No.

In The
Supreme Court of the United States

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, ET AL.,

Petitioners,

v.

BRIAN W. COUGHLIN.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Bankruptcy Code expresses unequivocally Congress's intent to abrogate the sovereign immunity of Indian tribes.

PARTIES TO THE PROCEEDINGS

Petitioners Lac du Flambeau Band of Lake Superior Chippewa Indians, L.D.F. Business Development Corporation, L.D.F. Holdings, LLC, and Niiwin, LLC, d/b/a Lendgreen, were defendants in a contested matter in the bankruptcy court and appellees in the court of appeals.

Respondent Brian W. Coughlin was the debtor in the bankruptcy court and the appellant in the court of appeals.

RULE 29.6 STATEMENT

No Petitioner is a "nongovernmental corporation" within the meaning of Supreme Court Rule 29.6. The Lac du Flambeau Band of Lake Superior Chippewa Indians wholly owns L.D.F. Business Development Corporation; L.D.F. Business Development Corporation wholly owns L.D.F. Holdings, LLC; and L.D.F. Holdings, LLC wholly owns Niiwin, LLC, d/b/a Lendgreen. No publicly held company owns 10% or more of any Petitioner's stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Coughlin v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, No. 21-1153 (1st Cir. May 6, 2022); and
- *In re: Coughlin*, No. 19-14142-FJB (Bankr. D. Mass. Oct. 19, 2020).

There are no other proceedings in state or federal trial or appellate courts, including proceedings in this Court, directly related to this case. SUP. CT. R. 14.1(b)(iii).

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INTRODUCTION

This case presents a question of utmost importance to Indian tribes and over which the courts of appeals are undisputedly divided: whether the Bankruptcy Code abrogates tribal sovereign immunity. As separate sovereigns pre-existing the Constitution, tribes possess the common-law immunity from suit traditionally enjoyed by sovereign governments—unless and until Congress unequivocally expresses its intent to abrogate that immunity. The Bankruptcy Code abrogates the sovereign immunity of "governmental units," but the Code does not refer to Indian tribes in defining that term (or anywhere else). Instead, the Code provides a list of specific federal, state, local, and foreign entities, and then adds "or other foreign or domestic government" in a residual clause.

In the decision below, a divided panel of the First Circuit—aligning itself with the Ninth Circuit—held that because Indian tribes are governments within the territory of the United States, Congress abrogated their tribal sovereign immunity in the Bankruptcy Code by using the words "other *** domestic government." The Sixth Circuit disagrees, emphasizing that it is not enough simply to say that tribes check the "government" and "domestic" boxes. After all, "domestic government" is not a phrase clearly understood to encompass tribes, and, as the Seventh Circuit has explained (in holding that an analogous abrogation provision lacks the requisite clarity), this Court has never upheld an abrogation of tribal sovereign immunity absent at least some mention of Indian tribes in the statutory text.

That circuit conflict, which the courts of appeals have described as "irreconcilable," warrants this Court's attention. This Court has steadfastly safeguarded tribal sovereign immunity by requiring an unequivocal expression of Congress's intent before subjecting tribes to suit, precisely because tribes occupy a unique space within our constitutional structure that is neither foreign nor domestic. Indeed, this Court repeatedly has refused to carve out exceptions to that immunity even for commercial activity that occurs off reservation (like that at issue here) out of the recognition that tribes are *sui generis* "domestic dependent nations" that face numerous federal, state, and historical barriers to self-sufficiency. The decision below tramples that precedent. Worse yet, it erects barriers for tribal economic enterprises to generate essential revenues for their governments only in certain parts of the country, thereby creating geographic-dependent and non-uniform results in bankruptcy proceedings.

At bottom, the doctrine of tribal sovereign immunity and this Court's precedent insist that Congress make a considered decision to diminish Indian tribes' inherent authority, and to manifest that intention using language that admits of no doubt. Under this Court's precedents, more is required to effect an abrogation than a reference to "other *** domestic government." Accordingly, this Court should grant certiorari to restore a core and indispensable aspect of tribal sovereignty.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-52a) is reported at 33 F.4th 600. The memorandum of decision and order of the bankruptcy court (App., *infra*, 53a-58a) is reported at 622 B.R. 491.

JURISDICTION

The court of appeals entered its judgment on May 6, 2022. On July 13, 2022, the Chief Justice extended the time within which to file this petition to and including September 8, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 106(a) of title 11 of the U.S. Code provides in relevant part:

> Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:
>
> (1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

11 U.S.C. § 106(a).

Section 101(27) of title 11 of the U.S. Code provides:

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

11 U.S.C. § 101(27).

STATEMENT OF THE CASE

A. Legal Framework

"[T]he doctrine of tribal immunity is settled law." *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 756 (1998). Because Indian tribes "retain their historic sovereign authority" and therefore possess "the common-law immunity from suit traditionally enjoyed by sovereign powers," courts must "dismiss[] any suit against a tribe absent congressional authorization (or a waiver)." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788-789 (2014) (internal quotation marks omitted). "To abrogate tribal immunity, Congress must 'unequivocally' express that purpose." *C & L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001).

