

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

Pages: 1 through 70

Place: Washington, D.C.

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LAC DU FLAMBEAU BAND OF)

LAKE SUPERIOR CHIPPEWA INDIANS,)

ET AL.,)

Petitioners,)

v.) No. 22-227

BRIAN W. COUGHLIN,)

Respondent.)

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Washington, D.C.

Monday, April 24, 2023

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

1 APPEARANCES:

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

4 GREGORY G. RAPAWEY, ESQUIRE, Washington, D.C.; on
5 behalf of the Respondent.

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

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

2 (11:03 a.m.)

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

6 Mr. Shah.

7 ORAL ARGUMENT OF PRATIK A. SHAH

8 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

25 Indeed, Congress has long treated

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

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

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

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

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

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

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

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

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

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

1 other side accepts it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 MR. SHAH: Sure.

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

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

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

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

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

17 MR. SHAH: Right.

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

20 MR. SHAH: No.

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

23 MR. SHAH: The reason why --

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

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

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

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

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

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

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

12 MR. SHAH: Sure.

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

15 MR. SHAH: So --

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

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

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

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

1 but I think it's illuminating.

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

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

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

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

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

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

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

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

17 MR. SHAH: Yeah.

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

20 MR. SHAH: Yeah.

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

1 to think that includes Indian tribes.

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

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

9 MR. SHAH: Yeah.

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

12 MR. SHAH: Yeah.

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

15 MR. SHAH: Sure.

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

18 MR. SHAH: Right.

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

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

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

6 Now, again, Your Honor, none of us
7 know what Congress actually had in mind.

8 JUSTICE KAVANAUGH: What were your
9 other two -- what were your other two theories?

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

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

21 Around that same time, Congress was
22 passing statutes, and they're included on page
23 11 of the law professors' amicus brief. These
24 were statutes that were designed to augment
25 tribal self-determination and tribal economic

1 stability.

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

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

20 And so perhaps Congress -- again, none
21 of us know because Congress doesn't refer to
22 tribes even once in the legislative history or
23 in the text -- but perhaps they thought: Okay,
24 well, it doesn't -- it's not as fair to abrogate
25 the sovereign immunity of Indian tribes, who

1 weren't part of that deal or bargain struck in
2 the Constitutional Convention.

3 JUSTICE ALITO: Mr. Shah --

4 JUSTICE SOTOMAYOR: Counsel --

5 JUSTICE ALITO: -- just out of
6 curiosity, could I ask you a few questions about
7 the relationship between the tribe and Lendgreen
8 Loans?

9 MR. SHAH: Yes.

10 JUSTICE ALITO: Who actually operates
11 this?

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

21 Of course, they use third-party
22 vendors, servicers and all, like any other
23 business that may not be tribal lenders, but
24 this is not one of those situations that the
25 amicus brief talks about in other cases about

1 renting tribes' immunity. This is a tribal
2 business.

3 JUSTICE ALITO: Well, what -- what
4 percentage of the people who are actually
5 running this business are tribal members?

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

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

17 JUSTICE ALITO: Do you dispute the --
18 the facts that are set out in Respondent's brief
19 about what was done to --

20 MR. SHAH: Your Honor -- Your Honor,
21 the --

22 JUSTICE ALITO: -- his client that
23 even after he -- he filed the bankruptcy
24 petition and notified Lendgreen that he had done
25 so, they continued to contact him, and he

1 attempted to commit suicide, and even when he
2 was in the hospital after this unsuccessful
3 attempt, they were calling him at the hospital
4 to collect this loan?

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

10 JUSTICE ALITO: Well, I mean, I under
11 -- I --

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

18 JUSTICE ALITO: But it doesn't --

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

20 JUSTICE ALITO: -- it doesn't think
21 it's obligated to abide by the -- by an
22 automatic stay?

23 MR. SHAH: It is, Your Honor. That
24 is -- the tribe's view -- the tribe's view is
25 not, Your Honor, that the Bankruptcy Code

1 doesn't apply to it. What we have here is a
2 damages action for violation of the automatic
3 stay that's seeking hundreds of thousands of
4 dollars in actual damages like, emotional stress
5 damages and all of that.

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

11 However, if there's a violation of the
12 automatic stay, one could imagine an Ex parte
13 Young action that would sue the tribal officer.
14 They would have to abide by that, as this Court
15 said in Bay Mills.

