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

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INTRODUCTION

If this case presented a question of ordinary statutory construction, reasonable minds might differ: Respondent argues that the dictionary definitions of component terms indicate that "domestic government" (as used in the residual phrase "other *** domestic government") refers solely to Indian tribes; the Government reduces the entire statutory definition of "governmental unit" to "all governments"; and Petitioners contend that the statutory definition (including its residual phrase) does not sweep in tribes. But this is not an ordinary case. Everyone agrees that Respondent can prevail only if the Bankruptcy Code "unequivocally" abrogates tribal sovereign immunity.

This case is easily resolved under that exacting standard. The definition of "governmental unit" here is most naturally read to omit Indian tribes, but it certainly does not include them "unequivocally" so as to abrogate their sovereign immunity. Despite specifically naming the types of federal, state, and foreign entities otherwise entitled to claim sovereign immunity, the definition (and the Code more broadly) makes no reference to tribes (in any similar way, shape, or form). Given that Congress has never abrogated tribal sovereign immunity without any such reference, that conspicuous omission compels the conclusion that Congress did not intend to do so under the Code. That is not a "magic words" test; it is a straightforward application of the clear-statement rule.

Respondent is left to ask why Congress would treat tribes differently than the enumerated

governmental entities. But Congress has been doing so for the last century, including under the federal bankruptcy statute preceding the Code. That reality reinforces that such matters are the realm of Congress, which must act unequivocally when it comes to abrogating tribal sovereign immunity. This Court should reverse.

ARGUMENT

I. THE BANKRUPTCY CODE'S TEXT LACKS A CLEAR ABROGATION OF TRIBAL SOVEREIGN IMMUNITY

Despite Respondent's attempts (Br. 14-15, 32-34, 36-37 & n.17) to muddle the standard for abrogating tribal sovereign immunity, this Court's precedent sets forth a "simple but stringent test." *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989). "Our decisions establish *** that such a congressional decision must be clear. The baseline position, we have often held, is tribal immunity; and '[t]o abrogate [such] immunity, Congress must "unequivocally" express that purpose.'" *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014) (alterations in original). That means "[a]ny ambiguities in the statutory language are to be construed in favor of immunity," with "[a]mbiguity exist[ing] if there is a plausible interpretation of the statute that would not authorize money damages against [tribes]." *FAA v. Cooper*, 566 U.S. 284, 290-291 (2012); *see* Pet'rs Br. 20-21; Amicus Br. of Indian Law Professors 5-9; Gov't Br. 10-11.

The Bankruptcy Code falls well short of providing "perfect confidence" of abrogation as to Indian tribes. *Dellmuth*, 491 U.S. at 231. Indeed, not even the other traditional tools of statutory construction support the

conclusion that Congress omitted tribes from its painstaking enumeration of familiar "governmental unit[s]" but still captured tribes on the back end of the definition through a supposedly equivalent residual phrase "other *** domestic government." 11 U.S.C. § 101(27). If any doubt remains, the clear-statement rule and common sense foreclose that conclusion.

A. Neither Respondent Nor The Government Can Rationalize The Conspicuous Omission Of Indian Tribes (Or Similar Reference) In Section 101(27)

As all agree, Congress may express its unequivocal intention to abrogate tribal sovereign immunity using a variety of mechanisms. But Congress's unbroken practice is to refer directly to Indian tribes in some fashion. Courts have accepted, and thus reinforced, that practice. Tellingly, neither Respondent nor the Government can cite a *single* example in which Congress has abrogated tribal sovereign immunity without referencing tribes. They also do not dispute that the most natural, not to mention clearest, way for Congress to refer to tribes is to refer to tribes. Unsurprisingly, they struggle to explain why Congress—especially after painstakingly identifying the only other governmental entities that otherwise possess sovereign immunity—would take a different approach in the Bankruptcy Code alone.

