No. 22-227

In The Supreme Court of the United States

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, ET AL.,

Petitioners,

v.

BRIAN W. COUGHLIN,

Respondent.

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

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the Bankruptcy Code expresses unequivocally Congress's intent to abrogate the sovereign immunity of Indian tribes.

PARTIES TO THE PROCEEDINGS

Petitioners Lac du Flambeau Band of Lake Superior Chippewa Indians, L.D.F. Business Development Corporation, L.D.F. Holdings, LLC, and Niiwin, LLC, d/b/a Lendgreen, were defendants in a contested matter in the bankruptcy court and appellees in the court of appeals.

Respondent Brian W. Coughlin was the debtor in the bankruptcy court and the appellant in the court of appeals.

RULE 29.6 STATEMENT

The Lac du Flambeau Band of Lake Superior Chippewa Indians wholly owns L.D.F. Business Development Corporation; L.D.F. Business Development Corporation wholly owns L.D.F. Holdings, LLC; and L.D.F. Holdings, LLC wholly owns Niiwin, LLC, d/b/a Lendgreen. No publicly held company owns 10% or more of any Petitioner's stock.

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INTRODUCTION

This case presents a straightforward question of statutory interpretation, requiring application of longstanding principles governing abrogation of tribal sovereign immunity to the Bankruptcy Code. As separate sovereigns pre-existing the Constitution, Indian tribes retain their historic common-law immunity from suit. Although Congress may abrogate that immunity, all agree that it must express that purpose "unequivocally"—*i.e.*, by providing a "clear statement" of that intent.

The Bankruptcy Code expressly abrogates the sovereign immunity of a "governmental unit." But the Code's definition of that term lists only the United States, states, commonwealths, districts, territories, municipalities, or foreign states (and departments, agencies, or instrumentalities thereof), followed by the clause "or other foreign or domestic government." That definition (like the Code more broadly) does not refer to Indian tribes—the most obvious and natural means of capturing them, and one that Congress has used time and again to abrogate tribal sovereign immunity in other statutory contexts. Particularly in light of that established practice, ordinary tools of statutory interpretation suggest that the Code's definition does not reach tribes. The clear-statement rule cements that conclusion.

The panel majority in the court of appeals nevertheless concluded (over the dissent of Chief Judge Barron) that the residual phrase "other *** domestic government" could be construed in no way other than to encompass Indian tribes. The panel majority found it sufficient for tribes to fall within the

dictionary definition of "government," insofar as tribes are the governing authorities for their members, and the dictionary definition of "domestic," insofar as they exist within the boundaries of the United States and are not "foreign." Using "other *** domestic government" to refer to tribes, the panel majority added, followed from Chief Justice Marshall's coining of the term "domestic dependent nations" in *Cherokee Nation v. Georgia*.

Abrogation of tribal sovereign immunity, however, is an issue of unambiguous congressional intent—not dictionary definitions of component words in isolation, or analogies to similar-sounding terms that this Court devised precisely because Indian tribes cannot be neatly categorized as wholly foreign or domestic. The panel majority's arguments beg the question why Congress went to the trouble of using the phrase "other *** domestic government" when it could have much more easily and unmistakably referred to tribes. The simple answer is that Congress did not intend—and certainly not unequivocally so—to include tribes within the Code's definition of governmental unit. And given the availability of at least plausible alternative constructions of "other *** domestic government"—capturing hybrid governmental entities (like the Washington Metropolitan Area Transit Authority)—the clear-statement rule precludes a finding of abrogation here.

The decision to disturb tribal sovereign immunity rests with Congress, not courts. Because Congress has provided far less than "perfect confidence" that it intended abrogation under the Code, this Court should restore the immunity that tribes have long held as a

critical element of their sovereignty and self-determination.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-52a) is reported at 33 F.4th 600. The memorandum of decision and order of the bankruptcy court (Pet. App. 53a-58a) is reported at 622 B.R. 491.

JURISDICTION

The court of appeals entered its judgment on May 6, 2022. On July 13, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 8, 2022, and the petition was filed on that date. This Court granted the petition on January 13, 2022, and has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 106(a) of title 11 of the U.S. Code provides in relevant part:

> Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146,

> 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

11 U.S.C. § 106(a).

Section 101(27) of title 11 of the U.S. Code provides:

> The term "governmental unit" means 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.

11 U.S.C. § 101(27).

STATEMENT OF THE CASE

A. Legal Framework

1. In "retain[ing] their historic sovereign authority," Indian tribes possess "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (internal quotation marks omitted). Accordingly, courts must "dismiss[] any suit against a tribe absent congressional authorization (or a waiver)." *Id.* at 789. "To abrogate tribal immunity, Congress must 'unequivocally' express that purpose." *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001).

2. In response to this Court's decisions holding that section 106 of the Bankruptcy Code did not abrogate the sovereign immunity of the federal government or states with regard to certain monetary claims, *see United States v. Nordic Vill., Inc.*, 503 U.S. 30 (1992); *Hoffman v. Connecticut Dep't of Income Maint.*, 492 U.S. 96 (1989) (plurality opinion), Congress amended that provision in 1994 to provide that "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section," Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 113, 108 Stat. 4106, 4117-4118. That language is widely understood to abrogate sovereign immunity for "governmental unit[s]," including with respect to section 362's automatic stay on efforts to collect prepetition debts. 11 U.S.C. § 106(a); *see id.* § 362(a)(6); *City of Chi. v. Fulton*, 141 S. Ct. 585, 589 (2021). Courts, however, have divided over whether "governmental unit" includes Indian tribes.

Congress defined "governmental unit" in the original Bankruptcy Code (at the same time that it first enacted the abrogation provision). *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 101(21), 106, 92 Stat. 2549, 2552, 2555-2556. The definition (which remains the same) states that "governmental unit" means:

> 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.

11 U.S.C. § 101(27). The term "Indian tribe" (or any similar reference) does not appear in any of the foregoing provisions—or elsewhere in the Code.

B. Factual And Procedural Background

1. Petitioner Lac du Flambeau Band of Lake Superior Chippewa Indians—a federally recognized Indian tribe—operates several businesses that generate revenue essential to funding tribal services and programs. One of those businesses is Lendgreen, "a wholly owned subsidiary" of the Band that provides short-term financing to consumers. Pet. App. 3a.[1]

Lendgreen provided a $1,100 loan to Respondent Brian Coughlin. Pet. App. 3a. A few months later, Coughlin voluntarily filed a Chapter 13 bankruptcy petition in the U.S. Bankruptcy Court for the District of Massachusetts, listing his debt to Lendgreen as a nonpriority general unsecured claim. *Id.* at 3a-4a; *id.* at 54a. Coughlin alleges that after he filed for bankruptcy, and despite the automatic stay, Lendgreen called and emailed him in the normal course of business seeking repayment of his debt, which allegedly contributed to his "mental and financial agony." *Id.* at 4a.

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[1] Lendgreen is a trade name of Petitioner Niiwin, LLC. Pet. App. 3a n.1. The Band "is the sole owner of [Petitioner] L.D.F. Business Development Corporation," which "is the sole member of [Petitioner] LDF Holdings, LLC, which in turn is the sole member of Niiw[i]n." *Id.*

Coughlin filed a motion to enforce the automatic stay against Lendgreen, its corporate parents, and the Band. Pet. App. 4a. In addition to requesting an order prohibiting collection efforts, Coughlin sought $172,840 in damages, attorney's fees, and expenses. *Id.*; C.A. App. 92-93, 147; *see also* 11 U.S.C. § 362(k)(1). Petitioners asserted tribal sovereign immunity and moved to dismiss the enforcement proceeding for lack of subject matter jurisdiction and failure to state a claim. Pet. App. 4a; *id.* at 54a-55a.

The bankruptcy court granted the motion to dismiss. The court accepted as undisputed that each tribal entity Coughlin named is an "arm[] of the Tribe." Pet. App. 55a. Thus, "whatever immunity the Tribe has is also attributable to" the other Petitioners. *Id.*; *see id.* at 3a n.1.

