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

BRIEF IN OPPOSITION

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November 8, 2022

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QUESTION PRESENTED

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

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INTRODUCTION

The Lac du Flambeau Band of Lake Superior Chippewa Indians owns a number of corporate entities. One of those entities, Niiwin, LLC (operating under the name "Lendgreen"), makes payday loans over the Internet, charging triple-digit interest rates. Lendgreen claims that its rates are authorized by tribal law and that it cannot be sued over its lending practices because it is an "arm of the tribe" that shares in the Band's tribal sovereign immunity.

In July 2020, during a period of financial and psychological distress, Brian W. Coughlin made the mistake of taking a $1,100 loan from Lendgreen, which charged him an effective annual interest rate of 107.9%. Later that year, Coughlin's debts grew beyond his ability to pay, and he sought protection under Chapter 13 of the Bankruptcy Code. His filing of that petition operated as an automatic stay of all collection attempts.

Even after receiving notice of the stay from Coughlin's counsel and Coughlin personally, Lendgreen continued attempting to collect Coughlin's debt. It sent threatening emails and made harassing phone calls on a regular (sometimes daily) basis. Coughlin, who suffers from severe clinical depression, ultimately attempted to take his own life. While he was in the hospital recovering from that attempt, Lendgreen kept harassing him.

Coughlin moved the bankruptcy court to enforce the automatic stay. The Band and its corporations, including Lendgreen, asserted tribal immunity from suit, and the court dismissed Coughlin's motion. On appeal, the First Circuit held that the Bankruptcy Code unequivocally abrogates the Band's immunity. It relied on the Code's express "abrogat[ion]" of "sovereign immunity" for a "governmental unit," 11

U.S.C. § 106(a), a term defined to include not only the United States, the several States, and foreign states, but "other foreign or domestic government[s]," *id.* § 101(27). Because a tribe is a "domestic government" within the ordinary meaning of those words, the Code abrogates tribal immunity from suit.

Review of that interlocutory decision is not warranted at this time. Although the First and Ninth Circuits now disagree with the Sixth Circuit, that conflict is recent and shallow. It may resolve without this Court's intervention. Percolation may better develop the arguments on both sides. The Band fails to show any need for urgent review. The First Circuit's decision is also firmly grounded in traditional methods of statutory interpretation and consistent with this Court's precedent on tribal immunity. The petition should therefore be denied.

STATEMENT

1. When a debtor seeks federal bankruptcy protection, the Bankruptcy Code automatically imposes "a stay, applicable to all entities," of all efforts to collect the debtor's prepetition debts, including "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(6). "The automatic stay serves the debtor's interests by protecting the estate from dismemberment, and it also benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of the others." *City of Chicago v. Fulton*, 141 S. Ct. 585, 589 (2021). It is "'one of the fundamental debtor protections provided by the bankruptcy laws.'" *Midlantic Nat'l Bank v. New Jersey Dep't of Envt'l Prot.*, 474 U.S. 494, 503 (1986) (quoting S. Rep. No. 95-989, at 54 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840). A debtor injured by

a "willful violation" of the automatic stay has a cause of action to "recover actual damages, including costs and attorney's fees." 11 U.S.C. § 362(k)(1).

Congress has authorized the bankruptcy courts to enforce the Code's automatic stay even against sovereign entities. That authority is granted by § 106(a), which "abrogate[s]" the "sovereign immunity" of a "governmental unit" with respect to section 362 and certain other sections; permits "[t]he court [to] hear and determine any issue arising with respect to the application of such sections to governmental units"; and authorizes the court to "issue against a governmental unit an order, process, or judgment under such sections," including "an order or judgment awarding a money recovery." *Id.* § 106(a). The Code further defines a "governmental unit" to mean "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." *Id.* § 101(27).

