No. 23-824

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

DAVID L. MILLER,

Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber's membership includes businesses that may be and have been affected by bankruptcy proceedings. In particular, the creditors in bankruptcy cases often include businesses, including not only entities that transacted business with the debtor prior to bankruptcy but also entities that do business with the debtor once the bankruptcy proceeding commences or that are involved in the bankruptcy process itself. Acceptance of the government's position in this case would make it more difficult to bring actions against the government that would benefit creditors in bankruptcy and would reduce the estate assets available for distribution to creditors.

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[1] Pursuant to Rule 37, counsel for *amicus curiae* affirm that no counsel for a party authored this brief in whole or in part and no entity or person, other than *amicus*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government seeks an unprecedented and unwarranted expansion of sovereign immunity that would make it more difficult to hold the federal government and other governmental units liable in bankruptcy. Accepting that position would harm creditors, including businesses, in a variety of ways.

I. The government incorrectly asserts that sovereign immunity can bar trustees from prevailing on actions against the United States and other governmental units under Section 544(b) of the Bankruptcy Code. See 11 U.S.C. 544(b). Under Section 544(b), a trustee can avoid certain fraudulent transfers of the debtor's assets. In particular, a trustee can avoid a transfer that is "voidable" by a creditor under nonbankruptcy law, such as state fraudulent-transfer law. *Ibid.* On the government's view, Section 106(a)'s express waiver of sovereign immunity "with respect to" Section 544(b) is insufficient for trustees to avoid fraudulent transfers to governmental units. See 11 U.S.C. 106(a). Instead, the government urges, there needs to be a *second* waiver of sovereign immunity that applies specifically to the nonbankruptcy law that defines the circumstances under which Section 544(b) avoidance is proper. But that position produces the absurd result that Section 544(b), which Congress plainly intended to have some application to the United States and other governmental units, virtually never has any work to do. It cannot be correct that Congress must redundantly waive sovereign immunity when it has already broadly done so.

II. A. That conclusion is confirmed by the fact that the government's approach undermines several fundamental bankruptcy-law principles. A trustee's duty is to maximize the value of the bankruptcy estate, and thus to maximize repayment of the debtor's creditors. If fraudulent transfers to governments cannot be avoided under Section 544(b) because the government is immune, then money that would otherwise flow into the bankruptcy estate would instead remain in the government's coffers, and creditors—including businesses—would suffer. Indeed, the inability to obtain a meaningful recovery on their claims in bankruptcy can be devastating for businesses. Further, the "central policy" of the Bankruptcy Code is to *equally* distribute assets among creditors. *Begier* v. *IRS*, 496 U.S. 53, 58 (1990). On the government's view, a governmental unit as creditor can retain the assets fraudulently transferred to it plus its share of the (diminished) bankruptcy estate, rather than having to return those assets and stand in line with all the other creditors. That amounts to special treatment for governmental units that wrecks Congress's detailed scheme of creditor priority.

B. In addition, the government's approach represents an overbroad, self-aggrandizing view of sovereign immunity. Where Congress has waived sovereign immunity, the government has every incentive to try to minimize the scope of that waiver, thereby depriving individuals and businesses of any opportunity to obtain the relief that Congress envisioned. This case is yet another attempt by the government to achieve that minimization by contending that a single statutory waiver of sovereign immunity is somehow not sufficient and that a second and more

specific waiver is necessary. This Court has rejected that type of argument in analogous contexts, and the same result is warranted here. If the Court were instead to accept the government's argument, the effects would stretch far beyond Section 544(b) to encompass other provisions of the U.S. Code that incorporate by reference some other source of law on which the provision's applicability turns. Given the breadth of those effects, the government's narrow understanding of the Bankruptcy Code's waiver of sovereign immunity would create uncertainty and destabilization that would have negative effects on businesses.

ARGUMENT

I. Section 106(a) Waives Sovereign Immunity As To All Aspects Of Section 544(b), Including The Analysis Of Whether A Transfer Is Voidable Under "Applicable Law."