The bankruptcy court then held "that 11 U.S.C. §§ 106, 101(27) lack the requisite clarity of intent to abrogate tribal sovereign immunity." Pet. App. 55a-58a (internal quotation marks omitted). The court "not[ed] that the words 'Indian tribes' are not present in section 101(27)" and that "there is not one example in all of history where the Supreme Court has found that Congress has intended to abrogate tribal sovereign immunity without expressly mentioning Indian tribes somewhere in the statute." *Id.* at 56a-57a. As for Coughlin's argument that the phrase "other *** domestic government" must refer to Indian tribes because it is "sufficiently similar to the words 'domestic dependent nation'" and because "there are no other entities that fit that definition," the court explained that "Congress could have avoided any ambiguity simply by using the words 'Indian tribes'"

and that Coughlin otherwise "ignores the special place that Indian tribes occupy in our jurisprudence." *Id.* at 56a-58a.

2. After permitting a direct appeal, *see* 28 U.S.C. § 158(d), a divided panel of the First Circuit reversed.

a. The panel majority recognized that "Congress may abrogate tribal sovereign immunity" only "if it unequivocally express[es] that purpose," and that "courts will not lightly assume that Congress in fact intends to undermine Indian self-government." Pet. App. 5a (alteration in original) (internal quotation marks omitted) (quoting *Bay Mills*, 572 U.S. at 790). Because section 106 includes a "plain statement" that "abrogate[s] immunity for all governmental units," the panel majority focused on "whether a tribe is a domestic government" as that term is used in section 101(27)'s definition of "governmental unit." *Id.* at 6a-7a.

For the panel majority, two sets of dictionary definitions resolved that question. Pet. App. 18a (adopting "dictionary-based meaning"). "First, there is no real disagreement that a tribe is a government *** because [tribes] act as the 'governing authorit[ies] of their members.'" *Id.* at 7a (second alteration in original) (quoting *Government*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 982 (1961)). "Second, it is also clear that tribes are domestic, rather than foreign, because they 'belong[] or occur[] within the sphere of authority or control or the *** boundaries of' the United States." *Id.* at 8a (alterations and ellipsis in original) (quoting *Domestic*, WEBSTER'S THIRD, *supra*, at 671). "Thus," in the panel majority's view, "a tribe

is a domestic government and therefore a government unit." *Id.*

The panel majority found that conclusion supported by "historical context" and the "Bankruptcy Code's structure." Pet. App. 8a-12a. The panel majority noted that "at least one published bankruptcy opinion shows an understanding even before 1978 that tribes could function as and claim the benefits of governments." *Id.* at 9a (citing *In re Bohm's Inc.*, 5 Bankr. Ct. Dec. 259, 259 (Bankr. D. Ariz. 1979)). The panel majority then pointed to the fact that the federal government had long described tribes as "domestic dependent nations." *Id.* at 9a-10a. And lastly, the panel majority reasoned that, from a "practical and policy" standpoint, abrogation would enhance tribal self-determination efforts in light of "the special benefits afforded to governmental units under the Code"—such as the power "to collect tax revenue" notwithstanding a bankruptcy petition. *Id.* at 11a-12a.

b. Chief Judge Barron authored a lengthy dissent. Pet. App. 21a-50a. He did not dispute that the panel majority's construction of "other *** domestic government" as including tribes is "a possible one," especially if the "focus [were] only on [that] phrase in isolation." *Id.* at 31a-32a. But the "interpretive task" required conviction that "there is no plausible way of reading those words to exclude Indian tribes." *Id.* at 32a. That standard, he explained, could not be met for section 101(27). *Id.*

Considering the "other *** domestic government" phrase "in the context in which it appears," Chief

Judge Barron began by noting that "the majority's reading necessarily makes the phrase 'or other foreign or domestic government' a catch-all for every species of 'government.'" Pet. App. 32a. That begged the question why "Congress chose to define th[e] term 'governmental unit' more cumbersomely" by enumerating specific types of governments before providing the catch-all. *Id.* at 33a. It also gave him "pause *** because when Congress describes a general class after first setting forth a more specific exemplary list—as Congress did in § 101(27)—there is often good reason to think that Congress included the list to make the general class more selective than the words that describe that class might otherwise suggest." *Id.* at 33a-34a.

Chief Judge Barron then observed that "aside from 'foreign state[s],'" the "listed types of 'government' in § 101(27)" have the "shared characteristic *** that each of them is also an institutional component of the United States." Pet. App. 35a (alteration in original). Accordingly, in placing the clause "other foreign or domestic government" at the end of that list, Congress could have meant "only to include a 'government' that can trace its origins either to our federal constitutional system of government (such that it is a 'domestic government') or to that of some 'foreign state' (such that it is a 'foreign government')." *Id.* at 35a-36a.

"[U]nlike the listed governmental types, Indian tribes neither ratified the Constitution nor trace their origins to it." Pet. App. 36a. Instead, "Indian tribes have long been understood to be sui generis precisely because they uniquely possess attributes

characteristic of 'nations' without themselves being 'foreign state[s].'" *Id.* at 37a (alteration in original). Thus, Chief Judge Barron concluded that it is at least "plausible *** that Congress, by using the words 'domestic' and 'foreign' to describe the general class that follows the exemplary list, did not mean to include" Indian tribes. *Id.* at 35a-36a. Importantly, that "narrower reading of 'or other foreign or domestic government' also would not empty that phrase of all content," because it "still would usefully pick up commissions and authorities created by interstate compacts and their 'foreign' counterparts," which (unlike Indian tribes) are "sufficiently difficult to categorize pithily that it would be natural to encompass them through a residual clause of the sort that follows an express list." *Id.* at 38a; *see id.* at 28a-29a.

Chief Judge Barron also questioned the panel majority's concerns over surplusage. In the panel majority's view, "Congress included the trailing phrase 'other domestic government' for the sole purpose of including Indian tribes." Pet. App. 30a. But if that were correct, the panel majority would need to believe that "Congress had Indian tribes—and only Indian tribes—in mind in using that phrase but nonetheless thought it clearest not to name them and to refer to them instead in only much more general terms, notwithstanding Congress's obligation to abrogate Indian tribes' immunity only clearly and unequivocally." *Id.*

"[I]nsofar as the majority mean[t] to suggest that [the court] need not be guided by considerations of statutory text alone," Chief Judge Barron offered that

"the evidence of legislative purpose also is not as clearly and unequivocally on the side of reading § 101(27) to include Indian tribes as the majority suggests." Pet. App. 44a. For example, while the panel majority purported to identify certain benefits to abrogation of tribal sovereign immunity under the Bankruptcy Code, tribal businesses would no longer be permitted to seek bankruptcy protection, as was permitted "prior to the Code's enactment in 1978." *Id.* at 45a-47a. That "itself may be no small thing for Indian tribes" given "insuperable *** barriers Tribes face in raising revenue through more traditional means." *Id.* at 45a-46a (ellipsis in original). Yet "the legislative history to the Code does not suggest that it is making any shift in [tribes'] treatment"—and "[i]n fact *** makes no relevant mention of Indian tribes at all." *Id.* at 47a-48a.

In closing, Chief Judge Barron reiterated that congressional intent to abrogate tribal sovereign immunity must be "unmistakably clear in the language of the statute." Pet. App. 48a-49a. In his view, there was "no choice but to conclude that § 101(27) does not clearly and unequivocally include Indian tribes, because *** its text plausibly may be read not to cover them." *Id.* at 49a.

SUMMARY OF ARGUMENT

The Bankruptcy Code—lacking any reference to Indian tribes or any language that would unequivocally (or even naturally) encompass tribes—does not provide "perfect confidence" that Congress intended to abrogate tribal sovereign immunity.

I. Indian tribes are separate sovereigns that existed before the Constitution and continue to exercise their historic sovereign authority. Like all sovereigns, tribes enjoy the traditional common-law immunity from suit. In the tribal context, however, such immunity serves distinct sovereignty interests by promoting tribal self-sufficiency and economic development. Tribal businesses, which tribal sovereign immunity also protects, are essential to achieving those goals given the challenges tribes face in raising revenues through more traditional means (*e.g.*, taxation).

