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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, )

Petitioner, )

v. ) No. 23-824

DAVID L. MILLER, )

Respondent. )

- - - - -

Washington, D.C.

Monday, December 2, 2024

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

APPEARANCES:

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

LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:24 a.m.)

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

Ms. Dubin.

ORAL ARGUMENT OF YAIRA DUBIN  
ON BEHALF OF THE PETITIONER

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

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

Rather than leave that right to one creditor, Congress authorized the trustee to pull it into bankruptcy to benefit all creditors. But 544(b) doesn't come into play unless a transfer is already voidable under

1 state law; 544(b) simply allows the trustee to  
2 piggyback off that existing vulnerability.

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

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

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

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

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

9 I welcome the Court's questions.

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

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

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

24 But I think that sort of bakes in this  
25 idea that Congress would have wanted that

1 result, that Congress would have wanted the  
2 United States to be liable under a provision  
3 like 544(b) on the merits.

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

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

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

21 JUSTICE BARRETT: Yeah.

22 MS. DUBIN: -- that's where you're  
23 going with this.

24 JUSTICE BARRETT: Yeah.

25 MS. DUBIN: But we don't think that's

1 a problem with our interpretation because 106(a)  
2 waives immunity as to 59 sections by section,  
3 not by subsection, and the waiver has an  
4 important role to play as to 544(a) vis-a-vis  
5 the United States.

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

13 JUSTICE GORSUCH: Ms. --

14 JUSTICE BARRETT: Well, I was just --  
15 okay. Just one more.

16 JUSTICE GORSUCH: No. Go ahead,  
17 please.

18 JUSTICE BARRETT: Let me ask you that  
19 just about states. It's a slightly different  
20 question but kind of the same realm. The state  
21 amici say that if we construe this -- if we --  
22 if we construe it as the trustee wants, it's  
23 going to raise a constitutional question about  
24 whether Congress can abrogate state sovereign  
25 immunity under the bankruptcy clause. Is Katz



1 your answer to that?

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

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

15 JUSTICE BARRETT: Thank you.

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

22 Is that the gist of your -- your  
23 answer?

24 MS. DUBIN: With a small correction.  
25 It does -- definitely does work as to the United

1 States with respect to 544(a). It also does  
2 work with respect to any sovereign that has  
3 exposed itself to state law outside of  
4 bankruptcy, and some states have done that under  
5 544(b).

6 JUSTICE GORSUCH: Sure. Okay. But  
7 106 waives sovereign immunity for the federal  
8 government with respect to all of 544. It  
9 doesn't single out (a). And I think the gist of  
10 your argument is that, as you read 544(b), 106  
11 is effectively rendered a nullity. What's --  
12 what's your response to that?

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

15 The first point is that the way that  
16 106 operates with respect to 544(b) is defined  
17 by the limitation in 106(a) and the nature of  
18 544(b). So 106(a) is a waiver of immunity as to  
19 those 59 code provisions that you referenced,  
20 but it specifically says in 106(a)(5) that  
21 nothing in this section shall create any  
22 substantive claim for relief that doesn't  
23 otherwise exist.

24 JUSTICE GORSUCH: No, it doesn't  
25 create a new cause of action. I -- I grant you

1 that, but that's 544(b), is what your friends on  
2 the other side would say, right?

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

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

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

24 And Utah law, the applicable law being  
25 invoked here, makes clear that the identity of

1 the transferee matters. You can't avoid a  
2 transfer, for instance, against someone who  
3 takes it in good faith. So it's critical to  
4 understanding the applicable law --

5 JUSTICE GORSUCH: Yeah, but that --

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

7 JUSTICE GORSUCH: -- that doesn't  
8 apply -- the good-faith purchaser rule doesn't  
9 apply here, right?

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

19 JUSTICE GORSUCH: If I understand what  
20 you're saying -- and I'll let you go in a  
21 second --

22 MS. DUBIN: No.

23 JUSTICE GORSUCH: -- I promise -- is  
24 that essentially, the trustee steps into the  
25 shoes of a -- of -- of a normal creditor, and

1 that's how you read 544(b). I don't see that in  
2 -- in those -- that language isn't there. It  
3 does exist in some other statutes, which is  
4 notable. And we've got a very old case written  
5 by Oliver Wendell Holmes no less, Moore versus  
6 Bay, that says sometimes a trustee's powers to  
7 avoid property transfers can transcend the  
8 rights of the creditor in whose shoes he might  
9 otherwise step.

10 What do we do about that?

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

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

20 JUSTICE GORSUCH: Exactly.

21 MS. DUBIN: That is an exception, but  
22 it is an exception that's baked into 544(b).  
23 544(b) was understood to incorporate that  
24 exception, but when it did so, it made clear  
25 that in every other way, the trustee's rights

1 are coterminous with that actual creditor's.

2 JUSTICE GORSUCH: Where do you get  
3 that in the --

4 MS. DUBIN: And, critically, in the  
5 Moore versus --

6 JUSTICE GORSUCH: Yeah. Where do you  
7 get that in the language?

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

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

18 What Congress was concerned about in  
19 544(b) was a real right that exists outside of  
20 bankruptcy. And there's a reason for that.  
21 It's because the other federal avoidance powers  
22 convey all the ways that Congress wanted to give  
23 federal rights to avoidance.

24 544(b) does something different. It  
25 recognizes that sometimes out there in the real

1 world, an actual creditor has that right. And  
2 Congress picked that up with requiring an actual  
3 creditor in 544(b).

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

10 JUSTICE GORSUCH: That's why we're  
11 here, right?

12 MS. DUBIN: No. We're here on the  
13 106(a) question. We're here on --

14 JUSTICE GORSUCH: Well, how the two  
15 interact, yeah.

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

21 If you look at all those cases, for  
22 instance, DBSI, the case that started this split  
23 in the Ninth Circuit, everything about that case  
24 acknowledges this. Everyone agrees 544(b)  
25 operates by looking for an actual creditor.

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

8           JUSTICE GORSUCH: That's right. Thank  
9 you.

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

16           Is it because Congress was making a  
17 policy choice related to its concern about the  
18 potential disruptive nature of avoidance? So  
19 the general trustee avoidance power has a  
20 two-year statute of limitations because, when  
21 you come in and you void a previously existing  
22 transaction involving innocent third parties,  
23 that's like a big deal. That's causing a lot of  
24 disruption in the market.

