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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether Section 106(a) of the Bankruptcy Code, 11 U.S.C. 106(a), abrogates the sovereign immunity of a federally recognized Indian tribe.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statutory provisions involved 2
Statement 2
Summary of argument 6
Argument 9
A. Congressional abrogation of tribal sovereign immunity must be unequivocal 10
B. The Bankruptcy Code unequivocally abrogates tribal sovereign immunity 12
1. The statutory text unequivocally abrogates tribal sovereign immunity 12
2. The statutory structure confirms the unequivocal meaning of the text 23
3. History does not undermine the unequivocal meaning of the text 32
Conclusion 34
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Affordable Patios & Sunrooms, In re, No. 20-bk-50017, 2022 WL 1115413 (9th Cir. B.A.P. Apr. 13, 2022) 30
Begier v. *IRS*, 496 U.S. 53 (1990) 27
Blatchford v. *Native Village of Noatak*, 501 U.S. 775 (1991) 16
Bond v. *United States*, 572 U.S. 844 (2014) 16, 22, 23
C & L Enters., Inc. v. *Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001) 2, 10, 11
CSX Transp., Inc. v. *Georgia State Bd. of Equalization*, 552 U.S. 9 (2007) 12

Cases—Continued: Page

Central Virginia Cmty. Coll. v. *Katz*, 546 U.S. 356 (2006) 26
Cherokee Nation v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831) 8, 15
Chicago v. *Fulton*, 141 S. Ct. 585 (2021) 24
Cook v. *Gralike*, 531 U.S. 510 (2001) 21
De Lima v. *Bidwell*, 182 U.S. 1 (1901) 14
Dellmuth v. *Muth*, 491 U.S. 223 (1989) 33
Edelman v. *Jordan*, 415 U.S. 651 (1974) 29
FAA v. *Cooper*, 566 U.S. 284 (2012) 7, 11, 12, 19
Greektown Holdings, LLC, In re, 917 F.3d 451 (6th Cir. 2019), cert. dismissed, 140 S. Ct. 2638 (2020) 5, 16, 27
Hoffman v. *Connecticut Dep't of Income Maint.*, 492 U.S. 96 (1989) 34
HollyFrontier Cheyenne Ref., LLC v. *Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021) 13
Inyo Cnty. v. *Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701 (2003) 33
Jennings v. *Rodriguez*, 138 S. Ct. 830 (2018) 19
Kimel v. *Florida Bd. of Regents*, 528 U.S. 62 (2000) 11
Kiowa Tribe of Oklahoma v. *Manufacturing Techs., Inc.*, 523 U.S. 751 (1998) 11
Krystal Energy Co. v. *Navajo Nation*, 357 F.3d 1055 (9th Cir.), cert. denied, 543 U.S. 871 (2004) 5, 14, 17
Kucana v. *Holder*, 558 U.S. 233 (2010) 20
Lamar, Archer & Cofrin, LLP v. *Appling*, 138 S. Ct. 1752 (2018) 24
Law v. *Siegel*, 571 U.S. 415 (2014) 24, 30
Mayes, In re, 294 B.R. 145 (B.A.P. 10th Cir. 2003) 29

Cases—Continued: Page

Michigan v. *Bay Mills Indian Cmty.*, 572 U.S. 782 (2014) 2, 5-7, 9-11, 13-16, 21, 29, 32
Mohamad v. *Palestinian Auth.*, 566 U.S. 449 (2012) 12
Money Ctr. of America, Inc., In re, 565 B.R. 87 (Bankr. D. Del. 2017), aff'd, No. 14-10603, 2018 WL 1535464 (D. Del. Mar. 29, 2018) 27, 28
Montana v. *Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) 12
National Cattle Congress, In re, 247 B.R. 259 (N.D. Iowa 2000) 29
National Farmers Union Ins. Cos. v. *Crow Tribe of Indians*, 471 U.S. 845 (1985) 21
Norfolk & W. Ry. Co. v. *American Train Dispatchers' Ass'n*, 499 U.S. 117 (1991) 20
Oklahoma Tax Comm'n v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) 10
Paroline v. *United States*, 572 U.S. 434 (2014) 17
Plains Commerce Bank v. *Long Fam. Land & Cattle Co.*, 554 U.S. 316 (2008) 14
Puerto Rico v. *Sanchez Valle*, 136 S. Ct. 1863 (2016) 15, 21, 22
Ritzen Grp., Inc. v. *Jackson Masonry, LLC*, 140 S. Ct. 582 (2020) 3
Roberts v. *Sea-Land Servs., Inc.*, 566 U.S. 93 (2012) 12
Rousey v. *Jacoway*, 544 U.S. 320 (2005) 29
Samantar v. *Yousuf*, 560 U.S. 305 (2010) 14
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978) 2, 9-11
Seminole Tribe v. *Florida*, 517 U.S. 44 (1996) 11, 24
South Carolina v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986) 12

Cases—Continued: Page

Star Grp. Commc'ns, Inc., In re, 568 B.R. 616 (Bankr. D.N.J. 2016) 27
Stellwagen v. *Clum*, 245 U.S. 605 (1918) 24
Taggart v. *Lorenzen*, 139 S. Ct. 1795 (2019) 26
Tarrant Reg'l Water Dist. v. *Herrmann*, 569 U.S. 614 (2013) 29
Taylor v. *United States*, 579 U.S. 301 (2016) 17
Three Affiliated Tribes of the Fort Berthold Reservation v. *Wold Eng'g, P.C.*, 476 U.S. 877 (1986) 10, 11, 22
United States v. *Nordic Village, Inc.*, 503 U.S. 30 (1992) 11, 27, 28, 34
United States v. *Testan*, 424 U.S. 392 (1976) 11
Vermont Agency of Nat. Res. v. *United States ex rel. Stevens*, 529 U.S. 765 (2000) 33
Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832) 14

Constitution and statutes:

U.S. Const. Art. I, § 8, Cl. 3 21
Bankruptcy Act, Amendments of 1938, ch. 575, 52 Stat. 840:
§§ 1(24) and (29), 52 Stat. 841-842 33
§ 4, 52 Stat. 845 33
Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 25
§ 113, 108 Stat. 4117-4118 25
Bankruptcy Code, 11 U.S.C. 101 *et seq.* 1, 2
Ch. 1, 11 U.S.C. 101 *et seq.*:
11 U.S.C. 101(14A) 31
11 U.S.C. 101(27) 3, 5-8, 13-18, 21-23, 30, 31, 32, 34
11 U.S.C. 101(41) 32

Statutes—Continued: Page

11 U.S.C. 105(a) 26
11 U.S.C. 106 ..... 27, 34
11 U.S.C. 106(a) 1-3, 7, 10, 13, 16, 21, 23, 25
11 U.S.C. 106(a)(1) 2
11 U.S.C. 106(a)(3) 3
11 U.S.C. 106(b) 28
11 U.S.C. 106(c) 28
11 U.S.C. 107(c)(2) 30
11 U.S.C. 109 32
Ch. 3, 11 U.S.C. 301 *et seq.*:
11 U.S.C. 307 2
11 U.S.C. 362 3
11 U.S.C. 362(a) 3, 24
11 U.S.C. 362(a)(6) 26
11 U.S.C. 362(b)(4) 30
11 U.S.C. 362(b)(9) 30
11 U.S.C. 362(b)(18) 30
11 U.S.C. 362(b)(26) 30
11 U.S.C. 362(k)(1) 3, 4, 26
Ch. 5, 11 U.S.C. 501 *et seq.*:
11 U.S.C. 502(b)(9) 30
11 U.S.C. 505(a)(2)(B) 30
11 U.S.C. 507(a)(1)(A) 31
11 U.S.C. 507(a)(1)(B) 31
11 U.S.C. 507(a)(8) 30
11 U.S.C. 523(a)(5) 31
11 U.S.C. 523(a)(7) 30
11 U.S.C. 524(a)(2) 26
11 U.S.C. 542 26
11 U.S.C. 545 26

