

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

LAC DU FLAMBEAU BAND OF)
LAKE SUPERIOR CHIPPEWA INDIANS,)
ET AL.,)
) Petitioners,)
) v.) No. 22-227
BRIAN W. COUGHLIN,)
) Respondent.)

Pages: 1 through 70

Place: Washington, D.C.

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LAC DU FLAMBEAU BAND OF)

LAKE SUPERIOR CHIPPEWA INDIANS,)

ET AL.,)

Petitioners,)

v.) No. 22-227

BRIAN W. COUGHLIN,)

Respondent.)

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Washington, D.C.

Monday, April 24, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

1 APPEARANCES:

2 PRATIK A. SHAH, ESQUIRE, Washington, D.C.; on behalf
3 of the Petitioners.

4 GREGORY G. RAPAWEY, ESQUIRE, Washington, D.C.; on
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6 AUSTIN RAYNOR, Assistant to the Solicitor General,
7 Department of Justice, Washington, D.C.; for the
8 United States, as amicus curiae, supporting the
9 Respondent.

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1 P R O C E E D I N G S

2 (11:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Case 22-227, Lac du Flambeau
5 versus Coughlin.

6 Mr. Shah.

7 ORAL ARGUMENT OF PRATIK A. SHAH

8 ON BEHALF OF THE PETITIONERS

9 MR. SHAH: Mr. Chief Justice, and may
10 it please the Court:

11 The question presented is whether
12 Congress abrogated sovereign immunity with
13 respect to damages actions against Indian tribes
14 in the Bankruptcy Code. The code provision
15 specifying the governmental units whose immunity
16 is abrogated, Section 101(27), names
17 individually the United States, states, and
18 foreign states, as well as the department's
19 agencies and instrumentalities thereof, followed
20 by a residual clause, "or other foreign or
21 domestic government."

22 That definition, like the Bankruptcy
23 Code more broadly, does not refer to Indian
24 tribes specifically, the most obvious and
25 natural means of including them, as Congress has

1 done in every other statute abrogating tribal
2 sovereign immunity. Accordingly, the best
3 construction is that tribes are not included.

4 But this Court need not decide the
5 best construction. All parties agree that the
6 clear statement rule governs, and because of
7 that, the question is whether Congress has
8 unequivocally included tribes so as to abrogate
9 their sovereign immunity. In other words, as
10 this Court has framed the inquiry, is there any
11 plausible way to read the provision as omitting
12 tribes?

13 Petitioners easily surmount that bar.
14 The First Circuit majority's reliance on the
15 generic phrase "other domestic government" to
16 sweep in tribes and apparently only tribes rests
17 on a syllogistic interpretation of the terms
18 "domestic" and "government" in isolation.

19 Even if "other domestic government"
20 could reasonably be construed to refer to
21 tribes, despite their sui generis nature, the
22 provision as a whole doesn't come close to
23 providing the perfect confidence that this Court
24 requires for abrogation.

25 Indeed, Congress has long treated

1 tribes differently than the governmental
2 entities enumerated in Section 101(27),
3 including under the federal bankruptcy statute
4 preceding the code. Congress gave no
5 indication, let alone an unmistakably clear one,
6 that it newly intended to treat the tribes the
7 same in the current code.

8 I welcome the Court -- Court's
9 questions.

10 JUSTICE THOMAS: The -- so, in your
11 thinking and argument, Congress would actually
12 have to say "tribe"?

13 MR. SHAH: Well, Your Honor, I think
14 we could come up with hypothetical formulations
15 that Congress has never used in order to make it
16 abundantly clear that they're -- that they want
17 to cover Indian tribes, but those would be
18 hypothetical.

19 And I think it's fair for this Court
20 to take into account two undisputed realities.
21 One is Congress has never done that before in
22 the history of this country, that is, abrogate
23 the sovereign immunity of tribes without
24 mentioning tribes. Now they could do it, you
25 could imagine, in some formulation, but,

1 presumably, that formulation would not use the
2 standard locution that Congress has always used
3 when referring to the big four. And by "the big
4 four," I mean the United States, states --

5 JUSTICE THOMAS: Well, let me -- I
6 understand that argument. But can you think of
7 any other government, governmental unit, that
8 would be required to be named specifically, as
9 you seem to suggest the tribes would have to be?

10 MR. SHAH: Well, again, Your Honor,
11 it's normally the practice, when -- when
12 Congress is abrogating state sovereign immunity,
13 it mentions states. When the United --

14 JUSTICE THOMAS: I know, but states
15 are -- states have a different -- they have
16 sovereign immunity that has a constitutional
17 basis. Let me --

18 MR. SHAH: Well, Your -- Your Honor,
19 just to respond to that, this Court has been
20 abundantly clear, the United States concedes it,
21 Respondents concede it, that it's the same clear
22 statement rule that applies for states, the
23 United States, and Indian tribes. And I know
24 that some Justices on the Court have disagreed
25 with that, but that's currently the law, and the

1 other side accepts it.

2 JUSTICE THOMAS: Beyond the -- your
3 clear statement rule, can you give me an example
4 of any other government that falls outside of
5 the catch-all phrase?

6 MR. SHAH: That would -- would fall
7 within the catch-all phrase? Other domestic --

8 JUSTICE THOMAS: Or that would be
9 excluded from it. It seems to capture all
10 governments.

11 MR. SHAH: Oh, sure, Your Honor. You
12 know, I guess "Indian tribes" is the most
13 obvious example, but --

14 JUSTICE THOMAS: Well, it's the only
15 one so far.

16 MR. SHAH: Sure. Well, here's --
17 here's one other example. You can imagine
18 governmental entities like the International
19 Monetary Fund, not purely domestic because,
20 obviously, it has foreign governments involved,
21 but not pure -- clearly foreign because the
22 United States is a member.

23 So IMF, World Bank, other entities
24 that have been recognized to possess immunities
25 but not clearly domestic and not clearly

1 foreign. In fact, Congress has passed a
2 separate statute called the International
3 Organizations Act to deal with those not purely
4 domestic and not purely foreign entities. So
5 there's another example of an entity that would
6 not fall within your -- within that residual
7 clause, Your Honor.

8 CHIEF JUSTICE ROBERTS: What if the
9 statute said "every government"?

10 MR. SHAH: Your Honor, that would be
11 harder if it said "every government." But, if
12 it said every government after specifically
13 enumerating three of the big four --

14 CHIEF JUSTICE ROBERTS: No, no, it
15 just said "every government."

16 MR. SHAH: Yeah, if it just said
17 "every government," again, that's a harder case.
18 I -- I -- I still wouldn't give it up because
19 this Court has been very clear that Congress has
20 to be specific, but I grant you that would be a
21 harder case.

22 And, Chief Justice, what I would
23 respond is Congress has used that formulation
24 and then felt the need to clarify. I would
25 point you to the Resource Conservation and

1 Recovery Act, and that's cited on page 25 of our
2 brief, but I think our brief undersold it. If
3 you actually read it in full and quote it in
4 full, it uses a similar formulation. It says
5 you can bring civil actions against persons,
6 including the United States and any other
7 governmental instrumentality or agency. So
8 broader than the residual clause here. Similar
9 to your formulation.

10 But then it felt the need to go and
11 define "person." And in the definition of
12 "person," it lays out the big four: states,
13 United States -- it doesn't mention foreign
14 governments -- and then cross-references the
15 definition of Indian tribes explicitly. So even
16 --

17 JUSTICE BARRETT: But, Mr. Shah, what
18 if -- Mr. Chief Justice's hypothetical said
19 "every government." Would state sovereign
20 immunity be abrogated? Is that a hard question?

21 MR. SHAH: Yeah, I -- I -- I -- I -- I
22 think --

23 JUSTICE BARRETT: It seems to me like
24 you're saying -- it sounds to me your answer,
25 when you said you wouldn't give it up, it's hard

1 for me to see how that would be a hard question
2 for the United States or for a state. So it
3 sounds --

4 MR. SHAH: Sure.

5 JUSTICE BARRETT: -- to me like you're
6 carving out an extra-special super-super clear
7 rule for Indian tribes.

8 MR. SHAH: Well, Your Honor, if I --
9 if we lose under that formulation, that's fine.

10 JUSTICE BARRETT: But why would you --
11 why wouldn't you give it up? Why wouldn't you
12 --

13 MR. SHAH: I will give it up -- I will
14 -- I will give it up, so --

15 JUSTICE BARRETT: Well, you didn't
16 give it up at first. Why did you hesitate?

17 MR. SHAH: Right.

18 JUSTICE BARRETT: Is it that you have
19 to be more explicit for Indian tribes than --

20 MR. SHAH: No.

21 JUSTICE BARRETT: -- for other
22 governments --

23 MR. SHAH: The reason why --

24 JUSTICE BARRETT: -- that have a clear
25 statement rule?

1 MR. SHAH: -- the reason why I
2 hesitated is I am not sure the United States
3 would give it up. You can ask counsel for the
4 United States. They've been very parsimonious
5 when it comes to waiving the sovereign immunity
6 of the United States.

