No. 22-227

In the Supreme Court of the United States

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; L.D.F. BUSINESS DEVELOPMENT CORP.; L.D.F. HOLDINGS, LLC; NIIWIN, LLC, D/B/A LENDGREEN,

Petitioners,

v.

BRIAN W. COUGHLIN,

Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF ON BEHALF OF *AMICI CURIAE* PROFESSORS OF FEDERAL INDIAN LAW IN SUPPORT OF PETITIONERS

SETH DAVIS
225 Bancroft Way
Berkeley, CA 94704

MATTHEW L.M. FLETCHER
314 Hutchins Hall
Ann Arbor, MI 48109

KAIGHN SMITH, JR.
Counsel of Record
DRUMMOND WOODSUM
84 Marginal Way
Ste. 600
Portland, ME 04101
(207) 772-1941
ksmith@dwmlaw.com

Counsel for Amici Curiae *Professors of Federal Indian Law*

October 12, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. The Circuit Conflict Implicates Fundamental Principles of National Importance to Native Nations and to Congress's Authority To Determine Federal Indian Policy 5

II. The Decision Below Was Flat Wrong in Substituting "Policy" and "Historical Context" for the Unequivocal Expression that This Court's Precedents Require 13

CONCLUSION 22

APPENDIX: List of *Amici Curiae* Professors of Federal Indian Law App-1

TABLE OF AUTHORITIES

CASES

Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374 (8th Cir. 1995) 6

Blatchford v. Native Vill. of Noatak & Circle Vill., 501 U.S. 775 (1991)..... 17

Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173 (10th Cir. 2010) 6

C&L Enters. v. Citizen Band of Potawatomi Indian Tribe, 532 U.S. 411 (2001)..... 2, 7

Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Nation, 502 U.S. 251 (1992)..... 12

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)..... 11

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)..... 14, 16

Denezpi v. United States, 142 S. Ct. 1838 (2022)..... 16

Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96 (1989)..... 18, 19

In re Greektown Holdings, LLC, 917 F.3d 451 (6th Cir. 2019)..... 5, 9, 20, 21

Kiowa Tribe v. Mfg. Tech., Inc.,
523 U.S. 751 1998)..... 6, 8, 12

Krystal Energy Co. v. Navajo Nation,
357 F.3d 1055 (9th Cir. 2004) 5

McGirt v. Oklahoma,
140 S. Ct. 2452 (2020)..... 3, 8, 9, 21

Meyers v. Oneida Tribe of Indians of Wisc.,
836 F.3d 818 (7th Cir. 2016) 5

Michigan v. Bay Mills Indian Cmty.,
572 U.S. 782 (2014)..... *passim*

Montana v. Blackfeet Tribe,
471 U.S. 759 (1985)..... 3

Morton v. Mancari,
417 U.S. 535 (1974)..... .7

Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians,
471 U.S. 845, 851 (1985)..... 16

Ninigret Dev. v. Narragansett Indian Wetuomuck Hous. Auth.,
207 F.3d 21 (1st Cir. 2000) 7

Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.,
498 U.S. 505 (1991)..... *passim*

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978)..... *passim*

Three Affiliated Tribes of the Ft. Berthold Rsrv. v. Wold Eng'g, P.C.,
476 U.S. 877 (1986) 2

United States v. Lara,
541 U.S. 193 (2004) 7, 12

United States v. Nordic Vill., Inc.,
503 U.S. 30 (1992) 18, 19

United States v. Wheeler,
435 U.S. 313 (1978) 16

Upper Skagit Indian Tribe v. Lundgren,
138 S. Ct. 1649 (2018) 12

Ysleta Del Sur Pueblo v. Texas,
142 S. Ct. 1929 (2022) 2, 3, 14

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 3 13

U.S. Const. art. I, § 8, cl. 4 ..... 6, 13

STATUTES AND PUBLIC LAWS

Bankruptcy Code, 11 U.S.C. §§ 101-1532
§ 101(27) 13, 15, 16, 18
§ 106 ..... *passim*
§ 362 15

Bankruptcy Reform Act of 1978,
P.L. 103-394, 107 Stat. 4106 19

Fair Accurate Credit Transactions Act of 2003,
15 U.S.C. §§ 1681-1681 5

Fair Debt Collection Procedures Act,
28 U.S.C. §§ 3001-3308
§ 3002(7) 10
§ 3002(10) 10

Indian Civil Rights Act of 1968,
25 U.S.C. §§ 1301-1304 10

Indian Financing Act of 1974,
25 U.S.C. §§ 1451-1543 11

Indian Self-Determination and Education
Assistance Act of 1975,
25 U.S.C. §§ 5301-5423 11

Tribal Self-Governance Act of 1994,
Pub. L. No. 103-413,
108 Stat. 4250 (1994) 11