Statutes—Continued: Page

11 U.S.C. 547 ..... 26, 27
11 U.S.C. 548 26
11 U.S.C. 549 26
11 U.S.C. 550 ..... 26, 27
Ch. 7, 11 U.S.C. 701 *et seq.*:
11 U.S.C. 704(a)(8) 30
Ch. 11, 11 U.S.C. 1101 *et seq.*:
11 U.S.C. 1106(a) 30
Ch. 13, 11 U.S.C. 1301 *et seq.*:
11 U.S.C. 1305(a)(1) 30
11 U.S.C. 1327(a) 25
11 U.S.C. 1327(b)-(c) 25
Ch. 15, 11 U.S.C. 1501 *et seq.*:
11 U.S.C. 1519(d) 31
11 U.S.C. 1521(d) 31
25 U.S.C. 2710(d)(7)(A)(ii) 19
25 U.S.C. 5321(c)(3)(A) 19
28 U.S.C. 158(d) 5
28 U.S.C. 581-589a 2
33 U.S.C. 1362(4) 19
33 U.S.C. 1362(5) 19
42 U.S.C. 300f(10) 19
42 U.S.C. 300f(12) 19
42 U.S.C. 6903(13) 19
42 U.S.C. 6903(15) 19

Miscellaneous:

The American Heritage Dictionary (2d college ed. 1982) 15

Miscellaneous—Continued: Page

Exec. Order No. 13175, *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67,249 (Nov. 6, 2000) 15
H.R.J. Res. 241, 94th Cong., 2d Sess. (1976) 22
H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977) 34
H.R. Rep. No. 835, 103d Cong., 2d Sess. (1994) 34
Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 20
Powers of Indian Tribes, 55 Interior Dec. 14 (Oct. 25, 1934) 14
S. Rep. No. 989, 95th Cong., 2d Sess. (1978) 28, 34
Webster's Third New International Dictionary of the English Language:
(1961) 5
(1976) 13, 15, 16

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INTEREST OF THE UNITED STATES

The question presented in this case is whether Section 106(a) of the Bankruptcy Code abrogates the sovereign immunity of federally recognized Indian tribes from suit. The United States has a longstanding commitment to promoting tribal sovereignty and self-determination. More generally, the United States seeks to ensure the correct application of the rule that Congress must express any intent to abrogate sovereign immunity unequivocally, since the same rule applies to congressional waiver of the United States' sovereign immunity. The United States also has an interest in the proper functioning of the bankruptcy system. The United States is the Nation's largest creditor; federal entities participate in bankruptcy proceedings in various capacities; and United States Trustees supervise

the administration of bankruptcy cases, see 28 U.S.C. 581-589a; see also 11 U.S.C. 307. The United States therefore has a substantial interest in the resolution of the question presented.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

1. "As separate sovereigns pre-existing the Constitution," Indian tribes have long been recognized to have the immunity from suit "traditionally enjoyed by sovereign powers." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56, 58 (1978). At the same time, "tribes are subject to plenary control by Congress." *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). Thus, although "[t]he baseline position * * * is tribal immunity," Congress may abrogate tribal sovereign immunity by legislation. *Id.* at 790. But to do so, it "must 'unequivocally' express that purpose." *Ibid.* (quoting *C & L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001)).

Section 106(a) of the Bankruptcy Code, 11 U.S.C. 101 *et seq.*, unambiguously abrogates the sovereign immunity of governmental entities by providing 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" specified provisions of the Code. 11 U.S.C. 106(a)(1). The term "governmental unit," in turn, "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).

As relevant here, Section 106(a) abrogates sovereign immunity with respect to the Code's automatic-stay provision, 11 U.S.C. 362. That provision 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) (citation omitted). Pursuant to Section 362(a), the filing of a bankruptcy petition "operates as a stay, applicable to all entities," of a variety of acts that might advance a particular creditor's interests at the expense of the interests of the debtor and other creditors—most notably, efforts to collect prepetition debts. 11 U.S.C. 362(a). By "halt[ing] efforts to collect prepetition debts from the bankrupt debtor outside the bankruptcy forum," the automatic stay "'maintain[s] the status quo and prevent[s] dismemberment of the [bankruptcy] estate' during the pendency of the bankruptcy case." *Ritzen Grp., Inc.* v. *Jackson Masonry, LLC*, 140 S. Ct. 582, 589 (2020) (brackets and citation omitted).

To deter and redress violations of the automatic stay, Section 362 further provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. 362(k)(1). The abrogation of sovereign immunity contained in Section 106(a) qualifies that provision by stating that a "court may issue against a governmental unit an order, process, or judgment under [the specified] sections * * * , including an order or judgment awarding a money recovery, but not including an award of punitive damages." 11 U.S.C. 106(a)(3).

2. Petitioners are a federally recognized Indian tribe, the Lac du Flambeau Band of Lake Superior Chippewa Indians (Tribe), and several business entities that the Tribe wholly owns. One of the business entities, called Lendgreen, provides short-term financing to consumers. Pet. App. 3a. It is undisputed in this case that Lendgreen is an arm of the Tribe for purposes of sovereign immunity. *Id.* at 3a & n.1.

Lendgreen loaned $1100 to respondent Brian Coughlin in July 2019. Pet. App. 3a. Later that year, and before repaying the loan, respondent voluntarily filed a Chapter 13 bankruptcy petition in the District of Massachusetts, triggering the automatic stay. *Id.* at 3a-4a. Respondent listed his debt to Lendgreen as a nonpriority, unsecured claim. *Id.* at 4a. Respondent alleges that Lendgreen violated the automatic stay by engaging in numerous collection attempts after it had been notified of his bankruptcy petition. *Ibid.*

Respondent filed a motion to enforce the automatic stay against petitioners, seeking an order prohibiting further collection efforts as well as damages for (among other things) emotional distress and resulting medical expenses allegedly caused by Lendgreen's actions, attorney's fees, and expenses. Pet. App. 4a; see 11 U.S.C. 362(k)(1). Petitioners moved to dismiss the enforcement proceeding on the basis of tribal sovereign immunity. Pet. App. 4a.

The bankruptcy court granted petitioners' motion to dismiss. Pet. App. 53a-58a. The court observed that Congress must express any intent to abrogate tribal sovereign immunity "'unequivocally' in the statute at issue." *Id.* at 56a (quoting *Bay Mills*, 572 U.S. at 788). The parties disputed whether the last clause of the Code's definition of "governmental unit"—"other

foreign or domestic government," 11 U.S.C. 101(27)—unambiguously encompasses Indian tribes. Pet. App. 56a. The court held that it does not. *Id.* at 57a.

