No. 18-_____

IN THE
Supreme Court of the United States

BUCHWALD CAPITAL ADVISORS LLC,
LITIGATION TRUSTEE TO THE GREEKTOWN
LITIGATION TRUST,
Petitioner,

v.

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS
AND KEWADIN CASINOS GAMING AUTHORITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 18, 2019

QUESTION PRESENTED

Whether the Bankruptcy Code abrogates the sovereign immunity of Indian tribes.

PARTIES TO THE PROCEEDINGS

Petitioner Buchwald Capital Advisors LLC, Litigation Trustee to the Greektown Litigation Trust, was the plaintiff in the bankruptcy court, the appellant and appellee at different times in the district court, and the appellant in the court of appeals.

Respondents Sault Ste. Marie Tribe of Chippewa Indians and Kewadin Casinos Gaming Authority were defendants in the bankruptcy court, appellants and appellees at different times in the district court, and appellees in the court of appeals.

Barden Development, Inc., Barden Nevada Gaming, LLC, Maria Gatzaros, Ted Gatzaros, Lac Vieux Desert Band of Lake Superior Indians, Dimitrios ("Jim") Papas, and Viola Papas were defendants in the bankruptcy court that did not participate in the appeals relevant to this petition.

Contract Builders Corporation; Greektown Casino, LLC; Greektown Holdings, LLC; Greektown Holdings II, Inc.; Kewadin Greektown Casino, LLC; Monroe Partners, LLC; Realty Equity Company Inc.; and Trappers GC Partner, LLC were debtors in the bankruptcy court that did not participate in the appeals relevant to this petition.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Buchwald Capital Advisors LLC, Litigation Trustee to the Greektown Litigation Trust, states the following:

Buchwald Capital Advisors LLC is not a subsidiary or affiliate of a publicly owned corporation. Buchwald Capital Advisors LLC is the Trustee of the Greektown Litigation Trust, which was created pursuant to the confirmed plan of reorganization of Greektown Holdings, LLC, et al.

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Petitioner Buchwald Capital Advisors LLC, Litigation Trustee to the Greektown Litigation Trust, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-38a) is designated for publication, but not yet reported (it is currently available at 2019 WL 922658). The opinions and orders of the bankruptcy court and the district court (App. 39a-71a, 72a-98a, 99a-140a, 141a-165a) are reported at 584 B.R. 706, 559 B.R. 842, 532 B.R. 680, and 516 B.R. 462, respectively.

JURISDICTION

The court of appeals entered its judgment on February 26, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 101(27), 106, 544, and 550 of the Bankruptcy Code, 11 U.S.C. §§ 101(27), 106, 544, and 550, are reproduced at App. 166a-171a.

INTRODUCTION

The Bankruptcy Code "abrogate[s]" the "sovereign immunity" of any "governmental unit," 11 U.S.C. § 106(a), defined to include the United States, each of the States, and foreign governments; agencies and instrumentalities of federal, state, and foreign governments; and "other foreign or domestic government[s]," *id.* § 101(27). That broad abrogating language permits bankruptcy trustees to bring actions against otherwise immune sovereigns to avoid and recover preferential and fraudulent transfers. The statute reflects Congress's determination that even governments must be included in the bankruptcy process in order to serve the fundamental, centuries-old policy of treating all creditors equally and fairly in bankruptcy. This case presents the question whether that legislative judgment, as discerned using traditional methods of statutory construction, unequivocally includes Indian tribes as "governmental unit[s]" whose sovereign immunity is abrogated.

The Ninth Circuit held in 2004 that the Bankruptcy Code's abrogating provisions clearly cover Indian tribes because they are "domestic government[s]" within the plain and ordinary meaning of that phrase. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004). In this case, a divided panel of the Sixth Circuit acknowledged *Krystal Energy*, but declined to follow it because the Bankruptcy Code does not refer to "Indian tribe[s]" in so many words. The court of appeals instead followed *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 1331 (2017), which applied a similar analysis to the Fair and Accurate Credit Transactions Act of 2003. The result is a conceded circuit conflict on a pure question of federal statutory law.

The question on which the circuits are in conflict is an important one that warrants this Court's review. Fair and equal treatment of creditors in bankruptcy lies at the heart of federal bankruptcy policy. Leaving tribes and their enterprises out of that system threatens its integrity – as illustrated here, where respondents caused $177 million to be transferred away from the insolvent corporate parent of a troubled Detroit casino and then invoked tribal immunity to bar any judicial remedy for their conduct. It is, of course, for Congress to determine which of the conflicting values of bankruptcy policy and tribal autonomy should prevail in this and similar cases. But deference to the legislature in matters of tribal immunity makes it all the more important that courts properly ascertain the legislature's will.

The Sixth Circuit failed to do that here. The governing provisions of the Bankruptcy Code are broad, but not ambiguous: as the dissent put it, they show that "Congress abrogated the sovereign immunity of any government, of any type, anywhere in the world." App. 31a (Zouhary, J., dissenting). The panel majority rejected that conclusion by comparing the Code to other statutes in which Congress used the particular words "Indian tribe." In taking that approach, the court of appeals disregarded this Court's clear guidance that Congress "need not state its intent in any particular way" when it abrogates sovereign immunity, so long as its intent is clear from the words it did choose. *FAA v. Cooper*, 566 U.S. 284, 291 (2012). This Court should grant certiorari to resolve the conflict among the circuits; and it should reaffirm that the ordinary meaning of statutory words guides judicial decisions as much in cases involving tribes as in others.