16 What the tribe is saying is you can't
17 sue them for hundreds of thousands of dollars of
18 actual damages. That's at the core of sovereign
19 immunity. And that's what is the issue at
20 stake. Not the tribe's belief it doesn't have
21 to comply with the automatic stay, not the
22 tribe's belief that it wouldn't have to comply
23 with an injunction under Ex parte Young to abide
24 by the automatic stay, but rather just the
25 hundreds of thousands of dollars in --

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

7 Why would Congress want to try to keep
8 fraudulent transfers of millions of dollars?

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

13 JUSTICE SOTOMAYOR: You're really
14 going to say that --

15 MR. SHAH: So --

16 JUSTICE SOTOMAYOR: -- Nordic Village
17 is unclear about that?

18 MR. SHAH: No. So --

19 JUSTICE SOTOMAYOR: As is Greentown
20 unclear about that?

21 MR. SHAH: Katz, Your Honor, which
22 came after Nordic Village, cuts the exact
23 opposite way. What this Court said in Katz is,
24 unlike Nordic Village, which seemed to think
25 this was a damages action, the Court in Katz

1 viewed it more as an in rem action. If it's an
2 in rem action as property of the state, then the
3 tribe would have to return the property.

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

7 JUSTICE SOTOMAYOR: So why would --

8 MR. SHAH: -- would be --

9 JUSTICE SOTOMAYOR: -- why --

10 MR. SHAH: -- responsible under Ex
11 parte Young.

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

19 MR. SHAH: Well, Your Honor, if it had
20 wanted to clearly include Indian tribes, which,
21 of course, it had to do under this Court's
22 longstanding jurisprudence and reiterated just
23 six months before the code, if it wanted to
24 clearly include Indian tribes, it could have
25 enumerated them just like Congress did with

1 respect to the United States, states, foreign
2 governments, and just like Congress has done in
3 every other statute. We list both in the
4 abrogation context and outside of the abrogation
5 context.

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

11 But equally, I guess, the question is,
12 if Congress forgot Indian tribes --

13 MR. SHAH: Yes.

14 JUSTICE SOTOMAYOR: -- is the
15 structure of this so clear that it was meant to
16 include them?

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

24 JUSTICE SOTOMAYOR: But we have a very
25 different history after 1938. We have a history

1 --

2 MR. SHAH: Sure.

3 JUSTICE SOTOMAYOR: -- of the Court
4 itself saying that sovereigns are immune from
5 things like foreign -- fraudulent transfers.

6 MR. SHAH: Right.

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

14 MR. SHAH: Sure.

15 JUSTICE SOTOMAYOR: -- obligations,
16 like not to do -- not to violate the stay and
17 not to engage in fraudulent transfers.

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

24 But let me get beyond that and address
25 your question more head on. If they had used

1 the formulation that you said in your question,
2 every government, foreign or domestic, kind of
3 similar to the Chief Justice's hypothetical, and
4 that's all they said, I would have a tougher
5 argument here. My only argument left would be,
6 well, tribes are kind of sui generis, not really
7 domestic, not really foreign. And maybe I win
8 or lose on that.

9 But that's not what they did here. In
10 1978, six months after this Court issued Santa
11 Clara Pueblo, which refers to the tribes that
12 says they remain a separate people and that
13 you -- Congress has to use unequivocally clear
14 language if it wants to abrogate the sovereign
15 immunity of tribes, six months later, in
16 promulgating the code, they do the most opaque
17 thing possible, which is to list all of the
18 other entities entitled to sovereign immunity,
19 the United States, states, and foreign
20 governments, and omit Indian tribes, when it's
21 the easiest thing in the world, when in every
22 other statute in the history of the United
23 States it has referred to Indian tribes when it
24 wants to abrogate sovereign immunity.

25 From that, we divine a clear statement

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

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

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

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

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

1 MR. SHAH: Right.

2 JUSTICE GORSUCH: -- on the other side
3 for the tribes.

4 MR. SHAH: Exactly. So the -- the
5 view of tribes are united that, in fact, that
6 wouldn't be the proper judgment.

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

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

23 And, again, this is not the "every
24 government, any government under the sun"
25 hypothetical. This is where they painstakingly

1 enumerated the --

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

7 MR. SHAH: Yeah, I bet you states --

8 JUSTICE BARRETT: States?

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

11 JUSTICE BARRETT: But should they win?
12 I mean, it seems --

13 MR. SHAH: Yeah.

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

19 MR. SHAH: Right.

20 JUSTICE BARRETT: But it looks to me
21 like an effort to cover the waterfront. We have
22 to have a clear statement rule.

23 MR. SHAH: Right.

24 JUSTICE BARRETT: But I just -- if you
25 -- if you have a description --

1 MR. SHAH: Sure.

2 JUSTICE BARRETT: -- at the end that's
3 a catch-all --

4 MR. SHAH: Right.

5 JUSTICE BARRETT: -- that can be --

6 MR. SHAH: Well --

7 JUSTICE BARRETT: -- it seems to me
8 like to win you have to say --

9 MR. SHAH: Sure.

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

14 MR. SHAH: Right.

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

20 MR. SHAH: Sure. So, Your Honor, I
21 guess two responses. One is, under Atascadero,
22 I think the states would have a pretty strong
23 argument given Atascadero and how emphatic it is
24 on mentioning states very specifically.

