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 RESPONDENT


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## QUESTION PRESENTED

Whether 11 U.S.C. § 106(a), which "abrogate[s]" the "sovereign immunity" of a "governmental unit . . . with respect to" a list of Bankruptcy Code provisions, read together with 11 U.S.C. § 101(27), which defines the term "governmental unit" to include "other foreign or domestic government[s]," clearly abrogates the common-law immunity of an Indian tribe from suit.

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## INTRODUCTION

The Bankruptcy Code defines a class of "governmental unit[s]." That class includes the federal government, state governments, municipal governments, foreign states, all of their agencies and instrumentalities, and "other foreign or domestic government[s]." 11 U.S.C. § 101(27). The Code also tells courts how to treat governmental units. In some ways, it recognizes the special status of governments by giving them privileges and exceptions that ordinary private creditors do not get. In another way – the one at issue here – the Code takes away a special privilege that governments ordinarily enjoy. Through unambiguous language, the Code provides that "sovereign immunity is abrogated as to a governmental unit" for a list of Code sections. *Id.* § 106(a). For each of those sections, a governmental unit, like any other creditor that deals with a debtor in bankruptcy, is subject to the jurisdiction of the federal bankruptcy courts.

The government before this Court in this case is petitioner Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Band"). The Band has set up a chain of corporations that it declares (at 7) to be tribal "arm[s]." At the chain's end is petitioner Niiwin, LLC, doing business as "Lendgreen." Lendgreen is an Internet payday lender: it makes small loans to borrowers of limited means and then charges them exorbitant interest. The loans that led to this case had an effective annual rate of 107.9%. Lendgreen asserts that it operates under tribal law, is not subject to state-law limits on interest rates, and is protected by the Band's tribal immunity from suit.

In 2019 and 2020, the Band and Lendgreen violated the Bankruptcy Code by harassing respondent Brian Coughlin to collect a loan after Coughlin had filed a Chapter 13 petition. The violation was knowing,

repeated, and severe. Lendgreen's unceasing collection attempts and threats caused Coughlin, who suffers from clinical depression, to attempt suicide and to be hospitalized. Coughlin then brought an action to recover his medical bills and other actual damages in addition to attorneys' fees. The Code section that creates such an action is listed in § 106(a), its abrogating provision. As a result, if the Band and its instrumentalities are "governmental unit[s]" within the meaning of § 101(27), they are not immune.

The Band, and other tribes, are governmental units because they fit clearly within the Code's defining language as "domestic government[s]." Tribes are "government[s]" because they exercise governmental authority and perform governmental functions. They are "domestic" because they are subject to the authority of the United States and within its territorial boundaries. They carry out acts that other parts of the Code categorize as governmental, such as levying taxes, exercising police and regulatory powers, and administering child support for their members. The familiar tools of statutory construction all show that tribes are governmental units.

Against the ordinary meaning of Congress's words, the Band contends mainly that Indian tribes are so distinctive that the Code is ambiguous merely because it does not say "tribe." That is not how this Court construes statutes, and this is not the case to start. Congress has exercised its power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States," U.S. Const. art. I, § 8, cl. 4, to provide that domestic governments are not immune from federal bankruptcy jurisdiction. Tribes are domestic governments. Neither text nor context nor any background principle makes Congress's mandate unclear.

## STATEMENT

**1.** When a debtor seeks federal bankruptcy protection, the Bankruptcy Code automatically imposes "a stay, applicable to all entities," of all efforts to collect the debtor's prepetition debts. 11 U.S.C. § 362(a). Among other safeguards, the stay requires creditors to cease "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." *Id.* § 362(a)(6).

The automatic stay serves a dual purpose. It serves "the debtor's interests by protecting the estate from dismemberment, and it also benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of the others." *City of Chicago v. Fulton*, 141 S. Ct. 585, 589 (2021). It is "'one of the fundamental debtor protections provided by the bankruptcy laws.'" *Midlantic Nat'l Bank v. New Jersey Dep't of Envt'l Prot.*, 474 U.S. 494, 503 (1986) (quoting S. Rep. No. 95-989, at 54 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840). A debtor injured by a "willful violation" of the stay has a cause of action to "recover actual damages, including costs and attorneys' fees." 11 U.S.C. § 362(k)(1).

Congress has authorized bankruptcy courts to enforce the Code's automatic stay even against sovereign entities. That authority is granted by § 106(a), which "abrogate[s]" the "sovereign immunity" of a "governmental unit" with respect to § 362 and certain other sections. *Id.* § 106(a). Section 106(a) permits "[t]he court [to] hear and determine any issue arising with respect to the application of such sections to governmental units," and it authorizes the bankruptcy court to "issue against a governmental unit an order, process, or judgment under such sections," including "an order or judgment awarding a money recovery." *Id.*

§ 106(a)(2)-(3). The Code further defines a "governmental unit" broadly to include not only federal, state, municipal, and foreign governments, but also "other foreign or domestic government[s]." *Id.* § 101(27).

**2.** Petitioners are the Lac du Flambeau Band of Lake Superior Chippewa Indians, a federally recognized Indian tribe, together with several of its directly and indirectly owned corporate entities: L.D.F. Business Development Corp., L.D.F. Holdings, LLC, and, at the bottom of the corporate chain, Niiwin, LLC, which does business as "Lendgreen." *See* Pet. 5 n.1.[1] Lendgreen is an Internet payday lender: it makes small, high-interest loans through a website. The loans, with annual percentage rates sometimes as high as 838.85%, purport to be governed by the Band's laws rather than by those of the States in which borrowers reside. C.A. App. 303, 305.

As a federally recognized tribe, the Band is generally immune from suit in federal or state court under the doctrine of tribal sovereign immunity. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788-89 (2014). But tribal sovereignty is "qualified"; "a tribe's immunity, like its other governmental powers and attributes," is "in Congress's hands." *Id.* at 789. Accordingly, Congress can "abrogate tribal immunity" by enacting statutory language that "'unequivocally' express[es] that purpose." *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)).

**3.** Respondent Brian Coughlin is the debtor in a Chapter 13 bankruptcy proceeding in the District of Massachusetts. "Chapter 13 of the Bankruptcy Code

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[1] References to "the Band" include petitioners collectively, except where context indicates otherwise.

affords individuals receiving regular income an opportunity to obtain some relief from their debts while retaining their property." *Bullard v. Blue Hills Bank*, 575 U.S. 496, 498 (2015). A debtor under Chapter 13 proposes a plan to pay off some or all of his debts over three to five years and, if successful, "receives a discharge of his debts according to the plan." *Id.*

In 2019, Coughlin went through a time of financial distress and took out a $1,100 short-term loan from Lendgreen. App. 3a. In December 2019, he filed voluntarily for bankruptcy, listing the debt to Lendgreen – nearly $1,600 by that time – on his petition. App. 3a-4a, 54a. Coughlin's bankruptcy counsel mailed notice of Coughlin's bankruptcy filing to Lendgreen, including a copy of Coughlin's proposed Chapter 13 plan. App. 4a.

Coughlin's Chapter 13 petition triggered the automatic stay under § 362(a), requiring Lendgreen to cease attempting to collect from him. Lendgreen did not comply. Instead, it contacted Coughlin frequently (sometimes daily) to urge him to pay his debt and to threaten him with consequences if he did not. App. 4a; C.A. App. 88-90. Coughlin told Lendgreen's representatives that he had filed for bankruptcy and asked them to contact his lawyer. C.A. App. 116, 145. Lendgreen did not stop calling and emailing Coughlin. *Id.* at 88-90.

Coughlin suffers from severe clinical depression. *Id.* at 116-17, 145. Lendgreen's continuing harassment "compounded" and "escalated" the effects of his financial distress on his mental condition, "constantly . . . remind[ing]" him of his troubles. *Id.* at 117, 145. He suffered "sleepless nights" and "rising anxiety and depression." *Id.* at 146. On February 9, 2020, his "mental and financial agony," App. 4a, led him to "attempt[] suicide due to [his] overwhelming stress,

anxiety and lack of hope for a better life." C.A. App. 117, 146; *see also id.* at 118 ("The actions taken by LendGreen . . . literally 'sent me over the edge' . . . ."). Coughlin was hospitalized for 11 days. *Id.* at 146, 149-60. Lendgreen kept calling him even in the hospital and after his return home. *Id.* at 89-90, 146.