3. The First Circuit allowed a direct appeal and reversed and remanded. Pet. App. 1a-50a; see 28 U.S.C. 158(d). The court observed that two of its sister circuits had reached opposite conclusions on the question presented. Compare *Krystal Energy Co.* v. *Navajo Nation*, 357 F.3d 1055 (9th Cir.) (holding that the Code abrogates tribal sovereign immunity), cert. denied, 543 U.S. 871 (2004), with *In re Greektown Holdings, LLC*, 917 F.3d 451 (6th Cir. 2019) (holding that it does not), cert. dismissed, 140 S. Ct. 2638 (2020). Pet. App. 3a. The court sided with the Ninth Circuit, concluding that the phrase "other foreign or domestic government," 11 U.S.C. 101(27), provides the requisite "unequivocal[]" abrogation of tribal sovereign immunity, Pet. App. 5a (quoting *Bay Mills*, 572 U.S. at 790); see *id.* at 6a-7a.

The court of appeals reasoned that the list of governmental units in Section 101(27) "covers essentially all forms of government." Pet. App. 7a. Turning to the language of the catchall specifically, the court noted that "there is no real disagreement that a tribe is a government," and it concluded 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 (quoting *Webster's Third New International Dictionary of the English Language* 671 (1961) ("domestic") (brackets in original)). The court further observed that "[a]ll three branches of government have long used the phrase" "'domestic dependent nations'" to describe tribes. *Id.* at 9a.

The court also found support for its interpretation in the Code's structure, noting that classification as a "governmental unit," 11 U.S.C 101(27), not only abrogates immunity, but also confers benefits under the Code. Pet. App. 11a-12a. Among other things, "[m]any of those benefits enable governmental units, including tribes, to collect tax revenue." *Id.* at 11a.

Chief Judge Barron dissented. Pet. App. 21a-50a. He conceded that it is "possible" to interpret the phrase "'other * * * domestic government'" to include an Indian tribe. *Id.* at 31a-32a. But in his view, it is also "plausible" to "read[] those words to exclude Indian tribes." *Id.* at 32a. He noted that, in contrast to Section 106(a), "Congress has expressly named" "Indian tribes" "in every other instance in which a federal court has found [tribal] immunity to have been abrogated." *Id.* at 23a. And he emphasized that tribes are "sui generis" sovereigns possessing "unique[]" attributes. *Id.* at 37a. In Chief Judge Barron's view, each of the governments specifically enumerated in Section 101(27)—unlike tribes—"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.'" *Id.* at 36a. The catchall language encompassing "other foreign or domestic government," 11 U.S.C. 101(27), he maintained, should be interpreted, in light of that "shared characteristic," to exclude tribes. Pet. App. 35a.

SUMMARY OF ARGUMENT

A. One of the "core" aspects of tribal sovereignty is the immunity "'from suit traditionally enjoyed by sovereign powers.'" *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (citation omitted). Tribal sovereign immunity is "a necessary corollary to Indian

sovereignty and self-governance." *Ibid.* (citation omitted). Although Congress may abrogate tribal immunity, its decision to do so "must be clear" and expressed "'unequivocally.'" *Id.* at 790 (citation omitted). Any ambiguity must "be construed in favor of immunity," and any "plausible interpretation of the statute" that does not abrogate immunity means that "[a]mbiguity exists." *FAA* v. *Cooper*, 566 U.S. 284, 290-291 (2012). Nevertheless, Congress need not "use magic words." *Id.* at 291.

B. The Bankruptcy Code's text and structure unequivocally abrogate tribal sovereign immunity. Nothing in the Code's history undermines that conclusion.

1. The Code expressly abrogates the sovereign immunity of a "governmental unit," 11 U.S.C. 106(a), which it defines 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," 11 U.S.C. 101(27).

a. Tribes are "domestic government[s]" within the meaning of the definition's catchall clause. 11 U.S.C. 101(27). They are indisputably governments, and the definition's inclusion of the phrase "other foreign or domestic" should be read as a unitary whole to encompass all governments, without regard to where they are located or the authority under which they were formed or exist. In any event, tribes are domestic because they are located within the United States and subject to Congress's plenary control. This Court has long referred to

tribes as "domestic dependent nations." *E.g.*, *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

b. The broader context evidences Congress's intent to encompass *all* governments, including tribes. The plain meaning of the defined term "governmental unit," 11 U.S.C. 101(27), includes tribes. And the structure and content of the definition—a lengthy list of governments and their departments, agencies, and instrumentalities, followed by a broad catchall clause—demonstrates comprehensiveness.

c. Petitioners' contrary arguments lack merit. They observe that Section 101(27) does not expressly mention tribes, but this Court has disavowed a magic-words requirement. The ejusdem generis canon likewise provides no support for petitioners' position. Tribes share the same critical characteristic as the listed entities: they are all governmental entities. Petitioners contend that all of the governments included in the list trace their origins to the U.S. Constitution, but that characteristic does not fit multiple listed entities, like States. Finally, petitioners fall back on the notion that tribes are unique, but so are other listed entities—and in any event, tribes are not unique in the only way that matters: they are governments.

2. The Code's structure confirms the unequivocal meaning of the text.

a. In the Code, Congress established a highly reticulated, comprehensive scheme for conducting bankruptcy proceedings. Petitioners' interpretation would upset that scheme by exempting tribes from a host of provisions that offer critical protections to debtors and bankruptcy estates. Petitioners respond that the Code's substantive provisions would still apply to tribes, but even if true, there is no dispute that many of those

provisions would be effectively unenforceable in many circumstances.

b. Section 101(27) not only defines the entities for which immunity has been abrogated, but also identifies those entities entitled to special benefits in the exercise of their governmental powers. Petitioners contend that the harm to tribes from classification as governmental units would exceed the benefits. But the government's argument does not depend on a weighing of costs and benefits. Instead, it rests on the fact that the Code establishes comprehensive rules for mediating the interactions of sovereign governments with bankruptcy proceedings.

3. The Code's history is not probative in this case. Petitioners suggest that tribal corporations could seek bankruptcy protection prior to the enactment of the modern Code in 1978 and that respondent's interpretation would preclude them from doing so today. In petitioners' view, Congress would not have made that change without clearly indicating its intent to do so. But petitioners do not identify any historical practice of tribal corporations filing for bankruptcy. Petitioners also cite legislative history, but the legislative history is unilluminating to the interpretive task here.

ARGUMENT

As the United States has long recognized, a "core aspect[ ] of sovereignty that tribes possess" is the immunity from suit "'traditionally enjoyed by sovereign powers.'" *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978)); see, *e.g.*, U.S. Amicus Br. at 19-27, *Bay Mills*, *supra* (No. 12-515). And as the United States has also recognized, a "congressional decision" to abrogate tribal sovereign immunity "must be

clear" and expressed "'unequivocally.'" *Bay Mills*, 572 U.S. at 790 (quoting *C & L Enters., Inc.* v. *Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001)); see, *e.g.*, U.S. Amicus Br. at 10-11, *Upper Skagit Indian Tribe* v. *Lundgren*, 138 S. Ct. 1649 (2018) (No. 17-387); U.S. Amicus Br. at 9-17, *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991) (No. 89-1322). Under those uncontested principles, Section 106(a) of the Bankruptcy Code provides the requisite unequivocal abrogation of tribal sovereign immunity.

