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EAR vs. DBSI: A Battle Royale Over Sovereign Immunity and 11 U.S.C. § 544(B)(1)

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*EAR vs. DBSI: A BATTLE ROYALE OVER SOVEREIGN
IMMUNITY AND 11 U.S.C. § 544(B)(1)*

Collin Hart

I. INTRODUCTION

The bankruptcy process is one of the foundational aspects of the modern American economic and financial system. As businesses are bound to fail, any successful economic system needs a process to deal with such failures. Modern bankruptcy proceedings provide insolvent debtors a dignified and structured process to settle their debts and continue life without complete financial destruction. The central purpose of the bankruptcy proceeding is to ensure the fair and equal distribution of the debtor's assets among all entitled creditors.¹ In order to effectuate this process, federal bankruptcy law bestows special powers upon the bankruptcy trustee (and a debtor-in-possession), who is tasked with creating the order in which entitled creditors will be paid after the proceeding. One of the powers is the avoidance power.²

The avoidance power allows the bankruptcy trustee to avoid or unwind certain property transfers by the debtor that occurred prior to the filing of bankruptcy.³ The purpose of the avoidance power is to maximize the bankruptcy estate and to prevent debtors from depleting the resources and property available to the entitled creditors immediately prior to filing for bankruptcy.⁴ The avoidance power of federal bankruptcy law is codified in several sections of the Bankruptcy Code,⁵ including in 11 U.S.C. § 544.⁶ Recently, a circuit split has developed regarding the ability of a bankruptcy trustee to bring an 11 U.S.C. § 544(b)(1) derivative, state-law-based avoidance action against the federal government.⁷ While sovereign immunity would normally bar such an action, 11 U.S.C. § 106 broadly waives sovereign immunity for large sections of the Bankruptcy Code—

1. *See infra* Section II(a)(1).

2. *See infra* Section II(a)(2).

3. *See infra* Section II(a)(2); 11 U.S.C. § 544.

4. *See infra* Section II(a)(2).

5. *See* 11 U.S.C. §§ 101-1532.

6. *See infra* Section II(a)(2).

7. *See In re Equipment Acquisition Resources, Inc.*, 742 F.3d 743 (7th Cir. 2014); *In re DBSI, Inc.*, 869 F.3d 1004 (9th Cir. 2017). *In re Equipment Acquisition Resources, Inc.* and *In re DBSI, Inc.* address a near identical fact pattern in which a bankruptcy trustee (or the equivalent debtor-in-possession) attempted to use 11 U.S.C. § 544(b)(1) to avoid federal income tax payments that the corporation made to the IRS prior to bankruptcy. The Seventh and Ninth Circuits created a circuit split after arriving at opposite conclusions as to 11 U.S.C. § 106(a)'s effect on 11 U.S.C. § 544(b)(1), and whether 11 U.S.C. § 544(b)(1) actions against the federal government were barred by sovereign immunity.

including 11 U.S.C. § 544.⁸

The Seventh and Ninth Circuits have disagreed as to how 11 U.S.C. § 106's waiver of sovereign immunity should apply to avoidance actions brought against the federal government under 11 U.S.C. § 544(b)(1).⁹ This Article explores the split between the Seventh and Ninth Circuits and concludes that 11 U.S.C. § 106's waiver serves to alter the baseline requirements necessary to bring an action under 11 U.S.C. § 544(b)(1). Thus, 11 U.S.C. § 106 completely removes the sovereign immunity barrier for such actions and allows a bankruptcy trustee to bring a 11 U.S.C. § 544(b)(1) action against the federal government.¹⁰

This Article proceeds in three Parts. Part I contains background information on the bankruptcy proceeding, 11 U.S.C. § 544, 11 U.S.C. § 106, and the two Circuit Court decisions at issue. Part II discusses the proper interpretation of 11 U.S.C. § 106 as it applies to 11 U.S.C. § 544(b)(1) actions. Finally, Part III provides a brief overview and conclusion as to the proper interpretation of 11 U.S.C. §§ 106 and 544(b)(1).

II. BACKGROUND

This Part proceeds in six sections. Sections A and B overview the bankruptcy process, the avoidance power, 11 U.S.C. § 106, and 11 U.S.C. § 544. Section C then briefly outlines the doctrine of sovereign immunity. Then, Sections D and E review the two circuit decisions at issue: *In re Equipment Acquisition Resources, Inc.*¹¹ and *In re DBSI, Inc.*¹² Finally, Section F briefly describes the *In re Paloma Generating Company*¹³ line of cases that have challenged the constitutionality of 11 U.S.C. § 106.

A. Bankruptcy: Background

1. Bankruptcy Proceedings

Bankruptcy serves to mitigate the effects of financial failure. The

8. See *infra* Section II(b)(2).

9. The Seventh Circuit, in *Equipment Acquisition Resources*, held that 11 U.S.C. § 106's waiver did not apply to the underlying state law upon which an 11 U.S.C. § 544(b)(1) action was brought, and therefore sovereign immunity barred a bankruptcy trustee from bringing an 11 U.S.C. § 544(b)(1) action against the IRS. Conversely, the Ninth Circuit, in *DBSI*, held that 11 U.S.C. § 106's waiver applied to the underlying state law upon which an 11 U.S.C. § 544(b)(1) action, and therefore a bankruptcy trustee could bring an 11 U.S.C. § 544(b)(1) action against the IRS. See *infra* Part II.

10. *In re DBSI, Inc.*, 869 F.3d. 1004.

11. 742 F.3d. 743.

12. 869 F.3d. 1004.