**4.** On March 25, 2020, Coughlin moved to enforce the bankruptcy stay against the Band and its corporate entities, including Lendgreen. App. 4a. Invoking § 362(k), he sought damages, including his medical bills and lost vacation time from work and compensation for emotional distress; attorneys' fees; and an order against further collection efforts. *Id.* The Band moved to dismiss, asserting tribal immunity from suit. *Id.*[2] The Band's corporate entities further asserted that they shared the Band's immunity as "arm[s] of the Band." App. 3a n.1. Coughlin responded that Congress had abrogated tribal immunity in § 106(a), because tribal governments fit within the definition of a "governmental unit" in § 101(27) – in particular, the concluding phrase "other foreign or domestic government."

On October 19, 2020, the bankruptcy court granted the motion to dismiss. App. 53a-58a. The court recognized that the Bankruptcy Code contains "a broad abrogation of sovereign immunity." App. 55a. Nevertheless, it followed *In re Greektown Holdings, LLC*, 917 F.3d 451 (6th Cir. 2019), which had "concluded that '11 U.S.C. §§ 106[ and] 101(27) lack the requisite clarity of intent to abrogate tribal sovereign immu-

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[2] The parties agreed, and the bankruptcy court ordered, that petitioners could raise their immunity defense under the same procedure as for a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) – that is, accepting Coughlin's well-pleaded allegations as true. App. 53a-54a.

nity.'" App. 57a (quoting 917 F.3d at 461). The bankruptcy court recognized that *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), had reached a contrary conclusion, but declined to follow it. App. 57a.

**5.** The First Circuit reversed. In an opinion by Judge Lynch, joined by Judge Burroughs, it held that "the Bankruptcy Code unequivocally strips tribes of their immunity." App. 3a. The court "beg[a]n with the text," reasoning that § 106(a)'s directive that "'sovereign immunity is abrogated as to a governmental unit'" is a "plain statement" of Congress's "intent to abrogate immunity for all governmental units." App. 6a (quoting 11 U.S.C. § 106(a)). It then turned to the "capacious[]" definition of "governmental unit" in § 101(27), which it found covers "essentially all forms of government." App. 7a. Accordingly, the court determined that "[t]he issue is . . . whether a tribe is a domestic government." *Id.*

To resolve that issue, the court of appeals looked to whether "[t]ribes . . . fall within the plain meaning of the term government[]" and found "no real disagreement" that they do. *Id.* Tribes are the "'governing authorit[ies]' of their members," *id.* (quoting *Webster's Third New International Dictionary* 982 (1961) ("*Webster's Third* (1961)")) (brackets added below); exercise "'inherent power[s] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members,'" App. 8a (quoting *Montana v. United States*, 450 U.S. 544, 564 (1981)); "largely retain the authority to prosecute members for offenses committed in their territories," *id.*; and are generally immune from suit for the "very purpose of . . . protect[ing] 'Indian self-government,'" *id.* (quoting *Bay Mills*, 572 U.S. at 790).

The court of appeals also found it "clear that tribes are domestic." *Id.* Relying on the ordinary meaning of the term "domestic," it reasoned that tribes are "'within the sphere of authority or control or the . . . boundaries of' the United States." App. 8a & n.4 (quoting *Webster's Third* (1961) and other dictionaries from the time of the Bankruptcy Code's enactment) (ellipsis added below). It also collected examples from "[a]ll three branches of government" referring to tribes as "'domestic dependent nations,'" a phrase "coined" by "Chief Justice Marshall . . . in 1831." App. 9a (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)); *see* App. 9a-10a & nn.5-6 (collecting additional examples). Accordingly, the court concluded, Congress "understood tribes to be domestic governments" when it "enacted §§ 101(27) and 106," and those provisions "unmistakably abrogate[] the sovereign immunity of tribes." App. 11a.

The court of appeals "dr[e]w additional support" for that reading of the Bankruptcy Code from its "structure," which confers "benefits" to governmental units such as "priority for certain unsecured claims" and "certain exceptions to discharge." App. 11a-12a. It also addressed the Band's argument that Congress must "use[] the word 'tribe'" to abrogate immunity, rejecting that contention as a "magic-words test" foreclosed by *FAA v. Cooper*, 566 U.S. 284 (2012). App. 12a-13a. The court went on to address and reject the Band's other arguments, which included reliance on "silen[ce]" in the "legislative history," App. 14a, and on "canons of [statutory] construction . . . [that] apply only to ambiguous statutes," App. 15a.

Chief Judge Barron dissented. He accepted the Band's argument that Congress had not "use[d] the clearest means of abrogating . . . immunity by including 'Indian Tribe' – or its equivalent" – in § 101(27),

though at the same time he disclaimed the position that "Congress must name Indian tribes to abrogate their immunity." App. 24a-25a, 26a. He did not dispute that tribes are governments, App. 30a, or that they are "domestic" in the sense that they "operate within the United States as a geographic location," App. 32a. He further acknowledged that it was "not obvious that Congress would have wanted to abrogate the immunity of every sovereign entitled to assert it but an Indian tribe" and that immunity would "interfere[] with the [Bankruptcy] Code's operation." App. 43a-44a. But he nevertheless found it "plausible . . . that Congress 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')." App. 36a.

## SUMMARY OF ARGUMENT

**I.** In the Bankruptcy Code, Congress exercised its broad powers over both bankruptcy and tribal affairs to abrogate the common-law immunity from suit that tribes possess. The traditional tools of statutory construction, which this Court applies in immunity cases just as in other statutory cases, make that clear.

**A.** Congress used undisputedly clear language in 11 U.S.C. § 106(a) to abrogate the immunity of a "governmental unit." It then defined "governmental unit" in 11 U.S.C. § 101(27) to include not only federal, state, and local governments and foreign states, but also "other foreign or domestic government[s]." Because tribes fit unambiguously into that statutory language, the Code authorizes suit against them.

**1.** The starting point is the ordinary meaning of the words Congress chose. A tribe is a "government"

because it exercises governmental authority and performs governmental functions: making and enforcing tribal laws, imposing and collecting tribal taxes, and resolving certain disputes in tribal courts. Immunity itself is a governmental attribute that the Band can assert only because it is a government. Further, Congress, the Executive Branch, and this Court have all recognized tribes as governments.

**2.** Tribes are "domestic" because they are subject to the authority of the United States and because their territory is within the boundaries of the United States. Many decisions of this Court, beginning with Chief Justice Marshall's 1831 opinion in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), establish that tribes have those basic indicia of domestic status. Many decisions also use the term "domestic" to describe tribes – both in the familiar description "domestic dependent nations" and in other contexts as well.

The immediate context of the phrase "domestic government" shows that it encompasses tribes. Congress's pairing of "domestic" with its opposite "foreign" indicates that the phrase is to be read broadly. Likewise, Congress's uses of the disjunctive word "or" and the broadening word "other" further demonstrate the clear, intended breadth of the statutory definition.

**B.** Reading the Code as a whole reveals more reasons to conclude that the term "domestic government" includes tribes.

**1.** The abrogation provisions in § 106(a) are tied to critical features of bankruptcy law: the automatic stay that protects debtors' estates during bankruptcy and ensures equal treatment for creditors; the discharge injunction that gives debtors a fresh start after they finish the bankruptcy process; and the plan confirmation provisions that authorize bankruptcy

courts to bind all creditors to the terms of a Chapter 9, 11, 12, or 13 plan that gives effect to the Code's priority scheme. The language of those key provisions shows that they operate globally as exercises of the bankruptcy court's *in rem* jurisdiction over the debtor's estate. Federal law does not permit any creditor in the world, governmental or otherwise, to disregard them. Indeed, Congress directed that the stay and discharge injunction operate as court orders, linking them to the settled principle that a court with jurisdiction can enforce its orders even against a sovereign.

**2.** Beyond abrogation, the Code's other references to governmental units all grant special treatment that protects the exercise of governmental functions. The functions the Code protects include taxation, police and regulatory powers, and the creation and enforcement of domestic-support obligations such as alimony and child support. Tribes perform each of those functions; they are the kind of entities for which Congress created the class of "governmental units." It would be strange to read the Code to deny special treatment to tribes' governmental functions in the name of tribal sovereignty.

**C.** Although the Code is clear enough on its face, its clear meaning is reinforced by background principles grounded in the Constitution that shape the interaction between Congress's bankruptcy powers and sovereign immunity. *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), held that the States agreed to waive their immunity from suit in the plan of the Constitutional Convention because assertion of immunity would conflict with the Framers' system of bankruptcy adjudications in the courts of a single federal sovereign. Although *Katz* does not control directly, this Court's reasoning there that, "[i]n bankruptcy, . . . sovereign immunity has no place,"

*Allen v. Cooper*, 140 S. Ct. 994, 1002-03 (2020), further weighs against the Band's contention that tribes have retained that immunity.