No doubt, Congress wields plenary authority over Indian affairs and may choose to abrogate tribal sovereign immunity. But Congress may disturb the baseline position of immunity only by "unequivocally" expressing that intention. Under that clear-statement rule, a court may not imply an abrogation of immunity or find an abrogation if there are other plausible readings. The rule thereby promotes respect for both Indian self-government and Congress's authority.

II. A. 1. The text of the Bankruptcy Code does not support abrogation with respect to Indian tribes. Although section 106 of the Code abrogates the immunity of a "governmental unit," section 101(27)'s definition of that term is most naturally read to

exclude Indian tribes. Notably, section 101(27) lists other familiar governmental units (*e.g.*, United States, states) that are routinely mentioned alongside Indian tribes in federal statutes, but it nowhere references Indian tribes. Indeed, in stark contrast to the Code, federal statutes most often effectuate abrogation of tribal sovereign immunity by including "Indian tribes" among a definitional list of persons or entities against whom an action may be brought. Courts have taken Congress at its word, finding abrogation when tribes are mentioned (in some fashion) and a retention of immunity when they are not. Because of that longstanding practice, it is significant that Congress chose not to include tribes among the governmental units specifically identified in section 101(27).

Such a conclusion does not run afoul of any "magic words" prohibition. Just as one would expect abrogation of state sovereign immunity to occur through an explicit reference to states, one would expect an abrogation of tribal sovereign immunity to occur through an explicit reference to Indian tribes. That conclusion is dictated by this Court's clear-statement precedents, which reject the notion that Congress might express an intention to abrogate in a roundabout manner when a straightforward alternative exists. Outside of the clear-statement context, this Court has similarly held that when Congress passes up obvious and direct language that would achieve a particular result, the natural implication is that it did not intend that result. The clear-statement rule and traditional tools of statutory interpretation thus point to the same answer here: Congress did not mention Indian tribes in section

101(27) because it did not intend the definition of "governmental unit" to reach them.

2. The panel majority nevertheless held that section 101(27)'s residual clause ("other foreign or domestic government") satisfies the clear statement rule for Indian tribes, reasoning that the words "other *** domestic government" could refer to nothing else. That is not even a natural reading of those words, much less one that is unequivocal.

The panel majority was wrong to rely on dictionary definitions of component words. Whether an Indian tribe can be regarded as "domestic" in a geographic sense does not answer the question whether "other *** domestic government" provides certainty that Congress intended to capture tribes. Analogizing to the term "domestic dependent nation" does not bridge the gap between "other *** domestic government" and tribes. As Chief Justice Marshall made clear in *Cherokee Nation v. Georgia*, tribes may be described as "domestic dependent nations" because they remain unique sovereigns that defy categorization as foreign or domestic. In addition, because the key phrase appears in a residual clause that follows a list of specifically identified governmental units and their departments, agencies, and instrumentalities, the *ejusdem generis* canon instructs that "other *** domestic government" be limited to similar governmental entities. As unique sovereigns that pre-existed the Constitution, tribes stand apart from the listed governmental entities—all of which can trace their origins to the Constitution (or, in the case of foreign entities, to foreign governments).

The panel majority's concern that excluding Indian tribes from section 101(27) would result in "other *** domestic government" becoming surplusage is unfounded. Even setting aside how odd it would be for Congress to use "other *** domestic government" to refer solely to Indian tribes, the statutory language readily captures hybrid governmental entities (like the Washington Metropolitan Area Transit Authority). That more-than-plausible alternative reading of section 101(27) precludes the panel majority's conclusion that "other *** domestic government" satisfies the clear-statement rule.

B. The panel majority's resort to historical and policy considerations fails in multiple respects. Contrary to the panel majority's supposition, there has never been a settled understanding in bankruptcy law that Indian tribes were governmental units. Floor statements by individual legislators using the term "domestic dependent nation" to describe tribes (not even in the context of the Bankruptcy Code) are irrelevant. And while the panel majority thought that tribes would be better off as governmental units under the Code, that reasoning ignores the reality that any benefits (including with respect to taxation) would be illusory and that tribes would be disadvantaged in other material ways. Such ill-advised engagement in policy debates is exactly why this Court has admonished that it is fundamentally Congress's job to weigh and accommodate policy considerations in determining whether to abrogate tribal sovereign immunity.

ARGUMENT

I. TRIBAL SOVEREIGN IMMUNITY CAN BE ABROGATED ONLY BY CONGRESS'S UNEQUIVOCAL STATEMENT

The governing legal principles in this case are undisputed. First, Indian tribes retain their sovereignty and inherent common-law immunity from suit. Second, Congress may abrogate that immunity—including in the Bankruptcy Code—only by unequivocally expressing that intention.

1. "[T]he doctrine of tribal immunity is settled law." *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 756 (1998). As "'domestic dependent nations' that exercise inherent sovereign authority," *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)), Indian tribes remain "separate sovereigns pre-existing the Constitution," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). As such, they "retain their historic sovereign authority." *Bay Mills*, 572 U.S. at 788 (internal quotation marks omitted).

"Among the core aspects of sovereignty that tribes possess *** is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Bay Mills*, 572 U.S. at 788 (quoting *Santa Clara Pueblo*, 436 U.S. at 58). Indeed, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind[.]" THE

FEDERALIST NO. 81, at 511 (Alexander Hamilton) (B. Wright ed., 1961) (emphasis omitted).

For Indian tribes, that general sense and practice serves distinct sovereignty interests relating to self-governance. *See Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g*, 476 U.S. 877, 890 (1986) ("The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance."). "A nation cannot long exist without revenues," for without that "essential support, it must resign its independence." THE FEDERALIST NO. 12, at 75 (Alexander Hamilton) (Random House 1941). That is why "[a] key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding." *Bay Mills*, 572 U.S. at 810 (Sotomayor, J., concurring); *see California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-217 (1987) (explaining that "traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development," are "important federal interests").

Yet, in contrast to other sovereigns, Indian tribes face "insuperable *** barriers" to "raising revenue through more traditional means." *Bay Mills*, 572 U.S. at 810-813 (Sotomayor, J., concurring). Due to various federal policies that led to non-Indians owning significant portions of Indian reservations, tribes today have little income, property, or sales they can tax. *Id.* What little tax base exists, moreover, is already subject to state taxation, leaving tribes loath

to impose additional burdens that would discourage economic growth. *Id.*

As a result, "tribal business operations are critical to the goals of tribal self-sufficiency." *Bay Mills*, 572 U.S. at 810-813 (Sotomayor, J., concurring). Such enterprises "may be the only means by which a tribe can raise revenues" to provide government services and combat rates of poverty and unemployment that are significantly higher than the national average. *Id.*; *see* Amicus Cert. Br. of Native Am. Fin. Servs. Ass'n 3-4, 8-12 ("Often lacking traditional tax bases, to truly exercise self-determination, tribes must use commercial enterprises to raise revenue and fund their own priorities.").

By protecting tribal businesses, tribal sovereign immunity "promote[s] economic development and tribal self-sufficiency." *Kiowa Tribe*, 523 U.S. at 757; *see Allen v. Gold Country Casino*, 464 F.3d 1044, 1046-1047 (9th Cir. 2006) (explaining that immunity "directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general"). Reflecting the practical realities of tribal self-governance, courts (including in this case) have repeatedly recognized that tribal enterprises "enjoy[] whatever immunity the [tribe] does." Pet. App. 3a n.1; *see, e.g.*, *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1183, 1191-1195 (10th Cir. 2010) (setting forth widely adopted framework for extending immunity to tribal subdivisions, "including those engaged in economic activities").

2. Of course, tribal sovereign immunity remains subject to the plenary power of Congress over Indian affairs. *Bay Mills*, 572 U.S. at 790. As in other contexts, a well-developed set of precedents guides the "grave" determination of whether Congress has abrogated that immunity. *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018).