25           And so, ordinarily, a trustee can only



1 do that for two years after that transaction has  
2 occurred. There's no such limitation in the  
3 544(b) world in terms of timing, but maybe,  
4 maybe -- this is my theory -- the -- the  
5 relevant limitation is this actual creditor  
6 requirement, that what's happening there is the  
7 trustee gets the avoidance power but only to the  
8 extent that an actual creditor could have  
9 affected the same kind of disruption in the  
10 market by bringing this kind of action on his  
11 own.

12 What do you think about that?

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

19 So all Congress is doing is saying  
20 that the trustee, instead of leaving that right  
21 to one creditor alone, he is going to vindicate  
22 the principle of equality among creditors,  
23 equality of distribution, bring it into the  
24 bankruptcy and that transfer can be avoided for  
25 the benefit of all creditors.

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

6           JUSTICE BARRETT: Counsel --

7           JUSTICE KAGAN: Can I take you --

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

18           MS. DUBIN: I think it happens. I  
19 don't know -- I can't give you exact numbers,  
20 but it certainly can happen. It's not some  
21 fantasy. Of course, if the actual creditor has  
22 a right that the trustee can invoke and it's  
23 used in 544(b), then there will --

24           JUSTICE BARRETT: Then it's gone.

25           MS. DUBIN: -- no longer be the right

1 outside of bankruptcy.

2 But if, for instance, the trustee  
3 doesn't take advantage of that right or runs the  
4 statute of limitations within bankruptcy, then  
5 the actual creditor will regain the right when  
6 the bankruptcy closes.

7 JUSTICE BARRETT: And it's the same  
8 for if that -- if the -- if the transferee has  
9 the money and then someone at the actual  
10 creditor runs and grabs it before the trustee  
11 has a chance, then the trustee can't get it  
12 because, presumably, there's preclusion that  
13 would apply?

14 MS. DUBIN: That's right.

15 JUSTICE KAGAN: Can I take you back to  
16 the distinction between 544(b) and 544(a) that  
17 you're drawing? And as I understand the  
18 difference between the two sections, it's 544(b)  
19 concerns an actual creditor and 544(a) concerns  
20 a hypothetical creditor.

21 Why wouldn't sovereign immunity play  
22 similarly with respect to both those provisions?  
23 So, to the extent that sovereign immunity is  
24 always going to bar a 544(b) action, why  
25 wouldn't it do the exact same thing with the

1 hypothetical creditor in a 544(a) action?

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

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

14 The trustee is allowed to step into  
15 that shoes of that judgment lien creditor under  
16 544(a). So he now has that -- the lien is not  
17 valid against him. How does 106(a) help him?  
18 106(a) helps him enforce that.

19 He can now prime the United States.  
20 He now has priority over that tax lien. There's  
21 no issue of immunity outside the bankruptcy  
22 proceeding, and 106(a) removes the immunity  
23 within the bankruptcy proceeding.

24 This is done quite a lot. Really, the  
25 way it manifests in -- in practical terms is

1 usually when we have a tax lien that's not  
2 properly recorded, we will file as an unsecured  
3 creditor because we know the trustee can prime  
4 the lien. Of course, if 106(a) wasn't there,  
5 that wouldn't be the case.

6 JUSTICE KAGAN: Got it.

7 JUSTICE SOTOMAYOR: Just curious, why  
8 did the trustee not act within the two years  
9 under 548 here?

10 MS. DUBIN: He was too late by the  
11 time he was appointed. It was too -- it was  
12 more than --

13 JUSTICE SOTOMAYOR: Oh, it was too  
14 late.

15 MS. DUBIN: It wasn't just the  
16 appointment. At the time the bankruptcy was  
17 filed in 2017, these transfers were in 2014, the  
18 two-year lookback period had already expired.

19 And that goes to the concerns Justice  
20 Jackson was talking about, which is this repose  
21 that the federal statute bakes into it.

22 JUSTICE SOTOMAYOR: All right. Thank  
23 you.

24 JUSTICE BARRETT: And as a practical  
25 matter, is that what 544(b) gets you that you

1 don't get under 548, that, you know, the  
2 two-year statute of limitation and the -- in 548  
3 versus some state -- states have longer lookback  
4 periods?

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

19 The trustee can do so if an actual  
20 creditor could have done so outside of  
21 bankruptcy because that transfer was vulnerable,  
22 but he can't do so where no actual creditor  
23 already had that right. Then he's stuck with  
24 548 and he would be stuck with 548 in this case.

25 JUSTICE KAGAN: I mean, just taking a

1 step back, Ms. Dubin, there is something a  
2 little bit peculiar about the argument, right,  
3 saying 106 waives sovereign immunity and what  
4 happens as a result of that is you can hale the  
5 trustee into court, and then the trustee gets to  
6 court and it turns out he always loses.

7 So what was the point of the thing?

8 MS. DUBIN: Sure. So two points on  
9 that.

10 On the first point, he loses because  
11 of the nature of 544(b) because of the merits.  
12 I understand your --

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

20 MS. DUBIN: Yeah. So this goes to my  
21 second point. 106(a) is not a waiver about  
22 544(b). 106(a) waives immunity with respect to  
23 59 code provisions. It is a general waiver.

24 JUSTICE KAGAN: Yeah. Do you think  
25 you would have the same argument if it was just

1 a 544 waiver?

2 MS. DUBIN: I think this would be a  
3 much harder case if it was just a 544(b) waiver.  
4 I don't think it would be a hard case if it was  
5 a 544 waiver because of the work that it does in  
6 544(a).

7 I think, if you had the same waiver  
8 written with respect only to 544(b), you would  
9 have this question as to why Congress wrote a  
10 waiver that doesn't have practical effect as to  
11 the federal government.

12 JUSTICE KAGAN: I mean, but, if I  
13 understand the argument that you're making,  
14 you're saying, well, because Congress included  
15 so many things, we don't have to take any one of  
16 them particularly seriously.

17 MS. DUBIN: That is not at all our  
18 position. Our position is --

19 JUSTICE KAGAN: Because it doesn't  
20 sound all that good.

21 (Laughter.)

22 MS. DUBIN: Yes. That's -- so that is  
23 not our position, and let me explain why. First  
24 of all, 106(a) identifies each of the 59  
25 provisions not by subsection but by section. So



1 it has to have meaningful effect as to each  
2 section, and it certainly does have meaningful  
3 effect as to 544(a). When Congress was  
4 identifying sections for which the waiver of  
5 immunity would operate, of course it would  
6 include Section 544.