The Bankruptcy Code "abrogate[s]" the "sovereign immunity" of "a governmental unit" as to

certain enumerated Code provisions, 11 U.S.C. § 106(a)(1), including section 362's automatic stay on certain efforts to collect prepetition debts, *id.* § 362(a)(6); *see City of Chi. v. Fulton*, 141 S. Ct. 585, 589 (2021). The term "governmental unit"—centrally at issue here—is defined as follows:

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

11 U.S.C. § 101(27). The term "Indian tribes" does not appear in any of the foregoing provisions or elsewhere in the Bankruptcy Code.

B. Factual And Procedural Background

1. Petitioner Lac du Flambeau Band of Lake Superior Chippewa Indians—a federally recognized Indian tribe—operates several businesses that generate critical revenue for tribal services and programs. One of those businesses is Lendgreen, "a wholly owned subsidiary" of the Band that provides short-term financing to consumers. App., *infra*, 3a.[1]

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[1] Lendgreen is a trade name of Petitioner Niiwin, LLC. App., *infra*, 3a n.1. The Band "is the sole owner of [Petitioner] L.D.F. Business Development Corporation," which "is the sole member of [Petitioner] LDF Holdings, LLC, which in turn is the sole member of Niiw[i]n." *Id.*

In July 2019, Lendgreen provided a $1,100 loan to Respondent Brian Coughlin. App., *infra*, 3a. Later that year, Coughlin voluntarily filed a Chapter 13 bankruptcy petition in the U.S. Bankruptcy Court for the District of Massachusetts, listing his debt to Lendgreen as a nonpriority general unsecured claim. *Id.* at 3a-4a. Coughlin alleges that, despite the automatic stay, Lendgreen called and emailed him in the normal course of business seeking repayment of his debt, which allegedly contributed to his "mental and financial agony." *Id.* at 4a.

In March 2020, Coughlin filed a motion to enforce the automatic stay against Lendgreen and its corporate parents, including the Band. App., *infra*, 4a. In addition to requesting an order prohibiting collection efforts, Coughlin sought damages, attorney's fees, and expenses. *Id.*; *see also* 11 U.S.C. § 362(k)(1). Petitioners asserted tribal sovereign immunity and moved to dismiss the enforcement proceeding for lack of subject matter jurisdiction and failure to state a claim. App., *infra*, 4a; *id.* at 54a-55a. It is undisputed that each tribal entity Coughlin named "is an arm of the Band, so it enjoys whatever immunity the Band does." App., *infra*, 3a n.1; *see id.* at 55a.

2. "After careful consideration of the extensive briefing," the bankruptcy court granted the motion to dismiss the enforcement proceeding on the basis of tribal sovereign immunity. App., *infra*, 54a. The court recognized that "circuit courts have grappled" with whether the Bankruptcy Code "expresse[s] 'unequivocally'" Congress's intent to abrogate tribal sovereign immunity and have "come to differing results." *Id.* at 55a-56a (quoting *Bay Mills*, 572 U.S.

at 788). Specifically, the bankruptcy court explained that section 106 abrogates the sovereign immunity of a "governmental unit" in various respects. *Id.* at 55a. But courts of appeals disagree whether the reference to "other foreign or domestic government," as part of the definition of "governmental unit" provided by section 101(27), was intended to reach Indian tribes. *Id.* at 55a-57a.

The bankruptcy court agreed with the Sixth Circuit, which had relied on the reasoning of an analogous Seventh Circuit decision, that section 101(27) "lack[s] the requisite clarity of intent to abrogate tribal sovereign immunity." App., *infra*, 57a (quoting *In re Greektown Holdings, LLC*, 917 F.3d 451, 460 (6th Cir. 2019)); *see also Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818 (7th Cir. 2016); *In re Whitaker*, 474 B.R. 687 (B.A.P. 8th Cir. 2012). The bankruptcy court thus rejected the Ninth Circuit's contrary holding that, for purposes of abrogation, "the words 'domestic government' in section 101(27) are sufficiently similar to the words 'domestic dependent nations,' which are the words often used by the Supreme Court to refer to Indian tribes." App., *infra*, 56a-57a (citing *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004)). The Ninth Circuit's position, the bankruptcy court added, "ignores the special place that Indian tribes occupy in our jurisprudence," which demands that "'[a]mbiguities in federal law [are] construed generously in order to comport with *** traditional notions of sovereignty and with the federal policy of encouraging tribal independence.'" *Id.* at 58a (alterations in original)

(quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-144 (1980)).

3. After permitting a direct appeal, *see* 28 U.S.C. § 158(d), a divided panel of the First Circuit reversed.

a. Acknowledging that "[t]his case presents an important question" on which the courts of appeals have "reached opposite conclusions," the panel majority sided with the courts "hold[ing] that the Bankruptcy Code unequivocally strips tribes of their immunity." App., *infra*, 3a. According to the panel majority, because section 106 includes a "plain statement" that "abrogate[s] immunity for all governmental units," the analysis hinges on "whether a tribe is a domestic government," as that term is used in section 101(27)'s definition of "governmental unit." *Id.* at 6a-7a.