13. 588 B.R. 695 (Bankr. D. Del. 2018).

purpose of the bankruptcy proceeding is to rearrange the rights and liabilities between a debtor and its creditors, and to provide a single proceeding to control and distribute the assets and property of the debtor among all entitled creditors.¹⁴ More specifically, bankruptcy proceedings seek to prioritize creditors and ensure that creditors of equal priority receive equal treatment through the fair and equitable distribution of the debtor's assets.¹⁵ Therefore, three central goals of bankruptcy are (1) to identify and control all property interests of the debtor, (2) distribute the debtor's assets equitably among all creditors, and (3) maximize the benefit available to all entitled creditors.¹⁶

The commencement of a bankruptcy case creates a bankruptcy estate.¹⁷ The bankruptcy estate is a separate entity from the debtor¹⁸ and generally includes all non-exempt property in which the debtor had an interest as of the date of the filing for bankruptcy.¹⁹ As discussed in this Article, the estate may also be comprised of property interests that a debtor transferred to a third-party prior to filing for bankruptcy.²⁰

The bankruptcy trustee is an officer of the court,²¹ a representative of the estate, and a representative of all the estate's unsecured creditors.²² The primary duty of the bankruptcy trustee is to collect, liquidate, and distribute estate property.²³ In certain types of bankruptcy cases, the debtor in bankruptcy functions as a "debtor-in-possession" and serves the role of the bankruptcy trustee.²⁴

2. The Avoidance Power

Under the Bankruptcy Code, a bankruptcy trustee has the power to avoid (or invalidate) certain property transfers made by the debtor.²⁵ A "transfer" for bankruptcy purposes can be many things, including any (1) creation of a lien; (2) retention of title as a security interest; (3) foreclosure of a debtor's equity of redemption; or (4) parting with any property or an interest in property.²⁶ If the trustee successfully avoids a transfer made by

14. 8A C.J.S. *Bankruptcy* § 1 (2019).

15. 1 COLLIER ON BANKRUPTCY § 1.01 (Richard Levin & Henry J. Sommer eds., 16th ed. 2018).

16. 8A C.J.S. *Bankruptcy* § 2 (2019).

17. *Id.* §547.

18. *Id.*

19. 1 COLLIER ON BANKRUPTCY, *supra* note 15, §1.03.

20. *See infra* Section II(a)(2).

21. 8A C.J.S. *Bankruptcy* § 247.

22. *Id.* § 248.

23. *Id.*

24. *Id.* § 288.

25. *Id.* § 664.

26. 11 U.S.C. §101(54) (Current through P.L. 116-5).

the bankrupt party, the recovered property consequently becomes a part of the bankruptcy estate and is available for distribution among creditors.²⁷ The avoidance power seeks to prevent a debtor from intentionally depleting the resources and property available to bankruptcy creditors immediately prior to bankruptcy by transferring its assets.²⁸ The avoidance power therefore serves to maximize the bankruptcy estate and allow recovery for all creditors.²⁹

B. Bankruptcy: Selected Statutory Provisions

1. 11 U.S.C. § 544³⁰

11 U.S.C. § 544 (Section 544) vests a bankruptcy trustee with the “strong-arm avoidance powers” that allow him to avoid certain property transfers.³¹ Although Section 544(a) and (b) allow the trustee to avoid different types of transfers, both sections have the same goal: maximize the estate and equalize the distribution of a debtor’s assets among creditors of the same class.³²

Section 544(b)(1) provides, in relevant part, that a 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.”³³ The general consensus is that Section 544(b)(1) confers upon the bankruptcy trustee no greater rights of avoidance than a creditor would have if the creditor asserted the claim, on its own behalf, outside of bankruptcy.³⁴ Thus, the general rule is that if a creditor outside of bankruptcy would be estopped from recovery under applicable law, a bankruptcy trustee is likewise estopped or barred per Section 544(b)(1).³⁵ This general rule is commonly referred to as the “actual creditor” requirement or the “triggering creditor” requirement.³⁶

2. 11 U.S.C. § 106³⁷

11 U.S.C. § 106 (“Section 106”) acts as a broad waiver of sovereign

27. 8A C.J.S. *Bankruptcy* § 664.

28. *Id.*

29. *Id.*

30. 11 U.S.C. § 544 (Current through P.L. 116-5).

31. 5 COLLIER ON BANKRUPTCY, *supra* note 15, § 544.01.

32. *Id.*

33. 11 U.S.C. § 544(b)(1) (Current through P.L. 115-281) (emphasis added).

34. 5 COLLIER ON BANKRUPTCY, *supra* note 15, §544.06.

35. *Id.*

36. *Id.*

37. 11 U.S.C. § 106 (Current through P.L. 116-5).

immunity for large sections of the Bankruptcy Code.³⁸ Congress first attempted to abrogate sovereign immunity in certain bankruptcy contexts when it adopted the first version of Section 106 in 1978.³⁹ In 1994, Congress amended Section 106 to further clarify its intent to waive sovereign immunity and the scope of its waiver after the Supreme Court twice challenged⁴⁰ the clarity and constitutionality of the previous version of Section 106.⁴¹ To remedy these challenges, current Section 106(a), as amended, lists the sections of the Bankruptcy Code to which sovereign immunity is abrogated.⁴²

Section 106(a) does not completely eliminate sovereign immunity under the Bankruptcy Code;⁴³ rather, Congress chose to exclude various sections of the Bankruptcy Code, including 11 U.S.C. § 541⁴⁴ (Section 541), from Section 106(a)'s list of affected sections.⁴⁵ Thus, government defendants are still permitted to assert sovereign immunity in select, enumerated circumstances, including against suits brought under Section 541.⁴⁶

C. Sovereign Immunity

Under the American governmental system, the federal government and all individual states remain sovereign entities, and, according to the Supreme Court, it is inherent in the nature of sovereignty that sovereign entities are not amenable to suit by an individual without the sovereign's consent.⁴⁷ Thus, federal and state governmental bodies are immune from suit by an individual except when their immunity has been either abrogated by Congress, waived by some action taken by the governmental

38. *See id.*

39. 2 COLLIER ON BANKRUPTCY, *supra* note 15, §106.01.

40. *Id.*; *see also* Hoffman v. Connecticut Department of Income Maintenance, 492 U.S. 96 (1989); United States v. Nordic Village, Inc., 503 U.S. 30 (1992).

41. 2 COLLIER ON BANKRUPTCY, *supra* note 15, §106.01.

42. *Id.* Section 106(a) provides in relevant part, that:

sovereign immunity is abrogated as to a governmental unit ... with respect to the following: sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1237 of this title.

11 U.S.C. § 106(a) (Current through P.L. 115-281) (emphasis added).

43. 2 COLLIER ON BANKRUPTCY, *supra* note 15, §106.04.

44. 11 U.S.C. § 541 (Current through P.L. 116-5) (Section 541 largely applies to pre-bankruptcy petition causes of action).

