No. 03-984

In the Supreme Court of the United States

RICHARD A. BALSER AND CORINNE L. BALSER,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF JUSTICE AND
OFFICE OF THE UNITED STATES TRUSTEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' suit against the Department of Justice and the Office of the United States Trustee for monetary damages and equitable relief arising from a closed bankruptcy proceeding is barred by sovereign immunity.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32-43) is reported at 327 F.3d 903. The opinion of the district court granting the motion to dismiss (Pet. App. 51-52) and the order of the district court denying reconsideration (Pet. App. 48-49) are unreported.

JURISDICTION

The court of appeals entered its judgment on April 29, 2003. A petition for rehearing was denied on July 9, 2003 (Pet. App. 44). The petition for a writ of certiorari was filed on October 7, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1978, Congress established the United States Trustee Program to improve the administration of bankruptcy cases. See 11 U.S.C. 1104. Twenty-one United States Trustees oversee bankruptcy cases within specified geographic areas. 28 U.S.C. 581(a). To remove any appearance of bias, Congress provided that the United States Trustees would not operate under the direct supervision of the bankruptcy court. Instead, the Trustees are "executives of the bankruptcy network," responsible for "protecting the public interest and ensuring that bankruptcy cases are conducted according to law." H.R. Rep. No. 595, 95th Cong., 2d Sess. 88-99, 109-110 (1977). As such, the United States Trustees hold a status that Congress compared to that of a prosecutor. *Id.* at 110; see *id.* at 88 (United States Trustees "serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena"). The United States Trustees are Justice Department officials and are appointed by the Attorney General. 28 U.S.C. 581-589. They "may raise and may appear and be heard on any issue in any case or proceeding under" the Bankruptcy Code. 11 U.S.C. 307.

2. A creditor initiated involuntary bankruptcy proceedings against petitioners, which subsequently were converted into a voluntary Chapter 11 reorganization proceeding. See 11 U.S.C. 1101 *et seq.* During that proceeding, petitioners stipulated to the entry of an order by the bankruptcy court directing the United States Trustee to select an examiner under 11 U.S.C. 1104(d), who would have the power to manage the petitioners' real properties and to seek approval of their sale. Pet. App. 33; see also 11 U.S.C. 1106(b)

(specifying an examiner's duties). The United States Trustee nominated an examiner and, after notice and a hearing, the bankruptcy court approved the appointment, pursuant to 11 U.S.C. 1104(d). See Pet. App. 33.

The creditor subsequently sought relief from the automatic stay, under 11 U.S.C. 362(d), so that it could foreclose on its secured claims against petitioners' real property. The examiner filed a motion seeking approval of the sale of the real property for $1,592,500, free and clear of all liens, pursuant to 11 U.S.C. 363. After notice to all creditors and parties in interest, the bankruptcy court granted the creditor's motion and approved the sale of the real property. Pet. App. 33-34. The bankruptcy court overruled petitioners' objection to the terms of the sale. *Id.* at 34. Petitioners filed a notice of appeal from the bankruptcy court's order, but they failed to prosecute their appeal, resulting in its dismissal. *Ibid.* Three years later, the bankruptcy court approved petitioners' plan for reorganization and the bankruptcy proceeding was closed. *Id.* at 34, 55.

Eight months after the bankruptcy proceeding closed, petitioners contacted the United States Trustee to complain about the examiner's conduct in selling their real property. Pet. App. 34. The United States Trustee conducted an investigation and found no evidence of fraud or other wrongdoing.

3. Petitioners filed suit, pro se, in federal district court against the United States Department of Justice and the Office of the United States Trustee, alleging that the United States Trustee had "acted negligently and fraudulently in connection with the appointment and supervision of the examiner." Pet. App. 34. More specifically, petitioners' amended complaint alleged that the examiner had colluded with the buyer's

attorney and had sold the properties at below market value. *Ibid.* The complaint further asserted that the United States Trustee knew of the alleged conflict of interest and fraudulent conduct but nevertheless "failed to follow its statutory duty to supervise the administration of [petitioners'] estate in a manner that protected the [petitioners'] interests." *Id.* at 35. Petitioners also asserted violations of their Fifth, Seventh, Ninth, and Fourteenth Amendment rights. Petitioners seek injunctive relief and $5 million in damages. *Ibid.* The complaint did not name the buyer, examiner, or any individual government official as a defendant.