For the panel majority, two sets of dictionary definitions resolved that issue. App., *infra*, 18a (adopting "dictionary-based meaning"). "First, there is no real disagreement that a tribe is a government *** because [tribes] act as the 'governing authorit[ies] of their members.'" *Id.* at 7a (second alteration in original) (quoting *Government*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 982 (1961)). "Second, it is also clear that tribes are domestic, rather than foreign, because they 'belong[] or occur[] within the sphere of authority or control or the *** boundaries of' the United States." *Id.* at 8a (alterations and ellipsis in original) (quoting *Domestic*, WEBSTER'S THIRD, *supra*, at 671). "Thus," in the panel majority's view, "a tribe is a domestic government and therefore a government unit." *Id.*

The panel majority found that conclusion supported by "historical context" and the "Bankruptcy Code's structure." App., *infra*, 8a-12a. The panel majority noted that "at least one published bankruptcy opinion shows an understanding even before 1978 that tribes could function as and claim the benefits of government." *Id.* at 9a (citing *In re Bohm's Inc.*, 5 Bankr. Ct. Dec. 259, 259 (Bankr. D. Ariz. 1979)). The panel majority then pointed to the fact that the federal government had long described tribes as "domestic dependent nations." App., *infra*, 9a-10a. And lastly, the panel majority reasoned that from a "practical and policy" standpoint, abrogation would enhance tribal self-determination efforts in light of "the special benefits afforded to governmental units under the Code"—such as the power "to collect tax revenue" notwithstanding a bankruptcy petition. App., *infra*, 11a-12a.

b. Chief Judge Barron authored a lengthy dissent. App., *infra*, 21a-50a. He did not dispute that the panel majority's construction of "other *** domestic government" to include tribes is "a possible one" or even "the better reading" of section 101(27), if the "focus [were] only on [that] phrase in isolation." *Id.* at 31a-32a. But the "interpretive task" requires conviction that "there is no plausible way of reading those words to exclude Indian tribes." *Id.* at 32a. That standard, he explained, could not be met. *Id.*

Considering the "other *** domestic government" phrase "in the context in which it appears," Chief Judge Barron began by noting that "the majority's reading necessarily makes the phrase 'or other foreign or domestic government' a catch-all for every species

of 'government.'" App., *infra*, 32a. That begged the question why "Congress chose to define th[e] term 'governmental unit' more cumbersomely" by enumerating specific types of governments before providing the catch-all. *Id.* at 33a. It also gave him "pause *** because when Congress describes a general class after first setting forth a more specific exemplary list—as Congress did in § 101(27)—there is often good reason to think that Congress included the list to make the general class more selective than the words that describe that class might otherwise suggest." *Id.* at 33a-34a.

Chief Judge Barron then observed that "aside from 'foreign state[s],'" the "listed types of 'government' in § 101(27)" have the "shared characteristic *** that each of them is also an institutional component of the United States." App., *infra*, 35a. Accordingly, in placing the phrase "other foreign or domestic government" at the end of that list, Congress could have 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')." *Id.* at 35a-36a.

"[U]nlike the listed governmental types, Indian tribes neither ratified the Constitution nor trace their origins to it." App., *infra*, 36a. Instead, "Indian tribes have long been understood to be sui generis precisely because they uniquely possess attributes characteristic of 'nations' without themselves being 'foreign state[s].'" *Id.* at 37a (alteration in original). Thus, Chief Judge Barron concluded that it is at least

"plausible" "that Congress, by using the words 'domestic' and 'foreign' to describe the general class that follows the exemplary list, did not mean to include" Indian tribes. *Id.* at 35a-36a. Importantly, that "narrower reading of 'or other foreign or domestic government' also would not empty that phrase of all content," because it "still would usefully pick up commissions and authorities created by interstate compacts and their 'foreign' counterparts," which are (unlike Indian tribes) "sufficiently difficult to categorize pithily that it would be natural to encompass them through a residual clause of the sort that follows an express list." *Id.* at 38a.

"[I]nsofar as the majority mean[t] to suggest that [the court] need not be guided by considerations of statutory text alone," Chief Judge Barron offered that "the evidence of legislative purpose also is not as clearly and unequivocally on the side of reading § 101(27) to include Indian tribes as the majority suggests." App., *infra*, 44a. For example, while the panel majority purported to identify certain benefits to abrogation of tribal sovereign immunity under the Bankruptcy Code, tribal businesses would no longer be permitted to seek bankruptcy protection as they had done since "prior to the Code's enactment in 1978." *Id.* at 45a-47a. That "itself may be no small thing for Indian tribes" given "insuperable *** barriers Tribes face in raising revenue through more traditional means." *Id.* at 45a-46a (ellipsis in original) (citation omitted). Yet "the legislative history to the Code does not suggest that it is making any shift in [tribes'] treatment"—and "[i]n fact *** makes no relevant mention of Indian tribes at all." *Id.* at 47a-48a.

In the end, Chief Judge Barron reiterated that congressional intent to abrogate tribal sovereign immunity must be "unmistakably clear in the language of the statute." App., *infra*, 48a-49a (citation omitted). In his view, there was "no choice but to conclude that § 101(27) does not clearly and unequivocally include Indian tribes, because *** its text plausibly may be read not to cover them." *Id.* at 49a.

REASONS FOR GRANTING THE WRIT

There can be no dispute that the courts of appeals have taken "irreconcilable" positions on whether the Bankruptcy Code abrogates tribal sovereign immunity. The decision below, moreover, is incorrect that the words "other *** domestic government" demonstrate Congress's unequivocal intent to abrogate the sovereign immunity of Indian tribes, which have a unique status that defies foreign or domestic classification. The issue goes to the heart of Indian self-government and self-sufficiency and is of surpassing importance. This Court should grant review.