7 But I think it is also crystal clear  
8 that Congress would not have thought that that  
9 waiver of immunity would expose the IRS  
10 substantive state liability under 544(b). And  
11 that's because Congress specifically said in the  
12 waiver that nothing in this section creates any  
13 substantive claim for relief that doesn't  
14 otherwise exist.

15 And everyone has always known that the  
16 way 544(b) operates is only by pulling in  
17 existing state law liability, and everyone knows  
18 that the IRS is not subject to existing state  
19 law liability.

20 So when Congress wrote -- wrote a  
21 waiver that included 544, I think it is very  
22 clear that Congress did not think that that  
23 waiver would have the effect of altering  
24 substantive liability as to IRS that could never  
25 exist outside of bankruptcy.

1 JUSTICE KAVANAUGH: On -- on what  
2 Congress might have been thinking, the other --  
3 the other side says that your position will  
4 create a playbook for fraud, that you pay your  
5 personal tax debts with corp -- corporate funds  
6 and let the IRS then, in their words, hide  
7 behind sovereign immunity that would  
8 short-change creditors. I just want to make  
9 sure you respond to that.

10 MS. DUBIN: Thanks. I appreciate the  
11 opportunity to do that. I think that argument  
12 and those considerations cut the opposite  
13 direction. The trustee's position here would  
14 allow these insiders, the wrongdoers here, to go  
15 free. In his world, he recovers this -- this  
16 money from the IRS. He then cannot go after the  
17 insiders because he's entitled to only a single  
18 satisfaction under the bankruptcy's provision --  
19 Bankruptcy Code's provision. Meanwhile, we  
20 can't go after the insiders either because the  
21 statute of limitations has expired. And that  
22 will be ever more likely when you're using a  
23 longer limitations period to go after these  
24 transfers.

25 By contrast, under our view of the

1 world and how this is supposed to work, when  
2 you're outside the lookback period, you should  
3 be going after the insiders. And you have  
4 claims to do that because they are the  
5 wrongdoers here. They used corporate funds to  
6 pay their own debts. So you should be able to  
7 go after them for corporate misappropriation,  
8 breach of fiduciary duty, and all of the --  
9 those claims that come from insiders taking  
10 corporate money.

11 Here -- and we find this a little bit  
12 inexplicable -- the trustee did go after the  
13 insiders, but one case was dismissed for failure  
14 to prosecute, and one was settled. And we  
15 assume that settled for this because that would  
16 obviously violate the double satisfaction rule.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Thomas? Anything?

19 Justice Alito?

20 Justice Gorsuch?

21 JUSTICE GORSUCH: One quick question.  
22 Let's suppose that the money didn't go to the  
23 U.S. government but to a private party. Along  
24 the way, the trustee, in your view, could  
25 recover for that?

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

10 JUSTICE GORSUCH: Yeah.

11 MS. DUBIN: -- to himself, and you  
12 would be --

13 JUSTICE GORSUCH: That's what I'm  
14 talking about. Yeah.

15 MS. DUBIN: You would be limited --

16 JUSTICE GORSUCH: Yeah.

17 MS. DUBIN: -- in bankruptcy.

18 JUSTICE GORSUCH: Yeah. You could --  
19 you could pursue that person?

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

22 JUSTICE GORSUCH: Yeah.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Kavanaugh?

25 JUSTICE BARRETT: Just one question

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

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

21 MS. DUBIN: Yes. That's right. Let  
22 me try to say it back to you and see if you  
23 think you agree.

24 JUSTICE BARRETT: Okay.

25 MS. DUBIN: The work that 106(a) is

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

12 106(a) allows the trustee to assert  
13 that cause of action against a sovereign,  
14 absolutely --

15 JUSTICE BARRETT: Yeah.

16 MS. DUBIN: -- the federal cause of  
17 action. You're right to say that the way 544(b)  
18 works is by looking to what would have happened  
19 under state law, whether there's a viable  
20 avoidance action outside state law. And that's  
21 where that state's waiver of sovereign immunity  
22 comes into being, which is that that state has  
23 exposed itself to fraudulent transfer liability  
24 in own courts. The trustee can now mirror that  
25 inside the bankruptcy.

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

4 MS. DUBIN: That's right, and that's  
5 the purpose of 106(a)'s waiver as to the 59  
6 provisions. It's to allow those federal code  
7 provisions to be applied, invoked, enforced  
8 against sovereign entities. That's the work  
9 it's doing.

10 JUSTICE BARRETT: So the other side  
11 says, well, that's pretty weird because then  
12 you're looking for two waivers of sovereign  
13 immunity or an abrogation of sovereign -- two  
14 abrogations of waiver and an abrogation that you  
15 have to double-team in order to go. Do you want  
16 to respond to that?

17 MS. DUBIN: Yes, thanks. I don't  
18 think that our position is asking for two  
19 waivers. To the contrary, what our position is  
20 resting on the premise of is that when Congress  
21 made a provision like 544(b), which turns on  
22 liability that exists outside the code, it  
23 doesn't mean to affect that by waiving immunity  
24 inside the bankruptcy proceeding. So we  
25 disagree with the premise that Congress wanted

1 to accomplish this thing.

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

19 CHIEF JUSTICE ROBERTS: Justice  
20 Jackson?

21 JUSTICE JACKSON: I think the thing I  
22 found interesting in, like, the exchange you  
23 just had with Justice Barrett is that she  
24 approached the analysis by starting with 544 and  
25 you started with 106(a). And I wonder if that



1 might be the sort of -- to the extent there's  
2 any disconnect, and I don't think there is, but  
3 the framing is slightly different.

4           You say we need the waiver of  
5 sovereign immunity to start to allow for the  
6 trustee to bring an action. And then to  
7 determine whether or not that action can proceed  
8 or is successful or whatnot, you go to 544,  
9 which says you have to allow -- the trustee can  
10 proceed only to the extent that he could -- that  
11 an actual creditor could outside of bankruptcy,  
12 and sovereign immunity there can do the work to  
13 prevent the trustee from proceeding. Is that  
14 how you're viewing this?

15           MS. DUBIN: I actually don't think it  
16 matters where you start. I think the --

17           JUSTICE JACKSON: Okay.

18           MS. DUBIN: -- where Justice Barrett  
19 started was a perfectly fine too.

20           JUSTICE JACKSON: Okay.

21           MS. DUBIN: This is more just  
22 conceptually trying to understand what's going  
23 on here, as sort of a whole code, what is  
24 Congress doing here. And 106(a) absolutely  
25 waives immunity as to these federal code

1 provisions. It doesn't matter whether you do  
2 that at the end of the analysis or at the  
3 beginning of the analysis.