Under Section 544(b), a bankruptcy trustee can avoid "any transfer of an interest of the debtor * * * that is voidable under applicable law by a creditor," regardless of whether that transfer took place outside the Bankruptcy Code's usual two-year limitations period for avoiding transfers. 11 U.S.C. 544(b)(1); see 11 U.S.C. 548(a)(1)(B). In this case, for example, the trustee brought an action against the United States to avoid a transfer of tax payments fraudulently made to the Internal Revenue Service (IRS) from the debtor's coffers. To identify a "creditor" who could "void[]" the transfer "under applicable law," 11 U.S.C. 544(b)(1), the trustee pointed to a former employee of the debtor with an unpaid employment-

discrimination settlement who could void the transfer under the Utah Uniform Fraudulent Transfer Act.[2]

Section 106(a) contains a broad waiver of sovereign immunity as to Section 544(b). Section 106(a) states that "sovereign immunity is abrogated as to a governmental unit"—that is, as to the United States, States, tribes, and other governmental units—"with respect to" Section 544. 11 U.S.C. 106(a).[3] Language like "with respect to" typically "has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." *Lamar, Archer & Cofrin* v. *Appling*, 584 U.S. 709, 717 (2018). Section 106(a) thus waives sovereign immunity for avoidance under Section 544(b) and all matters relating to that avoidance. In other words, Section 106(a)'s "abrogation of sovereign immunity is *absolute* with respect to" Section 544(b). *In re DBSI*, 869 F.3d 1004, 1010 (9th Cir. 2017) (emphasis added). Section 106(a) therefore bars governments from raising sovereign immunity as a defense in a trustee's action under Section 544(b).

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[2] Because "[a] significant impact" of Section 544(b) is to permit avoidance of "fraudulent transfers," this brief generally refers to such transfers. 4 *Norton Bankruptcy Law and Practice* § 63:7 (3d ed. 2019). But other types of transfers also may be avoided under Section 544(b). *Ibid.* (noting, for example, that transfers could be avoided "under state bulk sales laws" and "state preference laws").

[3] See 11 U.S.C. 101(27); *Lac du Flambeau Band* v. *Coughlin*, 599 U.S. 382, 388-389 (2023) (holding that federally recognized tribes are "governmental unit[s]" for purposes of Section 106(a) and explaining that the statutory definition of that term "exudes comprehensiveness from beginning to end").

But the government takes the position that Section 106(a) does not govern whether, pursuant to the terms of Section 544(b), the transfer at issue is "voidable under applicable law by a creditor." 11 U.S.C. 544(b)(1); see U.S.Br.19. Thus, in the government's view, a *second* waiver of sovereign immunity is necessary in order to enable trustees to use Section 544(b) to avoid fraudulent transfers to the United States and other governmental units.

That cannot be correct, because it would mean that virtually *no* Section 544(b) avoidance against the United States *could ever succeed*. A creditor operating under nonbankruptcy law would presumably *always* be barred by the United States' sovereign immunity from voiding a transfer in court. See Resp.Br.19. "No sensible reason can be imagined why the [United States], having consented to be sued, should thus paralyze the remedy." *Anderson* v. *John L. Hayes Construction*, 153 N.E. 28, 29 (N.Y. 1926) (Cardozo, J.); see, *e.g.*, *In re Pharmacy Distrib. Servs.*, 455 B.R. 817, 821 (Bankr. S.D. Fla. 2011) (rejecting argument that Congress waived sovereign immunity for the United States "for actions under section 544 knowing that section 544 encompasses state law theories," but still needed to adopt "a separate waiver of sovereign immunity for the necessary state law component in actions under section 544").

The same problem arises as to non-federal governmental units that are covered by the Section 106(a) waiver of sovereign immunity. With Congress having decided as a matter of federal bankruptcy policy that such a waiver was necessary, it would be equally odd and self-defeating to demand another

waiver by Congress or to require a separate waiver of sovereign immunity by the relevant governmental unit that is specific to whatever a creditor's underlying cause of action would be in seeking to void the transfer. The government identifies only a handful of governmental units that have made such separate waivers of sovereign immunity. See Resp.Br.20.

Given those absurdities and the breadth of the language in Section 106(a), it must be true, as respondent argues, that a governmental unit may not claim that a Section 544(b) action against it fails because sovereign immunity bars the enforcement of the underlying nonbankruptcy law to which Section 544(b) refers. In short, Section 106(a) "abolish[es] the Government's sovereign immunity in an avoidance proceeding" under Section 544(b), "*regardless of the context in which the defense arises*." Pet.App.8a (emphasis added). No matter how the government asserts the defense, Section 106(a) unequivocally defeats it.