Safe Drinking Water Act, Pub. L. 93-523,
42 U.S.C. §§ 300F-300J-27
§ 300f(10) 10
§ 300f(12) 10
§ 300j-9(i)(2)(a) 10

25 U.S.C.
§ 2710(d)(7)(A)(ii) 9
§ 5321(c)(3)(A) 9

42 U.S.C.
§ 6903(13) 10
§ 6903(15) 10
§ 6972(a)(1) 10

LEGISLATIVE DOCUMENTS

123 Cong. Rec. 35447 (Oct. 27, 1977) 20

140 Cong. Rec. H10766
(daily ed. Oct. 4, 1994) 20

140 Cong. Rec. H10917 (Oct. 4, 1994). 19

A Report Prepared by the Staff of the Subcomm. on Civil and Constitutional Rights for the Comm. on the Judiciary, H.R. Staff Rep. No. 3, 95th Cong. 1st Sess. (1977) 20

Bankruptcy Act Revision: Hearings before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary on H.R. 31 *and H.R. 32*, H.R. 94th Cong. 2d Sess. (Apr. 2, 1976) 20

Bankruptcy Reform: Hearing Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary, 103d Cong., 2d Sess. (Aug. 17, 1994) 19

Comm'n to Study Bankruptcy Laws: Hearings before the Subcomm. on Bankruptcy of the Comm. on the Judiciary on S.J. Res. 100, S. 90th Cong. 2d Sess. (1968) 20

H.R. Rep. No. 95-595 (1977)..... 18

H.R. Rep. No. 835 (1994)..... 19

Ltr. from Conrad K. Cyr, Nat'l Conf. of Bankruptcy Judges to Rep. Don Edwards (Mar. 3, 1977) 20

S. Rep. No. 95-989 (1977) 18

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (5th ed. 1979) 16

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2012 ed.) 3

Karen M. Gebbia-Pinetti, *State Sovereign Immunity and the Bankruptcy Code*, 7 J. Bankr. L. & Prac. 521 (1998) 17

S. Elizabeth Gibson, *Congressional Response to* Hoffman *and* Nordic Village*: Amended Section 106 and Sovereign Immunity*, 69 Am. Bankr. L.J. 311 (1995) 19

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici law professors listed in the Appendix are leading scholars and teachers of federal Indian law, with expertise in the rules of statutory interpretation that preserve the sovereign immunity of Native Nations absent Congress's unequivocal decision to abrogate it. They file this brief out of a shared belief that the decision below is irreconcilable with this Court's precedents and encroaches upon Congress's constitutional authority to determine federal Indian policy.

SUMMARY OF ARGUMENT

The circuit courts of appeal are divided over a question of statutory interpretation that is answered by two bedrock principles of federal Indian law and the constitutional separation of powers between Congress and the judiciary. Together, these principles make it clear that "it is fundamentally Congress's job, not [the federal courts], to determine whether or how to limit tribal immunity." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 800 (2014). Citing "policy" among other reasons, Pet. App. 12a, the First Circuit wrongly took on that job when it held that Native Nations may not invoke sovereign immunity to bar damages actions under the Bankruptcy Code.

---

[1] Counsel of record for the parties received timely notice of the *Amici*'s intent to file this brief and consented to the filing of this brief. *See* S. Ct. R. 37.2(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission. *See* S. Ct. R. 37.6.

First, as this Court reaffirmed just last Term in *Ysleta Del Sur Pueblo v. Texas*, Native Nations "possess 'inherent sovereign authority.'" 142 S. Ct. 1929, 1934 (2022) (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). Sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g,* 476 U.S. 877, 890 (1986). "Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." *Citizen Band Potawatomi Tribe*, 498 U.S. at 509.

Second, "[u]nder our Constitution, treaties, and laws, Congress . . . bears vital responsibilities in the field of tribal affairs." *Ysleta Del Sur Pueblo*, 142 S. Ct. at 1934. Though Congress may abrogate the federal government's recognition of the "traditional[]"sovereign immunity of Native Nations, *Bay Mills*, 572 U.S. at 782 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)), "courts will not lightly assume that Congress in fact intends to undermine Indian self-government," *id.* at 790. Unless Congress "'unequivocally' express[es]" the intent to abrogate Tribal sovereign immunity, the federal courts will not construe a statute to abrogate it. *Id.* (quoting *C&L Enters. v. Citizen Band of Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001)).

