No. 21-1153

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

IN RE: BRIAN W. COUGHLIN
Debtor,

BRIAN W. COUGHLIN,
Appellant,

v.

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS; L.D.F. BUSINESS DEVELOPMENT CORP.; L.D.F. HOLDINGS, LLC; NIIWIN, LLC, d/b/a Lendgreen,
Appellees.

On Appeal from the United States Bankruptcy Court for the District of Massachusetts, No. 1:19-bk-14142-FJB (Hon. Frank J. Bailey)

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Corporate Disclosure Statement

Appellees Lac du Flambeau Band of Lake Superior Chippewa Indians, L.D.F. Business Development Corp., L.D.F. Holdings, LLC, and Niiwin, LLC d/b/a Lendgreen make the following disclosure under Federal Rule of Appellate Procedure 26.1:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   No.

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Statement in Support of Oral Argument

Oral argument will be helpful because whether Congress unequivocally expressed its intent to abrogate tribal sovereign immunity is a matter of first impression for this Court and because that question involves complicated issues of federal Indian law and its interplay with statutory interpretation.

Introduction

From its earliest decisions, the Supreme Court has acknowledged that Indian tribes are separate sovereigns that preexisted the Constitution and that retain inherent attributes of sovereignty. Among these attributes is the common-law immunity from suit traditionally enjoyed by other sovereigns. The Supreme Court has long highlighted this immunity from suit as both a core aspect of tribal sovereignty and paramount to the federal government's policy of fostering tribal economic development, self-sufficiency, and self-governance. Thus, while Congress now possesses plenary authority to abrogate tribal sovereign immunity, it must unequivocally express that purpose. Against this backdrop, the Bankruptcy Court concluded that the Bankruptcy Code (the "Code"), which does not reference Indian tribes or anything like them, did not effect a congressional abrogation of tribal sovereign immunity.

Appellant Brian W. Coughlin claims error. In doing so, he pays nothing more than lip service to the Supreme Court's exacting standard. Instead, he parses the Code for breadth in place of specific intent, and he relies on implication in place of unequivocality. In reality, he is divining congressional intent in a way that dilutes the Supreme Court's exacting standard. This Court should reject Coughlin's attempt to rewrite the Supreme Court's standard and uphold the Bankruptcy Court's decision.

Statement of the Issue

To abrogate tribal sovereign immunity, "Congress must unequivocally express that purpose." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014). The Code—including its provisions regarding abrogation of sovereign immunity—and its legislative history contain no references to its application to Indian tribes or anything like Indian tribes. Did Congress unequivocally express an intent to abrogate tribal sovereign immunity in the Code?

Statement of the Case

In December 2019, Coughlin petitioned for Chapter 13 bankruptcy. J.A. 20. The petition triggered an automatic stay under 11 U.S.C. § 362(a). Among Coughlin's creditors is Lendgreen, an assumed name of Niiwin, LLC, with whom he had an existing unsecured loan balance of roughly $1,600. J.A. 43; *see also* J.A. 95. Lendgreen—and, therefore, Niiwin—was listed in his mailing matrix and served a copy of his Chapter 13 workout plan in December 2019. J.A. 70; *see also* J.A. 97.

Despite the automatic stay, Coughlin alleges that Niiwin continued to make collection calls and send him emails regarding his unsecured loan. J.A. 88-91, 116. Coughlin claims the collection calls, coupled with stress related to his decision to file for bankruptcy and severe clinical depression, led to him attempting suicide in February 2020. J.A. 116-18.

In March 2020, Coughlin moved the Court to enforce the automatic stay, seeking actual damages, attorney fees and costs, and punitive damages for Niiwin's violations. J.A. 86, 92-93. Instead of just seeking relief against Niiwin, Coughlin also sought relief against LDF Holdings, LLC ("Holdings"), the LDF Business Development Corporation (the "BDC"), and the Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe") (collectively, the "Tribal Parties"). J.A. 86, 92-93.

As Coughlin himself explains, the relationship between these entities is through a chain of corporate equity. J.A. 87. The Tribe wholly owns the BDC, a tribally chartered corporation. J.A. 87. The BDC wholly owns Holdings, a tribally organized limited liability company. J.A. 87. Holdings wholly owns Niiwin, also a tribally organized limited liability company. J.A. 87. Notably, Coughlin has made no allegation that the Tribe, the BDC, or Holdings themselves engaged in any of the alleged violations of the stay. J.A. 86-112, 115-18. Furthermore, the Tribe, the BDC, and Holdings were not listed as creditors nor served or otherwise provided notice of Coughlin's bankruptcy or the resulting stay until he moved to enforce the stay. J.A. 20-70, 83-85, 113-14. And even then, Coughlin did not properly serve these parties at their correct addresses until over a month after he initiated the proceeding. J.A. 119-43.

On July 30, 2020, the Tribal Parties moved to dismiss, asserting among other arguments their sovereign immunity as a defense to Coughlin's motion. J.A. 164, 172, 179, 189. For his part, Coughlin agreed that the BDC, Holdings, and Niiwin were arms of the Tribe and that, if the Tribe were dismissed based on sovereign immunity, the others should be as well. J.A. 420.

After numerous rounds of briefing, the Bankruptcy Court, Judge Frank J. Bailey presiding, granted the Tribal Parties' motions, concluding the Code did not abrogate the Tribal Parties' sovereign immunity and their sovereign immunity stood as a bar to Coughlin's motion to enforce the stay. J.A. 166, 181, 199, 256, 312, 318, 326, 341, 348; Add. 1, 4-6. In doing so, the Bankruptcy Court joined three federal appellate courts that have reached the same conclusion with respect to the Code or have followed the exact same reasoning to reach a similar conclusion with respect to similarly worded statutes. Add. 4 (agreeing with *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings LLC)*, 917 F.3d 451 (6th Cir. 2019); *Meyers v. Oneida Tribe of Indians of Wisc.*, 836 F.3d 818 (7th Cir. 2016) (applying the same reasoning to the Fair and Accurate Credit Transactions Act ("FACTA")); *In re Whitaker*, 474 B.R. 687 (B.A.P. 8th Cir. 2012)).

The matter is now before this Court on direct appeal. J.A. 431-32.

Summary of the Argument

The Supreme Court has long observed that Indian tribes are separate sovereigns that preexist the Constitution. It has also recognized the direct and unique relationship between the federal government and Indian tribes, one of a solemn trust responsibility, and that Congress has embraced a longstanding federal policy of supporting tribal independence and self-determination. In light of tribal sovereignty and the federal policy of supporting it, the Supreme Court has admonished courts to carefully scrutinize federal legislation before drawing the conclusion that Congress has acted to undermine it. This is particularly true with respect to congressional abrogation of tribal sovereign immunity, where the Supreme Court requires Congress to unequivocally express its intent.

I. The Code does not meet the Supreme Court's exacting standard because it plainly lacks an unequivocal expression of congressional intent to abrogate tribal sovereign immunity. Its text makes no references to Indian tribes or anything like them and provides no indication Congress was even considering Indian tribes or tribal sovereign immunity.

Coughlin asks this Court to disregard the Code's omissions and interpret its abrogation of sovereign immunity expansively to encompass Indian tribes. This position fails for two reasons. First, the definition of 'governmental unit' in the Code is not as expansive as he claims. It is limited to specified types of

governments, with a catch-all provision designed to include like governments. But the U.S. Constitution, the Supreme Court, and even dictionaries recognize that Indian tribes are not like the other governments listed. Second, the test for abrogation of tribal sovereign immunity has never been about expansiveness, it has always focused on specific intent with respect to *tribal sovereign immunity*.

Finally, even if this Court were to conclude the Code does not plainly lack an unequivocal expression of congressional intent to abrogate tribal sovereign immunity, it is at bottom ambiguous about Congress's intent. This is evidenced not only by the countervailing points made between the parties in this proceeding, but also by the fact that courts have reached different decisions on this very question. The Indian canon of construction compels this Court to resolve this ambiguity in favor of Indian tribes.

II. The Code's legislative history only underscores that Congress did not contemplate Indian tribes and tribal sovereign immunity, either when enacting it or when amending its provisions regarding sovereign immunity. Coughlin relies on the Constitutional Convention as evidence that Congress intended to effect the broadest possible abrogation of sovereign immunity. But Indian tribes were not parties to the Constitutional Convention, making reliance on it an exercise in speculation.