**II.A.1.** The Band's lead argument is that the Bankruptcy Code is unclear because it does not use the word "tribe" in its definition of "governmental unit." That contention runs afoul of this Court's repeated admonition that Congress does not need magic words or special phrases to make its meaning clear. The Court has adhered to that principle in past cases involving federal, state, and tribal sovereignty.

**2.** The Band offers no good reason for the Court to depart from that principle now. It does not make the Code unclear that Congress has used the word "tribe" in other statutes, including some that abrogate tribal immunity. Congress can and does use different words in different statutes to achieve similar or related purposes. Indeed, the statutes that the Band cites as comparisons had other reasons for using the word "tribe" that do not apply to the Code. Nor can the Band find support in this Court's past cases involving tribal immunity or general principles of statutory construction for the special-word requirement it now seeks to invent.

**B.1.** Contrary to the Band's contention, this Court frequently looks to the ordinary meanings of the words in a phrase to determine the meaning of that phrase. It takes a different approach when it finds strong contextual indications that ordinary meaning does not apply. There are no such indications here. The context of the Code supports an ordinary-meaning approach to its terms.

**2.** The Court's past descriptions of tribes as "unique" or "peculiar" do not suggest that they are not "domestic" or not "governments." Instead, beginning

with *Cherokee Nation*, the Court has focused on the unique nature of tribes as entities that once had full sovereignty, that retain some inherent sovereignty today, but that are subject to congressional control. Nothing about tribes' partially retained sovereignty is relevant to their classification as "governmental unit[s]" in the Code.

**3.** The *ejusdem generis* canon does not help the Band to limit the phrase "other foreign or domestic government." That canon applies only to ambiguous statutes, and the Code is not ambiguous. Also, *ejusdem generis* requires a list with a readily identifiable common attribute, and the Band's efforts to present one fall short.

**4.** That § 101(27) identifies a broad class of governments that qualify as governmental units under the Code also does not make it unclear. Rather, it is a statute that is both broad and clear.

**C.** The Band's remaining arguments lack force. Silence in the legislative history is irrelevant (as the Band agrees) because the Code itself is clear. Nor (as the Band also agrees) is it this Court's role to determine whether the benefits granted to tribes through being classified as "governmental unit[s]" outweigh the burdens imposed upon them. The Court's role is to interpret and apply the Code that Congress wrote. That Code requires treating tribes as governmental units for all purposes, not just some. The Court should give effect to that clear mandate.

## ARGUMENT

Congress has powers both "[t]o regulate Commerce . . . with the Indian Tribes" and "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cls. 3, 4. It has "broad general powers to legislate in respect to Indian tribes" and "'plenary power to legislate in the field of Indian affairs.'" *United States v. Lara*, 541 U.S. 193, 200 (2004) (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)). Using its plenary power, Congress can take away "the 'common-law immunity from suit'" that tribes have as "'a necessary corollary to [their] sovereignty.'" *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), and *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986)). Thus, "Indian sovereignty" is "qualified": "a tribe's immunity, like its other governmental powers and attributes, [is] in Congress's hands." *Id.* at 789 (citing *United States v. United States Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940)).

Whether Congress has authorized suit against an otherwise immune defendant is a matter for the "'traditional tools of statutory construction.'" *FAA v. Cooper*, 566 U.S. 284, 291 (2012) (quoting *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008), in the context of federal sovereign immunity). One such "'tool for interpreting the law'" is a clear-statement requirement: the intent to authorize suit must "be clearly discernable from the statutory text." *Id.* (quoting *Richlin*, 553 U.S. at 589). The same requirement applies to tribal governments because "tribal immunity" is the "baseline position." *Bay Mills*, 572 U.S. at 790 (citing *Santa Clara Pueblo*, 436 U.S. at 58-60).

Here, the words of the Bankruptcy Code "'unequivocally' express [a] purpose" to depart from that baseline. *Id.* (quoting *C & L Enters., Inc. v. Citizen Band Potawatomi Tribe of Oklahoma*, 532 U.S. 411, 418 (2001)). Congress made clear that tribal governments, like federal, state, and foreign ones, are subject to a bankruptcy court's jurisdiction to enforce its orders.

## I. THE BANKRUPTCY CODE CLEARLY ABROGATES TRIBAL IMMUNITY

### A. The Operative Language of § 106(a) and § 101(27) Is Clear

Section 106(a) of the Bankruptcy Code provides that, "[n]otwithstanding 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" a list of other Code sections. 11 U.S.C. § 106(a). Among the listed sections is "[s]ection[] . . . 362," *id.* § 106(a)(1), the automatic stay. Section 362 contains the stay of "any act to collect" a prepetition debt that Lendgreen violated when it harassed Coughlin, *id.* § 362(a)(6), as well as the enforcement provision that permits Coughlin to recover "actual damages, including costs and attorneys' fees," for willful violations of that stay, *id.* § 362(k)(1).

For each Code section listed in § 106(a)(1), a bankruptcy court "may hear and determine any issue arising with respect to the application of such sections to governmental units," *id.* § 106(a)(2); and "may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages," *id.* § 106(a)(3). There is no dispute that § 106(a) unequivocally abrogates the sovereign immunity of a "governmental unit."

Section 101(27) of the Code defines the term "governmental unit" to mean:

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

*Id.* § 101(27). "'When a statute includes an explicit definition'" of a statutory term, as § 101(27) does here, this Court "'follow[s] that definition.'" *Tanzin v. Tanvir*, 141 S. Ct. 486, 490 (2020) (quoting *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 776 (2018)). A tribal government fits squarely within the ordinary meaning of the last phrase in the definition: it is an "other foreign or domestic government" – specifically, a "domestic government." It follows that the Code clearly abrogates tribal immunity.

**1. A Tribe Is a "Government"**

In defining the term "governmental unit," the Bankruptcy Code uses the undefined word "government." Accordingly, the Court should "look first to th[at] word's ordinary meaning," to which contemporaneous dictionary definitions are a useful guide. *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407-08 (2011). Congress enacted the language that is now § 101(27) in 1978. The relevant ordinary meaning of "government" was then, as it is now, "the organization, machinery, or agency through which a political unit exercises authority and performs functions." *Webster's Third New International Dictionary* 982 (1976) ("*Webster's Third*"). Other dictionaries

before and since similarly define a "government" in terms of its authority and its functions.[3]

Tribes are "government[s]" within the ordinary meaning of that term because they exercise governmental authority and perform governmental functions. They have authority "to legislate and to tax activities on the reservation, including certain activities by nonmembers." *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (citing *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 201 (1985)). They have authority to execute and administer the laws they make, including the "power . . . to punish tribal members who violate tribal criminal laws," *Montana v. United States*, 450 U.S. 544, 563 (1981), as well as non-member Indians, *see Lara*, 541 U.S. at 199-200. They have authority to create courts whose decisions bind their own members and in some cases non-members as well. *See Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

Indeed, the immunity from suit the Band invokes in this case is itself one of tribes' "governmental powers and attributes," *Bay Mills*, 572 U.S. at 789; and this Court has said that, "[a]t one time, the doctrine of tribal immunity from suit might have been thought

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[3] *See, e.g.*, *American Heritage Dictionary of the English Language* 570 (1976) ("*American Heritage*") ("The office, function, or authority of one who governs or a governing body."); *Random House Unabridged Dictionary* 826 (2d ed. 1993) ("*Random House*") ("[T]he governing body of persons in a state, community, etc.; administration."); *see also Webster's New International Dictionary of the English Language* 1083 (2d ed. 1952) ("*Webster's Second*") ("the ruling and administration of a political body" and "[t]he person or persons authorized to administer the laws; the governing body; the administration"). There are other definitions (such as "the act or process of governing" or "the executive branch," *Webster's Third* 982), but none plausibly fits § 101(27).

necessary to protect nascent tribal governments from encroachments by States," *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 758 (1998). In other cases not involving tribes, this Court has likewise referred to sovereign immunity as "governmental immunity." *E.g., Republic of Philippines v. Pimentel*, 553 U.S. 851, 866-67 (2008) (discussing "the governmental immunity of the United States"); *Loeffler v. Frank*, 486 U.S. 549, 554 (1988) (quoting the discussion in *FHA v. Burr*, 309 U.S. 242, 245 (1940), of "waivers by Congress of governmental immunity").

Congress, the Executive Branch, and this Court have recognized tribes, or their governing bodies, as "governments" and described their relations to the United States in governmental terms. For instance, in 1975, Congress authorized grants for "the strengthening or improvement of tribal government." Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, § 104(a)(1), 88 Stat. 2203, 2207 (1975).[4] During the same period, this Court referred to tribes the same way. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-42 (1982) (describing tribes as "governmental entities" that have the power to "rais[e] revenue necessary to cover the costs of government"); *Santa Clara Pueblo*, 436 U.S. at 57 (in 1978, describing legislation "imposing certain restrictions upon tribal governments").