The proper application of the unequivocal expression requirement is of national importance to Native Nations and to Congress. It is important because it concerns legal principles that preserve Tribal sovereignty and shape Tribal economic development. The unequivocal expression requirement is one of several canons of construction

that direct courts to assume that Tribal sovereignty and Tribal rights are preserved where treaties and statutes are ambiguous. *See Ysleta Del Sur Pueblo*, 142 S. Ct. at 1941 n.3 (referring to "rule—long established by our precedents—that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit'" (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985))); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1], at 113-14 (2012 ed.). These canons reflect the separation of powers between Congress and the federal courts, which is grounded in the Constitution's assignment of authority to the political branches in the field of Indian affairs. Because "the Legislature wields significant constitutional authority when it comes to tribal relations," a federal court will not "lightly infer" congressional intent to encroach upon Tribal sovereignty and self-governance. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020). Therefore, just as Congress must clearly say so if it intends to break a treaty promise and to diminish an Indian reservation, *see id.*, so too must Congress express unequivocally its intent to abrogate Tribal sovereign immunity, *see Bay Mills*, 572 U.S. at 788.

The unequivocal expression requirement is a well-established rule of construction upon which Congress may rely to support the goals of its longstanding Tribal self-determination policy. Both when Congress enacted the original Code and amended it to include the provision at issue in this case, it presumably was aware that an unequivocal expression of intent was necessary to abrogate Tribal sovereign immunity. *See Ysleta Del Sur Pueblo*, 142 S. Ct. at 1940 ("This Court generally assumes that, when Congress enacts statutes, it is aware of this Court's

relevant precedents."). Yet the Bankruptcy Code does not even mention Tribes, much less unequivocally indicate that Congress decided to encroach upon Tribal sovereignty by abrogating Tribal sovereign immunity. That is unsurprising: During the same decade that Congress enacted the Bankruptcy Code, it adopted the Tribal self-determination policy and "consistently reiterated its approval of the [Tribal sovereign] immunity doctrine." *Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. at 510.

The decision below flatly misconstrued the Bankruptcy Code because it did not properly apply the unequivocal expression requirement. The panel majority combined dictionary definitions, "historical context," and references to "structure" and "policy" to justify abrogating Tribal sovereignty. Pet. App. 8a-9a, 11a-12a. But, as Chief Judge Barron explained in his dissenting opinion, the question is not whether the Code might plausibly be read to abrogate Tribal sovereign immunity—much less whether federal judges think it would be good "policy" to do so. Instead, the question is whether Congress considered abrogating Tribal sovereign immunity and unequivocally expressed its intention to do so. *See Bay Mills*, 572 U.S. at 790. And as to that question, whether one looks to statutory text, structure, or legislative context, the answer is plain: Congress did not clearly abrogate Tribal sovereign immunity when it enacted the Code in 1978 or amended the Code in 1994 to enact the current abrogation provision.

This Court should therefore grant the petition for certiorari, reverse the decision below, and reaffirm that the decision to abrogate the federal government's longstanding recognition of Tribal sovereign immunity rests with Congress, the branch tasked

with determining the United States' policy in Indian affairs.

ARGUMENT

I. THE CIRCUIT CONFLICT IMPLICATES FUNDAMENTAL PRINCIPLES OF NATIONAL IMPORTANCE TO NATIVE NATIONS AND TO CONGRESS'S AUTHORITY TO DETERMINE FEDERAL INDIAN POLICY

The First Circuit's decision deepened an already established circuit conflict over the application of the unequivocal expression requirement to the Bankruptcy Code. The Sixth Circuit has held that the Code does not abrogate Tribal sovereign immunity because it does not "clearly, unequivocally, and unmistakably express [Congress's] intent" to do so. *In re Greektown Holdings, LLC*, 917 F.3d 451, 459-60 (6th Cir. 2019). The Ninth Circuit, and now the First Circuit, have held to the contrary. *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004); Pet. App. 12a. In so doing, the First Circuit rejected not only the Sixth Circuit's reasoning, but also the reasoning of the Seventh Circuit in a case involving the Fair Accurate Credit Transactions Act of 2003, 15 U.S.C. §§ 1681-1681 (FACTA), a statute with a similarly worded provision that the Seventh Circuit held does not abrogate Tribal sovereign immunity. *See Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 824 (7th Cir. 2016).

The proper construction of the Bankruptcy Code—not to mention similar statutes such as FACTA—is itself of national importance. In enacting the Code, Congress exercised its constitutional authority to establish "uniform Laws on the subject of

Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. The circuit conflict has created disuniformity in the Code's application, with Tribal businesses unable to assert their "traditional[]" sovereign immunity in bankruptcy proceedings in the First and Ninth Circuits. *Bay Mills*, 572 U.S. at 782.

This traditional immunity is important to Native Nations' self-determination and economic development. As the Eighth and Tenth Circuits have recognized, "[n]ot only is sovereign immunity an inherent part of the concept of sovereignty and what it means to be a sovereign, but 'immunity [also] is thought [to be] necessary to promote the federal policies of tribal self[-]determination, economic development, and cultural autonomy.'" *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1182 (10th Cir. 2012) (quoting *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1995)). Thus, Tribal sovereign immunity is a component of Tribal sovereignty and a background principle upon which Congress has relied in enacting its Tribal self-determination policy.

