The Scope of the Sovereign Immunity Defense in Avoidance Actions Following the Supreme Court's Decision in *United States v. Miller*

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1. INTRODUCTION

Following the Supreme Court's recent decision in *United States v. Miller*,[2] the sovereign-immunity defense will become an issue in many avoidance actions brought against governmental units. Federal sovereign immunity deprives courts of jurisdiction to hear suits against the United States absent Congress's express consent.[3] In *Miller*, the Supreme Court held that 11 U.S.C. § 106(a)'s[4] sovereign-immunity waiver applies only to an 11 U.S.C. § 544(b)[5] claim itself and not to state-law claims nested within that federal claim. As such, sovereign immunity bars any action brought against the United States under a state-law avoidance statute and § 544(b). This holding is significant because state-law avoidance statutes, such as California's, often have longer lookback periods than the two-year lookback period of 11 U.S.C. § 548.[6] And, in the instance of fraudulent transfers paid to the taxing authorities, the government often offers the best prospect of recovery for the bankruptcy estate because the individual taxpayers who discharged their tax liability with the fraudulent transfers may be noncollectible.

Post-*Miller*, governmental units being sued by trustees in avoidance actions will of course seek to invoke sovereign-immunity protections. But, how extensive are these protections? Do they, for instance, deprive bankruptcy courts of jurisdiction over all avoidance actions against governmental units, or only those arising under § 544(b) and a state-law claim? And, what about state and local governments? Can they also invoke the sovereign-immunity protections outlined in *Miller*?

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[2] *United States v. Miller*, 604 U.S. 518 (2025).
[3] *Id.* at 527.
[4] Unless otherwise indicated, all statutory citations are to Title 11 of the United States Code, *i.e.*, the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
[5] Title 11 U.S.C. § 544(b)(1) provides, with a narrow exception set forth in § 544(b)(2) for charitable contributions, as follows:

> [T]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

[6] *Compare* 11 U.S.C. § 548(a)(1) ("The trustee may avoid any transfer . . . that was made . . . within 2 years before the date of the filing of the petition . . ."), *with AFI Holding, Inc. v. Mackenzie*, 525 F.3d 700, 707 (9th Cir. 2008) (noting that California Civil Code § 3439.04(a)(1) is "the equivalent of" 11 U.S.C. § 548(a)(1)(A), and California Civil Code § 3439.04(a)(2) is "the equivalent of" § 548(a)(1)(B)), *and Donell v. Kowell*, 533 F.3d 762, 773 (9th Cir. 2008) (noting that an action under California Civil Code § 3439.04(a)(1) or § 3439.04(a)(2) must be brought within four years after the transfer was made); *see generally Miller v. United States*, 71 F.4th 1247, 1254 (10th Cir. 2023), *rev'd on other gds.*, 604 U.S. 518 (2025) (noting that the lookback period under state avoidance statutes is typically four years).

The exact scope of the *Miller* decision will likely be litigated extensively in the coming years. This article endeavors to explore that scope to guide any judge or practitioner who finds himself or herself in such a dispute.

2. SOVEREIGN Immunity Generally and *Miller*

Sovereign immunity is "jurisdictional in nature" and "deprives courts of the power to hear suits against the United States absent Congress's express consent."[7] Congressional consent must be "unequivocally expressed in the text of a relevant statute."[8] The clear textual waiver rule ensures that Congress has specifically considered sovereign immunity and has intentionally legislated on the matter.[9] The party suing the federal government has the "high" burden of showing an unequivocally expressed congressional waiver of sovereign immunity.[10]

Federal sovereign immunity is a judge-made doctrine originating from English law.[11] The Supreme Court's reasons for embracing the doctrine of sovereign immunity "have never been entirely clear."[12] Originally, the only reason given for sovereign immunity was tradition; namely, that sovereign immunity had "always been treated as an established doctrine."[13] The Supreme Court later elaborated as follows:

> The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants. A sense of justice has brought a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen.[14]

Relevant to the question of sovereign-immunity waiver for bankruptcy purposes is § 106(a), which abrogates the sovereign immunity of governmental units regarding certain sections of the Bankruptcy Code.[15] Specifically, § 106(a) provides, in relevant part, as follows:

> Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

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[7] *Miller*, 604 U.S. at 527.
[8] *Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 768 (9th Cir. 2018) (internal quotation marks omitted).
[9] *Id.* at 768-69.
[10] *Hajro v. U.S. Citizenship & Immigration Servs.*, 811 F.3d 1086, 1101 (9th Cir. 2016); *Eiselin v. USCIS San Diego*, No. 23-CV-1961 JLS (AHG), 2024 U.S.Dist.LEXIS 30785, at *4 (S.D. Cal. Feb. 22, 2024).
[11] *See* SARAH L. BRINTON, Three-Dimensional Sovereign Immunity, 54 SANTA CLARA LAW REVIEW 237, 242 (2014). Ironically, English law did not protect its sovereign from suit "in the ways traditionally thought." *Id.* at 242 n.12 (collecting authority). In the United States, meanwhile, the people are the sovereign, yet the federal government invokes sovereign immunity against its citizens. *Id.* at 238.
[12] JOHN PAUL STEVENS, Is Justice Relevant?, 114 U.S.A. 1837, 1839 (2020).
[13] *Id.* (citing *Cohens v. Virginia*, 19 U.S. 264 (1821)).
[14] *United States v. Shaw*, 309 U.S. 495, 500-01 (1940) (citations omitted).
[15] 2 COLLIER ON BANKRUPTCY ¶ 106.04 (Richard Levin & Henry J. Sommer eds., 16th ed.).

> (1) Sections . . . 544, 545, 546, 547, 548, 549, 550, 551, . . . 553, . . . [and] 724 . . . of this title.