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

12 But 544(b) works differently, and it's  
13 long been understood to work differently. You  
14 have to go look at what is happening outside of  
15 bankruptcy. And nothing in 106(a) suggests that  
16 Congress meant to affect what's happening  
17 outside of bankruptcy or that requirement that  
18 you look to what's happening outside of  
19 bankruptcy.

20 Essentially, what the trustees is  
21 asking for here, and it's a little hard to put  
22 it into words, but we both agree that 106(a)  
23 waives sovereign immunity at the federal level.  
24 We also both agree that 106(a) does not waive  
25 immunity at the state law level. So what she's

1 asking for is that when you look at the 544(b)'s  
2 actual creditor requirement, you close your eyes  
3 or you disregard sovereign immunity that hasn't  
4 been waived, that continues to exist. And  
5 that's where the theory is wrong and it's why  
6 the 544(b) claim fails on the merits.

7 JUSTICE JACKSON: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Ms. Blatt.

11 ORAL ARGUMENT OF LISA S. BLATT

12 ON BEHALF OF THE RESPONDENT

13 MS. BLATT: Mr. Chief Justice, and may  
14 it please the Court:

15 106 waiver with respect to 544 means  
16 that trustees can avoid fraudulent transfers  
17 inside bankruptcy even though sovereign immunity  
18 applies outside bankruptcy. "With respect to,"  
19 even read very narrowly, means directly relating  
20 to 544. And the waiver that concededly applies  
21 to the trustee's claim has the same direct  
22 relationship to the incorporated state law  
23 elements. No textual or logical distinction  
24 exists between the two.

25 106(a)(2) also lets courts hear any

1 issue respecting 544's application to  
2 governments, so courts can thus hear these  
3 claims without regard to sovereign immunity.

4 Congress waived immunity knowing that  
5 544 has always required trustees to step into  
6 creditors' shoes under state law. By waiving  
7 immunity, Congress clearly expected trustees to  
8 sue governments by relying on state law.  
9 Congress could not have plausibly intended to  
10 waive immunity only to see it smuggled in  
11 through the back door under the guise of  
12 applying state law.

13 Nor is it plausible that Congress has  
14 ever waived immunity but only contingent on a  
15 second waiver. No such statute exists in the  
16 U.S. Code, nor does any statute contain a double  
17 waiver.

18 Congress spoke expressly when it  
19 wanted to give the IRS special treatment and to  
20 make exceptions for fraudulent transfers, but it  
21 did neither for the IRS in 544. The  
22 government's position overrides these choices  
23 and allows the IRS to keep assets that every  
24 other transferrer would have to return.

25 That result would prevent the trustee

1 from recouping this money and paying it to the  
2 bus drivers and the mechanics and the vendors,  
3 who certainly gave All Resorts more value than  
4 the IRS did. All -- the government's position  
5 finally -- destroys creditor equality. Where  
6 governments are creditors, like they are here,  
7 the government gets to keep the fraudulent  
8 transfer and its share of a much smaller pie.

9 I welcome the Court's questions.

10 JUSTICE THOMAS: What do you do with  
11 your analysis -- under your analysis with  
12 106(a)(5)?

13 MS. BLATT: (a)(5)? Well, I think it  
14 says on its face that it doesn't create  
15 liability that doesn't otherwise exist under  
16 this title. And the government concedes that  
17 the trustee, I think it said it six times, the  
18 trustee has a cause of action to which sovereign  
19 immunity has been waived under 544. It's just  
20 contesting whether it went to the incorporated  
21 elements.

22 And there's no logical distinction how  
23 105 is not implicated to that waiver, but  
24 somehow it's implicated to the waivers extending  
25 to the elements. It also just says otherwise

1 existing under this title or non-bankruptcy law,  
2 and everyone concedes that the trustee has a  
3 cause of action but for one defense and one  
4 defense only, and that's sovereign immunity,  
5 which is the very defense that 106 waives.

6           And I wanted to get to the 544(a)  
7 point because the government does not dispute  
8 that 106(a) does absolutely no more work under  
9 544(a) than it does under 544(b), meaning 544(a)  
10 incorporates state law. Absent a second waiver  
11 of immunity, which the government says  
12 accurately exists under -- I don't know if it's  
13 28 U.S.C. but 2610, the -- the quiet title,  
14 there is no state law where a bona fide  
15 purchaser or bon -- a bona fide creditor could  
16 avoid the lien.

17           So both under (a) and (b), the  
18 government has its two waiver theory. 106(a) is  
19 just kind of irrelevant. And in terms of the  
20 idea that this applies to 59 sections, if you  
21 could put your shoes, pun intended, in the form  
22 of Congress who overruled the Supreme Court's  
23 decisions in two of them, you're asking Congress  
24 to go back again. And in Hoffman you said to  
25 Congress: You were too scattershot because you

1 didn't list the code provisions. It just would  
2 have applied to a hundred. Here Congress listed  
3 all 59.

4           And another thing that's interesting  
5 just about making Congress do this again, the  
6 government doesn't dispute that its position  
7 would make Congress have to go through and add a  
8 second waiver, and all the provisions to which  
9 the state law is incorporated -- and we  
10 identified many -- and they don't dispute that  
11 one of them is 547(b).

12           And that's the very same issue in  
13 Hoffman. So if you rule against us, you're  
14 really telling Congress after all they still  
15 need to go back and do it a third time and maybe  
16 a fourth time because in the government's view,  
17 the state sovereign immunity will always creep  
18 in.

19           JUSTICE JACKSON: But, Ms. Blatt --

20           MS. BLATT: Yes?

21           JUSTICE JACKSON: -- I understand the  
22 need for two waivers here but isn't that a  
23 function of Congress's policy choice to  
24 incorporate state law as the requirement of  
25 544(b)?

1 MS. BLATT: That's --

2 JUSTICE JACKSON: You seem to be  
3 accepting that Congress was, in 544(b), allowing  
4 for the trustee to stand in the shoes of the  
5 actual creditor, but you started off by saying  
6 the trustee can do more, essentially, by virtue  
7 of 106(a) than the actual creditor.

8 And I feel like those two things are  
9 inconsistent.

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

17 But in terms of what Justice Gorsuch  
18 said, there's two very important caveats to this  
19 actual --

20 JUSTICE JACKSON: No, no, no, I'm  
21 sorry. Sorry. Before you go to the second  
22 part, I don't understand that.

23 I mean, I thought the waiver of  
24 sovereign immunity was a threshold issue that  
25 didn't tell us anything about the merits of



1 whether or not you win the action underlying it.