2. Petitioners are the Lac du Flambeau Band of Lake Superior Chippewa Indians, a federally recognized Indian tribe, together with several of its directly and indirectly owned corporate entities: L.D.F. Business Development Corp., L.D.F. Holdings, LLC, and, at the bottom of the corporate chain, Niiwin, LLC, which does business as "Lendgreen." *See* Pet. 5 n.1.[1] Lendgreen is an online payday lender; it makes small, high-interest loans over the Internet. The

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

loans, which in some instances have featured annual percentage rates as high as 838.85%, purport to be governed by the Band's laws rather than the laws of the States in which borrowers reside. C.A. App. 305.

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

3. Respondent Brian Coughlin is the debtor in a Chapter 13 bankruptcy proceeding in the District of Massachusetts. In 2019, he went through a time of financial distress. In July 2019, he took out a $1,100 short-term loan from Lendgreen. App. 3a. In December 2019, he filed voluntarily for bankruptcy, listing the debt to Lendgreen, which by that time was nearly $1,600, on his petition. App. 3a-4a, 54a. Coughlin's bankruptcy counsel mailed notice of Coughlin's bankruptcy filing to Lendgreen, including a copy of Coughlin's proposed Chapter 13 plan to pay off his debts. App. 4a.

Coughlin's Chapter 13 petition triggered the automatic stay under § 362(a), requiring Lendgreen to cease attempting to collect on its loan agreement. Lendgreen did not comply. Instead, it contacted Coughlin frequently (sometimes daily) to urge him to pay his debt and to threaten him with consequences if he did not. App. 4a; C.A. App. 88-90. Coughlin

told Lendgreen's representatives that he had filed for bankruptcy and asked them to contact his lawyer. C.A. App. 116, 145. Lendgreen did not stop calling and emailing Coughlin directly. *Id.* at 88-90.

Coughlin suffers from severe clinical depression. *Id.* at 116-17, 145. Lendgreen's continuing harassment "compounded" and "escalated" the effects of his financial distress on his mental condition, "constantly . . . remind[ing]" him of his troubles. *Id.* at 117, 145. He suffered "sleepless nights" and "rising anxiety and depression." *Id.* at 146. On February 9, 2020, his "mental and financial agony," App. 4a, led him to "attempt[] suicide due to [his] overwhelming stress, anxiety and lack of hope for a better life." C.A. App. 117, 146; *see also id.* at 118 ("The actions taken by LendGreen . . . literally 'sent me over the edge' . . . ."). As a result of his suicide attempt, Coughlin was hospitalized for 11 days. *Id.* at 146, 149-60. Lendgreen continued to call him in the hospital and afterwards. *Id.* at 89-90, 146.

4. On March 25, 2020, Coughlin moved to enforce the bankruptcy stay against the Band and its corporate entities, including Lendgreen. App. 4a. Invoking § 362(k), he sought to recover his damages, including his medical bills and lost vacation time from work; his attorney's fees; and an order against further collection efforts. *Id.* The Band moved to dismiss, asserting that the Band was immune from suit under the doctrine of tribal immunity. *Id.*[2] The Band's corporate entities further asserted that they

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

shared in the Band's immunity under the "arm of the tribe" doctrine. App. 3a n.1. Coughlin responded that Congress had abrogated tribal immunity in § 106(a), because tribal governments fit within the definition of a "governmental unit" in § 101(27) – in particular, the concluding phrase "other foreign or domestic government."

On October 19, 2020, the bankruptcy court (Bailey, J.) granted the motion to dismiss. App. 53a-58a. The bankruptcy court recognized that the Bankruptcy Code contains "a broad abrogation of sovereign immunity." App. 55a. Nevertheless, it found persuasive and followed *In re Greektown Holdings, LLC*, 917 F.3d 451 (6th Cir. 2019), which had "concluded that '11 U.S.C. §§ 106[and] 101(27) lack the requisite clarity of intent to abrogate tribal sovereign immunity.'" App. 57a (quoting 917 F.3d at 461). It recognized that *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), had reached a contrary conclusion, but declined to follow that case. *See id.*[3]