At first glance, § 106(a) looks like an unequivocal waiver of federal sovereign immunity regarding § 544(b) claims in their entirety. In fact, multiple courts had so held.[16] But, in *Miller*, the Supreme Court held:

> Section 106(a) of the Bankruptcy Code abrogates sovereign immunity for the federal cause of action created by § 544(b). It does not take the additional step of abrogating sovereign immunity for whatever state-law claim supplies the "applicable law" for a trustee's § 544(b) claim.[17]

Miller arose from fraudulent-transfer actions against the United States. There, two shareholders of All Resort Group transferred approximately $145,000 in company funds in June 2014 to pay their personal income-tax liability.[18] All Resort Group filed bankruptcy in April 2017, and the United States Trustee appointed David L. Miller as the chapter 7 trustee[19] upon conversion of the case from chapter 11 to chapter 7.[20] The Trustee filed an action against the United States under § 544(b) to avoid the 2014 tax payments, invoking the Utah Uniform Fraudulent Transfer Act[21] as the source of "applicable law."[22] The parties cross-moved for summary-judgment regarding whether sovereign immunity precluded the Trustee from using § 544(b) to recover payments made to the Internal Revenue Service.[23]

The United States conceded that the Trustee had proved all the elements of his § 544(b) and UUFTA claim, except for the element that there be an actual creditor who could avoid the transfers at issue.[24] According to the United States, there was no actual creditor because the sovereign-immunity defense would bar any suit by a creditor against the United States under the

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[16] *See United States v. Miller*, 604 U.S. 518, 526 (2025) (noting that the bankruptcy court, district court, and Tenth Circuit Court of Appeals had all found § 106(a) to constitute an unequivocal waiver of sovereign immunity regarding § 544 claims). The Ninth Circuit and Fourth Circuit had also previously determined that § 106(a)(1)'s waiver applied to the underlying "applicable law." *Zazzali v. United States (In re DBSI, Inc.)*, 869 F.3d 1004, 1013 (9th Cir. 2017) (holding that § 106(a)'s waiver extended to an Idaho state-law cause of action under § 544(b)(1); *In re Yahweh Ctr., Inc.*, 27 F.4th 960 (4th Cir. 2022) (holding in the alternative that § 106(a)'s waiver extended to a North Carolina state-law cause of action under § 544(b)(1)). The Seventh Circuit, by contrast, held that it did not. *In re Equip. Acquisition Res., Inc.*, 742 F.3d 743 (7th Cir. 2014) (holding that § 106(a)'s waiver did not extend to an Illinois state-law cause of action under § 544(b)(1)).

[17] *Miller*, 604 U.S. at 539.

[18] *Id.* at 525.

[19] Chapter 7 trustee David L. Miller shall hereafter be referred to as the "Trustee."

[20] *Miller v. United States (In re All Resort Grp., Inc.)*, 617 B.R. 375, 379 (Bankr. D. Utah 2020), *rev'd*, 604 U.S. 518 (2025).

[21] The Utah Uniform Fraudulent Transfer Act, Utah Code § 25-6-6 et seq., shall hereafter be referred to as the "UUFTA."

[22] *In re All Resort Grp., Inc.*, 617 B.R. at 379-80. The Trustee also brought a § 548(a) fraudulent transfer claim, but the transfers fell outside of the two-year lookback period for § 548 claims. *Id.*; *see also* 11 U.S.C. § 548(a)(1) (providing a two-year lookback period). The UUFTA, by contrast, provides that a fraudulent transfer claim must be brought "no later than four years after the transfer was made or the obligation was incurred." Utah Code § 25-6-305.

[23] *In re All Resort Grp., Inc.*, 617 B.R. at 379.

[24] *Id.* at 382.

UUFTA to recover the tax payments.[25] The Trustee contended that § 106(a)(1) abrogated sovereign immunity in the bankruptcy context.[26]

The bankruptcy court began with the "language of the statue itself," noting the Supreme Court's directive, that where "the statute's language is plain, the sole function of the courts is to enforce it according to its terms."[27] And, according to the bankruptcy court, "the plain text of § 106(a)(1) unequivocally abrogates sovereign immunity as to the underlying state law cause of action."[28] The bankruptcy court highlighted, for instance, that § 106(a)(1) does not distinguish between § 544(a) and (b), and that § 106(a)(1) contains "no exceptions, qualifiers, or carve-outs in its language."[29] And, the bankruptcy court found that the waiver of sovereign immunity in § 106(a) "remove[d] the ability of a governmental unit to interpose immunity as a defense to the underlying state law cause of action when a bankruptcy trustee asserts that cause of action standing in the actual creditor's shoes."[30] Because it was undisputed that the Trustee could fulfill the actual creditor requirement, but for a sovereign-immunity defense which the bankruptcy court found § 106(a) abrogated, the bankruptcy court granted the Trustee's motion for summary judgment and denied the United States's motion for summary judgment.[31]

The United States appealed, and the U.S. District Court for the District of Utah affirmed "[f]or the reasons set forth in the bankruptcy court's memorandum decision and order."[32]

The United States appealed again, and the Tenth Circuit affirmed.[33] The Tenth Circuit reasoned that "§ 106(a)(1) clearly expresses Congress's intent to abolish the Government's sovereign immunity in an avoidance proceeding arising under § 544(b)(1), regardless of the context in which the defense arises."[34] The Tenth Circuit further highlighted that § 106(a)(2) allows a court to "hear and determine any issue arising with respect to the application of" § 544.[35] According to the Tenth Circuit, § 106(a)(2) authority would be "substantially curtailed" if sovereign immunity precluded a bankruptcy court from considering whether a trustee had satisfied the substantive elements of an underlying state-law cause of action invoked pursuant to § 544(b)(1).[36] The Tenth Circuit further addressed the Seventh Circuit's holding in *In* re *Equipment Acquisition Resources, Inc.*,[37] that banned actions under § 544(b)(1) to set aside avoidable transfers against a "governmental entity" absent a second waiver of sovereign immunity by way of Congress or a state legislature as to the underlying state-law cause of action.[38] The Tenth Circuit explained this

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[25] *Id.* at 382-83.
[26] *Id.*
[27] *Id.* at 384 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989)) (internal quotation marks omitted).
[28] *Id.* at 386.
[29] *Id.* at 386-88.
[30] *Id.* at 389.
[31] *Id.* at 393-94.
[32] *United States v. Miller*, No. 2:20-CV-00248-BSJ, 2021 U.S.Dist.LEXIS 171247 (D. Utah Sept. 8, 2021), *rev'd*, 604 U.S. 518 (2025).
[33] *Miller v. United States*, 71 F.4th 1247, 1252 (10th Cir. 2023), *rev'd*, 604 U.S. 518 (2025).
[34] *Id.* at 1253.
[35] *Id.* at 1253-54.
[36] *Id.* at 1254.
[37] *In re Equip. Acquisition Res., Inc.*, 742 F.3d 743 (7th Cir. 2014).
[38] *Miller*, 71 F.4th at 1254.

