PRISCILLA R. OWEN, Circuit Judge, concurring:

I join the majority's judgment. In my view, section 106(c)[1] does not unambiguously abrogate the federal government's sovereign immunity retained by the Federal Tort Claims Act.[2]

Section 106(c) provides: "Notwithstanding any assertion of sovereign immunity by a governmental unit, there shall be offset against a claim or interest of a governmental unit any claim against such governmental unit that is property of the estate."[3] The "[n]otwithstanding" phrase can plausibly be read as merely providing a forum in bankruptcy courts for claims against the federal government that would have been cognizable in another venue. This construction would not override the express reservation of sovereign immunity in the Federal Tort Claims Act for a lengthy list of particular claims.[4] Nor would it subject the federal government to liability under state common law or myriad state and federal statutes as a "person" or entity without sovereign immunity. But a plausible argument can also be mounted, as the dissent has done, that the phrase "[n]otwithstanding any assertion of sovereign immunity" means that all sovereign immunity is swept aside in its entirety, and therefore all state and federal causes of action that would be viable against a private entity are viable against the federal government.

The Supreme Court has repeatedly held that "[w]aivers of the Government's sovereign

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[1]11 U.S.C. § 106(c) (2004).

[2]28 U.S.C. § 2680 (1994 & Supp. 2006).

[3]11 U.S.C. § 106(c) (2004).

[4]28 U.S.C. § 2680 (1994 & Supp. 2006).

immunity, to be effective, must be unequivocally expressed,"[5] and "the Government's consent to be sued must be construed strictly in favor of the sovereign."[6] The Supreme Court has held that sections 106(b) and 106(c), when they were, respectively, sections 106(a) and 106(b),[7] "meet this 'unequivocal expression' requirement with respect to monetary liability."[8] The Court said in this regard,

> Addressing "claim[s]," which the Code defines as "right[s] to payment," § 101(4)(A), they plainly waive sovereign immunity with regard to monetary relief in two settings: compulsory counterclaims to governmental claims, § 106(a); and permissive counterclaims to governmental claims capped by a setoff limitation, § 106(b). Next to these models of clarity stands [former] subsection (c).[9] Though it, too, waives sovereign immunity, it fails to establish unambiguously that the waiver extends to monetary claims. It is susceptible of at least two interpretations that do *not* authorize monetary relief.[10]

I submit that while former sections 106(a) and 106(b), now sections 106(b) and 106(c),

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[5]*United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990) (quoting *United States v. Mitchell*, 445 U.S. 535, 538 (1980), and *United States v. King*, 395 U.S. 1, 4 (1969))) (internal quotation marks omitted).

[6]*Id*. at 34 (quoting *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983)) (internal quotation marks and citation omitted).

[7]11 U.S.C. § 106(a), (b) (1978) (amended 1994).

[8]*Nordic Village*, 503 U.S. at 34.

[9]At the time of the *Nordic* decision, 11 U.S.C. § 106(c) (1978) provided:

> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity–
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> (1) a provision of this title that contains 'creditor', 'entity', or 'governmental unit' applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

[10]*Nordic Village*, 503 U.S. at 34.

clearly waive sovereign immunity with respect to monetary liability, they do not unequivocally abrogate sovereign immunity to the extent that they breathe life into causes of action against the federal government that would not otherwise exist. The Supreme Court was not presented with this question in *Nordic Village*, and its statement that the language in sections 106(b) and 106(c) are an "'unequivocal expression' . . . with respect to monetary liability" cannot be stretched to encompass the issue before us today.

Even when Congress has used waiver language that "should be given a liberal—that is to say, expansive—construction," such as a sue-and-be-sued provision,[11] "the interpretation of the waiver statute was just the initial step in a two-part inquiry."[12] In *United States Postal Service v. Flamingo Industries (USA) Ltd.*,[13] the Supreme Court discussed the analysis employed in an earlier case, *FDIC v. Meyer*:[14] "[E]ven though sovereign immunity had been waived, there was the further, separate question whether the agency was subject to the substantive liability recognized in *Bivens*."[15] In *Flamingo Industries*, the question was whether the Postal Service could be liable under the Sherman Act based on the sue-and-be-sued provision in the Postal Reorganization Act of 1970.[16] The Supreme Court explained,

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[11]*United States Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 741 (2004).