STATEMENT

Section 106 of the Bankruptcy Code "abrogate[s]" the "sovereign immunity" of "a governmental unit." 11 U.S.C. § 106(a). That section lists 59 sections of the Code to which abrogation extends – including, as relevant here, § 544 and § 550, which authorize a bankruptcy trustee to avoid and recover certain transfers that creditors or others could have avoided under applicable nonbankruptcy law. *See id.* § 106(a)(1). A federal bankruptcy court may "hear and determine any issue arising with respect to the application of [those 59] sections to governmental units." *Id.* § 106(a)(2). Should it find the governmental unit liable, the court may issue "against" that unit "an order, process, or judgment," "including an order or judgment awarding a money recovery." *Id.* § 106(a)(3). The court may "enforce[] . . . any such order, process, or judgment against any governmental unit," but such enforcement "shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit." *Id.* § 106(a)(4).

The term "governmental unit" is in turn defined by the Code as "mean[ing]":

> United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

Id. § 101(27). This case involves the application of § 106(a) and § 101(27) to respondent Sault Ste. Marie Tribe of Chippewa Indians (the "Tribe") and to its political subdivision respondent Kewadin Casinos

Gaming Authority (the "Authority"). That application occurred during the resolution of the 2008 bankruptcies of Greektown Casino, LLC (the "Casino"), which owns and operates a gaming facility in downtown Detroit, Michigan; of the Casino's owner from 2005 to 2008, Greektown Holdings, LLC ("Holdings"); and of other corporate entities related to Holdings and to the Casino (collectively, the "Debtors").

1. The events leading to the Casino's ruin began in 2000. At that time, the Tribe already partly owned the Casino through several corporate layers; it then bought out the other owners to acquire complete indirect ownership of the Casino. App. 2a. Despite the formal separation of the Tribe and the Casino in terms of corporate structure, petitioner alleges – and the courts below all assumed – that the Tribe in fact "exerted complete dominion and control" over the Casino, including its day-to-day operations. App. 4a n.1. As part of the 2000 transaction, the Tribe promised to pay the Casino's former part-owners $265 million over the ensuing years. App. 2a.

In 2002, to obtain needed permissions from the City of Detroit (the "City"), the Casino entered into a development agreement with the City and the City's Economic Development Corporation. App. 2a; Compl.[1] ¶ 33. Under that agreement, the Casino promised to build a 400-room hotel with a theater, a ballroom, a convention area, and a 4,000-vehicle parking facility. Compl. ¶ 34. The Casino's promises to the City committed it to spend at least $200 million. App. 2a; Compl. ¶ 34.

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[1] References to "Compl. ¶ _" are to the Complaint filed in the bankruptcy court on May 28, 2010 (Case No. 08-53104). It is reproduced as part of the Designation of Record, *In re Greektown Holdings, LLC, et al.*, Case No. 16-cv-13643, Doc. 5, Pg ID 50-86 (Bankr. E.D. Mich. Nov. 14, 2016).

In 2005, the obligations to the former owners and to the City were placing the Casino and other Debtors under great financial strain. App. 2a-3a. In response, the Tribe refinanced the Casino's debt and created Holdings to be the Casino's direct owner. *Id.* The Tribe continued to control the Casino's day-to-day operations through its own officials. App. 3a-4a & n.1, 75a-76a. From the financing proceeds, the Tribe caused Holdings to transfer $177 million to or for the benefit of various parties, including $6 million to the Tribe through its political subdivision, the Authority. App. 3a. The refinancing and transfers left Holdings with negative equity of $138.5 million on its balance sheet even before taking into account the Casino's obligation to spend $200 million to fulfill its promises to the City. Compl. ¶¶ 40-41.

2. On May 29, 2008, the Debtors filed voluntary petitions under Chapter 11 of the Bankruptcy Code. App. 3a-4a. On May 28, 2010, the official committee of the Debtors' unsecured creditors began an adversary proceeding to avoid the $177 million transferred in the 2005 refinancing and recover that amount under 11 U.S.C. § 544 and § 550. The creditors alleged that the transfers were constructively fraudulent because they rendered Holdings insolvent and unable to pay its debts, and they were made either for no consideration or for consideration that was inadequate. App. 4a. Petitioner Buchwald Capital Advisors LLC (the "Trustee") was later appointed as trustee of a litigation trust to pursue those claims, and substituted for the creditors' committee as plaintiff. App. 142a n.1. The Tribe moved to dismiss, arguing that the Bankruptcy Code's language did not unequivocally abrogate tribal sovereign immunity under *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

On August 12, 2014, the bankruptcy court (Shapero, J.) denied the Tribe's motion to dismiss. App. 141a-165a. The court identified the question before it as "whether the phrase 'or other foreign or domestic government,'" in § 101(27), "includes Indian tribes and thus abrogates their sovereign immunity." App. 144a. It reasoned that "Indian tribes are clearly and unequivocally 'governments,'" in part because "[b]y the very definition of sovereign immunity, only governmental entities hold it." App. 149a-150a (emphasis omitted). It relied on this Court's "long recogni[tion] that Indian tribes are territorially domestic," quoting, among other cases, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), in which Justice Marshall described tribes as "domestic dependent nations," and rejecting the Tribe's argument that tribes are "part of a separate category that transcends the foreign/domestic dichotomy." App. 150a-152a. The court also rejected the Tribe's argument that Congress must "explicitly use[] the words 'Indian tribe' (or similar language)" to abrogate tribal immunity, App. 156a, finding the Bankruptcy Code "perfectly . . . clear, despite not using the 'magic words.'" App. 160a-161a.