45. 2 COLLIER ON BANKRUPTCY, *supra* note 15, §106.04.

46. *Id.*

47. *Id.* §106.01.

body, or eliminated by a specific provision of the Constitution itself.⁴⁸ A valid congressional waiver of sovereign immunity must satisfy two requirements:⁴⁹ (1) Congress must have “unequivocally expressed its intent to abrogate the immunity[,]”⁵⁰ and (2) Congress must have acted “pursuant to a valid exercise of power.”⁵¹

*D. In re Equipment Acquisition Resources, Inc.*⁵²

1. Background

On February 4, 2014, the Seventh Circuit Court of Appeals decided *In re Equipment Acquisition Resources, Inc.*⁵³ (EAR).⁵⁴ In doing so, the Seventh Circuit became the first Circuit Court to address the question of whether Section 106(a)’s waiver of sovereign immunity applied to the underlying state law upon which a Section 544(b)(1) claim was brought.⁵⁵ The Seventh Circuit concluded that Section 106(a)’s waiver did not apply to the underlying state law and therefore a bankruptcy trustee (or debtor-in-possession) was barred from bringing a Section 544(b)(1) action against the IRS.⁵⁶

EAR concerned an Illinois corporation in bankruptcy.⁵⁷ During its operation, the corporation made several federal income tax payments to the IRS on behalf of the corporation’s shareholders.⁵⁸ Once in bankruptcy, the Illinois corporation (as a debtor-in-possession) filed several advisory actions against the federal government to recover some of the tax payments made.⁵⁹ Among other actions, the Illinois corporation brought a Section 544(b)(1) action against the IRS via Illinois’s version of the Uniform Fraudulent Transfer Act (UFTA).⁶⁰ In support of its action, the Illinois corporation argued that the Bankruptcy Code’s abrogation of sovereign immunity, under Section 106(a)(1), precluded the IRS from claiming immunity.⁶¹

48. *Id.*

49. *Id.*

50. 2 COLLIER ON BANKRUPTCY, *supra* note 15, §106.01.

51. *Id.*

52. 742 F.3d. 743 (7th Cir. 2014).

53. *Id.*

54. *See id.*

55. *See id.*

56. *Id.* at 744.

57. *Id.* at 744-45.

58. *Id.* at 745.

59. *Id.*

60. *Id.*

61. *Id.*

While the government agreed to disgorge most of the tax payments, the government contested the Illinois corporation's ability to recover the final payment under Section 544(b)(1).⁶² The government argued that as sovereign immunity ordinarily prevented a creditor outside of bankruptcy from bringing an Illinois UFTA action against the IRS, the final payment was not avoidable under 544(b)(1) because it was not "voidable under [the] applicable law."⁶³ The bankruptcy court rejected this argument holding that Congress intended Section 106(a)'s "general waiver" of immunity to include state-law-based causes of action available under Section 544(b)(1).⁶⁴ The court grounded its conclusion in "[t]he plain, unambiguous language of § 106," the deliberate inclusion of Section 544 within Section 106(a), and policy considerations favoring greater recovery for the benefit of all creditors.⁶⁵

The government appealed to the district court, which affirmed the bankruptcy court's ruling.⁶⁶ The district court framed the dispute as "whether § 544(b), which explicitly limits a trustee's ability to avoid a transfer, overrides § 106(a)'s abrogation of sovereign immunity."⁶⁷ The district court agreed with the bankruptcy court that Section 106's "complete abolishment" of sovereign immunity carried the day stating that, "[i]t simply does not matter *how* a sovereign immunity defense is invoked" because "106(a)(1) simply eliminates [that] obstacle wherever it appears 'with respect to' § 544."⁶⁸

2. Issue and Statutory Construction

In overturning the district court, the Seventh Circuit began its analysis with the text and structure of Section 544(b)(1).⁶⁹ The Seventh Circuit noted that unlike other Bankruptcy Code sections that authorize a cause of action, Section 544(b)(1) did not provide a *direct* cause of action.⁷⁰ Instead, Section 544(b)(1) provides a derivative cause of action that allows the bankruptcy trustee to avoid transfers that are voidable under other applicable laws.⁷¹ In the Seventh Circuit's view, Section 544(b)(1) only enables a trustee in bankruptcy to do what a traditional creditor could

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 746.

70. *Id.*

71. *Id.*

do outside of bankruptcy.⁷² Therefore, if no creditor exists that could void the transfer in question outside of bankruptcy, the trustee is powerless to act under Section 544(b)(1).⁷³ In other words, the bankruptcy trustee stands in the shoes of an actual unsecured creditor (outside of bankruptcy) and if the actual creditor could not succeed—whether due to the statute of limitations, estoppel, res judicata, waiver, or any other defense—then the bankruptcy trustee is similarly barred and cannot avoid the transfer.⁷⁴

Based on this analysis of Section 544(b)(1), the Seventh Circuit framed the issue as whether Section 106(a)(1)'s abrogation of sovereign immunity allows a bankruptcy trustee to bring a state-law fraudulent-transfer suit against the federal government even though, outside of bankruptcy, sovereign immunity would bar a non-bankruptcy creditor from bringing such a claim.⁷⁵ In holding that Section 106(a)(1) confers no such right, the Seventh Circuit primarily relied upon its view as to the proper statutory interpretation of Section 544(b)(1).⁷⁶

The Seventh Circuit concluded that the lower courts “focused too narrowly” on the language of Section 106 and “largely disregarded” the substantive requirements of Section 544.⁷⁷ While the Seventh Circuit agreed that the language of Section 106 is clear and unambiguous, the court argued that the crux of the issue was the language of Section 544(b)(1).⁷⁸ In the court's view, Congress did not alter the substantive requirements of Section 544(b)(1) merely by stating, in Section 106, that the federal government's sovereign immunity was abrogated with respect to Section 544.⁷⁹ Therefore, Section 544(b)(1) continued to require a party bringing a 544(b)(1) action to show that a creditor outside of bankruptcy could have succeed on a similar action brought under the applicable state law even after the enactment of Section 106.⁸⁰ In the court's view, because Congress had not abrogated sovereign immunity for the Illinois UFTA, no creditor outside of bankruptcy could sue the IRS under the Illinois UFTA. Thus, the Illinois corporation's 544(b)(1) action was barred because the tax payment was not “voidable under applicable law.”⁸¹

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 748-49.