Most fundamentally, this Court's "decisions establish *** that such a congressional decision must be clear." *Bay Mills*, 572 U.S. at 790. "The baseline position, [this Court] ha[s] often held, is tribal immunity; '[t]o abrogate [such] immunity, Congress must "unequivocally" express that purpose.'" *Id.* (last two alterations in original) (quoting *C & L Enters.*, 532 U.S. at 418). The same clear-statement rule protects the federal government and states. *See, e.g.*, *Lane v. Pena*, 518 U.S. 187, 192 (1996) (federal government); *Sossamon v. Texas*, 563 U.S. 277, 284-285 (2011) (states); *see also* Pet. App. 5a n.3.

Although "Congress need not state its intent in any particular way" or "use magic words," *FAA v. Cooper*, 566 U.S. 284, 291 (2012), "[i]t is settled that a waiver of sovereign immunity cannot be implied," *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotation marks omitted). Nor is it enough to show that the best reading of a federal statute favors abrogation. "*Any* ambiguities in the statutory language are to be construed in favor of immunity." *Cooper*, 566 U.S. at 290 (emphasis added). So long as there is a "plausible" interpretation of a statute that does not permit suit against a sovereign, *Nordic Vill.*, 503 U.S. at 37, a court lacks the requisite "perfect confidence that Congress in fact intended *** to abrogate sovereign

immunity," *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989).

As this Court has explained, the clear-statement rule as applied to tribal sovereign immunity "reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Bay Mills*, 572 U.S. at 790. Or, put another way, "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent." *Santa Clara Pueblo*, 436 U.S. at 60; *see* Amicus Cert. Br. of Professors of Fed. Indian Law 7-12 ("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.").

In the end, it is Congress—not this Court—that "is in a position to weigh and accommodate the competing policy concerns and reliance interests" through "comprehensive legislation." *Kiowa Tribe*, 523 U.S. at 758-759; *see Bay Mills*, 572 U.S. at 800-803 (discussing examples). Accordingly, this Court readily and consistently "defer[s] to the role Congress may wish to exercise in this important judgment," recognizing abrogation only where Congress has "alter[ed] [tribal sovereign immunity's] limits through explicit legislation." *Kiowa Tribe*, 523 U.S. at 758-759 (citing *Santa Clara Pueblo*, 436 U.S. at 58).

II. THE BANKRUPTCY CODE DOES NOT ABROGATE TRIBAL SOVEREIGN IMMUNITY

The Bankruptcy Code falls well short of supplying a clear statement that unequivocally expresses Congress's intention to abrogate the historic common-law immunity of Indian tribes. Section 106 provides that "sovereign immunity is abrogated as to a *governmental unit*" with respect to certain Code provisions. 11 U.S.C. § 106(a) (emphasis added). But the definition of "governmental unit"—including the residual reference to "other *** domestic government," 11 U.S.C. § 101(27)—hardly offers "perfect confidence" that Congress meant to strip Indian tribes of their immunity in bankruptcy litigation. *Dellmuth*, 491 U.S. at 231.

A. The Text Of The Bankruptcy Code Does Not Contain An Unequivocal Expression Of Congress's Intent To Abrogate

1. Congress easily could have, but did not, refer to Indian tribes.

a. The text of section 101(27), which defines "governmental unit," does not make unmistakably clear Congress's intention to extend abrogation to Indian tribes:

> The term "governmental unit" means 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.

11 U.S.C. § 101(27). To the contrary, the most natural reading excludes Indian tribes.

Section 101(27) defines "governmental unit" in terms of three categories: (i) specifically identified units, *i.e.*, "United States; State; Commonwealth; District; Territory; municipality; foreign state"; (ii) a "department, agency, or instrumentality of" those specifically identified units (with the exception of a U.S. trustee in a bankruptcy case); or (iii) "other foreign or domestic government." 11 U.S.C. § 101(27). The provision does *not* mention Indian tribes.

That fact alone sows considerable doubt over section 101(27)'s reach vis-à-vis Indian tribes. There can be no serious question that the most straightforward expression of congressional intent to include Indian tribes within the definition of "governmental unit" would be an explicit reference to Indian tribes. After all, there are numerous examples in which Indian tribes are mentioned alongside the entities already listed in section 101(27). Outside of foreign nations, this Court has long recognized three sovereigns—the United States, the states, and Indian tribes—with respective immunities that are often discussed in the same breath. *See, e.g.*, *Three Affiliated Tribes*, 476 U.S. at 890 ("[B]ecause of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy."); *see also Kiowa Tribe*, 523 U.S. at 765 (Stevens, J., dissenting) (comparing "broader immunity" enjoyed by

"Indian tribe" to that of "the States, the Federal Government, and foreign nations"). Congress regularly has done the same.[2]

Unsurprisingly, referring specifically to Indian tribes is the mechanism that Congress has consistently employed to express its intent to abrogate tribal sovereign immunity. In some circumstances, the statute provides a cause of action against tribes. *See, e.g.*, 25 U.S.C. § 2710(d)(7)(A)(ii) (providing that federal district courts shall have jurisdiction over suits to enjoin class III gaming activity located on Indian lands). In others, Congress simply declares that tribal sovereign immunity may not be raised as a defense. *Id.* § 5321(c)(3)(A) (stating that "insurance carrier

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[2] *See, e.g.*, 7 U.S.C. § 8310 (providing that "Secretary may cooperate with other Federal agencies, States or political subdivisions of States, national governments of foreign countries, local governments of foreign countries, domestic or international organizations, domestic or international associations, Indian tribes, and other persons); 42 U.S.C. § 8802(17) (defining "person" to mean "any individual, company, cooperative, partnership, corporation, association, consortium, unincorporated organization, trust, estate, or any entity organized for a common business purpose, any State or local government (including any special purpose district or similar governmental unit) or any agency or instrumentality thereof, or any Indian tribe or tribal organization"); *id.* § 9601(16) (defining "natural resources" in terms of control by "the United States *** , any State or local government, any foreign government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe"); 49 U.S.C. § 5121(g) (stating that Secretary "may enter into grants and cooperative agreements with a person, agency, or instrumentality of the United States, a unit of State or local government, an Indian tribe, a foreign government (in coordination with the Department of State), an educational institution, or other appropriate entity").

shall waive any right it may have to raise as a defense the sovereign immunity of an Indian tribe from suit" regarding certain claims).

Where (as here) a statutory provision abrogating immunity relies on a term defined elsewhere, the definitional provision expressly includes Indian tribes—oftentimes alongside the same governmental units listed in section 101(27) of the Bankruptcy Code. To take a few examples, the Resource Conservation and Recovery Act permits suits against a "person," 42 U.S.C. § 6972(a)(1), which includes a "municipality" that is then defined to include "an Indian tribe or authorized tribal organization or Alaska Native village or organization," *id.* § 6903(13), (15). Similarly, the Safe Drinking Water Act authorizes complaints against a "person," *id.* § 300j-9(*i*)(2)(A), which includes a "municipality" defined as "a city, town, or other public body created by or pursuant to State law, or an Indian Tribe," *id.* § 300f(10), (12). The Clean Water Act's citizen-suit provision follows the same structure. *See* 33 U.S.C. §§ 1362(4)-(5), 1365(a)(1) (referring to "person," which includes a "municipality" defined as an "Indian tribe or an authorized Indian tribal organization"). And the Federal Debt Collection Procedures Act refers to a "[g]arnishee"—a non-debtor "person" who may be the subject of a court-issued writ of garnishment, 28 U.S.C. § 3002(7)—and specifies that "person" includes "a State or local government or an Indian tribe," *id.* § 3002(10).

Courts, in turn, have appropriately followed Congress's lead when confronting immunity questions. "[T]here 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." *In re Greektown Holdings, LLC*, 917 F.3d 451, 460 (6th Cir. 2019). With the sole exception of the Bankruptcy Code, there are "numerous examples of circuit courts finding that tribal sovereign immunity was abrogated where the statute specifically referred to an 'Indian tribe,' and refusing to do so where it did not." *Id.* at 460-461.