The Tribe appealed to the district court. On June 9, 2015, that court (Borman, J.) reversed, App. 99a-140a, concluding that it could not "say 'with perfect confidence' that Congress intended, by using the generic phrase 'other domestic governments' in § 101(27), to clearly, unequivocally, unmistakably and without ambiguity abrogate tribal sovereign immunity in § 106(a)." App. 105a. In reaching that conclusion, the court acknowledged that "[t]here cannot be reasonable debate that Indian tribes are both 'domestic' . . . and . . . are fairly characterized as possessing attributes of a 'government.'" App. 122a. Nevertheless, the court found it dispositive that "there is not one example

in all of history where the Supreme Court has found that Congress intended to abrogate tribal sovereign immunity without expressly mentioning Indian tribes somewhere in the statute," and that, "in many instances, when Congress did mean to abrogate tribal immunity, it did use the 'magic words' 'Indian tribes' in doing so." App. 123a (emphasis omitted).

The district court remanded for further proceedings concerning the Trustee's alternative argument (not raised here) that the Tribe and the Authority had waived sovereign immunity by causing the Debtors to invoke federal bankruptcy jurisdiction at a time where the Tribe's officials controlled the Debtors' day-to-day operations and disregarded their corporate forms. The bankruptcy court rejected the waiver argument, dismissing the Trustee's claims entirely and entering final judgment for the Tribe. App. 72a-98a. The district court affirmed. App. 39a-71a.

3. The Trustee appealed to the Sixth Circuit. On February 26, 2019, a divided panel affirmed. App. 1a-38a. The majority (Clay, J., joined by Griffin, J.) stated that a "useful place to start" was "Congress's knowledge and practice regarding the abrogation of tribal sovereign immunity in 1978," App. 8a, when the current Bankruptcy Code (including § 101(27)) was first enacted. At that time, the court observed, Congress would have been aware of *Santa Clara Pueblo*, which held that Congress's intent to abrogate tribal immunity must be "'unequivocally expressed,'" 436 U.S. at 58 (quoting *United States v. Testan*, 424 U. S. 392, 399 (1976)) – an instruction that the court argued must be read "literally" to require "no doubt about [Congress's] intent." App. 9a (emphasis omitted). It further suggested that Congress "understood the meaning of 'unequivocal'" because statutes other than the Bankruptcy Code, passed in the 1970s and

later, used the phrase "Indian tribe" when authorizing lawsuits against tribes. App. 8a-9a & n.3.

The court of appeals agreed with the bankruptcy court that previous courts addressing the question before it had reached "'irreconcilable conclusions'" – and suggested that such disagreement was "[o]stensibly evidence enough that Congress has left doubt about its intent." App. 9a (quoting App. 110a) (emphasis omitted). Representing "one side" of the conflict, the court cited the Ninth Circuit's *Krystal Energy* decision, which "held . . . that Congress *did* unequivocally express an intent to abrogate tribal sovereign immunity." App. 9a-10a (citing 357 F.3d at 1061). Representing the other side, the court cited *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 1331 (2017), a case involving not the Bankruptcy Code, but the Fair and Accurate Credit Transactions Act of 2003 ("FACTA") – a statute that the court believed contained language "functionally equivalent" to the Code provisions at issue here. App. 10a.

The court of appeals chose to follow *Meyers*. Like the district court, the Sixth Circuit acknowledged the absence of "'reasonable debate'" that "'tribes are . . . "domestic"'" and "'possess[] attributes of a "government."'" App. 14a (quoting App. 122a). Nevertheless, it contended, "[e]stablishing that Indian tribes are domestic governments does not lead to the conclusion that Congress unequivocally meant to include them when it employed the phrase 'other foreign or domestic government.'" App. 15a (emphasis omitted). To support that conclusion, it relied on the lack of any case from this Court holding "'that Congress intended to abrogate tribal sovereign immunity *without* expressly mentioning Indian tribes somewhere in the statute,'" App. 16a (quoting *Meyers*, 836 F.3d at 824);

on circuit court cases holding tribal immunity abrogated by statutes that did use the words "Indian tribe," *id.*; and on other cases holding immunity not abrogated by statutes that did not, *id.*

The court of appeals conceded that "Congress need not use 'magic words' to abrogate tribal sovereign immunity" and claimed that it was not "hold[ing] that specific reference to Indian tribes is in all instances required to abrogate tribal sovereign immunity." App. 17a. In a footnote, it suggested that "a statute stating that 'sovereign immunity is abrogated as to all parties who could otherwise claim sovereign immunity,'" App. 17a n.10 (quoting *Krystal Energy*, 357 F.3d at 1058), "might" be sufficiently unequivocal to satisfy its test. It further rejected the Trustee's additional arguments that other provisions of the Code using the phrase "governmental units" undisputedly apply to Indian tribes, App. 18a; and that, if the phrase "other . . . domestic government" does not encompass tribes, it has no identifiable meaning, App. 19a. In a separate part of its opinion, the court of appeals also affirmed the lower courts' ruling that the Tribe had not waived its immunity on the facts of this case. App. 21a-29a.

