struggling with, and maybe you can help. It
5 seems to me that the result of your view is that
6 the trustee can recover money from the estate
7 under this particular circumstance in a way that
8 no actual creditor could because you concede
9 that all actual creditors bringing a lawsuit
10 against the United States for recovery for these
11 fraud -- this fraudulent transfer would be
12 barred by -- by sovereign immunity. So --

13 MS. BLATT: No. If --

14 JUSTICE JACKSON: No?

15 MS. BLATT: No. Just if you -- if
16 you're just putting aside -- remember, we have
17 that alternative argument that you never had to
18 sue the United States. You could --

19 JUSTICE JACKSON: No, I understand.

20 MS. BLATT: But putting aside that --

21 JUSTICE JACKSON: Putting aside the
22 alternative argument --

23 MS. BLATT: -- you would -- we -- of
24 course, we agree that sovereign immunity applies
25 outside of bankruptcy, which is why it makes it

1 so strange for you to hold that --

2 JUSTICE JACKSON: No, but let me tell
3 you what I think is strange, and then you can
4 respond.

5 MS. BLATT: Okay.

6 (Laughter.)

7 JUSTICE JACKSON: All right. So -- so
8 we have a situation in which the trustee is
9 recovering this money, putting it in under
10 circumstances in which no actual creditor could.
11 Ms. Dubin says: But think about the work of
12 544. What 544 was really about, she says, is
13 making sure that an actual creditor who would
14 otherwise be able to get this money for himself
15 is actually essentially barred from doing so and
16 the money goes into the estate and split -- is
17 split up among creditors, that the work of 544
18 is to give the trustee the ability to execute
19 the claim that the actual creditor would
20 otherwise have been able to in a way that
21 undermines bankruptcy principles.

22 So why isn't she right about that? If
23 we think about what 544 is really about, then it
24 seems to me to undermine your view that we
25 should be reading 106 to allow for the trustee

1 to recover money that an actual creditor would
2 not have been able to recover.

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

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

8 MS. BLATT: Okay, but 5 -- 544 has --
9 has a waiver of sovereign immunity that the
10 government concedes six ways to Sunday is
11 written into 544(b).

12 JUSTICE JACKSON: And what Ms. Dubin
13 says --

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

16 JUSTICE JACKSON: Okay.

17 MS. BLATT: If I can just finish my
18 answer.

19 JUSTICE JACKSON: All right.

20 MS. BLATT: Ms. Dubin agrees that
21 540 -- 544(b) has the words in there sovereign
22 immunity is hereby abrogated. I think she's
23 saying either Congress didn't put it in the
24 right place -- I don't know where she should
25 have put it --

1 JUSTICE JACKSON: She's saying --

2 MS. BLATT: -- or that it was a poor
3 choice.

4 JUSTICE JACKSON: -- that it's with
5 respect to a subsection of 544, not the whole
6 thing. We're --

7 MS. BLATT: Oh, no. She thinks it's
8 in 544(b) too because she just says it's sitting
9 there and waiting to be, I don't know,
10 impregnated by another waiver of sovereign
11 immunity.

12 JUSTICE JACKSON: No, no, no. 106(a)
13 absolutely refers to the Section 544. It's in
14 there.

15 MS. BLATT: Correct.

16 JUSTICE JACKSON: We see it. She says
17 the work that that's doing is -- with respect to
18 544(a), not (b). And, in fact, when you think
19 about what 544(b) is actually doing, it is
20 inconsistent with an argument that sovereign
21 immunity is supposed to be not taken into
22 account and that the actual creditor bar is not
23 supposed to apply to the trustee.

24 So she -- she's -- she's giving work
25 to 544 in 106(a). It -- she says it relates to

1 544(a) and that it really can't logically apply
2 to 544(b) when we understand what 544(b) is
3 doing.

4 MS. BLATT: And the government's --
5 reply brief is completely silent on our argument
6 that 106 has the -- sorry, state law has the
7 exact same relationship under (a), under (b).
8 It's incorporated. And absent a second waiver
9 of sovereign immunity, there is nothing -- there
10 is no work that 106(a) does except as operate as
11 a venue provision. It does no work as to
12 waiving sovereign immunity as to the underlying
13 claim, because she concedes 544(a) can never be
14 used by a hypothetical creditor without a second
15 waiver of sovereign immunity.

16 So, under all of 544, it operates as a
17 contingent waiver.

18 JUSTICE JACKSON: Isn't that what
19 she's also saying with respect to (b)? She's
20 saying there's no second waiver here, and you
21 need it.