25 But, if I'm wrong about that, if you

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

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

16 JUSTICE BARRETT: But it says domestic
17 or foreign.

18 MR. SHAH: Right, domestic or foreign.
19 They are neither. Tribes are sui generis. This
20 Court --

21 JUSTICE JACKSON: And the other -- the
22 other governments have sovereign immunity as
23 well. I mean, the thing that I'm struggling
24 with is that all of the passion about sovereign
25 immunity and not abrogating lightly, I think,

1 would make more sense at least to me if we
2 didn't have a clear statement that Congress was
3 interested in abrogating sovereign immunity.

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

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

13 CHIEF JUSTICE ROBERTS: Sure.

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

19 And the -- the clear statement rule
20 applies to both parts. It has to clearly
21 express its intent to abrogate sovereign
22 immunity, but then it has to clearly identify
23 the governmental units whose immunity it is
24 abrogating, and in that definition, it
25 enumerates three of the big four.

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

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

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Not clearly domestic, but "dependent
13 domestic nations" is a common term, I would say
14 perhaps --

15 MR. SHAH: Yes.

16 CHIEF JUSTICE ROBERTS: -- the most
17 common.

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

24 Domestic -- if -- if Congress had used
25 "domestic dependent nation," I would not be

1 standing here. I would concede completely that
2 that is a term of art that's interchangeable
3 with "Indian tribes." "Domestic government" is
4 not.

5 CHIEF JUSTICE ROBERTS: You've
6 mentioned a couple times the big four.

7 MR. SHAH: Yes.

8 CHIEF JUSTICE ROBERTS: Is there --
9 where has that been used before?

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

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

21 MR. SHAH: That is -- that's the
22 locution that Congress uses when it wants to
23 cover those four governments. It's even more
24 strongly in the abrogation context because of
25 the clear statement rule.

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

10 CHIEF JUSTICE ROBERTS: Yeah.

11 MR. SHAH: But even there, Congress
12 felt the need to then define that term and lay
13 out the big four --

14 CHIEF JUSTICE ROBERTS: Well, I don't
15 mean --

16 MR. SHAH: -- in its definition.

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

25 I don't know -- I think it would

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

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

13 CHIEF JUSTICE ROBERTS: Justice
14 Thomas?

15 Justice Alito?

16 Justice Sotomayor?

17 JUSTICE SOTOMAYOR: I would call it
18 the big five. Territories.

19 MR. SHAH: Territories. Fair -- fair
20 enough. Thank you.

21 And -- and, Justice Sotomayor, what I
22 would add is the statute does include
23 territories by name, Section 101(27). So, when
24 there's doubt, it includes it by name. So now
25 they've included four of the big five, even more

1 in my favor.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 Justice Gorsuch?

4 Justice Kavanaugh?

5 Justice Barrett?

6 JUSTICE BARRETT: No.

7 CHIEF JUSTICE ROBERTS: Justice

8 Jackson?

9 Okay. Thank you, counsel.

10 Mr. Rapawy.

11 ORAL ARGUMENT OF GREGORY G. RAPAWY

12 ON BEHALF OF THE RESPONDENT

13 MR. RAPAWY: Mr. Chief Justice, and

14 may it please the Court:

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

23 They are domestic governments because
24 they are subject to the authority of and within
25 the territory of the United States.

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

5 It recognizes and privileges the
6 governmental functions, which include taxation,
7 the exercise of the police and regulatory
8 powers, and the making and enforcement of family
9 law.

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

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

24 I welcome the Court's questions.

25 JUSTICE THOMAS: Petitioner said that

1 there's been a change in the treatment of tribes
2 under the new Bankruptcy Code.

3 Do you agree with Petitioner, or do
4 you -- and if not, could you elaborate on your
5 differences?

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

14 For example, foreign governments are
15 included now as they were not previously
16 included.

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

23 What do you think?

24 MR. RAPAWY: So we -- we do think the
25 tribes are clearly domestic. That is our

1 primary position. But we also think that if you
2 thought that tribes had characteristics of both,
3 they would still be covered by the statute
4 because the phrase is not just domestic
5 governments but foreign or domestic governments.

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

13 And so, to the extent that you have a
14 entity that has both foreign and domestic
15 characteristics, whether it's a tribe, whether
16 it's an intergovernmental organization, it would
17 still be covered by the clause. We think that
18 applies to all governments.