5. The First Circuit reversed. In an opinion by Judge Lynch, joined by Judge Burroughs, it held that "the Bankruptcy Code unequivocally strips tribes of their immunity." App. 3a. The court "beg[a]n with the text," reasoning that § 106(a)'s directive that "'sovereign immunity is abrogated as to a govern-

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[3] The bankruptcy court incorrectly stated that "three circuits . . . have rejected the Ninth Circuit['s]" decision in *Krystal Energy*. App. 57a. It cited *Greektown Holdings*, *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818 (7th Cir. 2016), and *In re Whitaker*, 474 B.R. 687 (8th Cir. B.A.P. 2012). *Meyers* did not involve the Bankruptcy Code and declined to "weigh in" on whether the Code abrogates tribal immunity. 836 F.3d at 826. *Whitaker* was decided by a Bankruptcy Appellate Panel constituted under 28 U.S.C. § 158(b), not by the Eighth Circuit.

mental unit'" is a "plain statement" of Congress's "intent to abrogate immunity for all governmental units." App. 6a. It then turned to the "capacious[]" definition of "governmental unit" in § 101(27), which it found covers "essentially all forms of government." App. 7a. Accordingly, the court determined that "[t]he issue is . . . whether a tribe is a domestic government." *Id.*

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

The court of appeals also found it "clear that tribes are domestic." *Id.* Relying on the ordinary meaning of the term "domestic," it reasoned that tribes are "'within the sphere of authority or control or the . . . boundaries of' the United States." App. 8a & n.4 (quoting *Webster's Third* and other dictionaries from the time of the Bankruptcy Code's enactment) (ellipsis in original). It also collected examples from "[a]ll three branches of government" referring to tribes as "'domestic dependent nations,'" a phrase "coined" by "Chief Justice Marshall . . . in 1831." App. 9a (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.)

1, 17 (1831)); *see* App. 9a-10a & nn.5-6 (collecting additional examples). Accordingly, the court concluded, Congress "understood tribes to be domestic governments" when it "enacted §§ 101(27) and 106," and those provisions "unmistakably abrogate[] the sovereign immunity of tribes." App. 11a.

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

Chief Judge Barron dissented. He accepted the Band's argument that Congress had not "use[d] the clearest means of abrogating . . . immunity by including 'Indian Tribe' – or its equivalent" – in § 101(27), though at the same time disclaiming the position that "Congress must name Indian tribes to abrogate their immunity." App. 24a-25a, 26a. He did not dispute that tribes are governments, App. 30a, nor that they are "domestic" in the sense that they "operate within the United States as a geographic location," App. 32a. He further acknowledged that it was "not obvious that Congress would have wanted to abrogate the immunity of every sovereign entitled to assert it but an Indian tribe" and that immunity would "interfere[] with the [Bankruptcy] Code's operation." App. 43a-44a. But he nevertheless found

it "plausible . . . that Congress meant . . . only to include a 'government' that can trace its origins either to our federal constitutional system of government (such that it is a 'domestic government') or to that of some 'foreign state' (such that it is a 'foreign government')." App. 36a.

The First Circuit remanded the case back to the bankruptcy court, which has declined to stay proceedings and permitted limited discovery to begin. The present petition followed.

REASONS FOR DENYING THE PETITION

I. REVIEW IS NOT WARRANTED AT THIS TIME

A. The Circuit Conflict Is Recent and Shallow, and It May Resolve Without This Court's Intervention

The question whether the Bankruptcy Code abrogates tribal sovereign immunity has reached circuit courts only three times since Congress enacted the Bankruptcy Code in 1978. Further, until 2019, when the Sixth Circuit decided *In re Greektown Holdings, LLC*, 917 F.3d 451 (6th Cir. 2019), there was no relevant conflict at the circuit level. Although a conflict now exists, it is recent and shallow, and it may still resolve without this Court's intervention. Especially if other circuits join the First and Ninth Circuits, the Sixth Circuit may yet change its contrary position through *en banc* review.