II. The Government's Contrary Approach Is Both Wrong And Harmful.

A. The Government's Argument Undermines Several Fundamental Bankruptcy-Law Principles.

The government's contrary position on sovereign immunity in this case undermines fundamental bankruptcy-law principles that protect businesses' interests, including (1) the principle that the bankruptcy estate should be maximized to permit recovery by creditors, and (2) the principle that distribution should be equal as among creditors except as other-

wise specified expressly in the Bankruptcy Code's carefully calibrated list of creditor priorities.

1. Accepting The Government's Position Would Thwart The Statutory Goal Of Maximizing The Bankruptcy Estate.

A trustee administers the bankruptcy estate, which "consist[s] of all the debtor's assets and rights." *Mission Prod. Holdings* v. *Tempnology*, 587 U.S. 370, 373 (2019). "The estate is the pot out of which creditors' claims are paid." *Ibid.* The trustee's "goal is to maximize the value of the estate and, in turn, to maximize the amount the creditors will get paid." *In re Blasingame*, 920 F.3d 384, 388 (6th Cir. 2019); see *Commodity Futures Trading Comm'n* v. *Weintraub*, 471 U.S. 343, 352 (1985); 11 U.S.C. 704(a)(1).

One way in which the trustee can "maximize the funds available for * * * distribution to creditors" is to use his or her powers to invalidate certain "transfers by the debtor or transfers of an interest of the debtor in property." *Merit Management Group* v. *FTI Consulting*, 583 U.S. 366, 369 (2018). By setting "aside certain types of transfers," the trustee can "recaptur[e] the value of those avoided transfers for the benefit of the estate." *Id.* at 370 (citation omitted). In other words, when a transfer is avoided, money flows back into the estate—and into the pot that is used to pay creditors.

The trustee's power to avoid transfers is critically "important" because "the debtor is almost always unable to fully repay unsecured creditors." *In re Yahweh Ctr.*, 27 F.4th 960, 965 (4th Cir. 2022); see Brook E. Gotberg, *Relational Preferences in Chapter 11 Pro-*

ceedings, 71 Okla. L. Rev. 1013, 1014 (2019) ("[B]ankruptcy is synonymous with nonpayment of debt."). When a trustee avoids transfers, there are at least "more assets to repay unsecured creditors"—even if those creditors ultimately cannot be made entirely whole. *Yahweh Ctr.*, 27 F.4th at 965.

The government's interpretation of the Bankruptcy Code here would compromise the trustee's ability to maximize the estate's value for the benefit of creditors. Under that interpretation, the trustee could no longer use Section 544(b) to avoid a whole swath of fraudulent transfers. In particular, sovereign immunity would prevent trustees from avoiding fraudulent transfers to governmental units that took place more than two years before bankruptcy. Money that properly belongs to the estate—the funds fraudulently transferred to the governmental unit—would thus stay in the relevant unit's pockets. The result would be a smaller pot of money to divide among creditors.

Those creditors will almost always include businesses. Debtors of course often owe money to businesses, such as vendors from which the debtor purchased assets, at the moment when the bankruptcy proceedings begin. See Yiannis Bazinas *et al.*, *Dealing with Different Creditor Stakeholder Groups*, 32 Norton J. of Bankruptcy L. & Practice, Issue 3 (Oct. 2023) (in insolvency proceedings, "the unsecured creditor class is comprised primarily of vendors and other trade creditors"). And after the bankruptcy commences, businesses often provide services that "help the bankruptcy process to function" or that are for the "continued operation of the debtor's business," thereby bolstering the business's value as a going

concern. 4 *Norton Bankruptcy Law and Practice* §§ 49:15, 49:23 (3d ed. 2019). Those businesses can range from a law firm representing the trustee in a proceeding to recover the debtor's property, see *In re McKenzie*, 494 B.R. 329, 331 (Bankr. E.D. Tenn. 2013), to businesses that "supply goods and services" necessary to continue the debtor's ordinary business, *Norton Bankruptcy Law and Practice*, *supra*, § 49:23. Such businesses are often creditors in line for the debtor's assets.

In the underlying bankruptcy proceedings here, for example, the creditors include multiple businesses. And some of those businesses—including insurance companies and a car-rental service—had not been fully paid out as of 2021. See Motion for Approval of Employee Chapter 11 Administrative Claims and for Approval of Interim Distribution at 20, *In re All Resort Group*, No. 17-23687 (Bankr. D. Utah Feb. 2, 2021), ECF No. 758. On the whole, the claims of those businesses total $922,643.88, but as of 2021, the creditor businesses had been paid only about *half* that amount. See *ibid.* If the trustee here could avoid the fraudulent transfer made to the IRS under Section 544(b), there would be more funds available to pay those creditors (and others).