Judge Zouhary dissented. "[B]egin[ning] with the text," he observed that § 106(a)'s statement that "'sovereign immunity is abrogated as to a governmental unit'" is an "explicit, unmistakable statement from Congress that it intends to abrogate sovereign immunity" – so that "[t]he sole remaining question is whose sovereign immunity." App. 31a. He found the answer in § 101(27), with its long list of government entities "and, on top of those, any 'other foreign or domestic government.'" *Id.* Reading those provisions together, he concluded that "Congress abrogated the sovereign immunity of any government, of any type, anywhere in the world." *Id.* He further reasoned that

"an Indian tribe" is a "domestic government" based on the ordinary meaning of that phrase: a tribe is "domestic" because it "resid[es] and exercis[es] its sovereign authority within the territorial borders of the United States," and it is "a form of government" because it "exercises political authority on behalf of and over its members." App. 32a. To confirm that "natural reading," Judge Zouhary pointed to examples from this Court's cases and from other statutes where tribes are referred to as being "domestic" and as being "governments." App. 32a-33a.

Judge Zouhary also disagreed with the majority's contention that the Seventh Circuit's decision in *Meyers* was on point, observing (among other differences) that "FACTA makes no mention of sovereign immunity, [but] the [Bankruptcy] Code targets it directly." App. 34a-35a. He conceded, however, one point of "fundamental[] disagree[ment]" with *Meyers* and the majority: whether it is "important that the Bankruptcy Code does not mention the words 'Indian tribe.'" App. 36a. He contended that the judicial "task . . . [of] determin[ing] whether 'the language of the statute' contains an unequivocal expression of intent to abrogate sovereign immunity," App. 37a (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)), does not require "demand[ing] that [Congress] use the same words . . . as it has in the past," *id.* After finding "clear evidence of congressional intent to abrogate" in the statute's "text," Judge Zouhary further observed that the majority's opinion also gave short shrift to the Bankruptcy Code's "purpose of establishing and enforcing a fair and equitable distribution procedure" under which "all governments must play by the rules." App. 37a-38a.

REASONS FOR GRANTING THE PETITION

The decision of the Sixth Circuit acknowledges a conflict with the Ninth Circuit on the question presented: whether the Bankruptcy Code abrogates tribal sovereign immunity. That is a pure question of federal statutory law, and this case presents it cleanly. The question is important both because it recurs frequently in the bankruptcy courts and because it involves two weighty, competing interests: the uniformity and integrity of the federal bankruptcy system on one hand, and the autonomy of tribal governments on the other. Review is warranted to resolve the disagreement among the circuits about how Congress struck that balance.

I. THE CIRCUITS ARE IN ACKNOWLEDGED CONFLICT ON WHETHER TRIBES ARE IMMUNE FROM FEDERAL BANKRUPTCY JURISDICTION

The court of appeals correctly described the federal courts as having reached "'two irreconcilable conclusions,'" App. 9a (quoting App. 110a), as to whether the Bankruptcy Code abrogates tribal sovereign immunity. It also correctly identified the Ninth Circuit's decision in *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), as representing one side of that split. *Krystal Energy* addressed the same question presented here and reached the opposite result, finding it "clear from the face of §§ 106(a) and 101(27) that Congress did intend to abrogate the sovereign immunity of all 'foreign and domestic governments'" and "certain[]" that "Indian tribes are . . . governments, whether considered foreign or domestic." *Id.* at 1057 (quoting § 101(27)). The Ninth Circuit further reasoned – like the dissent here, App. 36a – that it did not matter whether Congress used the specific

words "Indian tribes" because "the ordinary, all-encompassing meaning of the term 'other foreign or domestic governments'" made the statute sufficiently unequivocal. *Krystal Energy*, 357 F.3d at 1059.

The Ninth Circuit also highlighted the Bankruptcy Code's "explicit[] use[] [of] the terms 'sovereign immunity' and 'abrogate.'" *Id.* On that basis it distinguished cases holding that a "'general authorization for suit in federal court,'" applying to a group of sovereign and non-sovereign defendants, "'is not . . . sufficient to abrogate'" immunity. *Id.* at 1060 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245-46 (1985)) (emphasis omitted). Unlike the provisions of the Rehabilitation Act of 1973 at issue in *Atascadero*, § 106(a) "does not simply 'authorize suit in federal court' under the Bankruptcy Code – it specifically abrogates the sovereign immunity of governmental units, a defined class that is largely made up of parties that could claim sovereign immunity." *Id.* Accordingly, merely "interpret[ing] the statute's reach in accordance with both the common meaning of its language and the use of similar language by the Supreme Court" was enough "to conclude that Congress 'unequivocally expressed' its intent to abrogate Indian tribes' immunity." *Id.*

Krystal Energy remains good law in the Ninth Circuit, as confirmed by decisions of bankruptcy and district courts interpreting and applying its holding. Examples include *Jamestown S'Klallam Tribe v. McFarland*, 579 B.R. 853 (E.D. Cal. 2017), which followed *Krystal Energy* in holding a tribal government not immune from a fraudulent transfer action, *see id.* at 856-57; *In re Womelsdorf*, Bankr. No. 12-62075-fra7, 2015 WL 3643477 (Bankr. D. Or. June 11, 2015), which applied *Krystal Energy* to a tribal

corporation, reasoning that the corporation's immunity "derived solely from the corporation's status and purpose as an arm of the tribe," *id.* at *3; and *In re Brown*, BAP No. NC-06-1101-MaMeRy, 2006 WL 6810938 (B.A.P. 9th Cir. Sept. 28, 2006), a turnover proceeding under 11 U.S.C. § 542, which explained that under *Krystal Energy* tribal immunity was abrogated because § 542 is one of the provisions of the Bankruptcy Code listed in § 106(a), *see id.* at *4. If the present case had arisen in the Ninth Circuit, the Tribe's motion to dismiss would have been denied; conversely, if *Jamestown S'Klallam* or *Womelsdorf* had arisen in the Sixth Circuit, the tribes' or tribal entities' motions to dismiss in those cases would have been granted.