A. Congressional Abrogation Of Tribal Sovereign Immunity Must Be Unequivocal

Indian tribes are "'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Bay Mills*, 572 U.S. at 788 (quoting *Oklahoma Tax Comm'n*, 498 U.S. at 509). Among their attributes "[a]s separate sovereigns pre-existing the Constitution," Indian tribes possess the "immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 56, 58. That immunity from suit "is a necessary corollary to Indian sovereignty and self-governance," *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Eng'g, P. C.*, 476 U.S. 877, 890 (1986), and it also helps to promote "tribal self-sufficiency and economic development," *Oklahoma Tax Comm'n*, 498 U.S. at 510 (citation omitted). Tribal sovereign immunity applies to suits based on both commercial and noncommercial activities, and conduct taking place both on and off a tribe's reservation. *Bay Mills*, 572 U.S. at 789-790.

"As dependents," however, "the tribes are subject to plenary control by Congress." *Bay Mills*, 572 U.S. at 788. Thus, although "[t]he baseline position * * * is tribal immunity," Congress may abrogate that

immunity if it chooses. *Id.* at 788, 790. Because "a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that [the Court] tread lightly in the absence of clear indications of legislative intent," *Santa Clara Pueblo*, 436 U.S. at 60, the Court has properly required a "clear" and "'unequivocal[]'" expression of congressional intent before it will find abrogation, *Bay Mills*, 572 U.S. at 790 (quoting *C & L Enters.*, 532 U.S. at 418).

That rule reflects "Congress' jealous regard for Indian self-governance." *Three Affiliated Tribes*, 476 U.S. at 890. It also reflects concerns for the autonomy and dignity of all sovereigns more generally: despite any differences in the precise scope of immunity among the federal government, the States, and tribes, see *Kiowa Tribe of Oklahoma* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 756 (1998), the same requirement of an unequivocal abrogation applies to all three, see *Santa Clara Pueblo*, 436 U.S. at 58 (adopting unequivocal expression standard from *United States* v. *Testan*, 424 U.S. 392, 399 (1976), which addressed United States' waiver of immunity); *Seminole Tribe* v. *Florida*, 517 U.S. 44, 55 (1996) (same standard for States).

Although this Court has "never required that Congress make its clear statement in a single section or in statutory provisions enacted at the same time," the relevant provisions "as a whole" must show Congress's unequivocal intent to abrogate immunity. *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 74, 76 (2000). "Any ambiguities in the statutory language are to be construed in favor of immunity," and "[a]mbiguity exists if there is a plausible interpretation of the statute" that would not abrogate immunity. *FAA* v. *Cooper*, 566 U.S. 284, 290-291 (2012); see *United States* v. *Nordic Village,*

Inc., 503 U.S. 30, 37 (1992). Abrogation must instead be "unmistakabl[y]" expressed in the statutory text. *Cooper*, 566 U.S. at 291.

At the same time, "Congress need not state its intent in any particular way" and need not "use magic words" to abrogate immunity. *Cooper*, 566 U.S. at 291. Moreover, as this Court has recognized in a range of contexts, judicial disagreement over the meaning of a statutory term does not, by itself, render the term ambiguous. See, *e.g.*, *CSX Transp., Inc.* v. *Georgia State Bd. of Equalization*, 552 U.S. 9, 15-16, 20 (2007) (concluding that the relevant statute provided an "'unambiguous,'" "clear statement" despite a circuit conflict on the issue in dispute) (citation omitted); *Roberts* v. *Sea-Land Servs., Inc.*, 566 U.S. 93, 99, 113 & n.12 (2012); *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 452-453, 458 (2012).*

B. The Bankruptcy Code Unequivocally Abrogates Tribal Sovereign Immunity

1. The statutory text unequivocally abrogates tribal sovereign immunity

The Bankruptcy Code explicitly abrogates the sovereign immunity of any "governmental unit,"

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* In passing, petitioners invoke (Br. 39 n.3) the proposition that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). But that canon "does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986); see *id.* at 506 n.16. In this case, then, it does not add to the rule that Congress must clearly state its intention to abrogate tribal sovereign immunity, just as it must with respect to the immunity of other sovereigns.

"[n]otwithstanding an[y] assertion of sovereign immunity" it might make. 11 U.S.C. 106(a). The Code defines "governmental unit" as "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 Common-wealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." 11 U.S.C. 101(27). The textual phrase "other foreign or domestic government," *ibid.*, read together with the remainder of the statutory definition, "unequivocally" abrogates tribal sovereign immunity, *Bay Mills*, 572 U.S. at 790 (citation omitted).

Taken as a whole, the definition clearly manifests an intent by Congress comprehensively to include *all* governmental entities, of whatever nature and wherever located. And by using that all-inclusive language in Section 106, Congress unequivocally abrogated the sovereign immunity of all governments, including Indian tribes. Or, put another way, Congress categorically abrogated the sovereign immunity of any government that otherwise would possess it.

a. A tribe is literally a "domestic government" within the meaning of the residual clause in Section 101(27). 11 U.S.C. 101(27). The Bankruptcy Code does not define that term, and this Court accordingly examines its "ordinary or natural meaning." *HollyFrontier Cheyenne Ref., LLC* v. *Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2176 (2021) (citation omitted).

There is no dispute that tribes are "governments" as that term is ordinarily used. They act as the "governing authorit[ies]" of their members. *Webster's Third New International Dictionary of the English Language* 982

(1976) (*Webster's Third*) ("government"); see, *e.g.*, *Powers of Indian Tribes*, 55 Interior Dec. 14 (Oct. 25, 1934). Indeed, a key premise of petitioners' position is that tribal sovereign immunity is "a necessary corollary to Indian sovereignty and self-governance." *Bay Mills*, 572 U.S. at 788 (citation omitted); see, *e.g.*, *Plains Commerce Bank* v. *Long Fam. Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (recognizing that tribes are "'distinct, independent political communities' qualified to exercise many of the powers and prerogatives of self-government") (quoting *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832)).

An Indian tribe is not only a "government," but also falls within the catchall clause's inclusion of governments that are "foreign or domestic." 11 U.S.C. 101(27). That phrase should be understood as a unified whole to cover all governments, without regard to where they are located or the authority under which they were formed or exist. See *Krystal Energy Co.* v. *Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir.) (reasoning that "logically, there is no other form of government outside the foreign/domestic dichotomy"), cert. denied, 543 U.S. 871 (2004); see also pp. 16-18, *infra* (discussing context). Tribes plainly fall within the residual clause on that understanding. See Resp. Br. 22-23.

Moreover, to the extent it is necessary to identify Indian tribes as either "foreign" or "domestic," tribes occupy the "domestic" category. 11 U.S.C. 101(27). Unlike foreign governments, tribes do not govern a particular territory outside the United States, exempt from congressional control. See, *e.g.*, *Samantar* v. *Yousuf*, 560 U.S. 305, 314 (2010) ("The term 'foreign state' on its face indicates a body politic that governs a particular territory."); *De Lima* v. *Bidwell*, 182 U.S. 1, 180 (1901)

(observing that a "foreign country" is "one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States"). And this Court has recognized that "an Indian tribe or nation within the United States is not a foreign state in the sense of the constitution." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831).

Instead, Indian tribes fall naturally within the ordinary meaning of "domestic" because they "belong[] or occur[] within the sphere of authority or control or the fabric or boundaries of [an] indicated nation or sovereign state." *Webster's Third* 671; see, *e.g.*, *The American Heritage Dictionary* 416 (2d college ed. 1982) (defining "domestic" to mean "[o]f or pertaining to a country's internal affairs"). Tribes "compose a part of the United States" and are within its "jurisdictional limits," *Cherokee Nation*, 30 U.S. (5 Pet.) at 17, and they "are subject to plenary control by Congress," *Bay Mills*, 572 U.S. at 788; see *Cherokee Nation*, 30 U.S. at 17 (noting that tribes are "completely under the sovereignty and dominion of the United States").