19 JUSTICE GORSUCH: Mr. Rapawy, let --
20 let's take the first part of that. I mean, you
21 say they're clearly domestic, and you cite Chief
22 Justice Marshall's domestic dependent nations
23 language. But even that contains a -- a hint of
24 the -- the difficulty here, domestic dependent
25 nations, suggesting that they're something other

1 than a state. And then, of course, in Parks,
2 this Court said that tribes are in many respects
3 foreign and independent nations as well.

4 What do we do with that?

5 MR. RAPAWEY: Well, let me start with
6 Chief Justice Marshall in Cherokee Nation and
7 say that that opinion does decide very clearly
8 that tribes are a state. And so the -- the --

9 JUSTICE GORSUCH: That they're a
10 state?

11 MR. RAPAWEY: That they -- that they
12 count as a state. He says they -- he says that
13 the -- the counsel was attempting to establish
14 they are a foreign state have --

15 JUSTICE GORSUCH: A foreign state,
16 yeah.

17 MR. RAPAWEY: -- that they were --
18 counsel was attempting to establish that they
19 were a foreign state.

20 JUSTICE GORSUCH: Right.

21 MR. RAPAWEY: And so Chief Justice
22 Marshall says --

23 JUSTICE GORSUCH: They're not that.

24 MR. RAPAWEY: -- they're definitely a
25 state because they have a government -- I mean,

1 I'm paraphrasing slightly, but I do think the
2 opinion will bear this reading -- but they are
3 not a foreign state because they are not foreign
4 to the United States.

5 JUSTICE GORSUCH: Yeah.

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

7 JUSTICE GORSUCH: Parks?

8 MR. RAPAWY: -- that a close reading
9 of that reinforces --

10 JUSTICE GORSUCH: How about Parks?

11 MR. RAPAWY: I am blanking on the
12 exact passage that Your Honor is citing, but I
13 think that generally, when this Court has --

14 JUSTICE GORSUCH: In many respects, a
15 foreign and independent nation. You said
16 similar things about the territories too. I
17 mean, we actually, in the -- in the crazy
18 insular cases, said they are foreign to the
19 United States in a domestic sense.

20 MR. RAPAWY: Well, if you were to
21 conclude --

22 JUSTICE GORSUCH: Whatever that means.

23 MR. RAPAWY: Understood, Your Honor.

24 So, if you were to conclude that
25 there's doubt whether -- that -- that -- that

1 they're domestic and -- then I would proceed to
2 my -- my fallback --

3 JUSTICE GORSUCH: Yeah. Before --

4 MR. RAPAWY: -- which is the
5 government's lead position.

6 JUSTICE GORSUCH: -- before we leave
7 that, though, let's say -- I'll give you a silly
8 hypothetical.

9 Let's say I invite you to go to my
10 refrigerator and take out either vanilla or
11 chocolate ice cream and help yourself.

12 Does that license you to take the last
13 scoop of the chocolate-vanilla swirl ice cream
14 in a separate container, maybe one with a note
15 on it that says "reserved for a later birthday"?

16 MR. RAPAWY: In that case, Justice
17 Gorsuch, the "or" would be exclusive. I
18 would -- as your guest, I would be bound to read
19 that "or" as exclusive, one or the other, but
20 not something with characteristics of both.

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

24 But I don't want to give up the
25 argument that tribes are domestic because I

1 think that the question here is not whether
2 there may have been doubt at one time, and,
3 certainly, there was some doubt expressed before
4 Chief Justice Marshall came down the way he did
5 in 1831, and there may be later cases, the
6 insular cases that -- that use the term
7 "foreign" in -- in -- with respect to things
8 that would be domestic under our test, but,
9 rather, what -- what would Congress have meant
10 in 1978 by using the word "domestic"?

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

19 JUSTICE KAGAN: Mr. Rapawy, OI mean,
20 this is just a very odd statute. It lists all
21 these different kinds of governments,
22 governments that really never show up in our
23 abrogation cases.

24 And -- and -- and it doesn't list
25 Indians. It doesn't list tribes. Even though,

1 you know, you want to call it the big four, you
2 want to call it the big five, it's pretty clear
3 that tribes are out there and that they have
4 sovereign characteristics.

5 And this statute just doesn't say
6 tribes or Indians. Why not?

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

13 And I think that this -- this -- this
14 type of enumeration, lots of different
15 governments with lots of different
16 characteristics with very different relations to
17 the United States and then a concluding clause
18 that says "or foreign or domestic governments as
19 well," is a natural way to do that.

20 JUSTICE KAGAN: I mean, I agree with
21 you that this looks like a trying to cover the
22 waterfront statute. It just has this -- this
23 question, really, at the heart of it, like, if
24 you were trying to cover the waterfront, why
25 aren't you listing tribes, which is, like, so

1 much more obvious than all the things that they
2 do list?

