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)

OPENING BRIEF FOR APPELLANT BRIAN W. COUGHLIN

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Oral argument will likely be helpful to the Court because this case presents the important legal question whether Congress abrogated tribal sovereign immunity in the Bankruptcy Code – a question of first impression in this Circuit.

PRELIMINARY STATEMENT

Section 106(a) of the Bankruptcy Code "abrogate[s]" the "sovereign immunity" of a "governmental unit"; and § 101(27) of the same Code defines "governmental unit" with categorical and clear breadth, to include a "foreign or domestic government." Because of that clear language, neither the United States and its agencies, nor the states and theirs, nor any foreign sovereign in the world can assert immunity from the authority of a federal bankruptcy court to shield a debtor who has sought that court's protection. The question in this appeal, on which the circuits have divided, is whether the otherwise sweeping authority of a bankruptcy court fails against the immunity of a federally recognized Indian tribe.

That question arises because the Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe") has gone into the payday lending business. Through several layers of corporate identity, the Tribe owns Niiwin, LLC, which does business as "Lendgreen." Lendgreen, like other payday lenders, extends small loans to debtors and charges exorbitant interest – in this case, the equivalent of an annual interest rate exceeding 100%. In 2019, Lendgreen made such a loan to Brian W. Coughlin, who was then in financial distress. Later that year, Coughlin filed a Chapter 13 petition for bankruptcy. With the bankruptcy court's approval, he made and has since begun to carry out a plan to pay off fully, within 60 months, every creditor that filed a proof of claim with that court.

Lendgreen received due notice of Coughlin's petition. It did not file a claim. Instead, violating the automatic stay on collection efforts triggered by Coughlin's petition, Lendgreen kept trying to collect from him. It hounded him with repetitive calls and messages even after he told its representatives he had filed for bankruptcy and asked them to contact his attorney. Coughlin, who suffers from severe clinical depression, could not bear the constant reminders of his troubles. He attempted to take his own life and was hospitalized.

Coughlin moved to enforce the automatic stay and sought damages. Lendgreen and its parent entities, including the Tribe, then appeared and argued that the bankruptcy court lacked jurisdiction because of their tribal status. The bankruptcy court agreed, concluding that the Bankruptcy Code's abrogation of the "sovereign immunity" of a "domestic government" was insufficiently clear because Congress did not refer specifically to "Indian tribes" in the statute.

The bankruptcy court's decision was in error. The ordinary meaning of "domestic government" includes tribes because they are both governments and domestic. Context, structure, and purpose confirm this by showing the importance of the automatic stay and by underscoring that "governmental unit" refers to entities that perform governmental functions, as tribes do. Abrogation of sovereign immunity does not require Congress to use magic words. Congress's intent is clear from the words it used. That is enough.

STATEMENT OF JURISDICTION

On December 4, 2019, Appellant filed a voluntary petition under Chapter 13 of the Bankruptcy Code. J.A. 20-70. The district court had subject-matter jurisdiction under 28 U.S.C. § 1334(a), and the bankruptcy court had subject-matter jurisdiction under 28 U.S.C. § 157(a). Referral to the bankruptcy court was authorized by the district court's Local Rule 201.

On March 25, 2020, Appellant moved under 11 U.S.C. § 362(a)(6) and (k) to enforce against Appellees the bankruptcy court's automatic stay of collection activities. J.A. 86-114. The district court had subject-matter jurisdiction over the motion under 28 U.S.C. § 1334(b), and the bankruptcy court had subject matter jurisdiction under 28 U.S.C. § 157(b).

Appellees moved to dismiss Appellant's motion for lack of subject-matter jurisdiction under the doctrine of tribal sovereign immunity. On October 19, 2020, the bankruptcy court granted Appellees' motion and denied Appellant's. Add. 1-5. On November 18, 2020, the bankruptcy court certified its order for direct appeal to this Court under 28 U.S.C. § 158(d)(2). J.A. 364-65. On February 23, 2021, this Court authorized this direct appeal. J.A. 431-32.

This Court has appellate jurisdiction under 28 U.S.C. § 158(d).

STATEMENT OF THE ISSUE

Whether Congress abrogated the tribal sovereign immunity of Indian tribes by stating in 11 U.S.C. § 106(a) that, "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit"; and in 11 U.S.C. § 101(27) that "[t]he term 'governmental unit' means," among other things, a "foreign or domestic government."

STATEMENT OF THE CASE

1. As of late 2019, Debtor-Appellant Brian W. Coughlin ("Coughlin") had incurred debts beyond his ability to pay. On December 4, 2019, he filed a Chapter 13 bankruptcy petition. At that time, Coughlin had assets of $13,635 and liabilities of $83,688.25. J.A. 27. His liabilities included $5,017.27 in tax debts, $16,042.65 in student loans, and $62,628.33 in other unsecured debt. J.A. 27-28. Among his unsecured debts were loans from nine "payday" lenders adding up to $14,762.90. J.A. 38-44. By statute, Coughlin's bankruptcy filing "operate[d] as a stay, applicable to all entities," 11 U.S.C. § 362(a), of "any act to collect, assess, or recover a claim against [Coughlin] that arose before the commencement of [his] case," *id.* § 362(a)(6).

One of the nine payday lenders was Respondent-Appellee Niiwin, LLC, which does business under the name "Lendgreen." J.A. 86. Lendgreen traces its ownership to Respondent-Appellee Lac du Flambeau Band of Lake Superior

Chippewa Indians (the "Tribe"), a federally recognized Indian tribe with a reservation in northern Wisconsin. J.A. 87. Respondent-Appellee Lac du Flambeau Business Development Corporation (the "BDC") describes itself as a "wholly-owned and operated economic arm and instrumentality of the Tribe." J.A. 183. The BDC in turn wholly owns and controls Respondent-Appellee LDF Holdings, LLC ("LDF Holdings"), which wholly owns and controls Lendgreen.

In or around July 2019, Coughlin borrowed $1,100 from Lendgreen. J.A. 115-16 (affidavit from Coughlin describing original amount "to the best of [his] knowledge"). At the time of his bankruptcy in December 2019, Coughlin owed Lendgreen $1,594.91, *id.*, reflecting interest of about 45% in five months, which equates to about 107.9% per year.

Coughlin identified his debt to Lendgreen on the Schedule of Unsecured Debts in his Chapter 13 petition, and listed Lendgreen in the Mailing Matrix at the petition's end. J.A. 87-88, 97, 116. His counsel sent the petition to all creditors listed in the Mailing Matrix, including Lendgreen. J.A. 88. Lendgreen also received copies of further filings in the bankruptcy court. J.A. 89. Coughlin filed a Chapter 13 plan with the bankruptcy court, amended it twice, and received a confirmation order. *See* J.A. 2, 4, 6 (docket entries 11, 23, 30, 47). Under that order, all creditors that filed proofs of claim will be paid 100% of what they are owed within 60 months of February 1, 2020. J.A. 91 n.1; Bankr. ECF No. 47, at 3.

2. Lendgreen did not file a proof of claim. *See id.* Instead, from December 4, 2019, until at least March 19, 2020, Lendgreen contacted Coughlin repeatedly to remind him about his debt and to urge him to pay immediately. J.A. 88-90, 116. Those contacts came in the form of telephone calls, emails, and voicemail messages. J.A. 88-90, 116, 145. They occurred "regularly and during some weeks on nearly a daily basis." J.A. 116, 145.

Each time he spoke with a Lendgreen representative, Coughlin told them he had filed for bankruptcy protection, asked them to contact his counsel instead of contacting him directly, and gave them his counsel's telephone number and email address. J.A. 116, 145. On February 26, 2020, a Lendgreen representative sent Coughlin an email acknowledging his statement that he had filed for bankruptcy. J.A. 88. Lendgreen nevertheless continued to call and email Coughlin directly, urge him to pay, and threaten him with consequences if he did not. J.A. 89-90.