holding by the Seventh Circuit's "hypothesi[s]," that an abrogation of sovereign immunity as to § 544(b) and the underlying state-law claims could render "federal tax revenue . . . more vulnerable to unexpected recovery actions" by extending the applicable statute of limitations (typically four years) or relaxing criteria for what constitutes an avoidable transfer under state law.[39] But, the Tenth Circuit dismissed such policy rationales that are "not based in the text of the statute."[40] Based on the conclusion, that § 106(a) waives the United States's sovereign immunity as to both a § 544(b)(1) claim and the underlying state-law cause of action, the Tenth Circuit affirmed the decisions of the bankruptcy and district courts.[41]

The United States filed a petition for writ of certiorari, which the Supreme Court granted to resolve the conflict regarding whether § 106(a) abrogates sovereign immunity with respect to a state-law claim that supplies the "applicable law" for a trustee's § 544(b) claim.[42]

The Supreme Court highlighted § 544(b)(1)'s requirement, that the transfer be "voidable under applicable law."[43] The Trustee and the United States did not dispute that, outside of bankruptcy, the United States could invoke a sovereign immunity defense to bar any lawsuit seeking to invalidate a federal tax payment under a state's fraudulent-transfer law.[44] The Court indicated that § 106(a) is a "jurisdiction-creating provision" rather than a "liability-creating provision" and thus did not find that § 106(a)'s grant of jurisdiction by waiving immunity expanded the Trustee's § 544(b) avoidance powers.[45] The Court noted that § 106(a)'s language, that it does not "create any substantive claim for relief or cause of action not otherwise existing" under some other source of law.[46] And, the Court noted that § 544(b)'s actual-creditor requirement "restricts the universe of transactions a trustee can invalidate" and "is unique to § 544(b)."[47] According to the Court, the actual-creditor requirement "reflects a deliberate congressional choice to tie the trustee's rights under subsection (b) to the rights of an actual creditor under 'applicable law.'"[48]

The Court did not find the Trustee's argument, that § 106(a)(1)'s use of the phrase "with respect to" requires a broad reading of sovereign-immunity waiver, persuasive.[49] Rather, the Court read these words in their context, which it found "cuts decidedly against" the Trustee's broad reading because sovereign-immunity waivers must be construed narrowly.[50] The Court did not agree with the Trustee, that § 106(a)'s amendment in 1994 to add 59 specific provisions, including § 544, waived sovereign immunity, because "no amount of legislative history can supply a waiver that is not clearly evident from the language of the statute."[51]

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[39] *Id.* at 1254.
[40] *Id.* at 1254-55.
[41] *Id.* at 1256.
[42] *United States v. Miller*, 604 U.S. 518, 527 (2025).
[43] *Id.* at 522.
[44] *Id.* at 528.
[45] *Id.* at 529.
[46] *Id.* (citing 11 U.S.C. § 106(a)(5)).
[47] *Id.* at 531.
[48] *Id.*
[49] *Id.* at 532-33.
[50] *Id.* at 533-34.
[51] *Id.* at 534 (citation and internal quotation marks omitted).

The Court found the argument unavailing that a sovereign-immunity bar to state avoidance claims would "blunt the impact of Congress's decision to include § 544" on § 106(a)'s list.[52] According to the Court, trustees might still prevail against the government under § 544(a).[53] The Court did not agree that § 106(a) should give substantive effect to all § 544's subsections, because many of the other 58 provisions listed in § 106(a) "plainly do not implicate sovereign immunity at all."[54] And, the Court flagged that if a state had subjected itself to potential liability under its own fraudulent-transfer statutes, § 106(a) would grant federal courts jurisdiction to hear § 544(b) suits against that state.[55] As such, the Court reversed the decision of the Tenth Circuit and held that § 106(a) does not abrogate sovereign immunity for the state-law claim that supplies the "applicable law" for a trustee's § 544(b) claim.[56]

3. DISCUSSION of the Supreme Court's Decision

Following the Supreme Court's decision in *Miller*, it is now clear that trustees may not bring actions under § 544(b)(1) to set aside avoidable transfers against a governmental unit absent a second waiver of sovereign immunity by Congress or a state legislature as to the underlying state-law cause of action. And, because Congress has not waived federal sovereign immunity regarding state-law fraudulent transfer claims, bankruptcy courts lack jurisdiction over any actions against the United States under § 544(b) and an underlying state avoidance statute. This article will first argue that the Supreme Court reached the conclusion it did with an eye towards practical administration at a time when the specter of DOGE cuts was haunting the federal workforce. It will then explore the further ramifications of *Miller* beyond the parameters of state-law fraudulent transfer actions against the United States pursuant to § 544(b).

A. THE Practical Administration Purpose of the Supreme Court's Construction of Section 106(a)

As always, any analysis of the meaning of a statute must begin "with the language of the statute itself."[57] Where "the statute's language is plain, the sole function of the courts is to enforce it according to its terms."[58] As the lower courts in *Miller* and the Ninth Circuit in *DBSI* all

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[52] *Id.* at 535.
[53] *Id.* at 536.
[54] *Id.* at 536-37.
[55] *Id.* at 537.
[56] *Id.* at 539. Justice Gorsuch issued a dissenting opinion, expressing his reasoning as follows:

> As I see it, those three provisions [11 U.S.C. § 106(a)(1), 11 U.S.C. § 544(b)(1), and Utah's fraudulent transfer statute] play out this way. Under the Utah statute, a transfer is "voidable" if, after a creditor's claim arose against the debtor, the debtor (1) "made the transfer" (2) "without receiving a reasonably equivalent value in exchange," and (3) "was insolvent at the time." Notably, no one before us disputes that these conditions are satisfied here and a good fraudulent-transfer claim exists. [Citation.] Thus, under "applicable law," the relevant transfers are "voidable," and the bankruptcy trustee can use §544(b)(1) to set them aside. That remains true even though the trustee must sue the United States to void the relevant transfers, because §106(a)(1) bars the government from raising a sovereign-immunity defense in the trustee's action.