3 MR. RAPAWY: I do not have a -- an
4 answer to that question, other than to say that
5 I think that the Court should construe the
6 statute according to the words that Congress
7 used.

8 And I think that if you were in any
9 doubt about that from the language alone in --
10 in 101(27), you should look to the other
11 supporting provisions of the statute that also,
12 I think, unequivocally support our reading.

13 JUSTICE KAVANAUGH: What about the
14 historical practice, though, of Congress using
15 "tribe" when it wanted to include tribes?
16 Against that backdrop, doesn't the failure to
17 mention tribes that Justice Kagan points out
18 create at least some ambiguity?

19 MR. RAPAWY: I think that's
20 overstated, Justice Kavanaugh. I think that if
21 you -- if you look at the statutes that
22 they've -- that they've cited, I mean, we
23 focused specifically on the abrogation statutes.

24 There were particular reasons for
25 Congress to name tribes rather than -- than

1 using a general term because the general terms
2 they were using were general terms that would
3 also cover non-sovereigns.

4 And under Atascadero, if you use a
5 general term that covers both sovereigns and
6 non-sovereigns and you authorize suit, you
7 haven't been clear enough. Obviously, that's
8 not this case because 106(a) says we are very
9 clearly abrogating sovereign immunity.

10 But, in the cases that they -- that
11 they deal with, either you have -- they -- they
12 reference to tribes because they're dealing
13 specifically with tribes, such as in the -- in
14 IGRA and there's one, the Indian -- I think the
15 Indian Self-Determination and Education Act has
16 an abrogation as well. But, regardless, they're
17 tribe-specific statutes, or they're statutes
18 that fit the model of, well, we're going to say
19 -- say that a municipality can and can't do
20 certain things, and we'll include tribe in a
21 municipality. Well, ordinarily, you wouldn't
22 read the phrase "municipality" to -- to read the
23 include tribe so you have to include it. And,
24 likewise, with the phrase "person." You
25 ordinarily wouldn't read the phrase "person" to

1 include a sovereign like a tribe, so you have to
2 include expressly.

3 But when you have a statute that --
4 dealing specifically with governments that uses
5 the general term "governmental units" and the --
6 the -- the meaning of the defined term itself is
7 relevant to the Court's statutory analysis and
8 "governmental units" standing alone would be
9 ordinarily read, I think, to include tribes.

10 JUSTICE JACKSON: Suppose we think
11 that -- suppose we think that Congress just
12 forgot about tribes. Do you lose, then, under
13 the clear statement rule?

14 MR. RAPAWY: I don't -- so I would --
15 I would resist the premise, but even -- if you
16 -- if you think that -- when you say Congress
17 forgot about tribes, if individuals -- if the
18 people who wrote the words on the page in their
19 individual human minds had -- did not -- were
20 not thinking about the problem, but they used
21 words that by their ordinary and natural meaning
22 include tribes, I think we still win.

23 And I think that there's -- that the
24 -- the goal of trying to pursue that subjective
25 mental state of individual legislators or

1 individual drafters is one this Court has
2 largely abandoned, and I -- I think that's a --
3 that's a -- the approach we would urge in this
4 case.

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

14 And so the kinds of entities that --
15 that Congress did have in its metaphorical mind
16 when it passed the code were entities that tax
17 because it was talking about governmental units
18 as levying and assessing taxes, and it made
19 special exceptions to ordinary bankruptcy rules
20 for taxes because taxes are important.

21 And it was also thinking about
22 entities that exercise police and regulatory
23 power, which tribes can do. And it made
24 exceptions to the automatic stay for exercises
25 of police and regulatory power because that's --

1 that's important too. And then family law, we
2 give the -- the example in our brief of domestic
3 support obligations, child support and alimony,
4 that are defined in Section 101(14A) to include
5 these, you know, partially by reference to
6 governmental units. And Congress made -- gave
7 special treatment to that because that's
8 important.

9 And all -- looking at all of that
10 together, that tells you that tribes perform the
11 kind of governmental functions that the code
12 recognizes and gives -- gives that special
13 treatment to.

14 I would -- and -- and those -- those
15 exceptions, you know, there was a point made in
16 the reply, I think, that, well, it doesn't
17 matter if there's an exception for tribes
18 because there are lots of other exceptions as
19 well. But the exceptions that Congress made
20 were -- are part of a detailed system that
21 balances bankruptcy and non-bankruptcy issues
22 and that does not include an exception for the
23 types of loans at issue here, which I concede
24 it's possible Congress might not have thought of
25 governments engaging in those type of loans,

1 these -- these -- these triple digit online
2 loans in 1978. Certainly, they wouldn't have
3 contemplated the Internet.