Given Congress's established practice of referring to Indian tribes when it intends to abrogate tribal sovereign immunity, and appellate courts' (nearly) unbroken acceptance thereof, the absence of such language from section 101(27) reasonably signals Congress's intent. *See EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991) (finding lack of clear statement to apply statute extraterritorially buttressed by fact that Congress has expressly legislated that result on "numerous occasions"). Congress is presumed to legislate (and has legislated) against the backdrop of a clear-statement rule and this Court's explication of tribal sovereign immunity. *See Kiowa Tribe*, 523 U.S. at 758-759 (providing examples); *see also Bond v. United States*, 572 U.S. 844, 857 (2014) ("Part of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions," including a "clear statement" rule.); *Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent.").

Indeed, Congress is all too aware of the consequences of failing to speak clearly enough when

it comes to sovereign immunity and the Bankruptcy Code. It enacted the current version of section 106 in 1994 to address a pair of this Court's decisions finding no abrogation of federal and state sovereign immunity against certain monetary claims. *See Nordic Vill.*, 503 U.S. at 33-37, 39 ("Neither § 106(c) nor any other provision of law establishes an unequivocal textual waiver of the [federal] Government's immunity from a bankruptcy trustee's claims for monetary relief."); *Hoffman*, 492 U.S. at 98-104 (holding, for a plurality, that section 106(c) did not "authorize[] a bankruptcy court to issue a money judgment against a State that has not filed a proof of claim in the bankruptcy proceeding"); *see* pp. 46-47, *infra*.

Accordingly, the better—and certainly at least a reasonable—conclusion is that Congress did not mention Indian tribes in section 101(27) because it did not intend them to be "governmental unit[s]" under the Bankruptcy Code. That is sufficient to defeat a claim that the Code abrogates tribal sovereign immunity.

b. Seeking to dodge Congress's conspicuous omission of Indian tribes in section 101(27), the panel majority posited that Congress need not use "magic words" to effectuate a valid abrogation. *Cooper*, 566 U.S. at 291; *see* Pet. App. 13a-14a, 17a-18a. True enough. But looking to Congress's practice is not the same as requiring magic words. "Congress is free to use any number of different phrases to indicate unambiguously its intent to abrogate an Indian tribe's immunity—'every government,' 'any government with sovereign immunity,' or 'Indian tribes.'" Pet. App. 42a-43a (Barron, C.J., dissenting); *see In re Greektown*,

917 F.3d at 461 & n.10; *cf.* 25 U.S.C. § 2710(d)(7)(A)(ii) (providing federal district court jurisdiction "to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact"); *Northern States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty.*, 991 F.2d 458, 462 (8th Cir. 1993) (holding that Hazardous Materials Transportation Act abrogates tribal sovereign immunity by "allow[ing] preemption cases to be brought in 'any court of competent jurisdiction,'" because "[e]very relevant subsection of [the Act] contains the language 'state or political subdivision thereof or Indian tribe'").

The point is simply that it would be exceedingly odd to conclude that although Congress in other contexts uniformly indicates an intent to abrogate tribal sovereign immunity by using the most natural and straightforward option—referring to Indian tribes—it chose a different and more convoluted method of achieving the same result in the Bankruptcy Code.

This Court has rejected such reasoning. In *Dellmuth*, for example, this Court described the dissent's criticism of the clear-statement rule as "premised on an unrealistic and cynical view of the legislative process[,] *** find[ing] it difficult to believe that the 94th Congress, taking careful stock of the state of Eleventh Amendment law, decided it would drop coy hints but stop short of making its intention manifest." 491 U.S. at 230-231; *see also West Virginia v. EPA*, 142 S. Ct. 2587, 2622 (2022) (Gorsuch, J., concurring) ("'[O]blique or elliptical language' will not supply a clear statement.") (alteration in original).

The same can be said of the Congress that enacted sections 101(27) and 106. *See* Pet. App. 30a (Barron, C.J., dissenting) (questioning why Congress "thought it clearest not to name [Indian tribes] and to refer to them instead in only much more general terms, notwithstanding Congress's obligation to abrogate Indian tribes' immunity only clearly and unequivocally").

Nor is there any tension with the observation that the clear-statement rule "'is a tool for interpreting the law' and *** does not 'displac[e] the other traditional tools of statutory construction.'" Pet. App. 18a (alteration in original) (quoting *Cooper*, 566 U.S. at 291). This Court has frequently remarked that "[w]hen legislators did not adopt 'obvious alternative' language, 'the natural implication is that they did not intend' the alternative." *Advocate Health Care Network v. Stapleton*, 581 U.S. 468, 477 (2017) (quoting *Lozano v. Montoya Alvarez*, 572 U.S. 1, 16 (2014)); *see, e.g.*, *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812-1813 (2019) (refusing to "favor a most unlikely reading over th[e] obvious one" that provides "a much more direct path to [a] destination"). That is exactly the type of "textual clue[]" a court may not "disregard" when interpreting any statute. *Allina Health*, 139 S. Ct. at 1813.

Given how much those interpretative principles overlap, the clear-statement rule "can be considered merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29 (1997). As Justice Scalia explained: "For example,

since congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied—so something like a 'clear statement' rule is merely normal interpretation." *Id.* The panel majority's attempt to drive a wedge between the clear-statement rule and traditional tools of statutory construction thus misses the mark.

*2. Reference to "other *** domestic government" fails to satisfy the clear-statement rule.*

The panel majority nevertheless concluded that section 101(27)'s reference to "other *** domestic government"—within the residual clause "other foreign or domestic government," 11 U.S.C. § 101(27)—makes Congress's intention to abrogate tribal sovereign immunity unequivocal. That conclusion is incorrect. For several reasons, reading "other *** domestic government" as a substitute for Indian tribes is not even the best reading of the statute, let alone one that passes muster under the clear-statement rule.

a. For starters, read in context, "other *** domestic government" does not refer to Indian tribes—and certainly not unmistakably. The panel majority's disagreement was driven almost entirely by dictionary definitions of the words "domestic" and "government." Reducing the clear statement inquiry to the most basic of syllogisms, the panel majority reasoned:

- "Tribes are governments because they act as the 'governing authorit[ies] of their members.'" Pet. App. 7a (alteration in

original) (quoting *Government*, WEBSTER'S THIRD, *supra*, at 982).

- "[T]ribes are domestic, rather than foreign, because they 'belong[] or occur[] within the sphere of authority or control or the *** boundaries of' the United States." *Id.* at 8a (alterations except first and ellipsis in original) (quoting *Domestic*, WEBSTER'S THIRD, *supra*, at 671).
- "Thus, a tribe is a domestic government and therefore a government unit." *Id.*

Such reasoning does not reveal a clear statement. For one thing, "[w]hether a statutory term is unambiguous *** does not turn solely on dictionary definitions of its component words." *Yates v. United States*, 574 U.S. 528, 537 (2015) (plurality opinion); *see* Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era To Determine the Original Meaning of the Constitution*, 82 GEO. WASH. L. REV. 358, 373 (2014) ("[D]ictionary definitions do not always capture the correct meaning of words that form a part of a phrase or compound, such as 'Vice President' or 'declare war.'"). For another, the issue in this case is not simply whether an Indian tribe may be both a "government" and "domestic" in a geographic sense, but rather whether "Congress combined those terms in a single phrase in § 101(27) to clearly, unequivocally, and unmistakably express its intent to include Indian tribes" among the other specified governmental units whose immunity the Bankruptcy Code displaces. *In re Greektown*, 917 F.3d at 460.

Even assuming "other *** domestic government" could include Indian tribes, that does not mean it must.

The panel majority attempted to buttress its dictionary-driven result by claiming that section 101(27)'s list of enumerated governments and reference to "other foreign or domestic government" has to "cover[] essentially all forms of government," because "[l]ogically, there is no other form of government outside the foreign/domestic dichotomy." Pet. App. 7a. Not so. Indian tribes defy simple categorization as "foreign" or "domestic" governments. Regardless of whether "logic" suggests a binary choice between those options, *id.* at 17a (describing "classic dichotomy between the words 'foreign' and 'domestic'"), this Court has repeatedly held that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence," and that tribes are "marked by peculiar and cardinal distinctions which exist no where else," *Cherokee Nation*, 30 U.S. at 16; *see, e.g.*, *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021) (identifying tribes as "distinct, independent political communities" with "sovereignty that *** is of a unique *** character").