2 So we have this initial question, can  
3 you even bring this action? And then when you  
4 bring it, the court goes on to adjudicate the  
5 merits, which is what the elements go to.

6 MS. BLATT: Right, without regard to  
7 sovereign immunity, which is 106. In the  
8 government' view, Congress --

9 JUSTICE JACKSON: But there's --  
10 there's a theory in which sovereign immunity is  
11 just doing the work of allowing you to bring the  
12 lawsuit to begin with.

13 MS. BLATT: Only to lose.

14 JUSTICE JACKSON: Well, sometimes that  
15 happens.

16 MS. BLATT: Always it will happen  
17 because no law, tribal, foreign, federal, no law  
18 anywhere waives sovereign immunity with respect  
19 to fraudulent transfers.

20 JUSTICE JACKSON: But 544(b) is bigger  
21 than the government. So, you know, there could  
22 be other --

23 MS. BLATT: Well, 106 only relates to  
24 the government.

25 JUSTICE JACKSON: Yeah.

1 MS. BLATT: You're just saying 106 was  
2 -- 106 application to 544 in all of its  
3 applications, (a) and (b) was a waste of time  
4 because sovereign immunity will always be  
5 incorporated under state law.

6 And the point I was trying -- which is  
7 just a -- with respect, it's a dumb statute.  
8 Why would Congress waive immunity only to see  
9 that there's no way to bring it, unless --

10 JUSTICE JACKSON: Ms. Dubin says that  
11 (a), those claims go forward all the time.

12 MS. BLATT: They can't go forward,  
13 which she concedes, without a second waiver of  
14 immunity. And there's only two. There's the  
15 federal government and then the four states'  
16 generic waiver -- four states --

17 JUSTICE SOTOMAYOR: I'm sorry, there's  
18 an action against the people who engaged in the  
19 fraudulent transfer. So 544(a) -- (b) is not  
20 useless.

21 MS. BLATT: It's useless as to  
22 governments.

23 JUSTICE SOTOMAYOR: Well, but why does  
24 that matter?

25 MS. BLATT: Because 106 is a statute.

1 JUSTICE SOTOMAYOR: It's not -- it's  
2 not useless. You agree that under 544(b)  
3 incorporates some state law defenses, like the  
4 statute of limitations.

5 MS. BLATT: All of them. And this is  
6 my second point.

7 JUSTICE SOTOMAYOR: That's all of  
8 them.

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

10 JUSTICE SOTOMAYOR: Except you're  
11 saying all of them --

12 MS. BLATT: Except for one.

13 JUSTICE SOTOMAYOR: State sovereign  
14 immunity?

15 MS. BLATT: No, because that is waived  
16 by 106. If I -- that would be even weirder to  
17 have --

18 JUSTICE SOTOMAYOR: That brings us to  
19 the constitutional -- that brings us to the  
20 constitutional question. But if 544(b) requires  
21 an actual creditor, correct, who can bring the  
22 claim, so if there's no creditor who can bring  
23 the claim because the statute of limitations has  
24 passed, correct?

25 MS. BLATT: Correct, that the actual

1 creditor requirement assumes that all state law  
2 elements are met --

3 JUSTICE SOTOMAYOR: So --

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

10 JUSTICE SOTOMAYOR: So he can get it  
11 --

12 MS. BLATT: The trustee can get --

13 JUSTICE SOTOMAYOR: -- to the people,  
14 the insiders, who made this fraudulent transfer,  
15 correct?

16 MS. BLATT: Right, and he tried. It  
17 was not dismissed for failure to prosecute until  
18 it settled.

19 JUSTICE SOTOMAYOR: Well, I don't know  
20 why but he could have.

21 MS. BLATT: He did.

22 JUSTICE SOTOMAYOR: He did? One of  
23 them he settled with. The other, I don't know  
24 what he did --

25 MS. BLATT: He went bankrupt.

1 JUSTICE SOTOMAYOR: He went bankrupt.

2 MS. BLATT: They took over --

3 JUSTICE SOTOMAYOR: I'm not -- I'm not

4 --

5 MS. BLATT: -- 2 million out of the  
6 estate.

7 JUSTICE SOTOMAYOR: -- sure why we're  
8 going to have incorporate 106(b) into the state  
9 law defenses, and say that --

10 MS. BLATT: I think we're saying  
11 incorporate the waiver of sovereign immunity  
12 into the only way the trustee can bring this  
13 claim, which was relying on state law. The  
14 other just --

15 JUSTICE SOTOMAYOR: All right. Thank  
16 you, Ms. Blatt.

17 JUSTICE GORSUCH: Ms. Blatt, if I  
18 might just turn us to 544(b) where I think, you  
19 know, the rubber meets the road. And the view  
20 on -- I think it's common ground that you -- the  
21 trustee steps into the shoes of -- of the  
22 creditor.

23 And then the question is what does  
24 this voidability language mean? And one view  
25 is, well, you've got to look at to whom the

1 transfer was made. I think that's the  
2 government's view, that -- that that matters.

3 MS. BLATT: Yeah -- the statute  
4 doesn't say that.

5 JUSTICE GORSUCH: If I might.

6 MS. BLATT: Yeah.

7 JUSTICE GORSUCH: We're almost there.

8 The government says: Well, okay, you  
9 step into the shoes of the creditor and you look  
10 at the identity of the transferee. And here,  
11 because the transferee is the government, you're  
12 out of luck.

13 Your argument, as I take it, is the  
14 statute doesn't say that. It says you ask  
15 whether the transfer is voidable by the  
16 creditor --

17 MS. BLATT: Correct.

18 JUSTICE GORSUCH: -- by -- by the  
19 debtor here, whoever he is, and is it voidable.  
20 And that transfer is voidable because it was  
21 done unlawfully, fraudulently.

22 And if when Congress wants to identify  
23 the transferee and make a difference there, it  
24 does so. For example, it protects good faith  
25 purchasers and some other statutes.

1           Have I got the gist of the dispute  
2 accurately there?

3           MS. BLATT: That's correct.

4           And, Justice Sotomayor, what's  
5 critical to understand is the government's view  
6 is that the trustee illegally went after the  
7 insiders because they too would be able to  
8 assert sovereign immunity.

9           Their view is the trustee, because  
10 this went to the United States, it will always  
11 block any transfer because the United States,  
12 there's no way to ever get at this money.