The Sixth Circuit argued that its decision was supported by the Seventh Circuit's decision in *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 1331 (2017). As the dissent showed, App. 34a-37a, there are significant textual distinctions between the Bankruptcy Code and FACTA, the statute at issue in *Meyers*.[2] Nevertheless, *Meyers* discussed not only *Krystal Energy*, *see Meyers*, 836 F.3d at 825, but also the decision of the district court in this case, endorsing that court's contention that, because Congress did not "'expressly mention[s] Indian tribes somewhere in'" the Bankruptcy Code, the statute was not sufficiently unequivocal to abrogate tribal sovereign immunity, *id.* at 824 (quoting App. 123a). *Meyers* thus supports review, at a minimum, by confirming that the arguments supporting each side of the circuit conflict have

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[2] The Trustee argued to the court of appeals that *Meyers* could be distinguished, in part because the Seventh Circuit stopped short of disagreeing with *Krystal Energy*. *See* Pet'r C.A. Reply 12-13 (citing *Meyers*, 836 F.3d at 826).

been evaluated by multiple appellate courts, giving this Court confidence that it can expect to hear tested arguments on both sides of the issue.

Other bankruptcy and district courts have also considered the issue and joined one side of the split or the other. Leaving aside decisions in this case, on the Ninth Circuit's side are decisions of bankruptcy courts in the District of New Mexico, the District of Arizona (before *Krystal Energy*), and the Northern District of New York.[3] On the Sixth Circuit's side are decisions of the district court in the District of Delaware, a bankruptcy appellate panel in the Eighth Circuit, and bankruptcy courts in the District of New Jersey and the Northern District of Iowa.[4] Those decisions, too,

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[3] *See In re Platinum Oil Props., LLC*, 465 B.R. 621, 643 (Bankr. D.N.M. 2011) ("11 U.S.C. § 106 together with 11 U.S.C. § 101(27) embodies Congress' clear and unequivocal abrogation of tribal sovereign immunity."); *In re Russell*, 293 B.R. 34, 44 (Bankr. D. Ariz. 2003) ("'[O]ther foreign or domestic government' in § 101(27) unequivocally, and without implication, includes Indian tribes as 'governmental units.'"); *In re Vianese*, 195 B.R. 572, 576 (Bankr. N.D.N.Y. 1995) (tribes "comprise 'governmental units' within the meaning of Code § 101(27)"); *see also In re Sandmar Corp.*, 12 B.R. 910, 916 (Bankr. D.N.M. 1981) (tribe was a "governmental unit" under the definition then in effect).

[4] *See In re Money Ctrs. of Am., Inc.*, No. AP 16-50410-CSS, 2018 WL 1535464, at *4 (D. Del. Mar. 29, 2018) ("Section 101(27)'s reference to 'other . . . domestic government[s]' falls short of the clarity required for abrogation of tribal sovereign immunity.") (alterations in original); *In re Whitaker*, 474 B.R. 687, 695 (B.A.P. 8th Cir. 2012) ("[I]n enacting § 106, Congress did not unequivocally express its intent by enacting legislation explicitly abrogating the sovereign immunity of tribes."); *In re Star Grp. Commc'ns, Inc.*, 568 B.R. 616, 622-25 (Bankr. D.N.J. 2016) (following *Whitaker*); *In re National Cattle Cong.*, 247 B.R. 259, 267 (Bankr. N.D. Iowa 2000) ("The Code makes no specific mention of Indian tribes."). The Tenth Circuit's bankruptcy appellate panel has also stated in dictum that § 106 "probably

confirm that the merits of the question presented have been aired before many judges and are ready for this Court's review. They also demonstrate that the question presented recurs frequently in bankruptcy cases, underscoring the benefits of an authoritative answer from this Court.

II. WHETHER TRIBES ARE IMMUNE FROM FEDERAL BANKRUPTCY JURISDICTION IS AN IMPORTANT QUESTION

This Court has recognized "the power to authorize courts to avoid preferential transfers and to recover the transferred property," embodied in the Constitution's Bankruptcy Clause, as "a core aspect of the administration of bankrupt estates since at least the 18th century." *Central Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 372 (2006); *see BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 540-41 (1994) (tracing the history of "the law of fraudulent transfers" back to 1570, and observing that "[e]very American bankruptcy law has incorporated a fraudulent transfer provision"). The powers to avoid preferential and fraudulent transfers conveyed to courts and trustees "'help implement the core principles of bankruptcy'" by "'deter[ring] the race of diligence of creditors to dismember the debtor before bankruptcy,'" by "promot[ing] 'equality of distribution,'" and by "set[ting] aside transfers that 'unfairly or improperly deplete . . . assets or . . . dilute the claims against those assets.'" *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 888 (2018) (quoting Charles Tabb, *Law of Bankruptcy* § 6.1 (4th ed. 2016); *Union Bank v. Wolas*, 502 U.S. 151, 161 (1991); and 5 *Collier on Bankruptcy* ¶ 548.01, at 548-10 (16th ed. 2017)) (ellipses in original); *see also*

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does not apply" to tribes. *In re Mayes*, 294 B.R. 145, 148 n.10 (B.A.P. 10th Cir. 2003).

Begier v. IRS, 496 U.S. 53, 58 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code.").