7 But let's -- I'll be willing to give
8 it up. Here's what I think the -- the modifier
9 here is not "every government." It's after you
10 have a list that names three of the big four --
11 the United States, states, and -- there's only
12 four entities that have been well recognized to
13 have sovereign immunity: the United States,
14 states, foreign governments, and Indian tribes.
15 You have a statute that painstakingly names the
16 other three in an abrogation provision, for some
17 reason omits what the First Circuit thought to
18 be the only entity covered by the residual
19 clause. Why would you have a residual clause if
20 it's only there to cover Indian tribes?

21 Congress, in every other statute, when
22 they wanted to abrogate the sovereign immunity
23 of Indian tribes, has said "Indian tribes."
24 "Indian tribes" is shorter. What kind of rules
25 don't follow --

1 JUSTICE KAGAN: You said -- you said,
2 Mr. Shah, for some reason omits. Do you -- do
3 you have a reason? Do you have a theory?

4 MR. SHAH: Sure, Your Honor. I
5 actually have three potential reasons as to why
6 Congress might have omitted Indian tribes. Of
7 course, Bay Mills. This Court has said that's
8 not the right question in a clear statement
9 case. But I'm going to answer your question --

10 JUSTICE KAGAN: We've also said that
11 there should be --

12 MR. SHAH: Sure.

13 JUSTICE KAGAN: -- no -- this is not
14 --

15 MR. SHAH: So --

16 JUSTICE KAGAN: -- a magic words
17 requirement.

18 MR. SHAH: So let -- yes. So --

19 JUSTICE KAGAN: And I think that the
20 difficulty for you is, aren't you really making
21 it into a magic words requirement?

22 MR. SHAH: Right. So let me -- let me
23 give you the three potential explanations and
24 then answer the magic words question. The first
25 one may take a minute, so please bear with me,

1 but I think it's illuminating.

2 The omission of tribes becomes much
3 easier to understand in light of the baseline
4 against which Congress was legislating in the
5 1978 code.

6 The pre-code federal bankruptcy
7 statute, which had been on the books since 1938,
8 that treated tribes differently than the
9 governmental units specified in 101(27). So the
10 disparate treatment is nothing new.

11 And let me be very specific. The
12 other side points to the fact that under -- in
13 the current code, governmental units are
14 entitled to preferential treatment for certain
15 claims, like tax claims. They say Congress
16 couldn't have meant to leave tribes out of that
17 because tribes also levy taxes.

18 But what they don't acknowledge is the
19 pre-code statute, which is cited on page 20 and
20 quoted on page 21 of our reply brief. In the
21 pre-code statute, Congress did exactly that. It
22 extended preferential treatment to tax claims to
23 the United States, states, and municipalities
24 but not Indian tribes. So fast-forward to 1978.
25 Rather than list out the entities separately,

1 Congress creates the definition of "governmental
2 unit" and it uses the same sort of governmental
3 units it used in the 1938 statute.

4 And then, when it wants to give
5 preferential treatment to -- to tax claims, it
6 references that definition of "governmental
7 units," which doesn't include Indian tribes,
8 just like they weren't included under the 1938
9 statute.

10 So my answer to you, Justice Kagan,
11 is, in short, is it's the status quo. Congress
12 didn't extend similar treatment to Indian tribes
13 into the 1938 statute. Now whether it was
14 conscious of that --

15 JUSTICE KAGAN: So, if that's right,
16 Mr. Shah, I mean --

17 MR. SHAH: Yeah.

18 JUSTICE KAGAN: -- that sounds very
19 considered on the part of Congress.

20 MR. SHAH: Yeah.

21 JUSTICE KAGAN: And then wouldn't you
22 have something that says but not Indian tribes?
23 Or at least wouldn't you have said to yourself:
24 You know, if we put in a catch-all clause after
25 we list all these governments, somebody is going

1 to think that includes Indian tribes.

2 MR. SHAH: Well, Justice Kagan, but
3 not Indian tribes is the exact opposite of a
4 clear statement rule. Because of the backdrop
5 of the clear statement rule, in 1978, Your Honor
6 --

7 JUSTICE KAGAN: I think that the point
8 --

9 MR. SHAH: Yeah.

10 JUSTICE KAGAN: -- of the question is
11 --

12 MR. SHAH: Yeah.

13 JUSTICE KAGAN: -- if you were really
14 --

15 MR. SHAH: Sure.

16 JUSTICE KAGAN: -- meaning to exclude
17 Indian tribes, you wouldn't have said --

18 MR. SHAH: Right.

19 JUSTICE KAGAN: -- here are the
20 governments, dah-dah, dah-dah, dah-dah, and
21 everything else that we can think of.

22 MR. SHAH: Well, it may not be that
23 they were trying to exclude Indian tribes. They
24 may have just been trying to continue the status
25 quo from 1938, which was to extend the

1 preferential treatment to the United States,
2 states, and municipalities. The 1938 code makes
3 no mention of Indian tribes receiving that
4 special treatment, so maybe they just want to do
5 the status quo.

6 Now, again, Your Honor, none of us
7 know what Congress --

8 JUSTICE KAVANAUGH: What were your
9 other two --

10 MR. SHAH: -- actually had in mind.

11 JUSTICE KAVANAUGH: -- what were your
12 other two theories?

13 MR. SHAH: Oh. The other two were
14 more affirmative, right? I don't know if that
15 was conscious or accidental or what, Justice
16 Kagan. What I do know is it wasn't clear.

17 But the other two reasons might be
18 more affirmative reasons why Congress would want
19 to treat Indian tribes differently, again,
20 thinking in 1978, remember the code was enacted
21 six months after this Court's decision in Santa
22 Clara Pueblo, which emphatically reinforced the
23 clear statement rule with respect to tribes.

24 Around that same time, Congress was
25 passing statutes, and they're included on page

1 11 of the law professors' amicus brief. These
2 were statutes that were designed to augment
3 tribal self-determination and tribal economic
4 stability.

5 So perhaps Congress made the decision,
6 at the same time they're trying to augment
7 tribal self-determination and tribal economic
8 stability, they're not going to abrogate tribal
9 sovereign immunity. That's one potential --
10 that's a second potential explanation.

11 A third potential explanation is that
12 unlike the states and the United States, which
13 participated in the Constitutional Convention
14 that this Court said in *Katz* kind of struck a
15 bargain in the Federal Bankruptcy Clause that
16 would essentially constitute a semi-waiver of
17 their sovereign immunity, obviously, as this
18 Court has said, the Indian tribes didn't
19 participate in the Constitutional Convention, so
20 it would be absurd to assume that they struck --
21 that's the Court's words, not mine -- to assume
22 that they struck a similar sort of bargain.

23 And so perhaps Congress -- again, none
24 of us know because Congress doesn't refer to
25 tribes even once in the legislative history or

1 in the text -- but perhaps they thought: Okay,
2 well, it doesn't -- it's not as fair to abrogate
3 the sovereign immunity of Indian tribes, who
4 weren't part of that deal or bargain struck in
5 the Constitutional Convention.

6 JUSTICE ALITO: Mr. Shah --

7 JUSTICE SOTOMAYOR: Counsel --

8 JUSTICE ALITO: -- just out of
9 curiosity, could I ask you a few questions about
10 the relationship between the tribe and Lendgreen
11 loans?

12 MR. SHAH: Yes.

13 JUSTICE ALITO: Who actually operates
14 this?

15 MR. SHAH: The tribe does, Your Honor.
16 This is not a rent-a-tribe situation. The other
17 side has never alleged it. Actually, this is a
18 true tribal business. The headquarters is on
19 the reservation. They have 50 to 60 -- this is
20 all outside the record, but I'm just answering
21 your question -- 50 to 60 employees. The money
22 comes from the tribe, tribal accounts. This is
23 a fully tribal operation.