That usage continues to the present day. In 1993, this Court considered a 1991 self-governance compact

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[4] The Bureau of Indian Affairs' implementing regulations established procedures for acknowledging a tribe as having "a government-to-government relationship to the United States." Final Rule, Procedures for Establishing That an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361, 39,364 (Sept. 5, 1978).

that recognized one tribe's "sovereign right to self-governance within 'the family of governments in the federal constitutional system.'" *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 118 (1993) (citation omitted).[5] And, in 1994, the same Congress that enacted § 106(a) also passed the Indian Self-Determination Contract Reform Act of 1994 and the Tribal Self-Governance Act, which referred to "tribal governments" and to the "government-to-government relationship" of "Indian tribes" with the United States. Pub. L. No. 103-413, tit. I, § 103, 108 Stat. 4250, 4260-61 (1994); *id.*, tit. II, §§ 202(2)-(5), 204, 108 Stat. 4270, 4271, 4277. Within the past few years, this Court has considered and applied the definition of a "federally recognized tribe" as "one that has entered into 'a government-to-government relationship [with] the United States.'" *Yellen v. Confederated Tribes of Chehalis Reservation*, 141 S. Ct. 2434, 2440 (2021) (quoting 1 Felix S. Cohen, *Handbook of Federal Indian Law* § 3.02[3] (Nell Jessup Newton ed., 2012)) (brackets in *Yellen*). No one in 1978 or since would hesitate to call a tribe a "government" in everyday speech.[6]

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[5] Other compacts have similarly referred to tribes as part of "the family of governments in the federal constitutional system." *E.g.*, Compact of Self-Governance Between the Little River Band of Ottawa Indians and the United States of America § 2(c) (2016); Compact of Self-Governance Between the Duckwater Shoshone Tribe and the United States of America § 2(c) (1995). The compacts are accessible at https://www.tribalselfgov.org/resources/document-library/.

[6] The Constitution itself also classes "Indian Tribes" as governmental by listing "Commerce" with them alongside commerce "among the several States" and "with foreign Nations." U.S. Const. art. I, § 8, cl. 3.

### 2. A Tribe Is a "Domestic" Government

#### a. The Ordinary Meaning of "Domestic" Includes Tribes

Section 101(27) also uses the undefined word "domestic" as part of the phrase "or other foreign or domestic government." When "domestic" describes a government, its ordinary meaning is "belonging or occurring within the sphere of authority or control or the fabric or boundaries of [an] indicated nation or sovereign state." *Webster's Third* 671; *cf. United States v. United Verde Copper Co.*, 196 U.S. 207, 213-14 (1905) ("We may properly and accurately speak of domestic manufactures, meaning not those of the household, but those of a county, state, or nation, according to the object in contemplation.").[7] Because the Bankruptcy Code is a federal statute, the indicated sovereign state is the United States. Tribes are "domestic government[s]" as to the United States because they are governmental entities within its authority or control and their territory is within its boundaries.

Many decisions of this Court recognize that tribes are within the "authority" or "control" of the United States, often in those exact words. *E.g.*, *United States v. Cooley*, 141 S. Ct. 1638, 1643 (2021) ("In all cases, tribal authority remains subject to the plenary

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[7] *See also American Heritage* 389 ("[o]f or pertaining to a country's internal affairs" and "[p]roduced in or indigenous to a particular country"); *Random House* 581 ("of or pertaining to one's own or a particular country" and "indigenous to or produced or made within one's own country; not foreign; native"); *Webster's Second* 768 ("[o]f or pertaining to, or made in, a nation considered as one's own country; internal; intestine"). The primary alternative meaning has to do with families and households, *see Webster's Third* 671, which is obviously not what the Code means.

authority of Congress."); *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 70 (2016) ("After the formation of the United States, the tribes became 'domestic dependent nations,' subject to plenary control by Congress – so hardly 'sovereign' in one common sense."). And this Court has also recognized since at least 1831 that tribal lands "compose a part of the United States" and are within its "jurisdictional limits." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Marshall, C.J.). Those characteristics alone make tribes "domestic."

This Court has also many times used the word "domestic" specifically to describe tribes. Most often, it has used the phrase "domestic dependent nations," coined in *Cherokee Nation* to distinguish tribes from foreign states that can invoke Article III jurisdiction. *Id.*; *see*, *e.g.*, *Sanchez Valle*, 579 U.S. at 70 (quoting *Lara*, in turn quoting *Cherokee Nation*); *Bay Mills*, 572 U.S. at 788 (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), in turn quoting *Cherokee Nation*); *Merrion*, 455 U.S. at 141 (example from 1982, shortly after 1978 Code); App. 9a-10a & nn.5-6 (more examples from legislative, executive, and judicial sources).

This Court's and its members' opinions call tribes "domestic" in other contexts as well. *See*, *e.g.*, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991) ("Respondents argue that Indian tribes are more like States than foreign sovereigns. That is true in some respects: They are, for example, domestic."); *United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100, 103 (1856) (concluding that "the Cherokee territory" is "not a foreign, but a domestic territory," because it "originated under our constitution and laws"); *see also Bay Mills*, 572 U.S. at 808 (Sotomayor, J., concurring)

("Both States and Tribes are *domestic governments* who come to this Court with sovereignty that they have not entirely ceded to the Federal Government.") (emphasis added).

**b. The Immediate Context of "Other Foreign or Domestic Government" Shows That It Includes Tribes**

The immediate context of "domestic government" in § 101(27) confirms in three ways that those words unequivocally include tribes. *First*, Congress paired the word "domestic" with "foreign," its opposite, in the phrase "foreign or domestic government." That pairing broadens, rather than narrows, the meaning of the phrase compared to the isolated term "government." Congress often pairs "foreign" and "domestic" in an expansive way. *E.g.*, 5 U.S.C. § 3331 (requiring federal officeholders and civil servants to swear to "support and defend the Constitution of the United States against all enemies, foreign and domestic"); 8 U.S.C. § 1448(a) (same for naturalization); 10 U.S.C. § 502(a) (same for armed forces enlistment).[8]

That pairing is consistent with ordinary speech. Using "foreign or domestic" as § 101(27) does is like saying that a friend may call "day or night" or that one will be true to a spouse "for richer or for poorer." Those common expressions do not mean that the friend should not call at twilight or that the marriage is off if the couple's net worth stays the same. Here, the phrase "foreign or domestic" directs bankruptcy

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[8] *See also* 15 U.S.C. § 57b-2b(d) (protecting voluntary disclosures to the Federal Trade Commission about possible wrongdoing and clarifying that the protection covers certain entities, "whether foreign or domestic"); *id.* § 1152(a) (authorizing the Secretary of Commerce to acquire certain "information from whatever sources, foreign and domestic, that may be available").

courts to treat governments as "governmental unit[s]" regardless of whether they are subject to the authority or within the territory of the United States.

*Second*, Congress inserted "or" three times in § 101(27), with two of those uses appearing in the phrase "or other foreign or domestic government." Repeated use of the "disjunctive word 'or'" in a statutory provision "bespeaks breadth." *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018); *see also* 11 U.S.C. § 102(5) ("[i]n this title . . . 'or' is not exclusive"). "'[O]r'" in "its ordinary use" also indicates that "the words it connects are to 'be given separate meanings,'" *United States v. Woods*, 571 U.S. 31, 45-46 (2013) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)), supporting a reading of § 101(27) that gives "domestic government" the full scope of its meaning.

*Third*, Congress placed the word "other" before "foreign or domestic government," indicating that the phrase includes governmental units different in kind from those previously listed. That choice too deserves weight. In *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), this Court construed "[t]he words 'other ownership interest'" in the phrase "shares or other ownership interest" to include "the contingency of ownership forms in other countries, or even in this country, that depart from conventional corporate structures." *Id.* at 476. In *United Verde Copper*, this Court relied on Congress's "intentional use of the word 'other'" as an indication that permission to fell timber "for building, agricultural, mining or other domestic purposes" required a reading of "domestic purposes" not limited to the uses that preceded it. 196 U.S. at 213. "The limitation of the other purposes," the Court explained, "is in the word 'domestic.'" *Id.* Here, even that limitation is not present, as Congress provided

that the "other" governments could be either "foreign or domestic."