4 But, nonetheless, there is no
5 exception for this type of conduct. There
6 shouldn't be an exception for this type of
7 conduct. And you don't have to read the code to
8 create an exception for this type of conduct.

9 CHIEF JUSTICE ROBERTS: Justice
10 Thomas?

11 Justice Sotomayor?

12 Justice Kavanaugh?

13 Justice Jackson?

14 JUSTICE JACKSON: Can I just ask, why
15 shouldn't we require a clear indication that
16 Congress actually considered the tribes? I
17 mean, Justice Kagan points out we do have a
18 detailed list. They clearly considered other
19 entities. And having not considered, supposedly
20 or maybe, tribes, why isn't that just
21 dispositive of the clear statement issue?

22 MR. RAPAWEY: Well, I think -- the
23 clear statement rule is a textual rule. The
24 Court doesn't look to legislative history. And
25 the -- and the cases that have talked about

1 actually considering tribes, like United States
2 versus Dion, it's a treaty abrogation case, they
3 say, well, you can find the -- the evidence in
4 the legislative history.

5 JUSTICE JACKSON: Well, no, I'm
6 talking about the text. We have a list,
7 detailed list, of many kind of entities,
8 including territories and municipalities and
9 other entities that are spelled out in the
10 definition.

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

20 MR. RAPAWY: I think that the -- the
21 reason why that's not the answer, Justice
22 Jackson, is because the clear statement rule is
23 a -- is a tool for interpreting the law and a
24 way of determining congressional intent, not a
25 way of imposing a heightened burden on

1 Congress's exercise of powers that it
2 conceivably has within the Constitution.

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

16 JUSTICE JACKSON: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Mr. Raynor?

20 ORAL ARGUMENT OF AUSTIN RAYNOR
21 FOR THE UNITED STATES, AS AMICUS CURIAE,
22 SUPPORTING THE RESPONDENT

23 MR. RAYNOR: Mr. Chief Justice, and
24 may it please the Court:

25 The Bankruptcy Code unequivocally

1 abrogates the sovereign immunity of the United
2 States, states, districts, territories, foreign
3 states, instrumentalities or agencies of any of
4 those governments, and other foreign or domestic
5 governments. That language unambiguously
6 encompasses all governments, including Indian
7 tribes.

8 Petitioners respond principally that
9 the statute does not use the word "Indian" or
10 "tribe." But it's hornbook law that Congress
11 does not need to use those words to abrogate
12 tribal immunity.

13 Petitioners also suggest the words
14 "foreign or domestic" are words of exclusion,
15 designed to exclude tribes, and only tribes,
16 from an otherwise all-encompassing definition.
17 That's not a plausible understanding of
18 congressional intent.

19 Instead, Congress chose those words to
20 stress the breadth and comprehensiveness of its
21 chosen definition.

22 I welcome the Court's questions.

23 CHIEF JUSTICE ROBERTS: Well, but, I
24 mean, the biggest hurdle I think you have to get
25 over is that they -- everywhere else they use

1 the word "tribe" and they didn't here. And
2 they've got a long list of other type of
3 governmental agencies.

4 I mean, you don't have to be in the
5 big four or big five, because they're, I don't
6 know, like -- you must have counted them -- it
7 looks like at least a dozen, and surely they're
8 in the top dozen. So is -- this is the only
9 instance where they haven't used the word
10 "tribe" or "Indian" when they meant to include
11 them, right?

12 MR. RAYNOR: This is the only one
13 we're aware of. That doesn't mean there aren't
14 unlitigated statutes out there that might
15 encompass tribes. I will say that there are
16 other contexts in -- in terms of where Congress
17 has abrogated sovereign immunity where they
18 didn't specify particular units of government.
19 So Title VII is a classic example. The Court
20 has found in Fitzpatrick that Title VII
21 abrogates state sovereign immunity even though
22 it doesn't use the word "state."

23 And I don't think Congress's prior
24 practice can be dispositive here for a couple of
25 reasons. One is that it would amount to a rule

1 of adverse possession. I think Petitioners'
2 basic argument is that, even if Congress wasn't
3 required to use the word "tribe" at the
4 beginning, when it started legislating as to
5 tribes, once it has been hyper-clear in all
6 these statutes using the word "tribe" over and
7 over, its drafting discretion is now constrained
8 going forward.

9 And that's just not how this Court has
10 traditionally thought of clear statement rules.
11 Congress has to provide a clear statement, but
12 what it's done in the past doesn't dictate what
13 counts as a clear statement.

14 JUSTICE BARRETT: Mr. Raynor, do you
15 want to take a position on the question that I
16 asked your friend on the other side about, if a
17 statement -- if Congress enacts a provision that
18 says we abrogate the sovereign immunity of all
19 governments, domestic and foreign, include the
20 United States or not?