24 Of course, they use third-party
25 vendors, servicers and all, like any other

1 business that may not be tribal lenders, but
2 this is not one of those situations that the
3 amicus brief talks about in other cases about
4 renting tribes' immunity. This is a tribal
5 business.

6 JUSTICE ALITO: Well, what -- what
7 percentage of the people who are actually
8 running this business are tribal members?

9 MR. SHAH: Again, this is outside the
10 record. My knowledge -- and I -- I -- if you
11 take out the outside vendors, 100 percent is my
12 knowledge. It's got 50 to 60 employees who
13 operate out of a headquarters located.

14 Now I can't tell you whether all of
15 those 50, 60 employees who work in the
16 headquarters on the tribal reservation are
17 tribal members, but that's the -- that --
18 that -- that -- that's the extent of my
19 knowledge on that.

20 JUSTICE ALITO: Do you dispute the --
21 the facts that are set out in Respondent's brief
22 about what was done to --

23 MR. SHAH: Your Honor -- Your Honor,
24 the --

25 JUSTICE ALITO: -- his client that

1 even after he -- he filed the bankruptcy
2 petition and notified Lendgreen that he had done
3 so, they continued to contact him, and he
4 attempted to commit suicide, and even when he
5 was in the hospital after this unsuccessful
6 attempt, they were calling him at the hospital
7 to collect this loan?

8 MR. SHAH: Your Honor, this was on a
9 motion to dismiss. That was the posture. There
10 has been no factual development, and the tribe
11 would actually have responses. There hasn't
12 been any factual development here. And so --

13 JUSTICE ALITO: Well, I mean, I under
14 -- I --

15 MR. SHAH: -- what I will say is it is
16 Lendgreen's policy, Your Honor, in this,
17 presumably, if we were to prevail, or if there
18 were factual -- further factual development, it
19 is Lendgreen's policy not to continue collecting
20 debts once it's notified of an automatic stay.

21 JUSTICE ALITO: But it doesn't --

22 MR. SHAH: Now I can't --

23 JUSTICE ALITO: -- it doesn't think
24 it's obligated to abide by the -- by an
25 automatic stay?

1 MR. SHAH: It is, Your Honor. That
2 is -- the tribe's view -- the tribe's view is
3 not, Your Honor, that the Bankruptcy Code
4 doesn't apply to it. What we have here is a
5 damages action for violation of the automatic
6 stay that's seeking hundreds of thousands of
7 dollars in actual damages, like emotional stress
8 damages and all of that.

9 It's not that it doesn't have to abide
10 by an injunction, an Ex parte Young injunction
11 -- or just forget Ex parte Young, that it
12 doesn't -- it does believe it has to abide by
13 the automatic stay.

14 However, if there is a violation of
15 the automatic stay -- one could imagine an Ex
16 parte Young action that would sue the tribal
17 officer -- they would have to abide by that, as
18 this Court said in Bay Mills.

19 What the tribe is saying is you can't
20 sue them for hundreds of thousands of dollars of
21 actual damages. That's at the core of sovereign
22 immunity. And that's what is the issue at
23 stake. Not the tribe's belief it doesn't have
24 to comply with the automatic stay, not the
25 tribe's belief that it wouldn't have to comply

1 with an injunction under Ex parte Young to abide
2 by the automatic stay, but rather just the
3 hundreds of thousands of dollars in --

4 JUSTICE SOTOMAYOR: This might be an
5 easy case if it was only that, but there's more.
6 If they retain tribal immunity, they would be
7 immune from action -- avoidance actions seeking
8 to undo fraudulent transfers of money, as the
9 Sixth Circuit held in Greentown.

10 Why would Congress want to try to keep
11 fraudulent transfers of millions of dollars?

12 MR. SHAH: Your Honor, I think that is
13 an open question. And the tribe doesn't take a
14 position on that actually. We are -- we are
15 here about actual --

16 JUSTICE SOTOMAYOR: You're really
17 going to say that --

18 MR. SHAH: So --

19 JUSTICE SOTOMAYOR: -- Nordic Village
20 is unclear about that?

21 MR. SHAH: No. So --

22 JUSTICE SOTOMAYOR: As is Greentown
23 unclear about that?

24 MR. SHAH: Katz, Your Honor, which
25 came after Nordic Village, cuts the exact

1 opposite way. What this Court said in Katz is,
2 unlike Nordic Village, which seemed to think
3 this was a damages action, the Court in Katz
4 viewed it more as an in rem action. If it's an
5 in rem action as property of the state, then the
6 tribe would have to return the property.

7 So the latest word from this Court is,
8 in fact, suggesting that it's an in rem -- in
9 rem sort of remedy, in which case the tribe --

10 JUSTICE SOTOMAYOR: So why would --

11 MR. SHAH: -- would be --

12 JUSTICE SOTOMAYOR: -- why --

13 MR. SHAH: -- responsible under Ex
14 parte Young.

15 JUSTICE SOTOMAYOR: Tell me why
16 Congress would want to leave that unclear. It
17 seems to me with the catch-all phrase that it
18 wanted to deal with sovereign immunity and to
19 give certain benefits for it and take away
20 certain -- certain restrictions on subjecting it
21 to things like fraudulent transfer.

22 MR. SHAH: Well, Your Honor, if it had
23 wanted to clearly include Indian tribes, which,
24 of course, it had to do under this Court's
25 longstanding jurisprudence and reiterated just

1 six months before the code, if it wanted to
2 clearly include Indian tribes, it could have
3 enumerated them just like Congress did with
4 respect to the United States, states, foreign
5 governments, and just like Congress has done in
6 every other statute. We list both in the
7 abrogation context and outside of the abrogation
8 context.

9 JUSTICE SOTOMAYOR: That -- that is
10 clearly perplexing in this statute because
11 you're absolutely right, in every other
12 situation, it has listed Indian tribes when
13 intended. So that is very, very puzzling.

14 But equally, I guess, the question is,
15 if Congress forgot Indian tribes --

16 MR. SHAH: Yes.

17 JUSTICE SOTOMAYOR: -- is the
18 structure of this so clear that it was meant to
19 include them?

20 MR. SHAH: Well, Your Honor, no. I
21 think, for the reasons that I've said, it
22 exclude -- it excluded them from the code that
23 had been on the books for 40 years. The
24 Bankruptcy Code and the Chandler Act since 1938
25 did not extend that preferential tax treatment

1 to Indian tribes.

2 JUSTICE SOTOMAYOR: But we have a very
3 different history after 1938. We have a history
4 --

5 MR. SHAH: Sure.

6 JUSTICE SOTOMAYOR: -- of the Court
7 itself saying that sovereigns are immune from
8 things like foreign -- fraudulent transfers.

9 MR. SHAH: Right.

10 JUSTICE SOTOMAYOR: That -- and so we
11 have a point, the juncture point, in which
12 Congress is saying: Okay, everyone, foreign or
13 domestic, is going to be included, is going to
14 have their sovereignty waived. We're going to
15 give them certain benefits, and they're going to
16 be subject to certain --

17 MR. SHAH: Sure.

18 JUSTICE SOTOMAYOR: -- obligations,
19 like not to do -- not to violate the stay and
20 not to engage in fraudulent transfers.

21 MR. SHAH: Okay. So I guess a couple
22 responses. One is, again, the tribe -- even if
23 we prevail here, the tribe does have to abide by
24 the automatic stay. And if this Court abides by
25 its view in Katz, it would have to return any

1 fraudulent transfer activity.

2 But let me get beyond that and address
3 your question more head on. If they had used
4 the formulation that you said in your question,
5 every government, foreign or domestic, kind of
6 similar to the Chief Justice's hypothetical, and
7 that's all they said, I would have a tougher
8 argument here. My only argument left would be,
9 well, tribes are kind of sui generis, not really
10 domestic, not really foreign, and maybe I win or
11 lose on that.