[12]*Id*. at 743.

[13]*Id.*

[14]510 U.S. 471 (1994).

[15]*Flamingo Indus.*, 540 U.S. at 743 (referring to a so-called "*Bivens* action" based on *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)).

[16]*Id.* at 743-44 (construing 39 U.S.C. § 401 (1980)).

"We ask first whether there is a waiver of sovereign immunity for actions against the Postal Service. If there is, we ask the second question, which is whether the substantive prohibitions of the Sherman Act apply to an independent establishment of the Executive Branch of the United States."[17] The Supreme Court criticized the court of appeals because the court of appeals "found that the Postal Service's immunity from suit [was] waived to the extent provided by the statutory sue-and-be-sued clause" and, in doing so, "conflated the two steps[, which] resulted in an erroneous conclusion."[18] The Supreme Court explained that the substantive law on which a claim is based must be consulted to determine if it was intended to reach the federal entity:

> While Congress waived the immunity of the Postal Service, Congress did not strip it of its governmental status. The distinction is important. An absence of immunity does not result in liability if the substantive law in question is not intended to reach the federal entity. So we proceed to *Meyer's* second step to determine if the substantive antitrust liability defined by the statute extends to the Postal Service. Under *Meyer's* second step, we must look to the statute.[19]

The "[n]otwithstanding any assertion of sovereign immunity by a governmental unit" phrase in section 106(c) does not clearly strip the federal government of its governmental status as distinguished from immunity. It would seem that Congress would more plainly state its intention to override the Federal Tort Claims Act's retention of sovereign immunity from the claims enumerated in 28 U.S.C. § 2680, including those based on the exercise or performance of a discretionary function or duty, or arising out of interference with contract

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[17] *Id.* at 743.

[18] *Id*. at 743-44.

[19] *Id*. at 744.

rights, if that were Congress' intent. The "[n]otwithstanding" phrase is an improbable vehicle for such a sea change in the government's liability. For example, the Federal Tort Claims Act expressly retains sovereign immunity from liability for punitive damages.[20] If Congress intended to strip the federal government of its governmental status in bankruptcy court, then punitive damages would be available under sections 106(b) and 106(c) of the Bankruptcy Code since section 106(a) expressly provides that punitive damages may not be awarded,[21] but no similar provision is included in either section 106(b) or 106(c).

We cannot resort to legislative history to discern the intent of Congress when there is ambiguity regarding waiver of sovereign immunity. As the Supreme Court has said, "legislative history has no bearing on the ambiguity point. . . . [T]he 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in the statutory text. If clarity does not exist there, it cannot be supplied by a committee report."[22]

Focusing on whether a claim against the government "is property of the estate" is not helpful in determining whether section 106(c) permits assertion of the claims at issue in the case before us.[23] Even assuming that a pre-petition claim that is barred by sovereign

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[20]28 U.S.C. § 2674 (1994) ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.").

[21]11 U.S.C. § 106(a)(3) (2004) ("The court may issue against a governmental unit an order, process, or judgment under such [enumerated sections of the Bankruptcy Code] or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages.").

[22]*United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992).

[23]11 U.S.C. § 106(c) (2004).

immunity is not property of the debtor's estate, if section 106(c) abrogates sovereign immunity, sovereign immunity is not a bar to the pre-petition claim; therefore, the claim is property of the estate. Whether Supreme Beef Processors prevails ultimately turns on the meaning of the "[n]otwithstanding" phrase in section 106(c). Because that phrase is ambiguous, it does not waive the federal government's immunity from the claims enumerated in 28 U.S.C. § 2680.

For these reasons, I would affirm the district court's judgment.