1. Congress's unbroken practice of referring to Indian tribes informs the interpretation of the Bankruptcy Code.

Faced with the sheer number of statutes in which Congress has referred to Indian tribes alongside many of the same governmental entities enumerated in

section 101(27)—including in several provisions abrogating tribal sovereign immunity—Respondent and the Government do nothing more than brush them aside as being "of little use." Resp't Br. 34-35; *see* Gov't Br. 19. In their view, the Bankruptcy Code's omission of tribes is unexceptional, but they cite no example in which Congress has swapped tribes for the ambiguously generic phrase "domestic government," let alone to abrogate sovereign immunity.

Respondent therefore surmises that "Congress had reason to use the words '[Indian] tribe' [in other statutes abrogating tribal sovereign immunity] that do not apply to the Bankruptcy Code." Resp't Br. 35-36. But Congress's obvious reason for doing so—the desire to displace sovereign immunity and subject tribes to a statute—has no less force here. That is particularly true considering this Court's longstanding application of the clear-statement rule to questions of tribal sovereign immunity, as well as this Court's decisions determining that a prior version of the Code lacked such a statement as to other sovereigns for certain monetary claims. Pet'rs Br. 26-27. Congress thus had *every* reason to reference tribes in section 101(27) and no reason to avoid doing so.

In any event, the Code is not distinguishable. If anything, where a general statute like the Code is concerned (as opposed to an Indian-specific statute), there is more (not less) reason for Congress to express unequivocally its intent to reach tribes. *Contra* Resp't Br. 35; Gov't Br. 19. Whether the Code's definition of "governmental unit" is "nested" does not change the fact that, like other definitions of generic terms, mentioning tribes ensures inclusion while omitting them "otherwise might not." Resp't Br. 35.

The question under the Code's reticulated definition of "governmental unit" remains *which* sovereigns Congress targeted for abrogation. A court cannot presume that mere use of "governmental unit" portends abrogation for any and all "sovereign entit[ies] exercising governmental authority and possessing governmental prerogatives." Gov't Br. 16-17; *cf. Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 541 (2002) ("[A] facially broad grant of jurisdiction over 'all civil actions' could be read to include claims by Indian tribes against nonconsenting States, but we held that such language was insufficient to constitute a clear statement of an intent to abrogate state sovereign immunity."). To the contrary, specifically enumerating federal, state, and foreign entities while omitting tribes suggests just the opposite.

2. Petitioners' position does not run afoul of any "magic words" prohibition.

Lacking any explanation for Congress's conspicuous omission of Indian tribes in section 101(27), Respondent leans heavily on this Court's admonition that Congress need not use "magic words" to abrogate sovereign immunity. Resp't Br. 32 (quoting *Cooper*, 566 U.S. at 291 (rejecting abrogation of immunity for emotional distress damages because statute permitted only "actual damages," which could plausibly be limited to pecuniary damages)); *see* Gov't Br. 18. But Petitioners have never made this case about "whether [section 101(27)] had to use the word 'tribe.'" Resp't Br. 34. To be clear: Congress need not use any specific words. Pet'rs Br. 27-28. When it comes to abrogating tribal sovereign immunity, however, Congress always references tribes in *some*

manner at least *somewhere* in the statute. Most often, tribes are named explicitly in the abrogation provision itself (or in the cross-referenced definition of a general term).

No principle of statutory construction requires this Court to close its eyes to that commonsense practice. On the contrary, this Court has held that Congress's use (or omission) of a common statutory term carries weight, clear-statement rule or otherwise. *See, e.g.*, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) ("Where Congress intends to refer to ownership in other than the formal sense, it knows how to do so *** [by] refer[ring] to 'direct and indirect ownership.' The absence of this language in 28 U.S.C. § 1603(b) instructs us that Congress did not intend to disregard structural ownership rules.") (citations omitted); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991) ("Congress' awareness of the need to make a clear statement that a statute applies overseas is amply demonstrated by the numerous occasions on which it has expressly legislated the extraterritorial application of a statute.").

Taking Congress at its word (or silence) also dovetails with precedent, both inside and outside the clear-statement-rule context, "doubt[ing] *** that Congress [would] s[eek] to accomplish in a 'surpassingly strange manner' what it could have accomplished in a much more straightforward way." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812-1813 (2019); *see Dellmuth*, 491 U.S. at 230-231 ("We find it difficult to believe that the 94th Congress, taking careful stock of the state of Eleventh Amendment law, decided it would drop coy hints but

stop short of making its intention manifest [under the clear-statement rule].").