I. THE DECISION BELOW DEEPENS AN ACKNOWLEDGED CIRCUIT CONFLICT

A. The Courts of Appeals Are Divided Over Whether The Bankruptcy Code Evinces Congress's Unequivocal Intent To Abrogate The Sovereign Immunity Of Indian Tribes

As the First Circuit recounted, the question of "whether the Bankruptcy Code abrogates tribal immunity" is one that "two of [its] sister circuits ha[d]

already considered." App., *infra*, 3a. Those courts of appeals "reached opposite conclusions." *Id.*

1. In *Krystal Energy*, the Navajo Nation obtained dismissal of a bankruptcy adversary proceeding on immunity grounds. 357 F.3d at 1055-1056. On appeal, the Ninth Circuit recognized that "an abrogation of [tribal sovereignty immunity] must be 'unequivocally expressed' in 'explicit legislation'" and "may not be implied." *Id.* (citation omitted) (quoting *Kiowa*, 523 U.S. at 759). But turning to the Bankruptcy Code, the Ninth Circuit concluded that "[i]t is clear from the face of §§ 106(a) and 101(27) that Congress did intend to abrogate the sovereign immunity of *all* 'foreign and domestic governments,'" including Indian tribes. *Id.* at 1057.

The Ninth Circuit arrived at that result through "syllogistic reasoning." 357 F.3d at 1058. As a major premise, the Ninth Circuit accepted that section 101(27)'s listing of certain types of governments followed by "a catch-all phrase, 'or other foreign or domestic governments,'" meant that "*all* foreign and domestic governments, including but not limited to those particularly enumerated in the first part of the definition, are considered 'governmental units' for the purpose of the Bankruptcy Code, and, under § 106(a), are subject to suit." *Id.* at 1057. As a minor premise, the Ninth Circuit accepted that Indian tribes must be *domestic* governments because "logically, there is no other form of government outside the foreign/domestic dichotomy, unless one entertains the possibility of extra-terrestrial states," and because this Court has described Indian tribes as "domestic dependent nations." *Id.*

Based on those premises, the Ninth Circuit reasoned: "Congress explicitly abrogated the immunity of *any* 'foreign or domestic government.' Indian tribes are domestic governments. Therefore, Congress expressly abrogated the immunity of Indian tribes." 357 F.3d at 1058.

2. The Sixth Circuit confronted the same issue in *In re Greektown Holdings*, calling the Ninth Circuit's approach "irreconcilable" with the more persuasive reasoning already set forth in several bankruptcy court, district court, and bankruptcy appellate panel decisions. 917 F.3d at 457 & nn.4-5 (cataloging lower courts that have analyzed the question presented). Much like in *Krystal Energy* (and in this case), the abrogation question in the Sixth Circuit arose when the Sault Ste. Marie Tribe of Chippewa Indians and related entities successfully invoked tribal sovereign immunity against fraudulent conveyance claims brought under the Bankruptcy Code. *Id.* at 454-455. The Sixth Circuit affirmed the dismissal of those claims on that ground. *Id.* at 467.

In doing so, the Sixth Circuit expressly rejected *Krystal Energy*'s "simple syllogism." 917 F.3d at 460 n.8. For the Sixth Circuit, it was not enough to say "that Indian tribes are both 'domestic' and 'governments'" because the mere "combin[ation] [of] those terms in a single phrase in § 101(27)" does not "clearly, unequivocally, and unmistakably express [Congress's] intent to include Indian tribes" within the Bankruptcy Code's abrogation provision. *Id.* at 459-460. Furthermore, the Ninth Circuit was wrong to "presume[] the very fact in contention, i.e., that 'domestic government' is a phrase clearly understood

beyond all rational debate to encompass an Indian tribe." *Id.* at 460 n.7.

The Sixth Circuit also observed that in the years immediately preceding enactment of the Bankruptcy Code (and thereafter), Congress demonstrated that it knew how to "leave *no doubt* about its intent": by expressly authorizing suits against "Indian tribes." 917 F.3d at 457. Indeed, "a broader survey of the case law" revealed that there was "not one example in all of history where the Supreme Court has found that Congress intended to abrogate tribal sovereign immunity *without* expressly mentioning Indian tribes somewhere in the statute." *Id.* at 460. While acknowledging that "Congress need not use 'magic words' to abrogate tribal sovereign immunity," the Sixth Circuit found salient that "it is undisputed that no provision of the Bankruptcy Code mentions Indian tribes." *Id.* at 461 (quoting *FAA v. Cooper*, 566 U.S. 284, 290-291 (2012)).

3. In siding with the Ninth Circuit and against the Sixth Circuit, the First Circuit deepened the circuit conflict. App., *infra*, 3a, 12a-14a ("Like the Ninth Circuit, we hold that the Bankruptcy Code unequivocally strips tribes of their immunity."). Undertaking the same syllogistic reasoning as the Ninth Circuit, the panel majority first looked to the text of section 101(27) and, finding the "enumerated list" of governmental units to "cover[] essentially all forms of government," framed its inquiry in terms of "whether a tribe is a domestic government." *Id.* at 7a. The panel majority then held that Indian tribes must be "governments" and "domestic"—the latter "because they 'belong[] or occur[] within the sphere of authority

or control or the *** boundaries of' the United States'"—and made much of the fact that they have been described as "domestic dependent nations." *Id.* at 7a-9a (alterations and ellipsis in original) (quoting *Domestic*, WEBSTER'S THIRD, *supra*, at 671). And "[a]s domestic dependent nations are a form of domestic government, it follow[ed] that Congress understood tribes to be domestic governments" and "unmistakably" abrogated the sovereign immunity of tribes in the Bankruptcy Code. *Id.* at 10a-11a.