Id. at 540 (Gorsuch, J., dissenting).
[57] *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989).
[58] *Id.* (internal quotation marks omitted).

correctly held, the language of § 106(a) is plain and abrogates sovereign immunity regarding § 544(b) claims. The Supreme Court even acknowledged that the Trustee's argument to this effect had "traction."[59] But, the Supreme Court dismissed this argument based on its observations that:

(1) Even if § 106(a) does not enable trustees to prevail against the Government under § 544(b), they might still prevail against the Government under §544(a); and

(2) Many of the other Bankruptcy Code sections listed in § 106(a) "plainly do not implicate sovereign immunity at all."[60]

The problem with the Supreme Court's logic is that § 544(b) plainly does implicate sovereign immunity, and Congress enacted § 544(b)(1) before it enacted § 106(a)(1),[61] yet Congress did not exclude § 544(b) from its list in § 106(a)(1). As the Tenth Circuit highlighted, it is "always appropriate to assume our elected representatives . . . know the law."[62] Further, as the bankruptcy court in *Miller* found, the inclusion of certain subsections in § 106(a) to which sovereign immunity cannot apply evinces Congress's intent that the waiver be as broad as possible.[63]

The Supreme Court also flagged that Congress amended § 106(a) in 1994 with the "narrow aim" of overturning two decisions that did not involve § 544(b): *United States* v. *Nordic Village, Inc.*[64] and *Hoffman* v. *Conn. Dep't of Income Maint.*[65] The Court construed this "narrow aim" to mean that Congress merely sought to "make section 106 conform to the Congressional intent of the Bankruptcy Reform Act of 1978;" namely, to provide a "limited waiver of sovereign immunity in bankruptcy cases."[66] But, the Court did not clearly explain why, if the aim of § 106(a)'s amendment was as "narrow" as it suggests, Congress added a sovereign-immunity waiver to § 106(a) for 59 specific provisions of the Bankruptcy Code (including § 544) in its 1994 amendment to § 106(a).[67]

So why, then, did the Supreme Court find that § 106(a)(1) does not abrogate sovereign immunity regarding § 544(b) and the underlying state-law claims when it plainly does? The answer likely lies in a theory proffered by the Tenth Circuit in its *Miller* decision. The Tenth Circuit explained the Seventh Circuit's earlier holding, that § 106(a) did not abrogate federal sovereign immunity regarding an underlying state-law claim, as a policy decision to conserve tax funds.[68] Such an application of sovereign immunity would be consistent with the doctrine's accepted purpose of practical administration.[69]

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[59] *Miller*, 604 U.S. at 535.
[60] *Id.* at 535-37.
[61] *Miller v. United States*, 71 F.4th 1247, 1255 (10th Cir. 2023).
[62] *Id.* (citation omitted).
[63] *Miller v. United States (In re All Resort Grp., Inc.)*, 617 B.R. 375, 387 (Bankr. D. Utah 2020).
[64] *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992).
[65] *Hoffman* v. *Conn. Dep't of Income* Maint. 492 U.S. 96 (1989).
[66] *United States v. Miller*, 604 U.S. 518, 535 (2025).
[67] *Id.* at 534.
[68] *Miller v. United States*, 71 F.4th 1247, 1254 (10th Cir. 2023).
[69] *United States v. Shaw*, 309 U.S. 495, 500-01 (1940).

Although not mentioned in the Supreme Court's analysis, practical administration was an important consideration when the Court issued its decision on March 26, 2025. This timing came in the midst of "mass firings and dramatic disruptions to federal programs" prompted by the U.S. Department of Government Efficiency[70] in early 2025.[71] DOGE sought, inter alia, "mass head-count reductions across the federal bureaucracy."[72] The *Miller* decision, which limits the statute of limitations for fraudulent transfer claims against the United States to two years rather than four, will no doubt reduce the volume of litigation against the United States and the required payouts on fraudulent-transfer claims. The expansion of sovereign immunity came at an opportune time when the federal government was undergoing an historic reduction to its workforce.

Ultimately, whether the Supreme Court was right or wrong on the law, its decision is now final and binding on all lower courts.[73] It is not unthinkable that Congress will amend § 106(a) to clearly waive federal sovereign immunity as to state avoidance statutes nested within § 544(b); as noted above, the 1994 amendments to § 106, in fact, were enacted to overturn two Supreme Court's decisions. But, unless and until Congress intervenes,[74] bankruptcy professionals will have to understand the implications of *Miller*. Exactly what these implications are will be discussed in the following sections.

B. THE Effect of *Miller* on Other Avoidance Provisions of the Bankruptcy Code

It is clear that post-*Miller*, sovereign immunity deprives bankruptcy courts of jurisdiction over actions by trustees to avoid transfers against federal governmental units pursuant to § 544(b) and an underlying state avoidance statute. But, § 544(b) is not the only basis for avoidance of a transfer by a trustee. Rather, there are at least seven other provisions in the Bankruptcy Code that allow for avoidance of a transfer against governmental units:

- § 544(a) (invalid against the trustee as judicial lien creditor, creditor with an unsatisfied writ of execution, bona fide purchaser of real property) and § 544(b) (as successor to rights of an actual, unsecured creditor under applicable nonbankruptcy);
- § 545 (invalid statutory liens);
- § 547 (preferences);
- § 548 (fraudulent transfers and obligations);

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[70] The United States Department of Government Efficiency, i.e., DOGE, shall hereafter be referred to as "DOGE."

[71] *See generally Citizens for Resp. & Ethics in Wash. v. United States DOGE Serv.*, 769 F.Supp.3d 8, 11 (D.D.C. 2025) (discussing the DOGE cuts). DOGE's stated purpose was "to dismantle Government Bureaucracy, slash excess regulations, cut wasteful expenditures, and restructure Federal Agencies." *Id.*

[72] *Id.* at 12 (citation omitted).