Despite Respondent's effort (Br. 37 & n.18) to narrow some of those cases to their facts (while the Government just ignores them), those principles largely resolve this case. Congress's omission of Indian tribes from section 101(27)'s enumerated list of entities—the most obvious, straightforward, and repeatedly employed method of abrogating tribal sovereign immunity—upends any argument that Congress used opaque language like "domestic government" to achieve the same result under the Bankruptcy Code.

Forced to rely on the residual phrase, Respondent takes the bizarre position that Congress chose to use "other *** domestic government" to refer to tribes—and only tribes—instead of just saying "tribes." *See* Resp't Br. 45 & n.23. For its part, the Government responds that the "oddity" is eliminated by reading section 101(27) to "encompass[] all governments and governmental entities." Gov't Br. 18. But that position is equally untenable: "Congress easily could have used the simpler and seemingly self-evidently all-encompassing phrase 'any'—or, even better 'every'—'government' to be the sole means of defining a 'governmental unit.' *** But, instead, Congress chose to define that term *** much more cumbersomely." Pet. App. 33a (Barron, C.J., dissenting).

Paroline v. United States, 572 U.S. 434 (2014), is inapposite. In that case, the Court grappled with whether proximate-causation language appearing in a catchall phrase applied to five preceding enumerated

categories of losses. The Court held that the proximate-cause requirement extended to the five categories because they were meant to "provide guidance *** as to the specific types of losses Congress thought would often be the proximate result of [the statutory] offense." *Id.* at 448. Here, by contrast, it is implausible (and certainly not clear) that Congress was merely providing guidance as to the meaning of "governmental unit" by specifically listing every domestic unit, save for one that was (aberrationally) captured by "other *** domestic government." A single-item residual phrase does not "serve[] 'as a summary of the type[s] of [listed]' entities covered" by section 101(27). Gov't Br. 17 (quoting *Paroline*, 572 U.S. at 447).

B. "Other *** Domestic Government" Is (At Least) Ambiguous

1. Respondent repeats the First Circuit's misstep of relying on dictionary definitions of component words.

a. Respondent's defense of the panel majority's conclusion that "other *** domestic government" supplies the requisite clear statement tracks the same dictionary-driven, syllogistic reasoning: an Indian tribe is a "government" and "domestic," and therefore must be a "domestic government" whose sovereign immunity is abrogated under the Bankruptcy Code.

Such simplistic reliance on dictionary definitions, read in isolation and then transferred to a new phrase, skews the congressional intent analysis. That is not to say, of course, a court must ignore the definitions of component words. But in certain circumstances (like here) it is inappropriate to find "a statutory term [to

be] unambiguous" based "solely on dictionary definitions of its component words." *Yates v. United States*, 574 U.S. 528, 537 (2015) (plurality opinion). Application of that principle does not require a court to clear any "high bar" or to "depart[] from ordinary meaning." Resp't Br. 39. The reason to guard against blind adherence to component definitions is that "two words together may assume a more particular meaning than those words in isolation." *FCC v. AT&T Inc.*, 562 U.S. 397, 406 (2011).

The Court confronted such a case just last Term in determining whether "foreign tribunal" reached private adjudicative bodies:

> Standing alone, the word "tribunal" casts little light on the question. *** This is where context comes in. "Tribunal" does not stand alone—it belongs to the phrase "foreign or international tribunal." And attached to these modifiers, "tribunal" is best understood as an adjudicative body that exercises governmental authority.

ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2086-2087 (2022).