As an example, on March 17, 2020, Lendgreen sent Coughlin an email using large, brightly colored capital letters to tell him that his loan was "150 days overdue" and "being reported to credit reporting agencies." J.A. 89, 106-08 (capitalization omitted). The body of the email repeated that the loan was "150 past due [sic]," had been "reported . . . to credit reporting agencies," and warned Coughlin that "your ability to receive a loan in the future may be impacted." *Id.* The email urged him to "call . . . now to make a payment," to "[c]all us now to set

up a payment schedule," and to "call now to clear your debt"; or, "[a]lternatively, [to] . . . authorize a direct payment." *Id.* (capitalization omitted). At the bottom, it included a post office box as Lendgreen's address – the same address where Coughlin's counsel had mailed notice of the bankruptcy. J.A. 107.

3. As Coughlin explained to the bankruptcy court in two affidavits, he suffers from Type I diabetes and severe clinical depression. J.A. 116-17, 145. The experience of seeking bankruptcy protection was itself stressful for him. J.A. 117, 145. The ongoing harassment he received from Lendgreen "compounded" and "escalated" the effects of that stress on his mental health, "constantly . . . remind[ing]" him of his financial troubles. J.A. 117, 145. He suffered "sleepless nights" and "rising anxiety and depression." J.A. 146. His "desponden[cy]" also interfered with his ability to successfully move forward with his bankruptcy case, causing him to miss a scheduled meeting with his Chapter 13 trustee that nearly led to the case being dismissed. J.A. 117, 145.

Beginning in mid-January 2020, Coughlin experienced "suicidal thoughts caused by LendGreen's hectoring and harassment." J.A. 117, 145. On February 9, he "attempted suicide due to [his] overwhelming stress, anxiety and lack of hope for a better life." J.A. 117, 146; *see also* J.A. 118 ("The actions taken by LendGreen . . . literally 'sent me over the edge' . . . ."). From February 10 to 20, 2020, he was hospitalized and spent 11 days recovering. During that period, he

incurred hospital and medical bills of $76,828.33. J.A. 146, 149-60. He also used sick leave and vacation time worth $9,011.55. J.A. 146, 162-63.

While Coughlin was in the hospital, Lendgreen continued to contact him to demand payment of his debt. J.A. 146. Lendgreen also continued to contact him after he was out of the hospital, including the March 17, 2020 email described above, and including voicemail messages on March 18 and 19 telling Coughlin to call about a "very important matter." J.A. 89-90.

4. On March 25, 2020, Coughlin moved to enforce the automatic stay. J.A. 86-114. He alleged that Lendgreen's continuing attempts to collect the debt violated 11 U.S.C. § 362(a)(6). J.A. 90-91. He named as respondents Lendgreen, LDF Holdings, the BDC, and the Tribe. J.A. 86-87.[1] Invoking 11 U.S.C. § 362(k)(1), Coughlin asked the bankruptcy court to award actual damages, punitive damages, and attorneys' fees for a willful violation of the automatic stay. J.A. 92-93. His requested actual damages were his hospital medical bills, his lost sick leave and vacation time, and $87,000 in emotional damages. J.A. 146-47.

[1] Coughlin later supplemented his motion with additional allegations and evidence that the Tribe and its various entities acted as alter egos of one another. *See* J.A. 199-253, 326-32. Among other things, Coughlin proffered corporate documents from another publicly filed case against Lendgreen showing that Lendgreen's parent entity, LDF Holdings, would regularly leave only "$500 in [Lendgreen's] cash accounts" and that "[w]henever the cash account balance exceed[ed]" that "amount," Lendgreen would "declare[ ] and pa[y]" an "immediate Distribution" to LDF Holdings to eliminate the excess. J.A. 240.

The Tribe, the BDC, LDF Holdings, and Lendgreen appeared to oppose the motion and indicated that they would raise (among other grounds) tribal sovereign immunity. The parties agreed, and the bankruptcy court ordered, that the immunity and other defenses would be resolved using the procedure of a motion to dismiss under Federal Rule of Civil Procedure 12. J.A. 9 (docket entry 71).

5. On October 19, 2020, the bankruptcy court (Bailey, J.) granted the Tribe's and the tribal entities' motions to dismiss. The court began by stating that the "Tribe is a federally recognized Indian tribe" and therefore a "sovereign nation[]" presumptively immune from suit; and that the BDC and its subsidiaries were "arms of the Tribe" sharing in its immunity. Add. 2. It recognized that the Bankruptcy Code "contains a broad abrogation of [the] sovereign immunity" of any "governmental unit," *id.* (quoting 11 U.S.C. § 106(a)); and that the definition of "governmental unit" includes, in addition to federal, state, local, and foreign governments, an "other foreign or domestic government," *id.* (quoting 11 U.S.C. § 101(27)) (emphasis omitted). But, the court went on, that definition does not "specifically include federally recognized Indian tribes as a 'governmental unit.'" *Id.*

The bankruptcy court acknowledged that "whether sovereign immunity is abrogated by 11 U.S.C. [§] 106(a) as to Indian tribes" is "a matter of first impression in this circuit" and that "other circuit courts have grappled with this

question and come to differing results." Add. 2-3. On the side finding congressional abrogation, the court cited *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004). Add. 3. On the side finding tribal immunity, the court cited *Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings)*, 917 F.3d 451 (6th Cir. 2019), *cert. dismissed*, 140 S. Ct. 2638 (2020). *Id.*[2]

The bankruptcy court disagreed with *Krystal Energy* and followed *Greektown*. In particular, it quoted *Greektown*'s reasoning that "there is not one example in all of history where the Supreme Court has found that Congress has intended to abrogate tribal sovereign immunity without expressly mentioning Indian tribes somewhere in the statute." Add. 3-4 (quoting *Greektown*, 917 F.3d at 460, in turn quoting *Meyers*, 836 F.3d at 824).

The court further disagreed with Coughlin's argument that "no other entities" but tribes "fit [the] definition" of "other . . . domestic government" in § 101(27), arguing that "if that were the case Congress could have avoided any ambiguity simply by using the words 'Indian tribes'"; and that Coughlin's reading

[2] The bankruptcy court incorrectly stated that "the reasoning of the Ninth Circuit in *Krystal Energy* had been rejected by three circuit courts," citing, in addition to *Greektown*, the decisions in *Meyers v. Oneida Tribe of Indians*, 836 F.3d 818 (7th Cir. 2016), and *In re Whitaker*, 474 B.R. 687 (B.A.P. 8th Cir. 2012)). As set forth below, that court erred in its characterization of *Meyers* and *Whitaker*. *See infra* p. 17 n.3.

of "other . . . domestic government" would render "the other words in [§ 101(27)] . . . surplusage." Add. 4. The court ended by remarking on "the special place that Indian tribes occupy in our jurisprudence" and the approach of "constru[ing]" statutes "generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *Id.* (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980)).

6. Coughlin filed a notice of appeal and an unopposed motion for certification under § 158(d)(2) to support a direct appeal to this Court. The bankruptcy court certified that its order "involves a question of law as to which there is no controlling decision of th[is] Court . . . or of the Supreme Court of the United States" and that "an immediate appeal from the order may materially advance the progress of [Coughlin's] Motion" to enforce the stay. J.A. 365. This Court then granted permission for direct appeal. J.A. 431-32.

SUMMARY OF ARGUMENT

Congress has the power to abrogate the sovereign immunity of Indian tribes by statute. Before concluding that Congress has done so, courts look for unequivocal language expressing an intent to abrogate. To determine whether Congress has spoken clearly, courts use familiar tools of statutory interpretation: text, context, structure, and purpose. Here, those tools yield the result that the Bankrutpcy Code clearly abrogates the immunity of all governments, whether foreign or domestic, from a suit to enforce the automatic stay.

I.A. Section 106(a) of the Bankruptcy Code abrogates the immunity of a "governmental unit" from a motion to enforce the automatic stay. Section 101(27) defines a "governmental unit" to include federal, state, and municipal governments and their instrumentalities; foreign states and their instrumentalities; and "other foreign or domestic government[s]." As the Ninth Circuit correctly concluded in *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), that language clearly includes tribes.