The importance of those core bankruptcy policies explains why bankruptcy jurisdiction is an exception to rules that otherwise protect vital sovereign interests of a broad range of sovereigns. Generally, money claims against the United States are subject to strict requirements under defined statutory procedures such as the Contract Disputes Act of 1978 or the Federal Tort Claims Act; but a bankruptcy court can hear voidable-preference or fraudulent-transfer claims against the United States using that court's own procedures. *See, e.g., In re DBSI, Inc.*, 869 F.3d 1004, 1007 (9th Cir. 2017). Generally, the Eleventh Amendment and the doctrine of state sovereign immunity prohibit States from being sued in federal court without their consent; but this Court held in *Katz* that state consent to preference claims was given "in the plan of the Convention," 546 U.S. at 379, before federal bankruptcy laws were even enacted. Generally, the Foreign Sovereign Immunities Act of 1976 is "the sole basis for obtaining jurisdiction over a foreign state in our courts," *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989); but § 106(a) and § 101(27) by their plain terms make another exception to the immunity of foreign governments. Congress created that unique system, in which "all governments must play by the rules," App. 38a (Zouhary, J., dissenting) – and, except as the Code provides otherwise, by the same rules as private parties – because of the unique responsibility of the bankruptcy courts to distribute estate assets equally among all creditors.

Knowing whether Indian tribes are the one class of sovereign left out of Congress's scheme is important in practice as well as in principle. Five years ago, in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), this Court reaffirmed the holding of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), that tribal immunity applies to off-reservation commercial activities. The principal *Bay Mills* dissent amassed evidence that, "[i]n the 16 years since *Kiowa*, the commercial activities of tribes have increased dramatically." 572 U.S. at 822 (Thomas, J., dissenting). Justice Thomas cited reports and studies showing that tribally owned enterprises generate tens of billions of dollars in gaming revenue annually; engage in on-reservation activities including "tourism, recreation, mining, forestry, and agriculture"; and, off-reservation, "run the gamut, . . . sell[ing] cigarettes and prescription drugs online; engag[ing] in foreign financing; and operat[ing] greeting cards companies, national banks, cement plants, ski resorts, and hotels." *Id.* at 822-23. Since then, tribally owned enterprises have continued to grow: for example, tribal gaming revenues went up four or five percent in each of the last three reported years, reaching $32.4 billion in 2017.[5]

If tribes are immune from bankruptcy court jurisdiction, then any tribe can place the assets of any tribally owned enterprise – including, as this case illustrates, any controlled subsidiary of any tribally owned entity – beyond the reach of creditors simply by transferring those assets to the tribe itself. It is hard

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[5] *See* National Indian Gaming Comm'n, *Gross Gaming Revenue Reports*, *at* https://www.nigc.gov/commission/gaming-revenue-reports (follow link for "Growth in Indian Gaming Graph 2008-2017") (last visited Mar. 14, 2019).

to see why a rational tribal government would then leave assets in the possession of a tribally owned business entity that is reaching or approaching insolvency; and equally hard to see why non-sovereign creditors of such an entity would not move to secure assets before the tribe could act. That scenario – a variation on the "race . . . to dismember the debtor before bankruptcy," *Merit Mgmt.*, 138 S. Ct. at 888, that bankruptcy law has long worked to prevent – would not in the end make anyone better off. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 331 (1999) (warning against triggering a "race to the courthouse" by "radically alter[ing] the balance between debtor's and creditor's rights which has been developed over centuries through many laws").

All this is not to deny that Indian tribes' interests are also entitled to weight. The court of appeals thought that "'the doctrine of tribal [sovereign] immunity reflects a societal decision that tribal autonomy predominates over other interests.'" App. 30a (quoting *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 781 (D.C. Cir. 1986)) (alteration in original). This Court has made clear, however, that the "societal decision" of how to reconcile federal policies with tribal autonomy is not a decision for the courts, but one for Congress. *See Bay Mills*, 572 U.S. at 800 ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity."). The important questions at stake in this and similar cases should therefore be decided by interpreting the words that Congress wrote in § 106(a) and § 101(27). This case is an excellent vehicle for doing so.

III. THE COURT OF APPEALS INCORRECTLY HELD THAT TRIBES ARE IMMUNE FROM FEDERAL BANKRUPTCY JURISDICTION

The plain language of the Bankruptcy Code "abrogate[s]" the "sovereign immunity" of a "governmental unit," 11 U.S.C. § 106(a), and defines a "governmental unit" to include a "domestic government," *id.* § 101(27). The court of appeals did not dispute – as it hardly could – that the Trustee had "[e]stablish[ed] that Indian tribes are domestic governments," App. 15a, within the ordinary meaning of that phrase. It follows that the Tribe is a "governmental unit" within the meaning of the Bankruptcy Code and that its immunity is abrogated by § 106(a). The requirement that Congress "'unequivocally' express [its] purpose" to abrogate tribal immunity, *Bay Mills*, 572 U.S. at 790, is satisfied, and the only rule of statutory construction necessary to decide this case is the "cardinal canon before all others" that "a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

An Indian tribe is a "government" as ordinary speakers of English use that term. The general definition of a "government" is "the organization, machinery, or agency through which a political unit exercises authority and performs functions." *Webster's Third New International Dictionary* 982 (2002). Indian tribes fit that definition because they "exercise 'inherent sovereign authority,'" *Bay Mills*, 572 U.S. at 788 (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991)), on behalf of their members. The Tribe here exercises its authority through a constitution that defines its "governing body" as its board of directors,

elected by majority vote, and includes a description of the history of the "modern governmental organization of the Tribe" and the process through which "[t]he Tribe sought organization of its tribal government under a constitution." App. 173a, 176a. The board exercises the Tribe's legislative authority and has enacted a Tribal Code, App. 188a-198a; it appoints tribal officers who perform executive functions subject to the board's review, App. 181a-182a; and it has created a court to carry out the judicial function, App. 180a-181a, 192a. There is nothing equivocal about identifying this set of institutions as a government.