The parallels between combining "foreign" with "tribunal" on the one hand, and "domestic" with "government" on the other, are apparent. As in *ZF Automotive,* it "casts little light" to ask whether an Indian tribe is a "government" and then separately whether it is "domestic." Indeed, as discussed next, Respondent's analysis of each component word falls into precisely the traps that this Court has warned against.

b. Respondent spends several pages on why an Indian tribe is a "government." But whether "[n]o one in 1978 or since would hesitate to call a tribe a 'government' in everyday speech," Resp't Br. 19, this Court must determine whether Congress intended to abrogate tribal sovereign immunity under the Bankruptcy Code by referring to "other *** domestic government" in the context of section 101(27)'s full definition. The most that can be said is that tribes could satisfy one part of the residual phrase in section 101(27).

c. Respondent's arguments regarding "domestic" fare no better.

First, citing one definition of "domestic"—*i.e.*, "belonging or occurring within the sphere of authority or control or the fabric or boundaries of [an] indicated nation or sovereign state"—Respondent asserts that Indian tribes "are governmental entities within [the United States'] authority or control and their territory is within its boundaries." Resp't Br. 20 (first alteration in original) (quoting *Domestic*, WEBSTER'S THIRD INTERNATIONAL DICTIONARY 671 (1976)). Although tribes can be described that way, this Court's precedents make clear that tribes' legal and territorial relationship to the United States cannot be so easily—or clearly—reduced to a simple definition.

As to the legal relationship, the fact that "tribes are subject to plenary control by Congress" is qualified by the fact that "unless and until Congress acts, the tribes retain their historic sovereign authority." *Bay Mills*, 572 U.S. at 788 (internal quotation marks omitted). That is why this Court asks whether a "treaty or statute" has "explicitly divested Indian

tribes of the[ir] *** authority." *United States v. Cooley*, 141 S. Ct. 1638, 1643 (2021). Thus, while in one sense tribes are within the United States' authority and control, in another sense they are free to continue exercising "tribal power *** in its earliest form." *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 70 (2016).

Likewise, as to the territorial relationship, tribes literally exist within the boundaries of the United States. But physical location alone does not create a "domestic" relationship. *Cf. Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019) (discussing "federal enclave," *i.e.*, "an area of exclusive Federal jurisdiction located within a State"). At the time Congress enacted the Bankruptcy Code, this Court was "continu[ing] to stress that Indian tribes are unique aggregations possessing attributes of sovereignty over *** their territory," such that "reservation lands are insulated in some respects." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (internal quotation marks omitted); *see Ysleta del Sur Pueblo v. Texas*, 142 S. Ct. 1929, 1934 (2022) (reiterating tribes' "inherent sovereign authority" over their "territories").

At bottom, those examples reflect the long-acknowledged reality that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). Accordingly, it is not enough to show that tribes *could* fall within a generic definition of "domestic."

Second, even assuming tribes can be clearly characterized as "domestic," Respondent still needs to show that "other *** domestic government" unequivocally reaches tribes. The closest that Respondent comes to addressing that issue is his analogy to "domestic dependent nation." But the two are not interchangeable. *See* Pet'rs Br. 32-34.

Chief Justice Marshall's inclusion of the word "dependent" itself shows that he did not consider tribes to be purely "domestic." Furthermore, his coining of the term was highly qualified; he suggested that Indian tribes "*may*, *more* correctly, *perhaps*, be denominated domestic dependent nations." 30 U.S. at 17 (emphases added). Those are not endorsements of tribes as "fully domestic." Resp't Br. 41.

The same passage refutes Respondent's contention that there is no authority holding that "tribes are neither domestic nor foreign." Resp't Br. 41. That is the very upshot of Chief Justice Marshall's analysis. As he explained, "[t]he term foreign nation is, with strict propriety, applicable by either [the United States or tribes] to the other" because they do not "ow[e] a common allegiance." 30 U.S. at 16 (emphasis omitted). Because of certain aspects of the legal and territorial relationship between the two sovereigns, however, tribes could not, "with strict accuracy, be denominated foreign nations." *Id.* at 17. Against that backdrop, Chief Justice Marshall went on to describe tribes not as "domestic" but as "domestic dependent nations." *Id.*

Had Chief Justice Marshall understood there to be a binary choice between "foreign" and "domestic" governments, that nuanced analysis and new

terminology would not have been necessary. Nor would he have had reason to remark that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions *which exist no where else*." 30 U.S. at 16 (emphasis added). Such a statement acknowledges that tribes occupy a one-of-a-kind position that transcends traditional categorization and makes them anything but "'domestic government[s]' in the ordinary sense." Resp't Br. 40 (alteration in original) (capitalization omitted).