Consistent with that understanding and with Indian tribes' place in the constitutional structure, this Court has long referred to tribes as "domestic dependent nations." *E.g.*, *Cherokee Nation*, 30 U.S. at 17; *Bay Mills*, 572 U.S. at 788; *Puerto Rico* v. *Sanchez Valle*, 579 U.S. 59, 70 (2016). The Executive Branch has done the same. *E.g.*, Exec. Order No. 13175, *Consultation and Coordination with Indian Tribal Governments*, 65 Fed. Reg. 67,249, 67,249 (Nov. 6, 2000); Pet. App. 9a n.6. As the court of appeals explained, "domestic dependent nations are a form of domestic government" and thus are "domestic governments" for purposes of Section 101(27). Pet. App. 10a. This Court has elsewhere

confirmed that logic, observing that "Indian tribes are more like States than foreign sovereigns" "in some respects" because "[t]hey are, for example, domestic." *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 782 (1991); see, *e.g.*, *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.").

b. Petitioners point to nothing in the statutory context to suggest that the unequivocal terms of Sections 101(27) and 106(a) do not mean what they say. To the contrary, the statutory context confirms the above interpretation. The term "governmental unit" and the full statutory definition of that term evidence Congress's unambiguous intent to abrogate the immunity of *all* governments and governmental entities, which include Indian tribes. See *In re Greektown Holdings, LLC*, 917 F.3d 451, 467 (6th Cir. 2019) (Zouhary, D.J., dissenting) ("Congress abrogated the sovereign immunity of any government, of any type, anywhere in the world."), cert. dismissed, 140 S. Ct. 2638 (2020).

To start, when interpreting the scope of a statutory definition, "it is not unusual to consider the ordinary meaning of [the] defined term." *Bond* v. *United States*, 572 U.S. 844, 861 (2014). Here, the plain meaning of "governmental unit," 11 U.S.C. 101(27), includes tribes and every other government or governmental subdivision. See pp. 13-14, *supra* (defining "government"); *Webster's Third* 2500 (defining "unit" as "a single thing * * * that constitutes an undivided whole"). Each recognized Indian tribe is a "single," "undivided," *ibid.*, sovereign entity exercising governmental authority and possessing governmental prerogatives, and thus is a

"governmental unit," 11 U.S.C. 101(27). Yet petitioners seek to avoid classification as a governmental unit while, at the same time, invoking a form of immunity that the Tribe owes to its very status as a governmental unit.

The full definition of "governmental unit," 11 U.S.C. 101(27), conveys the same meaning. That definition employs a common structure for delineating the scope of a particular category: it specifically enumerates salient members of that category, and then includes a residual clause to sweep in all the remaining members. See, *e.g.*, *Taylor* v. *United States*, 579 U.S. 301, 305 (2016) (addressing a similar statutory structure); *Paroline* v. *United States*, 572 U.S. 434, 446 (2014) (same). The listed entities "provide guidance" to courts as to the sovereign entities "Congress thought would often be" implicated in bankruptcy cases, and the catchall clause serves "as a summary of the type of" entities covered—namely, governmental entities—and sweeps in any that are not specifically listed. *Paroline*, 572 U.S. at 447-448; see *Krystal Energy*, 357 F.3d at 1057 (concluding that "*all* foreign and domestic governments, including but not limited to those particularly enumerated in the first part of the definition, are considered 'governmental units'"). And the very breadth of the list and catchall confirm this comprehensiveness of coverage.

Petitioners misapprehend the definition's structure, suggesting that "the reason Congress appended 'other foreign or domestic government' to section 101(27)" was "to make 'doubly sure' that the" listed entities "were clearly understood to be governmental units." Br. 37 (citation omitted). But as *Paroline* indicates, petitioners have it backwards: the listed items are illustrative

of a broader category, encompassed by the catchall clause. See 572 U.S. at 447-448.

The manifestly categorical nature of the statutory definition as encompassing all governments and governmental entities eliminates the supposed oddity petitioners perceive (Br. 23)—that Congress intended to abrogate tribal immunity without mentioning tribes specifically. Congress unambiguously abrogated the sovereign immunity of *all* governments, foreign and domestic—a category that necessarily includes tribes. Petitioners themselves concede that Congress may abrogate sovereign immunity as to a category that includes tribes without identifying tribes specifically. See *id.* at 27 (acknowledging that "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'") (quoting Pet. App. 42a-43a (Barron, C.J., dissenting)). That is exactly what Congress did in the Code.

c. Petitioners offer several arguments for the proposition that an Indian tribe, alone of all governments, does not qualify as a "governmental unit." 11 U.S.C. 101(27). None withstands scrutiny.

Petitioners' primary argument is that the Code "does not mention Indian tribes," even though "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." Br. 23 (emphasis omitted). But this Court has already explained that Congress need not "use magic words" to abrogate sovereign immunity as long as its intent is "clearly discernable from the statutory

text in light of traditional interpretive tools." *Cooper*, 566 U.S. at 291.

Petitioners cite (Br. 24) various instances in which Congress "refer[red] specifically to Indian tribes * * * to express its intent to abrogate tribal sovereign immunity," and contend (Br. 27) that "looking to Congress's practice is not the same as requiring magic words." But their cited examples (Pet. Br. 24-25) shed little light on the question. Many of the cited provisions encompass private entities as well as a subset of governments—rather than, as here, simply all governments—thus requiring Congress to list each specific type of governmental entity that it intended to cover. See, *e.g.*, 42 U.S.C. 6903(13) and (15); 42 U.S.C. 300f(10) and (12); 33 U.S.C. 1362(4)-(5). Other statutes also have particular reasons to mention tribes, or are otherwise distinguishable. See, *e.g.*, 25 U.S.C. 5321(c)(3)(A) (relating to "self-determination" contracts between the federal government and tribal organizations); 25 U.S.C. 2710(d)(7)(A)(ii) (addressing federal-court jurisdiction for certain actions involving gaming on Indian lands); Pet. Br. 24 n.2 (citing various provisions that do not address sovereign immunity).

But even if Congress has explicitly enumerated Indian tribes in some cases where doing so was not strictly necessary, there is no requirement that it take the same approach in all other instances. Congress is free to use different language in different statutes with different structures to accomplish similar ends. See *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 845-846 (2018). And placing significant reliance on other statutes arising in other contexts would be especially unwarranted here, where Congress adopted a categorical abrogation of sovereign immunity for all governments.

In the same vein, petitioners assert (Br. 25-26) that this Court has never found that Congress intended to abrogate tribal sovereign immunity where it did not expressly mention Indian tribes somewhere in the statute. But petitioners likewise do not cite any decisions *rejecting* abrogation in a case involving statutory text like that here. The fact that a case like this one has never arisen before is no reason to disregard the unequivocal text.

Next, petitioners invoke (Br. 34-37) the canon of ejusdem generis. "Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Norfolk & W. Ry. Co.* v. *American Train Dispatchers' Ass'n*, 499 U.S. 117, 129 (1991). Here, a tribal government is plainly "of the same genre" as the listed entities. *Kucana* v. *Holder*, 558 U.S. 233, 246 (2010). They are all governments or governmental entities. See pp. 13-14, *supra*.