### B. Reading the Code as a Whole Confirms That a Tribe Is a "Governmental Unit"

"[T]he cardinal rule that a statute is to be read as a whole," *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991), further supports giving the phrase "other foreign or domestic government" its ordinary meaning and including tribes along with all other kinds of governments. That can be seen in the list of provisions as to which § 106(a) abrogates sovereign immunity and in the other ways the Bankruptcy Code uses the term "governmental unit."

#### 1. The Automatic Stay, Discharge Injunction, and Plan Confirmations Bind All Creditors, Including Governments

The abrogation of sovereign immunity in § 106 applies not only to the automatic stay at issue here (§ 362), but also to the discharge injunction (§ 524) and to the bankruptcy court's authority to bind creditors through confirmed plans under Chapters 9, 11, 12, and 13 of the Bankruptcy Code (§§ 944, 1141, 1227, and 1327). *See* 11 U.S.C. § 106(a)(1).

Those judicial powers are "[c]ritical features of every bankruptcy proceeding." *Central Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 363-64 (2006). As this Court has explained, the automatic stay protects both debtors from financial "dismemberment" and creditors from each other. *City of Chicago v. Fulton*, 141 S. Ct. 585, 589 (2021). The discharge injunction permits an "'honest but unfortunate debtor'" to "enjoy 'a new opportunity in life with a clear field for future effort.'" *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991) (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). The court's plan-confirmation authority enables it to

enforce the "priority system" that is "fundamental to the Bankruptcy Code's operation." *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017).

The stay, discharge, and confirmation provisions apply globally, as their terms make clear. The filing of a bankruptcy petition "operates as a stay, applicable to all entities," 11 U.S.C. § 362(a), of a broad range of proceedings and acts. A discharge in bankruptcy "operates as an injunction against" proceedings and acts "to collect, recover or offset any [discharged] debt as a personal liability of the debtor." *Id.* § 524(a)(2). "[T]he provisions of a confirmed plan bind . . . any creditor" and leave "the property dealt with by the plan . . . free and clear of all claims and interests of creditors." *Id.* §§ 1141(a), 1141(c); *see id.* §§ 944(a), 1227(a), 1227(c), 1327(a), 1327(c) (similar).

The bankruptcy court can give the stay, injunction, and confirmation provisions global effect because its "jurisdiction is premised on the debtor and his estate, and not on the creditors." *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004). It therefore can "'determin[e] all claims that anyone, whether named in the action or not, has to the property or thing in question'" in a single proceeding "'against the world.'" *Id.* (quoting 16 James W. Moore et al., *Moore's Federal Practice* § 108.70[1] (3d ed. 2004), and discussing the *in rem* nature of federal bankruptcy jurisdiction) (brackets in *Hood*).

Indeed, the Band does not dispute that the automatic stay and discharge injunction apply to tribes, *see* Pet. Br. 49 n.5, just as to every other creditor in the world. It argues only that tribes (and their "arms" such as Lendgreen) are immune from the judicial enforcement mechanisms that the Code sets out for the stay and the injunction. But the admittedly global reach of the Code's core provisions makes implausible

a statutory reading that would single out tribal governments (and tribally backed Internet payday lenders) for immunity from suits that the Code authorizes against the United States, the several States, and equally sovereign governments around the world.

It also matters that "stay[s]" and "injunction[s]" are court orders; the Code directs that petitions, which trigger stays, and discharges "operate[] as" such orders.[9] Similarly, a plan confirmation order is a final judgment of a court.[10] Even in suits against sovereigns, "'federal courts are not reduced to issuing injunctions . . . and hoping for compliance'"; "'[o]nce issued, an injunction may be enforced.'" *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 440 (2004) (quoting *Hutto v. Finney*, 437 U.S. 678, 690 (1978)). Congress's use of court-order language in those core bankruptcy provisions further shows that they are enforceable even against governmental defendants generally immune from suit. Nothing in the Code supports a tribal exception to the principle that federal courts can enforce their orders.

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[9] *See Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (holding that 11 U.S.C. § 105 and § 524(a)(2) together "authorize a court to impose civil contempt sanctions" when a creditor violates a "discharge order" without an "objectively reasonable basis" for its conduct); *In re Spookyworld, Inc.*, 346 F.3d 1, 8 (1st Cir. 2003) (explaining that debtors can seek contempt orders to enforce the automatic stay; citing *In re Chateaugay Corp.*, 920 F.2d 183, 186 (2d Cir. 1990)).

[10] *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 269-70 (2010) (holding that a creditor seeking relief from a final confirmation order must meet the standards for reopening a final judgment under Federal Rule of Civil Procedure 60(b)).

### 2. Other Code Provisions Address Governmental Units in Terms of Governmental Functions That Tribes Perform

Other parts of the Bankruptcy Code use "governmental unit" to refer to entities that carry out governmental functions such as collecting taxes, protecting public safety, and regulating family relations. Generally, the Code does so to recognize the importance of governmental functions and to make accommodations for them. Tribes perform these functions for their members. The close fit between the Code provisions and tribal-government activities is yet another indication that "governmental unit" includes tribes.

*First*, the Bankruptcy Code refers to governmental units as exercising the power to tax. A "governmental unit" may conduct tax audits, issue tax deficiency notices, demand tax returns, assess taxes, create or perfect tax liens, and withhold tax refunds, all without offending the automatic stay. 11 U.S.C. § 362(b)(9), (18), (26). Certain taxes and tax-related penalties are administrative expenses of the bankruptcy estate entitled to payment during bankruptcy; "governmental unit[s]," unlike other claimants, need not "file a request" for that favorable treatment. *Id.* § 503(b)(1)(B), (D). Certain tax claims by "governmental units," including penalties and interest, take priority over general unsecured claims and are excepted from discharge. *Id.* §§ 507(a)(8), 523(a)(1)(A).

Tribes are governmental units that can tax. They have the "power to tax" as part of their "general authority . . . to control economic activity within [their] jurisdiction[s], and to defray the cost of providing governmental services." *Merrion*, 455 U.S. at 137; *see id.* at 138 (observing that tribes resemble "other governmental entities" in this respect).

*Second*, the Bankruptcy Code refers to governmental units as exercising police and regulatory powers. "[G]overnmental unit[s]" using "police or regulatory" powers can access otherwise protected confidential information and can benefit from a special exception to the automatic stay. 11 U.S.C. §§ 107(c)(2), 362(b)(4). Similarly, fines, penalties, or forfeitures "payable to and for the benefit of a governmental unit" are excepted from discharge. *Id.* § 523(a)(7).

Tribes are governmental units with police and regulatory powers. Although tribal authority over nonmembers is limited, tribes enforce their laws through criminal prosecutions of their own members and nonmember Indians, *see Lara*, 541 U.S. at 199-200, and can "regulat[e] . . . non-Indian activities on the reservation that ha[ve] a discernible effect on the tribe or its members," *Plains Com. Bank*, 554 U.S. at 332; *see also In re Sandmar Corp.*, 12 B.R. 910, 916 (Bankr. D.N.M. 1981) (accepting that the Navajo Nation was a governmental unit for purposes of § 362(b)(4), though concluding that it had not exercised police or regulatory power by evicting the debtor).

*Third*, the Bankruptcy Code refers to governmental units as exercising powers over family relationships. The Code defines the term "domestic support obligation" as a debt "in the nature of alimony, maintenance, or support" for a "spouse, former spouse, or child," including claims "recoverable by . . . a governmental unit" and "established . . . by reason of . . . a determination made . . . by a governmental unit." 11 U.S.C. § 101(14A). Such obligations receive first priority for payment, including when a "governmental unit" asserts them, and cannot be discharged. *Id.* §§ 507(a)(1)(A)-(B), 523(a)(5).

Tribes are governmental units that make and apply family law. They have power "to regulate domestic

relations among [their] members." *Plains Com. Bank*, 554 U.S. at 327. Many have child-support enforcement programs supported by federal funding.[11]

In sum, tribes have the attributes the Code describes and protects as governmental. Concluding that tribes nevertheless are not governmental units "would create a profound mismatch" between the Code and the functions of tribal governments. *Maslenjak v. United States*, 137 S. Ct. 1918, 1926 (2017). This Court's "'role to make sense rather than nonsense out of the *corpus juris*,'" *id.* (quoting *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991)), counsels against creating such incongruities.

Again, the Band's reading of the Code is that the automatic stay and discharge orders do apply to tribes, but that (because tribes are not "governmental unit[s]") the mechanisms Congress created to enforce those orders do not. *See supra* pp. 25-26. Because "governmental unit" is a defined term throughout the Code, the Band's reading would imply that the exceptions to the stay and discharge injunction for governmental units also do not apply to tribes. By that reasoning, a tribe member could seek federal bankruptcy protection and obtain a discharge of tribally assessed taxes or fines, or tribally imposed alimony or child support, though equivalent debts would be preserved if owed to or imposed by a state or foreign government.[12] That would be a strange way to protect tribal sovereignty.