Tribes are "separate sovereigns pre-existing the Constitution" with powers of self-government, including sovereign immunity from suit. *See Santa Clara Pueblo*, 436 U.S. at 56. Like other sovereigns, Native Nations enjoy a traditional immunity from suit in the courts of another sovereign. *Bay Mills*, 572 U.S. at 788. "As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe, Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751, 754 (1998). This basic rule, which is part of the "background" against which Congress legislates with

respect to Tribes, extends to commercial activities. *Id.* at 758, 760. Tribal sovereign immunity also extends to arms of the Tribe, which may, as occurred in this case, invoke it as a shield to suit. *See Ninigret Dev. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000).

This Court has consistently reaffirmed "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity." *Bay Mills*, 134 S. Ct. at 2037. This fundamental principle reflects the separation of powers between Congress and the federal courts and the unique "government-to-government" relationship between Tribal sovereigns and the United States. *See generally United States v. Lara*, 541 U.S. 193, 202 (2004). Congress's authority arises from a constellation of explicit constitutional provisions and structural principles implicit in the Constitution. *See id.* at 200; *Morton v. Mancari*, 417 U.S. 535, 552 (1974). This constitutional authority empowers Congress to fulfill its "unique obligation toward the Indians" arising from the government-to-government relationship. *Mancari*, 417 U.S. at 541-42, 555. Congress's powers, the Court has held, include the authority to abrogate federal recognition of Tribal sovereign immunity. But, the Court has repeatedly cautioned, "courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Bay Mills*, 572 U.S. at 790. Rather, "[t]he baseline position . . . is tribal immunity; and '[t]o abrogate [such] immunity, Congress must "unequivocally" express that purpose.'" *Id.* (quoting *C&L Enters.*, 532 U.S. at 418).

The unequivocal expression requirement thus reflects the fundamental principle that the authority to abrogate federal recognition of Tribal sovereign

immunity lies with Congress. In *Kiowa Tribe*, the Court "defer[red]" to Congress rather than abrogate a Tribe's sovereign immunity from suit for off-reservation commercial activities. 523 U.S. at 758-59. And in *Bay Mills*, the Court reaffirmed that "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity." 572 U.S. at 800. Because in both cases Congress had not unequivocally expressed an intent to abrogate it, the Court held that Tribal sovereign immunity required dismissal of actions against Tribes. *See Kiowa Tribe*, 523 U.S. at 760; *Bay Mills*, 572 U.S. at 800.

The requirement of an unequivocal expression of congressional intent is one of several rules of statutory construction that preserve Tribal sovereignty and support Congress's Tribal self-determination policy. In *McGirt v. Oklahoma*, the Court made clear the vital role that statutory construction plays in respecting Congress's authority in the field of Indian affairs. The question there was whether Congress had diminished the reservation of the Muscogee (Creek) Nation. *See McGirt*, 140 S. Ct. at 2462. The Court held that an Indian reservation "persists" unless and until Congress clearly expresses an intent to diminish it. *See id.* This clear statement rule, the Court explained, is grounded in judicial recognition of the "significant constitutional authority" that Congress possesses "when it comes to tribal relations." *Id.* When Congress intends to wield its authority to "breach its own promises and treaties" and encroach upon Tribal sovereignty, it must be clear. *Id.* at 2462-63. The federal courts will not "lightly infer" that Congress intended to diminish a reservation it has established. *Id.* at 2462. Similarly, the Court explained, it has required a clear expression

of congressional intent before a state or the United States may criminally prosecute "Indians for conduct on their lands." *Id.* at 2477. This clear expression rule reflects the principle of inherent Tribal sovereignty and the federal government's promise that Tribes would have "the right to continue to govern themselves." *Id.* "If Congress wishes to withdraw its promises" of support for Tribal sovereignty, the Court concluded, "it must say so" clearly. *Id.* at 2482.

As in *McGirt*, where "[h]istory show[ed] that Congress knows how to withdraw a reservation when it can muster the will," *id.* at 2462, so too here history shows that Congress knows how to be unequivocal when authorizing lawsuits against Indian Tribes. Many statutes—both those enacted before the Bankruptcy Code of 1978 and after it—unequivocally express this congressional intent. *See In re Greektown Holdings*, 917 F.3d at 457.

Congress sometimes states directly that it is abrogating Tribal sovereign immunity. It may, for example, state that a defendant may not raise the defense of Tribal sovereign immunity to suit. *See, e.g.*, 25 U.S.C. § 5321(c)(3)(A) (providing that an "insurance carrier shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit"). Or Congress may specify that the federal courts have jurisdiction over a right of action against a Tribe. *See id.* § 2710(d)(7)(A)(ii) ("The United States district courts shall have jurisdiction over . . . any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into . . . .").