78. *Id.* at 747.

79. *Id.*

80. *Id.*

81. *Id.*

3. The Rejected Counter-Arguments

After declaring its view as to the proper interpretation of Section 544(b)(1), the Seventh Circuit rejected several counter arguments.⁸² First, the Seventh Circuit rejected the argument that Congress knowingly included state-law-based causes of action within the category of suits to which a sovereign immunity defense could no longer be asserted “[b]y including § 544 in the list of Bankruptcy Code sections set forth in § 106(a).”⁸³ The Seventh Circuit concluded that inferred congressional intent cannot trump a provision’s clear and unambiguous text.⁸⁴ Therefore, because the Seventh Circuit viewed the substantive requirements of Section 544(b)(1) as clear and unaltered by Section 106, the Seventh Circuit viewed any arguments based upon Congressional intent as moot.⁸⁵

Second, the Seventh Circuit rejected the argument that its holding would render Section 106’s abrogation of immunity meaningless with respect to Section 544.⁸⁶ The Seventh Circuit noted that Section 106 does not only abrogate sovereign immunity with respect to the federal government, but also abrogates immunity with respect to state and local governments.⁸⁷ Thus, in the Seventh Circuit’s opinion, if a state waived its immunity to UFTA actions, Section 106 would allow a bankruptcy trustee to bring a 544(b)(1) action against that state based upon the state’s UFTA.⁸⁸

The Seventh Circuit also noted that subsection (b)(1) is only one subpart of Section 544, and that the court’s holding would not affect Section 106’s effect on the remainder of Section 544, including subsection (a).⁸⁹ The Seventh Circuit was unpersuaded by the argument that if Congress only intended Section 106 to apply to certain portions of 544, it would have drafted its reference to Section 544 more specifically.⁹⁰

4. Policy Considerations

Finally, the Seventh Circuit invoked several policy considerations in support of its holding.⁹¹ First, the Seventh Circuit raised concerns about

82. *See id.* at 747-50.

83. *Id.* at 747.

84. *Id.*

85. *Id.*

86. *Id.* at 749.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 750.

exposing the federal government to liability based upon state laws, the dimensions of which Congress does not control.⁹² Second, the Seventh Circuit reasoned that its holding was more consistent with the judicial presumption in favor of the government in sovereign immunity questions.⁹³ The court noted that the Supreme Court has repeatedly warned against interpretations that “expand the scope of the government’s liability beyond the point where its consent is unequivocal.”⁹⁴ Therefore, the courts should limit sovereign immunity in situations like this, where a plausible interpretation of a provision exists that would preserve immunity.⁹⁵

*E. In re DBSI, Inc.*⁹⁶

1. Background

On August 31, 2017, the Ninth Circuit Court of Appeals decided *In re DBSI, Inc.*⁹⁷ In doing so, the Ninth Circuit became the second circuit court to address the question of whether Congress’s waiver of sovereign immunity under Section 106(a)⁹⁸ extends to the underlying “applicable law” of a Section 544(b)(1) action.⁹⁹ In deciding that Section 106(a)’s waiver of sovereign immunity applied to the underlying state law of a Section 544(b)(1) action, the Ninth Circuit directly contradicted the Seventh Circuit¹⁰⁰ in a case with almost identical facts.¹⁰¹

*In re DBSI, Inc.*¹⁰² (“*DBSI*”) concerned an Idaho corporation in bankruptcy.¹⁰³ Prior to filing for bankruptcy, the corporation made several income tax payments to the IRS on behalf of its shareholders.¹⁰⁴ Shortly after filing for bankruptcy, the bankruptcy trustee (“*DBSI Trustee*”) was appointed and commenced a proceeding to recover the allegedly fraudulent tax payments to the IRS.¹⁰⁵ The *DBSI Trustee* relied in part

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *In re DBSI, Inc.*, 869 F.3d. 1004 (9th Cir. 2017).

97. 869 F.3d. 1004.

98. 11 U.S.C. § 106(a)(1).

99. 11 U.S.C. § 544(b)(1); *DBSI, Inc.*, 869 F.3d. at 1007.

100. *See Equipment Acquisition Resources*, 742 F.3d. at 743; *supra* Section II(d).

101. *See DBSI, Inc.*, 869 F.3d. at 1006-07; *Equipment Acquisition Resources*, 742 F.3d. at 1010.

102. *DBSI, Inc.*, 869 F.3d. at 1004.

103. *Id.* at 1007.

104. *Id.*

105. *Id.*

upon Section 544(b)(1) to bring its claim against the IRS.¹⁰⁶

At trial, the government moved to dismiss the Section 544(b)(1) action by arguing that Section 106(a)(1) did not apply to the Idaho UFTA—the underlying applicable law upon which the DBSI Trustee brought its Section 544(b)(1) action.¹⁰⁷ Therefore, because the federal government had not separately waived sovereign immunity with regard to Idaho’s UFTA, no creditor outside of bankruptcy existed who could sue the IRS under Idaho’s UFTA. Thus, the government argued that the actual-creditor requirement of Section 544(b)(1) was not satisfied.¹⁰⁸ The Bankruptcy Court rejected the government’s position, holding that Section 106’s waiver *did* apply to Idaho’s UFTA, and thus sovereign immunity did not bar the Section 544(b)(1) action.¹⁰⁹ The district court affirmed and the government appealed to the Ninth Circuit.¹¹⁰ While the appeal was pending, the Seventh Circuit decided *EAR*.

2. Statutory Interpretation

In holding that sovereign immunity did not bar the DBSI Trustee’s 544(b)(1) action, the Ninth Circuit relied primary upon the text, structure, and interplay of Sections 544(b)(1) and 106.¹¹¹

First, the Ninth Circuit reasoned that its holding was supported by a holistic view of the provisions at issue.¹¹² The court noted that proper statutory construction is a “holistic endeavor” that relies upon context to be a “preliminary determinate of meaning.”¹¹³ Thus, a court must look not only to the particular statutory language at issue, but also to the “language and design of the statute as a whole.”¹¹⁴ Based upon these principles, the Ninth Circuit reasoned that it could not properly analyze the text and requirements of Section 544(b)(1) without considering Section 106’s abrogation of sovereign immunity.¹¹⁵

With this interpretive structure, the Ninth Circuit concluded that Section 106(a)(1)’s “unequivocal” waiver “completely” abolished sovereign immunity “wherever it appear[ed] ‘with respect to Section 544,’ and that such waiver “necessarily include[d] the derivative state law

106. *Id.* at 1008.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *See id.* at 1009-16.