Contrary to the panel majority's insistence, the term "domestic dependent nation"—which traces back to *Cherokee Nation*—does not prove that "other *** domestic government" refers to Indian tribes. *Cherokee Nation* raised the "difficult[]" question of whether "the Cherokees constitute a foreign state" for purposes of this Court's original jurisdiction. 30 U.S. at 16. Writing for this Court, Chief Justice Marshall explained that "it may well be doubted whether those

tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations." *Id.* at 17. He then suggested that tribes "may, more correctly, perhaps, be denominated domestic dependent nations" insofar as "[t]heir relation to the United States resembles that of a ward to his guardian." *Id.* But that shorthand (and highly qualified) descriptor does not come close to placing tribes *unequivocally* into the generic category of a "domestic government." 11 U.S.C. § 101(27). Rather, tribes continue to "occupy a unique status under our law" that is neither foreign nor domestic. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985); *see* Pet. App. 40a-41a (Barron, C.J., dissenting) ("[A] 'tribal government' is plausibly understood to be neither a 'domestic' nor a 'foreign government[.]'").

For those reasons, it is at least questionable—if not entirely inaccurate—to hold that "domestic government" and "domestic dependent nations" are "functionally equivalent." Pet. App. 10a. Chief Justice Marshall captured a far more complex concept than mere geography in coining "domestic dependent nations." *See Cherokee Nation*, 30 U.S. at 17 ("They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage."). Indeed, this Court has subsequently referred to Indian tribes as "*quasi* domestic nations." *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 411 (1865).

At bottom, the panel majority's labored effort to tether dictionary definitions to Indian tribes, using

"domestic dependent nations" as supposed proof that "other *** domestic government" provides a perfect match for tribes, is "hardly intuitive." Pet. App. 26a (Barron, C.J., dissenting). It would be a "surpassingly strange manner of accomplishing that result." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 647 (2012). That is especially true given that tribes may be *distinguished* from domestic governments. As Chief Judge Barron noted, "[o]ne need only consult the Code of Federal Regulations to see that *** understanding laid out in official black and white": defining "[g]overnmental entity" to include a "tribal government" *separate and apart from* "domestic government" and "foreign governmental subdivision." Pet. App. 41a (quoting 7 C.F.R. § 205.2).

b. Several textual and structural features of section 101(27) further undermine the conclusion that "other *** domestic government" encompasses Indian tribes.

First, the words "other *** domestic government" in section 101(27) "follow[], in the same sentence, explicit reference to" specific governmental units and their departments, agencies, or instrumentalities. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114 (2001). Under the *ejusdem generis* canon, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Id.* at 114-115 (alteration in original) (quoting 2A Norman J. SINGER & SHAMBIE SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47.17 (1991)); *see also* ANTONIN SCALIA & BRIAN GARNER, READING LAW:

THE INTERPRETATION OF LEGAL TEXTS 199-200 (2012) (explaining that catchall phrase following enumeration of specifics "implies the addition of *similar* after the word *other*"). Just as a residual clause ("any other class of workers engaged in *** commerce") in the Federal Arbitration Act "should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it" ("seaman" and "railroad employees") and thus limited to "transportation workers," *Circuit City*, 532 U.S. at 114-115, 119 (ellipsis in original), "other *** domestic government" should be constrained by the preceding list of specific governmental units, *see* Pet. App. 33a-35a (Barron, C.J., dissenting).

The panel majority agreed that it must "draw the meaning of 'other foreign or domestic government' from the preceding enumeration of governments." Pet. App. 15a. It also recognized "the relevant category is governments like the federal government, states, territories, municipalities, and foreign states and instrumentalities of the federal government, states, territories, municipalities, and foreign states." *Id.* But to the panel majority, there was no "relevant" or "functional" difference between those governmental units and Indian tribes. *Id.* at 15a-16a.

That statement defies history, reality, and this Court's precedents. To repeat: "Indian tribes occupy a unique status under our law." *National Farmers Union*, 471 U.S. at 851. They have frequently been "single[d] out" under federal law, *Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g, P.C.*, 467 U.S. 138, 146 (1984), and as a result face distinct

governmental challenges, *see* pp. 18-19, *supra*. As "unique aggregations," *United States v. Mazurie*, 419 U.S. 544, 557 (1975), tribes also retain a "special brand of sovereignty," *Bay Mills*, 572 U.S. at 800. In particular, unlike states that surrendered their immunity (not to mention their sovereignty over bankruptcy matters) to the federal government at the Constitutional Convention, "'it would be absurd to suggest that the tribes'—at a conference 'to which they were not even parties'—similarly ceded their immunity." *Id.* at 789-790 (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991)); *see Torres v. Texas Dep't of Pub. Safety*, 142 S. Ct. 2455, 2462 (2022).

Accordingly, it is not enough for the panel majority to declare that Indian tribes, like all of the units actually named in section 101(27), "are forms of government." Pet. App. 15a. Nor is it meaningful that "[a]ll, except municipalities, enjoy some immunity from unconsented suit." *Id.* Nor is it appropriate to analogize the "governmental functions" of the enumerated units to those of tribes. *Id.* at 16a. The dissimilarities are fundamental and manifest, providing Congress with ample reason to view tribes as different in kind.

What is more, as Chief Judge Barron observed, all of the units (save for foreign governments) that *are* listed in section 101(27) share a characteristic that Indian tribes do not: "each of them is also an institutional component of the United States, insofar as that entity is understood not just as a physical location on a map but as a governmental system that traces its origin to the United States Constitution."

Pet. App. 35a. Given that the phrase "other foreign or domestic government" would otherwise capture "every 'government' on Earth, near or far"—a result at odds with Congress's decision to structure the definition in section 101(27) as it did when it could have just used "any" or "every" government as "the sole means of defining 'governmental unit'"—it is more than plausible that the words "foreign" and "domestic" impart traceability to a government as opposed to mere geography. *Id.* at 32a-33a, 35a-36a. Indian tribes are neither, because both they pre-existed the Constitution and cannot trace their origins to any foreign government.

Second, the panel majority made much of the fact that section 101(27) is "an unmistakably broad provision" that employs a "belt-and-suspenders" approach. Pet. App. 14a. That may be correct, but it cuts against the panel majority—and in fact reinforces the application of the *ejusdem generis* canon. The purpose of the belt-and-suspenders approach is to "make sure" through "redundancy" that a meaning, common to both the belt and suspenders, is conveyed. *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.5 (2020). If that were the reason Congress appended "other foreign or domestic government" to section 101(27), it would have been to make "doubly sure" that the United States, states, commonwealths, districts, territories, municipalities, and foreign governments—along with their departments, agencies, instrumentalities, *or other such entities*—were clearly understood to be governmental units. *Barton v. Barr*, 140 S. Ct. 1442, 1453 (2020). It would not have been to expand the scope of section 101(27) to

include (unmentioned) Indian tribes. *See Guam v. United States*, 141 S. Ct. 1608, 1615 (2021) ("This sort of belt-and-suspenders approach hardly compels an all-encompassing reading of [the statute].").

Belts and suspenders aside, breadth should not be equated with clarity. *Bond v. United States* is instructive. In that case, a provision of the Chemical Weapons Convention Implementation Act imposed federal criminal liability on those who "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 572 U.S. at 851 (quoting 18 U.S.C. § 229(a)(1)). A separate provision, applicable to the Act as a whole, defined "chemical weapon" to include any "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose." *Id.* (quoting 18 U.S.C. § 229F(1)(A)). Because the provisions if read broadly risked altering the usual constitutional balance between federal and state powers over criminal matters, this Court applied a clear-statement rule to discern the scope of "chemical weapon." *Id.* at 857-860.