12 But that's not what they did here. In
13 1978, six months after this Court issued Santa
14 Clara Pueblo, which refers to the tribes that
15 says they remain a separate people and that
16 you -- Congress has to use unequivocally clear
17 language if it wants to abrogate the sovereign
18 immunity of tribes, six months later, in
19 promulgating the code, they do the most opaque
20 thing possible, which is to list all of the
21 other entities entitled to sovereign immunity --
22 the United States, states, and foreign
23 governments -- and omit Indian tribes, when it's
24 the easiest thing in the world, when in every
25 other statute in the history of the United

1 States it has referred to Indian tribes when it
2 wants to abrogate sovereign immunity.

3 From that, we divine a clear statement
4 that it meant to abrogate tribal sovereign
5 immunity when it had never conferred the
6 benefits of bankruptcy, even under the prior
7 Bankruptcy Code. I think, under normal
8 statutory interpretation, we should prevail,
9 but, under the clear statement rule, it
10 shouldn't be a close question.

11 JUSTICE GORSUCH: Mr. Shah, I think
12 the gist of some of the questions is, while
13 prevailing here would advantage the tribe,
14 obviously, in terms of monetary claims against
15 it, that it would also mean that you'd lose
16 certain benefits for tribes.

17 And on a net basis, could Congress
18 have been concerned that, you know, the rule
19 you're asking for will hurt rather than help
20 tribes? I think that's the gist of some of the
21 questions here, and I just want to get your
22 response to that.

23 MR. SHAH: Sure, Your Honor. Well, of
24 course, the main -- the -- the country's largest
25 tribal organizations have filed an amicus brief

1 supporting --

2 JUSTICE GORSUCH: They're all lined up
3 on your side. I don't see any amici --

4 MR. SHAH: Right.

5 JUSTICE GORSUCH: -- on the other side
6 for the tribes.

7 MR. SHAH: Exactly. So the -- the
8 view of tribes are united that, in fact, that
9 wouldn't be the proper judgment.

10 But to answer your question more
11 fundamentally is, yes, that is a judgment for
12 Congress to make. That is part of the reason
13 why there is a clear statement rule. That is,
14 if Congress -- we want to be really careful that
15 Congress made that judgment and didn't
16 accidentally or unintentionally or otherwise
17 abrogate the sovereign immunity of Indian
18 tribes.

19 Here, this is the furthest thing from
20 a clear statement given the backdrop against
21 which Congress was legislating in 1978 and the
22 fact that every other time they wanted to do it,
23 the easiest thing in the world is to add Indian
24 tribes to the list of entities that they had
25 done.

1 And, again, this is not the "every
2 government, any government under the sun"
3 hypothetical. This is where they painstakingly
4 enumerated the --

5 JUSTICE BARRETT: Okay. So what if
6 they painstakingly enumerated and let's say
7 said, you know, no sovereign immunity for Indian
8 tribes, the United States, or any other domestic
9 or foreign government.

10 MR. SHAH: Yeah, I bet you state --

11 JUSTICE BARRETT: States?

12 MR. SHAH: -- I bet you states would
13 be in here arguing it. Or more particularly --

14 JUSTICE BARRETT: But should they win?
15 I mean, it seems --

16 MR. SHAH: Yeah.

17 JUSTICE BARRETT: -- to me like one
18 way to read this phrase is it's an attempt to
19 cover the waterfront. I'll grant you that it's
20 a little bit odd to have used magic words for
21 the other entities.

22 MR. SHAH: Right.

23 JUSTICE BARRETT: But it looks to me
24 like an effort to cover the waterfront. We have
25 to have a clear statement rule.

1 MR. SHAH: Right.

2 JUSTICE BARRETT: But I just -- if you
3 -- if you have a description --

4 MR. SHAH: Sure.

5 JUSTICE BARRETT: -- at the end that's
6 a catch-all --

7 MR. SHAH: Right.

8 JUSTICE BARRETT: -- that can be --

9 MR. SHAH: Well --

10 JUSTICE BARRETT: -- it -- it seems to
11 me like, to win, you have to say --

12 MR. SHAH: Sure.

13 JUSTICE BARRETT: -- that "domestic
14 and foreign" means not here or there but a --
15 but a word that actually doesn't seem to me the
16 definition is about --

17 MR. SHAH: Right.

18 JUSTICE BARRETT: -- you know, derives
19 from the foundational document or gets its
20 authority from, that's not even really clear to
21 me that that's what the definitions you cite
22 mean.

23 MR. SHAH: Sure. So, Your Honor, I
24 guess two responses. One is, under Atascadero,
25 I think the states would have a pretty strong

1 argument given Atascadero and how emphatic it is
2 on mentioning states very specifically.

3 But, if I'm wrong about that, if you
4 were to find in your hypothetical that, hey,
5 look, even though you mentioned states, Indian
6 tribes, foreign governments, and you left states
7 under the Eleventh Amendment to the residual
8 clause, if you thought that was specific enough,
9 our case is stronger because states, at least
10 you could say, gosh, you are clearly domestic;
11 there is nothing not domestic about you, State.

12 Indian tribes, this Court has grappled
13 for two centuries in trying to describe Indian
14 tribes in its opinions. It has said they are
15 not clearly foreign because, obviously, they
16 have connections to the United States. They are
17 not purely domestic because they have
18 pre-constitutional residual sovereign power.

19 JUSTICE BARRETT: But it says domestic
20 or foreign.

21 MR. SHAH: Right, domestic or foreign.
22 They are neither. Tribes are sui generis. This
23 Court --

24 JUSTICE JACKSON: And the other -- the
25 other governments have sovereign immunity as

1 well. I mean, the thing that I'm struggling
2 with is that all of the passion about sovereign
3 immunity and not abrogating lightly, I think,
4 would make more sense at least to me if we
5 didn't have a clear statement that Congress was
6 interested in abrogating sovereign immunity.

7 It sort of goes back to Justice
8 Barrett's original point, which was it sounds
9 like you're asking for a special, separate rule
10 that preserves the sovereign immunity of tribes
11 in a circumstance in which Congress has clearly
12 indicated that it wants to abrogate the
13 sovereign immunity of governments.

14 MR. SHAH: So, Your Honor, it -- I
15 don't quibble with you. May I finish?

16 CHIEF JUSTICE ROBERTS: Sure.

17 MR. SHAH: Sure. I don't quibble that
18 Congress clearly indicated its intent to
19 abrogate sovereign immunity of certain
20 governmental units, but it then provided a
21 definition of governmental units, right?

22 And the -- the clear statement rule
23 applies to both parts. It has to clearly
24 express its intent to abrogate sovereign
25 immunity, but then it has to clearly identify

1 the governmental units whose immunity it is
2 abrogating, and in that definition, it
3 enumerates three of the big four.

4 Why leave out when, in every other
5 instance, it -- when Congress did want to
6 include Indian tribes, it's named it by name,
7 and leave it to the most vague residual clause
8 which might amply cover states and the United
9 States because the United States and states are
10 clearly domestic.

11 Indian tribes, not clearly domestic.
12 See 200 years of this Court's opinions.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Not clearly domestic, but "dependent
16 domestic nations" is a common term, I would say
17 perhaps --

18 MR. SHAH: Yes.

19 CHIEF JUSTICE ROBERTS: -- the most
20 common.

21 MR. SHAH: Yes, Your Honor. That is a
22 term of art. "Domestic dependent nation" is
23 different than the generic phrase "domestic
24 nation." We have searched the United States
25 Code. There's not a single reference to

1 domestic government encompassing Indian tribes.

2 Domestic -- if -- if Congress had used
3 "domestic dependent nation," I would not be
4 standing here. I would concede completely that
5 that is a term of art that's interchangeable
6 with "Indian tribes." "Domestic government" is
7 not.

8 CHIEF JUSTICE ROBERTS: You've
9 mentioned a couple times the big four.

10 MR. SHAH: Yes.

11 CHIEF JUSTICE ROBERTS: Is there --
12 where has that been used before?

13 MR. SHAH: So I will cite -- so, on
14 page 24 and 25 of our brief, Your Honor, we cite
15 some exemplary statutes. I can represent to you
16 there are many more. That's both in the context
17 of abrogation and outside of. So Footnote 2 on
18 24, these are all statutes outside the context
19 of abrogation. And if you look at it, for
20 example, in any kind of statute defining --

21 CHIEF JUSTICE ROBERTS: Well, you're
22 just saying that that -- there are collections
23 of statutes where you see the four listed?

24 MR. SHAH: That is -- that's the
25 locution that Congress uses when it wants to

1 cover those four governments. It's even more
2 strongly in the abrogation context because of
3 the clear statement rule.