112. *Id.* at 1010.

113. *Id.* (internal quotation marks omitted).

114. *Id.*

115. *Id.*

claim” upon which a 544(b)(1) action was brought.¹¹⁶ Therefore, the interplay between Sections 106 and 544(b)(1) could only be interpreted one way: to succeed on a Section 544(b)(1) claim, a trustee “need only identify an unsecured creditor, who, *but for sovereign immunity*, could bring an avoidance action against the IRS.”¹¹⁷

Second, the Ninth Circuit emphasized that Section 106(a)(1) was enacted after Section 544(b)(1).¹¹⁸ Thus, when Congress waived sovereign immunity with respect to Section 544(b)(1), it understood that Section 544(b)(1) codified a trustee’s right to invoke state law.¹¹⁹ In the Ninth Circuit’s opinion, because Congress is presumed to understand the state of existing law when it legislates, it was clear that Congress “knowingly included state law causes of action within the category of suits to which a sovereign immunity defense could no longer be asserted” by including Section 544 within Section 106’s waiver.¹²⁰

Third, the Ninth Circuit reasoned that adopting the government’s position would “essentially nullify Section 106(a)(1)’s effect on Section 544(b)(1)” because a trustee would always need to demonstrate that Congress provided a separate waiver of sovereign immunity for the underlying “applicable law” of a Section 544(b)(1) claim.¹²¹ In the court’s view, this conclusion would violate the basic rule of statutory construction that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute meaningless.¹²²

The Ninth Circuit also rejected the counterargument that the government’s argued interpretation would not render Section 106’s effect on Section 544 completely meaningless because Section 106 would still apply to Section 544(a).¹²³ In the Ninth Circuit’s view, if Congress intended to limit Section 106’s effect on Section 544 to subsection (a), it would have specifically referenced section 544(a), and not section 544 generally, in the text of Section 106.¹²⁴

3. Policy Considerations

The Ninth Circuit further grounded its holding in the equitable

116. *Id.* at 1010-11.

117. *Id.* at 1010 (emphasis added).

118. *Id.* at 1011.

119. *Id.*

120. *Id.*

121. *Id.* at 1011-12.

122. *Id.*

123. *Id.* at 1012.

124. *Id.*

principles and policies that underlie federal bankruptcy law.¹²⁵ It noted that prior to the enactment of Section 106, the Bankruptcy Code's treatment of governmental entities was inherently inequitable because the government was both able to participate in the distributions of a bankruptcy case but was also shielded from liability via sovereign immunity.¹²⁶ Thus, in the Ninth Circuit's view, Congress enacted Section 106 so as to place governmental creditors on more equal footing with all other bankruptcy creditors.¹²⁷ Therefore, the Ninth Circuit's holding, at least in its view, more properly aligned with Congressional intent and the underlying principles of bankruptcy law by ensuring more equitable distribution of the debtor's property among all entitled creditors.¹²⁸

*F. In re Paloma Generating Company*¹²⁹ and Related Cases

*In re Paloma Generating Company*¹³⁰ and a handful of other decisions¹³¹ have raised issue with the constitutionality of Section 106 regarding its effect on state and local governments. *In re Paloma* concerned a California energy company in bankruptcy.¹³² The Bankruptcy trustee brought bankruptcy actions against several state agencies to avoid certain property tax payments.¹³³ In response, the state agency raised a sovereign immunity defense.¹³⁴ In finding for the state agency, the bankruptcy court held Section 106's waiver of sovereign immunity—as it applies to state and local governments—unconstitutional.¹³⁵

III. DISCUSSION

The central question addressed in this Part is whether a trustee (or debtor-in-possession) can bring a Section 544(b)(1) action against the federal government. More specifically, whether Section 106's waiver of sovereign immunity applies to the underlying “applicable law” of a

125. *Id.* at 1015-16.

126. *Id.* at 1016.

127. *Id.*

128. *Id.*

129. 588 B.R. 695.

130. *Id.*

131. See *In re Patriot Coal Corp.*, 562 B.R. 632 (Bankr. E.D. Va. 2016); *In re Philadelphia Entm't and Dev. Partners, L.P.*, 549 B.R. 103 (Bankr. E.D. Pa. 2016); *In re Sarfani, Inc.*, 527 B.R. 241 (Bankr. N.D. Miss. 2015).

132. 588 B.R. at 701, 703.

133. *Id.* at 701.

134. *Id.*

135. *Id.* at 734-35.

Section 544(b)(1) action such that no additional waiver specific to the “applicable law” at issue is required to bring a 544(b)(1) action against the federal government. This Article argues that Section 106’s waiver flows through Section 544(b)(1) and applies to the underlying applicable law in bankruptcy proceedings such that a trustee can bring a Section 544(b)(1) action against the federal government. In essence, Section 106 alters the requirements necessary to bring a 544(b)(1) action. Therefore, a bankruptcy trustee (or debtor-in-possession) can bring a Section 544(b)(1) action against the IRS based upon a state’s UFTA. This conclusion is based upon the proper statutory interpretation of Sections 544(b)(1) and 106, congressional intent behind both statutes, practical and functional considerations, and acting in furtherance of the central purposes of federal bankruptcy law. Finally, it is important to note that while *In re Paloma Generating Company*¹³⁶ and other decisions¹³⁷ have raised issue with the constitutionality of Section 106, such decisions have no effect on this Article.¹³⁸

This Part proceeds in three sections. First, this Part discusses the proper statutory interpretation of Sections 106 and 544(b)(1). Second, this Part addresses the proper use of congressional intent in the analysis of Sections 106’s effect on 544(b)(1). Finally, this Part explores how practical and policy considerations support the conclusion of this Article that Section 106’s waiver flows through Section 544(b)(1) and applies to the underlying applicable law in bankruptcy proceedings such that a trustee can bring a Section 544(b)(1) action against the federal government.