Consistent with the common definition of "government," this Court has used that term to refer to the political organization of an Indian tribe in the same decisions that have recognized tribal immunity. *See*, *e.g.*, *Kiowa*, 523 U.S. at 758 (suggesting that "the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59-60 (1978) (stating that tribal immunity protects "a tribal government's ability to maintain authority"); *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512-13 (1940) (referring to Indian tribes' "governmental organization"); *Turner v. United States*, 248 U.S. 354, 357-58 (1919) (stating that "the Creek Nation" had the same "free[dom] from liability" as "other governments, municipal as well as state"). As the bankruptcy court pointed out, it is only because the Tribe is a government that it can assert immunity at all: "[b]y the very definition of sovereign immunity, only governmental entities hold it." App. 150a (emphasis omitted); *see Bay Mills*, 572 U.S. at 789 (describing "a tribe's immunity" from suit as one of "its . . . governmental powers and attributes")

As additional evidence that the ordinary usage of "government" embraces tribes, Congress frequently uses the phrase "tribal government" to refer to an Indian tribe. *See*, *e.g.*, 6 U.S.C. § 572(a) (directing cooperation with "State, local, and tribal governments"); 15 U.S.C. § 7451(a)(2) (authorizing various cybersecurity activities that include "State, local, and tribal governments"); 19 U.S.C. § 4332(d)(4)(A)(i) (requiring sharing of best practices concerning a safety plan with "State, local, and tribal governments"); 23 U.S.C. § 202(a)(1)(B)-(C) (providing for funding of certain programs and projects "administered by" or "associated with" "a tribal government"); 51 U.S.C. § 60302(2) (authorizing research and development "to enhance Federal, State, local, and tribal governments' use of" certain technologies); *see also* 25 U.S.C. § 4116(b)(2)(B)(ii)(I) (referring to a "government-to-government relationship between the Indian tribes and the United States").

A tribal government also fits within the phrase "foreign or domestic government." It is not analytically necessary to determine whether a government is "foreign or domestic" to apply § 101(27), because the phrase "foreign or domestic" broadens rather than narrows the term "government," making it clear there is no implied limitation either to foreign or to domestic governments. *See Krystal Energy*, 357 F.3d at 1057 ("logically, there is no other form of government outside the foreign/domestic dichotomy"). In any event, tribes are clearly domestic in relation to the United States, as this Court has said in cases including *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2 (1831) ("domestic dependent nations"); *United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100, 103 (1856) ("the Cherokee territory" is "not a foreign, but a domestic territory"); and *Blatchford v. Native Village*

of Noatak, 501 U.S. 775, 782 (1991) ("in some respects," tribes "are more like States than foreign sovereigns" – "[t]hey are, for example, domestic"). Recently, in *Bay Mills*, the majority quoted Justice Marshall's formulation of "'domestic dependent nations'" from the *Cherokee Nation* case. 572 U.S. at 788. In her concurrence, Justice Sotomayor further observed that this Court has "repeatedly relied on that characterization in subsequent cases," *id.* at 805-06 (Sotomayor, J., concurring); stated that "[t]wo centuries of jurisprudence . . . weigh against treating Tribes like foreign visitors in American courts," *id.* at 806; and described tribes as "domestic governments," *id.* at 808, confirming that they are included in the ordinary and natural meaning of that phrase.

Context in the Bankruptcy Code further confirms that the phrase "governmental unit" in § 106(a) includes tribal governments. The Code gives governmental units special rights, such as bypassing the automatic stay for certain police and regulatory enforcement actions, 11 U.S.C. § 362(b)(4); obtaining priority for certain unsecured tax debts, *id.* § 507(a)(8); and asserting exemptions from discharge for certain "fine[s], penalt[ies], or forfeiture[s]," *id.* § 523(a)(7). As the Tribe itself has never denied, tribes are governmental units for purposes of exercising those rights, *see Sandmar*, 12 B.R. at 916; *see also Krystal Energy*, 357 F.3d at 1060. Further, if a tribe is not a governmental unit, there is substantial question whether it would be entitled even to the rights of a non-governmental creditor, such as filing a proof of claim – rights the Tribe has exercised in this very case.[6]

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[6] "The term 'creditor'" in the Bankruptcy Code is restricted to creditors qualifying as an "entity," 11 U.S.C. § 101(10), and "[t]he term 'entity' includes person, estate, trust, governmental unit,

The court of appeals suggested that, because no unequivocal statement is required outside the abrogation context, it would not be "inconsistent for Indian tribes to be considered 'governmental units' for some provisions of the Bankruptcy Code but not for 11 U.S.C. § 106." App. 19a. That makes no sense: the definition of "governmental unit" in § 101(27) applies throughout the Bankruptcy Code, *see* 11 U.S.C. § 101 (definitions apply "[i]n this title"); and § 106(a) unequivocally "abrogate[s]" the "sovereign immunity" of "a governmental unit," *id.* § 106(a). Waving off an inconsistency in a statutory definition meant to govern the entire Bankruptcy Code is not the "respectful reading" due to "obviously broad" language that Congress has incorporated in "an important statutory definition." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687, 705 (1995).[7]

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and United States trustee," *id.* § 101(15). A tribe is not a person, estate, trust, or U.S. trustee, so if it is not a "governmental unit" it is not on the list in § 101(15). The court of appeals argued this problem could be solved by relying on the word "includes" in § 101(15), which means that the list is "not limiting." *Id.* § 102(3). But that overlooks the familiar principle that, where Congress defines a term with an illustrative list, courts interpret the term to include "only things similar to the specific items in the list," *Molloy v. Metropolitan Transp. Auth.*, 94 F.3d 808, 812 (2d Cir. 1996); and the whole premise of the Tribe's argument here is that tribes are not like any other participants in our federal system.