This Court accepted that "'[c]hemical weapon' is the key term that defines the statute's reach" and that the definition was "extremely broad[]." 572 U.S. at 860. Notwithstanding that breadth, the Court construed the "general definition" of "chemical weapon" as excluding "everything from the detergent under the kitchen sink to the stain remover in the laundry room." *Id.* at 860, 862. The Court held that Congress must speak more clearly if it intended the

definition to sweep so broadly as "to reach local criminal conduct." *Id.* at 860.

So too here: Section 101(27) is a general definition that defines the scope of "governmental unit," as used in the Bankruptcy Code. Although the definition can be viewed as broad in isolation, that does not amount to a "clear statement" of Congress's intent to "effect a significant change in the sensitive" area of tribal sovereign immunity. 572 U.S. at 858, 860.[3]

Third, the panel majority expressed concern that "if we interpret the phrase to exclude tribes, we are left with surplusage" because there are "no other examples of governments that would fit" within "other *** domestic government." Pet. App. 19a. That interpretative canon hurts, not helps, the panel majority. If the panel majority were correct that "other *** domestic government" refers to Indian

[3] In addition to the clear-statement rule, the Indian canons of construction compel construing "governmental unit" as excluding Indian tribes so as to avoid impinging on tribal sovereignty. *See* Pet. App. 26a-27a n.14 (Barron, C.J., dissenting). In *Montana v. Blackfeet Tribe of Indians*, for example, this Court recognized "the standard principles of statutory construction do not have their usual force in cases involving Indian law," and that two canons "rooted in the unique trust relationship between the United States and the Indians" governed the inquiry into whether a federal law authorized Montana to enforce certain tax statutes against the tribe. 471 U.S. 759, 766 (1985). The Court determined both that Congress had not authorized such taxation with sufficient clarity and that Montana's contrary interpretation would not "satisfy the rule requiring that statutes be construed liberally in favor of the Indians." *Id.* at 766-768.

tribes—and only Indian tribes—Congress's intention to use that amorphous phrase to satisfy the clear-statement rule becomes all the more dubious. *See* Pet. App. 27a-28a, 30a (Barron, C.J., dissenting).

In any event, the surplusage canon has no role to play here because there are more reasonable interpretations of "other *** domestic government" that do not implicate Indian tribes. As Chief Judge Barron's dissent explains, "other *** domestic government" can also "be read to pick up otherwise excluded, half-fish, half-fowl governmental entities like authorities or commissions that are created through interstate compacts." Pet. App. 28a. Such entities are commonplace and raise unique immunity questions. *See, e.g.*, *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994).

Take the Washington Metropolitan Area Transit Authority (WMATA)—an entity created through a compact to operate a mass transit system across the District of Columbia and surrounding areas of Maryland and Virginia. "WMATA's sovereign immunity exists because the signatories have successfully conferred their *respective* sovereign immunities upon it." *Morris v. Washington Metro. Area Transit Auth.*, 781 F.2d 218, 219 (D.C. Cir. 1986) (emphasis added). Specifically, Congress exercised its "power to legislate for the District of Columbia and to create an instrumentality that is immune from suit," while "Maryland and Virginia have immunity under the eleventh amendment and each can confer that immunity upon instrumentalities of the state." *Id.* at 219-220. The D.C. Circuit recognized that WMATA was neither an instrumentality of the District nor an

instrumentality of the states, but rather an "*interstate* instrumentality" that possessed "three immunities *** added together." *Id.* at 228 (emphasis added).

"Other *** domestic government" captures such entities under the Bankruptcy Code. Because of its peculiar governmental structure, an entity like WMATA would "not [be] susceptible of the kind of one or two-word description ('Interstate Commission, Authority, or the Like'? 'Products of compacts or agreements'?) that" are readily available to Congress for other entities—like Indian tribes. Pet. App. 28a-29a (Barron, C.J., dissenting). "Nor do any other words in § 101(27) lend themselves to a construction that would encompass such odd governmental hydras." *Id.* at 29a. An instrumentality that is both federal and state in nature is not unmistakably an instrumentality of the "United States" or "a State" (or even of multiple states, *contra* Pet. App. 19a). 11 U.S.C. § 101(27). "Other *** domestic government" solves the problem of attempting to categorize such hybrids.

The panel majority countered "that an agency created by interstate compact enjoys an immunity only as an instrumentality of its creator states." Pet. App. 19a. That is correct, *see Hess*, 513 U.S. 30, but unresponsive. Whatever the source of the entity's sovereignty, the question is whether an unequivocal statement abrogates its immunity. *See* Pet. App. 29a n.15 (Barron, C.J., dissenting). At a minimum, it is plausible that Congress inserted "other *** domestic government" to remove any ambiguity on that subject. That alternative construction "is enough to establish that a reading imposing monetary liability on [Indian

tribes] is not 'unambiguous' and therefore should not be adopted." *Nordic Vill.*, 503 U.S. at 37.

At any rate, surplusage would not be "a silver bullet." *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 881 (2019). "Sometimes the better overall reading of the statute contains some redundancy." *Id.* Here, as already explained (pp. 37-38, *supra*), "other *** domestic government" could just reinforce the preceding provisions of section 101(27). *See* SCALIA & GARNER, *supra*, at 176-177 ("Sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach."). That is far more palatable than concluding Congress chose "other *** domestic government" as a clear statement on Indian tribes. *See United States v. Atlantic Rsch. Corp.*, 551 U.S 128, 137 (2007) ("[O]ur hesitancy to construe statutes to render language superfluous does not require us to avoid surplusage at all costs.").

B. Historical Context And Policy Considerations Cannot (And Do Not) Supply The Necessary Clear Statement

Although the unequivocal intention to abrogate tribal sovereign immunity must be found in the statutory text itself and may not be implied, *see Nordic Vill.*, 503 U.S. at 37; *Santa Clara Pueblo*, 436 U.S. at 58, the panel majority used history and policy to justify that result in the bankruptcy context. Those considerations, which are insufficient under the clear-statement rule, are unavailing on their own terms here.

1. Historical context does not support the abrogation of tribal sovereign immunity.

Neither cited piece of "historical context," Pet. App. 8a, supports the panel majority's interpretation.

a. According to the panel majority, "[w]hen Congress abrogated immunity in 1994 [by amending section 106], it did so against the preexisting backdrop of § 101(27)" and a "clear" awareness that "tribes were governmental units." Pet. App. 8a-9a. The panel majority's sole authority for that supposed backdrop, however, is a single 1979 bankruptcy court decision "published" in a reporter called Bankruptcy Court Decisions. *Id.* at 9a (citing *In re Bohm's*, 5 Bankr. Ct. Dec. 259). Given that "[i]t seems most unlikely *** that a smattering of lower court opinions could ever represent the sort of 'judicial consensus so broad and unquestioned that we must presume Congress knew of and endorsed it,'" *BP P.L.C. v. Mayor & City Council of Balt.*, 141 S. Ct. 1532, 1541 (2021) (quoting *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 349 (2005)), the panel majority presumed far too much about the legal landscape against which Congress amended section 106 in 1994.

If that were not enough, *In re Bohm's* is wholly inapposite. It concerns "pre-1978 bankruptcy law," not any practice under the Bankruptcy Code (enacted in 1978) that would have informed Congress's understanding in 1994. Pet. App. 9a. And the bankruptcy court there "treated the claim the San Carlos Apache Tribe *filed*'—*i.e.*, as a creditor choosing to engage in the bankruptcy process—"to recoup

hunting and fishing fees owed to it, as being effectively a claim by a federal instrumentality." *Id.* at 48a n.19 (Barron, C.J., dissenting) (emphasis added). None of that has anything to do with the immunity of a non-consenting tribe subject to a damages action in a bankruptcy proceeding, much less the meaning of "other *** domestic government."