Tribes are "governments" in the ordinary sense of the word: they exercise political authority derived from the consent of their members, make and execute laws, and create their own courts to decide controversies within their jurisdiction. Judicial decisions, including those of the Supreme Court and this Court, refer to tribes as governments and to tribal sovereign immunity as a governmental

attribute. Many other statutes refer to tribes as "governments," frequently while recognizing their dignity as sovereigns and stressing the importance of "government-to-government" or "intergovernmental" relations with them. Tribes themselves, including the Tribe here, also refer to their own "governments."

The use of the word "government" in the phrase "foreign or domestic government" confirms that Congress meant to speak broadly, sweeping in all governments of any kind. Tribes, moreover, are classified as "domestic" just as naturally as they are classified as "governments" because they are within the territory of the United States and subject to its legislative power. The Supreme Court has long referred to tribes as "domestic" in nature.

B. The broader context, structure, and purpose of the Bankruptcy Code confirm that the term "governmental unit" includes tribes. The automatic stay is of paramount importance to that Code. The stay not only protects debtors from severe hardship (as this case shows), but also ensures that creditors are treated equally, avoids a race to seize the debtor's assets, and allows the bankruptcy process to function in an orderly way. For those reasons, no government body or agency, however important its role, may violate the stay – or, equally, the discharge injunction that a debtor receives at the end of the bankruptcy process. This Court need not and should not conclude that Congress meant to make tribes

and their instrumentalities the only governments in the world that may disregard bankruptcy stays and discharges with impunity.

Leaving the abrogation provisions aside and looking to the Bankruptcy Code as a whole, the Code's use of the term "governmental unit" in other provisions confirms that it includes Indian tribes. Various provisions of the Code refer to governmental units as entities with the power to tax, to exercise police and regulatory power, and to regulate family relationships by imposing obligations to pay alimony, maintenance, and child support. All "governmental unit[s]" receive special treatment in bankruptcy: priority treatment of claims for governmental fines and taxes, exceptions from discharge for the same types of claims, and even narrowly defined exceptions to the automatic stay when they exercise police and regulatory powers. Tribes, as governments, exercise authority to tax and regulate, including in areas of family law such as marriage, divorce, and child support. No reason exists in the Code or out of it to believe that Congress wanted such tribal actions to be denied the same priorities and other special treatment that actions of "governmental unit[s]" receive – as they would be, if tribes are excluded from the definition of that term under § 101(27).

II. Congress need not use the particular phrase "Indian tribes" to refer to tribes clearly enough to abrogate tribal immunity from suit. Believing that special words were required was the error made in *Buchwald Capital Advisors, LLC v.*

Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings), 917 F.3d 451 (6th Cir. 2019), *cert. dismissed*, 140 S. Ct. 2638 (2020) – and also the one made here. This Court should now reject that reasoning and reaffirm the principle, stated both in Supreme Court cases and in this Court's own precedent, that neither magic words nor talismanic phrases are required to abrogate sovereign immunity.

In all statutory cases, including cases that involve sovereign immunity, the duty of the courts is to use the tools of statutory interpretation to determine the statute's meaning. Where that meaning is clear, it governs unless there is a constitutional constraint; here, there is none. This Court should thus look to the words Congress did use, as well as the context in which it used them. It should not focus on the absence of other words Congress might have used, but did not. Applying that approach to §§ 106(a) and 101(27) yields the unambiguous conclusion that Indian tribes, like all other governments, lack immunity from the jurisdiction of a bankruptcy court to enforce its automatic stay.

STANDARD OF REVIEW

The bankruptcy court dismissed the case by applying Federal Rule of Bankruptcy Procedure 7012, which incorporates Federal Rule of Civil Procedure 12(b), and by "tak[ing] the well-pled facts to be true." Add. 1. This Court reviews that decision de novo. *See In re Curran*, 855 F.3d 19, 25 (1st Cir. 2017).

ARGUMENT

"Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) ("*Potawatomi Tribe*")). They have "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). But tribal sovereignty is "qualified": "a tribe's immunity, like its other governmental powers and attributes," is "in Congress's hands." *Bay Mills*, 572 U.S. at 789. Congress may therefore "abrogate tribal immunity" through a statute that "'unequivocally' express[es] that purpose." *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting *Santa Clara Pueblo*, 436 U.S. at 58).

To determine whether Congress has abrogated tribal immunity by statute, this Court employs the familiar methods of statutory construction. It gives the "language" of a statute its "natural reading." *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 51 (1st Cir. 2007). It considers the context, "read[ing] statutes, whenever possible, to give effect to every word and phrase." *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 26 (1st Cir. 2006) (en banc). It "presume[s] that Congress acts with knowledge of relevant Supreme Court precedent," and considers the "historical background" of enactments. *Id.* If, after that full

consideration, the statute "clearly abrogates [a] [t]ribe's sovereign immunity," *id.* at 27, the tribe is not immune.

Whether Congress abrogated tribal immunity in the Bankruptcy Code is a question of first impression in this Circuit. Two other circuits have addressed it and have split. *Compare Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1055-56 (9th Cir. 2004) (holding that "Congress . . . abrogate[d] the sovereign immunity of Indian tribes under 11 U.S.C. §§ 106(a) and 101(27)"), *with Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe (In re Greektown Holdings, LLC)*, 917 F.3d 451, 461 (6th Cir. 2019) (holding "that 11 U.S.C. §§ 106, 101(27) lack the requisite clarity of intent to abrogate tribal sovereign immunity"), *cert. dismissed*, 140 S. Ct. 2638 (2020).[3] The Ninth Circuit's holding is better supported by the statutory text, context, structure, and purpose.

[3] The bankruptcy court incorrectly stated that *Krystal Energy* had been "rejected by three other circuit courts." Add. 4 (citing, in addition to *Greektown*, *Meyers v. Oneida Tribe of Indians*, 836 F.3d 818 (7th Cir. 2016), and *In re Whitaker*, 474 B.R. 687, 695 (B.A.P. 8th Cir. 2012)). *Meyers* involved a different statute. Although critical of *Krystal Energy*, it distinguished the Ninth Circuit's decision rather than disagreeing with it. *See Meyers*, 836 F.3d at 826 (declining to "weigh in on . . . how to interpret the breadth [of] the term 'other domestic governments' under the Bankruptcy Code"). *Whitaker* was a Bankruptcy Appellate Panel decision, not a decision of the Eighth Circuit.

I. Congress Abrogated Tribal Immunity in the Bankruptcy Code

A. Sections 101(27) and 106(a) Clearly Abrogate Tribal Immunity

Section 106(a) provides that, "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to" a list of sections of the Bankruptcy Code. 11 U.S.C. § 106(a). The list includes "[s]ection[ ] . . . 362," *id.* § 106(a)(1), which creates the automatic stay against collection efforts, *see id.* § 362(a)(6), and which authorizes the bankruptcy court to enforce that stay, *see id.* § 362(k)(1). As to all the provisions it lists, § 106(a) authorizes "[t]he court [to] hear and determine any issue arising with respect to the application of such sections to governmental units," *id.* § 106(a)(2); and to "issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages," *id.* § 106(a)(3).

Read together, those provisions authorize a damages claim under § 362(k)(1), as Coughlin seeks to bring here, against any defendant that is a "governmental unit." That already broad phrase is further broadened and clarified by an explicit statutory definition, under which

> [t]he term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this

> title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

Id. § 101(27). An Indian tribe is covered by the concluding phrase "other . . . domestic government."

