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)

BRIEF OF THE NATIVE AMERICAN FINANCIAL SERVICES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Under First Circuit Rule 26.1, the Native American Financial Services Association ("NAFSA") discloses that it is a non-profit trade association formed under section 501(c)(6) of the Internal Revenue Code. NAFSA has no parent corporation and issues no stock.

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INTEREST OF *AMICUS CURIAE*

The Native American Financial Services Association ("NAFSA") is a non-profit trade association advocating for tribal sovereignty, responsible financial services, and better economic opportunities in Indian Country.[1] NAFSA has advocated for these positions in *amicus* briefs filed in the U.S. Supreme Court, the U.S. Courts of Appeals for the Third, Fourth, Sixth, and Ninth Circuits, and other federal courts.

NAFSA's member tribes, like the Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe" or "Lac du Flambeau"), face several barriers to economic prosperity, including rural isolation, which inhibits their ability to leverage gaming and other brick-and-mortar consumer-based industries as effective tools to stimulate their economies. NAFSA members have found the internet and e-commerce to be great equalizers in overcoming such isolation and providing for their people. Harnessing the potential of e-commerce is vital to ensuring that American Indian tribes have not only the right, but also the ability, to exercise self-determination. By creating tribal businesses, like Niiwin, LLC, L.D.F. Business Development Corporation, and L.D.F. Holdings, LLC (collectively, the "Tribal Businesses"), tribal leaders have filled the gap in federal funding that tribes receive

[1] Counsel for all parties consented to NAFSA's participation as *amicus curiae* in this proceeding.

for basic social services. NAFSA defends tribes' sovereign rights to determine their own economic futures.

Appellant urges the Court to hold that the Bankruptcy Code abrogates tribal sovereign immunity by implication. In addition to being contrary to the Supreme Court's requirement that any diminishment of tribal sovereign immunity be done through an unequivocal Congressional expression of that purpose, this position has the potential to harm many of NAFSA's member tribes and tribally-owned businesses. NAFSA has a particular interest in ensuring that the sovereign immunity of the Tribe and the Tribal Businesses (and those of similarly situated NAFSA members) is upheld and affirmed because that sovereign immunity is the cornerstone of tribal economic development and self-determination.[2]

[2] Under First Circuit Rule 29(a)(4)(E), NAFSA submits the following statement: No counsel for a party authored this brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparation or submission of this brief; and no person, other than *amicus*, contributed money that was intended to fund preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

"A nation cannot long exist without revenues. Destitute of this essential support, it must resign its independence, and sink into the degraded condition of a province."[3]

The founders of this nation recognized that governmental revenues play an essential role in the exercise of sovereign authority. This fundamental truth holds true today for American Indian tribes that seek to exercise their rights to self-determination. Often lacking traditional tax bases, tribes must instead use commercial enterprises to raise revenue and fund their own priorities in order to truly exercise self-determination. NAFSA asks the Court to consider three important factors as it evaluates this case.

First, tribal sovereign immunity is a "baseline" from which Congress may depart only when it unequivocally expresses that purpose. Thus, when Congress speaks in general terms and does not explicitly consider the unique status of federally-recognized Indian tribes, courts must not imply Congressional intent to abrogate sovereign immunity.

Second, tribal economic development is essential to the realization of Indian self-determination. Successful tribal economic development in turn depends upon sovereign immunity to protect tribal businesses and tribes from unconsented suits

[3] The Federalist No. 12 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

that have the potential to drain tribal treasuries and degrade the ability of tribes to exercise self-determination.

Third, permitting tribal sovereign immunity to be abrogated by implication, rather than by express Congressional action intended to achieve that result, has the potential to diminish tribal sovereignty not just in the context of the Bankruptcy Code, but in countless other areas where Congress legislates broadly and generally without giving special consideration to the status of Indian tribes.

ARGUMENT

I. Tribes and Tribal Businesses Are Sovereigns and Are Immune from Unconsented Suit.

The sovereign authority of American Indian tribes existed long before the formation of the United States government. *Worcester v. Georgia*, 31 U.S. 515, 520 (1832); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 (1973); *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978). As part of that authority, tribes possess "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citations omitted). Moreover, tribal immunity has been recognized as a doctrine in "American jurisprudence for well over a century." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 804 (2014) (Sotomayor, J., concurring) (citations omitted).

Congress has plenary authority to legislate on issues involving Indian affairs. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (citations

omitted); *see also United States v. Lara*, 541 U.S. 193, 200 (2004) (noting that Congress's power with respect to Indian tribes has consistently been described as "plenary and exclusive") (citations omitted).[4] A tribe's sovereign immunity is maintained unless the tribe has clearly and explicitly waived its immunity or it has been abrogated "unequivocally" by Congress. *Bay Mills*, 572 U.S. at 790 (quoting *C & L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001)). *See also Santa Clara Pueblo*, 436 U.S. at 58; *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754-56 (1998).[5] This is the "baseline" from which judicial analysis proceeds. *Bay Mills*, 572 U.S. at 790.