21 MR. RAYNOR: Yes, we think that would
22 include the United States.

23 JUSTICE JACKSON: Okay.

24 MR. RAYNOR: And I think actually that
25 hypothetical plays up a weakness in their

1 position because what they are arguing is that,
2 by using the phrase "foreign or domestic,"
3 rather than "every government," Congress
4 intended that as kind of a convoluted way of
5 excluding these entities that Petitioners
6 characterize as twilight entities, like the IMF
7 or Indian tribes.

8 So rather than using "foreign or
9 domestic" to make clear that it was covering the
10 waterfront, Congress used that as a backdoor way
11 to cut out entities that in Petitioners' view
12 don't fit into either bucket.

13 But we just don't think that's a
14 plausible way to think about what Congress was
15 doing here when it provided this comprehensive
16 list followed by a broad --

17 JUSTICE KAVANAUGH: When you --

18 MR. RAYNOR: -- catch-all clause.

19 JUSTICE KAVANAUGH: -- refer to
20 adverse possession, another way to describe that
21 is Congress's customary practice that we discern
22 over time from decades of practice. I think
23 your office relies on that at times, as does
24 every -- as does the Court.

25 So why does the word "adverse

1 possession," that term, answer the concern here?

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

10 JUSTICE KAVANAUGH: I think -- I think
11 they're saying it just creates some doubt, and
12 that's enough when the standard is unambiguously
13 abrogate.

14 MR. RAYNOR: Right. And I don't think
15 it is sufficient to create an alternative
16 plausible reading. That's what they need to do
17 here, is to show that their reading is a
18 plausible one. I don't think that it is
19 sufficient to do that.

20 And as counsel for Respondents pointed
21 out, many of these prior statutes are easily
22 distinguishable. So when Congress passes a
23 statute that is specifically targeted at Indian
24 tribes, like the Indian Gaming Regulatory Act is
25 one of their examples, of course that statute is

1 going to use the word "Indian" or "tribe."

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

10 JUSTICE KAGAN: So what's your theory
11 of why tribes are or Indians don't appear in
12 this quite long list?

13 MR. RAYNOR: It's a hard question. I
14 think this is sort of akin to Paroline case, the
15 statutory structure in the Paroline case. I
16 think the best explanation is that Congress was
17 listing the entities that it thought were most
18 likely to be implicated in a bankruptcy
19 proceeding, and then added a broad catch-all
20 clause to sweep in everybody else.

21 It wouldn't go that surprising that
22 Congress wasn't thinking of tribes in the 1970s.
23 This was above the modern boom of tribal
24 participation in the mod -- in the economy.
25 This was before the Indian Gaming Regulatory

1 Act, which was passed a decade later.

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

10 I also want to talk for a second about
11 history. My friend on the other side pointed
12 out that the code prior to 1978 treated tribes
13 differently, at least implicitly than it treated
14 the United States and states, in that it didn't
15 accord them a tax preference.

16 I don't think that's probative at all.
17 1978 is a reset. There was no across-the-board
18 definition of "governmental unit" in the pre-'78
19 Bankruptcy Act.

20 In 1978 Congress adopts a definition
21 of "governmental unit" that applies across the
22 board. And it's different in many respects. It
23 includes foreign states and it also includes a
24 catch-all clause. There's just no presumption
25 here of continuity with the pre-'78 law and the

1 1978 code.

2 JUSTICE KAVANAUGH: You're not saying
3 he's mistaken about the pre-'78 history. You're
4 just saying it doesn't translate; is that
5 correct?

6 MR. RAYNOR: Correct. Exactly.
7 There's no reason to think that Congress was
8 trying to do the same thing in the '78 code that
9 it had been doing before. In fact, there is
10 every reason to think that it was trying to
11 depart from the scope of the pre-'78 code.

12 I would also like to mention for a
13 moment the operation of the Bankruptcy Code. I
14 don't think the Court needs to get to this
15 because I think the text is clear here, but if
16 you read this language in context of the rest of
17 the code, it's clear that the rest of the code
18 would not function that -- the way Congress
19 thought it would function.

20 This is a classic structural analysis,
21 Petitioners try to suggest that that is like an
22 embedded policy analysis, but frequently the
23 Court looks to the effect that an interpretation
24 would have on other provisions in discerning
25 whether that interpretation is correct.

1 Utility Air Regulatory Group, I think,
2 is a case that does this exact same kind of
3 structural analysis.

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

6 MR. RAYNOR: That's a hard question.
7 I think we probably agree with Petitioners that
8 some interstate compact entities would be
9 included in the catch-all clause. They give the
10 example of WMATA.

11 We're probably on the same page that
12 that would also fall within the catch-all
13 clause. Instrumentalities of tribes would
14 likely fall within the catch-all clause.
15 Instrumentalities are listed in the proceeding.
16 And so this isn't a catch-all clause of one in
17 our view.