To the extent the pre-Code landscape matters, "federal bankruptcy law prior to the Code's enactment in 1978 seemingly permitted tribal corporations to file for bankruptcy, even though states and municipalities could not." Pet. App. 47a (Barron, C.J., dissenting) (citing Bankruptcy Act Amendments of 1938, ch. 575, §§ 1(24), (29), 4, 52 Stat. 840, 841-842, 845). Because the Code does not permit a governmental unit as defined by section 101(27) to file a bankruptcy petition, *see* 11 U.S.C. § 109(a) ("[O]nly a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title."); *id.* § 101(41) ("The term 'person' includes individual, partnership, and corporation, but does not include governmental unit[.]"), extending that definition to tribes would have marked a change that one would expect Congress to have made explicit. Yet there is no indication anywhere in the Code or its legislative history of any such intent.

b. The panel majority also made much of the fact that individual Members of Congress have used Chief Justice Marshall's phrase from *Cherokee Nation*, "domestic dependent nation," since at least 1882. Pet. App. 9a-10a. That lends nothing to the analysis. Beyond the fact that "domestic dependent nation" is

not tantamount to the residual phrase "other *** domestic government," pp. 32-34, *supra*, under the clear-statement rule "legislative history has no bearing," *Nordic Vill.*, 503 U.S. at 37. "[T]he 'unequivocal expression' of elimination of sovereign immunity that [this Court] insist[s] upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report." *Id.*

Relying on floor statements is even flimsier. "[F]loor statements by individual legislators rank among the least illuminating forms of legislative history." *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 307 (2017). Worse still, the statements the panel majority cited are not even directed to the Bankruptcy Code, much less the provisions at issue.[4] Consequently, the panel majority was left to surmise that, because Senator Hatch at one point discussed "domestic dependent nations" on the floor in 1978 and was the

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[4] *See, e.g.*, 139 Cong. Rec. H26542 (daily ed. Oct. 28, 1993) (statement of Rep. Thomas) (arguing that Congress should not extend federal recognition to group seeking formal acknowledgement as Indian tribe outside established administrative process, and noting that federal recognition "permanently establishes a government-to-government relationship between the United States and the recognized tribe as a 'domestic dependent nation'"); 124 Cong. Rec. S8380 (daily ed. Apr. 3, 1978) (statement of Sen. Hatch) (arguing with respect to proposed treaty regarding Panama Canal that Constitution does not permit President to cede territory via self-executing treaties, and that Supreme Court decisions approving government's acquisition of Indian territory via treaty were not to the contrary, while noting that "[t]he peculiar status of Indian Tribes was defined by Chief Justice Marshall in 1831 in the case of *Cherokee Nation v. Georgia*, 5 Peters 17, as that of 'domestic dependent nations'").

ranking member on the Judiciary Committee that marked up amendments to the Code in 1994, Congress intended to abrogate tribal sovereign immunity by using the words "other *** domestic government." Pet. App. 10a. That speculation strains credulity.

It also calls attention to the absence of any relevant reference to Indian tribes (or even "domestic dependent nations") in the legislative history connected to the Bankruptcy Code itself. What legislative history does exist on the original versions of sections 101(27) and 106 refers only to the federal government and states. *See, e.g.*, H.R. REP. NO. 95-595, at 311, 317 (1977) (discussing definition of "governmental unit" in terms of enumerated entities and "connection with a state or local government or the federal government," and explaining that abrogation "is within Congress' power vis-à-vis both the Federal Government and the States"); S. REP. NO. 95-989, at 24, 29-30 (1978) (same).

Likewise, when Congress enacted the current version of section 106 in 1994, the legislative history identified the need to "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," and that the amendment will "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 in this regard." H.R. REP. NO. 103-835, at 42 (1994); *see also* S. Elizabeth Gibson, *Congressional Response to* Hoffman *and* Nordic Village*: Amended Section 106 and Sovereign*

Immunity, 69 AM. BANKR. L.J. 311, 327-329 (1995). Consistent with that intent, and the omission of any reference to Indian tribes, Congress left the original definition of "governmental unit" unaltered in 1994.

In sum, if legislative history is to be given any weight, the history of sections 101(27) and 106 is far more probative than the panel majority's scattered references. And that history undermines any suggestion that Congress intended to abrogate tribal sovereign immunity.

2. Weighing competing immunity policies and interests is a job for Congress, not courts.

To shore up its dubious application of the clear-statement rule, the panel majority rationalized the abrogation of tribal sovereign immunity under the Bankruptcy Code as *helping* Indian tribes. As the panel majority saw things, tribes would "benefit from their status as governmental units" because they would be able to "enjoy the special benefits afforded to government units under the Code, such as priority for certain unsecured claims, and certain exceptions to discharge." Pet. App. 11a-12a (citations omitted). Even better, tribes would be able "to collect tax revenue" notwithstanding other Code provisions, thereby furthering "tribal self-determination." *Id.* Such reasoning is deeply misguided.

As an initial matter, the panel majority overstates the benefits and understates the burdens associated with construing "governmental unit" to include Indian tribes. As to benefits, it has been well-documented that tribes face special headwinds in

collecting tax revenue from an already limited tax base. *See, e.g.*, *Bay Mills*, 572 U.S. at 810-813 (Sotomayor, J., concurring); pp. 18-19, *supra*. Accordingly, it is a stretch to conclude that tribes are strengthened by the ability to collect taxes from a debtor in bankruptcy.

As to burdens, the panel majority ignores the ways in which Indian tribes might be disadvantaged under the Code if they are considered to be governmental units. For instance, tribal entities would lose their ability to file for bankruptcy protections as debtors. *See* Pet. App. 45a-46a (Barron, C.J., dissenting); p. 44, *supra*. More importantly (and obviously), they would lose the tribal sovereign immunity that protects them from becoming embroiled in disruptive and costly bankruptcy litigation. *See, e.g.*, *In re Whitaker*, 474 B.R. 687, 689-690 (B.A.P. 8th Cir. 2012) (dismissing adversary proceedings brought against tribe for turnover of tribal revenue for the benefit of creditors). That immunity "is a necessary corollary to Indian sovereignty and self-governance," *Three Affiliated Tribes*, 476 U.S. at 890, because it "promote[s] economic development and tribal self-sufficiency," *Kiowa Tribe*, 523 U.S. at 757. Casting it aside as a means to further tribal self-determination, as the panel majority did here, turns the doctrine on its head.

In any event, delving into such "practical and policy considerations," Pet. App. 12a, is decidedly the province of Congress, not courts. To be sure, immunity is not costless; it "can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter,

as in the case of tort victims." *Kiowa Tribe*, 523 U.S. at 758. But whether those considerations compel the abrogation of immunity is a decision that only Congress may make. *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."). That is no less true in the bankruptcy context, where Congress has already "balanced the difficult choices," adopted a scheme in which there may be "inequitable results" in particular cases, and set forth a "meticulous—not to say mind-numbingly detailed—enumeration of exemptions and exceptions to those exemptions," which "confirms that courts are not authorized to create additional exceptions." *Law v. Siegel*, 571 U.S. 415, 424-427 (2014).[5]

Ultimately, the need to weigh immunity-related policy considerations "counsels some caution by [courts] in this area" and underscores the need for the clear-statement rule. *Kiowa Tribe*, 523 U.S. at 759. Simply put, "[t]he baseline position *** is tribal

[5] To be clear, the Code "would still apply to Indian tribes, notwithstanding their retention of immunity." Pet. App. 45a (Barron, C.J., dissenting); *see In re Greektown*, 917 F.3d at 461 (noting "important distinction between being subject to a statute and being able to be sued for violating it"). Thus, for example, tribal sovereign immunity "would supply no defense with respect to provisions of the Code (such as the one that permits a bankruptcy court to order the discharge of debts) that do not authorize *in personam* suits against Indian tribes." Pet. App. 44a (Barron, C.J., dissenting) (citing *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 450 (2004)). In addition, "equitable relief could *** provide an avenue for a debtor to enforce certain provisions of the Code against tribal actors" that otherwise violate the automatic stay. *Id.* at 45a (citing *Bay Mills*, 572 U.S. at 796).

immunity; and '[t]o abrogate [such] immunity, Congress must "unequivocally" express that purpose.'" *Bay Mills*, 572 U.S. at 790 (alterations except first in original) (quoting *C & L Enters.*, 532 U.S. at 418). Here, the Bankruptcy Code does not impart "perfect confidence that Congress in fact intended *** to abrogate sovereign immunity." *Dellmuth*, 491 U.S. at 231.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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February 22, 2023