The panel majority then used that same logic to criticize the Sixth Circuit's decision in *In re Greektown Holdings*. According to the panel majority, the Sixth Circuit incorrectly held that "[e]stablishing that Indian tribes are domestic governments does *not* lead to the conclusion that Congress unequivocally meant to include them when it employed the phrase 'other foreign or domestic government.'" App., *infra*, 13a (alteration in original) (quoting 917 F.3d at 460). The panel majority's disagreement was rooted in its conflicting view that Congress had "expressly eliminat[ed] immunity as to governmental units, which *** include tribes," by virtue of the fact that they are domestic governments. *Id.*

B. The Circuit Conflict Over The Bankruptcy Code Implicates A Broader Disagreement Over Abrogation Of Tribal Sovereign Immunity

In addition to the cases discussed above, the Seventh Circuit's decision in *Meyers*, 836 F.3d 818, features prominently in the development of the circuit conflict. For good reason: *Meyers* raises essentially

the same abrogation question at issue here, in the context of a different federal statute.

Meyers concerned the Fair and Accurate Credit Transactions Act (FACTA), which authorizes suits against a "person" who prints certain credit or debit card information on receipts given to customers. 15 U.S.C. §§ 1681c(g)(1), 1681*o*. The statute defines "person" to include "any *** government." *Id.* § 1681a(b). The Seventh Circuit held that such language does *not* abrogate tribal sovereign immunity.

Considering the argument that those words were "broad enough to include Indian tribes," the Seventh Circuit stated: "Perhaps if Congress were writing on a blank slate, this argument would have more teeth, but Congress has demonstrated that it knows full well how to abrogate tribal immunity" through definitions that expressly include Indian tribes. *Meyers*, 836 F.3d at 824 (discussing examples). Although "Congress need not invoke 'magic words' to abrogate immunity," FACTA's language was "equivocal" when measured "[a]gainst the long-held tradition of tribal immunity." *Id.* at 824, 826. Unlike "say[ing] 'any government' means 'the United States,'" which "is an entirely natural reading of 'any government,'" it was not enough for the plaintiff "to focus on whether the Oneida Tribe is a government so that [the court] might shoehorn it into FACTA's statement that defines liable parties to include 'any government.'" *Id.* at 826-827.

Notably, the Seventh Circuit declined the plaintiffs' invitation to follow the lead of the Ninth Circuit in *Krystal Energy*, *see* 836 F.3d at 824-825 ("[Plaintiff] attempts to hitch himself to this wagon."),

while discussing several other federal court decisions "reject[ing] the Ninth Circuit's conclusion," *id.* at 825 (discussing *In re Whitaker*, 474 B.R. at 695, *In re Greektown Holdings, LLC*, 532 B.R. 680, 693, 700-701 (E.D. Mich. 2015), and *In re National Cattle Cong.*, 247 B.R. 259, 267 (Bankr. N.D. Iowa 2000))). In turn, the Sixth Circuit "f[ou]nd the Seventh Circuit's reasoning in *Meyers*—as applied to 11 U.S.C. §§ 106, 101(27)—persuasive." *In re Greektown Holdings*, 917 F.3d at 459. And the First Circuit, appreciating that the Sixth Circuit in "*Greektown* largely adopted the Seventh Circuit's reasoning in *Meyers*," likewise disagreed with the Seventh Circuit (and the decisions discussed by it). App., *infra*, 13a n.8 ("[T]o the extent that the same logic applies to both statutes, we reject *Meyers* for the same reasons we reject *Greektown.* We also reject *Whitaker*[.]").

Given the substantial interplay between the decisions, it should be clear that the circuit conflict reaches beyond the bankruptcy context. Answering the specific question whether the Bankruptcy Code abrogates tribal sovereign immunity will lend clarity to the scope of abrogation provisions in other federal statutes as well.

II. THE DECISION BELOW FLOUTS THIS COURT'S PRECEDENTS ON TRIBAL SOVEREIGN IMMUNITY

The First Circuit's conclusion that the Bankruptcy Code abrogates tribal sovereign immunity cannot be squared with longstanding precedent that respects tribes' continuing status as "separate sovereigns pre-existing the Constitution" entitled to

exercise the aspects of their inherent sovereign authority—including immunity from suit. *Bay Mills*, 572 U.S. at 788-789. This Court should not countenance the panel majority's (and the Ninth Circuit's) syllogistic and dictionary-driven analysis of the Bankruptcy Code's "other *** domestic government" language to brush aside tribal sovereign immunity. 11 U.S.C. § 101(27).