In other instances, Congress has abrogated Tribal sovereign immunity by expressly including Indian Tribes within a list of parties amenable to suit under a statutory right of action. In the Resource Conservation and Recovery Act of 1976, for example, Congress authorized citizen suits to force compliance with the statute "against any person . . . who is alleged to be in violation" of the statute, while defining "person" to include "an Indian Tribe." *See* 42 U.S.C. § 6972(a)(1) (authorizing a citizen suit); *id.* § 6903(15) (defining "person" to include a "municipality"); *id.* § 6903(13) (defining "municipality" to include "an Indian tribe").[2] Congress thus may meet the unequivocal expression requirement in more than one way.

Congress may also decide to preserve Tribal sovereign immunity even when it expressly regulates the exercise of Tribal sovereignty. Congress did so, for instance, when it enacted the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1304 (ICRA), which imposed various civil rights provisions upon Tribal governments. In *Santa Clara Pueblo*, this Court applied the unequivocal expression requirement to conclude that Congress had not subjected Native Nations to suit in federal court for alleged violations of ICRA. 436 U.S. at 59. As this Court explained, ICRA's goals included the promotion of Tribal self-determination. *Id.* at 61. And because "[n]othing on the face of Title I of the ICRA purport[ed] to subject tribes to the jurisdiction of the federal courts in civil

---

[2] Congress has similarly abrogated Tribal sovereign immunity in the Safe Drinking Water Act, *see* 42 U.S.C. §§ 300f(10), 300f(12), 300j-9(i)(2)(a), and the Fair Debt Collection Procedures Act, 28 U.S.C. §§ 3002(7), (10), to name but two other examples.

actions," this Court refused to authorize an encroachment upon Tribal sovereignty and self-determination. *See id.* at 58-59.

Similarly, judicial abrogation of Tribal sovereign immunity under the Bankruptcy Code would be inconsistent Congress's self-determination policy. *See Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. at 510 (reasoning that in light of Congress's self-determination policy, "we are not disposed to modify the long-established principle of tribal sovereign immunity"). Congress enacted the Bankruptcy Code during the first full decade of the Self-Determination Era, a period during which "Congress . . . consistently reiterated its approval of the [Tribal sovereign] immunity doctrine." *Id.* (citing Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543, and Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 5301-5423). Congress has remained committed to this Tribal self-determination policy. Tellingly, the 103d Congress, which enacted the current abrogation provision in Section 106 of the Bankruptcy Code, also amended the Indian Self-Determination and Education Assistance Act "to provide for tribal Self-Governance." Pub. L. No. 103-413, 108 Stat. 4250. These self-determination statutes "reflect Congress' desire to promote the 'goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development.'" *Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. at 510 (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)).

In short, the requirement of an unequivocal expression of congressional intent ensures it is Congress that makes the policy decision whether to

depart from its overarching policy of promoting Tribal self-determination. The Constitution assigns primary authority in the field of Indian affairs to Congress, not to the courts. *See Bay Mills*, 572 U.S. at 801 (citing *Lara*, 541 U.S. at 200). And it is Congress, not the federal judiciary, that "has the greater capacity 'to weigh and accommodate the competing policy concerns and reliance interests'" involved in determining whether to abrogate federal recognition of Tribal sovereign immunity. *Bay Mills*, 572 U.S. at 801 (quoting *Kiowa Tribe*, 523 U.S. at 759). It is wholly unsurprising, therefore, that this Court has rejected arguments for judicial abrogation of "the long-established principle of tribal sovereign immunity" four times in recent decades. *Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla.,* 498 U.S. at 510; *Upper Skagit Indian Tribe v. Lundgren,* 138 S. Ct. 1649, 1652–53 (2018) (holding that the Supreme Court's decision in *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251 (1992), did not abrogate Tribal sovereign immunity for *in rem* lawsuits); *Bay Mills*, 572 U.S. at 803 ("a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty"); *Kiowa Tribe*, 523 U.S. at 760 ("we decline to revisit our case law and choose to defer to Congress").

II. THE DECISION BELOW WAS FLAT WRONG IN SUBSTITUTING "POLICY" AND "HISTORICAL CONTEXT" FOR THE UNEQUIVOCAL EXPRESSION THAT THIS COURT'S PRECEDENTS REQUIRE

The unequivocal expression requirement applies full force to the question of abrogation as it arises under the Bankruptcy Code. Not only does the Constitution assign Congress the "Power . . . [t]o regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. It also assigns Congress the "Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." *Id.* art. I, § 8, cl. 4. The substantive policy determinations involved in this case are for Congress, not the federal courts to make. And Congress made those determinations—first in 1978, when it enacted the Code, and in 1994, when it amended the abrogation provision—against the backdrop of this Court's unequivocal expression requirement. To hold that Tribes may not invoke sovereign immunity against damages suits under the Code "would entail both overthrowing [this Court's] precedent and usurping Congress's current policy judgment." *Bay Mills*, 572 U.S. at 803.