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

14          MS. BLATT: So a trustee, if it goes  
15 to the IRS, which has over 10 years to seek --  
16 10 years, which is a lot longer than the four  
17 year statute of limitations to go after tax  
18 liability and is a lot more capable than I would  
19 say the bus -- the bus drivers and the workers  
20 who work for this estate, the trustee is not  
21 here for his personal benefit --

22          JUSTICE BARRETT: Ms. -- Ms. Blatt --

23          MS. BLATT: -- but to get money to  
24 people who need it.

25          JUSTICE BARRETT: -- can I ask you a

1 follow-up to Justice Gorsuch's question?

2 How is it -- so I get that the statute  
3 doesn't mention the transferee, but how is --  
4 does that make 544(b) different from 544(a)?  
5 Because isn't the suit you're asserting somewhat  
6 hypothetical rather than actual, if you're just  
7 imagining the claim existing kind of in the  
8 ether?

9 MS. BLATT: Yes. So the actual --  
10 because that's the -- the creditor, there has to  
11 be an actual creditor, but it doesn't matter  
12 that -- who the transferee was.

13 So the transferor here was, All -- All  
14 Resort, the debtor, but the statute just  
15 requires by the creditor. It doesn't say as to  
16 who the defendant would be. And so -- and just  
17 because there's got to be a way under state law  
18 to go after all the wrong parties, a creditor in  
19 Robin Salazar's shoes could always go after both  
20 All Resort that was bleeding assets, the  
21 wrongdoers, Bizarro and Cummins, and also the  
22 United States.

23 JUSTICE BARRETT: But don't -- doesn't  
24 -- I mean, you -- you concede, right, that other  
25 defenses would be available?



1 MS. BLATT: State law defenses.

2 JUSTICE BARRETT: State law defenses.

3 And how can you know what those defenses would  
4 be if you weren't considering who the transferee  
5 was?

6 MS. BLATT: Well, so the -- because  
7 they -- the defenses that I know of and that the  
8 cases are talking about are things like stuff  
9 that runs to Robin Salazar, like collateral  
10 estoppel, like if she had already brought the  
11 claim, or res judicata or laches.

12 So it's not the -- there are statutory  
13 defenses about good faith transferees, and those  
14 would be actual defenses that would go to  
15 recovery. But in just pure voidability under  
16 Utah law, and this works with all fraudulent  
17 conveyance, you're just looking at the elements,  
18 whether the transfer is voidable. The recovery  
19 is a separate issue, both under state law and  
20 federal law, like how you go and get the money.  
21 But the actual voidability just goes to the  
22 transfer. That why we -- and this Court has  
23 recognized it's in the nature of an in rem  
24 proceeding.

25 JUSTICE GORSUCH: So you can have --

1 JUSTICE BARRETT: Okay. Last --

2 JUSTICE GORSUCH: I'm sorry. Please.

3 JUSTICE BARRETT: Just -- just last  
4 question. You said before that when you're  
5 thinking about whether 106(a) has any work to do  
6 for 544(b), that there is no state that you're  
7 aware of that has waived sovereign immunity in  
8 these -- in this fraudulent transfer context.

9 MS. BLATT: Correct.

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

12 MS. BLATT: It's not a dead letter as  
13 to the four states that waived immunity  
14 generically. So -- but it is a dead letter  
15 because those are a two-year period, and they  
16 can already be sued under 548. So the  
17 government concedes --

18 JUSTICE BARRETT: Well, but there was  
19 a difference about when the statute was enacted,  
20 right?

21 MS. BLATT: For sure.

22 JUSTICE BARRETT: Yeah.

23 MS. BLATT: But today it's a dead  
24 letter as to all governments.

25 JUSTICE BARRETT: Except for the four?

1 And -- and -- and that's only because of the way

2 --

3 MS. BLATT: Except for --

4 JUSTICE BARRETT: Put aside the -- but

5 let's see. The timing issue, we're talking

6 about a question of statutory interpretation.

7 The time --

8 MS. BLATT: Yeah, it had a one-year

9 impact for -- you know, until it was amended --

10 JUSTICE BARRETT: Okay.

11 MS. BLATT: -- to two years.

12 JUSTICE BARRETT: But during that one

13 year, there were four states?

14 MS. BLATT: There were four states,

15 but, boy, Congress did a lot for -- so it did a

16 lot of work for so little effort, and it's only

17 because there's a generic waiver. But as a

18 practical matter, which I was saying is so

19 ironic, is that Congress would say we are

20 abrogating, abrogating very clearly sovereign

21 immunity, but it's only contingent on the

22 sovereigns who we just abrogated for them

23 agreeing to our waiver.

24 And that is a -- just a case I've

25 never heard of that says that --

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

3 MS. BLATT: Yes. It's like a statute  
4 with a contingent remainder. I just don't know  
5 of many statutes that are like here's a waiver  
6 and we hope that everyone else will -- will --  
7 will get on, you know -- just there's no statute  
8 like that that's contingent. It's bad enough to  
9 try to get a waiver when you have a clear  
10 unambiguous waiver and Congress acted to say,  
11 notwithstanding, it's abrogated, and then they  
12 list all 59 cases -- 59 sections and the  
13 government says, yeah, but you need a second  
14 waiver if you ever have to rely on state law.

15 And I do think it's significant that  
16 no case of a century is talking about a federal  
17 defense. And I think their preemption argument  
18 kind of shows how strange it is because they're  
19 saying Congress wanted the trustee to rely on  
20 state law but we incorporate a federal law  
21 defense, when normally the government -- your  
22 cases would just say you look at that as implied  
23 repeal. You're in a -- you're interpreting a  
24 federal cause of action and everyone concedes  
25 all elements of state law are met, hook, line

1 and sinker. The only defense that's lacking is  
2 the one defense that was waived in the statute,  
3 sovereign immunity.

4 JUSTICE KAGAN: I guess I'm not sure  
5 about the nature of the argument, if -- if  
6 you're conceding there were these four states  
7 and that there could have been more in the  
8 future, and Congress wants zero states, why  
9 Congress wouldn't have done exactly this. Like,  
10 well, four states is four states too many. It's  
11 not 50 states, but it's more than zero states.  
12 And who knows, the four might go up to 10. And  
13 we're -- you know, so we're concerned about  
14 this.