After allowing petitioners to amend their complaint, the district court granted the government's motion to dismiss. Pet. App. 51-52. The court held that the Department of Justice and the Office of the United States Trustee were immune from suit under established principles of sovereign immunity. *Id.* at 52. The court further held that, "[e]ven were the Court to construe [petitioners'] pleadings to infer a suit against the Trustee individually, the Trustee would be protected from liability for the alleged actions of business mismanagement by judicial immunity." *Ibid.*

4. A unanimous court of appeals affirmed. Pet. App. 32-43. The court first held that petitioners' complaint "plainly states a cause of action against the United States" only. *Id.* at 36. The court then rejected petitioners' argument that Section 106(a) of the Bankruptcy Code, 11 U.S.C. 106(a), waived the United States' sovereign immunity from a civil suit for damages and injunctive relief. The court of appeals recognized that Section 106(a) expressly waives sovereign immunity for "governmental unit[s]" involved in certain proceedings under the Bankruptcy Code. Pet. App. 37. But, the court emphasized, the Bankruptcy Code exempts "a

United States trustee while serving as a trustee in a case under this title" from that waiver of immunity. *Ibid.* (quoting 11 U.S.C. 101(27)).

The court of appeals also rejected petitioners' contention that the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680, provides the necessary waiver of sovereign immunity. The court noted first that petitioners had not invoked the Federal Tort Claims Act in the district court and thus had waived that argument. Pet. App. 37-38. The court further held that, in any event, any claim under the Federal Tort Claims Act would implicate "quintessentially acts of discretion within the meaning of the [Federal Tort Claims Act's] discretionary function exception." *Id.* at 38-39.

The court found petitioners' reliance on *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to be unavailing for two reasons. First, petitioners had failed to name any government official in his individual capacity as a defendant. Pet. App. 39 & n.4. Second, the court held that any claim under *Bivens* would have been futile because the United States Trustee would have been entitled to absolute judicial immunity for his actions. *Id.* at 41. In so holding, the court reasoned that the United States Trustee had "assume[d] the judicial functions historically vested in bankruptcy and district courts" and "performs many of the functions that had been assigned previously to the bankruptcy judge." *Ibid.*

Finally, the court of appeals held that many of the alleged missteps by the United States Trustee, such as the appointment of the examiner and the sale of the real properties, were "approved by the bankruptcy court." Pet. App. 42. Those bankruptcy proceedings "addressed and satisfied" petitioners' constitutional rights

in the bankruptcy process. *Ibid.* If petitioners disagreed with the bankruptcy court's rulings, the court explained, the proper course was to appeal those rulings, but petitioners "voluntarily elected to abandon their appeal" instead. *Id.* at 43 n.6. Confirmation of the reorganization plan thus barred, under principles of res judicata, any claims that petitioners could have pressed in the bankruptcy proceedings. *Ibid.*

ARGUMENT

The judgment of the court of appeals dismissing the case on sovereign immunity grounds is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners' record-bound collateral challenge to completed bankruptcy proceedings does not otherwise merit an exercise of this Court's certiorari jurisdiction.

1. Petitioners seek (Pet. 6-14) this Court's review of the court of appeals' judgment that the Bankruptcy Code did not abrogate the United States' immunity from a private civil suit for monetary damages and equitable relief. Petitioners, however, identify no conflict in the circuits on that question or any conflict between the court of appeals' ruling and this Court's precedent that merits this Court's resolution. Nor is the United States aware of any such conflict.

In any event, the judgment of the court of appeals is correct. Petitioners filed suit solely against the United States Department of Justice and the Office of the United States Trustee as official components of the United States government. The United States government, however, is immune from suit unless it has expressly waived its sovereign immunity. See *Department of Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 260

(1999); *Department of Energy* v. *Ohio*, 503 U.S. 607, 615 (1992).