Even if the conflict does not resolve itself, the Court's process of decision may benefit from further percolation. *See Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950) (Frankfurter, J., respecting the denial of the petition for writ of certiorari) ("It may be desirable to have different aspects of an issue further illumined by the lower courts."). The

opinions in this case suggest that percolation may have benefits. The majority noted that the dissent had made at least three arguments that the parties had not briefed, App. 16a, 20a & n.13; the dissent observed that the parties had not addressed at least two points it found relevant to its analysis, App. 21a, 26a n.14. Such observations suggest that additional dialogue at the circuit level may yet be productive and ultimately helpful to this Court.

This case is also in an "interlocutory posture," which "counsel[s] against this Court's review." *NFL v. Ninth Inning, Inc.*, 141 S. Ct. 56, 56-57 (2020) (statement of Kavanaugh, J., respecting the denial of certiorari) (citing *Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (statement of Roberts, C.J., respecting the denial of certiorari)). Proceedings continue in the bankruptcy court. The First Circuit denied a stay of its mandate, and the bankruptcy court has also denied a stay and has directed limited discovery. The Band has stated that it wishes to move again to dismiss on non-immunity grounds. Coughlin intends to pursue diligently a final judgment against the Band. If and when he obtains one, the immunity question can be reviewed on a post-judgment petition for certiorari with fully developed facts.

B. There Is No Broader Circuit Conflict

The Band inaccurately suggests (at 18) that "the circuit conflict reaches beyond the bankruptcy context," citing *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818 (7th Cir. 2016). *Meyers* involved the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), a differently worded statute that authorizes suit against a "person," 15 U.S.C. §§ 1681n, 1681*o*, and defines a "person" to include "any . . . government," *id.* § 1681a(b). FACTA contains no express language of abrogation comparable to

§ 106(a), contains no definition of "government" or "governmental unit" as expansive as § 101(27), and does not use the phrase "foreign or domestic government," the focus of the parties' dispute here.

To be sure, *Meyers* criticized *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), and the First Circuit in this case declined to follow the "logic" of *Meyers*. *See Meyers*, 836 F.3d at 824-26; App. 13a n.8. But *Meyers* also clarified (in language the Band omits) that the Seventh Circuit did not need to "weigh in" on the Bankruptcy Code's immunity provisions because they were not "directly on point for purposes of interpreting a different definition in FACTA." 836 F.3d at 826. And the First Circuit likewise "note[d]" that "*Meyers* dealt with a different statute." App. 13a n.8. In addition, the Ninth Circuit, which held in *Krystal Energy* that the Code abrogates tribal immunity, more recently cited *Meyers* favorably in concluding that FACTA does not abrogate federal sovereign immunity. *See Daniel v. National Park Serv.*, 891 F.3d 762, 774 (9th Cir. 2018). That undermines any argument that *Meyers* is part of a circuit split relevant to the Band's petition.

C. Petitioners' Claims of Urgency Lack Force

There is no reason that the Court should answer the question presented with special urgency. The general importance of tribal immunity is not a reason to rush to decide particular cases about it. For example, in *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018), which the Band quotes (at 26), the Court referred to the "limits" on tribal immunity as a "grave question" not as a reason for haste, but as a reason for deliberation – specifically, a reason to remand for a state supreme court to address certain arguments, instead of deciding them in the first instance. 138 S. Ct. at 1654. That

reasoning only reinforces that this Court applies its ordinary principles of review in tribal-immunity cases.

The Court should give no weight to the Band's exaggerated claim (at 28) that abrogation of immunity in the Bankruptcy Code poses an "existential threat" to tribal "self-governance." *Krystal Energy* has been the law of the Ninth Circuit for 18 years, and the Ninth Circuit contains 422 (73.5%) of the 574 federally recognized Indian tribes.[4] Those tribes have not ceased to be self-governing, and the Band has pointed to no flood of bankruptcy-related litigation against them. They are merely in the same position as the federal government and its agencies, whose sovereign immunity is waived by § 101(27) and § 106(a); and as state governments and their agencies, whose immunity from federal bankruptcy jurisdiction was waived "in the plan of the Convention." *Central Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 379 (2006).