In the end, "domestic dependent nation" is a term of art, not a shorthand for "other *** domestic government." While the former clearly designates Indian tribes, the latter does not. That the two sound similar is not the same as a clear statement.[1]

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[1] The Executive Branch, whose views Respondent elsewhere embraces (Br. 40), has also recognized the distinction between "domestic government" and tribes. *See* 7 C.F.R. § 205.2 ("Governmental entity. Any domestic government, tribal government, or foreign governmental subdivision providing certification services."); Pet'rs Br. 35. In a footnote, Respondent posits that the genesis of the regulatory term—initially proposed as "State entity" but clarified to "Governmental entity" in the final rule—explains why it made sense to include a separate reference to "tribal government." Resp't Br. 34 n.14. That is a *non sequitur*. To the extent a definition encompassing any "domestic" or "foreign" government would have left doubt over whether tribes were included, that is Petitioners' point: referring to tribes is how one would remove the same ambiguity in section 101(27).

*2. "Other *** domestic government," as used in the context of section 101(27), can be interpreted readily not to include Indian tribes.*

Even assuming "other *** domestic government" could refer to tribes in isolation, Respondent and the Government would need to show that such language is not susceptible to another construction in the broader context of section 101(27). *See, e.g.*, *United States v. Nordic Vill., Inc.*, 503 U.S. 30 (1992). They cannot make that showing.

a. At a minimum, it is plausible that Congress inserted "'other *** domestic government' *** to pick up otherwise excluded, half-fish, half-fowl governmental entities like authorities or commissions that are created through interstate compacts." Pet. App. 28a (Barron, C.J., dissenting) (first ellipsis in original). As elaborated in Petitioners' opening brief (at 40-42), courts have long appreciated the unique immunity concerns associated with peculiar governmental hydras—such as the Washington Metropolitan Area Transit Authority ("WMATA")—that are difficult to encapsulate in statutory language. The Government's retort (Br. 22) that tribes could be described as such is both wrong, because (among other distinctions) tribes are easily named, and unresponsive, because it does nothing to eliminate the competing construction precluding a clear statement.

The best Respondent can muster is that the competing construction "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." Resp't Br. 45 n.23 (ellipsis and alteration in original). But unrebutted case law, recognizing that such interstate compact entities are not in fact instrumentalities of either the federal government or a single state, indicates that the quoted statutory language in fact would be insufficient. *See, e.g.*, *Morris v. Washington Metro. Area Transit Auth.*, 781 F.2d 218, 228 (D.C. Cir. 1986) (describing WMATA as "interstate" entity possessing "three immunities *** added together").

The alternative is no better for Respondent. If Respondent were correct that "other *** domestic government" does not reach entities like WMATA or any other entity aside from Indian tribes, that would mean Congress oddly used "other *** domestic government" to mean *only* Indian tribes. That makes Petitioners' construction all the more likely—and certainly plausible.

b. The *ejusdem generis* canon fortifies Petitioners' construction. Like the panel majority, Respondent and the Government argue that the specifically enumerated governmental units in section 101(27) and Indian tribes "share the attribute of being governmental entities," such that it would be appropriate to include the latter in section 101(27)'s residual clause. Resp't Br. 42-43; *see* Gov't Br. 20-22. The fact that tribes exercise governmental functions, however, does not answer the question of whether tribes are similar in the relevant manner. For a host of reasons, they are not. *See* Pet'rs Br. 18-19, 35-36; Amicus Br. of Navajo Nation et al. 7-12 (hereinafter "Tribal Amicus Br.").