22 MS. BLATT: Correct.

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

1 MS. BLATT: It's definitely
2 consistent.

3 JUSTICE JACKSON: Right. She's saying
4 544(a) can go forward despite 106 because
5 there's a second waiver. Here, there's not, so
6 there shouldn't be.

7 MS. BLATT: And all I'm saying is that
8 there's no case nor any statute that has a
9 waiver of sovereign immunity, certainly not with
10 respect to a section, that's -- can -- that says
11 we waive it as to the claim, but if you can --
12 you can only bring the claim and succeed on it
13 if there's a second waiver.

14 And after Congress made this very
15 broad after this Court twice narrowed it, it
16 just would be a strange thing, especially when
17 state law's also incorporated in the very
18 provision at issue in Hoffman, the preferential,
19 which also relies -- it's the same -- it's the
20 same thing. It wasn't --

21 JUSTICE JACKSON: Thank you.

22 MS. BLATT: Okay. I'm -- if there are
23 no questions --

24 JUSTICE KAVANAUGH: You can continue.

25 MS. BLATT: Oh, I -- I -- oh, the one

1 thing on the 548 and 544, it's true this is
2 beyond the two-year period, but let's just not
3 forget that 544 is supposed to apply to
4 everybody. It applies to every transferee.

5 And it would be particularly odd to
6 say: Well, Congress waived sovereign immunity
7 with respect to both the two-year period under
8 548 and the generally four-year period under
9 548, except for the IRS, that they are -- they
10 are except, even though every other transferee,
11 and I guess with respect to all other
12 governments, tribes, et cetera, don't get that
13 two-year lookback period.

14 And, as here, the -- the trustee had
15 no choice because it had already -- the --
16 the -- the -- the -- the bankruptcy petition was
17 filed after the two-year period had expired, and
18 so the trustee acted promptly going after all --
19 all available assets.

20 In terms of your question about how
21 often are there creditors left over, if the
22 trustee's doing his job, the answer should be
23 none because the trustee is taking whatever
24 claim, even if it's \$5, and going after every
25 single transferee within the time period. And

1 every transferee would have to give back this
2 money.

3 And just in terms of the equities, the
4 notion that this is not a roadmap for fraud, if
5 the IRS had just given back the money, they
6 would have had six years to go after these
7 people. They just fought the case under
8 sovereign immunity, but they will always have 10
9 years. And this has a four-year statute of
10 limitations.

11 The IRS -- excuse me. The government
12 itself has a six-year fraudulent transfer
13 statute, so they have two years longer than all
14 the states does.

15 I think that's all I have if there are
16 no --

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Justice Thomas?

20 Justice Sotomayor?

21 Thank you, counsel.

22 MS. BLATT: Thank you.

23 CHIEF JUSTICE ROBERTS: Rebuttal,
24 Ms. Dubin?

25

1 REBUTTAL ARGUMENT OF YAIRA DUBIN
2 ON BEHALF OF THE PETITIONER

3 MS. DUBIN: Thank you, Mr. Chief
4 Justice.

5 Justice Jackson and Justice Barrett,
6 you were both asking about 544(a), and I just
7 want to clarify something. 544(a) does not
8 require a second waiver of sovereign immunity.

9 26 U.S.C. 620 -- 6323 gives the
10 trustee -- gives a hypothetical judgment lien
11 creditor the right to prime a federal tax lien
12 that isn't properly recorded. There's no suit
13 required to do that. It just means that that
14 tax lien is not valid against that hypothetical
15 judgment lien creditor.

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

20 Where 106(a) comes into being is to
21 allow the trustee to effectuate that right
22 within the bankruptcy proceeding to bring an
23 adversary proceeding to do things to make sure
24 that it is enforcing the priority of that lien.

25 Second, I wanted to come back to

1 Justice Barrett's question about the defenses
2 that a transferee could raise. This is in the
3 red brief appendix at 9a, which is also Utah
4 Code 2569. Those, the good-faith defense is a
5 defense to a transfer, not -- to avoidance, not
6 to recovery.

7 The third thing is that the trustee
8 said that, in our view, you can't go after the
9 insiders.

10 That is not correct. You absolutely
11 should go after the insiders and can go after
12 the insiders. Our point is that going after the
13 insiders in an avoidance action doesn't affect
14 the rights of the United States. It just
15 affects the transfer vis-à-vis the insiders.