4 That is, in other words, I can't find
5 a single example, and the other side hasn't
6 given one, where it's used the hypothetical that
7 you gave me to start off with, which I probably
8 lose under, but "any and every government under
9 the sun." The one example I found of that is in
10 the example I cited you, the Resource
11 Conservation Recovery Act, and the Clean Water
12 Act repeats it.

13 CHIEF JUSTICE ROBERTS: Yeah.

14 MR. SHAH: But even there, Congress
15 felt the need to then define that term and lay
16 out the big four --

17 CHIEF JUSTICE ROBERTS: Well, I don't
18 mean --

19 MR. SHAH: -- in its definition.

20 CHIEF JUSTICE ROBERTS: It sounds a
21 little bit like, you know, a college football
22 poll, but there are -- there are others here
23 that I can imagine in other contexts would
24 think -- you'd think of them before you'd think
25 of Indian tribes. I mean, it's United States,

1 state, municipality, foreign state, agency of
2 the United States.

3 I don't know -- I think it would
4 depend on your context and how closely it was
5 related to Indian affairs and issues. I don't
6 know that in bankruptcy you would naturally say,
7 when you want to list the governments, that
8 Indian tribes are going to be in the first four.

9 MR. SHAH: Sure, Your Honor. When I
10 mean big four, I mean really when we're talking
11 about abrogation because there really only are
12 four entity -- entities that this Court has
13 recognized as having sovereign immunity in which
14 to abrogate: the United States, states, foreign
15 governments, Indian tribes. That's it.

16 CHIEF JUSTICE ROBERTS: Justice
17 Thomas?

18 Justice Alito?

19 Justice Sotomayor?

20 JUSTICE SOTOMAYOR: I would call it
21 the big five. Territories.

22 MR. SHAH: Territories. Fair -- fair
23 enough. Thank you.

24 And -- and, Justice Sotomayor, what I
25 would add is the statute does include

1 territories by name, Section 101(27). So, when
2 there's doubt, it includes it by name. So now
3 they've included four of the big five, even more
4 in my favor.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?

6 Justice Gorsuch?

7 Justice Kavanaugh?

8 Justice Barrett?

9 JUSTICE BARRETT: No.

10 CHIEF JUSTICE ROBERTS: Justice

11 Jackson?

12 Okay. Thank you, counsel.

13 Mr. Rapawy.

14 ORAL ARGUMENT OF GREGORY G. RAPAWY

15 ON BEHALF OF THE RESPONDENT

16 MR. RAPAWY: Mr. Chief Justice, and

17 may it please the Court:

18 The Bankruptcy Code provides that a
19 governmental unit may not assert sovereign
20 immunity to bar a motion to enforce the
21 automatic stay. The defined class governmental
22 units includes tribes because it includes
23 foreign or domestic governments. Tribes are
24 governments because they exercise governmental
25 authority and perform governmental functions.

1 They are domestic governments because they are
2 subject to the authority of and within the
3 territory of the United States.

4 The Bankruptcy Code respects tribal
5 self-government. It does not treat tribes like
6 private parties but accords them the same status
7 as federal, state, and foreign sovereigns.

8 It recognizes and privileges their
9 governmental functions, which include taxation,
10 the exercise of the police and regulatory
11 powers, and the making and enforcement of family
12 law.

13 But it also holds them accountable, as
14 it does other governmental units, for violations
15 of the code's critical features that define and
16 enforce the Bankruptcy Court's exclusive
17 jurisdiction over the debtor's estate to protect
18 debtors and to ensure equitable treatment of
19 creditors.

20 You have heard from The Band that if
21 Congress had meant tribes, it would have used
22 the particular word "tribes." But Congress can
23 speak clearly in more than one way. And so the
24 focus here should be the unambiguous words that
25 Congress did use, not other words that it might

1 have used but did not.

2 I welcome the Court's questions.

3 JUSTICE THOMAS: Petitioner said that
4 there's been a change in the treatment of tribes
5 under the new Bankruptcy Code.

6 Do you agree with Petitioner, or do
7 you -- and if not, could you elaborate on your
8 differences?

9 MR. RAPAWY: I agree that some of the
10 priority language that they cite in their reply
11 does not include tribal governments. But I
12 would add what I think is an important point,
13 that that status quo is not the status quo
14 today. The definition of "governmental unit"
15 that Congress created in 1978 is clearly broader
16 than the provisions that are cited in the reply.

17 For example, foreign governments are
18 included now as they were not previously
19 included.

20 JUSTICE THOMAS: I'm not quite --
21 Petitioner made the argument, the -- that the
22 domestic and foreign government distinction
23 doesn't seem to work for tribes, that it's
24 neither foreign nor domestic. It seemed -- at
25 least that's the suggestion that I heard.

1 What do you think?

2 MR. RAPAWY: So we -- we do think the
3 tribes are clearly domestic. That is our
4 primary position. But we also think that if you
5 thought that tribes had characteristics of both,
6 they would still be covered by the statute
7 because the phrase is not just "domestic
8 governments" but "foreign or domestic
9 governments."

10 And I would point the Court to
11 Section 102, subsection 5, of the Bankruptcy
12 Code, which states that in the Bankruptcy Code
13 "or" is not exclusive. So, when Congress says
14 "or," as it did in this phrase, it doesn't mean
15 one or the other but not both. It means either
16 or both.

17 And so, to the extent that you have a
18 entity that has both foreign and domestic
19 characteristics, whether it's a tribe, whether
20 it's an intergovernmental organization, it would
21 still be covered by the clause. And we think
22 that applies to all governments.

23 JUSTICE GORSUCH: Mr. Rapawy, let --
24 let's take the first part of that. I mean, you
25 say they're clearly domestic, and you cite Chief

1 Justice Marshall's "domestic dependent nations"
2 language. But even that contains a -- a hint of
3 the -- the difficulty here, "domestic dependent
4 nations," suggesting that they're something
5 other than a state.

6 And then, of course, in Parks, this
7 Court said that tribes are in many respects
8 foreign and independent nations as well.

9 What do we do with that?

10 MR. RAPAWY: Well, let me start with
11 Chief Justice Marshall in Cherokee Nation and
12 say that that opinion does decide very clearly
13 that tribes are a state. And so the -- the --

14 JUSTICE GORSUCH: That they're a
15 state?

16 MR. RAPAWY: That they -- that they
17 count as a state. He says they -- he says that
18 the -- the counsel that was attempting to
19 establish they are a foreign state have --

20 JUSTICE GORSUCH: A foreign state,
21 yeah.

22 MR. RAPAWY: -- that they were --
23 counsel was attempting to establish that they
24 were a foreign state.

25 JUSTICE GORSUCH: Right.

1 MR. RAPAWY: And so Chief Justice
2 Marshall says --

3 JUSTICE GORSUCH: They're not that.

4 MR. RAPAWY: -- they're definitely a
5 state because they have a government -- I mean,
6 I'm paraphrasing slightly, but I do think the
7 opinion will bear this reading -- but they are
8 not a foreign state because they are not foreign
9 to the United States.

10 JUSTICE GORSUCH: Yeah.

11 MR. RAPAWY: So I think that that --

12 JUSTICE GORSUCH: Parks?

13 MR. RAPAWY: -- that a close reading
14 of that reinforces --

15 JUSTICE GORSUCH: How about Parks?

16 MR. RAPAWY: I am blanking on the
17 exact passage that Your -- Your Honor is citing,
18 but I think that generally, when this Court has
19 --

20 JUSTICE GORSUCH: In many respects, a
21 foreign and independent nation. You said
22 similar things about the territories too. I
23 mean, we actually, in the -- in the crazy
24 insular cases, said they are foreign to the
25 United States in a domestic sense.

1 MR. RAPAWY: Well, if you were to
2 conclude --

3 JUSTICE GORSUCH: Whatever that means.

4 MR. RAPAWY: Understood, Your Honor.

5 So, if you were to conclude that
6 there's doubt whether -- that -- that -- that
7 they're domestic and -- then I would proceed to
8 my -- my fallback --

9 JUSTICE GORSUCH: Yeah. Before --

10 MR. RAPAWY: -- which is the
11 government's lead position.

12 JUSTICE GORSUCH: -- before we leave
13 that, though, let's say -- I'll give you a silly
14 hypothetical.

15 Let's say I invite you to go to my
16 refrigerator and take out either vanilla or
17 chocolate ice cream and help yourself.

18 Does that license you to take the last
19 scoop of the chocolate-vanilla swirl ice cream
20 in a separate container, maybe one with a note
21 on it that says "Reserved for a later birthday"?