Yet that is precisely what the First Circuit did. Its conclusion that sections 101(27) and 106(c) of the Code together abrogate Tribal sovereign immunity flies in the face of both precedent and Congress's policy judgment. *See Bay Mills*, 572 U.S. at 803. The panel majority rested its holding upon "policy" and "historical context," as well as two dictionary definitions of terms within the Code. *See* Pet App. 8a-9a, 11a-12a. But the panel majority is not Congress,

and its sense of good policy is not an unequivocal expression of congressional intent. This Court has never held that a federal statute abrogated Tribal sovereign immunity when there is no indication in the text or legislative history that Congress even considered doing so.

The unequivocal expression requirement was a background rule of statutory interpretation when Congress enacted the Code in 1978 and amended its pertinent provisions in 1994. As the Court explained in 1978, it was "settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58-59 (citations, marks omitted). Presumably, then, Congress was aware when it enacted and amended the Code that an unequivocal expression was required to abrogate Tribes' traditional sovereign immunity. *See Ysleta Del Sur Pueblo*, 142 S. Ct. at 1940 (presuming that Congress is aware of "this Court's relevant precedents").

One will search the statutory text in vain for an unequivocal expression of congressional intent to abrogate Tribal sovereign immunity. Finding none, the panel majority stitched together dictionary definitions and this Court's decision in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), to conclude that the Code's text supports abrogation. For the panel majority, it was enough to say that a Native Nation's government might be classified as a "domestic government" subject to the Code's abrogation provision. *See* Pet. App. 8a-11a. In support of this conclusion, the panel majority plucked dictionary definitions of "domestic" and cited *Cherokee Nation*, 30 U.S. at 17, which described Native Nations as "domestic dependent nations." But this stitching of

Webster's Third and *Cherokee Nation* does not hold together. *See* Pet. App. at 7a-8a & n.4, 11a & n.7.

The two key provisions of the Code—Sections 101(27) and 106(c)—say nothing about Indian Tribes. Rather, Section 106(a), enacted in 1994, provides that "sovereign immunity is abrogated as to a governmental unit" with respect to various sections of the Code, including 11 U.S.C. § 362, under which the Respondent has sought damages and attorneys' fees. *See id.* § 106(a)(1). According to the First Circuit, a Native Nation is "a governmental unit" subject to the abrogation provision under Section 101(27), a provision enacted in 1978 that defines "governmental unit" to include the United States government, state governments and municipalities, territorial governments, and foreign states, and "other foreign or domestic government[s]." *Id.* § 101(27).

This generic statutory phrase—"other foreign or domestic government"—does not unequivocally express congressional intent to abrogate Tribal sovereign immunity. The term "domestic" *might* refer to the territorial location of a government. And the term "domestic dependent nation," first used by this Court in 1831, *might* be taken as a background principle against which to construe the phrase "domestic government" in a statute enacted in 1978 that says nothing about Native Nations. But under this Court's precedents, one thing is clear: It is not enough for a court to conclude that a statute *might* be construed to abrogate Tribal sovereign immunity. Only if it *must* be construed thus—only, that is, if Section 101(27) unequivocally encompasses Native Nations—may a federal court conclude that it abrogates Tribal sovereign immunity.

There is no unequivocal evidence anywhere—not in dictionaries, this Court's federal Indian law opinions, or anywhere else—that Native Nations are "domestic government[s]" within the meaning of Section 101(27). As Chief Judge Barron pointed out, "domestic" has multiple dictionary definitions. *See* Pet. App. 39a. And not all of them refer to the current location of something. "Domestic" may instead refer to the place of origin of a thing. Pet. App. 36a (citing *Black's Law Dictionary* (5th ed. 1979)). And, as this Court's precedents make clear, the origin of Tribal sovereignty is not in that sense "domestic" to the United States.

Just last Term, this Court reaffirmed that Native Nations are "separate sovereigns from the United States." *Denezpi v. United States*, 142 S. Ct. 1838, 1845 (2022). As this Court reiterated, "before Europeans arrived on this continent, tribes 'were self-governing sovereign political communities.'" *Id.* (quoting *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978)). Their origins, that is, are not "domestic." Thus, for example, Native Nations "'derive their power'" to enact criminal laws from their inherent sovereignty, not from the United States. *Id.* (quoting *Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 69 (2016)).