1. A Tribe Is a "Government"

An Indian tribe is a "government" within the ordinary meaning of the term. Tribes exercise authority by the consent of their members, granted through political processes such as elections and referenda. The dictionary definitions require no more. *See Webster's Third New International Dictionary* 982 (2002) ("*Webster's Third*") (defining "government" as "the organization, machinery, or agency through which a political unit exercises authority and performs functions").[4] As an example, the Tribe in this case has a constitution that defines its "Tribal Council" as its "governing body," Lac du Flambeau Const. art. III, § 1;

[4] *See American Heritage Dictionary of the English Language* 761 (5th ed. 2011) ("*American Heritage*") ("The agency or apparatus through which a governing individual or body functions and exercises authority."); *Random House Unabridged Dictionary* 826 (2d ed. 1993) ("*Random House*") ("[T]he governing body of persons in a state, community, etc.; administration."); *Webster's New International Dictionary of the English Language* 1083 (2d ed. 1952) ("*Webster's Second*") ("the ruling and administration of a political body" and "[t]he person or persons authorized to administer the laws; the governing body; the administration"). There are, of course, many definitions of the term, but, when used to apply to an organization, it consistently means an organization that exercises authority and wields power on a political basis.

delegates "administrative power" to an "Executive Council," *id.* art. III, § 3; and a "Judiciary" in which it has "vested" its "judicial power," *id.* art. X, § 2.[5]

Judicial usage of the term "government" confirms that its ordinary meaning includes tribes. The Supreme Court and this Court have often called tribes "government[s]." *See*, *e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2467 (2020) (discussing "the Creek government" and the "three separate branches of government" of the "Creek Nation"); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137-38 (1982) (discussing "police protection and other governmental services" of a "tribal government"; comparing the "Jicarilla Tribe" to "other governmental entities"); *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618, 626 (1st Cir. 2017) (discussing the "government" of the Wampanoag Tribe and its "governmental power"); *Aroostook*, 484 F.3d at 51 (rejecting an argument that a statute "applie[d] state law to Maine tribes as 'polities' but not to their governments").

Indeed, the Supreme Court has described the very tribal characteristic at issue here – common-law immunity from suit – as one of a "tribe's . . . governmental powers and attributes," *Bay Mills*, 572 U.S. at 789, and has given a

[5] The Tribe has made its Constitution, Bylaws, and Ordinances available to the public at https://www.ldftribe.com/pages/23/Court-Ordinances/. The Constitution and Bylaws are specifically at https://www.ldftribe.com/uploads/files/Court-Ordinances/BYLAWS.pdf.

historical reason for such immunity as "protect[ing] nascent tribal governments from encroachments by States," *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998). Courts also refer to sovereign immunity as "governmental immunity" outside the tribal context. *See*, *e.g.*, *Republic of Philippines v. Pimentel*, 553 U.S. 851, 866-67 (2008) (discussing the "governmental immunity of the United States"); *Hydrogen Tech. Corp. v. United States*, 831 F.2d 1155, 1160 (1st Cir. 1987) (similar). It is strange at best to suggest that a tribe is government enough to assert governmental immunity, but not within the plain meaning of the statutory term "government" abrogating that same immunity.

Congress also frequently refers to tribes as "government[s]." Numerous statutes refer to "a government-to-government relationship" between the United States and Indian tribes. *E.g.*, 25 U.S.C. § 3601(1).[6] Others describe

[6] *See also* 16 U.S.C. § 410 note (directing "government-to-government consultations" between the Secretary of the Interior and a "tribal chairman"); 25 U.S.C. § 2011(b)(1) (directing "[t]he United States acting through the Secretary" to "work in a government-to-government relationship" with "tribes"); *id.* § 4301(a)(2) (finding that, "beginning in 1970, . . . each President has reaffirmed the special government-to-government relationship between Indian Tribes and the United States"). Other references to "government-to-government consultation[s]" and "government-to-government relationship[s]" with tribes appear at 16 U.S.C. §§ 410aaa note and 539p(c)(3)(A); 23 U.S.C. §§ 207(c)(2) and 326(b)(1); 25 U.S.C. §§ 1602(6), 1661(a)(4), 2018(b)(3)(A), 3601(1), 3651(1), 3701(1), 4116(b)(2)(B)(ii)(I), 5363(a)(1), 5364(a)-(b), 5373(c), 5384(a)-(b), 5385(a), and 5397(c); and 38 U.S.C. § 547(a)(3).

"intergovernmental" relationships or activities with tribes. *E.g.*, 16 U.S.C. § 410.[7] Still others refer to "tribal governments." *E.g.*, 6 U.S.C. § 572.[8] Indeed, Congress passed one statute referring to "tribal governments" and their "government-to-government relationship" with the United States within three days of abrogating sovereign immunity for "governmental unit[s]" in § 106(a).[9]

Tribes and tribal organizations themselves often refer to tribes as governments. For example, the National Congress of American Indians refers to "[t]ribal governments [as] an important and unique member of the family of American governments"; states that "[t]he US Constitution recognizes that tribal

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[7] *See also* 15 U.S.C. § 375 note (savings clause preserving certain "intergovernmental arrangements between any State or local government and any government of an Indian tribe"); 21 U.S.C. § 1521(8) (emphasizing importance of "[i]ntergovernmental cooperation and coordination" involving "tribal leadership"); 25 U.S.C. § 5321 note (discussing "interact[ion]" between "Indian tribes and other entities and persons . . . in commerce and intergovernmental relationships"). Other references to "intergovernmental" interactions with tribes appear at 2 U.S.C. §§ 602(g)(2)(B), 658(3)-(5), 658b(d), 658c(a)(2), 658d(b), 658g(a)(1), 1501(8), 1512, 1532(a)(2), 1534(a)-(b), 1535(a)(1), and 1552(a); 16 U.S.C. § 410 note; and 42 U.S.C. § 8262b(b)(1).

[8] *See also*, *e.g.*, 15 U.S.C. § 7451(a) (authorizing cybersecurity activities that include "tribal governments"); 19 U.S.C. § 4332(d)(4)(A)(i) (requiring sharing of best practices concerning a safety plan with "tribal governments"); 23 U.S.C. § 202(a)(1)(B)-(C) (funding programs and projects "administered by" or "associated with a tribal government"). The Code contains hundreds of other references to "tribal governments" – too many to list here.

[9] *Compare* Tribal Self Governance Act of 1994, Pub. L. No. 103-314, §§ 108(b), 202(2), (4)-(5), 203, 408(c), 108 Stat. 4250, 4261, 4271, 4277, *with* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 113, 108 Stat. 4106, 4117-18.

nations are sovereign governments, just like Canada or California"; and states that "[t]he governmental status of tribal nations is at the heart of nearly every issue that touches Indian Country."[10] The Tribe in this case not only describes its Tribal Council as its "governing body," Lac du Flambeau Const. art. III, § 1, but also has passed an ordinance purporting to regulate tribal lenders such as Lendgreen, which requires that the lenders' "business profits [be] used for the benefit of the Tribe's government and its members" and for purposes that include "funding the Tribe's government operations or programs." Lac du Flambeau Tribal Code ch. 94, §§ 1.2(c), 1.3(a)(1). In sum, no ordinary speaker of English would hesitate to use the word "government" to describe a tribe.

2. A Tribe Is a "Domestic" Government

The immediate context of the word "government" in the phrase "other foreign or domestic government" confirms that it includes tribes. The adjective "other" indicates that the definition of "governmental unit" is not limited to the specific governments named in the preceding list. If not read to expand the definition to all governments, the concluding phrase would do nothing at all –

[10] National Congress of American Indians, *Tribal Governance*, https://www.ncai.org/policy-issues/tribal-governance (last visited May 21, 2021).

contrary to the principle that courts "read statutes, whenever possible, to give effect to every word and phrase." *Narragansett*, 449 F.3d at 26.[11]

The phrase "foreign or domestic" indicates that the definition of "governmental unit" is not limited to governments either inside or outside the borders of the United States. "Foreign" and "domestic" are opposites: using them with the disjunctive "or" is a way to show the definition's breadth, as one might refer to "any time, day or night" or to "odd or even numbers." *Cf. Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) (noting repeated use of the "disjunctive word 'or'" as evidence that a statutory provision "bespeaks breadth"). As the Ninth Circuit put it, "logically, there is no other form of government outside the foreign/domestic dichotomy, unless one entertains the possibility of extra-terrestrial states." *Krystal Energy*, 357 F.3d at 1057.