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[11] *See* U.S. Dep't of Health & Human Servs., Office of Child Support Enforcement, *Tribal Agencies*, at https://www.acf.hhs.gov/css/child-support-professionals/tribal-agencies (current as of Jan. 27, 2023); 45 C.F.R. pt. 309.

[12] The tribe member as debtor could then raise the discharge as a defense to any collection action. *Cf. El Paso Nat. Gas Co. v.*

### C. The Scope and History of Congress's Bankruptcy Power Further Show That the Code Abrogates Tribal Immunity

The Bankruptcy Code's unequivocal text and structure are enough to resolve this case. But this Court also recognizes that "'Congress legislates against the backdrop' of certain unexpressed presumptions." *Bond v. United States*, 572 U.S. 844, 857 (2014) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). The clear-statement rule on which the Band relies is one of those background principles, but not the only one. The Code is an exercise of Congress's power "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. When Congress exercises that power, there is less reason to presume that it will recognize the immunity of other sovereigns from the burdens of federal litigation.

The leading case on the relationship of the Bankruptcy Clause to sovereignty is *Katz*, which rejected a state sovereign-immunity defense to a Chapter 11 trustee's action to recover preferential transfers. *Katz* grounded its holding in "[t]he history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification." 546 U.S. at 362-63. The historical record showed that "the Framers' primary goal was to prevent competing sovereigns' interference with the debtor's discharge" and to replace the "patchwork of insolvency and bankruptcy laws" that prevailed in the period before ratification. *Id.* at 366, 373.

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*Neztsosie*, 526 U.S. 473, 485 n.7 (1999) ("federal preemption defense[s]" can generally be raised in tribal courts).

Based on that history, *Katz* concluded that the "States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'" *Id.* at 377. This Court has since described *Katz* as reasoning that, "[i]n bankruptcy, . . . sovereign immunity has no place." *Allen v. Cooper*, 140 S. Ct. 994, 1002-03 (2020). It has also put Congress's bankruptcy powers, with its eminent domain and war powers, in a small category of federal authorities "that give rise to . . . structural inferences" against state sovereign immunity. *Torres v. Texas Dep't of Pub. Safety*, 142 S. Ct. 2455, 2467 (2022).

*Katz*'s reasoning sheds light on the related question of tribal immunity from bankruptcy jurisdiction.[13] This Court has said it will not "lightly assume" that Congress intended to "undermine Indian self-government." *Bay Mills*, 572 U.S. at 790. Neither should it lightly assume that Congress abandoned the Framers' "pressing goal of harmonizing bankruptcy law" at the expense of "sovereign immunity defenses that might have been asserted in bankruptcy proceedings," *Katz*, 546 U.S. at 362, or that Congress made exceptions to the "[c]ritical features of every bankruptcy proceeding," particularly "the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a 'fresh start,'" *id.* at 363-64.

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[13] To be clear, *Katz*'s holding does not directly control because plan-of-the-Convention waiver does not extend to tribes. *See Blatchford*, 501 U.S. at 782 ("[I]t would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties.").

Further, *Katz*'s observation that the "narrow" nature of bankruptcy court's "chiefly *in rem*" jurisdiction "does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction," *id.* at 378, applies to tribal sovereignty as well. In light of *Katz*'s holding that States have already waived immunity from federal bankruptcy jurisdiction, giving fair effect to the terms of § 101(27) and § 106(a) would not pose any risks of "unequal treatment of States and Tribes" or "fail[ure] to respect the dignity of Indian Tribes." *Bay Mills*, 572 U.S. at 809 (Sotomayor, J., concurring). It would treat tribes equally with other federal, state, and foreign sovereigns, all of which subject themselves to a federal bankruptcy court's authority when they seek to collect claims from a debtor's estate that is subject to that court's exclusive jurisdiction.

## II. THE BAND FAILS TO SHOW THAT THE BANKRUPTCY CODE IS UNCLEAR

### A. Congress Need Not Use the Specific Word "Tribe" To Clearly Abrogate Immunity

#### 1. The Sovereign-Immunity Canons Do Not Require Congress To Use Magic Words

The Band fails to advance any plausible reading of the Bankruptcy Code under which a tribe is not a "governmental unit" whose immunity the Code abrogates. Instead, the Band's analysis begins with a discussion of Congress's choice not to use the particular word "tribe" when defining "governmental unit." This Court has never required that Congress "state its intent in any particular way" or "use magic words" to waive or abrogate sovereign immunity. *Cooper*, 566 U.S. at 291. Instead, it uses "other tools of construction in tandem with the sovereign immunity canon" and has instructed that "resort" to the canon is "need[ed]" only where "there is . . . ambiguity . . . for [a court] to construe." *Richlin*, 553 U.S. at 589-90.

Similarly, when determining whether a statute abrogates (or attempts to abrogate) state sovereign immunity, this Court has declined to "require[] that Congress make its clear statement in a single section or in statutory provisions enacted at the same time," *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 76 (2000), and has never adopted a requirement that Congress make an "explicit reference to state sovereign immunity or the Eleventh Amendment," *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring). The Band makes much (at 2, 13, 20, 22, 50) of this Court's statement in *Dellmuth* that "perfect confidence" is required for abrogation, 491 U.S. at 231, but the point of the concurrence in that case (whose author provided the fifth vote for the result) was precisely to avoid confusion between the need for confidence and a requirement for particular words. A majority later endorsed that view. *See Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991) (citing Justice Scalia's concurrence in *Dellmuth* and explaining that a statute need "not . . . mention judges explicitly" for it to "be plain to anyone reading the [statute] that it covers judges").

The same principles apply to tribal sovereignty, including tribal immunity from suit. Although Congress must "clearly express its intent" to disestablish a reservation, "[d]isestablishment has 'never required any particular form of words.'" *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2463 (2020) (quoting *Hagen v. Utah*, 510 U.S. 399, 411 (1994)). Likewise, although "a tribe's waiver" of its sovereign immunity "must be 'clear,'" *C & L Enters.*, 532 U.S. at 418 (quoting *Potawatomi*, 498 U.S. at 509), that does not mean that "'a waiver of sovereign immunity, to be deemed explicit, must use the words "sovereign immunity,"'" *id.* at 420 (quoting *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 660 (7th Cir. 1996)). Here,

the Bankruptcy Code does use the words "sovereign immunity," and the dispute is over whether it also had to use the word "tribe." But the logic is the same: clarity does not and should not require special words.

### 2. The Band Fails To Show That Congress Must Use the Word "Tribe"

The Band advances four main arguments to support its position that Congress's enactment of § 101(27) and § 106(a) without the word "tribe" renders those provisions unclear. Each falls short.

*First*, the Band lists at (23-24 & n.2) cases and statutes in which this Court and Congress have used the words "tribe" or "tribal" to refer to tribal governments while also mentioning the federal and state governments. Its list includes no example of Congress or this Court using the phrase "domestic government" (much less the broader phrase "other foreign or domestic government") and yet also mentioning tribes.[14] Accordingly, the list does nothing to counter Coughlin's showing that the ordinary meaning of the operative statutory words includes tribes.

*Second*, the Band draws comparisons (at 24-25) to statutes in which Congress has abrogated tribal immunity and has used the word "tribe" without

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[14] Later in its brief, the Band cites (at 34) a lone example from the Code of Federal Regulations: in 2000, the Department of Agriculture defined a "governmental entity" to mean a "domestic government, tribal government, or foreign governmental subdivision." 7 C.F.R. § 205.2. That regulatory definition was originally written for the term "State entity" in an earlier-proposed version of the regulation. *See* Final Rule, National Organic Program, 65 Fed. Reg. 80,548, 80,551 (Dec. 21, 2000); Proposed Rule, National Organic Program, 65 Fed. Reg. 13,512, 13,522 (Mar. 13, 2000). It is not surprising that, when defining a "State entity" but wanting to include tribes, the agency's drafters might have thought "tribal" was needed.

using the words "domestic government." Those comparisons are of little use. "[T]here is no 'canon of interpretation that forbids interpreting different words used in different parts of the same statute to mean roughly the same thing,'" *Jennings v. Rodriguez*, 138 S. Ct. 830, 845-46 (2018) (quoting *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 540 (2013)); there certainly is none saying different words used in different statutes cannot mean similar things. *See Russello v. United States*, 464 U.S. 16, 25 (1983) ("[l]anguage in one statute usually sheds little light upon the meaning of different language in another statute").