This Court has stated again and again that Native Nations have a "unique status under our law." *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985). In *Cherokee Nation*, the slender reed upon which the panel majority rested so much of its holding, this Court described the relationship between the United States and Native Nations as one "marked by peculiar and cardinal distinctions which exist [nowhere] else." 30 U.S. at 16. To be sure, Native Nations are "domestic" in the sense

that their lands are within the boundaries of the United States. *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 782 (1991). But at the same time, they "are in many ways *foreign* to the constitutional institutions of the federal and state governments." *Santa Clara Pueblo*, 436 U.S. at 71 (emphasis added). Their sovereignty, that is, does not stem from and thus is not "domestic" to the United States.

Against this backdrop, the First Circuit's reading of the statutory text is, if anything, *less* plausible than a reading that would exclude Native Nations from the definition of "other foreign or domestic government[s]."

The legislative context, moreover, does not anywhere suggest that Congress even considered the question whether to subject Tribes to claims under the Code. To the contrary, the legislative context supplies every reason to *doubt* that the Code abrogates Tribal sovereign immunity. In particular, when it amended the Code in 1994, the 103rd Congress was not aiming at Tribal sovereign immunity at all. Rather, it enacted the current abrogation provision in order to abrogate state sovereign immunity and waive federal sovereign immunity after the Supreme Court had held that the 1978 version of the Code did not do so. *See* Karen M. Gebbia-Pinetti, *State Sovereign Immunity and the Bankruptcy Code*, 7 J. Bankr. L. & Prac. 521, 562-70 (1998) (discussing history of 1994 amendments). It is therefore wholly unsurprising that Congress did not even mention Tribes, much less unequivocally express an intent to abrogate Tribal sovereign immunity.

There is no plausible argument that Congress unequivocally abrogated Tribal sovereign immunity

from claims for money damages when it enacted the Code in 1978. In Section 106(c), the 1978 Code provided that "notwithstanding any assertion of sovereign immunity—(1) a provision of [Title 11, the Bankruptcy Code] that contains 'creditor,' 'entity,' or 'governmental unit' applies to governmental units; and (2) a determination by the court of an issue under such a provision binds governmental units." 11 U.S.C. § 106(c) (1978). Then, as now, "governmental unit" was defined to include states and the federal government expressly as well as "other . . . domestic government[s]." 11 U.S.C. § 101(27). The House and Senate Reports to Section 106(c) focused upon Congress's authority to abrogate state sovereign immunity and did not discuss Tribes. *See* H.R. Rep. No. 95-595 at 317; S. Rep. No. 95-989 at 29-30 (1977).

Congress amended the Code's abrogation provision in response to two decisions of this Court that addressed state and federal sovereign immunity. In *Hoffman v. Conn. Dept. Income Maint.*, 492 U.S. 96, 104 (1989) (plurality op.), the Supreme Court held that Section 106(c) did not clearly authorize suits for money damages against states. And in *United States v. Nordic Vill., Inc.*, the Court held that Congress did not "unequivocally express" its intent to waive the federal government's sovereign immunity when it defined a "governmental unit" to include the United States and enacted Section 106(c). 503 U.S. 30, 32-34 (1992), Given that Congress nowhere mentioned Tribes in the 1978 Code, it follows from *Nordic Village* that Congress did not then unequivocally express congressional intent to abrogate Tribal sovereign immunity with respect to monetary liability.

Nor did Congress unequivocally express an intent to abrogate Tribal sovereign immunity when it

overturned the effect of *Hoffman* and *Nordic Village* in 1994. Congress reorganized Section 106 and enacted the current abrogation provision in Section 106(a) to accomplish that goal. *See* H.R. Rep. No. 835 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3350, 3351 ("This section would effectively overrule two Supreme Court cases that have held that the States and Federal Government are not deemed to have waived their sovereign immunity by virtue of enacting section 106(c) of the Bankruptcy Code."). The amendment was proposed during a House subcommittee hearing "relatively late in the legislative process." *See* S. Elizabeth Gibson, *Congressional Response to* Hoffman *and* Nordic Village*: Amended Section 106 and Sovereign Immunity*, 69 Am. Bankr. L.J. 311, 327-28 (1995) (citing *Bankruptcy Reform: Hearing Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary,* 103d Cong., 2d Sess. (1994)). The original proposal was "virtually identical" to a proposal from the National Bankruptcy Conference, whose representative testified at the House subcommittee hearing about cases in which the federal government abused its sovereign immunity by seizing property. *See id.* at 328 & n.112. After some revisions which reflected negotiations with the Senate and the U.S. Department of Justice to clarify the abrogation provision, the full House afforded "relatively little debate" to the bill and "only a brief discussion of the amendment of § 106." *Id.* at 328-29 & n.117. The sponsor of the Bill stated that its intent was to overrule *Hoffman* and *Nordic Village*. *Id.* at 329 (citing 140 Cong. Rec. H10917 (Oct. 4, 1994) (statement of Rep. Berman)). And a section-by-section analysis of the bill stated that the amendment aimed "to make section 106 conform to the Congressional intent of the Bankruptcy Reform Act of 1978 waiving

the sovereign immunity of the States and the Federal Government," with no mention of Tribes. *See* 140 Cong. Rec. H10766 (daily ed. Oct. 4, 1994). The 103rd Congress was not considering Tribal sovereign immunity when it amended Section 106 and unsurprisingly did not unequivocally express an intent to abrogate that immunity.