Furthermore, the Code's robust legislative history contains few references to Indians and none to Indian tribes. Legislative history materials describing the Code's provisions on abrogation of sovereign immunity highlight that they are intended to waive federal and abrogate state sovereign immunity, consistent with the agreement of the states at the Constitutional Convention. Specifically, these materials reveal that Congress's intent was to supersede Supreme Court precedent regarding only federal and state sovereign immunity. This record contains no evidence that Congress intended to abrogate tribal sovereign immunity.

III. Finally, Coughlin asks this Court to look to the structure, context, and purpose of the Code "as a whole" to find an abrogation of tribal sovereign immunity. Coughlin argues that the intent of the Code was to establish uniform laws where everyone "plays by the same rules" and that tribal sovereign immunity will undermine that purpose. In fact, the Code and case law carve out numerous exceptions and the Code provides preferential treatment under certain conditions for certain creditors and certain debts. And contrary to Coughlin's suggestion, "uniform" does not mean the Code treats all people and entities the same. It simply means the Code applies across the entire country. Tribal sovereign immunity does not change that.

Argument

"The legal standards traditionally applicable to … motions to dismiss apply without change in bankruptcy proceedings." *In re Moultonborough Hotel Group. LLC*, 726 F.3d 1, 4 (1st Cir. 2013). Here, the Bankruptcy Court applied Fed. R. Bankr. P. 7012, which incorporates Fed. R. Civ. P. 12(b) defenses, and denied Coughlin's motion to enforce the stay for lack of subject-matter jurisdiction. Add. 1, 5-6. This Court "review[s] dismissals for lack of subject matter jurisdiction *de novo*. *In re Fin. Oversight & Mgmt. Bd. For Puerto Rico*, 919 F.3d 638, 644 (1st Cir. 2019).

I. The Code does not contain an unequivocal expression of congressional intent to abrogate tribal sovereign immunity.

Indian tribes are "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *see also Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 29 (1st Cir. 2000) As such, they possess and continue to exercise "inherent sovereign authority." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). "Among the core aspects of [this] sovereignty … is the common-law immunity from suit traditionally enjoyed by sovereign powers." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014). This immunity is a "necessary corollary to Indian sovereignty." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986).

Indian tribes are now treated as "domestic dependent nations," and remain subject to "plenary control by Congress." *Bay Mills*, 572 U.S. at 788. Thus, "Congress has always been at liberty to dispense with [tribal sovereign immunity] or limit it." *Citizen Band*, 498 U.S. at 510. Congress has indeed "authorized limited classes of suits against Indian tribes." *Id.* But, Congress has "consistently reiterated its approval of the immunity doctrine," reflecting its "desire to promote the goal of Indian self-government." *Id.* This policy accords with "distinctive obligation of trust incumbent upon the Government in its dealings" with Indian tribes, a moral obligation "of the highest responsibility." *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

This federal policy of promoting tribal independence and self-government has manifested in numerous statutes over the last century. For instance, through the Indian Reorganization Act of 1934, 25 U.S.C. § 5101 *et seq.*, Congress intended "'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'" *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)). Similarly, in the Indian Financing Act of 1974, Congress declared its policy "to provide capital … to help develop and utilize Indian resources … to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will

enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." Indian Finance Act of 1974, 25 U.S.C. § 1451. In the Indian Self-Determination and Education Assistance Act of 1975, Congress rested on its "historical and special legal relationship with, and resulting responsibilities to, American Indian people," for "the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 5301(a), 5302(b).

The federal policy embodied in these acts is important. Indian tribes do not possess the benefit of large tax bases like other sovereigns. Fletcher, Matthew L.M., *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D.L. Rev. 759, 771 (2004).[1] Thus, Indian tribes are forced to venture into commerce in creative ways to generate revenues for their governmental services. *Id.* at 771, 777-83 (providing numerous examples of how

[1] Moreover, Indian tribes have limited taxing authority over non-members, *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 658 (2001); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982), and their taxing authority over members is generally concurrent with federal and state taxing authority, *see* Fletcher, *supra* at 771-74. To avoid exposing their members and non-members residing or working on tribal lands to double and potentially triple taxes, most do not impose them. *See id*.

Indian tribes creatively generate revenue). In doing so, they must overcome significant hurdles. Most Indian tribes are sequestered to rural—often remote—areas with little infrastructure, limited access to capital, and under-skilled labor and managerial sectors and, consequently, face significant barriers to economic development. Williams, Robert A., *Small Steps on the Long Road to Self-Sufficiency for Indian Nations: The Indian Tribal Governmental Tax Status Act of 1982*, 22 Harv. J. on Legis. 335, 335-36 (1985). Additionally, commerce is accompanied by greater inherent risks than tax collection. Yet without these sources of income, Indian tribes have little hope of achieving what the federal government wants for them (and they for themselves): independence and self-determination.

Against this legal and policy backdrop, the Supreme Court has "treated the doctrine of tribal immunity as settled law and dismissed any suit against a tribe absent congressional authorization." *Bay Mills*, 572 U.S. at 789 (quotation omitted). In delineating the standard for finding congressional authorization for suit against Indian tribes, the Supreme Court has spoken in no uncertain terms. "The baseline position … is tribal immunity; and to abrogate such immunity, Congress must unequivocally express that purpose." *Id.* at 790 (emphasis added). An intent to abrogate "cannot be implied." *Martinez*, 436 U.S. at 58 (quotations omitted). "That rule of construction reflects an enduring principle of Indian law:

Although Congress has plenary authority over tribes, courts will not lightly assume Congress in fact intends to undermine Indian self-government." *Bay Mills*, 572 U.S. at 790. And it highlights the significance of the issue here: "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).

A. The Code plainly lacks an unequivocal expression of congressional intent to abrogate tribal sovereign immunity because it does not refer to Indian tribes or anything like Indian tribes.

With respect to certain proceedings under the Code, 11 U.S.C. § 106(a) provides that "sovereign immunity is abrogated as to a governmental unit." And 11 U.S.C. § 101(27) in turn defines "governmental unit":

> 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.

The Bankruptcy Court concluded these passages together do not meet the Supreme Court's exacting standard: an unequivocal expression of congressional intent to abrogate tribal sovereign immunity. *See* Add. at 4.

1. The absence of any reference to Indian tribes in the *entire* Code is extremely relevant to the question of whether

Congress *unequivocally* expressed its intention to abrogate *tribal sovereign immunity*.

In reaching its decision, the Bankruptcy Court relied heavily on the Sixth Circuit's decision in *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings), LLC*, 917 F.3d 451 (6th Cir. 2019). J.A. 3-4. That case involved a request by the trustee for avoidance and recovery of alleged fraudulent transfers from the Sault Ste. Marie Tribe and its gaming authority. *Id.* at 453. The defendants asserted their sovereign immunity, and the trustee argued that Sections 106 and 101(27) abrogated their sovereign immunity. *See id.* at 453, 456.

The Sixth Circuit rejected the trustee's argument, *id.* at 462-63, noting that "a useful place to start" its analysis was "Congress' knowledge and practice regarding the abrogation of tribal sovereign immunity in 1978," *id.* at 456. It reflected on previous instances when Congress had "unequivocally expressed" its intent to abrogate tribal sovereign immunity by specifically mentioning Indian tribes:

> We … need not hypothesize whether Congress understood the meaning of "unequivocal," as Congress kindly demonstrated as much in the years immediately preceding its enactment of the Bankruptcy Code. *See, e.g.*, Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6972(a)(1)(A), 6903(13), 6903(15) (authorizing suits against an "Indian tribe"); Safe Water Drinking Act of 1974, 42 U.S.C. §§ 300j-9(i)(2)(A), 300f(10), 300f(12) (authorizing suits against an "Indian tribe").

Id. at 457. And it noted the Seventh Circuit's prior observation "'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.'" *Id.* at 460 (quoting *Meyers v. Oneida Tribe of Indians of Wisc.*, 836 F.3d 818, 824 (7th Cir. 2016)).