16 Justice Gorsuch, you asked a few times
17 about the argument that 544(b) looks and
18 requires an actual creditor.

19 That is the trustee's alternative
20 argument, but on the primary argument, everyone
21 agrees, all the circuits have agreed, it is the
22 uniform practice for over a hundred years. And,
23 in fact, this trustee has always pointed to a
24 suit against the United States as the predicate
25 for the 544(b) action. We don't think there's

1 any reason to reach the alternative argument in
2 this case, but if you do, for the reasons we
3 explained in our reply brief, it's wrong.

4 Finally, stepping back and moving to
5 the primary argument, there's been a bunch of
6 questions about 544(b) and, like, what Congress
7 would have wanted here. And the point that
8 we've been making is that 544(b) has always been
9 understood as a provision that brings liability
10 that already exists into the Bankruptcy Code.

11 There's no reason to think that when
12 Congress generally waived immunity as to 544 and
13 specifically said that it was not affecting the
14 substance of those provisions that what it
15 actually was doing was creating new liability
16 that had never existed against the United States
17 under state fraudulent transfer law.

18 Finally, on 106(a), we think we have
19 the much better reading of the text of 106(a).
20 The trustee's reading essentially hinges on the
21 words "with respect to," which cannot bear that
22 weight. And if you -- if you add in the clear
23 statement rule, we think we certainly should
24 prevail on the text. But we have obviously been
25 losing. We've lost this case in three courts,

1 and I think the reason is that there's some
2 intuition that there's something strange about
3 what's going on here, that somehow our reading
4 renders 106(a) an empty gesture as to 544.

5 But that's not right for the
6 reasons -- we've discussed today. Under our
7 reading, 544(a) has meaning, important meaning,
8 as to the United States, and 544(b) has meaning
9 as to any sovereign that's waived its sovereign
10 immunity from a fraudulent transfer action, as
11 four states have done.

12 But the trustee is right that his
13 reading would mean that 544(b) would have more
14 effect as to the United States. But I submit
15 that that's a bug, not a feature, of the
16 trustee's reading. I don't think that Congress
17 wanted to expose the United States to fraudulent
18 transfer liability based on the terms set by
19 state law, and I think we know that from the
20 text of 106(a).

21 But Congress also passed a federal
22 fraudulent transfer provision in Section 548,
23 and it selected a two-year lookback period. And
24 there's every reason to think that Congress
25 intended that lookback period to apply to the

1 IRS, not indeterminate limitations periods set
2 by 50 states.

3 We ask that you reverse the judgment
4 below.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 The case is submitted.

8 (Whereupon, at 12:18 p.m., the case
9 was submitted.)

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<p>\$</p> <p>\$5 ^[1] 60:24</p> <p>\$55,000 ^[1] 43:15</p> <hr/> <p>1</p> <p>10 ^[4] 46:22,23 52:23 61:8</p> <p>105 ^[1] 37:4</p> <p>106 ^[18] 5:11 8:22 9:10, 13,19 22:8 34:20 37: 11 40:12 41:3,6,7 42: 7,23 55:25 56:4 58:6 59:4</p> <p>106(a) ^[43] 4:19,19,21, 23 5:6,8 7:3 9:20,21 14:17,21,22 15:6 19: 22,23 20:2,9 23:2,3 24:5 28:5,24 29:4,7, 17 30:6 32:5 33:4,20 34:2,4 37:14,24 39: 13 49:15 57:12,25 58: 10 62:20 64:18,19 65: 4,20</p> <p>106(a)'s ^[1] 30:10</p> <p>106(a)(2) ^[1] 35:5</p> <p>106(a)(5) ^[2] 9:23 36: 17</p> <p>106(b) ^[1] 44:15</p> <p>11:24 ^[2] 1:15 3:2</p> <p>12:18 ^[1] 66:8</p> <hr/> <p>2</p> <p>2 ^[2] 1:11 44:12</p> <p>2014 ^[1] 20:22</p> <p>2017 ^[1] 20:22</p> <p>2024 ^[1] 1:11</p> <p>23-824 ^[1] 3:4</p> <p>2569 ^[1] 63:4</p> <p>26 ^[3] 19:15 62:9,19</p> <p>2610 ^[1] 37:19</p> <p>28 ^[1] 37:19</p> <hr/> <p>3</p> <p>3 ^[1] 2:4</p> <p>34 ^[1] 2:7</p> <hr/> <p>4</p> <p>4 ^[2] 6:17 31:16</p> <hr/> <p>5</p> <p>5 ^[2] 35:6 56:8</p> <p>50 ^[2] 52:22 66:2</p> <p>540 ^[1] 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