The governing principles are not contested: "[A] congressional decision [to abrogate tribal sovereign immunity] must be clear. The baseline position, [this Court] ha[s] often held, is tribal immunity; and [t]o abrogate [such] immunity, Congress must unequivocally express that purpose." *Bay Mills*, 572 U.S. at 790 (last two alterations in original) (internal quotation marks omitted) (quoting *C & L Enters.*, 532 U.S. at 418). Put another way, a court must have "perfect confidence" that Congress intended to abrogate tribal sovereign immunity. *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989).

Section 101(27) falls well short of that exacting standard. The most natural reading of "other *** domestic government," as used in the residual definitional clause at issue, does not reach Indian tribes. But at a minimum, that amorphous term does not remove all doubt that Congress made the deliberate decision to abrogate tribal sovereign immunity.

A. The Text Of Section 101(27) Does Not Unequivocally Indicate Abrogation

Starting with the text, the First Circuit panel majority rested its holding on two propositions. First,

section 101(27)'s list of enumerated governments and reference to "foreign or domestic government" must "cover[] essentially all forms of government," because "[l]ogically, there is no other form of government outside the foreign/domestic dichotomy." App., *infra*, 7a (quoting *Krystal Energy*, 357 F.3d at 1057). Second, "tribes are domestic, rather than foreign, because they 'belong[] or occur[] within the sphere of authority or control of the *** boundaries of' the United States,'" and because they have been described as "domestic dependent nations." *Id.* at 8a-9a (alterations and ellipsis in original) (quoting *Domestic*, WEBSTER'S THIRD, *supra*, at 671).

Both propositions suffer from the same basic flaw: Indian tribes defy the simple categorization of "foreign" and "domestic" governments that the panel majority read into the statute. Regardless of whether "logic" suggests a binary choice between those options, App., *infra*, 17a (describing "classic dichotomy between the words 'foreign' and 'domestic'"), this Court has repeatedly held that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence," and that tribes are "marked by peculiar and cardinal distinctions which exist no[]where else," *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831); *see, e.g.*, *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021) (identifying tribes as "distinct, independent political communities" with "sovereignty that *** is of a unique *** character"); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 658-659 (2001) (characterizing tribes as "unique aggregations").

Cherokee Nation, from which the term "domestic dependent nation" derives, proves the point. That case raised the "difficult[]" question of whether "the Cherokees constitute a foreign state" for purposes of this Court's original jurisdiction. 30 U.S. at 16. Writing for this Court, Chief Justice Marshall explained that "it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations." *Id.* at 17. He then suggested that tribes "may, more correctly, perhaps, be denominated domestic dependent nations" insofar as "[t]heir relation to the United States resembles that of a ward to his guardian." *Id.* That shorthand (and highly qualified) descriptor does not come close to placing tribes *unequivocally* into the category of a "domestic government," 11 U.S.C. § 101(27)—especially not under the stringent abrogation standard. Rather, tribes continue to "occupy a unique status under our law" that is neither foreign nor domestic. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985); *see* App., *infra*, 40a-41a (Barron, C.J., dissenting) ("[A] 'tribal government' is plausibly understood to be neither a 'domestic' nor a 'foreign government[.]'").

For those reasons, it is at least questionable—if not entirely inaccurate—that "domestic government" and "domestic dependent nations" are "functionally equivalent." App., *infra*, 10a. Even assuming that "domestic government" as used in section 101(27) takes on the dictionary definition of "occurring within the boundaries of the United States," *id.*; *see id.* at 17a ("[T]he word domestic refers to the territory in which

the government exists."), Chief Justice Marshall captured a far more complex concept than mere geography in coining "domestic dependent nations," *see Cherokee Nation*, 30 U.S. at 17 ("They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage.").

More fundamentally, to whatever extent "domestic" in "domestic dependent nations" is nothing more than a territorial designation, the fact that section 101(27) also uses "domestic" cannot provide "perfect confidence" that Congress intended to abrogate tribal sovereign immunity. *Dellmuth*, 491 U.S. at 231. Given the complicated relationship between tribes and the United States, the abrogation of their immunity should not be measured by dictionary definitions that speak to (at most) one facet of that relationship.

It is no answer to say that "other *** domestic governments" must refer to Indian tribes to avoid rendering that language surplusage. Other reasonable interpretations of that language give it independent effect. *See* App., *infra*, 28a-30a, 35a-38a (Barron, C.J., dissenting); *see* pp. 25-26, *infra*. In any event, an abrogation of tribal sovereign immunity requires more than the inference that Congress could not have meant anything else. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) ("It is settled that a waiver of sovereign immunity cannot be implied[.]" (internal quotation marks and citation omitted)). The panel majority's contrary abrogation-by-default approach inverts this Court's insistence that the

"baseline position *** is tribal immunity." *Bay Mills*, 572 U.S. at 790.

B. Additional Context Belies Abrogation

Several contextual markers provide further reason to doubt that Congress acted unequivocally to abrogate tribal sovereign immunity in section 101(27).

1. In stark contrast to the "other *** domestic government" formulation of the Bankruptcy Code, 11 U.S.C. § 101(27), Congress knows precisely how to abrogate tribal sovereign immunity. Examples abound in which Congress has eliminated that defense from suit. *See, e.g.*, 25 U.S.C. § 5321(c)(3)(A) (barring insurance carrier from "rais[ing] as a defense the sovereign immunity of an Indian tribe from suit"); *id.* § 2710(d)(7)(A)(ii) (providing federal court jurisdiction over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity" in certain circumstances); 42 U.S.C. §§ 6903(13) & (15), 6972(a)(1) (authorizing suits against any "person" who violates statute and defining "person" specifically to include "an Indian tribe").