The Supreme Court has recognized that immunity from suit is "a necessary corollary to Indian sovereignty and self-governance." *Id.* at 788 (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877,

[4] This Congressional authority is founded in the Indian Commerce Clause of the U.S. Constitution. U.S. CONST. art. I, § 8, cl. 3. The Indian Commerce Clause provides Congress, and only Congress, with the power to abrogate tribal sovereign immunity. *Bay Mills*, 572 U.S. at 788 ("unless and 'until Congress acts, the tribes retain' their historic sovereign authority") (quoting *Wheeler*, 435 U.S. at 323).

[5] The Ninth Circuit's recent opinion in *Deschutes River Alliance v. Portland General Electric Co.* explains abrogation succinctly stating, "We must be able to say with 'perfect confidence that Congress meant to abrogate . . . sovereign immunity." No. 21-1153, 2021 WL 2559477, *4 (9th Cir. June 23, 2021) (quoting *Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 774 (9th Cir. 2018)). The Ninth Circuit concluded a provision authorizing Clean Water Act suits against "any other governmental instrumentality" was insufficient to abrogate tribal sovereign immunity. *Id.* at *5.

890 (1986)). As part of a tribe's self-governance and self-determination, tribes engage in commercial conduct to raise revenues for their communities. It is also well-established legal doctrine that a tribe's sovereign immunity extends to a tribe's commercial activities. *Id.* at 790 (citing *Kiowa Tribe*, 523 U.S. at 754-55). *See also Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1181 (10th Cir. 2010); *Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019).

II. Tribes Rely on Funds Raised by Tribal Businesses to Support Their Tribal Governments and Tribal Communities.

Tribal governments' sovereign right to self-determination depends largely on tribes' ability to engage in economic-development activities. There are limited opportunities for tribes to raise revenues to support their tribal governments and provide vital services to tribal citizens. Tribes are unable to tax most reservation property due to its being held in trust by the federal government. In addition, the challenge of dual taxation has crippled tribes' taxing powers. The Supreme Court has held that states have the authority to tax economic activity occurring on tribal lands that involves non-Indians. *Cotton Petroleum v. New Mexico*, 490 U.S. 163. This leaves tribes in an impossible bind—if they choose to tax an on-reservation non-Indian business on top of the state's taxes then businesses will go elsewhere. This specter of dual taxation is "crippling to the growth of Tribal economies." *See* Treasury Tribal Advisory Committee, Subcommittee on Dual Taxation Report at 2

(Dec. 9, 2020), *available at* https://home.treasury.gov/system/files/136/TTAC-Subcommittee-on-Dual-Taxation-Report-1292020.pdf. Further, comprehensive legal restrictions render reservation trust lands incapable of being leveraged to raise capital or support community development. *See* Cohen's Handbook of Federal Indian Law § 15.06[1] (2012).[6]

Tribes' economic enterprises generate income to fund tribal governmental budgets and tribal services. *See Bay Mills*, 572 U.S. at 807 (J. Sotomayor concurring) ("Tribes face a number of barriers to raising revenue in traditional ways. If Tribes are ever to become more self-sufficient, and fund a more substantial portion of their own governmental functions, commercial enterprises will likely be a central means of achieving that goal."). Lac du Flambeau, like many NAFSA member tribes, has made substantial strides towards self-sufficiency through its Tribal Businesses, which provide critical revenue for the Tribe's essential operations.

A. Federal Law and Policy Encourages Tribal Economic Development to Promote Tribal Self-Determination.

A critical component of federal Indian law and policy is the advancement of tribal economic development as a necessary mechanism for tribes' economic self-

[6] The unique status of tribal trust lands and practical (if not legal) limits on tribal taxation powers provides a further counterweight to the Plaintiff's assertion that tribes are "governmental units" simply because they have the power to tax. Appellant's Br. at 32-33.

sufficiency and self-determination. *See*, *e.g.*, Indian Reorganization Act, 25 U.S.C. §§ 5112, 5124 (appropriating funds for tribal corporations and describing the process for issuing tribal charter of incorporation); President Nixon, Special Message on Indian Affairs, July 8, 1970 ("[s]elf-determination among the Indian people can and must be encouraged"); Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5302(b) ("the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities"); Native American Business Development Act, 25 U.S.C. § 4301(b)(3) (purpose of the Act is "[t]o promote the long-range sustained growth of the economies of Indian Tribes."); Exec. Order 13175, § 2(c) (2000) ("The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination."). *See also Bay Mills*, 572 U.S. at 810 (J. Sotomayor concurring) ("A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding."); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 (1987) (There is an "'overriding [congressional] goal' of encouraging tribal self-sufficiency and economic

development.") (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983)).