The Band's assertions (at 26-27) that bankruptcy jurisdiction will interfere with tribes' "commercial enterprise[s]" and "economic . . . development" are similarly overblown. Commercial enterprises of all kinds – especially lenders – interact routinely with the bankruptcy system, and the Band offers no reason to think that bankruptcy jurisdiction will impede tribes' general abilities to participate in commerce. To be sure, enforcement of the automatic stay may hamper tribal payday lenders' ability to charge triple-digit interest rates, hound vulnerable debtors for payment, and ignore both written notice and personal pleas to

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[4] *See* Nat'l State Conf. of State Legislatures, *Federal and State Recognized Tribes*, https://www.ncsl.org/legislators-staff/legislators/quad-caucus/list-of-federal-and-state-recognized-tribes.aspx (last visited Nov. 3, 2022) (229 federally recognized tribes and villages in Alaska, 21 in Arizona, 110 in California, 4 in Idaho, 19 in Nevada, 10 in Oregon, and 29 in Washington).

cease harassment. *Supra* pp. 4-5. But Lendgreen and its *amici* do not claim that such activities are a large part of tribal commercial enterprise.

II. THE DECISION OF THE COURT OF APPEALS WAS CORRECT

Review is also not warranted because the First Circuit's decision was correct. This Court's precedent settles the basic framework for analysis: tribal immunity is subject to Congress's "plenary authority over tribes," but courts will determine that Congress has exercised authority to abrogate only where Congress has "'unequivocally' express[ed] that purpose." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014) (quoting *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001)). That requirement for a clear statutory statement of abrogation reflects the same legal standard for tribes as for other sovereigns, including the federal and state governments. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978) (citing *United States v. Testan*, 424 U.S. 392, 399 (1979)).

This Court has described the clear-statement rule for abrogation of immunity as a "canon of construction" and "a tool for interpreting the law" that does not "displace[] the other traditional tools of statutory construction." *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008). It has further instructed that "Congress need not state its intent in any particular way" and need not "use magic words," so long as its intent is "clearly discernable from the statutory text in light of traditional interpretive tools." *FAA v. Cooper*, 566 U.S. 284, 291 (2012); *see also Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring) (explaining that "statutory text [can] clearly subject[] States to suit for monetary damages . . .

without explicit reference to state sovereign immunity or the Eleventh Amendment").

A. The Court of Appeals Correctly Construed the Bankruptcy Code

The First Circuit's statutory interpretation began "'where all such inquiries must begin: with the language of the statute itself.'" *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1055-56 (2019) (quoting *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 412 (2012)); *see* App. 6a. The first steps of that analysis were and are undisputed: § 106(a) expressly abrogates the sovereign immunity of a "governmental unit," and § 101(27) defines that phrase to include "other foreign or domestic government[s]" beyond those it specifically lists. App. 6a-8a. Because there was no dispute that tribes are "government[s]," and no contention that they are "foreign" to the United States, the court appropriately focused on whether tribes are "domestic."

Because the Bankruptcy Code does not define the term "domestic," the First Circuit gave that term its ordinary meaning. *See Schindler Elevator Corp. v. U.S. ex rel. Kirk*, 563 U.S. 401, 407 (2011) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses that legislative purpose."). The court of appeals properly looked to dictionary definitions current at the time of the Bankruptcy Code's enactment to show that the term "domestic" encompasses tribes because they are "within the sphere of authority or control," as well as within the "boundaries," of the United States. App. 8a & n.4.