Tribes also fit neatly into the "domestic" half of that dichotomy. The ordinary meaning of "domestic" – especially when contrasted to "foreign" – is "belonging or occurring within the sphere of authority or control or the fabric or boundaries of [an] indicated nation or sovereign state." *Webster's Third* at 671; *cf.*

[11] The bankruptcy court incorrectly suggested that Coughlin's reading of the phrase "other . . . domestic government[]" would make "all the other words in [§ 101(27)] surplusage." Add. 4. To the contrary, Coughlin's reading of the term "other" indicates that the final phrase does not itself refer to the previously listed governments, but includes other governments not previously listed. It is the Tribe's approach that makes the final phrase meaningless by limiting "domestic government" solely to governments already identified by name.

United States v. United Verde Copper Co., 196 U.S. 207, 213 (1905) ("We may properly and accurately speak of domestic manufactures, meaning not those of the household, but those of a county, state, or nation, according to the object in contemplation.").[12] Here, the indicated nation is the United States; Indian tribes are within both its sphere of authority and control and its geographical boundaries. *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470 (1979) *(*plenary and exclusive power over Indian affairs); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Marshall, J.) (observing that Indian tribal lands "compose a part of the United States" and are within its "jurisdictional limits"). They are thus "domestic" governments.

Looking again to judicial usage, the Supreme Court has consistently referred to Indian tribes as "domestic" in the sense that they are within the United States and subject to its legislative power. *See*, *e.g.*, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991) ("Respondents argue that Indian tribes are more like States than foreign sovereigns. That is true in some respects: They are, for

[12] *See also American Heritage* at 533 ("[o]f or relating to a country's internal affairs" and "produced in or indigenous to a particular country"); *Random House* at 581 ("of or pertaining to one's own or a particular country" and "indigenous to or produced or made within one's own country; not foreign; native"); *Webster's Second* at 768 ("[o]f or pertaining to, or made in, a nation considered as one's own country; internal; intestine"). The most important other definition has to do with homes and households, as *United Verde Copper* observed – but, of course, Congress did not intend to define the head of a household as a governmental unit.

example, domestic.").[13] Legislating against that background, Congress would have had no doubt that when it defined a "governmental unit" in 1978 and "abrogated" the immunity of such units in 1994, those provisions would apply to Indian tribes.

B. The Structure, Context, and Purpose of the Bankruptcy Code Confirm the Meaning of Its Text

Though §§ 101(27) and 106(a) are plain on their face, their meaning is reinforced by reading "the Bankruptcy Code . . . as a whole." *In re Jamo*, 283 F.3d 392, 399 (1st Cir. 2002). Doing so confirms that the term "governmental unit" clearly encompasses tribes.

1. The Automatic Stay and Discharge Are Fundamental to Bankruptcy and Bind All Governmental Units

This case involves the enforcement of the bankruptcy court's automatic stay. The filing of a bankruptcy petition "operates as a stay, applicable to all entities," of collection activities, 11 U.S.C. § 362(a) – including "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case." *Id.* § 362(a)(6). "The automatic stay is 'one of the fundamental debtor protections provided by the bankruptcy laws,'" *IRS v. Murphy*, 892 F.3d 29, 36

[13] *See also*, *e.g.*, *Potawatomi Tribe*, 498 U.S. at 509 ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories.") (quoting *Cherokee Nation*, 30 U.S. (5 Pet.) at 17); *United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100, 103 (1855) (concluding that "the Cherokee territory" is "not a foreign, but a domestic territory," because it "originated under our constitution and laws").

(1st Cir. 2018) (quoting *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986)). It "gives a 'breathing spell' to the debtor and stops 'all collection efforts, all harassment, and all foreclosure actions.'" *Id.* (quoting *Tringali v. Hathaway Mach. Co.*, 796 F.2d 553, 562 (1st Cir. 1986) (Breyer, J.). As this case shows, for an individual debtor such as Brian Coughlin in severe financial and emotional distress, the stay can be lifesaving relief.

The automatic stay has structural significance besides its humanitarian importance. It "protects the debtor's assets from 'disorderly, piecemeal dismemberment . . . outside the bankruptcy proceedings,'" *In re Smith*, 910 F.3d 576, 580 (1st Cir. 2018) (quoting *Mann v. Chase Manhattan Mortg. Corp.*, 316 F.3d 1, 3 (1st Cir. 2003)), preventing individual creditors from jumping the line to recover ahead of (or instead of) other competitors for the debtor's assets. Without such protection, creditors would be forced to engage in a "race of diligence . . . for the debtor's assets," *Tringali*, 796 F.2d at 562 (quoting H.R. Rep. No. 95-595, at 340 (1977)), interfering with the federal policy of "centraliz[ing] all disputes concerning property of the debtor's estate so that reorganization can proceed efficiently," *Smith*, 910 F.3d at 580 (quoting *SEC v. Miller*, 808 F.3d 623, 630 (2d Cir. 2015)).

The importance of the automatic stay to the operation of the Bankruptcy Code is underscored by the broad waiver of sovereign immunity associated with

enforcement actions. The IRS serves the vital function of obtaining revenue for the Treasury; but when the IRS willfully violates the automatic stay, it must nevertheless go before the bankruptcy court and pay damages caused by the violation. *See Murphy*, 892 F.3d at 41. So must states and their agencies. *See In re Diaz*, 647 F.3d 1073, 1086 (11th Cir. 2011) (holding that a bankruptcy court may "generally . . . exercise jurisdiction over a state in . . . proceedings" arising from automatic stay violations) (emphasis omitted).[14] Yet, under the bankruptcy court's reading of the statute, a tribe retains the immunity that federal and state revenue agencies do not. It makes no sense to read the Bankruptcy Code to treat tribes differently from all other governments in this manner.

The question presented also affects the enforcement of the discharge injunction at the close of bankruptcy. *See* 11 U.S.C. § 524(a)(2) ("A discharge in a case under this title . . . operates as an injunction against . . . an act[ ] to collect, recover or offset any [discharged] debt as a personal liability of the debtor[.]"). "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor,'" *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286 (1991)), and the

[14] Although explaining that, under *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), state agencies generally are not immune from such motions, *Diaz* made an exception for a contempt motion brought four years after the alleged violation, "too late to be considered essential to any *in rem* functions of the bankruptcy court." 647 F.3d at 1086.

discharge injunction "advances [that] overarching purpose," *In re Canning*, 706 F.3d 64, 69 (1st Cir. 2013)).

The discharge injunction, like the automatic stay, binds federal and state governments as well as private parties, and is enforceable against them through judgments for money damages. *See In re Rivera Torres*, 432 F.3d 20, 24 (1st Cir. 2005) (explaining, in action against IRS for violation of discharge injunction, that "[t]here is no doubt that § 106 is an express waiver of sovereign immunity" and that it "is a waiver, in appropriate circumstances, for 'money recovery' and for entry of money judgments") (citation omitted); *Diaz*, 647 F.3d at 1087-88 (holding state agencies not immune from motion to enforce discharge injunction). Again, the bankruptcy court's reasoning would make tribes a lone, unwarranted exception.

Equal treatment of all sovereigns also serves the special need for uniformity in bankruptcy law. The Constitution gives Congress the power "[t]o establish . . . uniform laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4. As the Supreme Court has explained, the Constitution's use of the term "uniform" reflects "general agreement," at the time of its enactment, "on the importance of authorizing a uniform federal response to the problems" presented by pre-1787 American bankruptcy cases. *Katz*, 546 U.S. at 369. The problems to which *Katz* refers were "difficulties posed by [a] patchwork of

insolvency and bankruptcy laws" and by the "uncoordinated actions of multiple sovereigns." *Id.* at 366.