15 MS. BLATT: I -- I mean, I just -- I  
16 feel bad for Congress that they tried to do the  
17 best they could and you're going to say it's not  
18 good enough when they said with respect to in  
19 the broadest -- the government doesn't even have  
20 an argument that the immunity, the waiver, is  
21 not with respect to the state law elements.  
22 They don't even have an argument. They just say  
23 well, sovereign immunity would block the claim  
24 even though sovereign immunity is waived with  
25 respect to the claim.

1           It -- literally, the statute says  
2 sovereign immunity is waived with respect to  
3 544(b). It has a claim. It has an elements.

4           JUSTICE KAGAN: But this waiver of  
5 sovereign immunity is not supposed to affect the  
6 substance.

7           MS. BLATT: It's not supposed to  
8 affect the substance unless the claim otherwise  
9 exists. And, again, the only thing lacking here  
10 is sovereign immunity. They're not -- we're not  
11 talking about a defect under state law.

12           JUSTICE JACKSON: But Ms. --

13           MS. BLATT: They have a fraudulent  
14 transfer.

15           JUSTICE JACKSON: Ms. Blatt, I guess  
16 just conceptually, here's what I'm struggling  
17 with and maybe you can help. It seems to me  
18 that the result of your view is that the trustee  
19 can recover money from the estate under this  
20 particular circumstance in a way that no actual  
21 creditor could because you concede that all  
22 actual creditors bringing a lawsuit against the  
23 United States for recovery for these -- this  
24 fraudulent transfer would be barred by -- by  
25 sovereign immunity. So --

1 MS. BLATT: No. It --

2 JUSTICE JACKSON: No?

3 MS. BLATT: No. Just if you -- if  
4 you're just putting aside -- remember, we have  
5 that alternative argument that you never had to  
6 sue the United States. You could --

7 JUSTICE JACKSON: No, I understand.

8 MS. BLATT: But putting aside that --

9 JUSTICE JACKSON: Putting aside the  
10 alternative argument --

11 MS. BLATT: -- we -- of course we  
12 agree that sovereign immunity applies outside of  
13 bankruptcy, which is why it makes it so strange  
14 for you to hold that --

15 JUSTICE JACKSON: No, but let me tell  
16 you what I think is strange and then you can  
17 respond.

18 MS. BLATT: Okay.

19 (Laughter.)

20 JUSTICE JACKSON: All right. So -- so  
21 we have a situation in which the trustee is  
22 recovering this money, putting it in under  
23 circumstances in which no actual creditor could.  
24 Ms. Dubin says: But think about the work of  
25 544. What 544 was really about, she says, is

1 making sure that an actual creditor, who would  
2 otherwise be able to get this money for himself,  
3 is actually, essentially barred from doing so  
4 and the money goes into the estate and is split  
5 up among creditors, that the work of 544 is to  
6 give the trustee the ability to execute the  
7 claim that the actual creditor would otherwise  
8 have been able to, in a way that undermines  
9 bankruptcy principles.

10 So why isn't she right about that? If  
11 we think about what 544 is really about, then it  
12 seems to me to undermine your view that we  
13 should be reading 106 to allow for the trustee  
14 to recover money that an actual creditor would  
15 not have been able to recover.

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

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

21 MS. BLATT: Okay, but 544 has -- has a  
22 waiver of sovereign immunity that the government  
23 concedes six ways to Sunday is written into  
24 544(b).

25 JUSTICE JACKSON: And what Ms. Dubin



1 says --

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

4 JUSTICE JACKSON: Okay.

5 MS. BLATT: If I can just finish my  
6 answer.

7 JUSTICE JACKSON: All right.

8 MS. BLATT: Ms. Dubin agrees that  
9 544(b) has the words in there sovereign immunity  
10 is hereby abrogated. I think she's saying  
11 either Congress didn't put it in the right  
12 place -- I don't know where she should have put  
13 it --

14 JUSTICE JACKSON: She's saying --

15 MS. BLATT: -- or that it's --

16 JUSTICE JACKSON: -- that it is with  
17 respect to a subsection of 544, not the whole  
18 thing.

19 MS. BLATT: Oh, no. She thinks it's  
20 in 544(b)(2) because she just says it's sitting  
21 there in waiting to be, I don't know,  
22 impregnated by another waiver of sovereign  
23 immunity.

24 JUSTICE JACKSON: No, no, no. 106(a)  
25 absolutely refers to the Section 544. It's in

1 there.

2 MS. BLATT: Correct.

3 JUSTICE JACKSON: We see it. She says  
4 the work that that's doing is with respect to  
5 544(a), not (b). And, in fact, when you think  
6 about what 544(b) is actually doing, it is  
7 inconsistent with an argument that sovereign  
8 immunity is supposed to be not taken into  
9 account and that the actual creditor bar is not  
10 supposed to apply to the trustee.

11 So she's -- she's giving work to 544  
12 in 106(a). She says it relates to 544(a). And  
13 that it really can't logically apply to 544(b)  
14 when we understand what 544(b) is doing.

15 MS. BLATT: And the government's reply  
16 brief is completely silent on our argument that  
17 106 has the -- sorry, state law has the exact  
18 same relationship under (a), under (b). It's  
19 incorporated. And absent a second waiver of  
20 sovereign immunity, there is nothing -- there is  
21 no work that 106(a) does except as operate as a  
22 venue provision. It does no work as to waiving  
23 sovereign immunity as to the underlying claim,  
24 because she concedes 544(a) can never be used by  
25 a hypothetical creditor without a second waiver

1 of sovereign immunity.

2 So under all of 544, it operates as a  
3 contingent waiver.

4 JUSTICE JACKSON: Isn't that what  
5 she's also saying with respect to (b)? She's  
6 saying there's no second waiver here, and you  
7 need it.

8 MS. BLATT: Correct.

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

12 MS. BLATT: It's definitely  
13 consistent.

14 JUSTICE JACKSON: Right. She's saying  
15 544(a) can go forward despite 106 because  
16 there's a second waiver. Here there's not, so  
17 there shouldn't be.

18 MS. BLATT: And all I'm saying is that  
19 there's no case nor any statute that has a  
20 waiver of sovereign immunity, certainly not with  
21 respect to a section, that's -- can -- that says  
22 we waive it as to the claim, but if you can --  
23 you can only bring the claim and succeed on it  
24 if there's a second waiver.