Coughlin faults the Sixth Circuit and the Bankruptcy Court for weighing the absence of references to Indian tribes in the Code. App. Br. 36-37. He argues that this Court need not look for magic words to find an unequivocal expression of intent to abrogate tribal sovereign immunity. App. Br. 37. But Coughlin has grossly underestimated the measure of both decisions. True, the Sixth Circuit highlighted the observable omission of the words "Indian tribes" from the Code. *See Buchwald*, 917 F.3d at 461. But it also provided a thorough survey of case law addressing the broader question of whether Congress has unequivocally expressed its intent to abrogate tribal sovereign immunity in the Code and other statutes with functionally equivalent abrogation provisions. *Id.* at 457-60.[2] And it addressed

[2] In addition to cases more fully addressed here, there are a host of courts outside of the Ninth Circuit that reached the same conclusion as the Sixth Circuit and the Bankruptcy Court. *See, e.g.*, *In re Money Centers of America, Inc.*, 2018 WL 1535464, *2 (D. Del. Mar. 29, 2018); *In re Star Group Communications, Inc*., 568 B.R. 616, 618 (Bankr. D. N.J. 2016); *In re Mayes*, 294 B.R. 145, 148 (B.A.P. 10th Cir. 2003); *In re National Cattle Congress*, 247 B.R. 259, 260 (Bankr. N.D. Iowa 2000).

numerous arguments raised by the trustee, some of which Coughlin himself raises in some form. *Compare id.* at 461-62, *with* App. Br. 19-25, 32-34, 36-41.

Similarly, the Bankruptcy Court did not solely rely on the absence of references to Indian tribes in the Code. While it highlighted that persuasive line of reasoning from the Sixth Circuit, Add. 3-4, it also rejected multiple arguments raised by Coughlin in his briefing. *Id.* at 4. The Bankruptcy Court ultimately indicated it had weighed the conflicting decisions of four federal appellate courts and chosen to follow the majority. *Id.*

In any event, the decisions Coughlin relies on for the proposition the Code need not reference Indian tribes to meet the Supreme Court's exacting standard do not lend the support he claims. For instance, in *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the Supreme Court considered whether the Citizen Band Potawatomi Indian Tribe of Oklahoma waived its sovereign immunity for enforcement of an arbitration agreement. 532 U.S. 411, 414 (2001). The Supreme Court concluded the agreement's provisions met the requisite level of clarity because certain terms of the agreement allowed for resulting awards to be reduced to judgments in "any court having jurisdiction," and the tribe agreed to be governed by the American Arbitration Association Rules—one of which provided that an "arbitration award may be entered in any federal or state court having jurisdiction." *Id.* at 418-19.

In *C&L Enterprises*, the Supreme Court was considering a waiver of sovereign immunity—not, as here, an alleged congressional abrogation of tribal sovereign immunity. Furthermore, there was no question in *C&L Enterprises* (as there is in this case) that *tribal sovereign immunity* was at issue, because the tribe itself was a party to the arbitration agreement.

Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16 (1st Cir. 2000), and *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41 (1st Cir. 2007), on which Coughlin relies, are similarly immaterial. In *Narragansett*, the Narragansett Indian Tribe was a party to a joint memorandum with the state of Rhode Island, which resolved a dispute over title to certain lands and included an agreement that "all laws of the State … shall be in full force and effect on the settlement lands." 449 F.3d at 19 (quotation omitted). Congress later passed a land settlement act providing that the "the settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State." *Id.* (quotation omitted). Years later, the tribe opened a smoke shop and refused to follow the state's cigarette-tax scheme, resulting in a raid of the smoke shop, seizure of products, and arrest of eight people. *Id.* at 20. The tribe sued, claiming its sovereign immunity shielded it from the state's criminal process. *Id.*

This Court rejected the tribe's position, concluding that subjecting the settlement lands to state civil and criminal laws and state jurisdiction would have

no meaning if the tribe's sovereign immunity barred the state from exercising jurisdiction. *See id.* at 25-26. It specifically distinguished the unique history of the settlement act: "the Settlement Act codified an agreement based on the mutual consent of the parties." *Id.* at 25 (quotation omitted). This Court also distinguished its decision from a Supreme Court decision that similar language in Public Law 280 did not abrogate tribal sovereign immunity. *Id.* at 27-28 (distinguishing from *Three Affiliated Tribes*, 476 U.S. 877). It explained that Public Law 280 "neither reflected the mutual consent of all parties, nor resulted from a negotiated arrangement in which a tribe surrendered certain sovereign rights in exchange for substantial concessions from the host state." *Id.* at 28. Continually emphasizing that its decision was linked to the specific language and history of the facts underlying the case, the Court further distinguished other decisions where the language at issue did not "arise under a statute configured in the fashion of the Settlement Act." *Id.* at 29.

In *Aroostook*, this Court considered in detail the Maine Indian Claims Settlement Act of 1980, which resolved land-claims disputes between the Penobscot Nation and the Passamaquoddy Tribe and Maine. 484 F.3d at 44-45. That settlement act provided that "*all* Indian … tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe [and] the Penobscot Nation, … shall be subject to the civil and criminal jurisdiction of the State [and] the laws

of the State … to the same extent as any other person … therein." *Id.* at 45 (quotation omitted). Several years later, the Aroostook Band of Micmacs resolved its own land claims with the state and obtained federal recognition through additional legislation, which this Court determined did not repeal the prior settlement act's jurisdictional provision. *Id.* at 56.

Aroostook arose after the Maine Human Rights Commission filed charges with the U.S. Equal Employment Opportunity Commission on behalf of three employees fired by the tribe. *Id.* at 47. The tribe then sued, seeking a declaration that the state's employment laws did not apply to the tribe and, in any event, that its sovereign immunity barred enforcement of those laws. *Id.* In rejecting those arguments, this Court pointed to the abrogation of tribal sovereign immunity found in the settlement act:

> [The claims settlement act] is clear. In § 1725(a) it not only made Maine Indians "subject to … the laws of the state," and "subject to the civil and criminal jurisdiction of the State," but it expressly added the emphasizing phrase "to the same extent as any other person." *And § 1725(a) not only applies to "Indians," but also to the "Indian nations, … tribes[, and] bands of Indians" themselves. Short of using "magic words," it is hard to imagine how § 1725(a) could have been clearer.*

Id. at 50 (emphasis added). This Court did not consider "Indian nations, … tribes[, and] bands of Indians" as "magic words" themselves, but instead saw them as relevant to whether there was an abrogation of tribal sovereign immunity.[3]

The present case is readily distinguishable from *Narragansett* and *Aroostook*. Here, the relevant congressional legislation was not designed to codify "an agreement based on the mutual consent" of the tribal and state parties. *Narragansett*, 449 F.3d at 25 (quotation omitted). Nor is it a "specific law[]" that expressly defines the rights of all Indian tribes within a particular state or a law "designed to settle Indian claims." *See Aroostook*, 484 F.3d at 49, 59. This case does not ask whether Sections 106 and 101(27) abrogate sovereign immunity generally—it asks whether they abrogate *tribal* sovereign immunity. In *Narragansett*, the tribe was a party to the agreement underlying the settlement act, and its settlement lands were specifically referenced in the state jurisdictional provision. 449 F.3d at 19, 25.[4] And in *Aroostook*, the relevant state jurisdictional

[3] Coughlin latches on to this Court's rejection of the tribe's argument that the ratifying legislation "applie[d] state law to Maine tribes as 'polities' but not to their governments." App. Br. at 39; *Aroostook*, 484 F.3d at 51. That argument has no bearing here. The Tribal Parties have never argued that the Bankruptcy Code abrogates tribal sovereign immunity for tribes as polities but not as governments because, unlike in the ratifying legislation, there is no mention of Indian tribes in the Bankruptcy Code at all. Therefore, there is no need to draw that "artificial distinction." *Aroostook*, 484 F.3d at 51. Whether "Indian tribe" means a polity or a government, it is absent from the Bankruptcy Code.

[4] Coughlin tries to pivot by arguing that the relevant provisions in *Narragansett* "did not mention tribal immunity." App. Br. 39. This does not change the fact that

provision expressly applied to "all Indians, Indian nations, or tribes or bands of Indians in the State of Maine," which included the tribe. 484 F.3d at 45. Thus, the abrogations of sovereign immunity, if present, were abrogations of *tribal* sovereign immunity.