The decision-making and management of tribal businesses is an exercise in sovereignty because it generates much-needed income for tribal treasuries. Tribal governments then fund vital programs for their citizens—healthcare, education, housing, and infrastructure. *See*, *e.g.*, James Robert Colombe & Rory Taylor, *Tribal enterprises drive economic activity in Indian Country and beyond*, Federal Reserve Bank of Minneapolis (July 6, 2021), *available at* https://www.minneapolisfed.org/article/2021/tribal-enterprises-drive-economic-activity-in-indian-country-and-beyond (noting that "tribal enterprises are economic engines" and that tribal funding of public goods and services is "almost entirely reliant on either federal government appropriations or revenue that tribal enterprises generate"). The revenue provided by tribal businesses make it possible for tribes to fulfill the goal of self-determination that is encouraged and promoted by the federal government.

B. The Sovereign Status of Tribal Businesses Is Critical to Tribes' Economic Development Efforts.

"[O]ne of the primary purposes underlying tribal immunity is the promotion of tribal self-governance." *Williams*, 929 F.3d at 179. Indeed, tribal sovereignty and tribal immunity go hand in hand. *See Breakthrough Mgmt. Grp.*, 629 F.3d at 1182-83 ("'Tribal sovereignty and the jurisdictional counterpart of tribal sovereign immunity from suit are the bedrock principles of tribal self-determination.'")

(quoting Patrice H. Kunesh, *Tribal Self–Determination in the Age of Scarcity*, 54 S.D. L. Rev. 398, 398 (2009)). The Supreme Court has explained that "[w]e retained the [tribal sovereign immunity] doctrine . . . on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency." *Kiowa Tribe*, 523 U.S. at 757 (citation omitted).

The immunity of tribal enterprises '"directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general."' *Breakthrough Mgmt. Grp.* at 1183 (quoting *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006)). Because sovereign immunity is such an integral aspect of tribal sovereignty, it cannot and should not be rescinded without an unambiguous, explicit order from Congress. In this case, the lower court arrived at the correct decision when it found that 11 U.S.C. §§ 106, 101(27) does not unequivocally waive tribal sovereign immunity, and thus, does not apply to the Tribe and its Tribal Businesses.

III. Reversal of the Decision Below Will Constrain Tribal Economic Development for NAFSA Member Tribes.

Plaintiff's arguments present serious challenges to the sovereign authority of federally-recognized Indian tribes to engage in commercial activity. As previously mentioned, many NAFSA member tribes, including Lac du Flambeau, are located in geographically remote areas, with limited opportunities for economic growth. This fact, along with the practical limits on traditional revenue-raising mechanisms,

means that tribes must engage in a variety of business enterprises to meet the needs of their citizens. Subjecting tribes to the Bankruptcy Code would be yet another burden placed on their economic development efforts—and one that Congress did not clearly intend to impose.

Today's American Indian tribes have survived removal, forced assimilation, and unlawful termination. The official policies of the United States today disavow the unjust policies of the past in favor of self-determination. In this context, it is not at all unusual that the Courts require Congress to speak plainly and unequivocally in order to find any new diminishment of tribal sovereignty. As demonstrated by the brief of the Appellees (39-45), Congress expressed no such intent here.

Permitting private parties to hale tribes and tribal businesses into court and subsequently abrogate their sovereign immunity by mere implication is counter to current federal law and policy and undermines Congressional authority. It would also discourage commercial activity by tribes, which would prevent economic development activity that is essential to tribal governments' self-sufficiency. Congress speaks broadly and generally on many topics. But out of respect for the sovereignty of tribes, the Courts have repeatedly declined to find general and broad terms sufficient to abrogate tribal sovereign immunity.

CONCLUSION

Tribes lack the traditional tax bases of other governments, and they are prevented from raising funds through traditional governmental revenue sources. Alexander Hamilton recognized that a "nation cannot long exist without revenues." Tribal governments must be able to exercise their inherent sovereign authority to raise revenues through tribally-owned businesses in order to provide public goods and services for their members. The sovereign status of tribal businesses is critical in order to effectively support tribal communities. The lower court was correct in its holding that the Tribe and the Tribal Businesses are immune from suit because Congress did not unequivocally abrogate the sovereign immunity of American Indian tribes in the Bankruptcy Code. A reversal of the lower court's decision would threaten the ability of tribal businesses to sustain their communities. Accordingly, the decision of the lower court should be affirmed.

Respectfully submitted,

/s/ Patrick O. Daugherty

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITS, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limit of Fed. R. App. R. 32(a)(7)(B) and the word limit of 29(a)(5) and First Circuit Rule 32(g)(1) because excluding the portions of the document exempted by the Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 2,552 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: July 22, 2021

/s/ Patrick O. Daugherty
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CERTIFICATE OF SERVICE

On this 22nd day of July, 2021, I electronically filed the foregoing using the Court's appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by that system.

/s/ Patrick O. Daugherty
PATRICK O. DAUGHERTY