A. Statutory Interpretation

As a matter of proper statutory construction, Section 106’s abrogation of sovereign immunity applies to the underlying law of a Section 544(b)(1) action and therefore acts to alter the requirements necessary to bring a Section 544(b)(1) action. The Ninth Circuit is correct in stating that Section 106’s effect on Section 544(b)(1) is such that a trustee “need only identify an unsecured creditor, who, *but for sovereign immunity*,

136. *Id.* at 695.

137. *See In re Patriot Coal Corp.*, 562 B.R. 632 (Bankr. E.D. Va. 2016); *In re Philadelphia Entm’t and Dev. Partners, L.P.*, 549 B.R. 103 (Bankr. E.D. Pa. 2016); *In re Sarfani, Inc.*, 527 B.R. 241 (Bankr. N.D. Miss. 2015).

138. *See, e.g., Paloma*, 588 B.R. at 695. *Paloma* and other related cases, have begun to attack the constitutionality of Section 106. Specifically, these cases assert that Section 106’s waiver of state sovereign immunity is unconstitutional. *See id.* at 695; *Patriot*, 562 B.R. at 632; *Philadelphia Entm’t*, 549 B.R. at 103; *Sarfani*, 527 B.R. at 241. The argument expressed in *Paloma* is irrelevant for this analysis because this Article concerns the applicability of Section 106’s waiver of sovereign immunity in actions brought against the federal government. Because no case, including *Paloma*, challenges Congress’ ability to waive the federal government’s sovereign immunity, no constitutional questions surround Section 106 as it applies for this discussion.

could bring an avoidance action against” the federal government.¹³⁹ This conclusion is based on a holistic view of the Bankruptcy Code and a desire to avoid rendering part of Section 106 meaningless.

First, the Ninth Circuit properly stated that statutory construction requires a holistic approach. Statutory construction does not end with an isolated analysis of the specific provisions at issue, but must also analyze each provision at issue within the context of the entire statute of which it is a part. Therefore, to properly analyze the question at issue, a court must both analyze and understand the language and requirements of Section 544(b)(1) *and* analyze how other sections of the Bankruptcy Code—namely Section 106—alter or effect those requirements.

Under this approach, analysis of the issue in question should begin with the text of Section 544(b)(1). Section 544(b)(1) simply states that a trustee may “avoid any transfer” that is “voidable under applicable law.”¹⁴⁰ A plain reading of this language indicates that a transfer is avoidable in bankruptcy if that transfer is also voidable under applicable law. If a court’s statutory analysis were to stop at this juncture, the question of whether a Section 544(b)(1) action can be brought under a state’s UFTA would be simple—unless the federal government had specifically waived sovereign immunity with regard to the UFTA at issue, sovereign immunity would still remain a barrier and a Section 544(b)(1) action would be barred. But, as the Ninth Circuit accurately highlights, analysis of the issue does not end solely with the text of Section 544(b)(1).

After considering the “voidable under applicable law” requirement of Section 544(b)(1), a court must consider how Section 106 alters this language. Section 106 plainly states that sovereign immunity is abrogated with respect to the listed sections, one of which is the entirety of Section 544.¹⁴¹ Because Section 106 is a valid waiver of sovereign immunity,¹⁴² the correct interpretive result is that Section 106 acts to remove the procedural barrier of sovereign immunity for any action brought under the listed sections—including Section 544(b)(1). More simply stated, Section 106 alters the baseline requirements necessary to bring a 544(b)(1) action by removing the procedural hurdle of sovereign immunity.

The recognition of Section 106’s effect on Section 544(b)(1) is where the two Circuits diverge. The Ninth Circuit appropriately concludes that

139. *In re DBSI, Inc.*, 869 F.3d. 1004, 1010 (9th Cir. 2017) (emphasis added).

140. 11 U.S.C. § 544(b)(1).

141. 11 U.S.C. § 106(a).

142. Both the Ninth and Seventh Circuit agree that Section 106’s waiver of immunity is clear and unambiguous. Therefore, both courts agree that Section 106 meets the Supreme Court’s standard for an effective waiver of sovereign immunity. *DBSI, Inc.*, 869 F.3d. at 1013; *In re Equipment Acquisition Resources, Inc.*, 742 F.3d. 743, 747 (7th Cir. 2014).

because Section 106's waiver is clear, unambiguous, and applies to Section 544(b)(1) actions, Section 106 should be read as modifying the requirements necessary to bring a Section 544(b)(1) action. Essentially, the language of Section 544(b)(1) should be read in conjunction with the language of Section 106. When the two provisions are read in conjunction, the substantive requirements of a Section 544(b)(1) action change *from* "... any transfer that is voidable under applicable law" *to* "... [except with regard to issues of sovereign immunity,] any transfer that is voidable under applicable law."

Conversely, the Seventh Circuit concludes that while Section 106's waiver is clear, unambiguous, and applies to Section 544(b)(1), it is practically meaningless with respect to Section 544(b)(1) actions.

Second, the Ninth Circuit's conclusion abides by the canon of statutory construction against interpretations that hold part of a statute meaningless¹⁴³ by interpreting Section 106's waiver to fully apply to each applicable subsection of Section 544. Conversely, the Seventh Circuit's opinion renders Section 106's waiver essentially meaningless with respect to Section 544(b)(1). In the Seventh Circuit's view, to comply with the actual creditor requirement of 544(b)(1), Congress must grant a separate, specific waiver of immunity for the underlying "applicable law" of a 544(b)(1) action. If this interpretation is correct, Section 106's waiver is meaningless with respect to Section 544(b)(1) because the separate, "applicable law" specific waiver would eliminate sovereign immunity for claims brought both in and outside of bankruptcy. Thus, the result of the Seventh Circuit's interpretation is that Section 106's waiver is both insufficient to remove the sovereign immunity barrier for 544(b)(1) actions and also ultimately unnecessary in the face of a separate, "applicable law" specific waiver.