22 MR. RAPAWY: In that case, Justice
23 Gorsuch, the "or" would be exclusive. I would
24 under -- as your guest, I would be bound to read
25 that "or" as exclusive, one or the other, but

1 not something with characteristics of both.

2 But, in the Bankruptcy Code, "or" is
3 not exclusive, and so, if it has characteristics
4 of both, it's still included.

5 But I don't want to give up the
6 argument that tribes are domestic because I
7 think that the question here is not whether
8 there may have been doubt at one time, and,
9 certainly, there was some doubt expressed before
10 Chief Justice Marshall came down the way he did
11 in 1831, and there may be later cases, the
12 insular cases that -- that use the term
13 "foreign" in -- in -- with respect to things
14 that would be domestic under our test, but,
15 rather, what -- what would Congress have meant
16 in 1978 by using the word "domestic"?

17 And I think that by 1978, after the
18 many times that this Court had used the phrase
19 "domestic dependent nations" and the -- the --
20 the -- the -- that a -- a reasonable person
21 reading the statute at that time would say:
22 Yes, tribes are clearly domestic. That is --
23 that is clear now, even if it might have been a
24 doubt -- in doubt at one time in the past.

25 JUSTICE KAGAN: Mr. Rapawy, I mean,

1 this is just a very odd statute. It lists all
2 these different kinds of governments,
3 governments that really never show up in our
4 abrogation cases.

5 And -- and -- and it doesn't list
6 Indians. It doesn't list tribes. Even though,
7 you know, you want to call it the big four, you
8 want to call it the big five, it's pretty clear
9 that tribes are out there and that they have
10 sovereign characteristics. And this statute
11 just doesn't say tribes or Indians. Why not?

12 MR. RAPAWEY: So I don't know what was
13 in Congress's mind, Your Honor, and none of us
14 can really know that. But, when I look at the
15 words that they enacted, it looks to me like
16 they were trying to cover the waterfront, as --
17 as Justice Barrett suggested earlier.

18 And I think that this -- this -- this
19 type of enumeration, lots of different
20 governments with lots of different
21 characteristics with very different relations to
22 the United States and then a concluding clause
23 that says "or other foreign or domestic
24 governments as well," is a natural way to do
25 that.

1 JUSTICE KAGAN: I mean, I agree with
2 you that this looks like a trying-to-cover-the-
3 waterfront statute. It just has this -- this
4 question, really, at the heart of it, like, if
5 you were trying to cover the waterfront, why
6 aren't you listing tribes, which is, like, so
7 much more obvious than all the things that they
8 do list?

9 MR. RAPAWY: I do not have a -- an
10 answer to that question, other than to say that
11 I think that the Court should construe the
12 statute according to the words that Congress
13 used.

14 And I think that if you were in any
15 doubt about that from the language alone in --
16 in 101(27), you should look to the other
17 supporting provisions of the statute that also,
18 I think, unequivocally support our reading.

19 JUSTICE KAVANAUGH: What about the
20 historical practice, though, of Congress using
21 "tribe" when it wanted to include tribes?
22 Against that backdrop, doesn't the failure to
23 mention tribes that Justice Kagan points out
24 create at least some ambiguity?

25 MR. RAPAWY: I think that's

1 overstated, Justice Kavanaugh. I think that if
2 you -- if you look at the statutes that
3 they've -- that they've cited, I mean, we
4 focused specifically on the abrogation statutes.

5 There were particular reasons for
6 Congress to name tribes rather than -- than
7 using a general term because the general terms
8 they were using were general terms that would
9 also cover non-sovereigns.

10 And under Atascadero, if you use a
11 general term that covers both sovereigns and
12 non-sovereigns and you authorize suit, you
13 haven't been clear enough. Obviously, that's
14 not this case because 106(a) says we are very
15 clearly abrogating sovereign immunity.

16 But, in the cases that they -- that
17 they deal with, either you have -- they -- they
18 reference to tribes because they're dealing
19 specifically with tribes, such as in the -- in
20 IGRA and there's one, the Indian -- I think the
21 Indian Self-Determination and Education Act has
22 an abrogation as well. But, regardless, they're
23 tribe-specific statutes, or they're statutes
24 that fit the model of, well, we're going to say
25 -- say that a municipality can and can't do

1 certain things, and we'll include tribe in a
2 municipality. Well, ordinarily, you wouldn't
3 read the phrase "municipality" to -- to include
4 tribe, so you have to include it. And,
5 likewise, with the phrase "person," you
6 ordinarily wouldn't read the phrase "person" to
7 include a sovereign like a tribe, so you have to
8 include it expressly.

9 But, when you have a statute that --
10 dealing specifically with governments that uses
11 a general term "governmental units" and the --
12 the -- the meaning of the defined term itself is
13 relevant to the Court's statutory analysis, then
14 "governmental units" standing alone would
15 ordinarily be read, I think, to include tribes.

16 JUSTICE JACKSON: Suppose we think
17 that -- suppose we think that Congress just
18 forgot about tribes. Do you lose then under the
19 clear statement rule?

20 MR. RAPAWY: I don't -- so I would --
21 I would resist the premise, but even -- if you
22 -- if you think that -- when you say Congress
23 forgot about tribes, if individuals -- if the
24 people who wrote the words on the page in their
25 individual human minds had -- did not -- were

1 not thinking about the problem, but they used
2 words that by their ordinary and natural meaning
3 include tribes, I think we still win.

4 And I think that there -- that the --
5 the goal of trying to pursue that subjective
6 mental state of individual legislators or
7 individual drafters is one this Court has
8 largely abandoned, and I -- I think that's a--
9 that's a -- the approach we would urge in this
10 case.

11 And if I could go back for a second to
12 the broader context, I would also like to point
13 to the -- the -- the other ways in which the --
14 the code uses the phrase "governmental unit" to
15 -- largely to confer benefits. But our point
16 isn't really that they're benefits. Our point
17 is that the -- and we're not asking the Court to
18 weigh costs and benefits. We're asking the
19 Court to read the statute as a whole.

20 And so the kinds of entities that --
21 that Congress did have in its metaphorical mind
22 when it passed the code were entities that tax
23 because it was talking about governmental units
24 as levying and assessing taxes, and it made
25 special exceptions to ordinary bankruptcy rules

1 for taxes because taxes are important.

2 And it was also thinking about
3 entities that exercise police and regulatory
4 power, which tribes can do, and it made
5 exceptions to the automatic stay for exercises
6 of police and regulatory power because that's --
7 that's important too. And then family law, we
8 give the -- the example in our brief of domestic
9 support obligations, child support and alimony,
10 that are defined in Section 101(14A) to include
11 these, you know, partially by reference to
12 governmental units. And Congress made -- gave
13 special treatment to that because that's
14 important.

15 And all -- looking at all of that
16 together, that tells you that tribes perform the
17 kind of governmental functions that the code
18 recognizes and gives -- gives that special
19 treatment to.

20 I would -- and -- and -- and those --
21 those exceptions, you know, there was a point
22 made in the reply, I think, that, well, it
23 doesn't matter if there's an exception for
24 tribes because there are lots of other
25 exceptions as well. But the exceptions that

1 Congress made are part of a detailed system that
2 balances bankruptcy and non-bankruptcy issues
3 and that does not include an exception for the
4 types of loans at issue here, which I concede
5 it's possible Congress might not have thought of
6 governments engaging in those type of loans,
7 these -- these -- these triple-digit online
8 loans in -- in 1978. Certainly, they wouldn't
9 have contemplated the Internet.

10 But, nonetheless, there is no
11 exception for this type of conduct. There
12 shouldn't be an exception for this type of
13 conduct. And you don't have to read the code to
14 create an exception for this type of conduct.

15 CHIEF JUSTICE ROBERTS: Justice
16 Thomas?

17 Justice Sotomayor?

18 Justice Kavanaugh?

19 Justice Jackson?

20 JUSTICE JACKSON: Can I just ask, why
21 shouldn't we require a clear indication that
22 Congress actually considered the tribes? I
23 mean, Justice Kagan points out we do have a
24 detailed list. They clearly considered other
25 entities. And having not considered supposedly

1 or maybe tribes, why isn't that just dispositive
2 of the clear statement issue?