Additional support for a reading of "domestic" that encompasses tribes comes from this Court's and its

members' consistent usage of that term to describe them. Examples include Chief Justice Marshall's oft-quoted use in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), of the phrase "domestic dependent nations," *id.* at 17; Justice Scalia's more recent statement that tribes "are more like States than foreign sovereigns" in that they "are . . . domestic," *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991); and Justice Sotomayor's concurrence in *Bay Mills*, which used the specific phrase "domestic governments" to refer to "Tribes" in the course of emphasizing their retained sovereignty, 572 U.S. at 808 (Sotomayor, J., concurring); *see also* App. 9a & n.5 (additional examples). Further, as the court of appeals set out in detail, the executive and legislative branches frequently also refer to tribes as "domestic." App. 9a-10a & n.6.

The immediate context of the phrase "domestic government" further reinforces the inference that it includes tribes. As the Ninth Circuit observed in *Krystal Energy*, the two modifiers to "government" – the words "foreign or domestic" – set up a "dichotomy" that encompasses all "form[s] of government" whatsoever. 357 F.3d at 1057. The phrasing is similar to saying that a store is open "day and night" or that a game will be played "rain or shine." Those expressions leave no doubt that the store will be open at sunset or that the game will be played if the weather is overcast. The phrase "other foreign or domestic government" also comes at the end of a long list of other types of governments and government agencies and instrumentalities in § 101(27). The clear inference from such a list is that Congress intended to define the term "governmental unit" broadly to capture any form of government that might interact with a bankruptcy court.

The larger context of the Bankruptcy Code further confirms that Congress intentionally wrote the definition of "governmental unit" broadly. The term "governmental unit" is used not merely to identify the subjects of abrogation, but also to identify the recipients of a broad range of benefits. The court of appeals identified in particular the benefits available to taxing authorities, which include tribes. App. 11a-12a. The Code also contains special priorities and exemptions for governmental units that exercise police and regulatory powers[5] and issue orders to pay alimony, maintenance, and child support.[6] Tribes exercise those governmental functions with respect to their members. The Band cannot explain why Congress would have wanted to prevent tribes from being treated like governments when they exercise governmental powers.

B. Petitioners Fail To Show Any Error by the Court of Appeals

The Band presents two main criticisms of the First Circuit's decision. Neither shows error or supports

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[5] *See* 11 U.S.C. § 107(c)(2) (permitting "governmental unit[s]" exercising "police or regulatory" powers to access otherwise protected confidential information); *id.* § 362(b)(4) (special exception to automatic stay); *id.* § 523(a)(7) (exempting from discharge "fine[s], penalt[ies], or forfeiture[s] payable to and for the benefit of a governmental unit").

[6] *See* 11 U.S.C. § 101(14A) (defining the term "domestic support obligation" to refer to debts "in the nature of alimony, maintenance, or support" for a "spouse, former spouse, or child," including claims "recoverable by . . . a governmental unit" and "established . . . by reason of . . . a determination made . . . by a governmental unit"); *id.* § 507(a)(1)(A)-(B) (giving such obligations first priority for payment, including when a "governmental unit" asserts them); *id.* § 523(a)(5) (exempting such claims from discharge).

review. *First*, the Band argues (at 20) that tribes are neither "foreign" nor "domestic" because they "defy . . . simple categorization." It quotes this Court's statement that tribes cannot, "with strict accuracy, be denominated foreign nations" and might "more correctly, perhaps, be denominated domestic dependent nations," *Cherokee Nation*, 30 U.S. (5 Pet.) at 17, suggesting that this creates ambiguity about the categorization of tribes as "domestic." But *Cherokee Nation* considered whether tribes were "foreign" because the Cherokee Nation was, at that time, arguing that it was a "foreign state" within the meaning of Article III. The Court rejected that argument, holding that tribes were not "foreign" precisely because they were "domestic" – "[t]he Indian territory is admitted to compose a part of the United States," and the tribes were "completely under the sovereignty and dominion of the United States." *Id.* That is, *Cherokee Nation* looked to the same criteria of domesticity that the court of appeals did here: whether a tribe was within the territory of the United States and subject to its authority.