Respondent and the Government take issue with Chief Judge Barron's conclusion that the common characteristic of the specifically enumerated domestic governmental units is traceability to the United States. They assert that other entities have pre-existing sovereignty or are unique in their own right. But it should be obvious that those units are still of a different ilk than tribes, whose sovereignty was not agreed upon in the plan of the Convention. And while traceability might be to the United States *or* a foreign government, that is not the same as using "an attribute that inheres in only one of the list's preceding specific terms." *Southwest Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1792 (2022). The residual clause itself separates the two categories, *i.e.*, "other foreign *or* domestic government." 11 U.S.C. § 101(27) (emphasis added).[2]

II. THE STRUCTURE, CONTEXT, AND HISTORY OF THE BANKRUPTCY CODE DO NOT CONFER THE MISSING CLEAR STATEMENT

A. Bankruptcy Policy Cannot Drive The Result

Although Respondent and the Government purport to be using the Bankruptcy "Code as a [w]hole" to give meaning to "other *** domestic government," their arguments are really about how tribes ought to be treated under the Code. Resp't Br. 24; *see* Gov't Br.

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[2] Respondent does not mention the panel majority's reliance on the belt-and-suspenders canon as a mechanism for broadening section 101(27). For good reason: that canon actually tethers "other *** domestic government" to the specifically enumerated governmental units in that provision. *See* Pet'rs Br. 37-38; *see also* Gov't Br. 17 (misattributing panel majority's error to Petitioners).

24 (touting Code's "dual purposes"). Those policy arguments, echoed by other amici, have no place in the abrogation analysis, *see Bay Mills*, 572 U.S. at 800-801, and can be dispatched easily on their merits.

1. Respondent and the Government assert that the Code's automatic stay, discharge injunction, and plan confirmation powers "apply globally" in aid of certain bankruptcy policies. Resp't Br. 24-25; *see* Gov't Br. 24-25. Not so. "No statute pursues a single policy at all costs." *Bartenwerfer v. Buckley*, 143 S. Ct. 665, 675 (2023). Least of all "the Code, [which] like all statutes[] balances multiple, often competing interests," *id.*, using a "meticulous—not to say mind-numbingly detailed—enumeration of exemptions and exceptions to those exemptions," *Law v. Siegel*, 571 U.S. 415, 424 (2014).

Accordingly, the statement that bankruptcy courts "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," Resp't Br. 25 (alteration in original) (internal quotation marks omitted) (quoting *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 448 (2004)), obviously means within the confines of the Code and its exceptions. Each of the types of provisions that Respondent and the Government highlight is a case in point. *See, e.g.*, 11 U.S.C. § 362(b) (listing twenty-nine exceptions where filing of bankruptcy petition "does not operate as a stay"); *id.* § 524(b), (j) (explaining when discharge provisions "do[] not apply" and "do[] not operate as an injunction"); *id.* § 1141(d) (limiting effect of plan confirmation). In fact, the provision at issue here—the automatic stay—contains several exceptions for

"governmental unit[s]." *Id.* § 362(b)(4), (9), (18) (26); *see also* Resp't Br. 27-29 (discussing numerous Code provisions relating to governmental units); Gov't Br. 30-31 (identifying "preferential treatment" provisions for governmental units).

Governmental units thus are not in fact "on an essentially equal footing" with others in the bankruptcy process. Gov't Br. 25. Those entities remain free to undertake various actions against a debtor and retain certain claims following the discharge that otherwise facilitates a debtor's "fresh start," yet have not "undermine[d] the functioning of the comprehensive scheme envisioned by Congress." *Id.* at 24-25. Ironically, Respondent and the Government overlook the fact that if the Code's definition of "governmental unit" does not include Indian tribes, then tribes would fall outside of the foregoing exceptions and the Code would apply to tribes in a more uniform manner. All of this goes to show that the orderly and efficient operation of the Code does not turn on whether tribes are governmental units.

2. Respondent and the Government nevertheless complain that tribes must be governmental units because otherwise they alone would be able to claim immunity. Notably, as a general matter, the Code itself makes distinctions between governmental units—including with respect to discharge and plan confirmation, *see* 11 U.S.C. § 1141(d)(6)(A) (providing exception specifically for "domestic governmental unit")—oftentimes in byzantine ways. *See, e.g.*, *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115 (2016) (holding that Puerto Rico is a "state" for some but not other Code purposes). Hence, the Code

is (again) not as consistent as Respondent and the Government would make it out to be.