The First Circuit panel majority dismissed those examples as evidence of a "magic words" approach to abrogation. App., *infra*, 13a. But that overstates the prohibition against requiring "magic words." Congress need not express its purpose through any specific formulation; "[f]or instance, a court might find an unequivocal expression of congressional intent in a statute stating that 'sovereign immunity is abrogated as to all parties who could otherwise claim sovereign immunity.'" *In re Greektown Holdings*, 917 F.3d at 461 n.10; *see* App., *infra*, 43a (Barron, C.J.,

dissenting). The dispositive question is whether Congress has spoken clearly. Here, the fact that "there is not one example in all of history where the Supreme Court has found that Congress intended to abrogate tribal sovereign immunity *without* expressly mentioning Indian tribes somewhere in the statute," *In re Greektown Holdings*, 917 F.3d at 460, creates substantial uncertainty over whether Congress speaks clearly enough through generic phrases like "other *** domestic government," 11 U.S.C. § 101(27), or "any *** government," *Meyers*, 836 F.3d at 824. *Cf. McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020) ("History shows that Congress knows how to withdraw a reservation when it can muster the will.").

2. The First Circuit panel majority's reliance on floor statements by Members of Congress that refer to "domestic dependent nations" "rank[s] among the least illuminating forms of legislative history"—especially when they are not even about the Bankruptcy Code generally or the statutory language in question specifically. *NLRB v. SW Gen. Inc.*, 137 S. Ct. 929, 943 (2017); *see* App., *infra*, 48a n.19 (Barron, C.J., dissenting). Indeed, the panel majority's feeble attempt to tie those statements to the Bankruptcy Code—*i.e.*, Senator Hatch discussing the term "domestic dependent nations" on the floor in 1978, before serving as the ranking member for the Judiciary Committee that marked up the current version of section 106 in 1994—simply highlights "that [the Code's] legislative history makes no relevant mention of Indian tribes at all." App., *infra*, 48a & n.19 (Barron, C.J., dissenting). Rather, as even the panel majority admits, *id.* at 6a, Congress amended

section 106 in light of two of this Court's precedents requiring clearer language to abrogate the federal government's and states' sovereign immunity, without any apparent consideration of whether tribal sovereign immunity should be treated similarly. *See, e.g.*, 140 CONG. REC. 10,766 (Oct. 4, 1994) (discussing "governmental units" solely by reference to "the States and the Federal Government").

That distinction is significant. "[B]y ratifying the Constitution, the States had agreed that their sovereignty would yield to ensure the effectiveness of national bankruptcy policy." *Torres v. Texas Dep't of Pub. Safety*, 142 S. Ct. 2455, 2462 (2022) (discussing structural waiver recognized in *Central Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006)). But "it would be absurd to suggest that the tribes—at a conference to which they were not even parties—similarly ceded their immunity." *Bay Mills*, 572 U.S. at 789-790 (internal quotation marks omitted). It follows that different considerations govern the abrogation of tribal immunity. *Id.* at 790 (reiterating that courts will tread "lightly" on abrogation despite Congress's "plenary authority over tribes").

Accordingly, it makes perfect sense that "other *** domestic governments" refers to governmental bodies such as "commissions and authorities created by interstate compacts" or other "interstate hybrids [that] do trace their origins to the governmental system of the United States and not (like Indian tribes) to a source of sovereignty that predates it." App., *infra*, 35a-38a (Barron, C.J., dissenting). Indeed, limiting the "general class" to "institutional component[s] of the United States," like each of the

governmental types enumerated in the preceding "more specific exemplary list," comports with this Court's *ejusdem generis* precedent. *Id.* at 33a-37a (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001)). That interpretation of section 101(27) is more than reasonable, which is enough to defeat any claim that Congress provided the clear statement necessary to abrogate tribal sovereign immunity.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT AND WARRANTS REVIEW IN THIS CASE

1. The exceptional importance of the question presented is evident. "Determining the limits on the sovereign immunity held by Indian tribes is a grave question." *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018). Indeed, the inquiry affects not only a "core aspect[] of sovereignty that tribes possess," but "Indian sovereignty and self-governance" itself. *Bay Mills*, 572 U.S. at 788. As this Court has made clear in rebuffing attempts to abrogate tribal sovereign immunity, "courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Id.* at 789-791.

That "enduring principle of Indian law," *Bay Mills*, 572 U.S. at 790, is not simply an academic concern. Tribes have limited ability to raise revenues, due to limitations on the ability to tax property (when held in trust by the federal government) and the quandary of taxing non-Indians for economic activity conducted on tribal lands. Consequently, commercial enterprise has become the primary means by which tribes have sought to attain self-sufficiency and

provide essential programs for their citizens. *See id.* at 807, 809-813 (Sotomayor, J., concurring) ("Tribes face a number of barriers to raising revenue in traditional ways. If Tribes are ever to become more self-sufficient, and fund a more substantial portion of their own governmental functions, commercial enterprises will likely be a central means of achieving that goal.").