3 MR. RAPAWY: Well, I think, if -- the
4 clear statement rule is a textual rule. The
5 Court doesn't look to legislative history. And
6 the -- and the cases that have talked about
7 actually considering tribes, like United States
8 versus Dion, it's a treaty abrogation case, they
9 say, well, you can find the -- the evidence in
10 the legislative history.

11 JUSTICE JACKSON: Well, no, I'm
12 talking about the text. We have a list, a
13 detailed list, of many kinds of entities,
14 including territories and municipalities and
15 other entities that are spelled out in the
16 definition.

17 Tribes are not included. So why isn't
18 that dispositive? I understand the magic words,
19 you know, sort of take on clear statement, but
20 if the idea is we want to make sure that
21 Congress actually considered the entities that
22 are being affected by this rule, we have
23 evidence that they considered others because
24 they listed them in the statute, and, here,
25 tribes don't appear, why isn't that just the

1 answer?

2 MR. RAPAWEY: I think that the -- the
3 reason why that's not the answer, Justice
4 Jackson, is because the clear statement rule is
5 a -- is a tool for interpreting the law and a
6 way of determining congressional intent, not a
7 way of imposing a heightened burden on
8 Congress's exercise of powers that it concededly
9 has within the Constitution.

10 And so, to say, well, these words do
11 include tribes, as I -- which I think -- I don't
12 want to mischaracterize Your Honor's
13 hypothetical, but I think that's the thrust of
14 the question. The words include tribes because
15 -- by their plain meaning, but because the
16 specific word "tribes" aren't there -- isn't
17 there, we will not presume that Congress meant
18 it. That would, I think, be an approach that
19 this Court has rightfully rejected as
20 inconsistent with the legislative -- with the
21 judicial role, excuse me, to construe the law
22 that Congress has applied.

23 JUSTICE JACKSON: Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Raynor?

2 ORAL ARGUMENT OF AUSTIN RAYNOR

3 FOR THE UNITED STATES, AS AMICUS CURIAE,

4 SUPPORTING THE RESPONDENT

5 MR. RAYNOR: Mr. Chief Justice, and
6 may it please the Court:

7 The Bankruptcy Code unequivocally
8 abrogates the sovereign immunity of the United
9 States, states, districts, territories, foreign
10 states, instrumentalities or agencies of any of
11 those governments, and other foreign or domestic
12 governments. That language unambiguously
13 encompasses all governments, including Indian
14 tribes.

15 Petitioners respond principally that
16 the statute does not use the word "Indian" or
17 "tribe." But it's hornbook law that Congress
18 does not need to use those words to abrogate
19 tribal immunity.

20 Petitioners also suggest that the
21 words "foreign or domestic" are words of
22 exclusion designed to exclude tribes and only
23 tribes from an otherwise all-encompassing
24 definition. That's not a plausible
25 understanding of congressional intent.

1 Instead, Congress chose those words to
2 stress the breadth and comprehensiveness of its
3 chosen definition.

4 I welcome this Court's questions.

5 CHIEF JUSTICE ROBERTS: Well, but, I
6 mean, the biggest hurdle I think you have to get
7 over is that they -- everywhere else they use
8 the word "tribe" and they didn't here, and
9 they've got a long list of other type of
10 governmental agencies.

11 I mean, you don't have to be in the
12 big four or big five because they're, I don't
13 know -- you must have counted them -- it looks
14 like at least a dozen, and, surely, they're in
15 the top dozen. So is -- this is the only
16 instance where they haven't used the word
17 "tribe" or "Indian" when they meant to include
18 them, right?

19 MR. RAYNOR: This is the only one
20 we're aware of. That doesn't mean there aren't
21 unlitigated statutes out there that might
22 encompass tribes. I will say that there are
23 other contexts in -- in terms of where Congress
24 has abrogated sovereign immunity where they
25 didn't specify particular units of government.

1 So Title VII is a classic example. The Court
2 has found in Fitzpatrick that Title VII
3 abrogates state sovereign immunity even though
4 it doesn't use the word "state."

5 And I don't think Congress's prior
6 practice can be dispositive here for a couple
7 reasons. One is that it would amount to a rule
8 of adverse possession. I think Petitioners'
9 basic argument is that even if Congress wasn't
10 required to use the word "tribe" at the
11 beginning, when it started legislating as to
12 tribes, once it has been hyper-clear in all
13 these statutes using the word "tribe" over and
14 over, its drafting discretion is now constrained
15 going forward.

16 And that's just not how this Court has
17 traditionally thought of clear statement rules.
18 Congress has to provide a clear statement, but
19 what it's done in the past doesn't dictate what
20 counts as a clear statement.

21 JUSTICE BARRETT: Mr. Raynor, do you
22 want to take a position on the question that I
23 asked your friend on the other side about, if a
24 statement -- if Congress enacts a provision that
25 says we abrogate the sovereign immunity of all

1 governments, domestic and foreign, include the
2 United States or not?

3 MR. RAYNOR: Yes, we think that would
4 include the United States.

5 JUSTICE BARRETT: Okay.

6 MR. RAYNOR: And I think, actually,
7 that hypothetical plays up a weakness in their
8 position because what they are arguing is that
9 by using the phrase "foreign or domestic" rather
10 than "every government," Congress intended that
11 as kind of a convoluted way of excluding these
12 entities that Petitioners characterize as
13 twilight entities, like the IMF or Indian
14 tribes.

15 So rather than using "foreign or
16 domestic" to make clear that it was covering the
17 waterfront, Congress used that as a backdoor way
18 to cut out entities that in Petitioners' view
19 don't fit into either bucket.

20 But we just don't think that's a
21 plausible way to think about what Congress was
22 doing here when it provided this comprehensive
23 list followed by a broad catch-all clause.

24 JUSTICE KAVANAUGH: When you refer to
25 adverse possession, another way to describe that

1 is Congress's customary practice that we discern
2 over time from decades of practice. I think
3 your office relies on that at times, as does
4 every -- as does the Court.

5 So why does the word "adverse
6 possession," that term, answer the -- the
7 concern here?

8 MR. RAYNOR: Justice Kavanaugh, I
9 acknowledge that Congress's prior practice is
10 probative. The Court has looked to that in
11 various cases. I think the problem is that it
12 can't be dispositive in the way that Petitioners
13 are suggesting. What Petitioners are suggesting
14 is that Congress has always done this and -- and
15 therefore, it's required to do it going forward.

16 JUSTICE KAVANAUGH: I think -- I think
17 they're saying it just creates some doubt, and
18 that's enough when the standard is unambiguously
19 abrogate.

20 MR. RAYNOR: Right. And I don't think
21 it is sufficient to create an alternative
22 plausible reading. That's what they need to do
23 here, is to show that their reading is a
24 plausible one. I don't think that it's
25 sufficient to do that.

1 And as counsel for Respondents pointed
2 out, many of these prior statutes are easily
3 distinguishable. So, when Congress passes a
4 statute that is specifically targeted at Indian
5 tribes, like the Indian Gaming Regulatory Act is
6 one of their examples, of course, that statute
7 is going to use the word "Indian" or "tribe."

8 In a lot of the other statutes,
9 Congress is specifying a subset of governments
10 rather than all governments. And when it does
11 that, it makes sense that Congress would have to
12 list the governments that it's thinking about.
13 It can't use comprehensive language because it's
14 not trying to pick up on the universe of
15 governments like it's doing here.

16 JUSTICE KAGAN: So what's your theory
17 of why tribes or Indians don't appear in this
18 quite long list?

19 MR. RAYNOR: It's a hard question. I
20 think this is sort of akin to Paroline, the
21 statutory structure in the Paroline case. I
22 think the best explanation is that Congress was
23 listing the entities that it thought were most
24 likely to be implicated in a bankruptcy
25 proceeding and then added a broad catch-all

1 clause to sweep in everybody else.

2 It wouldn't be that surprising that
3 Congress wasn't thinking of tribes in the 1970s.
4 This was before the modern boom of tribal
5 participation in the mod -- in the economy.
6 This was before the Indian Gaming Regulatory
7 Act, which was passed a decade later.

8 So I don't think it's that surprising
9 that they didn't list tribes. That being said,
10 I would resist the notion that what we're doing
11 here is sort of a subjective inquiry into
12 Congress's intent. I think the test is, did it
13 clearly articulate the inclusion of tribes?
14 And, here, the catch-all language is sufficient
15 to do that.

16 I also want to talk for a second about
17 history. My friend on the other side pointed
18 out that the code prior to 1978 treated tribes
19 differently at least implicitly than it treated
20 the United States and states in that it didn't
21 accord them a tax preference.