[7] The court of appeals also incorrectly suggested that tribes did not need the special rights accorded to governmental units because their immunity had not been "abrogat[ed] . . . in the first place." App. 18a. That is not so – the special rights protect governmental units' ability to enforce their laws against and collect their debts from debtors. Tribal immunity, even if intact, would not enable tribes to ignore the automatic stay, because immunity alone would not compel the federal bankruptcy court with jurisdiction over the debtor's assets to recognize the validity of tribal actions. *See*, *e.g.*, *In re Montoya*, 547 B.R. 439, 447 &

The Sixth Circuit's main justification for finding the phrase "domestic government" equivocal was that, in other statutes, Congress has used the specific words "Indian tribe" to abrogate tribal immunity, but did not use those words in the Bankruptcy Code. In that reasoning, the court made the mistake of confusing statutory breadth with statutory ambiguity – an error against which this Court has often warned. *See*, *e.g.*, *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) ("Broad general language is not necessarily ambiguous when congressional objectives require broad terms."); *see also United States v. Monsanto*, 491 U.S. 600, 609 (1989) (explaining that the reach of a statutory provision "'does not demonstrate ambiguity,'" but rather "'demonstrates breadth'") (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)). Compared to the phrase "Indian tribe," the phrase "domestic government" is not more ambiguous in covering tribes. It is only broader.

The court of appeals also ran afoul of this Court's instructions that, in abrogating sovereign immunity, Congress "need not state its intent in any particular way" or "use magic words." *FAA v. Cooper*, 566 U.S. 284, 291 (2012) (discussing federal sovereign immunity); *see also Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring) (explaining that no "explicit reference to state sovereign immunity or the Eleventh Amendment" is required for a statute to "clearly subject[] States to suit for monetary damages"); *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d

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n.10 (Bankr. D.N.M. 2016) (tribal court action in violation of stay was void *ab initio* regardless of whether tribal immunity applied). Similarly, tribal immunity could not compel bankruptcy courts to give tribes governmental priorities or governmental protections from discharge.

16, 25 (1st Cir. 2006) (en banc) ("[A]n effective limitation on tribal sovereign immunity need not use magic words."). Rather, congressional intent to abrogate need only be "clearly discernable from the statutory text in light of traditional interpretive tools." *Cooper*, 566 U.S. at 291. That traditional approach recognizes that "Congress can embody a similar scope-of-coverage intent in different ways in different statutes." *United States v. Beasley*, 12 F.3d 280, 284 (1st Cir. 1993) (Breyer, C.J.).

To be sure, the court of appeals protested that it was not imposing the sort of magic-words requirement disapproved in *Cooper* or in Justice Scalia's *Dellmuth* concurrence. In doing so, the court suggested that it "might" be enough to abrogate tribal immunity if Congress passed "a statute stating that 'sovereign immunity is abrogated as to all parties who could otherwise claim sovereign immunity.'" App. 17a & n.10 (quoting *Krystal Energy*, 357 F.3d at 1058). The point the Ninth Circuit was making in imagining that hypothetical statute, however, was that it would apply because Indian tribes are clearly "parties who could otherwise claim sovereign immunity" – that is, they are clearly members of the class covered by the abrogation clause. If that statute would be enough, and if – as the court of appeals did not contest in its opinion – Indian tribes are also clearly members of the class "domestic government[s]" under the existing statute, then there is no principled distinction between the two. Thus, the court of appeals' protest merely points back to the core error in its opinion: in attempting to divine congressional intent, it failed to consider whether the words of the statute as written plainly encompass Indian tribes. Remarkably, the court of appeals dismissed that inquiry as "not the real question." App. 14a.

Finally, the court of appeals also erred in suggesting that disagreement among courts was "[o]stensibly evidence enough that Congress has left doubt about its intent." App. 9a (emphasis omitted). "[C]ourts often disagree about what qualifies" as "'ambiguous,'" *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring) (discussing *Chevron* deference), but judicial disagreement does not remove the need to read statutes to determine whether ambiguity is present. If it did, the mere presence of a dissent or a conflict among circuits would prevent a majority of this Court from holding that a statute clearly abrogates or waives sovereign immunity. That has never been the law.[8] The Sixth Circuit's suggestion that it is or should be underscores its departure from this Court's teaching that the words of a statute presumptively bear their "'ordinary, contemporary, common meaning'" – and that, where that meaning is clear, courts "begin and end [their] inquiry with the text." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (quoting *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997)).

CONCLUSION

The petition for a writ of certiorari should be granted.

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[8] *See, e.g.*, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 73-78 (2000) (finding abrogation over a dissent that would have found no clear statement); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 56-57 & n.9 (1996) (same); *United States v. Williams*, 514 U.S. 527, 530-40 (1995) (construing scope of waiver as clear over a dissent, and noting circuit conflict).

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