[73] *See generally Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

[74] Any state avoidance statute purporting to waive federal sovereign immunity would be ineffective, given the well-established requirement of clear Congressional waiver of sovereign immunity. *See, e.g.*, *United States v. Miller*, 604 U.S. 518, 527 (2025) (noting that sovereign immunity is "jurisdictional in nature" and "deprives courts of the power to hear suits against the United States absent Congress's express consent"); *see also Zazzali v. Swenson (In re DBSI, Inc.*), No. 10-54649(PJW), 2011 Bankr.LEXIS 791, at *12 (Bankr. D. Del. Feb. 11, 2011) (noting that neither the California legislature nor any state would have the authority to abrogate the sovereign immunity of the United States as a defense to a creditor claim under the state's version of the Uniform Fraudulent Transfer Act or otherwise) (citation omitted).

- § 549 (postpetition transfers);
- § 553(b) (setoffs within 90-day prepetition period); and
- § 724(a) (penalties secured by lien).[75]

This article will address the impact of *Miller* on each of these provisions.

i. SECTION 544

In *Miller*, the Supreme Court noted that "even if § 106(a) does not enable trustees to prevail against the [federal government] under §544(b), they might still prevail against the [federal government] under §544's other subprovision—subsection (a)."[76] This is because unlike § 544(b), § 544(a) has no actual-creditor requirement.[77]

In addition, even under § 544(b), § 106(a) grants federal courts jurisdiction to hear § 544(b) claims brought against state governments if the state has subjected itself to potential liability under its fraudulent transfer statute.[78] The implications of *Miller* regarding state and local governments will be discussed in more detail below.

ii. SECTION 545

Section 545 of the Bankruptcy Code is the "only provision pursuant to which a trustee may avoid certain statutory liens," including tax liens.[79] Fortunately for bankruptcy trustees, then, there should be no argument that the Supreme Court's *Miller* decision affects § 545 actions.

Like § 544(a), 11 U.S.C. § 545 imposes no actual-creditor requirement.[80] Further, § 106(a)(1) expressly lists § 545 and thus abrogates sovereign immunity regarding § 545 claims. Collier, in fact, recognizes that § 106(a) permits § 545 suits against governmental units.[81] Accordingly, any attempt by a governmental unit to invoke sovereign immunity in defense to a § 545 claim should fail.

iii. SECTIONS 547, 548, and 549

Although the Trustee in *Miller* brought § 548(a) claims against the defendants in addition to his § 544(b)/UUFTA claims, the § 548(a) claims were not at issue because the transfers fell before § 548(a)(1)'s two-year lookback period. But, what if the transfers had occurred within two years before the petition date?

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[75] *See* 5 COLLIER ON BANKRUPTCY ¶ 550.02 (Richard Levin & Henry J. Sommer eds., 16th ed.) (listing provisions under which a transfer might be avoided).
[76] *Miller*, 604 U.S. at 536.
[77] *Id.*
[78] *Miller*, 604 U.S. at 537.
[79] 5 COLLIER ON BANKRUPTCY ¶ 545.01 (Richard Levin & Henry J. Sommer eds., 16th ed.).
[80] *See Miller*, 604 U.S. 531 (noting that § 544(b)'s actual-creditor requirement "is unique to § 544(b)").
[81] 2 COLLIER ON BANKRUPTCY ¶ 106.04[1] (Richard Levin & Henry J. Sommer eds., 16th ed.) (noting that § 106(a) permits suits against governmental units to, inter alia, avoid liens).

The Supreme Court's decision in *Miller* hinges on § 544(b)'s requirement that the transfer be "voidable under applicable law by a creditor holding an unsecured claim." Under the Supreme Court's ruling, a party cannot maintain a § 544(b) fraudulent transfer claim against the United States because Congress has not waived sovereign immunity regarding the state-law claims nested within § 544(b)'s "applicable law" clause.[82] Sections 547, 548, and 549, in contrast, contain no such requirement.[83] Further, § 106(a)(1) contains an express waiver of sovereign immunity regarding §§ 548, 550, and 551, which are federal claims.[84] As such, *Miller* does not disturb a trustee's §§ 547, 548, and 549 claims to avoid preference, two-year, and postpetition transfers against the United States.

iv. SECTION 553(b)

Section 553(b) is a "direct avoidance provision" that provides that a trustee may recover from any creditor the amount of a prepetition setoff to the extent that the setoff permitted the creditor to recover more than the creditor would have recovered if the setoff had occurred at certain benchmark points in time.[85] Specifically, pursuant to § 553(b):

> **(1)** Except with respect to a setoff of a kind described in section 362(b)(6), 362(b)(7), 362(b)(17), 362(b)(27), 555, 556, 559, 560, 561, 365(h), 546(h), or 365(i)(2) of this title, if a creditor offsets a mutual debt owing to the debtor against a claim against the debtor on or within 90 days before the date of the filing of the petition, then the trustee may recover from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of—
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> > **(A)** 90 days before the date of the filing of the petition; and
> >
> > **(B)** the first date during the 90 days immediately preceding the date of the filing of the petition on which there is an insufficiency.
>
> **(2)** In this subsection, "insufficiency" means amount, if any, by which a claim against the debtor exceeds a mutual debt owing to the debtor by the holder of such claim.[86]

Nothing in § 553(b) requires that a transfer be "voidable under applicable law by a creditor holding an unsecured claim," and *Miller*'s reasoning does not apply to § 553(b) claims.[87]

v. SECTION 724(a)

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[82] *Miller*, 604 U.S. at 532 .
[83] *Compare* 11 U.S.C. § 544(b)(1), *with* 11 U.S.C. § 547(b), 11 U.S.C. § 548(a)(1), *and* 11 U.S.C. § 549(a); *see also Miller*, 604 U.S. at 531 (noting that § 544(b)'s actual creditor requirement "is unique to § 544(b)").
[84] *See also* 2 COLLIER ON BANKRUPTCY ¶ 106.04[1] (Richard Levin & Henry J. Sommer eds., 16th ed.) (recognizing that § 106(a) permits suits against governmental units to, inter alia, recover preferences and fraudulent transfers); *cf. Miller*, 604 U.S. at 532 (noting that § 106(a) abrogates sovereign immunity for the federal cause of action created by § 544(b) but not for whatever state-law claim supplies the "applicable law" for the § 544(b) claim); *Miller v. United States (In re All Resort Grp., Inc.)*, 617 B.R. 375, 385-86 (Bankr. D. Utah 2020) (distinguishing §§ 547, 548, and 549 claims, which are entirely federal law claims, from § 544(b) claims based on state avoidance statutes).
[85] 5 COLLIER ON BANKRUPTCY ¶ 553.09[2] (Richard Levin & Henry J. Sommer eds., 16th ed.).
[86] 11 U.S.C. § 553(b).
[87] *See Miller*, 604 U.S. at 531 (noting that § 544(b)'s actual-creditor requirement "is unique to § 544(b)").