The Seventh Circuit provides two arguments to defend against claims that its holding renders part of Section 106 meaningless. First, it argues that the waiver of immunity could still apply to other governmental units besides the federal government. Thus, for example, if Illinois waived sovereign immunity to actions brought under its UFTA, Section 106 would allow a bankruptcy trustee to bring a Section 544(b)(1) action against Illinois based on Illinois' UFTA. But, this defense does nothing to resolve claims that the Seventh Circuit's holding renders part of Section 106 meaningless because such argument still concludes that Section 106's waiver is insufficient by itself and a separate, "applicable law" specific waiver is needed to bring a Section 544(b)(1) action. But, as stated above,

143. See e.g., *United States v. Powell*, 6 F.3d 611, 614 (9th Cir. 1993) ("It is a basic rule of statutory construction that one provision should not be interpreted in a way which is internally contradictory or that renders other provisions of the same statute inconsistent or meaningless.") (internal quotation marks and citation omitted).

if the government granted a waiver specific to the underlying applicable law in question, under the Seventh Circuit's view of the actual creditor requirement, such waiver would suffice to eliminate the sovereign immunity barrier for Section 544(b)(1) actions as well. Again, the result is that Section 106's waiver is both insufficient for Section 544(b)(1) actions and ultimately meaningless. Thus, the Seventh Circuit's first defense is flawed.

The Seventh Circuit's second defense argues that its holding does not render Section 106's effect on Section 544 meaningless because Section 106 could still apply to Section 544(a). But, if Congress intended for Section 106 to only apply to 544(a)—and not 544(b)—Congress would have specified such intent in the text of Section 106. Congress would have listed Section 544(a) and not Section 544 in its entirety in the text of Section 106. Furthermore, by omitting Section 541 from Section 106, Congress clearly showed that it was selective and specific in determining to which parts of the Bankruptcy Code Section 106 should apply. But, the Seventh Circuit argues that Congress simply listed full sections in the text of Section 106 for drafting convenience. But such a conclusion should not overcome the logical presumption that Congress intended Section 106 to apply to all *applicable* subsections within the list of affected sections. The Seventh Circuit also tries to strengthen its argument by noting that Section 106's list of affected sections contains subsections to which a waiver of sovereign immunity would have no effect—subsections that do not authorize a cause of action; but, Section 544 is listed in its entirety. Therefore, that reasoning cannot support the position that Section 106 applies to one subsection of Section 544 but not another.

In conclusion, while the Seventh Circuit is correct that the language and requirements of Section 544(b)(1) are unambiguous when read in isolation, proper statutory interpretation of the question does not end with the plain language of Section 544(b)(1). Instead, proper interpretation of Section 544(b)(1) must also consider the interplay between the language of Section 544 and Section 106, and how Section 106 may alter, affect, or qualify the requirements of Section 544(b)(1). In this regard the Seventh Circuit's analysis falls short and succumbs to the very critique it lobbies against other courts: it focuses too narrowly on the language of one specific section rather than all the sections at play.

B. Analysis of Congressional Intent

While holding that Section 106's waiver alters the requirements of a Section 544(b)(1) action is correct based upon a holistic view of statutory interpretation, this holding is further strengthened by a simple analysis of Congressional intent. When viewing the language and history of Section

106, Congress's intent becomes quite clear: to broadly and completely eradicate the sovereign immunity defense within large sections of the Bankruptcy Code.

The history of Section 106 supports a conclusion that Congress intended Section 106's waiver to apply as broadly as possible, including to Section 544(b)(1) actions. The original version of Section 106 came under repeated attacks and eventually the Supreme Court held it unconstitutional.¹⁴⁴ Congress could have simply scrapped the section and proceeded to allow the federal government to claim immunity in the bankruptcy context. Congress could have also narrowed or limited the waiver at this point. Instead, Congress chose to amend and reenact Section 106,¹⁴⁵ thereby reaffirming its intention to waive sovereign immunity for the enumerated bankruptcy actions. This shows a clear desire by Congress to eliminate the sovereign immunity defense for all the listed sections.

Also, the broad but specific language of Section 106 supports a conclusion that Congress intended Section 106's waiver to apply to Section 544(b)(1) actions. While the Seventh Circuit attempts to attack the general section listings of Section 106, such general listings actually strengthen the argument that Congress intended Section 106's waiver to apply as broadly as possible. Whereas a short list of specific subsections would indicate an intention by Congress to limit and narrow the waiver's application, a long list of general sections indicates a desire by Congress for Section 106 to apply as broadly as possible. By using general section references instead of specific subsection references, Congress intended Section 106 to act as a broad brushstroke applying where ever possible within the listed sections. Just as a cascade of floodwaters will find their way into each crack and crevasse, Congress intended Section 106's waiver to find its way to every possible and applicable crack and crevasse within the listed sections.

Finally, the omission of Section 541 from Section 106 further supports the presumption that Congress intended Section 106 to apply to Section 544(b)(1). By omitting Section 541, Congress showed that it was selective and deliberate in deciding to which parts of the Bankruptcy Code Section 106 should apply. Thus, Congress intended Section 106 to apply throughout the entirety of Section 544—including subsection (b)(1).

Viewed in this light, Congressional intention behind Section 106 is quite clear. First, by enacting amended Section 106 and using broad, general section references, Congress intended to broadly and completely eliminate sovereign immunity where ever it applies within the listed

144. *See supra* Section II(b)(2).

145. *See id.*

sections. Second, because Congress was selective in determining to which sections the waiver should apply and because Section 544 is listed within the list of affected subsections, Congress clearly intended to completely eliminate sovereign immunity for the entirety of Section 544. Therefore, holding that Section 106's waiver alters the substantive requirements of a Section 544(b)(1) action and completely removes the sovereign immunity barrier from such actions conforms with the underlying Congressional intent behind Section 106.

The Seventh Circuit would counter such analysis by arguing that any consideration of Congressional intent is improper when the language of the statute at issue is plain and unambiguous. But, to side with the Seventh Circuit is to acknowledge fundamental ambiguity between Sections 544(b)(1) and 106. If one agrees with the Seventh Circuit's conclusion as to the actual creditor requirement, the result is substantial ambiguity as to how Section 106 applies. If the actual creditor requirement cannot be overcome, Congress had no reason to waive sovereign immunity for Section 544(b)(1) because absent an additional, applicable law specific waiver Section 106 would have no effect on Section 544(b)(1). Thus, the plain language-based conclusion of the Seventh Circuit creates substantial ambiguity as to what affect, if any, Section 106 has on Section 544(b)(1). In the face of such ambiguity, a court should look beyond the plain language of the statute and consider Congressional intent. As stated above, the correct analysis of congressional intent leads to the conclusion that Section 106 was meant to alter the requirements of Section 544(b)(1) and abrogate sovereign immunity with respect to Section 544(b)(1)'s derivative cause of action.