In sum, *C&L Enterprises*, *Narragansett*, and *Aroostook* offer no guidance in this case because none of them involved the question of whether a federal statute that makes no references to Indian tribes unequivocally expresses congressional intent to abrogate tribal sovereign immunity. What the Sixth Circuit and the Seventh Circuit observed is still true: the Supreme Court has *never* found a congressional abrogation of tribal sovereign immunity in a statute that does not reference Indian tribes. Coughlin cannot point to a single decision in which another federal appellate court has reached such a conclusion aside from *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), a decision that has been universally rejected by federal appellate courts that have subsequently considered it. *Buchwald*, 917 F.3d at 457-59; *In re Whitaker*, 474 B.R. 687, 693-95 (B.A.P. 8th Cir. 2012); *see also Meyers*, 836 F.3d at 824-27 (stating it need not address the effect of Sections 106 and 101(27) in the Code but deviating from the Ninth Circuit's line of reasoning to conclude that FACTA, which contains functionally

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there was no reason for this Court to question in that case whether the settlement act, including the provisions on state jurisdiction, applied to the tribe.

equivalent abrogation provisions, does not abrogate tribal sovereign immunity); *cf. Mayes*, 294 B.R. at 148 n.10 (noting Sections 106 "probably does not apply to … an Indian nation"). Just as importantly, Congress knows how to abrogate tribal sovereign immunity, and it has done so in rare instances. When it does, it references Indian tribes in the statute. *See, e.g.*, Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6972(a)(1)(A), 6903(13), 6903(15) (authorizing suits against an "Indian tribe"); Safe Water Drinking Act of 1974, 42 U.S.C. §§ 300j-9(i)(2)(A), 300f(10), 300f(12) (authorizing suits against an "Indian tribe"); Fair Debt Collection Procedures Act, 28 U.S.C. §§ 3002(7), 3002(10) (allowing garnishment proceedings against a "person," which includes "a natural person (including an individual Indian) … or an Indian tribe").

Ultimately, the absence of *any* reference to Indian tribes in the *entirety* of the Code is extremely relevant to what Congress intended with respect to tribal sovereign immunity. The Sixth Circuit and the Eighth Circuit Bankruptcy Appellate Panel have both observed the same. The Tenth Circuit Bankruptcy Appellate Panel has intimated the same. The Seventh Circuit has agreed in the context of FACTA. This Court should too.

2. Inclusion of the catch-all phrase "other foreign and domestic government" does not *unequivocally* express congressional intent to abrogate *tribal* sovereign immunity.

Coughlin acknowledges the distinction drawn above, and his response is merely "[t]he principle is the same." App. Br. 38. He argues that "Congress meant to speak broadly, sweeping in all governments of any kind" and that such breadth is enough. App. Br. 13. This, by and large, is the reasoning followed by the Ninth Circuit in *Krystal Energy*.

That proceeding was initiated against the tribe under 11 U.S.C. §§ 505 and 542. *Krystal Energy*, 357 F.3d at 1055-56. The tribe asserted its sovereign immunity, and the district court dismissed the proceeding. *Id.* On appeal, the Ninth Circuit rejected the tribe's position. *Id.* at 1056. In concluding the Code abrogates tribal sovereign immunity, the Ninth Circuit used multiple lines of inference: (1) Indian tribes are governments; (2) the Supreme Court has characterized Indian tribes as "domestic dependent nations"; (3) Congress abrogated tribal sovereign immunity for "domestic governments"; (4) "domestic dependent nations" are simply a form of "domestic governments"; and (5) therefore, Congress abrogated tribal sovereign immunity. *Id.* at 1057-58.

Of course, unlike Coughlin and this Court, which are privy to nearly two decades of jurisprudence on the question presented in this case, the Ninth Circuit was largely writing on a blank slate: "We can find no other statute in which

Congress effected a generic abrogation of sovereign immunity and because of which a court was faced with the question of whether such generic abrogation in turn effected specific abrogation of the immunity of a member of the general class." *Id.* at 1059. The Ninth Circuit has recently emphasized that it still sees expansiveness in abrogation language as indicative of intent to abrogate tribal sovereign immunity. *See Miller v. Wright*, 705 F.3d 919, 926 (9th Cir. 2013) (noting that federal antitrust laws do not "employ the sort of expansive language that we … have held to unequivocally abrogate tribal sovereign immunity"); *see also Deschutes River Alliance v. Portland Gen. Elec. Co.*, Nos. 18-35867, 18-35932, 18-35933, 2021 WL 2559477, *7 (9th Cir. June 3, 2021) (referencing *Miller*'s comparison between federal antitrust laws and other laws with more "expansive language").

The reasoning offered by Coughlin and relied upon in *Krystal Energy* presents two very serious problems. First, it is wrong to read Section 101(27) as expansively as the Ninth Circuit and Coughlin do. Coughlin argues the "adjective 'other' indicates the definition of 'governmental unit' is not limited to the specific governments named in the preceding list." App. Br. at 23. And he goes on to note that use of "or" between "foreign" and "domestic" "is a way to show the definition's breadth." App. Br. at 24. This all may be true, but it does not follow that "governmental unit" means every single government that exists or, more

importantly, that Congress has unequivocally expressed its intent to abrogate *tribal* sovereign immunity.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Relevant here, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (quotation omitted). Said differently, "A word is known by the company it keeps—a rule that is often wisely applied where a word is capable of many meanings in order to avoid the giving of *unintended breadth* to the Acts of Congress." *Dolan v. Postal Service*, 546 U.S. 481, 486 (2006) (quotations omitted) (emphasis added).

In *Washington State Department of Social & Health Services v. Guardianship Estate of Keffeler*, the Supreme Court was asked to decide the meaning of "other legal process" in the clause "execution, levy, attachment, garnishment, or other legal process." 537 U.S. 371, 375 (2003). Rather than take the approach Coughlin suggests, where "other legal process" could literally mean any type of legal activity, the Supreme Court applied *ejusdem generis* to conclude that the phrase "should be understood to be process much like the processes of

execution, levy, attachment, and garnishment." *Id.* at 384-85. Based on this reasoning, it rejected an argument that a social services department's efforts to serve as a representative payee of the benefits due to children under its care fit the category of "other legal process" because those efforts were not like an execution, levy, attachment, or garnishment. *Id.* at 385.

Similarly, in *Dolan*, the Supreme Court was asked to decide the meaning of "negligent transmission" in the clause "claim arising from loss, miscarriage, or negligent transmission of letters or postal matter." 546 U.S. at 485-86. The Court observed, "[i]f considered in isolation, the phrase 'negligent transmission' could embrace a wide range of negligent acts committed by the Postal Service," recognizing "in ordinary meaning and usage, transmission of the mail is not complete until it arrives at the destination." *Id.* at 486. But it noted the "definition of words in isolation … is not necessarily controlling" and a "word in a statute may or may not extend to the outer limits of its definitional possibilities." *Id.* The Court then looked to the context of the phrase:

> [T]he words "negligent transmission" … follow two other terms, "loss" and "miscarriage." … Since both those terms refer to failings in the postal obligation to deliver mail in a timely manner to the right address, it would be odd if "negligent transmission" swept far more broadly to include injuries … that happen to be caused by postal employees but involve neither failure to transmit mail nor damage to its contents.

Id. at 486-87. The Court went on to conclude that an injury caused by a person tripping on mail left on her porch was not a claim arising from "negligent transmission of letters or postal matter" because it was not an "injury arising … because mail either fails to arrive at all or arrives late, in damaged condition, or at the wrong address." *Id.* at 483, 486-87, 489, 492.

In this case, the phrase "other foreign and domestic governments" cannot be construed in isolation, as Coughlin suggests. App. Br. 19-26. Instead, it must be read in the context of "the company it keeps" so as to "avoid the giving of unintended breadth to the Acts of Congress." *Dolan*, 546 U.S. at 486 (quotation omitted). Preceding this catch-all phrase is an exhaustive attempt to capture any and all forms and subparts of the United States, states, and foreign governments. For instance, the United States and its subparts are listed four times: United States, United States departments, United States agencies, and United States instrumentalities. 11 U.S.C. § 101(27). States and their subparts are listed eight times: states, state departments, state agencies, state instrumentalities, commonwealths, commonwealth departments, commonwealth agencies, and commonwealth instrumentalities. *Id.* Further, municipalities, which are also separately defined as instrumentalities of states, 11 U.S.C. § 101(40), are listed four times: municipalities, municipal departments, municipal agencies, and municipal instrumentalities, 11 U.S.C. § 101(27). Foreign states and their subparts

are listed four times: foreign states, foreign state departments, foreign state agencies, and foreign state instrumentalities. *Id.* This structure evidences a fervent attempt by Congress to capture all components of *these* types of governments. "[O]ther foreign or domestic government" must be interpreted to mean only governments similar to the federal government, states, and foreign governments. Indian tribes simply do not fit the bill.