Section 724(a) "empowers the trustee to avoid liens that secure claims listed in section 726(a)(4) related to claims for fines, penalties or forfeitures, or other non-compensatory relief."[88] It provides: "The trustee may avoid a lien that secures a claim of a kind specified in section 726(a)(4) of this title."[89] Section 726(a)(4) claims are:

> any allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim.[90]

Section 724(a) is intended to protect innocent creditors from the consequences of a debtor's wrongdoing.[91]

Section 724(a) is particularly germane to the issue of sovereign immunity because taxing authorities may impose penalties subject to § 724(a) avoidance. As the Supreme Court has noted:

> Tax penalties are imposed at least in part as punitive measures against persons who have been guilty of some default or wrong. Enforcement of penalties against the estates of bankrupts, however, would serve not to punish the delinquent taxpayers, but rather their entirely innocent creditors.[92]

Fortunately for chapter 7 trustees and creditors, then, § 724(a) does not impose any requirement that a lien be "voidable under applicable law," and *Miller* should not provide a sovereign-immunity defense to governmental units against § 724(a) actions.[93]

C. POTENTIAL Workaround to *Miller*

The Supreme Court, in *Miller*, identified a potential workaround to its decision:

> Finally, we decline respondent's invitation to affirm on other grounds. As an alternative basis for ruling in his favor, respondent proposes a novel reading of § 544(b) that would purportedly allow a trustee to set aside a federal tax payment without ever triggering the Federal Government's sovereign immunity. Per that reading, the trustee could satisfy the actual-creditor requirement by showing that "applicable" state law would permit a creditor to void the tax payment by suing someone other than the United States. Respondent claims that he can do that here

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[88] 6 COLLIER ON BANKRUPTCY ¶ 724.02 (Richard Levin & Henry J. Sommer eds., 16th ed.).
[89] 11 U.S.C. § 724(a).
[90] 11 U.S.C. § 726(a)(4).
[91] 6 COLLIER ON BANKRUPTCY ¶ 724.02[7] (Richard Levin & Henry J. Sommer eds., 16th ed.).
[92] *Simonson v. Granquist*, 369 U.S. 38, 40-41 (1962); *see also Burden v. United States*, 917 F.2d 115, 117 (3d Cir. 1990) (noting that *Simonson* has been superseded by statute); *In re Brentwood Outpatient, Ltd.*, 134 B.R. 267, 271 (Bankr. M.D. Tenn. 1991) (same).
[93] *See United States v. Miller*, 604 U.S. 518, 531 (2025) (noting that § 544(b)'s actual-creditor requirement "is unique to § 544(b)").

> because Utah law would (in theory) permit an All Resort Group creditor to void the 2014 tax payments by suing the two shareholders who orchestrated those payments, neither of whom is protected by sovereign immunity.[94]

The Court "express[ed] no view on the merits of this argument" because it "turn[ed] on readings of both Utah law and § 544(b) that no other court has ever considered," because the Trustee had not raised the issue below, and because the issue had not been adequately briefed and argued.[95] As of the time of publication of this article, it remains to be seen whether this argument, in fact, offers a workaround to *Miller*.

4. THE Effect of *Miller* on State Sovereign Immunity

The analysis of *Miller*'s effect on state sovereign immunity is slightly different than the analysis regarding federal sovereign immunity. The Eleventh Amendment erects a general bar against federal lawsuits brought against a state.[96] It provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[97] The Eleventh Amendment bars suits which seek either damages or injunctive relief against "a state, an 'arm of the state,' its instrumentalities, or its agencies."[98]

State sovereign immunity under the Eleventh Amendment is "not absolute."[99] Rather, there are three exceptions to the rule:

(1) Congress can abrogate this immunity if it (i) makes its intention to abrogate unmistakably clear in the language of the statute" and (ii) "acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment;"[100]

(2) A state may waive its Eleventh Amendment immunity by consenting to suit;[101] and

(3) Under the *Ex parte Young* doctrine, immunity does not apply when the plaintiff chooses to sue a state official in his or her official capacity for prospective injunctive relief.[102]

Because a suit to avoid and recover transfers does not seek prospective injunctive relief, the third exception to state sovereign immunity, based on the *Ex parte Young* doctrine, does not apply. This article will thus discuss the waiver of state sovereign immunity under the first two

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[94] *Id.* at 538.
[95] *Id.* at 538 & n.7.
[96] *Steshenko v. Gayrard*, 70 F.Supp.3d 979, 988 (N.D. Cal. 2014).
[97] U.S. Const. amend. XI.
[98] *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995); *accord Kohn v. State Bar*, 119 F.4th 693, 696 (9th Cir. 2024) (noting that the Eleventh Amendment immunizes states from suit in federal court by citizens and noncitizens alike).
[99] *Steshenko*, 70 F.Supp.3d at 988.
[100] *Kohn*, 119 F.4th at 696; *Steshenko*, 70 F.Supp.3d at 988.
[101] *Steshenko*, 70 F.Supp.3d at 988.
[102] *Id.* (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73 (1996)).

exceptions noted above. It will then discuss special applications regarding arms, instrumentalities, and agencies of the state.

A. CONGRESSIONAL Waiver of State Sovereign Immunity

In *Miller*, the Supreme Court highlighted that § 106(a) abrogates sovereign immunity not just for the federal government, but for any "governmental unit," which 11 U.S.C. § 101(27) defines to include any "State."[103] The Court elaborated that at the time Congress enacted § 106(a), some states had chosen to subject themselves to potential liability under their own fraudulent-transfer statutes.[104] According to the Supreme Court, § 106(a) grants federal courts jurisdiction to hear § 544(b) suits against any such states.[105] Implicit in this discussion is a finding that if a state has not expressly waived sovereign immunity regarding its own avoidance statutes, § 106(a) does not constitute such a waiver.