22 I don't think that's probative at all.
23 1978 is a reset. There was no across-the-board
24 definition of "governmental unit" in the pre-'78
25 Bankruptcy Act.

1 In 1978, Congress adopts a definition
2 of "governmental unit" that applies across the
3 board. And it's different in many respects. It
4 includes foreign states and it also includes a
5 catch-all clause. There's just no presumption
6 here of continuity with the pre-'78 law and the
7 1978 code.

8 JUSTICE KAVANAUGH: You're not saying
9 he's mistaken about the pre-'78 history. You're
10 just saying it doesn't translate, is that
11 correct?

12 MR. RAYNOR: Correct. Exactly.
13 There's -- there's no reason to think that
14 Congress was trying to do the same thing in the
15 '78 code that it had been doing before. In
16 fact, there's every reason to think that it was
17 trying to depart from the scope of -- of the
18 pre-'78 code.

19 I'd also like to mention for a moment
20 the operation of the Bankruptcy Code. I don't
21 think the Court needs to get to this because I
22 think the text is clear here, but if you read
23 this language in context of the rest of the
24 code, it's clear that the rest of the code would
25 not function the way Congress thought it would

1 function.

2 This is a classic structural analysis.
3 Petitioners try to suggest that that is like an
4 embedded policy analysis, but frequently the
5 Court looks to the effect that an interpretation
6 would have on other provisions in discerning
7 whether that interpretation is correct.

8 Utility Air Regulatory Group, I think,
9 is a case that does this exact same kind of
10 structural analysis.

11 JUSTICE KAGAN: What else do you think
12 gets included in this catch-all clause?

13 MR. RAYNOR: That's a hard question.
14 I think we probably agree with Petitioners that
15 some interstate compact entities would be
16 included in the catch-all clause. They give the
17 example of WMATA. We're probably on the same
18 page that that would also fall within the
19 catch-all clause. Instrumentalities of tribes
20 would likely fall within the catch-all clause.
21 Instrumentalities are listed in the proceeding.
22 And so this isn't a catch-all clause of one in
23 our view.

24 JUSTICE KAGAN: Well,
25 instrumentalities of tribes really are just like

1 tribes, right? I mean, the structure of this
2 stat -- this statutory provision is a bunch of
3 things, plus their instrumentality. So I don't
4 think that got -- that gets you past one.

5 MR. RAYNOR: Correct. Well, I mean,
6 but I concede the WMATA point. I mean, that's
7 at least past one. And the list items do treat
8 instrumentalities as separate, but it treats
9 them all as governments, so they would fall in
10 the catch-all clause for that reason.

11 CHIEF JUSTICE ROBERTS: Well, I think
12 WMATA would probably have a better argument that
13 they're not included. I mean, I don't -- these
14 various -- various governmental agencies like
15 that, some have sovereign immunity; some don't.
16 And to say that they're -- they thought about
17 covering WMATA but didn't mention it, that would
18 seem surprising.

19 MR. RAYNOR: Our position isn't that
20 they subjectively thought about that. And to be
21 clear, the list isn't limited to entities with
22 sovereign immunity. So it includes
23 municipalities, for example, which don't enjoy
24 sovereign immunity, except when they're acting
25 as arms of the state. And whether an interstate

1 compact entity enjoys sovereign immunity will
2 depend on -- on the Hess test.

3 JUSTICE JACKSON: And the list -- the
4 list is apart from the abrogation section,
5 right? Were those enacted at the same time?

6 MR. RAYNOR: So there was an
7 abrogation enacted in 1978 at the same time as
8 the definitional section in 101(27). The
9 abrogation was expanded in its scope in 1994,
10 but, because there was a more limited abrogation
11 in 1978, the clear statement rule would have
12 applied from the beginning.

13 I do think it's important, though,
14 Justice Jackson, to emphasize that there is a
15 clear abrogation here. Congress was thinking
16 about sovereign immunity. It said we are
17 abrogating sovereign immunity, and it said we
18 are doing it to this broad category of
19 governments.

20 This isn't a situation like where
21 Congress has said, you can sue a person, and
22 "person" happens to be defined to include
23 governments. And there's no indication that
24 Congress has thought about immunity
25 specifically.

1 We know here that Congress was
2 thinking about immunity when it provided this
3 broad list of governments.

4 If there's no further questions.

5 CHIEF JUSTICE ROBERTS: Justice
6 Thomas?

7 JUSTICE THOMAS: Mr. Raynor, you said
8 that the tribal involvement in the economy has
9 changed since 1978.

10 Does that include the off-reservation
11 commercial activity of tribes?

12 MR. RAYNOR: Yes, Justice Thomas. As
13 this Court has noted, tribes are more involved
14 now than they used to be. And I offer that to
15 Justice Kagan as sort of a speculation about why
16 Congress might not have mentioned tribes, but to
17 be clear, none of our argument turns on the
18 degree of tribal involvement in the economy.

19 We think tribes are included in this
20 definition regardless of how frequently they'll
21 be implicated in bankruptcy proceedings.

22 CHIEF JUSTICE ROBERTS: Justice Alito?

23 Justice Sotomayor?

24 Justice Gorsuch?

25 Justice Jackson? I -- Justice

1 Jackson.

2 Justice Barrett?

3 Okay. Thank you, counsel.

4 MR. RAYNOR: Thank you.

5 CHIEF JUSTICE ROBERTS: Rebuttal?

6 REBUTTAL ARGUMENT OF PRATIK A. SHAH

7 ON BEHALF OF THE PETITIONERS

8 MR. SHAH: Thank you, Your Honor. I'd
9 just like to make two points.

10 First, our position isn't that it's
11 wholly unreasonable to read the phrase in
12 abstract "foreign or domestic government" as
13 including Indian tribes. There are reasonable
14 arguments that maybe it could be included. But
15 that's not the question here today.

16 Is it unequivocally clear, given the
17 structure that Congress used, serially listing
18 each of the big four, big five, and a bunch of
19 others but leaving out Indian tribes, is it
20 abundantly clear that they wanted to include
21 Indian tribes when adopting that structure?

22 The answer to that has to be no. And
23 there's two strong presumptions that at least
24 create doubt about that.

25 The first is the conceded history.

1 The other side no doubt has exhaustively
2 searched the code and cannot find a single
3 example in the history of this country where
4 Congress has abrogated the sovereign immunity of
5 tribes without mentioning tribes. That's not a
6 magic words test. That's simply applying all
7 the cases this Court has said is, you don't
8 disregard the standard practice of doing, of
9 Congress enacting legislation, when you're
10 interpreting legislation.

11 They try to distinguish one-off
12 examples. Oh, it occurs in the context of
13 Indian tribes. Well, a general statute, you
14 would expect more reason to signify Indian
15 tribes than in Indian statutes. And there are a
16 whole lot of examples that don't fall in that
17 bucket. The Federal Debt Collection Procedures
18 Act cited on page 25 of our brief, again,
19 nothing to do with tribes, yet enumerates states
20 alongside tribes.

21 The second predicate to that is the
22 fact that when addressing these sort of
23 sovereign entities, certainly, when it lists
24 them, it lists all of them. It does it by name.

25 Again, we cited those statutes on page

1 24 of our brief. It would be exceedingly odd
2 for Congress to have gone through all of this
3 trouble and then decide to use a generic
4 catch-all phrase that has never been used in the
5 history of this Court's jurisprudence to refer
6 to Indian tribes to capture Indian tribes under
7 a clear statement rule.

8 The last point I will make is the
9 Solicitor General argues that -- takes on the
10 history of what Congress was trying to do in
11 1978. Everyone concedes that in the decades
12 preceding the Federal Bankruptcy Code, Congress,
13 in fact, treated tribes differently. It did not
14 extend to them the preferential treatment for
15 tax claims.

16 It continued not to extend to tribes
17 in the 1978 code preferential treatment for tax
18 claims. That ended up being moved into the
19 definition of "governmental units." I can't
20 tell you whether Congress specifically intended
21 when they used that same definition to
22 cross-reference the abrogation, whether they
23 specifically thought about whether they were
24 including tribes or not, but what I can tell you
25 is they didn't unequivocally include them.

1 Thank you, Your Honor.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel. The case is submitted.

4 (Whereupon, at 12:02 p.m., the case
5 was submitted.)

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