A debtor's failure to repay its debts can have dramatic consequences for its business creditors. For instance, a debtor's "failure to pay" can "trigger[] payment obligations on the part of the creditor that [are] particularly onerous, as in cases where the creditor represent[s] a facilitator for the transfer of goods." Gotberg, 71 Okla. L. Rev. at 1038. A debtor's bankruptcy can even "trigger[] obligations for the creditor

that force[] the creditor to close its business entirely." *Ibid.* And one study found that "66% of bankrupt businesses responding to a survey about nonpayment by trade creditors reported that it was a factor in forcing their own bankruptcy filing." *Id.* at 1039. Outcomes like those underscore why trustees have a duty to maximize the estate's assets—and why the government's attempt to make it more difficult for trustees to do so should be rejected.

Separately, accepting the government's position could make it more difficult to maximize the value of the estate in Chapter 11 reorganization proceedings—to the detriment of both creditors *and* the debtor business. In such proceedings, the reorganization plan may provide for creditors to receive shares in the debtor's business. See *In re Funding Systems Asset Management*, 111 B.R. 500, 509 (Bankr. W.D. Pa. 1990). Avoidance actions can thus "enhanc[e] the value of" the reorganized company, to the benefit of its creditors-turned-shareholders. *In re Trans World Airlines, Inc.*, 163 B.R. 964, 969, 973 (Bankr. D. Del. 1994); see 11 U.S.C. 551. If sovereign immunity prevents avoidance of fraudulent transfers to governmental units, that could reduce benefits for creditors and "undercut the fresh start that is bankruptcy's promise" to the debtor business. *FCC* v. *NextWave Personal Communications*, 537 U.S. 293, 305 (2003) (internal quotation marks omitted).

2. Accepting The Government's Position Would Flout The Principle Of Equality Of Distribution Among Creditors.

The "Bankruptcy Code aims, in the main, to secure equal distribution among creditors." *Howard Delivery Serv.* v. *Zurich American Ins.*, 547 U.S. 651, 655 (2006); see, *e.g.*, *Nathanson* v. *NLRB*, 344 U.S. 25, 29 (1952) ("The theme of the Bankruptcy Act is 'equality of distribution.'" (quoting *Sampsell* v. *Imperial Paper & Color*, 313 U.S. 215, 219 (1941))); *Kothe* v. *R.C. Taylor Trust*, 280 U.S. 224, 227 (1930) (similar).

The trustee's powers to avoid certain transfers under the Bankruptcy Code further that aim. See *Merit*, 583 U.S. at 369 (Bankruptcy Code "gives a trustee the power to invalidate" certain transfers to "ensure equity in[] the distribution to creditors"). For instance, the trustee can "preclud[e] anyone who has received a voidable transfer from sharing in any distribution * * * unless he first pays back any preference that he has received." *In re Southern Produce Distributors*, 616 B.R. 667, 672 (Bankr. E.D.N.C. 2020) (quoting *In re Chase & Sanborn*, 124 B.R. 368, 371 (Bankr. S.D. Fla. 1991)). Avoidance thus ensures that "all creditors may share equally." *In re Issac Leaseco*, 389 F.3d 1205, 1209 (11th Cir. 2004).

The government's approach here disserves the "central policy of the Bankruptcy Code" that there should be "[e]quality of distribution among creditors." *Begier* v. *IRS*, 496 U.S. 53, 58 (1990). Under that approach, sovereign immunity would virtually always bar trustees from voiding fraudulent transfers to the United States or other governmental units under Sec-

tion 544(b). Effectively, then, governmental units would be allowed to cut to the front of the line of creditors. That is because the government would get to keep funds fraudulently transferred to it and then also receive its share of the estate's assets—instead of receiving whatever share it would be entitled to if it had to return the funds and get in line with everybody else. See Resp.Br.40; see generally *Clarke* v. *Rogers*, 228 U.S. 534, 548 (1913) ("Equality between creditors is necessarily the ultimate aim of the bankrupt law, and to obtain it we must regard the essential nature of transactions, not their forms or accidents.").