Petitioners argue that "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.'" Br. 36 (quoting Pet. App. 35a) (emphasis omitted). Petitioners contend (Br. 37) that, unlike the other listed entities, tribes "pre-existed the Constitution and cannot trace their origins to any foreign government."

The "share[d] * * * characteristic" that petitioners purport to identify, Br. 36, is hardly "obvious and readily identifiable," Antonin Scalia & Bryan A. Garner,

Reading Law: The Interpretation of Legal Texts 199 (2012). In fact, it is not a shared characteristic at all, since it does not encompass the "foreign" governments, 11 U.S.C. 101(27), to which the definition repeatedly refers. Even setting that flaw aside and focusing on the domestic aspect of petitioners' proposal, Section 101(27)'s list explicitly includes other sovereigns that, like tribes, "pre-existed the Constitution" and thus cannot "'trace[ ] [their] origin to'" the Constitution, Pet. Br. 36-37 (citation omitted)—namely, the original States. See *Puerto Rico*, 579 U.S. at 69-70 (observing that both States and tribes retain "'pre-existing' sovereignty") (citation omitted); see also, *e.g.*, *Cook* v. *Gralike*, 531 U.S. 510, 519 (2001) (noting "the powers retained by the pre-existing sovereign States") (citation omitted). And "Indian Tribes," like the States, are expressly named in the Constitution itself. U.S. Const. Art. I, § 8, Cl. 3.

Petitioners fall back on the contention that tribes occupy a class of one under the Code because they enjoy "a unique status under our law," Br. 35 (quoting *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845, 851 (1985)), and are characterized by "fundamental and manifest" "dissimilarities" from other governments, Br. 36. But whatever unique characteristics tribes possess in some respects, they are still governments like every other entity on the list—a point petitioners do not dispute. And of particular relevance here, they share with other sovereign governments the attribute that Congress specifically addressed and eliminated in Section 106(a)—sovereign immunity.

Petitioners emphasize that tribes, unlike States, did not surrender their immunity "to the federal government at the Constitutional Convention." Br. 36 (citing *Bay Mills*, 572 U.S. at 789-790). But the question here

is not the original basis for recognition of tribal sovereign immunity, but rather Congress's abrogation of that immunity along with the immunity of all other sovereigns, whatever the source of that immunity. And like Indian tribes, various other listed entities, including "Commonwealth[s]" and "Territor[ies]," 11 U.S.C. 101(27), similarly possess unique attributes, confirming Congress's intention to cover governments of every nature and origin. See, *e.g.*, *Puerto Rico*, 579 U.S. at 77 (observing that "Puerto Rico boasts 'a relationship to the United States that has no parallel in our history'") (citation omitted); H.R.J. Res. 241, 94th Cong., 2d Sess. (1976) (approving a covenant to establish the Northern Mariana Islands as a self-governing Commonwealth in political union with, and under the sovereignty of, the United States).

In any event, petitioners' assertion that tribes are too unique to fall within the statute's catchall clause is difficult to square with their contention that the catchall is designed "'to pick up otherwise excluded, half-fish, half-fowl governmental entities'" with "peculiar governmental structure[s]." Pet. Br. 40-41 (quoting Pet. App. 28a). By petitioners' account, that is what tribes are. See, *e.g.*, *id.* at 23 (noting "the peculiar 'quasi-sovereign' status of the Indian tribes") (quoting *Three Affiliated Tribes*, 476 U.S. at 890).

Lastly, petitioners invoke (Br. 38-39) *Bond* v. *United States*, *supra*, to argue that the term "governmental unit" should be construed to exempt tribes implicitly, despite its comprehensive text. In *Bond*, this Court interpreted a statute implementing an international chemical weapons treaty; the statute prohibited the use of any "chemical weapon," defined in relevant part as any chemical that "can cause death, temporary

incapacitation or permanent harm." 572 U.S. at 851 (citations omitted). The defendant there had used chemicals to inflict a minor thumb burn on her husband's mistress. *Id.* at 852. The Court declined to extend the statute to "purely local crimes," observing that such an interpretation "would 'dramatically intrude upon traditional state criminal jurisdiction,' and we avoid reading statutes to have such reach in the absence of a clear indication that they do." *Id.* at 857, 860 (citation omitted). The Court focused on the "dissonance" between the term "chemical weapon" and the purposes of the treaty, on the one hand, and the "circumstances" of the assault at issue, on the other. *Id.* at 861.

There is no similar "dissonance," *Bond*, 572 U.S. at 861, in this case. To the contrary, tribes are a natural fit with the term "governmental unit." Moreover, unlike in *Bond*, where there was no indication that Congress intended to "authorize[] such a stark intrusion into traditional state authority," *id.* at 866, Congress made the explicit choice in the Code to abrogate sovereign immunity for "governmental unit[s]," 11 U.S.C. 101(27); see 11 U.S.C. 106(a). And the definitional provision reflects Congress's considered decision to define that term to include all governments and governmental entities. Reading Section 101(27) to encompass Indian tribes is thus fully consonant with the plain meaning of the text and, as discussed next, the broader structure of the Code.

2. The statutory structure confirms the unequivocal meaning of the text

"Any conceivable doubt as to" whether Section 106(a) abrogates tribal sovereign immunity as part of a categorical abrogation of immunity "is dispelled when one

looks to the various provisions of" the rest of the Code. *Seminole Tribe*, 517 U.S. at 57.

a. The Code establishes a comprehensive scheme featuring a "meticulous—not to say mind-numbingly detailed—enumeration of" rules, "exemptions," "exceptions to those exemptions," and enforcement mechanisms. *Law* v. *Siegel*, 571 U.S. 415, 424 (2014). That reticulated scheme "is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character." *Stellwagen* v. *Clum*, 245 U.S. 605, 617 (1918).

In pursuit of those dual purposes, the Code provides that "the filing of a bankruptcy petition has certain immediate consequences." *Chicago* v. *Fulton*, 141 S. Ct. 585, 589 (2021). "For one thing, a petition 'creates an estate' that, with some exceptions, comprises 'all legal or equitable interests of the debtor in property as of the commencement of the case.'" *Ibid.* (citation omitted). "A second automatic consequence of the filing of a bankruptcy petition is that, with certain exceptions, the petition 'operates as a stay, applicable to all entities,' of efforts to collect from the debtor outside of the bankruptcy forum." *Ibid.* (quoting 11 U.S.C. 362(a)). "The automatic stay 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." *Ibid.*

Finally, the "Code contains broad provisions for the discharge of debts." *Lamar, Archer & Cofrin, LLP* v. *Appling*, 138 S. Ct. 1752, 1758 (2018). As relevant here,

confirmation of a Chapter 13 plan establishes that, except as otherwise provided in the plan or confirmation order, the property of the estate is vested in the debtor "free and clear of any claim or interest of any creditor provided for by the plan." 11 U.S.C. 1327(b) and (c). A plan binds each creditor regardless of whether it "has objected to, has accepted, or has rejected the plan." 11 U.S.C. 1327(a).

Exempting tribes from the definition of "governmental unit" would undermine the functioning of the comprehensive scheme envisioned by Congress, which it concluded in 1994 required a categorical abrogation of sovereign immunity for governmental units. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 113, 108 Stat. 4106, 4117-4118 (enacting modern Section 106(a)). One major purpose and effect of the 1994 amendment was to put governments on an essentially equal footing in certain critical respects with other persons and entities that are parties to or affected by bankruptcy proceedings. Section 106(a) abrogates sovereign immunity for a host of key provisions in the Code. If tribes were not governmental units, they would be the only sovereigns immune for violations of statutory provisions that would otherwise protect the debtor's estate and ensure orderly and efficacious bankruptcy proceedings. That result would undermine the very uniformity Congress intended.