18 JUSTICE KAGAN: Well,
19 instrumentalities of tribes are really just like
20 tribes, right? I mean, the structure of this
21 statutory provision is a bunch of things, plus
22 their instrumentality. So I don't think that
23 got -- that gets you past one.

24 MR. RAYNOR: Correct. Well, I mean,
25 but I concede the WMATA point. I mean, that is

1 at least past one. And the list of items do
2 treat instrumentalities as separate, but it
3 treats them all as governments, so they would
4 fall in the catch-all clause for that reason.

5 CHIEF JUSTICE ROBERTS: Well, I think
6 WMATA would probably have a better argument that
7 -- that they are not included. I mean, I don't
8 -- these various -- various governmental
9 agencies like that, some have sovereign
10 immunity; some don't. And to say that they're
11 -- they thought about covering WMATA but didn't
12 mention it, that would seem surprising.

13 MR. RAYNOR: Our position isn't that
14 they subjectively thought about that. And to be
15 clear, the list isn't limited to entities with
16 sovereign immunity.

17 So it includes municipalities, for
18 example, which don't enjoy sovereign immunity,
19 except when they're acting as arms of the state.
20 And whether an interstate compact entity enjoins
21 sovereign immunity will depend on -- on the Hess
22 test.

23 JUSTICE JACKSON: And the list -- the
24 list is apart from the abrogation section,
25 right? Were those enacted at the same time?

1 MR. RAYNOR: So there was an
2 abrogation enacted in 1978 at the same time as
3 the definitional section in 101(27). The
4 abrogation was expanded in its scope in 1994,
5 but because there wasn't more limited abrogation
6 in 1978, the clear statement rule would have
7 applied from the beginning.

8 I do think it's important, though,
9 Justice Jackson, to emphasize that there is a
10 clear abrogation here. Congress was thinking
11 about sovereign immunity. It said we are
12 abrogating sovereign immunity. And it said we
13 are doing it to this broad category of
14 governments.

15 This isn't a situation like where
16 Congress has said, you can sue a person and the
17 person happens to be defined to include
18 governments. And there's no indication that
19 Congress has thought about immunity
20 specifically.

21 We know here that Congress was
22 thinking about immunity when it provided this
23 broad list of governments.

24 If there is no further questions?

25 CHIEF JUSTICE ROBERTS: Justice

1 Thomas?

2 JUSTICE THOMAS: Mr. Raynor, you said
3 that the tribal involvement in the economy has
4 changed since 1978.

5 Does that include the off-reservation
6 commercial activity of tribes?

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

14 We think tribes are included in this
15 definition, regardless of how frequently they'll
16 be implicated in bankruptcy proceedings.

17 CHIEF JUSTICE ROBERTS: Justice Alito?
18 Justice Sotomayor?

19 Justice Kagan?

20 Justice Gorsuch?

21 Justice Jackson?

22 Justice Jackson?

23 Justice Barrett?

24 Okay. Thank you, counsel.

25 MR. RAYNOR: Thank you.

1 CHIEF JUSTICE ROBERTS: Rebuttal?

2 REBUTTAL ARGUMENT OF PRATIK A. SHAH

3 ON BEHALF OF THE PETITIONERS

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

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

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

18 The answer to that has to be no. And
19 there's two strong presumptions that, at least,
20 create doubt about that.

21 The first is the conceded history.
22 The other side no doubt has exhaustively
23 searched the code and cannot find a single
24 example in the history of this country where
25 Congress has abrogated the sovereign immunity of

1 tribes without mentioning tribes. That's not a
2 magic words test. That's simply applying all
3 the cases this Court has said is, you don't
4 disregard the standard practice of doing, of
5 Congress enacting legislation, when you're
6 interpreting legislation.

7 They try to distinguish one-off
8 examples. Oh, it occurs in the context of
9 Indian tribes. Well, a general statute, you
10 would expect, more reason to signify Indian
11 tribes than in Indian statutes. And there are a
12 whole lot of examples that don't fall in that
13 bucket.

14 The Federal Debt Collection Procedures
15 Act cited on page 25 of our brief, again,
16 nothing to do with tribes, yet enumerates states
17 alongside tribes.

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

22 Again, we have cited those statutes on
23 page 24 of our brief. It would be exceedingly
24 odd for Congress to have gone through all of
25 this trouble and then decide to use a generic

1 catch-all phrase that has never been used in the
2 history of this Court's jurisprudence to refer
3 to Indian tribes, to capture Indian tribes under
4 a clear statement rule.

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

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

23 Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. The case is submitted.

1 (Whereupon, at 12:02 p.m., the case
2 was submitted.)
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