If Congress wanted the government to receive such first-class treatment, it would have said so expressly. The Bankruptcy Code's "basic requirements generally apply to *all* creditors." *Lac du Flambeau Band* v. *Coughlin*, 599 U.S. 382, 391 (2023). A "complementary principle" to the Bankruptcy Code's theme of "secur[ing] equal distribution among creditors" is that "preferential treatment of a class of creditors is in order *only when clearly authorized by Congress*." *Howard*, 547 U.S. at 655 (emphasis added); see *Nathanson*, 344 U.S. at 29 ("[I]f one claimant is to be preferred over others, the purpose should be clear from the statute.").

When Congress wanted claims by governmental units that are creditors to receive priority over other creditors' claims based merely on those units' governmental status, Congress expressly said so. The Bankruptcy Code contains provisions dictating that certain unsecured creditors have "priority" status—meaning that their "claims are entitled to be paid be-

fore other unsecured, nonpriority claims." *Norton Bankruptcy Law and Practice*, *supra*, § 49:1. In Chapter 7 bankruptcy cases (like this case), "the categories of priority claims are entitled to priority in the order listed" in the Bankruptcy Code. 4 *Collier on Bankruptcy* § 507.01 (16th ed.); see 11 U.S.C. 507(a)(1)-(10). And some of those categories of claims are ones that can be held only by government actors, such as "unsecured claims for domestic support" assigned "to a governmental unit," 11 U.S.C. 507(a)(1)(B), and certain claims for collection of taxes, 11 U.S.C. 507(a)(8)(A).

The government's position here would essentially override the careful priorities that Congress enacted and write into the Bankruptcy Code a form of superpriority for governmental units—across the board—by allowing them to retain assets fraudulently transferred to them. That would permit governments to supersede creditors that Congress expressly stated should be paid first. The result would be to "diminish the recovery of other claimants qualifying for equal or lesser priorities," thus "dilut[ing] the value of the priority for those creditors Congress intended to prefer." *Howard*, 547 U.S. at 667 (quoting *In re Mammoth Mart*, 536 F.2d 950, 953 (1st Cir. 1976)).

There is no indication that Congress intended that outcome. Rather, it is clear that "Congress' scheme of priority creditors" was "designed to achieve important policy aims." *In re Coupon Carriers*, 77 B.R. 650, 652 (N.D. Ill. 1987). For example, one category of claims with priority are "administrative expenses." 11 U.S.C. 507(a)(2). That category encompasses claims by businesses for compensation based on their post-

petition activities, such as a claim by a law firm that helps a bankruptcy trustee bring proceedings to recover the debtor's property. See 11 U.S.C. 503(b)(2); *In re 604 Columbus Ave. Realty Trust*, 968 F.2d 1332, 1365 (1st Cir. 1992). "The thought is that the grant of administrative priority is necessary to induce third parties to do business with the estate or to participate in the bankruptcy proceeding." *Norton Bankruptcy Law and Practice*, *supra*, § 49:15. In the government's view, however, it can effectively recover ahead of all of those businesses (and individuals), thereby undermining that important inducement and destabilizing the bankruptcy system.

There is no similarly compelling policy reason to grant the government priority for assets fraudulently transferred to it, such as the tax payments fraudulently made to the government in this case. Despite the government's protestations about fiscal impacts, bankruptcy courts "have nearly uniformly adopted" respondent's position, apparently without harm to the United States. *DBSI*, 869 F.3d at 1013 n.11. And the government is well equipped to accommodate taxpayer noncompliance—for instance, by "rais[ing] taxes," "borrow[ing]" money, conserving its spending, "or some combination of the foregoing." James Alm & Jay A. Soled, *The Internal Revenue Code and Automobiles*, 14 Fla. Tax Rev. 419, 449 (2013).

Businesses have nowhere near the same resources as a government actor—especially when that actor is the federal government—to accommodate a debtor's failure to repay its debts. Again, for some businesses, the effects of such a failure can be "catastrophic," with the "bankruptcy filing * * * destroying" the

creditor's business. Gotberg, 71 Okla. L. Rev. at 1039; see pp. 10-11, *supra*. The United States will not go out of business because it cannot retain assets fraudulently transferred to it as tax payments, but companies can—and have—gone out of business after losing money to a bankrupt debtor whose estate pays creditors far less than they are owed.