The Bankruptcy Appellate Panel for the Eighth Circuit picked up on the uniqueness of Indian tribes in *Whitaker*. That case involved proceedings brought by the trustee against the Lower Sioux Indian Community and one of its subsidiaries. *Whitaker*, 474 B.R. at 689. Both defendants asserted their sovereign immunity, and the trustee argued their immunity was abrogated by Sections 101(27) and 106(a). *See id.* at 690.

The court rejected the trustee's argument, reasoning that despite knowing the Supreme Court's requirement that abrogation of tribal sovereign immunity be "unequivocally expressed," Congress passed and even amended Section 106(a) without ever mentioning Indian tribes. *Id.* at 693. It further relied on Supreme Court precedent for the observation that Indian tribes are "not a foreign state" nor "a domestic state," but rather are "'marked by peculiar and cardinal distinctions which exist nowhere else.'" *Id.* at 694 (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, at 16 (1831)). It even observed, as had the Supreme Court, that in the

Constitution "'they are as clearly contradistinguished by a name appropriate to themselves from foreign nations as from the several States composing the union.'" *Id.* (quoting *Cherokee Nation*, 30 U.S. at 18). Rather, as the court observed, Indian tribes have long been seen by the Supreme Court as "domestic dependent nations," unique entities Congress made no effort to fold into Sections 101(27) and 106(a). *Id.* at 693-95.

The separate and unique status of Indian tribes is memorialized in Article I, § 8 of the Constitution, which distinguishes Congress, "foreign Nations," "the several States," and "Indian Tribes." Indeed, the Supreme Court has recognized that Indian tribes "remain quasi-sovereign nations, which by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the federal and state governments" that remain "culturally and politically distinct." *Martinez*, 436 U.S. at 71-72.[5] The Supreme Court continues to recognize the unique status of Indian tribes and their sovereignty in its jurisprudence. *See, e.g.*, *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021) (identifying Indian tribes as "distinct, independent political communities" with "sovereignty that … is of a unique … character" (quotations omitted)); *Atkinson*

[5] So much has the Supreme Court viewed the authority of Indian tribes as distanced from the Constitution, that double-jeopardy claims do not arise from dual prosecutions occurring in federal and tribal courts. *United States v. Lara*, 541 U.S. 193, 199, 209 (2004).

Trading, 532 U.S. at 659 (characterizing Indian tribes as "unique aggregations" (quotation omitted)); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985) ("As we have often noted, Indian tribes occupy a unique status under our law."); *Martinez*, 436 U.S. at 55-56 (noting that Indian tribes "remain a separate people … regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority" (quotation omitted)).

Dictionary definitions, which Coughlin relies on heavily, also lend support to the unique status of Indian tribes. For instance, in 1968, shortly before passage of the Code, "Indian tribe" was defined as "[a] separate and distinct community or body of the aboriginal Indian race of men found in the United States." *Indian Tribe*, Black's Law Dictionary 912 (4th ed. 1968). Use of the passage "separate and distinct" denotes the unique status of Indian tribes, an understanding Congress undoubtably knew when it defined "governmental unit."

Indian tribes are treated and seen as separate and distinct, relative to other governments. They do not neatly fit within the same categories that the United States, states, and foreign states fit within. Rather than strain to contest their uniqueness and squeeze Indian tribes into the phrase "domestic government" as that term is narrowed by the list it follows, this Court should instead consider the other entities that more readily fit within it. For instance, the Multistate Tax

Commission is an interstate agency that well fits this requirement. 15 U.S.C. § 381 *et seq.* This is just one of many multi-state and regional commissions or agencies that exist by virtue of interstate compact or federal legislation. *See, e.g.*, Pub. L. 81-66, 63 Stat. 70 (1949) (Gulf States Marine Fisheries Commission); Pub. Res. 67-17, 42 Stat. 174 (1921) (Port Authority of New York and New Jersey); Pub. L. 88-177, 77 Stat. 332 (1963) (Dresden Interstate School District). Other foreign governments could include international bodies, such as the European Union, the United Nations, the North Atlantic Treaty Organization, or the World Trade Organization. The structure of Section 101(27) requires a narrower interpretation of "other foreign or domestic government" that would most naturally include these types of governments—not Indian tribes.

Coughlin also argued to the Bankruptcy Court that the catch-all phrase was intended to make the definition durable enough to ensure it applied to the listed entities even if their own makeups might change: "[T]he reason why I believe Congress utilized the language that it chose is because of the fact that it is possible to create new polities, … that a statute should be durable, not just for the here and now in 1994, but for what may exist in the future." J.A. 404. Certainly, there is merit to the idea Congress was trying to ensure the listed governments could not renegotiate their place in the Code by later altering their form. In fact, its repetition

of those entities strongly supports that notion, as does the legislative history, discussed *supra* Section II.

Ultimately, the structure of Section 101(27) does not lend itself naturally to a reading that "other foreign and domestic government" was meant to include every single type of government. Given the omission of anything resembling Indian tribes in that detailed list, it is unreasonable to assume Congress meant to include Indian tribes in the concluding catch-all provision. At bottom, it is absurd to claim that Congress unequivocally expressed its intent to abrogate tribal sovereign immunity by shoehorning them into a catch-all provision, which leads to the second problem with *Krystal Energy*'s and Coughlin's line of reasoning.

Breadth has never been the Supreme Court's test for congressional abrogation of tribal sovereign immunity. In fact, the opposite is true. The rule of construction for abrogation of tribal sovereign immunity is rooted in the unique trust relationship between the United States and Indian tribes. *Bay Mills*, 572 U.S. at 790; *Seminole Nation*, 316 U.S. at 296. And as the Supreme Court has explained repeatedly, one of the federal government's singular most important policies toward Indian tribes is to promote their independence and self-governance. *Citizen Band*, 498 U.S. at 510; *Morton v. Mancari*, 417 U.S. 535, 553-55 (1974). Abrogating tribal sovereign immunity undermines this policy. *See Bay Mills*, 572 U.S. at 790. It is for this reason that the Supreme Court does not look for breadth in

abrogation language but rather *specific intent* to abrogate *tribal* sovereign immunity. For this point, *Meyers* is instructive.

Meyers involved FACTA, which allowed for suits against any "person," defined to included "any … government." 836 F.3d at 824. Much like Coughlin does, the plaintiff "claim[ed] that the definition" was "broad enough to include Indian tribes." *Id.* The Seventh Circuit—like the Sixth Circuit in *Buchwald* and the Bankruptcy Appellate Panel for the Eighth Circuit in *Whitaker*—noted the clear absence of any reference to Indian tribes in the definition, highlighting that Congress had been careful to include that term in other statutes where tribal sovereign immunity was abrogated. *Id.* (citing the Safe Water Drinking Act, the Resource Conservation and Recovery Act of 1976 and the Fair Debt Collection Procedures Act).

The Seventh Circuit observed "Congress need not invoke 'magic words' to abrogate immunity," as Coughlin presses. *Id.* It even noted cases in which courts "had to take an indirect route to determine that Congress meant to abrogate immunity." *Id.* But it concluded FACTA did not abrogate tribal sovereign immunity. *Id.* at 827. In so doing, it explained that by asking the Seventh Circuit "to focus on whether the Oneida Tribe is a government so that [it] must shoehorn it into FACTA's statement that defines liable parties to include 'any government,'" the plaintiff had "lost sight of the real question." *Id.* As it explained,

> [W]hen it comes to sovereign immunity, shoehorning is precisely what [courts] cannot do. Congress' words must fit like a glove in their unequivocality. It must be said with perfect confidence that Congress intended to abrogate sovereign immunity and imperfect confidence will not suffice. Congress has demonstrated that it knows how to unequivocally abrogate immunity for Indian Tribes. It did not do so in FACTA.

Id. (quotations and citations omitted).

Even the Sixth Circuit acknowledged "there cannot be reasonable debate that Indian tribes are both 'domestic' and also that Indian tribes are fairly characterized as possessing attributes of a 'government.'" *Buchwald*, 917 F.3d at 459 (quotation omitted). But as it too recognized, "that is not the real question. The real question is whether Congress—when it employed the phrase 'other foreign or domestic government'—unequivocally expressed an intent to abrogate tribal sovereign immunity." *Id.* Both decisions highlight that the test is not about breadth; it is about congressional intent with respect to tribal sovereign immunity.