Most pertinent to this case, a tribal creditor could attempt to collect debts during bankruptcy proceedings without fear of liability under the Code because it would retain sovereign immunity for violations of the automatic stay, thereby removing that protection against harassment of the debtor and inflicting "damaging disruptions to the administration of a bankruptcy case."

Taggart v. *Lorenzen*, 139 S. Ct. 1795, 1804 (2019); see 11 U.S.C. 362(a)(6) and (k)(1). And just as significantly, a tribal creditor could persist in those efforts even after a discharge was entered since, under petitioners' theory, tribal creditors apparently would be immune from the tools that bankruptcy courts would otherwise use to enforce a discharge injunction. See 11 U.S.C. 524(a)(2) ("A discharge in a case under this title * * * operates as an injunction against * * * an act, to collect, recover or offset any such debt as a personal liability of the debtor."); see also, *e.g.*, *Taggart*, 139 S. Ct. at 1799 (recognizing that "a court may hold a creditor in civil contempt for violating a discharge order").

Tribal immunity would also impair a trustee's ability to recover and consolidate estate property, "a core aspect of the administration of bankrupt estates." *Central Virginia Cmty. Coll.* v. *Katz*, 546 U.S. 356, 372 (2006). A tribe could potentially claim immunity from provisions that would otherwise require it to turn over property of the estate to the trustee, 11 U.S.C. 542, as well as from provisions authorizing trustees to avoid certain statutory liens on the debtor's property, 11 U.S.C. 545; certain prepetition transfers that prefer one creditor to the detriment of others, 11 U.S.C. 547; fraudulent transfers, 11 U.S.C. 548; and certain post-petition transfers, 11 U.S.C. 549. Those provisions are enforceable, among other mechanisms, via a bankruptcy court's powers to impose liability on a transferee for an avoided transfer, 11 U.S.C. 550, and to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," 11 U.S.C. 105(a)—each of which would be unenforceable against tribes on petitioners' reading.

These concerns are not hypothetical. For example, in *In re Greektown Holdings, LLC*, *supra*, a trustee in a bankruptcy proceeding involving a tribally owned entity brought suit on behalf of unsecured creditors seeking avoidance and recovery of $177 million in allegedly fraudulent transfers made by that entity to or for the benefit of the tribe. 917 F.3d at 454-455. The Sixth Circuit concluded that the tribe was not a governmental unit and was therefore shielded by sovereign immunity from the trustee's suit, which resulted in the loss of those funds to the estate and other creditors. *Id.* at 463. Other examples similarly confirm that excepting tribes from the Code's provisions applicable to every other government would impair the operation of the Code and the "[e]quality of distribution among creditors." *Begier* v. *IRS*, 496 U.S. 53, 58 (1990); see, *e.g.*, *In re Star Grp. Commc'ns, Inc.*, 568 B.R. 616, 618 (Bankr. D.N.J. 2016) (dismissing preferential-transfer claims under Sections 547 and 550 against a tribally owned newspaper based on sovereign immunity); *In re Money Ctr. of America, Inc.*, 565 B.R. 87, 92, 104 (Bankr. D. Del. 2017) (finding that preferential-transfer claims under Sections 547, 548, and 550 against tribally owned casinos were barred by sovereign immunity absent waiver by tribe), aff'd, No. 14-10603, 2018 WL 1535464 (D. Del. Mar. 29, 2018).

After the Court held in *Nordic Village*, *supra*, that an avoidance action against the United States was barred by sovereign immunity under the prior version of Section 106, 503 U.S. at 31, 39, Congress waived sovereign immunity not just for the United States (and the States), but all governmental units. See p. 34, *infra*. There is no basis to conclude that Indian tribes were implicitly exempted from that categorical elimination of sovereign immunity.

Petitioners' interpretation could cause dislocations in the other subsections of Section 106, too. Section 106(b) provides that a governmental unit that files a proof of claim against an estate is deemed to have waived its immunity with respect to counterclaims arising "out of the same transaction or occurrence." 11 U.S.C. 106(b). Section 106(b) thereby prevents a governmental unit from "receiv[ing] a distribution from the estate without subjecting itself to any liability it has to the estate within the confines of a compulsory counterclaim rule," because "[a]ny other result would be one-sided." S. Rep. No. 989, 95th Cong., 2d Sess. 29 (1978) (Senate Report). Similarly, Section 106(c) states that an estate may "offset" against an allowed claim of a governmental unit the amount of any claim that the estate has "against such governmental unit." 11 U.S.C. 106(c). That provision allows "permissive counterclaims to governmental claims capped by a setoff limitation." *Nordic Village*, 503 U.S. at 34. Together, those two provisions function to prevent governmental entities from using sovereign immunity as a sword. But petitioners' interpretation would threaten to permit that outcome. See *In re Money Ctr.*, 565 B.R. at 109 (holding that tribal entity that filed proof of claim in bankruptcy proceeding did not waive sovereign immunity under Section 106(b)).

Seeking to minimize the disruption that their interpretation would cause to the statutory scheme, petitioners contend that the Code "would still apply to Indian tribes, notwithstanding their retention of immunity." Br. 49 n.5 (quoting Pet. App. 45a). But at least some courts have held that, because (in their view) the Code does not abrogate tribal sovereign immunity, bankruptcy courts are unable to provide debtors with "a fresh start" when it comes to certain obligations

relating to tribes. *Rousey* v. *Jacoway*, 544 U.S. 320, 325 (2005); see, *e.g.*, *In re National Cattle Congress*, 247 B.R. 259, 271-272 (N.D. Iowa 2000) (holding that debtor's Chapter 11 plan could not extinguish tribe's mortgage lien); *In re Mayes*, 294 B.R. 145, 147 (B.A.P. 10th Cir. 2003) (holding that tribe's lien on debtor's exempt property could not be avoided).

Even assuming that all provisions of the Code would apply to tribes if they did not qualify as governmental units, their retention of sovereign immunity would indisputably impair the Code's enforcement. Petitioners suggest that "equitable relief could * * * provide an avenue for a debtor to enforce certain provisions of the Code against tribal actors." Br. 49 n.5 (quoting Pet. App. 45a). Assuming the trustee could identify a relevant tribal defendant, such relief could potentially be effective in certain circumstances, see *Bay Mills*, 572 U.S. at 796, but its availability would be more limited in the bankruptcy context than others. Significantly, it likely would not enable a trustee to effectuate key provisions of the Code, such as those allowing the avoidance and recovery of fraudulent and other transfers. See *Edelman* v. *Jordan*, 415 U.S. 651, 665-666 (1974) (distinguishing prospective relief from backward-looking relief divesting a sovereign of its property).

At a minimum, petitioners' interpretation would spawn "jurisdictional and administrative" uncertainty and accompanying litigation as courts attempted to ascertain the circumstances in which rights of (or against) tribes could, or could not, be determined in bankruptcy proceedings. *Tarrant Reg'l Water Dist.* v. *Herrmann*, 569 U.S. 614, 635 (2013). Given the Code's comprehensive scope, distinctive granularity, and emphasis on resolving all claims *inter se* and affording the debtor a

fresh start, see, *e.g.*, *Siegel*, 571 U.S. at 424, it would be surprising if Congress had exempted tribes—alone of all sovereigns—from certain substantive standards and enforcement mechanisms without specifying whether or how those provisions of the Code would be applied or enforced in cases involving tribes. The absence of any such provisions furnishes another structural indication that the Code abrogates tribal sovereign immunity.

b. The Code does not simply abrogate the sovereign immunity of governmental units. It also accords preferential treatment to governmental units in various contexts.