Those effects on businesses, and the fear of those effects, may also have broader economic ripple effects. As one of the leading advocates of an early version of the bankruptcy statute explained, "creditors will be more willing to lend if they are confident that they will receive equal treatment. If debtors will pay their debts proportionately if they can not pay them in full, justly, man for man, without exception or discrimination," then "capital will run over this country like a Mississippi flood." David A. Skeel, Jr., *The Empty Idea of "Equality of Creditors,"* 166 U. Pa. L. Rev. 699, 707-708 (2018) (quoting 15 Cong. Rec. 2963 (1884) (statement of Sen. Hoar)). Any erosion of the equal-distribution principle—like the one the government seeks here—runs the risk of making creditors more reluctant to lend and of stalling the economy.

In sum, accepting the government's position would compromise Congress's "carefully crafted scheme of distribution," which "seeks to recognize the central princip[le] of equality of distribution while providing for those priorities in payment which Congress has determined to be consistent with sound bankruptcy policy." *In re U.S. Lan Sys.*, 235 B.R. 847, 856 (Bankr. E.D. Va. 1998). This Court should not give

governmental units special treatment when Congress declined to do so.

B. The Government's Approach Represents An Untenable Expansion of Sovereign Immunity.

The government has every incentive to try to expand the scope of its sovereign immunity beyond the boundaries that Congress has laid out via a statutory waiver. This case is just another one in a long line of such attempts—which have included, as this case does, an argument by the government that a single statutory waiver of sovereign immunity is not enough and that a second and more specific waiver is required to vitiate its immunity. This Court has rejected that type of argument before, and it should reject it again here.

1. This Court's precedent, both new and old, confirms that the government's position in this case must be rejected.

a. i. Just last term in *Department of Agriculture Rural Development Rural Housing Service* v. *Kirtz*, 601 U.S. 42 (2024), the Court rebuffed an argument by the government that is similar to the one it presses here. *Kirtz* involved a provision of the Fair Credit Reporting Act (FCRA) that authorizes suits against "[a]ny person," which is defined to include "any * * * governmental * * * agency." *Id.* at 50 (quoting 15 U.S.C. 1681n(a), 1681*o*(a), 1681a(b)). The Court ruled that those provisions "explicitly permitted" claims against the government, even though in specifically authorizing suit against the government Congress did not refer expressly to the sovereign-

immunity doctrine. *Id.* at 51. To conclude otherwise would have "effectively 'negat[ed]' suits Congress has clearly authorized." *Ibid.* (citation omitted).

The Court rejected the government's argument that "to impose liability on a sovereign, a plaintiff must identify both a 'source of substantive law' that 'provides an avenue for relief'" (present in the FCRA) "*and* 'a waiver of sovereign immunity'" that is clearly and expressly set forth (not present in the FCRA). 601 U.S. at 53. The Court explained that there is a waiver of sovereign immunity *either* "'when a statute says in so many words that it is stripping immunity'" *or* "'when a statute creates a cause of action' and explicitly 'authorizes suit against a government on that claim.'" *Id.* at 49 (citations omitted). Because the FCRA creates a cause of action against the government, that statute effects a waiver of sovereign immunity "even without a separate waiver provision." *Id.* at 53; see Resp.Br.27-28 (discussing *Kirtz*).

This case involves mirror-image circumstances. The Bankruptcy Code contains "a separate provision addressing sovereign immunity," but not "a cause of action explicitly against the government" to avoid a transfer. *Kirtz*, 601 U.S. at 53. Under *Kirtz*, the separate sovereign-immunity provision in Section 106(a) is sufficient to waive sovereign immunity. There is no need for a *second* waiver in Section 544(b) itself or elsewhere in applicable law.

ii. *United States* v. *Mitchell*, 463 U.S. 206 (1983), is similarly inconsistent with the government's position in this case. *Mitchell* involved the Tucker Act, which "effect[s] a waiver of sovereign immunity," *id.* at 216, for certain claims against the United States

"founded" on the Constitution, a federal statute or regulation, or "any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. 1491(a)(1). The Act itself "'does not create any substantive right enforceable against the United States for money damages'"; rather, such a right "must be found in some other source of law," like certain federal statutes or regulations. *Mitchell*, 463 U.S. at 216 (quoting *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980)).