The Supreme Court has explained that when Congress intends to abrogate tribal rights, it must show that it actually considered those rights and chose to abrogate them. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). In *Mille Lacs*, the predecessors to the Mille Lacs Band of Chippewa Indians entered into a treaty with the United States that "guaranteed to the Chippewa the right to hunt, fish, and gather on the ceded lands" several years before Minnesota was admitted to the Union. *Id*. at 176, 203. When the band filed

suit over a century later seeking a declaration of its retained treaty rights to hunt, fish, and gather in the ceded territory, Minnesota claimed that its enabling act abrogated the band's treaty rights. *Id.* at 185, 202-03. It argued that its admission "'into the Union on an equal footing with the original States in all respects whatever'" triggered the "constitutional principle that all States are admitted to the Union with the same attributes of sovereignty … as the original 13 States." *Id.* at 202-03 (quoting Act of May 11, 1858, 11 Stat. 285).

The Supreme Court rejected the state's argument, explaining that while "Congress may abrogate Indian treaty rights, … it must clearly express its *intent* to do so." *Id.* at 202, 208 (emphasis added). That intent must be shown by "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 202-03 (quotation omitted). The Supreme Court observed that Minnesota's enabling act "makes no mention of Indian treaty rights; it provides no clue that Congress considered the reserved rights of the Chippewa and decided to abrogate those rights when it passed the Act." *Id.* at 203. It buttressed its determination by noting "the State does not point to any legislative history describing the effect of the Act on Indian treaty rights." *Id.*

Similarly, in *Menominee Tribe of Indians v. United States*, the Supreme Court was asked whether Congress abrogated a treaty right to hunt and fish

through a termination act providing that state laws "shall apply to the tribe and its members in the same manner as they apply to other citizens or persons" and that "all statutes of the United States which affect Indians … shall no longer be applicable to the members of the tribe." 391 U.S. 404, 405-07 (1968). The Supreme Court concluded that this did not abrogate the treaty rights, reasoning that "[t]he use of the word 'statutes' is potent evidence that no treaty was in mind." *Id.* at 412-13. It declined "to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians." *Id.*

The Supreme Court has repeatedly emphasized this principle that Congress must establish that it has actually considered the specific tribal rights at issue before abrogation may be found. *See, e.g.*, *United States v. Dion*, 476 U.S. 734, 743-45 (1986) (after extensive analysis, finding that "Congress thus considered the special cultural and religious interests of Indians, balanced those needs against the conservation purposes of the statute, and provided a specific, narrow exception that delineated the extent to which Indians would be permitted to hunt the bald and golden eagle"); *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468-74 (2020). While this case does not involve an alleged abrogation of a treaty right or reservation diminishment, the Supreme Court looks to congressional intent in all of these and other contexts, reflecting its repeated observation that *Congress* possesses plenary power over Indian tribes and the enduring rule that courts must tread lightly when

deciding whether Congress has acted to undermine tribal independence and self-governance. *See, e.g.*, *Nebraska v. Parker*, 577 U.S. 481, 487-88 (2016) ("Only Congress can divest a reservation of its land and diminish its boundaries, and its intent to do so must be clear." (internal quotation and citation omitted)); *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights."); *cf. Menominee*, 391 U.S. at 412-13 ("While the power to abrogate [hunting and fishing] rights exists, the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress" (internal quotation and citations omitted)). Thus, *Mille Lacs*, *Menominee*, and *McGirt* all provide useful guidance regarding what this Court and others should look for when deciding if Congress has unequivocally expressed its intent to abrogate tribal sovereign immunity.

Here, just as in *Mille Lacs*, the Code "makes no mention of" Indian tribes or tribal sovereign immunity, and it provides no indication Congress actually considered tribal sovereign immunity and chose to abrogate it. Moreover, the legislative history of the Code does not describe the effect of the Code on tribal

sovereign immunity. *See infra* Section II. Without anything in the Code or its legislative history to suggest that Congress actually considered Indian tribes and tribal sovereign immunity and chose to abrogate it, this Court can only infer that intent. But of course, a congressional abrogation of tribal sovereign immunity "cannot be implied." *Martinez*, 436 U.S. at 58 (quotations omitted).

B. The Code is at best ambiguous about Congress's intent, an ambiguity this Court must resolve in favor of Indian tribes.

For the reasons stated above, the Code plainly lacks an *unequivocal* expression of congressional intent to abrogate tribal sovereign immunity. *See supra* Section I(A). But even if this Court disagrees, the Code is certainly ambiguous about such intent. The Bankruptcy Court acknowledged this possibility and noted that such an ambiguity must be construed in favor of Indian tribes. *See* Add. 4.

Coughlin does not appear to contemplate this possibility and instead assumes this Court must simply progress through its analysis using traditional canons of construction. App. Br. 16. Coughlin "fails to appreciate … that the standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see* Add. 4.

"Ambiguities in federal law [are] construed generously in order to comport with … traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448

U.S. 136, 143-44 (1980). In other words, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana*, 471 U.S. at 766. Like the test for congressional abrogation of tribal sovereign immunity itself, this canon of construction is "rooted in the unique trust relationship between the United States and Indians." *Oneida Cnty. v. Oneida Indian nation of New York State*, 470 U.S. 226, 247 (1985).

The phrase "other foreign or domestic government" is reasonably susceptible to a narrower interpretation than every and all forms of government. *See supra* Section I(A)(2). It is reasonably susceptible to an interpretation that does not include Indian tribes. This is highlighted by the fact that Congress did not use the word "all" or "any" in front of the phrase. *See Ali v. Federal Bureau of Prison*, 552 U.S. 214, 220 (2008) (noting that "Congress' use of 'any' to modify 'other law enforcement officer' is most naturally read to mean law enforcement officers of whatever kind"). Furthermore, the whole of Sections 106 and 101(27) are reasonably susceptible to an interpretation that Congress did not consider and intend to abrogate tribal sovereign immunity. When presented with multiple interpretations, this Court must adopt the one that favors Indian tribes. *White Mountain Apache*, 448 U.S. at 143-44.

II. The Code's legislative history confirms that Congress did not unequivocally intend to abrogate tribal sovereign immunity.

When it comes to congressional abrogation of sovereign immunity, "[l]egislative history generally will be irrelevant." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). After all, "[i]f Congress' intention is "unmistakably clear in the language of the statute," recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile.'" *Id.* Still, Coughlin invites this Court to reach back as far as the Constitutional Convention for the position Congress intended to abrogate sovereign immunity for Indian tribes. App. Br. 29-30. In reality, the Constitutional Convention and other legislative history for the Code lead only to the conclusion that Congress had no intent to abrogate tribal sovereign immunity.

A. The agreement of the *states* at the Constitutional Convention does not demonstrate an *unequivocal* expression of congressional intent to abrogate *tribal* sovereign immunity.

Coughlin first relies on a passage from *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), that "the states agreed in the plan of the Convention not to assert immunity against orders ancillary to the bankruptcy courts' *in rem* jurisdiction, such as orders directing turnover of preferential transfers." App. Br. at 30 (quotation omitted). From this, he makes the enormous leap that "it is federal policy today, as it has been from the beginning, that in bankruptcy court everyone plays by the same rules." App. Br. at 30.

Coughlin himself recognizes Indian tribes were not parties to the Constitutional Convention. App. Br. 30. The Supreme Court has already rejected states' similar reliance on the Constitutional Convention for the proposition that tribes are subject to claims brought by states: "While each State at the Constitutional Convention surrendered its immunity from suit by sister States, 'it would be absurd to suggest that the tribes'—at a conference 'to which they were not even parties'—similarly ceded their immunity against state-initiated suits." *Bay Mills*, 572 U.S. at 789-90 (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991)).

The same is true here. There is no reason to believe that Congress extended the states' compromise to Indian tribes, to which it has "moral obligations of the highest responsibility and trust," *Seminole Nation*, 316 U.S. at 296, without mentioning them in the Code or its legislative history. Instead, is far more likely that Congress satisfied the agreement of the states. In any event, relying on the Constitutional Convention as a basis for the position that Congress abrogated tribal sovereign immunity requires a significant inference.

B. The Code's legislative history strongly confirms that Congress was not contemplating abrogation of tribal sovereign immunity.