Petitioners first contend (Pet. 7) that Section 106(a) of the Bankruptcy Code contains the necessary waiver of sovereign immunity. That Section abrogates sovereign immunity for a "governmental unit to the extent set forth in this section" with respect only to specified provisions of the Bankruptcy Code. The court of appeals held that the waiver of sovereign immunity did not apply because "governmental unit" is defined to exclude the "United States trustee while serving as a trustee in a case under this title." 11 U.S.C. 101(27). Petitioners (Pet. 7-9) argue that the court of appeals erred because the United States Trustee was not, in fact, actually "serving as trustee" in petitioners' bankruptcy proceedings.

That argument is of no help to petitioners. Even if the limitation on the waiver of sovereign immunity applies only when a United States Trustee performs the functions of a traditional private trustee in a bankruptcy case, petitioners' post-bankruptcy, civil damages litigation does not fall within the scope of Section 106(a)'s waiver of sovereign immunity for bankruptcy proceedings. A statutory waiver of sovereign immunity must "be strictly construed, in terms of its scope, in favor of the sovereign." *Blue Fox*, 525 U.S. at 261. The waiver in Section 106(a) is, by its terms, expressly restricted to claims arising under sixty specific sections of the Bankruptcy Code.[1] Petitioners' civil litigation does not fall within any of those enumerated Sections.

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[1] Section 106(a) provides:

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to

Furthermore, even where the United States has generally waived its sovereign immunity from suit, the availability of monetary relief depends upon an additional express and particularized waiver by Congress. See, *e.g.*, *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34-37 (1992) (monetary claims unavailable). This Court has been "particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable for" "monetary exactions." *United States* v. *Idaho*, 508 U.S. 1, 8-9 (1993). Section 106(a)(3), however, authorizes courts only to "issue against a governmental unit an order, process, or judgment *under such sections [of the Bankruptcy Code] or the Federal Rules of Bankruptcy Procedure*, including an order or judgment awarding a money recovery, but not including an award of punitive damages." 11 U.S.C. 106(a)(3) (emphasis added). Petitioners' case was not brought in bankruptcy court and does not seek relief under any "such sections" of the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure.

Petitioners' claim (Pet. 15-17) that sovereign immunity was waived by the participation of the Internal Revenue Service in the bankruptcy proceedings overlooks the fact that the waiver of sovereign immunity in Section 106(b) pertains only to claims filed by the governmental unit *in the bankruptcy court* and arising

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the extent set forth in this section with respect to the following:

(1) 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, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

out of the "same transaction or occurrence out of which the claim of such governmental unit arose." 11 U.S.C. 106(b). Damages arising from the alleged failure of the United States Trustee to supervise an examiner have no conceivable nexus to any claims advanced by the Internal Revenue Service during petitioners' bankruptcy proceedings.[2]

2. Petitioners separately argue (Pet. 14-15) that sovereign immunity should not bar their claim for injunctive and declaratory relief. That argument fails for two reasons. First, sovereign immunity "shields the Federal Government and its agencies from *suit*," not just from monetary liability. *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994) (emphasis added). While such immunity does not generally extend to actions against federal officials, see *Ex parte Young*, 209 U.S. 123 (1908), petitioners have not named any individual federal officers as defendants.[3]

Second, petitioners lack standing to seek such equitable relief. The complaint contains no allegation of ongoing illegality relevant to any protected legal in-

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[2] In addition to lacking the requisite waiver of sovereign immunity, nothing in the Bankruptcy Code or any other source of law of which the United States is aware creates a separate civil cause of action for damages or injunctive relief against the United States arising out of alleged missteps in bankruptcy proceedings.

[3] It is doubtful that a suit would lie even if petitioners had named an individual official in light of both the absence of any allegation of ongoing unlawful conduct and the comprehensive remedial scheme already provided by the Bankruptcy Code for claims timely raised while those proceedings are ongoing. See *Seminole Tribe* v. *Florida*, 517 U.S. 44, 74-75 (1996) (holding that *Ex Parte Young* suits are impliedly barred by Congress's enactment of a detailed remedial scheme and when the relief sought can only be provided by the sovereign *qua* sovereign).

terest held by petitioners. Nor does the complaint allege that petitioners will be involved in any type of bankruptcy proceedings, let alone those involving the active participation of a United States Trustee, at any time in the foreseeable future. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983) (where a plaintiff "has made no showing that he is realistically threatened by a repetition of his experience * * *, then he has not met the requirements for seeking an injunction in federal court, whether the injunction contemplates intrusive structural relief or the cessation of a discrete practice"); *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969) (where it is "most unlikely" that a plaintiff would again be subject to the operation of a statutory scheme, no case or controversy of "sufficient immediacy and reality" exists to permit declaratory relief). Indeed, petitioners' inability to establish irreparable injury—"a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff[s] will be wronged again"—forecloses any claim for equitable relief on its merits.