25 And after Congress made this very

1 broad after this Court twice narrowed it, it  
2 just would be a strange thing, especially when  
3 state law's also incorporated in the very  
4 provision at issue in Hoffman, the preferential,  
5 which also relies -- it's the same -- it's the  
6 same thing. It wasn't --

7 JUSTICE JACKSON: Thank you.

8 MS. BLATT: Okay.

9 I'm -- if there are no questions --

10 JUSTICE KAVANAUGH: You can continue.

11 MS. BLATT: Oh, I -- oh, the one thing  
12 on the 548 and 544, it's true this is beyond the  
13 two-year period, but let's just not forget that  
14 544 is supposed to apply to everybody. It  
15 applies to every transferee.

16 And it would be particularly odd to  
17 say: Well, Congress waived sovereign immunity  
18 with respect to both the two-year period under  
19 548 and the generally four-year period under  
20 548, except for the IRS, that they are -- they  
21 are except, even though every other transferee,  
22 and I guess with respect to all other  
23 governments, tribes, et cetera, don't get that  
24 two-year lookback period.

25 And, as here, the -- the trustee had

1 no choice because it had already -- the --  
2 the -- the -- the -- the bankruptcy petition was  
3 filed after the two-year period had expired, and  
4 so the trustee acted promptly going after all --  
5 all available assets.

6 In terms of your question about how  
7 often are there creditors left over, if the  
8 trustee's doing his job, the answer should be  
9 none because the trustee is taking whatever  
10 claim, even if it's \$5, and going after every  
11 single transferee within the time period. And  
12 every transferee would have to give back this  
13 money.

14 And just in terms of the equities, the  
15 notion that this is not a roadmap for fraud, if  
16 the IRS had just given back the money, they  
17 would have had six years to go after these  
18 people. They just fought the case under  
19 sovereign immunity, but they will always have 10  
20 years. And this has a four-year statute of  
21 limitations.

22 The IRS -- excuse me. The government  
23 itself has a six-year fraudulent transfer  
24 statute, so they have two years longer than all  
25 the states does.

1 I think that's all I have if there are  
2 no --

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Justice Thomas?

6 Justice Sotomayor?

7 Thank you, counsel.

8 MS. BLATT: Thank you.

9 CHIEF JUSTICE ROBERTS: Rebuttal,  
10 Ms. Dubin?

11 REBUTTAL ARGUMENT OF YAIRA DUBIN  
12 ON BEHALF OF THE PETITIONER

13 MS. DUBIN: Thank you, Mr. Chief  
14 Justice.

15 Justice Jackson and Justice Barrett,  
16 you were both asking about 544(a), and I just  
17 want to clarify something. 544(a) does not  
18 require a second waiver of sovereign immunity.

19 26 U.S.C. 6323 gives the trustee --  
20 gives a hypothetical judgment lien creditor the  
21 right to prime a federal tax lien that isn't  
22 properly recorded. There's no suit required to  
23 do that. It just means that that tax lien is  
24 not valid against that hypothetical judgment  
25 lien creditor.

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

5           Where 106(a) comes into being is to  
6 allow the trustee to effectuate that right  
7 within the bankruptcy proceeding, to bring an  
8 adversary proceeding to do things to make sure  
9 that it is enforcing the priority of that lien.

10           Second, I wanted to come back to  
11 Justice Barrett's question about the defenses  
12 that a transferee could raise. This is in the  
13 red brief appendix at 9a, which is also Utah  
14 Code 2569. Those, the good-faith defense is a  
15 defense to a transfer, not -- to avoidance, not  
16 to recovery.

17           The third thing is that the trustee  
18 said that, in our view, you can't go after the  
19 insiders.

20           That is not correct. You absolutely  
21 should go after the insiders and can go after  
22 the insiders. Our point is that going after the  
23 insiders in an avoidance action doesn't affect  
24 the rights of the United States. It just  
25 affects the transfer vis-à-vis the insiders.

1           Justice Gorsuch, you asked a few times  
2 about the argument that 544(b) looks and  
3 requires an actual creditor.

4           That is the trustee's alternative  
5 argument, but on the primary argument, everyone  
6 agrees, all the circuits have agreed, it is the  
7 uniform practice for over a hundred years. And,  
8 in fact, this trustee has always pointed to a  
9 suit against the United States as the predicate  
10 for the 544(b) action.

11           We don't think there's any reason to  
12 reach the alternative argument in this case, but  
13 if you do, for the reasons we explained in our  
14 reply brief, it's wrong.

15           Finally, stepping back and moving to  
16 the primary argument, there's been a bunch of  
17 questions about 544(b) and, like, what Congress  
18 would have wanted here.

19           And the point that we've been making  
20 is that 544(b) has always been understood as a  
21 provision that brings liability that already  
22 exists into the Bankruptcy Code. There's no  
23 reason to think that when Congress generally  
24 waived immunity as to 544 and specifically said  
25 that it was not affecting the substance of those



1 provisions that what it actually was doing was  
2 creating new liability that had never existed  
3 against the United States under state fraudulent  
4 transfer law.

5           Finally, on 106(a), we think we have  
6 the much better reading of the text of 106(a).  
7 The trustee's reading essentially hinges on the  
8 words "with respect to," which cannot bear that  
9 weight.

10           And if you -- if you add in the clear  
11 statement rule, we think we certainly should  
12 prevail on the text. But we have obviously been  
13 losing. We have lost this case in three courts.  
14 And I think the reason is that there's some  
15 intuition that there's something strange about  
16 what's going on here, that somehow our reading  
17 renders 106(a) an empty gesture as to 544.

18           But that's not right for the reasons  
19 we've discussed today. Under our reading,  
20 544(a) has meaning, important meaning, as to the  
21 United States, and 544(b) has meaning as to any  
22 sovereign that's waived its sovereign immunity  
23 from a fraudulent transfer action, as four  
24 states have done.

25           But the trustee is right that his

1 reading would mean that 544(b) would have more  
2 effect as to the United States. But I submit  
3 that that's a bug, not a feature, of the  
4 trustee's reading. I don't think that Congress  
5 wanted to expose the United States to fraudulent  
6 transfer liability based on the terms set by  
7 state law, and I think we know that from the  
8 text of 106(a).

9 But Congress also passed a federal  
10 fraudulent transfer provision in Section 548,  
11 and it selected a two-year lookback period. And  
12 there's every reason to think that Congress  
13 intended that lookback period to apply to the  
14 IRS, not indeterminate limitations periods set  
15 by 50 states.

16 We ask that you reverse the judgment  
17 below.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 The case is submitted.

21 (Whereupon, at 12:18 p.m., the case  
22 was submitted.)

23  
24  
25

## Official - Subject to Final Review

|  |   |  |   |   |
|--|---|--|---|---|
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