In addition, despite their parades of horribles, Respondent and the Government ultimately accept—as flagged by Petitioners (Br. 49 n.5)—that bankruptcy courts are not lacking in means of equitable *in rem* enforcement. *See* Resp't Br. 26; Gov't Br. 26-29. And established principles already "prevent [tribes] from using sovereign immunity as a sword." Gov't Br. 28; *see, e.g.*, *In re National Cattle Cong.*, 247 B.R. 259, 268-269 (Bankr. N.D. Iowa 2000) ("[C]ontinuing to maintain a Proof of Claim in this case would contradict the Tribe's assertion of immunity. The Tribe must now make an election between withdrawing its Proof of Claim or asserting an unqualified claim by removing the Waiver Disclaimer from the Proof of Claim as filed."). Their fears about the disruption to and gaming of bankruptcy proceedings are therefore overblown.

The issue here is whether Petitioners can be held liable for money damages under 11 U.S.C. § 362(k)(1). *See* Resp't Br. 2-3, 6, 15; p. 22, *infra*. This Court's sovereign immunity precedent has long drawn the line at such claims. *See Nordic Vill.*, 503 U.S. at 38 ("[W]e have never applied an *in rem* exception to the sovereign immunity bar against monetary recovery, and have suggested that no such exception exists[.]"); *see also Ex parte Young*, 209 U.S. 123 (1908). Confirming that the Code does as well for tribes will

undoubtedly clarify the legal landscape, not "spawn *** uncertainty." Gov't Br. 29.[3]

That leaves Respondent's rundown of the ways in which the Code uses "governmental unit." Predictably, all of them concern "governmental functions such as collecting taxes, protecting public safety, and regulating family relations." Resp't Br. 27; *see* Gov't Br. 30-31. But "[t]he close fit between the Code provisions and tribal-government activities," Resp't Br. 27, is just another argument for why tribes *could* be governmental units, not that they *must* be. The question here is whether Congress unequivocally expressed an intent to abrogate tribal sovereign immunity, not whether tribes walk and talk like governments.

Moreover, the notion of a "'profound mismatch' between the Code and the functions of tribal governments," Resp't Br. 29, skirts tribes' limited ability to exercise traditional governmental powers (*e.g.*, taxation). *See* Pet'rs Br. 18-19; Tribal Amicus Br. 7-12. It is hardly "nonsense" (Resp't Br. 29) to think that Congress may have once again "single[d] out" tribes under federal law in view of their "unique legal status," history, and circumstances. *Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g, P.C.*, 467 U.S. 138, 146 (1984).

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[3] The Government frets (Br. 26-27) about "a trustee's ability to recover and consolidate estate property," including through avoidance of fraudulent transfers. "The proper characterization" of such actions, and its relationship to the *res*, is subject to dispute given that a court's order at least arguably seeks "return of the actual 'property transferred.'" *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 372 & n.10 (2006).

Indeed, federal bankruptcy law prior to the Code's enactment in 1978 did just that: tribes could not avail themselves of the priority treatment of tax claims afforded to federal and state governmental entities. *See* Bankruptcy Act Amendments of 1938, ch. 575, §§ 1(29), 64(a)(4), 52 Stat. 840, 842, 874 (conferring priority status for taxes due "to the United States or any State or any subdivision thereof" only); *see also id.* § 17(a)(1), 52 Stat. 851 (specifying that discharge shall not release bankrupt from debts as "are due as a tax levied by the United States, or any State, county, district, or municipality"). That disproves Respondent's contention (Br. 29) that it is "incongru[ous]" to distinguish between governments in bankruptcy. Neither Respondent nor the Government disputes that longstanding disparate treatment, which Congress expressed no hint of changing (and did not change) in the Code.