3. Petitioners also seek (Pet. 12-13, 22-23) this Court's review of the court of appeals' holding that the challenged actions of the United States Trustee fall within the Federal Tort Claims Act's (FTCA) exemption for discretionary functions. See Pet. App. 38 (citing 28 U.S.C. 2680(a)). That fact-bound claim does not merit this Court's review and, in any event, is incorrect for three reasons.

First, petitioners never invoked the FTCA as a basis for relief either in their complaint or in district court. The argument therefore was waived, as the court of appeals held. Pet. App. 38.

Second, petitioners have failed to allege before any court, including this Court, that they satisfied the

FTCA's administrative exhaustion requirement, see 28 U.S.C. 2675(a). That requirement is jurisdictional. See *McNeil* v. *United States*, 508 U.S. 106, 112 (1993).

Third, the court of appeals was correct (Pet. App. 38) in holding that any attempt by petitioners to amend the complaint to add an FTCA claim would be futile. Petitioners' claim for relief turns upon the United States Trustee's "alleged negligence in his general duties of selecting, monitoring, and investigating the examiner appointed in this case," and those actions are "quintessentially" matters of discretion "within the meaning of the FTCA discretionary function exception." *Id.* at 38-39; see also *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813-814 (1984).

Petitioners' reliance (Pet. 13) on *Berkovitz* v. *United States*, 486 U.S. 531 (1988), is misplaced because the Trustee has no non-discretionary duty to supervise and investigate examiners. While the United States Trustee nominates a person to serve as examiner "after consultation with parties in interest," 11 U.S.C. 1104(d), the formal selection of the examiner is by the bankruptcy court. Furthermore, nothing in the Bankruptcy Code charges the United States Trustees with supervising examiners once they are appointed by the court. See 11 U.S.C. 1106 (powers of examiners). To the contrary, examiners' powers and compensation are set by the court. 11 U.S.C. 330(a)(1), 1106(b). While 28 U.S.C. 586 vests the United States Trustee with the authority to "supervise * * * the administration of cases and trustees," that assignment is couched in the broadest of discretionary terms. See 28 U.S.C. 586(a)(3) (United States Trustee shall "supervise the administration of cases and trustees in cases under chapter 7, 11, 12, or 13 of title 11" by engaging in certain tasks "whenever the

United States trustee considers it to be appropriate").[4] The Trustee's statutory duties thus involve "an element of judgment or choice"; the statute does not "specifically prescribe[] a course of action for an employee to follow." *Berkovitz*, 486 U.S. at 536.

4. Finally, petitioners' failure to contest the real estate sales or any actions of the United States Trustee prior to the closure of the bankruptcy proceedings and the court's adoption of the reorganization plan forecloses this collateral attack. See 11 U.S.C. 1141(a) ("[T]he provisions of a confirmed plan bind the debtor."); see also *Trulis* v. *Barton*, 107 F.3d 685, 691 (9th Cir. 1995) ("Once a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to res judicata effect."); 5 *Collier on Bankruptcy* ¶ 1141.01[1], at 1141-3 (Lawrence P. King ed., 15th ed. 1995). As the court of appeals correctly held, petitioners' claims arising out of the conduct of the bankruptcy case are barred because "[t]he confirmed plan acted as res judicata as to claims that could have been raised in the bankruptcy proceedings, but were not." Pet. App. 43 n.6.

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[4] See also 28 U.S.C. 586(a)(3)(G) (empowering the United States Trustee, "whenever" he or she "considers it to be appropriate," to monitor the progress of cases under Title 11 and take "such actions as the United States trustee deems to be appropriate to prevent undue delay in such progress"); 28 U.S.C. 586(a)(3)(H) (allowing the United States Trustee, "whenever" he or she "considers it to be appropriate," to monitor applications under Title 11 "and, whenever the United States trustee deems it to be appropriate, [to] fil[e] with the court comments with respect to the approval of such applications").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted

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