Because of that special need for uniformity, the Supreme Court held in *Katz* that the states "agreed in the plan of the Convention not to assert . . . immunity" against "orders ancillary to the bankruptcy courts' *in rem* jurisdiction," such as "orders directing turnover of preferential transfers." *Id.* at 373. That holding does not govern directly here because tribes were not represented at the Constitutional Convention and therefore did not waive their immunity at that time. *See Blatchford*, 501 U.S. at 782. Nevertheless, *Katz* sheds light on the reasons for Congress's extremely broad abrogation of sovereign immunity in § 106(a): it is federal policy today, as it has been from the beginning, that in bankruptcy court everyone plays by the same rules.

Before the bankruptcy court, the Tribe contended that tribal sovereign immunity would not make the automatic stay unenforceable because "debtors can assert *Ex parte Young* claims against tribal officials and employees to enjoin alleged unlawful conduct." J.A. 390 (25:7-19) (referring to *Ex parte Young*, 209 U.S. 123 (1908)); *see Bay Mills*, 572 U.S. at 796 (indicating that *Ex parte Young* actions are available against tribal officials).[15] In the same breath, counsel

[15] The Tribe's reliance on *Ex parte Young* also underscores that it is attempting to assert the immunity of a "government" from suit, *see supra* pp. 20-21, because the justification for *Ex parte Young* is the fiction that an injunctive

suggested that there "may be a question of personal jurisdiction" over officials and employees, J.A. 390 (25:19-20), suggesting the concession was more illusory than real. The practical obstacles to identifying individual tribal-entity employees to sue them in their home jurisdictions are obvious.

Prospective injunctive relief against tribal employees would also fall short of the Bankruptcy Code's purposes in other ways. Unlike damages, an *Ex parte Young* order would give a tribal entity like Lendgreen little incentive to comply with the orders of other bankruptcy courts in other bankruptcies. For that reason, it would do little to protect the interests of other creditors: if Coughlin had somehow scraped up the cash to pay Lendgreen to stop its harassment, it would have achieved its goal of being paid first, and the other creditors would have no remedy.

In any event, the question now is not whether prospective injunctive relief against officers might provide limited, second-best enforcement for the crucial provisions of the automatic stay and discharge injunction, but whether Congress relegated debtors to such remedies in the Bankruptcy Code. This is not an Eleventh Amendment case where constitutional limits on Article I make *Ex parte Young* the only option.[16] Here, Congress abrogated the immunity of "domestic

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action against official acting unlawfully "does not affect[ ] the state in its sovereign or *governmental* capacity." 209 U.S. at 159 (emphasis added).

[16] *Cf. Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (observing that, because of *Ex parte Young* and federal enforcement actions,

government[s]," 11 U.S.C. § 101(27), and the only dispute is whether it created a system where tribes and their instrumentalities are immune from suit, even as federal, state, and foreign governments are not. The Court need not and should not conclude that Congress intended any such result.

2. Tribes Perform the Functions Associated with Governmental Units in the Bankruptcy Code

The Bankruptcy Code uses the term "governmental unit" to refer to entities that carry out governmental functions such as collecting taxes, enforcing laws, and ordering alimony, maintenance, and child support. The statutory scheme is naturally read to treat tribes performing those functions similarly to federal, state, and municipal governmental units performing those functions.

Taxes. Many provisions of the Bankruptcy Code refer to governmental units as having the power to tax. For example, a "governmental unit" may conduct tax "audit[s]," issue "notice[s] of tax deficiency," make "demand[s] for tax returns," "assess[]" taxes, 11 U.S.C. § 362(b)(9); "creat[e] or perfect[]" tax "lien[s]," *id.* § 362(b)(18); and withhold "income tax refunds[]," *id.* § 362(b)(26), without offending the automatic stay. Certain taxes and tax-related fines or penalties are administrative expenses of the bankruptcy estate; "governmental unit[s]," unlike other claimants, need not "file a request" for that favorable treatment. *Id.*

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invalidation of remedies against states in Title I of the Americans with Disabilities Act would "not mean that persons with disabilities have no federal recourse").

§ 503(b)(1)(B), (D). Many tax claims by "governmental units," including related penalties and interest, take priority over general unsecured claims, *id.* § 507(a)(8), and are excepted from discharge, *see id.* § 523(a)(1)(A).

Tribes have the "power to tax" as part of their "general authority . . . to control economic activity within [their] jurisdiction[s], and to defray the cost of providing governmental services." *Merrion*, 455 U.S. at 137; *see id.* at 138 (observing that tribes resemble "other governmental entities" in this respect). The Tribe in this case has authorized its Council to "promulgate legislation, statutes, codes and ordinances, which provide for taxes, assessments, or license fees," subject to "popular referendum." Lac du Flambeau Const. art. VI, § 1(i).

Police and regulatory powers. Several provisions of the Bankruptcy Code refer to governmental units as having police and regulatory powers. "Governmental unit[s]" exercising "police or regulatory" powers can access otherwise protected confidential information, 11 U.S.C. § 107(c)(2); and can benefit from a special exception to the automatic stay, *id.* § 362(b)(4). Similarly, "fine[s], penalt[ies], or forfeiture[s] payable to and for the benefit of a governmental unit" are excepted from discharge. *Id.* § 523(a)(7). Although the extent of tribal authority over non-members is limited by federal law, tribes have the power to enforce their laws through criminal prosecutions of both their own members and non-member Indians, *see United States v. Lara*, 541 U.S. 193, 199-

200 (2004), as well as to "regulat[e] . . . non-Indian activities on the reservation that ha[ve] a discernible effect on the tribe or its members," *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 332 (2008). The Tribe in this case has authorized its Tribal Council to exercise those powers. Lac du Flambeau Const. art. VI, § 1(*l*), (w)-(x).

Alimony, maintenance, and child support. Several provisions of the Bankruptcy Code use the defined term "domestic support obligation," which refers to debts "in the nature of alimony, maintenance, or support" for a "spouse, former spouse, or child," including claims "recoverable . . . by a governmental unit" and "established . . . by reason of . . . a determination made . . . by a governmental unit." 11 U.S.C. § 101(14A). Such obligations are given first priority for payment, including when a "governmental unit" asserts them, *id.* § 507(a)(1)(A)-(B), and are excepted from discharge, *see id.* § 523(a)(5). Tribes have power to "regulate domestic relations among [their] members." *Plains Commerce Bank*, 554 U.S. at 327. Again, the Tribe in this case has authorized its Council to do so. *See* Lac du Flambeau Const. art. VI, § 1(q).

Looking to the function of governmental units is consistent with this Court's reasoning in *TI Federal Credit Union v. DelBonis*, 72 F.3d 921 (1st Cir. 1995), that "[l]egislative history suggests that Congress intended to 'defin[e] "government unit" in the broadest sense,'" but also meant to "temper [that] exhortation to define

broadly" by considering whether an entity "carr[ies] out some governmental function." *Id.* at 930-31 (quoting H.R. Rep. No. 95-595, at 311).[17] Here, the functions discussed in the Bankruptcy Code and carried out by tribes confirm that they are the kind of entities Congress had in mind when it wrote the Code.

3. Recognizing Tribes as Governmental Units Avoids Gaps and Shortfalls in Other Provisions of the Code

The Bankruptcy Code's references to governmental functions performed by tribes also show that placing tribes outside the definition of "governmental unit" would create gaps and shortfalls not only in the Code's sovereign immunity provisions, but in other parts of the Code. Those gaps would injure tribes' legitimate governmental interests even while allowing some tribal entities to avoid accountability for violations of federal law. Courts strive to avoid such incoherent results. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008) ("[O]ur construction . . . must, to the extent possible, ensure that the statutory scheme is coherent and consistent.").

[17] In holding that a federally insured credit union was an "instrumentality of the United States," 11 U.S.C. § 101(27), *DelBonis* also considered whether credit unions "have an active relationship with the federal government." 72 F.3d at 931. Here, there is no need to look at the relationship of subordinate units to the Tribe. The Tribe is an appellee and the other appellees' claims to immunity rise or fall with the Tribe's. *See* Add. 2 ("[W]hatever immunity the Tribe has is also attributable to Lendgreen, BDC, and Holdings.").