If, however, Congress abrogated a governmental unit's sovereign immunity in § 106(a), that abrogation applies to the federal government and to states equally.[106] Thus, for all avoidance statutes other than § 544(b), the analysis will be the same as set forth above regarding federal sovereign immunity. In other words, if Congress waived sovereign immunity regarding a particular provision of the Bankruptcy Code in § 106(a), that waiver will apply to the federal government and to states alike.

B. STATE Waiver of State Sovereign Immunity

States may waive their own sovereign immunity in two ways. The first and most straightforward is an express legislative waiver. The second is a waiver by conduct that is incompatible with preservation of the immunity. Each possibility will be discussed in detail as follows.

i. LEGISLATIVE Waiver

As discussed above, in *Miller*, the Supreme Court noted that § 106(a) grants federal courts jurisdiction to hear § 544(b) suits against any states that had chosen to subject themselves to potential liability under their own fraudulent-transfer statutes.[107] Any party suing a state under § 544(b) and the state's fraudulent-transfer act should therefore consult state law to determine whether there has been a legislative waiver of Eleventh Amendment protections.

The California Uniform Voidable Transactions Act, for instance, does not purport to establish a cause of action against a governmental taxing authority for the refund of taxes.[108] And, the California Constitution expressly requires that actions for tax refunds be brought in a matter

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[103] *United States v. Miller*, 604 U.S. 518, 537 (2025).
[104] *Id.* (citing Ill. Comp. Stat., ch. 705, § 505/8(a); N. Y. Ct. Clms. Act Law Ann. § 8; Ohio Rev. Code Ann. § 2743.02(A)).
[105] *Id.*
[106] *See id.* (noting that § 106(a) abrogates sovereign immunity not just for the federal government, but for any "governmental unit," which 11 U.S.C. § 101(27) defines to include any "State").
[107] *Id.*
[108] *See* Cal. Civ. Code § 3439 et seq.

prescribed by the state legislature.[109] Accordingly, California has not consented to potential liability under the California Uniform Voidable Transactions Act.[110]

ii. WAIVER by Conduct

In the Ninth Circuit, legislation is not the only way for a state to waive its Eleventh Amendment immunity. Rather, the Ninth Circuit has held that a state may waive its Eleventh Amendment immunity "by conduct that is incompatible with an intent to preserve that immunity."[111] The court reasoned that a party knows whether it purports to be an "arm of the state" and can disclose early in the proceedings whether it objects to having the matter heard in federal court.[112] Timely disclosure prevents waste of resources and the "improper manipulation of the judicial process."[113] In *Hill*, the Blind Industries & Services of Maryland[114] "knew that [the] action had been filed in federal court, the identity of the plaintiff, the particular matters at issue, and the relief sought," yet it did not assert its Eleventh Amendment sovereign immunity defense until trial.[115] To prevent a "virtual fraud on the federal court and opposing litigants," the Ninth Circuit found that the BISM had waived its sovereign immunity defense.[116] In 2025, the Ninth Circuit reaffirmed its holding in *Hill* on the basis that a state's sovereign immunity is a "personal privilege which it may waive at [its] pleasure."[117]

Under *Hill*, a state governmental unit in the Ninth Circuit must timely raise a sovereign immunity defense to avoid an argument by the trustee that the state waived this protection. Any state sued in an avoidance action should therefore promptly assert sovereign immunity in a responsive pleading. If a state fails to do so, it risks finding itself in a dispute regarding whether it has waived its Eleventh Amendment protections.[118] And, while trustees should not count on a state waiving its Eleventh Amendment protections, in the event trustees find themselves in the

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[109] CAL. CONST. art. XIII, § 32; *see also Woosley v. State of Cal.*, 838 P.2d 758, 792 (Cal. 1992) (holding that the California Constitution precludes the court from expanding the methods for seeking tax refunds expressly provided by the legislature).
[110] The foregoing analysis is based on argument of the IRS in a motion to dismiss filed in *Sharp v. United States (In re SK Foods, LP)*, Case No. 10-02117-D, ECF No. 9 (Bankr. E.D. Cal. May 5, 2010).
[111] *Hill v. Blind Indus. & Servs.*, 179 F.3d 754, 758 (9th Cir. 1999). There is no implied waiver of federal sovereign immunity. *Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 768 (9th Cir. 2018). Rather, as noted above, federal sovereign immunity is "jurisdictional in nature" and "deprives courts of the power to hear suits against the United States absent Congress's express consent." *Miller*, 604 U.S. at 527.
[112] *Hill*, 179 F.3d at 758.
[113] *Id.*
[114] The Blind Industries & Services of Maryland shall hereafter be referred to as the "BISM."
[115] *Hill*, 179 F.3d at 758.
[116] *Id.* at 758, 763.
[117] *California ex rel. Bonta v. Del Rosa*, 158 F.4th 1066, 1075 (9th Cir. 2025) (quoting *Clark v. Barnard*, 108 U.S. 436 (1883)) (brackets in original).
[118] In *McHugh v. Illinois DOT*, the Seventh Circuit held that when it applies, the Eleventh Amendment deprives federal courts of jurisdiction over claims against immune defendants. Thus, according to the Seventh Circuit, Eleventh Amendment immunity "can be raised at any stage of the proceedings," and "failure to raise the immunity as a defense in the district court does not constitute waiver." *McHugh v. Ill. DOT*, 55 F.4th 529, 532 (7th Cir. 2022). States within the Ninth Circuit may therefore have an argument that *Hill* should be overturned as a matter of law. Given that the Ninth Circuit reaffirmed *Hill* as recently as 2025, however, such an argument will likely entail extensive briefing and potentially a Supreme Court decision. Further, although outside the purview of this article, which is written for the *California* Bankruptcy Journal, practitioners in circuits other than the Ninth Circuit should review their circuit's precedent regarding waiver of Eleventh Amendment immunity by conduct.

midst of avoidance litigation against a state that has not yet raised sovereign immunity as a defense,[119] this argument may provide a path to recovery.