In short, the legislative context confirms what the text of the Code indicates: Congress has not weighed the competing policy concerns involved in determining whether to abrogate Tribal sovereign immunity. And that should end the inquiry. *See In re Greektown Holdings*, 917 F.3d at 462 ("[T]he Supreme Court has repeatedly reaffirmed the requirement [of an unequivocal expression], and warned lower courts against abrogating tribal sovereign immunity if there is any doubt about Congress' intent.").[3]

---

[3] To the extent that the legislative context addresses Indians, it only provides further confirmation that Congress did not consider abrogating Tribal sovereign immunity. The isolated references to Indians in the legislative history do not address that topic, nor do they suggest consideration of questions of Tribal sovereignty more generally. *See* 123 Cong. Rec. 35447 (Oct. 27, 1977) (statement of Rep. William Cohen); Ltr. from Conrad K. Cyr, Nat'l Conf. of Bankruptcy Judges to Rep. Don Edwards (Mar. 3, 1977); *A Report prepared by the Staff of the Subcomm. on Civil and Constitutional Rights for the Comm. on the Judiciary*, H.R. Staff Rep. No. 3, 95th Cong. 1st Sess. (1977); *Comm'n to Study Bankruptcy Laws: Hearings before the Subcomm. on Bankruptcy of the Comm. on the Judiciary on S.J. Res. 100*, S. 90th Cong. 2d Sess., at 12 (1968) (statement of Daniel R. Cowans, First Vice President of the Nat'l Conf. of Referees in Bankruptcy); *Bankruptcy Act Revision: Hearings before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary on H.R. 31 and H.R. 32*, H.R. 94th Cong. 2d Sess.,

The panel majority's reliance upon the Code's structure and its sense of good "policy" are even farther from the mark set by the unequivocal expression requirement. *See* Pet. App. 11a-12a. Arguments from policy that "abandon[] any pretense of law" cannot satisfy that requirement. *Cf. McGirt*, 140 S. Ct. at 2478. The panel majority's sense that it would be bad policy to deny Native Nations access to some of the benefits that "domestic government[s]" enjoy under the Code is debatable. *See* Pet. App. 11a-12a. But that debate is irrelevant to the only question before this Court: whether Congress unequivocally expressed its intent to abrogate Tribal sovereign immunity.

Sometimes, as in this case, litigants argue that Congress need only use a generic phrase to refer to a class that might logically include Native Nations because of one or more of their characteristics. But, as the Bankruptcy Court recognized, "'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.'" Pet. App. 56a-57a (quoting *In re Greektown Holdings*, 917 F.3d at 460). Rather, in respecting inherent Tribal sovereignty and Congress's primary authority over federal Indian policy, the Court has repeatedly required an unequivocal expression of congressional intent to abrogate Tribal sovereign immunity. *See Bay Mills*, 572 U.S. at 790.

---

at 2044 (Apr. 2, 1976) (prepared statement of William T. Plumb, attorney).

Tribal sovereign immunity persists unless a Native Nation clearly waives it or Congress unequivocally says otherwise. Congress did not do so when it enacted the Code in 1978 or the current abrogation provision in 1994. And it has not done so since. Native Nations may therefore raise sovereign immunity as a defense to claims for damages under the Code.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

SETH DAVIS
225 Bancroft Way
Berkeley, CA 94704

MATTHEW L.M. FLETCHER
314 Hutchins Hall
Ann Arbor, MI 48109

KAIGHN SMITH, JR.
Counsel of Record
DRUMMOND WOODSUM
84 Marginal Way
Ste. 600
Portland, ME 04101
(207) 772-1941
ksmith@dwmlaw.com

Counsel for Amici Curiae *Professors of Federal Indian Law*

APPENDIX

List of *Amici Curiae*
Professors of Federal Indian Law

The *Amici Curiae* include the following professors of law, who submit this brief in their individual capacities and not on behalf of their institutions:

- Gregory Ablavsky, Professor of Law and Helen L. Croker Faculty Scholar, Stanford Law School
- Adam Crepelle, Assistant Professor, Antonin Scalia Law School at George Mason University
- Seth Davis, Professor of Law, University of California, Berkeley School of Law
- Matthew L.M. Fletcher, Harry Burns Hutchins Collegiate Professor of Law, The University of Michigan Law School
- Joseph William Singer, Bussey Professor of Law, Harvard Law School
- Alexander T. Skibine, S.J. Quinney Professor of Law, University of Utah S.J. Quinney College of Law