In any event, whether or not the Cherokee Nation had a reasonable but unsuccessful argument to be counted as a "foreign state" in 1831, there was no ambiguity about describing tribes as "domestic" in 1978, when Congress defined "governmental unit[s]" in § 101(27), or in 1994, when it "abrogated" the immunity of governmental units in § 106(a). By that point, *Cherokee Nation* had been the law for more than a hundred years; this Court had repeated its "formulation many times," App. 9a & n.5 (collecting examples); and the other branches of government had frequently quoted it as well, including "the ranking member of the Judiciary Committee when it marked up the 1994 amendments to the Code,"

App. 9a-10a & n.6.[7] Against that background, it is not enough for the Band to assert (at 2, 12) that tribes are "unique." It needs some reason to say that their unique status puts them outside the ordinary meaning of the word "domestic," and it has none.

Second, the Band repeats (at 24) the Sixth Circuit's contention that "there is not one example in all of history where [this] Court has found that Congress intended to abrogate tribal sovereign immunity *without* expressly mentioning Indian tribes somewhere in the statute." *Greektown Holdings*, 917 F.3d at 640. It is just as accurate to say that there is not one example in all of history where this Court has held that Congress must expressly mention Indian tribes to abrogate immunity. As the First Circuit explained, such a requirement would conflict with this Court's holding in *Cooper* that "Congress need not state its intent in any particular way" or "use magic words" to abrogate immunity. 566 U.S. at 291; *see* App. 13a-14a. The question is not what other phrases Congress might have used, but whether the phrase that Congress chose to use ("other foreign or domestic government"), read in context, clearly includes tribes.

This Court's decision in *C & L Enterprises* underscores the point that no particular form of words

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[7] The Band mischaracterizes (at 24) the court of appeals' decision as relying on "floor statements" as a form of "legislative history." The court of appeals' point was not that particular legislators' statements were the history of § 106(a), but that consistent legislative, executive, and judicial references to tribes as "domestic" in many contexts showed that Congress in 1978 and 1994 would have understood the phrase "domestic government" to include tribal governments. *Cf. Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 56-58 (2007) (relying on "standard civil usage" to interpret a disputed statutory phrase).

is required. *C & L Enterprises* dealt with a tribe's waiver of immunity in a contract, which is governed by the same clear-statement rule as congressional abrogation of immunity. *See* 532 U.S. at 418. The Court held that the tribe waived its immunity from suit in state court by using a form contract for a construction project, even though the contract did not mention tribal immunity. *Id.* at 419-21. Instead, the tribe waived immunity through the form contract's arbitration and choice-of-law clauses, which permitted entry of judgment "in any court having jurisdiction thereof" and chose "the law of the place where the Project is located." *Id.* at 415. The tribe's waiver in *C & L Enterprises* could have been more explicit by "us[ing] the words 'sovereign immunity.'" *Id.* at 420. But this Court held that the "clear import" of the clauses was that the tribe had "effectively consented" to confirmation of the arbitral award in state court. *Id.* at 414, 419. The same logic applies here: an abrogation, like a waiver, can be clear and effective without expressly referring to tribal immunity.

The Band's remaining points likewise lack force. It follows (at 24) the appellate dissent in referring to the absence of any "mention of Indian tribes" in the Code's "legislative history," App. 48a (Barron, C.J., dissenting), but fails to answer the majority's response that silence in the legislative history cannot change the meaning of clear text. App. 14a (citing *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018)). It invokes (at 25-26) the canon of *ejusdem generis*, but ignores this Court's teaching that *ejusdem generis* applies only "'when there is uncertainty'" in the meaning of a statute. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588-89 (1980) (quoting *United States v. Powell*, 423 U.S. 87, 91 (1975)). Here, the court of appeals correctly found

that the phrase "other foreign or domestic government" is clear on its face and in context; accordingly, *ejusdem generis* does not help the Band.

In sum, the petition fails to show any present need to review the decision of the court of appeals. That decision implicates only a shallow and recent circuit conflict, raises no issue of nationwide urgency, and departs in no way from this Court's precedent.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 8, 2022

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