Critically, the Court explained that "*a court need not find a separate waiver of sovereign immunity in the substantive provision*" that creates the cause of action against the government, as the Tucker Act *already* "provides the necessary consent" of the government to suit. *Id.* at 218 (emphasis added). In other words, "[b]ecause the Tucker Act supplies a waiver of immunity * * * , the separate statutes and regulations *need not provide a second waiver of sovereign immunity*." *Id.* at 218-219 (emphasis added). After all, "'[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." *Id.* at 219 (quoting *United States* v. *Aetna Surety*, 338 U.S. 366, 383 (1949)); see *Quality Tooling* v. *United States*, 47 F.3d 1569, 1575 (Fed. Cir. 1995) (Congress "need not redundantly waive the government's sovereign immunity if it is otherwise waived").

This Court's post-*Mitchell* decisions involving the Tucker Act further confirm that that conclusion. As this Court has explained, given the Tucker Act's clear

waiver of sovereign immunity, another provision of federal law must evince an "unambiguous intention to withdraw the Tucker Act remedy" to preclude governmental liability. *Preseault* v. *ICC*, 494 U.S. 1, 12 (1990) (quoting *Ruckelshaus* v. *Monsanto*, 467 U.S. 986, 1019 (1984)); see *Gomez-Perez* v. *Potter*, 553 U.S. 474, 491 (2008) ("[W]here one statutory provision unequivocally provides for a waiver of sovereign immunity to enforce a separate statutory provision, that latter provision 'need not * * * be construed in the manner appropriate to waivers of sovereign immunity.'" (quoting *United States* v. *White Mountain Apache Tribe*, 537 U.S. 465, 472-473 (2003))).

The parallels between this case and that line of Tucker Act cases are striking. As noted, when the Tucker Act comes into play, provisions of federal or state law outside the Tucker Act provide the cause of action. See 28 U.S.C. 1491(a)(1); *Bregan* v. *John Stewart Company*, 2024 WL 695400, at *6 (N.D. Cal. Feb. 19, 2024) (contract claims under the Tucker Act are based on "federal common law," which can "incorporate state law"). Similarly, nonbankruptcy law—including federal law as well as state law—may supply the "applicable law" under which a creditor can void a transfer, thus permitting the trustee to avoid that transfer under Section 544(b). See U.S.Br.3; *Norton Bankruptcy Law and Practice*, *supra*, § 63:7 ("In addition to state fraudulent conveyance laws, [Section 544(b)] conveys potential rights under state bulk sales laws, state preference laws, as well as various federal avoidance laws.").

Congress therefore did not need to provide "a second waiver of sovereign immunity" for the substan-

tive law providing the elements of a Section 544(b) cause of action. *Mitchell*, 463 U.S. at 218-219. Section 106(a) expressly waives sovereign immunity, and neither Section 544(b) nor another provision of the Bankruptcy Code unambiguously revokes it.

b. The government attempts to locate a relevant revocation of sovereign immunity in Section 106(a)(5), which provides that "[n]othing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law." 11 U.S.C. 106(a)(5); see U.S.Br.10-11. But that language demonstrates no intent—let alone "unambiguous" intent, *Preseault*, 494 U.S. at 12—to withdraw sovereign immunity related to Section 544(b) or any other provision. As respondent explains, all Section 106(a)(5) does is prevent use of Section 106(a)'s sovereign-immunity waiver against governmental units outside the bankruptcy context. Resp.Br.24.

The case law the government cites provides no support for its position. See U.S.Br.10, 20. First, the government cites *FDIC* v. *Meyer*, 510 U.S. 471 (1994), in which this Court explained that "whether there has been a waiver of sovereign immunity" and "whether the source of substantive law upon which the claimant relies provides an avenue for relief" are "two 'analytically distinct' inquiries." *Id.* at 484 (quoting *Mitchell*, 463 U.S. at 218). The Court did *not* say that the latter inquiry includes a redundant sub-inquiry into sovereign immunity. To the contrary, the Court cited *Mitchell*, which could not have been clearer that "the separate statutes and regula-

tions need not provide a second waiver of sovereign immunity." *Mitchell*, 463 U.S. at 218-219.

Second, the government cites *United States Postal Service* v. *Flamingo Industries (USA) Ltd.*, 540 U.S. 736 (2004)—but that case simply relies on *Meyer* for the proposition that "[e]ven though sovereign immunity had been waived, there was the further, separate question whether the agency was subject to * * * substantive liability." *Postal Service*, 540 U.S. at 743. And for the reasons just stated, *Meyer* is of no help to the government.