A robust review of the Code's legislative history reveals that Indian tribes as domestic dependent nations were not considered in the many hearings, reports, and debates held before the 1978 passage and the 1994 amendments to the Code. The

few scattered references to "Indians" in the extensive legislative history have nothing to do with applying the Code to Indian tribes or considering tribal sovereign immunity.[6] These references to "Indians" (not Indian tribes or tribal governments) do not come close to satisfying the Supreme Court's abrogation test, *i.e.*, that Congress specifically contemplated the presence and abrogation of tribal sovereign immunity.

When Congress passed the Code, it undoubtedly knew that it needed to specifically address tribal sovereign immunity if it wanted to abrogate it. *See, e.g.*, *Martinez*, 436 U.S. at 58-59 (decided in May 1978, six months before the

[6] These references include: the need for separate bankruptcy courts because of overworked district courts, including because of complex "Indian litigation" pending in Maine in 1977; a list of "selected bankruptcy court case narratives" that included one case involving a corporate, non-tribal debtor on the Hoopa Indian Reservation and the preservation of 250 jobs; a quip that the last time bankruptcy was holistically addressed by Congress was a decade before the battle of the Little Big Horn River in 1876; and a bankruptcy attorney's prepared statement noting the lack of exemption in the draft bill for restricted Indian lands held by individual noncompetent Indians. *See* 123 Cong. Rec. 35447 (Oct. 27, 1977) (statement of Rep. William Cohen); Ltr. from Conrad K. Cyr, Nat'l Conf. of Bankruptcy Judges to Rep. Don Edwards (Mar. 3, 1977), Appendix at 47, *A Report prepared by the Staff of the Subcommittee on Civil and Constitutional Rights for the Committee on the Judiciary*, H.R. Staff Rep. No. 3, 95th Cong. 1st Sess. (1977); *Commission to Study Bankruptcy Laws: Hearings before the Subcommittee on Bankruptcy of the Committee on the Judiciary on S.J. Res. 100*, S. 90th Cong. 2d Sess., at 12 (1968) (statement of Daniel R. Cowans, First Vice President of the Nat'l Conf. of Referees in Bankruptcy); *Bankruptcy Act Revision: Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary on H.R. 31 and H.R. 32*, H.R. 94th Cong. 2d Sess., at 2044 (Apr.-May 1976) (prepared statement of William T. Plumb, attorney).

enactment of the Code and discussing Congress's role in relation to tribal sovereign immunity). The absence of reference to Indian tribal governments in the legislative history of the Code is thus not mere happenstance. Congress knew what it needed to do, knew that it had the power to address tribal sovereign immunity, but simply chose not to do so.

Instead, the legislative history reveals that the relevant provisions were considered in reference to the federal government and the states. In both a 1978 Senate Report and a 1977 House Report offering a "Section-by-Section Analysis" of the new proposed Code, Section 106 is explained as providing a limited waiver of sovereign immunity in the context of "the Federal government," which Congress has the power to waive "completely," and "a State" via congressional exercise of "its bankruptcy power through the supremacy clause to prevent or prohibit State action that is contrary to bankruptcy policy." S. Rep. No. 95-989, at 29 (July 14, 1978); H.R. Rep. No. 95-595, at 317 (Sept. 8, 1977). No mention is made in this exploration of Section 106 of any other specific governmental entity beyond the federal government and the states. *See Whitaker*, 474 B.R. at 693 ("Indeed, the House Report for the Bankruptcy Reform Act of 1994 refers specifically to the sovereign immunity of the 'States and Federal Government,' neither of which could even remotely be interpreted to include Indian tribes.").

The legislative history for the 1994 revisions further confirms that congressional intent and focus was on the sovereign immunity of the states and the federal government. The House Report accompanying the bill specifies: "It is the Committee's intent to make section 106 conform to the Congressional intent of the Bankruptcy Reform Act of 1978 waiving the sovereign immunity of the States and the Federal Government in this regard." H.R. Rep. No. 103-835, at 42 (Oct. 4, 1994). This report also explicitly noted the intent of the amendments to the sovereign immunity section was to "overrule two Supreme Court cases that have held that the States and Federal Government are not deemed to have waived their sovereign immunity by virtue of enacting section 106(c) of the Bankruptcy Code." *Id.* (citing *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96 (1989) and *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992)). During debate on the bill, a member of the committee drafting the report further emphasized the intent of Congress to focus on state and federal sovereign immunity: "I would particularly note the import of Section 113[7] with regards to the rights of taxpayers. Section 113 establishes that that the Federal and State governments cannot seize the property of taxpayers who have filed for bankruptcy." 140 Cong. Rec. 27699 (Oct. 4, 1994) (statement of Rep. Howard

[7] Section 113 of Public Law 103-394 amended Section 106 (Sovereign Immunity) of Title 11.

Berman). This congressional intent also reflects what the Committee and Congress heard from the National Bankruptcy Commission during hearings on the bill. Kenneth Klee, Chairman of the Legislation Committee of the National Bankruptcy Conference submitted a prepared statement outlining cases where the federal government, states, and state entities (like a state traffic court) had asserted sovereign immunity in reliance on *Hoffman* and *Nordic Village*, and testified to the Conferences' support for Representative Berman's sovereign immunity addition, "which would prevent the *Federal Government* from violating the law by seizing property in bankruptcy cases." (emphasis added). *Hearing Before the Subcommittee on Economic and Commercial Law of the Committee on the Judiciary*, H. Rep. 103rd Cong. 2nd Sess. (Aug. 17, 1994), at 13, 122-29.

Coughlin relies on this Court's decision in *TI Federal Credit Union v. DelBonis*, 72 F.3d 921 (1st Cir. 1995), for the position that "[l]egislative history suggests that Congress intended to define governmental unit in the broadest sense." App. Br. 34 (quotations omitted). This language in *TI Federal Credit Union* comes from a 1977 House Report, which read as follows: "Paragraph (20) defines 'governmental unit' in the broadest sense. The definition encompasses the United States, a State, Commonwealth, District, Territory, municipality or foreign state, and a department, agency or instrumentality of any of those." H.R. Rep. No. 95-595, at 311. The exact same explanation is found in a July 1978 Senate Report. S.

Rep. No. 95-989, at 24. Both reports include this explanation in their "Section-By-Section Analysis" of the code. *See* H.R. Rep. No. 95-595, at 308; S. Rep. No. 95-989, at 21. Nowhere in either explanation, however, does it mention Indian tribes or reveal a congressional intent to capture any entities not specifically named in the list. Instead, the addition of "other foreign or domestic government" at the end of the definition in the final bill suggests Congress's intent to capture entities *like* those already listed—not the never discussed and wholly distinct entity of Indian tribes. *See supra* Section I(A)(2).

III. The Code's structure, context, and purpose do not evidence an unequivocal expression of congressional intent to abrogate tribal sovereign immunity.

Coughlin's fruitless legislative-history remarks are woven into a larger argument in which he relies on this Court's instruction in *In re Jamo*, that "the Bankruptcy Code should be read as a whole." 283 F.3d 392, 399 (1st Cir. 2002); App. Br. 26. But Coughlin omits a particularly relevant portion of the passage: "[T]he Bankruptcy Code should be read as a whole, *with a view toward effectuating Congress's discerned intent.*" *Jamo*, 283 F.3d at 398 (emphasis added). Furthermore, that decision considers only the interplay of provisions within the Code, not whether the Code abrogates tribal sovereign immunity. Coughlin's arguments are fraught with inference, conjecture, and policy opinion that only serve to distance his analysis from the real question: "whether

Congress—when it employed the phrase 'other foreign or domestic government'—unequivocally expressed an intent to abrogate tribal sovereign immunity." *Buchwald*, 917 F.3d at 459.

Coughlin first directs this Court's attention to the "humanitarian" and "structural" purposes of Section 362 regarding the automatic stay and 11 U.S.C. § 524 regarding discharge. App. Br. 26-29. Coupling these provisions with what he characterizes as "the broad waiver of sovereign immunity associated with enforcement actions," he concludes that "it is federal policy … that in bankruptcy court everyone plays by the same rules." App. Br. 27-28, 30. This of course begs the question of how broad Sections 106 and 101(27) are. But regardless, nothing could be further from the truth.