Among other things, governmental units are entitled to an extended period to file a claim. See 11 U.S.C. 502(b)(9). They enjoy priority for certain unsecured tax claims, see 11 U.S.C. 507(a)(8); *In re Affordable Patios & Sunrooms*, No. 20-bk-50017, 2022 WL 1115413, at *3 n.8 (9th Cir. B.A.P. Apr. 13, 2022), and exceptions to discharge of fines and penalties, see 11 U.S.C. 523(a)(7). The Code prohibits courts from determining the estate's right to a tax refund until after a determination by the relevant governmental unit or 120 days after a trustee properly requests such refund, see 11 U.S.C. 505(a)(2)(B), and trustees must provide specified tax information to the relevant governmental unit, see 11 U.S.C. 704(a)(8) and 1106(a)(6). Governmental units may also file post-petition tax claims in certain circumstances, see 11 U.S.C. 1305(a)(1), and various tax-collection activities are exempt from the automatic stay, see 11 U.S.C. 362(b)(9), (18), and (26).

The Code likewise includes priorities and exemptions for governmental units that exercise police and regulatory powers, see 11 U.S.C. 107(c)(2) and 362(b)(4), and that oversee alimony, domestic maintenance, and

support payments, see 11 U.S.C. 101(14A), 507(a)(1)(A) and (B), and 523(a)(5). And the Code prohibits bankruptcy courts from enjoining "a police or regulatory act of a governmental unit" in certain circumstances. 11 U.S.C. 1519(d); see 11 U.S.C. 1521(d).

Because there is no plausible way to read the term "governmental unit," 11 U.S.C. 101(27), to exclude Indian tribes for purposes of the Code's abrogation of sovereign immunity but include them for other purposes, petitioners' interpretation would foreclose tribes from availing themselves of the benefits that the Code accords to governmental units. Yet the benefits cited above pertain to the exercise of peculiarly *sovereign* functions, such as taxation and the exercise of regulatory authority. The provisions conferring special benefits on governmental units thus reflect Congress's intent to treat sovereigns as governmental units when they exercise governmental powers.

Petitioners respond that the harm to tribes by classification as governmental units would exceed the benefits. See Pet. Br. 47-48 (noting, for example, that "tribes face special headwinds in collecting tax revenue," and thus might not be able to avail themselves of benefits afforded to governmental units engaged in tax collection). That contention misses the point. The government's argument does not depend on a balancing of incommensurable benefits and harms, which "is decidedly the province of Congress, not courts." *Id.* at 48. Rather, it rests on the simple fact that the Code contains a comprehensive scheme for addressing the general interactions of governments with bankruptcy proceedings—a scheme that imposes both costs and benefits based on an entity's status as a government. Rather than vary costs and benefits according to the particular

sovereign or other government at issue, Congress crafted an all-inclusive definition that encompasses the United States, States, territories, foreign states, and every "other foreign or domestic government." 11 U.S.C. 101(27). Contrary to text and context, petitioners would wrench tribes out of that scheme to the detriment of a functioning bankruptcy system that Congress constructed to account for special attributes of governmental entities—and, in certain cases, to the detriment of tribes themselves.

Petitioners suggest (Br. 18) that their position would promote the goal of tribal "self-governance." "As dependents," *Bay Mills*, 572 U.S. at 788, however, tribes benefit in many circumstances when they are treated on par with other sovereigns. See p. 11, *supra* (same high standard for congressional abrogation of federal, state, and tribal sovereign immunity). Congress's decision to accord tribes the same benefits and burdens as other sovereigns in the unique context of the Bankruptcy Code is thus fully consistent with the United States' respect for the status of tribes as sovereigns and functioning governments.

3. History does not undermine the unequivocal meaning of the text

Petitioners contend (Br. 44) that, before Congress enacted the modern Code in 1978, tribal corporations may have been able to file for bankruptcy, but can no longer do so under respondent's interpretation. See 11 U.S.C. 109 (authorizing "person[s]" to file for bankruptcy); 11 U.S.C. 101(41) (defining "person" to include a "corporation" but generally not a "governmental unit"). In petitioners' view (Br. 44), "one would expect Congress to have made explicit" that change.

At the outset, it is an open question whether a tribal corporation that is an arm of the tribe could file for bankruptcy under the current Code on petitioners' interpretation, given the "longstanding interpretive presumption that 'person' does not include the sovereign." *Vermont Agency of Nat. Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 780 (2000); see, *e.g.*, *Inyo Cnty.* v. *Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 709 (2003). And even on respondent's interpretation, a corporation in which a tribe has a significant interest but is not an arm of the tribe could likely file for bankruptcy. Regardless, the only source petitioners cite for the proposition that a tribal corporation could seek bankruptcy relief under pre-1978 law is their own reading of the statutory text, see Br. 44 (citing Bankruptcy Act, Amendments of 1938, ch. 575, §§ 1(24) and (29), 4, 52 Stat. 840, 841-842, 845); petitioners do not identify any instance of a tribal corporation actually filing for bankruptcy, much less of any court approving such a filing. There is no reason to expect Congress to have been explicit in departing from such a sparse historical practice—to the extent Congress was aware of it or it existed at all.

Petitioners further observe (Br. 46) that the legislative history pertinent to Sections 101(27) and 106 focuses on the federal government and the States, and does not mention tribes. That observation has limited relevance because the government agrees with petitioners (Br. 45) that legislative history "generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate" tribal sovereign immunity, *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989), especially here where the statutory text is clear in categorically abrogating sovereign immunity.

In any event, petitioners can draw no affirmative support from the legislative history. The Senate and House Reports from the time of the Code's enactment stated that the Code "defines 'governmental unit' in the broadest sense," Senate Report 24; see H.R. Rep. No. 595, 95th Cong., 1st Sess. 311 (1977) (same), which supports respondent's interpretation, though the reports referred to other forms of government without mentioning tribes specifically. And although Congress focused on the federal government and States in amending the Code in 1994 (Pet. Br. 46), that is unsurprising because the amendments were designed to overrule two decisions of this Court holding that the prior version of Section 106 did not broadly abrogate the sovereign immunity of States and the United States. See H.R. Rep. No. 835, 103d Cong., 2d Sess. 42 (1994); see also *Hoffman* v. *Connecticut Dep't of Income Maint.*, 492 U.S. 96 (1989); *Nordic Village*, *supra*. The Code's preexisting definition of "governmental unit," 11 U.S.C. 101(27), however—and the unequivocal abrogation of sovereign immunity for all governmental units that Congress enacted in 1994—plainly extends beyond States and the United States.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

TABLE OF CONTENTS

Page

Statutory provisions:
11 U.S.C. 101(27) 1a
11 U.S.C. 106 ..... 1a
11 U.S.C. 362(a) and (k) 3a

1. 11 U.S.C. 101(27) provides:

Definitions

(27) 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.

2. 11 U.S.C. 106 provides:

Waiver of sovereign immunity

(a) 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.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court 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. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

(b) A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

(c) Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

3. 11 U.S.C. 362(a) and (k) provide:

Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

* * * * *

(k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.