Also, for each supposedly comparable statute, Congress had reasons to use the words "tribe" that do not apply to the Bankruptcy Code. The Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(A)(ii), and the Indian Self-Determination and Education Assistance Act, *id.* § 5321(c)(3)(A), deal specifically with tribal affairs. The Clean Water Act, the Safe Drinking Water Act, and the Resource Conservation and Recovery Act of 1976 use a nested structure that authorizes "suit" against a "person," defines "person" to include "municipality," and defines "municipality" to include "an Indian tribe," as it otherwise might not.[15] The Federal Debt Collection Procedures Act of 1990 authorizes writs of garnishment to an appropriate "garnishee," who must be a "person," and defines "person" to include "an Indian tribe."[16] There, "Indian tribe" is needed to overcome the "interpretive presumption that 'person' does not include [a] sovereign." *Vermont Agency of Nat. Res. v. United States ex rel.*

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[15] 33 U.S.C. §§ 1362(4)-(5), 1365(a)(1); 42 U.S.C. §§ 6903(13), 6903(15), 6972(a)(1)(A); *id.* §§ 300f(10), 300f(12), 300j-9(i).

[16] 28 U.S.C. §§ 3002(7), 3002(10), 3104, 3205(a).

*Stevens*, 529 U.S. 765, 780 (2000). No such presumption applies to "other foreign or domestic government" or "governmental unit," which naturally include sovereigns.

*Third*, the Band quotes (at 25-26) the Sixth Circuit's pronouncement that "there is not one example in all of history where [this] 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) (emphasis omitted). This Court has considered potential congressional abrogations of tribal immunity only a few times since the doctrine "developed almost by accident." *Kiowa Tribe*, 523 U.S. at 756 (referring to *Turner v. United States*, 248 U.S. 354 (1919)). None of those cases involved a statute using broad language of abrogation comparable to § 101(27) and § 106(a). Each involved a much narrower abrogation or none at all.

Thus, *Bay Mills* found a "partial[] abrogat[ion]" of "tribal sovereign immunity" that did not extend to the suit about off-reservation gaming before the Court in that case. 572 U.S. at 791. *Santa Clara Pueblo* construed a civil-rights statute that authorized federal habeas actions against tribal officials but no actions against tribes themselves. *See* 436 U.S. at 59. *United States v. United States Fidelity & Guarantee Co.*, 309 U.S. 506 (1940), involved cross-claims filed in Missouri against two tribes, but Congress had authorized cross-claims against those tribes only in the Indian Territory. *Id.* at 513. *Turner* itself turned not on whether the statute before the Court abrogated immunity, but on Turner's "lack of a substantive right" against the Creek Nation. 248 U.S. at 357-58.

None established a principle about using the word "tribe."[17]

*Fourth*, the Band argues that a requirement for Congress to use the word "tribe" derives from this Court's reasoning in cases such as *Advocate Health Care Network v. Stapleton*, 581 U.S. 468 (2017), that Congress's failure to use "obvious alternative" language to achieve a result shows the result was not intended. But *Advocate Health Care*, like the other cases the Band cites, compared the "most natural" reading of actual statutory language to a hypothetical alternative and concluded they were not the same. *Id.* at 477 (use of "maintained" rather than alternative "established and maintained" removed condition of establishment).[18] The equivalent here is asking whether the most natural reading of "domestic government" includes tribes. Because it does, *see supra* Part I, the Band's interpretive move does not work.

Indeed, the Band itself suggests that the word "tribe" is not needed after all. Following the dissent in the First Circuit, the Band offers (at 27) the phrases

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[17] The Court's other decisions about tribal immunity involved no contentions that federal statutes abrogated immunity. *See Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018) (state-law action to quiet title); *Kiowa Tribe*, 523 U.S. at 759-60 (state-law action for breach of contract); *Potawatomi*, 498 U.S. at 509 (state tax collection); *Three Affiliated Tribes*, 476 U.S. at 890 (state statute attempting to require waiver of tribal immunity as condition of access to state courts).

[18] *See also Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1813 (2019) ("cross-reference to one but not [an]other of the [Administrative Procedure Act]'s neighboring exemptions" showed lack of intent to incorporate the other); *Lozano v. Montoya Alvarez*, 572 U.S. 1, 15-16 (2014) (date of "discovery" for limitations period was obvious alternative to date of "wrongful removal or retention").

"every government" or "any government with sovereign immunity" as clear enough to abrogate without the word "tribe." But everything the Band has to say (at, *e.g.*, 1, 14, 26, 27) about Congress's supposed "practice" of referring to Indian tribes only by name could equally be said of a statute using those phrases. What the examples of "every" or "any" "government" really show is that Congress can make a clear statement in more than one way.[19]

### B. The Band Fails To Show That the Phrase "Other Foreign or Domestic Government" Is Unclear on Its Face or in Context

#### 1. The Court Can and Should Apply the Ordinary Meanings of "Domestic" and "Government"

When the Band at last comes to the Bankruptcy Code's text, it quotes (at 31) the plurality opinion in *Yates v. United States*, 574 U.S. 528 (2015), for the proposition that the clarity of a "statutory term . . . does not turn solely on dictionary definitions of its component words." *Id.* at 537 (plurality). *Yates* did not suggest that statutory analysis should not begin with the ordinary meanings of operative words. To the contrary, the plurality confirmed that, "[o]rdinarily, a word's usage accords with its dictionary definition." *Id.* Both before and after *Yates*, this Court has often looked to the ordinary meanings – as reflected

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[19] In a footnote, the Band suggests that its construction is supported by the "Indian canons of construction," which favor construing statutes "'liberally in favor of the Indians.'" Br. 39 n.3 (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). Those canons apply only to "ambiguous provisions," *Blackfeet Tribe*, 471 U.S. at 766; here, "[t]he language of the statute is too strong to bend as the [Band] would wish," *Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001).

by dictionary definitions – of the component words of a statutory phrase. *See*, *e.g.*, *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020) (using dictionary definitions of "actual" and "knowledge" to interpret "actual knowledge"); *Monasky v. Taglieri*, 140 S. Ct. 719, 726 (2020) (same for "habitual" and "residence" to interpret "habitual residence"); *Clark v. Rameker*, 573 U.S. 122, 127 (2014) (same for "retirement" and "funds" to interpret "retirement funds").

If anything, *Yates* teaches that the bar for departures from ordinary meaning is high. *Yates* held that a fish was not a "tangible object" within the meaning of 18 U.S.C. § 1519, an evidence-destruction prohibition enacted as part of the Sarbanes-Oxley Act of 2002. 574 U.S. at 532 (plurality). The plurality reached that conclusion after a detailed review of statutory context, observing that the provision's immediate context, surrounding language, placement in the Code, relationship to other provisions, and legislative history all weighed against reading § 1519 as a "general spoliation statute." *Id.* at 546. A separate opinion providing the fifth vote focused on the language of § 1519 (its "nouns," "verbs," and "title"), observing that a contrary reading would suggest that one could "make a false entry in a fish." *Id.* at 549, 551 (Alito, J., concurring in the judgment). A vigorous four-Justice dissent would have adhered to the "everyday" meaning of "tangible object" as "any object capable of being touched." *Id.* at 553 (Kagan, J., dissenting).

The Band does not and cannot point to anything in the Bankruptcy Code that would meet the high bar *Yates* set. To the contrary, reading the Code in full and in context underscores that tribes fit the definition of a "governmental unit." *See supra* Part I.B.

### 2. This Court's Decisions About Tribes Confirm That They Are "Domestic Government[s]" in the Ordinary Sense

The Band next turns (at 32-33) to decisions of this Court that comment on the "unique" or "peculiar" status of tribes. None of those decisions casts doubt on whether a tribe is a "domestic government," much less on whether one fits within the broader phrase "other foreign or domestic government."

*Cherokee Nation*, in which Chief Justice Marshall coined the description "domestic dependent nations" for tribes, dealt with the question whether the Cherokee Nation was a "foreign state" that could invoke Article III jurisdiction over an action against Georgia. 30 U.S. (5 Pet.) at 16. The Court reasoned that counsel for the Cherokee Nation had been "completely successful" in proving "the character of the Cherokees as a state," for much the same reasons that tribes today are governments: the Cherokee Nation was "a distinct political society, separated from others, capable of managing its own affairs and governing itself." *Id.* But the Court did not accept the argument that the Cherokee Nation was a "foreign" state for the same reasons that tribes today are not foreign governments: its "territory [wa]s admitted to compose a part of the United States" and they were "completely under [its] sovereignty and dominion." *Id.* at 17. That is, the Cherokee Nation was not "foreign" precisely because it was "domestic" in the sense of being within United States territory and subject to federal control.