Suppose the courts were to accept the Tribe's position that tribes are not "governmental unit[s]" but the automatic stay and discharge injunctions are enforceable through suits for prospective injunctive relief against tribal officials. *See supra* pp. 30-31. "[H]onest but unfortunate debtors," *Marrama*, 549 U.S. at 367, seeking protection from harassment by tribal lenders would find little comfort in such a ruling. But less honest debtors might seek to avoid tribally imposed taxes, penalties, fees, or family support obligations – the kinds of special debts to governmental units for which Congress made exceptions to the automatic stay and discharge injunctions. If tribes are not "governmental unit[s]" within the meaning of § 101(27), those special debts would not qualify for "governmental unit" exceptions to §§ 362(b) and 523(a), or "governmental unit" priority under § 507(a). They would be discharged like ordinary unsecured debts, and tribal officials could be enjoined from collecting them. Nothing in the Bankruptcy Code suggests Congress contemplated that result.

II. Congress Need Not Use the Specific Words "Indian Tribe" To Abrogate Tribal Immunity from Suit

The bankruptcy court erred in relying on the Sixth Circuit's decision in *Greektown* to find a lack of clarity in the Bankruptcy Code. Add. 3-4. In that case, the Sixth Circuit reasoned that "there is not one example in all of history where the Supreme Court has found that Congress has intended to abrogate tribal sovereign immunity without expressly mentioning Indian tribes somewhere in the statute."

Id. (quoting *Greektown*, 917 F.3d at 460, in turn quoting *Meyers*, 836 F.3d at 824). That reasoning is unpersuasive and inconsistent with Supreme Court and this Court's precedent. This Court should not follow it.

The Supreme Court has never insisted that Congress "state its intent in any particular way" or "use magic words" to abrogate sovereign immunity of any kind. *FAA v. Cooper*, 566 U.S. 284, 291 (2012). *Cooper* rejected a magic-words test for federal sovereign immunity, but the Court has similarly said of state sovereign immunity that Congress need not "make its clear statement in a single section," *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 76 (2000). Justice Scalia, a strong advocate of state sovereignty, similarly rejected the need for any "explicit reference to state sovereign immunity or the Eleventh Amendment" for a statute to "clearly subject[ ] States to suit for monetary damages." *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring); *see generally Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1749 (2020) (distinguishing statutory "breadth" from statutory "ambiguity").[18]

[18] *See also Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) ("Broad general language is not necessarily ambiguous when congressional objectives require broad terms."); *Pac. Choice Seafood Co. v. Ross*, 976 F.3d 932, 945 (9th Cir. 2020) ("[B]readth is not the same thing as vagueness."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 101 (2012) ("[T]he presumed point of using general words is to produce general coverage – not to leave room for courts to recognize ad hoc exceptions.").

C&L Enterprises is instructive. In that case, the Supreme Court applied the requirement that a tribal waiver of immunity must be "clear" – a requirement that the Court described as "[s]imilar[]" to the clear-statement requirement for congressional abrogation of immunity. 532 U.S. at 418. The tribe in *C&L Enterprises* had consented to arbitration and to enforcement of an arbitral award, but never said in so many words that it "waived its sovereign immunity." *Id.* at 421. The Court rejected the argument that "a waiver of sovereign immunity, to be deemed explicit, must use the words 'sovereign immunity,'" quoting with approval the Seventh Circuit's decision in *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 660 (7th Cir. 1996). *Id.* at 420. In the present case, this Court confronts a statute that uses the words "sovereign immunity" but not the words "Indian tribes." The principle is the same: Congress must state its intent clearly to abrogate, but need not use special words to be clear.

This Court sounded similar themes in *Narragansett* and *Aroostook*, both of which involved congressional abrogation of tribal immunity. *Narragansett* construed the Rhode Island Indian Claims Settlement Act, which provided that certain "settlement lands would be 'subject to the civil and criminal laws and *jurisdiction* of the State of Rhode Island.'" 449 F.3d at 25 (quoting 25 U.S.C.

§ 1708(a) (2005)).[19] Although this provision did not mention tribal immunity, this Court held that it "clearly abrogates the [Narragansett] Tribe's sovereign immunity" when "read in light" of a contemporaneous settlement agreement between that tribe and Rhode Island and that agreement's "unique historical context." *Id.* at 27. In reaching that conclusion, the Court emphasized that abrogation, like waiver, does not require "talismanic phrases" or "magic words." *Id.* at 25 (citing *C&L Enters.*, 532 U.S. at 420-21).

Aroostook construed similar language in the Maine Indian Claims Settlement Act, which made "Maine Indians 'subject to . . . the laws of the State,' and 'subject to the civil and criminal jurisdiction of the State,'" and "added the emphasizing phrase 'to the same extent as any other person.'" 484 F.3d at 50 (quoting 25 U.S.C. § 1725(a) (2006)).[20] Although the statute referred to "tribes" and "bands," it did not refer to "specific units of tribal government." *Id.* Seizing on that choice of words, the Aroostook Band argued that the statute "applies state law to Maine tribes as 'polities' but not to their governments." *Id.* at 51. But this Court rejected that argument because it was "not a natural reading of the language and . . .

[19] The current U.S. Code omits § 1708 because it is a statute "of special and not general application." 25 U.S.C. § 1708 (2019).

[20] As with § 1708, the current Code omits § 1725. 25 U.S.C. § 1725 (2019).

create[d] an artificial distinction merely to suit tribal purposes." *Id.*; *see also id.* at 50 (quoting *Narragansett*'s rejection of "talismanic phrases" and "magic words").

To be sure, the Sixth Circuit in *Greektown* paid lip service to the principle that "Congress need not use 'magic words,'" and purported "not [to] hold that specific reference to Indian tribes is in all circumstances required to abrogate tribal sovereign immunity." 917 F.3d at 461 (citing *Cooper*, 566 U.S. at 290-91). Yet the court's reasoning turned wholly on the absence of the phrase "Indian tribes" from the statute – returning to that point again and again, *see id.* at 458-59, 460-61, 462, just as the bankruptcy court's shorter opinion made the absence of that phrase nearly the whole of its analysis, *see* Add. 3-4. That is the precise mistake the Supreme Court warned against in *Cooper*, and this Court warned against in *Narragansett* and *Aroostook*.

Ultimately, "the sovereign immunity canon 'is a tool for interpreting the law'" that "does not 'displac[e] the other traditional tools of statutory construction.'" *Cooper*, 566 U.S. at 291 (quoting *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008)); *cf. Anderson v. John L. Hayes Constr. Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926) (Cardozo, J.) ("The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced."). The error in *Greektown* – and the bankruptcy

court's decision following it – is an exclusive focus on the absence of words present in other statutes ("Indian tribe") rather than the meaning of the words present in this statute ("other foreign or domestic government"). When those words are given their ordinary meaning, and read in the context of the Bankruptcy Code as a whole, it is clear that they include tribes.

CONCLUSION

This Court should reverse the decision of the bankruptcy court and remand for further proceedings.

Respectfully submitted,

/s/ *Gregory G. Rapawy*

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May 25, 2021

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ADDENDUM

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re **BRIAN W. COUGHLIN,** **Debtor**

Chapter 13
Case No. 19-14142-FJB

MEMORANDUM OF DECISION AND ORDER ON
MOTIONS TO DISMISS THE DEBTOR'S MOTION TO ENFORCE THE AUTOMATIC STAY

The debtor, Brian W. Coughlin (the "Debtor"), filed a motion to determine that four related parties have violated the automatic stay (the "Stay Motion"). See 11 U.S.C. §362(k). Those parties are Niiwin, LLC d/b/a Lendgreen ("Lendgreen"), L.D.F. Business Development Corporation ("BDC"), L.D.F. Holdings, LLC ("Holdings"), and the Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe") (collectively, the "Alleged Violators"). The Alleged Violators filed motions to dismiss the Stay Motion, and the court ordered that the provisions of Fed.R.Bankr.P. 7012 would apply to the motions to dismiss. See Fed.R.Bankr.P. 9014(c)("[t]he court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply").