C. Practical and Policy Considerations

Finally, practical and policy considerations support a finding that Section 106's waiver alters the requirements necessary to bring a Section 544(b)(1) action and completely removes the sovereign immunity barrier.

First, holding that Section 106's waiver alters the substantive requirements of a Section 544(b)(1) action more properly aligns the Bankruptcy Code with the central goal of bankruptcy: to provide for the fair and equal distribution of the debtor's assets among all entitled creditors.¹⁴⁶ Prior to the enactment of Section 106, sovereign immunity acted to provide the government substantially greater protection in bankruptcy proceedings than all other creditors. Sovereign immunity allowed the government to both participate in the distributions of a bankruptcy proceeding while also being exempt from liability. This

146. *See supra* Section II(a).

superior protection is inherently at odds with a bankruptcy system designed to provide for the *fair* and *equal* distribution of the debtor's assets to *all* entitled creditors. As the Ninth Circuit stated, it is inherently unfair to allow the government to participate in the distributions of a bankruptcy case while at the same time shielding itself from liability via sovereign immunity. By removing the sovereign immunity barrier for most bankruptcy actions, Congress sought to level the playing field and place the government on more equal footing with all other creditors. If Congress intended to equalize the government's standing with all other creditors via Section 106, it is contradictory to turn around and hold that the government retains its superior protection (via sovereign immunity) for Section 544(b)(1) actions.

Second, the Seventh Circuit's alternative of requiring additional, "applicable law" specific waivers is impractical. In the Seventh Circuit's view, to allow Section 544(b)(1) claims against the federal government, Congress would have to grant a separate, specific waiver to the underlying law of a 544(b)(1) action. For Congress to broadly allow Section 544(b)(1) claims against the federal government, Congress would have to pass a specific waiver for every state law that could possibly facilitate a Section 544(b)(1) action. This is simply impractical and unworkable.

Furthermore, if, as in the Seventh Circuit's view, the actual creditor requirement cannot be overcome, Congress would have to pass additional, specific waivers that waive sovereign immunity generally, not just in the bankruptcy context, in order to allow Section 544(b)(1) actions against the federal government. Thus, the Seventh Circuit's interpretation would prevent Congress from waiving sovereign immunity solely in the bankruptcy context. The better alternative is to simply give Section 106 the power Congress intended and allow it to completely remove the sovereign immunity barrier for all of Section 544 actions, including Section 544(b)(1) actions.

The Seventh Circuit also inappropriately attempted to use its own fear of derivative liability as a justification to overturn Congressional authority. The Seventh Circuit argued that allowing Section 106 to completely remove the sovereign immunity barrier for 544(b)(1) actions would overexpose the federal government to liability based upon laws that the federal government cannot control. While the Seventh Circuit is accurate that derivative causes of action expose the government to liability for laws it cannot control, Congress has the power and authority to expose the federal government to such liability if it desires. In fact, Congress did just that in enacting the amended Section 106. The Seventh Circuit may have reservations and fears of such liability, but these concerns cannot trump a Congressional decision on the matter as

Congress has authority to abrogate sovereign immunity as it sees fit.¹⁴⁷ The Seventh Circuit is wrong to use such an argument to undermine valid Congressional decision making.

Finally, the Seventh Circuit misapplied the governmental presumption regarding waivers of sovereign immunity. As the Seventh Circuit stated, the Supreme Court has instructed against expanding the scope of the government's liability beyond the point where its consent is unequivocal. But, as both the Seventh and Ninth Circuit's stated, Section 106's waiver is clear, unambiguous, and applies to Section 544(b)(1). Thus, Congressional desire to waive sovereign immunity for Section 544(b)(1) actions is unequivocal. The only issue for debate is how this waiver affects the underlying requirements necessary to bring a Section 544(b)(1) action. For all the reasons stated above, Congress clearly intended Section 106's waiver to apply to the underlying law of a 544(b)(1) action and to alter the requirements necessary to bring a 544(b)(1) claim.

IV. CONCLUSION

The Ninth Circuit properly held that Section 106's abrogation of sovereign immunity applies to the underlying law of a Section 544(b)(1) action and acts to alter the substantive requirements necessary to bring a Section 544(b)(1) action. This holding is appropriate based upon proper textual interpretation, an analysis Congressional intent, and other policy and practical considerations.

First, the Ninth Circuit's holding is correct based upon a holistic view of the Bankruptcy Code which interprets the requirements of Section 544(b)(1) in light of Section 106. Such a view supports the conclusion that Section 106 acts to alter the substantive requirements of Section 544(b)(1) action. The Ninth Circuit's holding also better complies with the canon of statutory interpretation because it errs against interpreting statutes to be internally contradictory or interpretations that hold part of a statute to be meaningless. Second, the Ninth Circuit's holding is correct based on an analysis of Congressional intent. Both the history and text of Section 106 support the conclusion that Congress clearly intended Section 106's waiver to broadly and completely eliminate sovereign immunity within all of the listed sections, including the entirety of Section 544. Finally, the Ninth Circuit's holding is correct based upon both practical and policy considerations because it furthers of the central goals of bankruptcy law and avoids creating a practically unworkable system.

At the end of the day, the power to waive federal government sovereign

¹⁴⁷. See *supra* Section II(c).

immunity is squarely within the hands of Congress. Within Section 106, Congress has clearly exercised such power to level the playing field among entitled creditors in bankruptcy actions. If Congress didn't want its waiver to apply to Section 544(b)(1) actions, it could have simply excluded it from Section 106's enumerated list. Furthermore, if Congress is unhappy with the effect of Section 106, it can repeal or amend Section 106. Fear for the consequences of such a waiver are irrelevant where Congress' intent is clear and unambiguous.

Therefore, Congress's intent within Section 106 is clear: Sovereign immunity is waived for all Section 544 actions, *including* Section 544(b)(1) actions. As required by the Constitution, the courts should stop setting up road blocks where none are needed or desired by Congress and let the United States bankruptcy system serve its intended purpose.