Since that 1831 decision, as the First Circuit observed, this Court and the political branches have referred consistently to tribes as "domestic." App. 9a-10a & nn.5-6; *see supra* pp. 21-22. The Band asserts (at 33) that this Court described tribes as "*quasi* domestic

nations" in *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 411 (1866), but the quote is from counsel's argument, not the Court's opinion.[20] Other than that, the Band points to no case in which this Court has ever questioned the domestic character of tribes since resolving that issue in *Cherokee Nation*. To the contrary, "Indian Tribes have never historically been classified as 'foreign' governments in federal courts even when they asked to be." *Bay Mills*, 572 U.S. at 805 (Sotomayor, J., concurring). Nor does the Band cite to any authority suggesting (as its argument requires) that tribes are neither domestic nor foreign.

What is "unique" about tribes, as the cases the Band cites explain, is their historical transition from "exercis[ing] virtually unlimited power over their own members as well as those who were permitted to join their communities," to being subject to the "plenary" power of the federal government, with their self-governing status protected by but subject to federal law. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985).[21] That is, tribes are unique not because they are somehow less than fully domestic, but because they possess only a

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[20] Westlaw's online version of *Holliday* contains a header incorrectly suggesting that the Court's opinion starts at page 410. In fact, it starts later. *Compare* 70 U.S. (3 Wall.) at 413 *with* 1865 WL 10774, at **3.

[21] *See also Cooley*, 141 S. Ct. at 1642 ("Due to their incorporation into the United States, . . . the sovereignty that the Indian tribes retain is of a unique and limited character.") (internal quotations omitted), *quoted in* Pet. Br. 32; *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 146 (1984) ("the unique legal status of Indian tribes under federal law permitted the Federal Government to single out tribal Indians in ways that otherwise might be unconstitutional"), *quoted in* Pet. Br. 35.

"qualified" sovereignty that is "in Congress's hands." *Bay Mills*, 572 U.S. at 789. The Band never explains why that way of being unique matters to the text, structure, or purpose of the Bankruptcy Code.

### 3. *Ejusdem Generis* Does Not Make the Statutory Text Unclear

The Band's reliance on the *ejusdem generis* canon (at 34-37) is misplaced. That canon "instructs courts to interpret a 'general or collective term' at the end of a list of specific items in light of any 'common attribute[s]' shared by the specific items." *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1789 (2022) (quoting *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 225 (2008)) (brackets in *Saxon*). *Ejusdem generis* does not support excluding tribes from the concluding phrase "other foreign or domestic government."

"[T]he rule of *ejusdem generis*, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty." *Garcia v. United States*, 469 U.S. 70, 74 (1984) (quoting a line of cases tracing back to *Gooch v. United States*, 297 U.S. 124, 128 (1936)); *see Ali*, 552 U.S. at 227 ("[W]e do not woodenly apply limiting principles every time Congress includes a specific example along with a general phrase."). To make the canon work, the Band must deploy it in support of a textually and contextually plausible interpretation of "domestic government" that excludes tribes. As the Band has none, *ejusdem generis* cannot help it.

Further, *ejusdem generis* calls for identification of a "common attribute," *Saxon*, 142 S. Ct. at 1789, 1791, 1792, that the listed items share. The items in § 101(27) share the attribute of being governmental entities, with governmental attributes and functions. *See supra* Part I.B.2. That supports giving the

concluding phrase its ordinary meaning. To counter that, the Band proposes (at 36) the attribute of being "'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,'" quoting the dissent in the court of appeals (at App. 35a). That is not "an obvious and readily identifiable genus" or one that "would come into the reasonable person's mind," as *ejusdem generis* requires. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199, 208 (2012).

Further, the Band's interpretation would, as the Band admits (at 36), exclude the foreign states also on the statutory list – a fatal flaw. *See Saxon*, 142 S. Ct. at 1792 (rejecting a proposed "attribute that inheres in only one of the list's preceding specific terms"). Indeed, the Band appears to suggest (at 36-37) one common attribute for the domestic governments on the list (being "institutional component[s]" of the United States) and a different common attribute for the foreign governments ("trac[ing] their origins to any foreign government").[22] It cites no case that has ever broken a statutory list into two to apply the canon. Nor does the Band justify giving the paired words "foreign" and "domestic" disconnected meanings. If "domestic" somehow meant institutionally part of the United States, then its opposite "foreign" would mean *not* institutionally part of the United States – putting tribes right back in the definition.

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[22] The test for domesticity cannot be "traceability" to the United States or its Constitution, as the Band also appears to suggest (at 37). The 13 original States do not trace their origins to either; they "'existed before the Constitution.'" *New York v. United States*, 505 U.S. 144, 162 (1992) (quoting *Lane Cnty. v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1869)).

### 4. The Breadth of § 101(27) Does Not Make It Unclear

The Band contends (at 38) that "breadth should not be equated with clarity." Breadth also is not ambiguity. *See Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("[T]hat a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'") (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)). Even quoting that admonition gives the Band's argument too much credit, because Congress did "expressly anticipate[]," *id.*, that bankruptcy courts would encounter foreign and domestic governments other than those listed in the first eight clauses of § 101(27). And when Congress anticipated that situation, it told courts to treat those governments as governmental units.

*Bond v. United States*, 572 U.S. 844 (2014), on which the Band relies (at 38-39), does not suggest otherwise. *Bond* rejected an unlikely interpretation of a prohibition on the use of a "chemical weapon," defined to include the use of a "toxic chemical," that "would [have] swe[pt] in everything from the detergent under the kitchen sink to the stain remover in the laundry room" and "ma[de] it a federal offense to poison goldfish." 572 U.S. at 851, 861-62. The rejected broader interpretation also created a constitutional problem: three Justices would have rejected the Court's narrower construction but then struck the statute down as beyond Congress's power to enact. *See id.* at 867, 881-82 (Scalia, J., concurring in the judgment). Here, recognizing that a tribe falls within the definition of a "domestic government," and therefore that of a "governmental unit," raises no comparable concerns

of textual implausibility, obvious substantive overbreadth, or constitutional doubt.[23]

### C. The Band's Remaining Arguments Also Fail To Overcome the Code's Clear Language

The Band makes two additional points that warrant response. *First*, after proclaiming legislative history irrelevant (at 44-45), it spends several pages (at 44, 46-47) arguing that the lack of references in legislative history to abrogation of tribal immunity supports its position. The Band's first position is correct: legislative history is irrelevant. The statute is clear, and this Court does not "allow[] ambiguous legislative history to muddy clear statutory language." *Milner v. Department of Navy*, 562 U.S. 562, 572 (2011).[24]

*Second*, the Band argues (at 47-48) that tribes will not greatly benefit from the special accommodations provided to governmental units in the Code because, for example, they have difficulty collecting taxes. The Court need not decide whether classification as a

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[23] The Band also contends (at 40-41) that its interpretation of "other foreign or domestic government" would not create surplusage because the phrase would still cover entities created through interstate compacts, like the Washington Metropolitan Area Transit Authority. The argument rests on the shaky premise that an instrumentality created by Congress and multiple statutes would not count as an "instrumentality of the United States . . . [or] a State" within the meaning of § 101(27)'s eighth clause if those words stood alone. In any event, the Code is clear enough that the rule against surplusage is not needed to clarify it further.

[24] Nor did the First Circuit rely on legislative history in the ordinary sense, as the Band inaccurately suggests (at 44-45). Rather, the court of appeals' references to legislative history materials were part of a larger analysis of "consistent use across government," App. 10a, showing that ordinary speakers at the time of the relevant enactments would readily have referred to tribes as "domestic government[s]." *See* App. 9a-10a & nn.5-6.

governmental unit will benefit tribes more than it burdens them. That is indeed a decision for Congress – one that involves not only tribal interests, but other important federal policy concerns such as debtor protection and ensuring equal treatment for creditors. In determining how Congress classified tribes, however, the Court can and should take into account that tribes perform the functions that Congress gave special treatment when performed by governmental units.

It may well benefit some tribal governments to assert immunity from avoidance actions after they receive assets from failing enterprises in preference to other creditors, as in *Greektown*, 917 F.3d at 453-54, or from damages actions after they unlawfully press insolvent debtors to repay predatory loans, as here. Some may prefer immunity even if it means that tribal taxes, fines, and child-support orders would be dischargeable as a result. *See supra* p. 29. Congress did not agree. The Code that it wrote requires treating tribes as governmental units for all purposes, not just some. The Court should give effect to that clear mandate.

## CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

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