Tribal sovereign immunity plays a critical role in fostering that economic and governmental development. *See Kiowa*, 523 U.S. at 757 ("We retained the doctrine *** on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency."). That is why this Court has flatly rejected pleas to create an immunity exception for tribes' commercial activities, even when they take place off Indian lands, *see, e.g.*, *Bay Mills*, 572 U.S. at 790 (cataloging precedent), and instead has "defer[red] to the role Congress may wish to exercise in this important judgment," *Kiowa*, 523 U.S. at 758; *see Bay Mills*, 572 U.S. at 797-803 (declining to overturn *Kiowa* because "[b]eyond upending 'long-established principle[s] of tribal sovereign immunity,' that action would replace Congress's considered judgment with our contrary opinion" (second alteration in original)).

Against that backdrop, it is particularly vexing for the panel majority to suggest, in its selective weighing of "practical and policy considerations," that "tribes *benefit* from their status as governmental units" under the Bankruptcy Code. App., *infra*, 12a (emphasis added); *see Bay Mills*, 573 U.S. at 800-801 ("Congress *** has the greater capacity 'to weigh and

accommodate the competing policy concerns[.]'" (quoting *Kiowa*, 523 U.S. at 759)). The notion that the Band's efforts to achieve self-sufficiency through enterprises like Lendgreen are improved because the Code trades sovereign immunity for the ability to continue collecting taxes, for example, not only ignores the difficulties that tribes face in raising revenues but also turns the abrogation analysis on its head. Abrogation represents an *encroachment* on a tribe's sovereign authority, not a benefit. *See Bay Mills*, 572 U.S. at 790.

Beyond that existential threat to self-governance, abrogation in this context subjects tribes to expensive lawsuits and potentially debilitating liability. This case alone has spawned years of costly litigation and a claim for six-figure damages arising out of a single small debt: $172,840 in alleged compensatory damages, plus attorneys' fees, costs, and punitive damages—all stemming from a loan balance on the day of filing that was less than $1,600. App., *infra*, 54a; *see* J.A. 92-93, 147.

Of course, Congress is free to determine that these harms to Indian tribes are outweighed by other policy considerations. Undoubtedly, Congress is aware of *Kiowa*'s statement that "[i]n th[e] economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." 523 U.S. at 758. Yet this Court has affirmed time and again that "it is fundamentally Congress's job, not [courts'], to determine whether or not to limit tribal immunity." *Bay Mills*, 572 U.S. at 800.

2. The patchwork of immunity protections also compels this Court's intervention. At the very least, tribal commercial enterprises with customers that file for bankruptcy in the First and Ninth Circuit are not entitled to exercise inherent and historic common-law immunity, while their counterparts with customers that file for bankruptcy in the Sixth Circuit (and likely the Seventh Circuit) may exercise that sovereign right. Meanwhile, in other circuits that lack binding precedent on the question presented, tribes are left to wonder whether the specter of bankruptcy litigation hangs over their commercial dealings. Such disparities are untenable in an area as critical as sovereign immunity. Congressional abrogation provisions should not hamper tribes' economic development in certain areas of the country, while promoting it in others.

That is even more true where (as here) that inconsistency derives from the Bankruptcy Code, which is subject to a constitutionally prescribed uniformity requirement. *See Siegel v. Fitzgerald*, 142 S. Ct. 1770, 1780-1781 (2022) (discussing Uniformity Clause, U.S. CONST. art. I, § 8, cl. 4); *McKenzie v. Irving Tr. Co.*, 323 U.S. 365, 408 (1945) (emphasizing that provision of Bankruptcy Act is "intended to have uniform application throughout the United States"). This Court has not hesitated to grant review to resolve 2-1 or even 1-1 conflicts over bankruptcy issues. *See, e.g.*, *Siegel*, 142 S. Ct. 1770 (2-1 split); *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 356 (2016) (2-1 split); *Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121 (2015) (1-1 split); *Harris v. Viegelahn*, 575 U.S. 510 (2015) (1-1 split).

There is no reason to believe that further percolation would shed additional light on the binary choice whether the words "other *** domestic government," 11 U.S.C. § 101(27), are sufficient to abrogate tribal sovereign immunity. On the contrary, courts have grappled with that recurring question for years. Essentially, they have simply agreed or disagreed—often explicitly, as did the First Circuit below—with the Ninth Circuit's or the Sixth Circuit's approach. *See, e.g.*, *In re Greektown Holdings*, 917 F.3d at 457 & nn.4-5 (cataloging cases in which "[s]everal bankruptcy courts, using similar reasoning, have agreed" with the approach adopted by the Ninth Circuit, and "[s]everal district courts, bankruptcy appellate panels, and bankruptcy courts, using similar reasoning, have agreed" with the approach adopted by the Sixth Circuit).

Hence, no benefit will come from delaying this Court's intervention. And this case presents a perfect vehicle for resolving the question presented: The divided panel decision below thoroughly airs the arguments, and this Court's resolution will determine fully whether the Band should be subject to the automatic stay and related enforcement proceedings in the bankruptcy court on remand. *See* App., *infra*, 3a ("Our decision permits *** Coughlin to enforce the Bankruptcy Code's automatic stay[.]"); *see also id.* n.1 ("All parties agree that Lendgreen is an arm of the Band, so it enjoys whatever immunity the Band does.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 8, 2022