The automatic stay under Section 362 is not absolute. It enumerates 29 specific examples of when and to whom the stay does not apply. *See* 11 U.S.C. § 362(b)(1)-(29). Some of these exceptions are specifically for post-petition actions by "governmental units," *e.g.*, 11 U.S.C. § 362(b)(4), (9), (18), as Coughlin himself acknowledges, App. Br. 32-33. Beyond those exceptions, this Court has identified at least one other exception for negotiating reaffirmation agreements, which can involve "hard-nosed negotiations." *Jamo*, 283 F.3d at 398-99 (rejecting an "extreme" construction that Section 362 "prohibit[s] all post-petition contact between creditors and debtors"). In addition, under Section 362(d), a party can

seek and receive relief from the automatic stay in certain circumstances. In sum, the suggestion that the automatic stay is absolute and applies the same to everyone is inaccurate.

Regarding discharge, Section 524 similarly is not absolute. It is immediately preceded by 11 U.S.C. § 523, which enumerates 19 specific examples of when a debtor does not receive a discharge of a debt. 11 U.S.C. § 523(a)(1)-(19). Many of these exceptions are for governmental units. 11 U.S.C. § 523(a)(1), (7), (8)(A)(i), (14A). These exceptions are acknowledged by Coughlin. App. Br. 33-34.[8]

It is disingenuous to say that "it is federal policy … that in bankruptcy court everyone plays by the same rules." App. B. 30. And it is even more disingenuous to draw from Sections 326 and 524 the conclusion that Congress unequivocally expressed its intention to abrogate tribal sovereign immunity in Sections 106 and 101(27).

In a related vein, Coughlin also points to the U.S. Constitution and case law for the proposition that Congress intended to fulfill the "special need for uniformity" in bankruptcy. App. Br. 30. He seems to equate "uniformity" with, again, the idea that everyone plays by the same rules under the Code. App. Br. 30. On the contrary, Coughlin himself highlights myriad examples of how certain

[8] Indeed, exceptions and preferential treatment abound in the Code, even with respect to filing claims, another fundamental component of the Code. *See, e.g.*, 11 U.S.C. § 507 (providing an order of priority for expenses and claims).

creditors, including governmental units, receive special treatment under the Code. See App. Br. 35-46. Rather, "uniform" as used in the Constitution and case law means only that the Code provides the laws on the subject of bankruptcy that apply throughout the country.

Katz, on which Coughlin relies, spells this out. In that case the Supreme Court explained that the problem solved by the Bankruptcy Code was the "wildly divergent schemes" of the several states "for discharging debtors from their debts." *Katz*, 546 U.S. at 365. The Supreme Court provided examples of jurisdictions that would "release[] debtors from prison upon surrender of their property," jurisdictions that "granted release from prison, but only in exchange for indentured servitude," jurisdictions that "provided no relief at all for the debtor," and others. *Id.* at 365-66. It explained that the result of "the uncoordinated actions of multiple sovereigns, each laying claim to the debtor's body and effects according to different rules, rendered impossible [a] neat … solution." *Id.* This was the basis for a uniform law on bankruptcy: to ensure that there was one set of rules that applied throughout the country. It had nothing to do with treating all creditors and debtors the same. As discussed previously, the Code provides many exceptions and preferences to various creditors and various debts—not everyone "plays by the same rules."

Coughlin also posits that "[i]t makes no sense to read the Bankruptcy Code to treat tribes differently from all other governments," and reinforces his position by characterizing tribal sovereign immunity as an "unwarranted exception." App. Br. 26, 28, 29 (quotation omitted). He proposes that "[t]he Court need not and should not conclude that Congress intended any such result." App. Br. 32. These arguments put in sharp relief just how clearly Coughlin has turned the Supreme Court's standard for congressional abrogation of tribal sovereign immunity on its head. "[I]t is fundamentally Congress's job, not [the federal judiciary's], to determine whether or how to limit tribal immunity." *Bay Mills*, 572 U.S. at 800; *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998) ("The capacity of the Legislative Branch to address [this] issue by comprehensive legislation counsels some caution by us in this area."); *Martinez*, 436 U.S. at 60 ("[A] proper respect both for tribal sovereignty and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."). Congress does not share Coughlin's position that tribal sovereign immunity is an "unwarranted exception." *See supra* Sections I, II. Regardless of the position this Court takes on that question, it must defer to Congress. *See Bay Mills*, 572 U.S. at 790.

Moreover, this is not an anomalous situation. For instance, in *Meyers*, the Seventh Circuit concluded that FACTA did not abrogate tribal sovereign immunity

even where a federal waiver of sovereign immunity seemed clear enough. *See* 836 F.3d at 826-27 (noting that the district court "hit the nail on the head when it explained that … [i]t is one thing to say 'any government' means 'the United States,'" but "it's another thing to say 'any government' means 'Indian Tribes'" (quotation omitted)). And just weeks ago, the Ninth Circuit concluded that the Clean Water Act, though waiving federal sovereign immunity, did not impair tribal sovereign immunity. *Deschutes River Alliance*, 2021 WL 2559477 at *5, 7. Coughlin's call for this Court to assume that Congress must have meant to treat Indian tribes the same as the federal government and states flies in the face of precedent.

Finally, Coughlin argues that Congress must have abrogated tribal sovereign immunity in the Code because otherwise Indian tribes would not be "governmental units" and would not have the ability to enforce special debts such as taxes, penalties, fees, or family-support obligations under exceptions in Sections 362 and 523. App. Br. 35-36.[9] He argues that "less honest debtors" could then potentially avoid fulfilling these special debts by seeking prospective injunctive relief against Indian tribes that try to collect on them outside of bankruptcy proceedings.

[9] This argument stems from his explanation that Indian tribes perform governmental functions similar to other governmental entities. App. Br. 32-35. Again, this misses the real question of "whether Congress—when it employed the phrase 'other foreign or domestic government'—unequivocally expressed an intent to abrogate tribal sovereign immunity." *Buchwald*, 917 F.3d at 459.

Even taking as true Coughlin's premise that Indian tribes would not be able to pursue special debts under exceptions in Sections 362 and 523, this just means that Indian tribes would need to weigh the risks and rewards of abiding by the Code. They could decide to participate in bankruptcy proceedings as non-governmental-unit creditors and risk limited fulfillment of these debts. In other words, if this Court adheres to the Supreme Court's exacting standard for congressional abrogation of tribal sovereign immunity and concludes that the Code does not meet that standard, Indian tribes could exercise their sovereignty and choose what risks they face within the resulting framework, which the federal government supports. *See Citizen Band*, 498 U.S. at 510; *Seminole Nation*, 316 U.S. at 296.

Moreover, it would be incorrect to call Coughlin's projected outcome incoherent, as he does. App. Br. 35. Rather, it would simply be a consequence of Congress weighing and accommodating competing policy concerns, including the federal policy of promoting tribal economic development, independence, and self-governance, and the understanding that abrogating tribal sovereign immunity undercuts that policy. *See Kiowa Tribe*, 523 U.S. at 759 (noting that "Congress is in a position to weigh and accommodate … competing policy concerns"); *Bay*

Mills, 572 U.S. at 790.[10] Though it may seem like an adverse result to Coughlin, as the Supreme Court recently explained, potentially adverse consequences must not prevent courts from applying the law as written: "Congress remains free to supplement its statutory directions … at any time. It has no shortage of tools at its disposal." *McGirt*, 140 S. Ct. at 2481-82.

Conclusion

Coughlin acknowledges that the Supreme Court has set an exacting standard for Congress to abrogate tribal sovereign immunity. But he asks this Court to embark on a different test altogether, one that would allow it to substitute breadth for specific intent and implication for unequivocality. This Court should not entertain this serious deviation from Supreme Court precedent.

Instead, it should weigh the facts that matter. The Code contains no references to Indian tribes. Its abrogation provisions include a detailed list of federal, state, and foreign governments with a vague catch-all limited to governments of the same kind as those listed. It flows from a legislative history that reveals Congress's singular focus on addressing federal and state sovereign

[10] This is equally true with respect to Coughlin's claimed impacts of tribal sovereign immunity on certain purposes of the Code. Even if those impacts exist, to therefore draw the conclusion that Congress must have abrogated tribal sovereign immunity requires a significant inference, one that disregards the reality that Congress must weigh and balance competing policy concerns, which can sometimes lead to adverse consequences. This Court cannot draw that inference. *See Martinez*, 436 U.S. at 58.

immunity. Weighing these facts, this Court should conclude that Congress did not unequivocally express an intent to abrogate tribal sovereign immunity and affirm the Bankruptcy Court's decision.

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Certificate of Service

I hereby certify that on July 15, 2021, I electronically filed the foregoing document with the U.S. Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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