In short, this Court's precedent refutes the government's position that Section 106(a)'s abrogation of sovereign immunity does not suffice and that there must be a second waiver of sovereign immunity for the law to which Section 544(b) refers in stating when a trustee may avoid a transfer. It is of course true that "when dealing with a statute subjecting the Government" to monetary liability, "this Court must not promote profligacy by careless construction." *Indian Towing* v. *United States*, 350 U.S. 61, 69 (1955). But "[n]either should [the Court] as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it." *Ibid.* The Court should reject the government's bid to import an extra, atextual layer of immunity into Section 544(b).

2. As further proof that the government's position cannot be right, accepting it would restrict the application of numerous Bankruptcy Code provisions other than Section 544(b). For example, Section 510(a) of the Bankruptcy Code makes a subordination agreement "enforceable" to "the same extent that such agreement is enforceable under applicable nonbank-

ruptcy law." 11 U.S.C. 510(a). Under the government's logic, Section 106(a)'s waiver of sovereign immunity, which refers to Section 510, would not extend to "applicable nonbankruptcy law." Governmental units could thus argue that subordination agreements are not "enforceable" against them because sovereign immunity would bar a contract-law case against them.

Another example is Section 545, which is likewise mentioned in Section 106(a)'s waiver of sovereign immunity. Section 545 permits a trustee to "avoid the fixing of a statutory lien on property of the debtor" in certain circumstances. 11 U.S.C. 545. One such circumstance is that the lien "is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists." 11 U.S.C. 545(2). "The nature, extent, and validity of statutory liens that fall within the scope of [Section] 545(2) and whether the lien is enforceable against a bona fide purchaser are matters governed by state law." *In re Petroleum Piping Contractors*, 211 B.R. 290, 299 (Bankr. N.D. Ind. 1997). But on the government's view, Section 106(a)'s waiver of sovereign immunity does not apply to the state law that helps determine whether a lien may be avoided under Section 545(2). That means that a governmental unit with a lien on the debtor's property may argue that its lien cannot be avoided under Section 545(2) because it has not waived sovereign immunity to state-law suits to cancel liens. See, *e.g.*, *Matter of Boerne Hills Leasing*, 15 F.3d 57, 57-58 (5th Cir. 1994) (taxing units of state of Texas held liens on debtor's in-

ventory); *Thompson* v. *Crow Tribe of Indians*, 962 P.2d 577, 581 (Mont. 1998) (tribe immune from state-court suit to void tribe's tax liens).

As those examples illustrate, the upshot of the government's position is that Congress needed to go through the Bankruptcy Code with a fine-toothed comb and insert additional waivers of sovereign immunity as to provisions that appear to implicate non-bankruptcy law. See Resp.Br.23. But that task would have been complicated and difficult, especially given that it is not always clear from the face of a provision whether it implicates another source of law. Some provisions, such as Section 510(a), do explicitly refer to "applicable nonbankruptcy law." 11 U.S.C. 510(a). But nothing in the language of Section 545(2) states that whether a statutory lien "is not perfected or enforceable" against a "bona fide purchaser" is determined by reference to state law. 11 U.S.C. 545(2).

Further, the Bankruptcy Code is hardly the only federal statute that refers to other provisions of state or federal law to define causes of action. For instance, "Congress has used statutory incorporation to incorporate state law into hundreds of federal statutes that result in a host of federal rights and liabilities being dependent on the myriad variations of state law." Sheldon A. Evans, *Interest-Based Incorporation: Statutory Realism Exploring Federalism, Delegation, and Democratic Design*, 170 U. Pa. L. Rev. 341, 344 (2022); see p. 20, *supra* (discussing Tucker Act). Of course, not all federal statutes referring to other sources of law relate to suits against the government or contain waivers of sovereign immunity. But adopting the government's position here has

the potential to raise questions about whether waivers of sovereign immunity outside the bankruptcy context are effective—or whether Congress needed to repeat the waiver a second time for the government to be held liable.

Creating uncertainty as to the effectiveness of a host of statutory provisions would likely have destabilizing effects, including for businesses. Businesses flourish in conditions of certainty, and the prospect of a broader-than-expected application of sovereign immunity could well force them to make painful financial decisions. This Court should not create circumstances ripe for such harmful effects to occur.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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SEPTEMBER 26, 2024