B. The Bankruptcy Clause Has No Bearing Here

Trying a constitutional angle, Respondent detours into the origins of the Bankruptcy Clause and claims that "[w]hen 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." Resp't Br. 30. Even assuming Respondent is right at a level of generality, he is wrong when it comes to tribes.

Respondent emphasizes that the Bankruptcy Clause was necessary to "prevent competing sovereigns' interference with the debtor's discharge." Rep't Br. 30. But only "*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.'" *Katz*, 546 U.S. at 373, 377 (emphasis added). Thus, as Respondent concedes, "*Katz*'s holding does not directly control because plan-of-Convention waiver does not extend to tribes." Resp't Br. 31 n.13; *see* Pet'rs Br. 36. Just as it is "absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties," *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991), it is absurd to analyze tribal sovereign immunity under cases holding that state sovereign immunity has no place in bankruptcy.

The same can be said of Respondent's argument that "the 'narrow' nature of [a] bankruptcy court's 'chiefly *in rem*' jurisdiction 'does not implicate *state* sovereignty to nearly the same degree as other kinds of jurisdiction.'" Resp't Br. 32 (emphasis added) (quoting *Katz*, 546 U.S. at 378). The quoted statement from *Katz* is also about state sovereignty.

On top of that, Respondent's action against Petitioners is not *in rem* or for equitable enforcement of the automatic stay. *See* 11 U.S.C. § 105(a). Rather, as noted above, it is one purely for money damages. *See id.* § 362(k)(1); *Nordic Vill.*, 503 U.S. at 38 ("Respondent sought to recover a sum of money, not 'particular dollars,' so there was no *res* to which the court's *in rem* jurisdiction could have attached[.]") (citation omitted). Respondent has never claimed that such an action triggers some sweeping constitutional sovereign immunity exception (that would render abrogation under section 106 unnecessary)—much less one applicable to tribes. To the contrary,

Respondent concedes that the established clear-statement rule applies.

C. This Court Should Reject The Invitation To Usurp Congress's Policymaking Role

Finally, Respondent and the Government attempt to distance themselves from the panel majority's unfounded view that tribes are better off being governmental units under the Bankruptcy Code. Yet they invite this Court to backdoor similar policy considerations into its clear-statement analysis.

In particular, Respondent cites "important federal policy concerns such as debtor protection and ensuring equal treatment for creditors." Resp't Br. 46. The Government advances its view (Br. 32) of how tribes should fit into a "functioning bankruptcy system" and suggests that abrogation of sovereign immunity benefits the tribes. And their amici inject consumer protection and other interests as well. Accounting for those considerations, however, is still the province of Congress. *See* Deborah L. Thorne & Luke L. Sperduto, *Sovereign Immunity Tests Bankruptcy's Least Contested Axioms*, 39 EMORY BANKR. DEV. J. 1, 10, 48-49 (2023) (noting "tradeoffs" and "[i]nherently [p]olitical" choice, and concluding that "[i]f Congress believes that creditor parity is more important than [tribal sovereign immunity], it should specify *** that Tribes are governmental units, because the current language of the Code equivocates"); Pet'rs Br. 47-50.

Plainly, Respondent and the Government believe that bankruptcy policy should prevail over tribal interests. But (similar to the panel majority) they mistakenly discount the preservation of tribal

sovereign immunity as a mere "prefer[ence]." Resp't Br. 46. As the amicus brief of major tribal organizations explains at length, subjecting tribes to over fifty Code provisions not only risks "widespread negative effects on the ability of tribal nations to self-govern and remain self-sufficient"; tribes' concrete experiences in the Ninth Circuit show that treating tribes as governmental units will expose them to "involuntary suits" in bankruptcy courts that end-run tribal proceedings and law, at great cost to tribes even when they prevail. Tribal Amicus Br. 12-23.

While any number of countervailing policy arguments can be made, the tribal amici's disturbing examples underscore why "[t]he baseline position *** is tribal immunity." *Bay Mills*, 572 U.S. at 790. In bankruptcy, as in any other context, this Court may "not lightly assume that Congress in fact intends to undermine Indian self-government." *Id.* Congress has not unequivocally indicated its intention to do so here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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April 13, 2023