C. ARMS, Instrumentalities, and Agencies of the State

As noted above, the Eleventh Amendment bars suits which seek either damages or injunctive relief against "a state, an 'arm of the state,' its instrumentalities, or its agencies."[120]

It is well-established that certain governmental units may invoke Eleventh Amendment protections. For instance, there are several cases holding that the California Franchise Tax Board is an arm of the State of California that enjoys Eleventh Amendment immunity.[121]

For many other governmental units, however, there is no authority regarding whether Eleventh Amendment protections to avoidance claims exist. State sovereign immunity, for example, does not extend to county and municipal governments, unless state law treats them as arms of the state.[122] To determine whether a governmental unit is an arm of the state, courts examine the five factors set forth in *Mitchell v. Los Angeles Community College District*[123]:

(1) whether a money judgment would be satisfied out of state funds;

(2) whether the entity performs central government functions;

(3) whether the entity may sue or be sued;

(4) whether the entity has the power to take property in its own name or only the name of the state; and

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[119] It is conceivable that a state will not have raised sovereign immunity as a defense in avoidance litigation. As discussed above, Ninth Circuit precedent had previously held that § 106(a) waived sovereign immunity regarding both § 544(b) claims and the state avoidance statutes nested within § 544(b) claims. *Zazzali v. United States (In re DBSI, Inc.)*, 869 F.3d 1004 (9th Cir. 2017). Under this holding, states lacked a sovereign immunity defense to § 544(b) avoidance claims in the Ninth Circuit and thus may not have asserted such a defense early in the litigation. Post-*Miller*, an Eleventh Amendment sovereign immunity defense may be available to § 544(b) claims based on state avoidance statutes, but at least in the Ninth Circuit, states will still need to affirmatively raise this defense to avoid waiver.

[120] *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995).

[121] *See Mitchell v. Franchise Tax Bd. (In re Mitchell)*, 209 F.3d 1111, 1114 (9th Cir. 2000) (affirming dismissal of an adversary complaint against the California Franchise Tax Board for lack of jurisdiction based on state sovereign immunity under the Eleventh Amendment); *Torres v. McDonnell*, No. 23-cv-04276-SI, 2023 U.S. Dist. LEXIS 159381, at *15 (N.D. Cal. Sept. 8, 2023) ("The State Franchise Tax Board is a state agency, and thus it is entitled to Eleventh Amendment immunity from suit."); *Abergel v. SSA*, Nos. 1:19-CV-6340 (LLS) & 1:19-CV-6413 (LLS), 2019 U.S. Dist. LEXIS 123455, at *4 (S.D.N.Y. July 24, 2019) ("The California Franchise Tax Board is an arm of the State and as such enjoys Eleventh Amendment immunity."); *Gouch v. Cal. Franchise Tax Bd.*, 2009 U.S. Dist. LEXIS 84023, at *7 (N.D. Ga. Sept. 15, 2009) ("The California Franchise Tax Board is part of the State of California. [Citation.] Therefore, plaintiff's claim for damages is barred by the Eleventh Amendment."); *accord* Cal. Cov. Code § 15700 ("There is in the state government . . . a Franchise Tax Board[.]").

[122] *Sato v. Orange Cty. Dep't of Educ.*, 861 F.3d 923, 928 (9th Cir. 2017); *accord Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994) ("Political subdivisions exist solely at the whim and behest of their state, yet cities and counties do not enjoy Eleventh Amendment immunity.") (internal quotation marks and citations omitted).

[123] *Mitchell v. Los Angeles Community College District*, 861 F.2d 198 (9th Cir. 1988).

(5) The corporate status of the entity.[124]

The party asserting Eleventh Amendment immunity from suit has the initial burden of establishing its status as an arm of the state.[125]

Should a governmental unit raise an Eleventh Amendment defense, there will likely need to be discovery regarding the arm-of-the-state factors (barring on-point precedent making an arm-of-the-state finding for the governmental unit at issue). Litigation of the arm-of-the-state factors may prove complex and expensive, and both trustees suing county and municipal entities and the entities themselves should be aware of the expense and uncertainty involved in such a defense.

5. CONCLUSION

Sovereign immunity is an unpopular doctrine to begin with,[126] and the Supreme Court's holding in *Miller* is not likely to endear the doctrine to any bankruptcy trustees or the creditor bodies they represent. In effect, *Miller* provides a safe harbor to governmental units that have received fraudulent transfers. Whereas § 544(b) and the underlying state avoidance statutes often provide a lookback period of four years, *Miller* limits fraudulent transfer actions against immune governmental units to § 548 with its two-year look back period. *Miller* thus provides governmental units with protections from avoidance claims that are not available to other fraudulent-transfer recipients. In so doing, *Miller* also provides a safe harbor to any parties who paid personal tax liabilities with fraudulently transferred funds. Specifically, a governmental unit may seek to impose liability against the taxpayer for any amounts that are avoided and recovered by a bankruptcy trustee. If the lookback period is limited to two years, the taxpayer who fraudulently transferred assets to satisfy personal tax liability indirectly benefits from the sovereign immunity defense. It is left to Congress and the state legislatures to decide whether they wish to provide governmental units with a sovereign-immunity defense to avoidance actions under § 544(b) and state avoidance statutes, notwithstanding the foregoing consequences of such a defense.

In the meantime, bankruptcy trustees and government defendants to avoidance actions need to understand the implications of *Miller.* In short, the holding of *Miller* is fairly limited. It provides a sovereign immunity defense to the federal government against all actions by bankruptcy trustees under a state avoidance statute nested within a § 544(b) claim. And, it provides the same protections to a state, unless the state has consented to suit under its avoidance laws. In other words, *Miller* limits the lookback period of fraudulent transfer actions to two years against the United States and to two years against states, unless the particular state has consented to a longer lookback period. This holding will certainly preclude avoidance and recovery of certain fraudulent transfers by bankruptcy trustees. And, undoubtedly, the exact parameters of *Miller*

[124] *Sato*, 861 F.3d at 928-29.
[125] *Wright v. Madison Cty. Reg'l Water Dist.*, No. 5:22-CV-5060, 2022 U.S.Dist.LEXIS 214765, at *2-3 (W.D. Ark. Nov. 29, 2022).
[126] *See generally* SARAH L. BRINTON, Three-Dimensional Sovereign Immunity, 54 SANTA CLARA LAW REVIEW 237 (2014) (discussing the "considerable public disfavor" regarding the doctrine of sovereign immunity).

will be litigated in the coming years. In the meantime, this article will serve as a reference regarding *Miller*'s scope.