In evaluating a motion to dismiss, I take the well-pled facts to be true (although I note that the Alleged Violators hotly dispute for a variety of reasons that they either individually or in concert are liable for a stay violation). The Debtor filed a chapter 13 petition on December 4, 2019. It is sufficient for present purposes to say that the Debtor claims that after he filed his petition he gave written and oral notice to the Alleged Violators, but that the Alleged Violators continued to send him emails and to make telephone calls to him seeking payment of a so-called payday loan that they made to him prepetition. It is undisputed that the amount due on the payday loan on the day of filing was less than $1,600. The

Debtor also claims that he was so emotionally upset by the continued collection activities that he suffered depression, anxiety, and suicidal ideation, resulting in catastrophic damages.

The Alleged Violators seek dismissal under both Fed.R.Civ.P. 12(b)(1) and (6). See Fed.R.Bankr.P. 7012(b). Under Fed.R.Civ.P. 12(b)(1), a party may seek dismissal of a claim by motion if the court lacks subject matter jurisdiction. Of course, it is axiomatic that a court must first determine whether it has subject matter jurisdiction before proceeding on the merits of a pending matter. *McCulloch v. Velez*, 364 F.3d 1, 5 (1st Cir. 2004). The Alleged Violators argue that I lack subject matter jurisdiction in this dispute because, as a sovereign nation, they are immune from suit in this court. After careful consideration of the extensive briefing filed in this case, I must agree.

The Tribe is a federally recognized Indian tribe and Indian tribes are sovereign nations with a "direct relationship with the federal government." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (Sotomayor, J., concurring). The Debtor concedes in the Stay Motion that Lendgreen, BDC, and Holdings are all arms of the Tribe. See Stay Motion, ¶3. See also *Ninegret Development v. Narragansetts Indian Wetuomuck Housing Authority*, 207 F.3d 21, 29 (1st Cir. 2000) (finding that an arm of a tribe enjoys the full extent of the tribe's sovereign immunity). Thus, whatever immunity the Tribe has is also attributable to Lendgreen, BDC, and Holdings.

The Bankruptcy Code contains a broad abrogation of sovereign immunity. Pursuant to Section 106(a) of Title 11, "sovereign immunity is abrogated as to a governmental unit," with respect to Section 362. Section 101(27) defines "governmental unit" as follows "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States . . . , a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; *or other foreign or domestic government*." 11 U.S.C. § 101(27) (emphasis added). Section 101(27) does not specifically include federally recognized Indian tribes as a "governmental unit." This brings me to the question of whether sovereign immunity is abrogated by 11 U.S.C. ¶106(a) as to Indian tribes. While this

appears to be a matter of first impression in this circuit, other circuit courts have grappled with this question and come to differing results.

The Supreme Court has consistently held that Indian tribes are "separate sovereigns" and as such have "common law immunity from suit." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) ; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13 (1940); *Turner v. United States*, 248 U.S. 354, 358 (1919. But Congress can abrogate that immunity "as and to the extent it wishes." *Id*. at 803-04. That abrogation must be expressed "unequivocally" in the statute at issue. *Id*. at 788; *see Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25 (1st Cir. 2006) (abrogation "must be clear and unequivocal"). At the center of the circuit split is whether an Indian tribe is an "other foreign or domestic government" whose sovereign immunity is "unequivocally" abrogated by section 106(a) of Title 11. See 11 U.S.C. § 101(27).

In *Buchwald Capital Advisors, LLC. v. Sault Ste. Marie Tribe of Chippewa Indians (In re Greektown Holdings)*, LLC, 917 F.3d 451 (6th Cir. 2019), the Sixth Circuit declined to conclude that section 106 abrogates sovereign immunity as to Indian tribes. After noting that the words "Indian tribes" are not present in section 101(27), the Sixth Circuit observed that (a) in many other statutes Congress has used the words "Indian tribes" when it eliminated their sovereign immunity, *id*. at 456, and that (b) where Congress intends to abrogate immunity for tribes it must do so in a manner that "leaves no doubt." *Id*. at 457. The court then rejected the Ninth Circuit's conclusion in *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004) that the words "domestic government" in section 101(27) are sufficiently similar to the words "domestic dependent nations," which are the words often used by the Supreme Court to refer to Indian tribes, to meet the unequivocality requirement. *Id*. The Sixth Circuit relied on the fact that "there is not one example in all of history where the Supreme Court has found that Congress has intended to abrogate tribal sovereign immunity without expressly mentioning Indian tribes somewhere in the statute." *Id*. at 460 (quoting *Meyers v. Oneida Tribe of Indians Wisc.*, 836 F.3d 818,

824 (7th Cir. 2016) (declining to find tribal immunity abrogated by section 106(a)). The Sixth Circuit concluded that "11 U.S.C. §§ 106, 101(27) lack the requisite clarity of intent to abrogate tribal sovereign immunity."

In this case, Coughlin argues that I should follow the reasoning of the Ninth Circuit in *Krystal Energy*, which has been rejected by three other circuit courts, and find that sections 101(27) and 106 abrogate the immunity upon which the Alleged Violators rely. See *Buchwald Capital Advisors, LLC. v. Sault Ste. Marie Tribe of Chippewa Indians (In re: Greektown Holdings), LLC*, 917 F.3d 451 (6th Cir. 2019); *Meyers v. Oneida Tribe of Indians Wisc.*, 836 F.3d 818, 824 (7th Cir. 2016): *In re Whitaker*, 474 B.R. 687 (8th Cir. 2012). I agree with the three circuits that have rejected the Ninth Circuit.

Coughlin raises one other argument. He says that the words "other . . . domestic government[s]" must refer to Indian tribes because there are no other entities that fit that definition. But that argument fails for two reasons. First, if that were the case Congress could have avoided any ambiguity simply by using the words "Indian tribes" in section 101(27). Second, as the Alleged Violators point out, if the words "other . . . domestic governments" is a catch-all phrase, then all the other words in that section are surplusage, which of course makes no sense.

Finally, Coughlin ignores the special place that Indian tribes occupy in our jurisprudence. Any consideration of the statutory waiver of tribal immunity starts with "the baseline position [that the Supreme Court has] often held is tribal immunity." *Michigan v. Bay Mills Indian Cmty*, 572 U.S. at 790. Thus, "[a]mbiguities in federal law [are] construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980).[1]

[1] I note that Coughlin also argues, for the first time in his sur-reply, that the long line of Supreme Court cases finding that Indian tribes are entitled to sovereign immunity subject only to precise congressional limitations should be overruled. That, of course, is well beyond the province of this court. *State Oil Co. v. Khan*, 522 U.S. 3,20 (1997) (". . . it is [the Supreme] Court's prerogative alone to overrule one of its precedents."). Moreover, Coughlin has not stated a basis for that relief.

ORDER

For the reasons stated above, the Motions to Dismiss are hereby granted, and accordingly, the Stay Motion will, by separate order, be dismissed for lack of subject matter jurisdiction.

Date: October 19, 2020

Frank J. Bailey
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

In re: BRIAN W. COUGHLIN, Debtor	Ch. 13 19-14142-FJB

Order

MATTER:
#27 Motion filed by Debtor Brian W. Coughlin to Enforce the Automatic Stay

For the reasons set forth in the separate memorandum of decision issued today, the Debtor's Motion to Enforce the Automatic Stay is hereby denied for lack of subject matter jurisdiction.

Dated: 10/19/2020

By the Court,

Frank J. Bailey
United States Bankruptcy Judge

11 U.S.C. § 101

§ 101. Definitions

In this title the following definitions shall apply:

* * * * *

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

* * * * *

11 U.S.C. § 106

§ 106. Waiver of sovereign immunity

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327 of this title.

(2) The court may hear and determine any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an

award of punitive damages. Such order or judgment for costs or fees under this title or the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

(4) The enforcement of any such order, process, or judgment against any governmental unit shall be consistent with appropriate nonbankruptcy law applicable to such governmental unit and, in the case of a money judgment against the United States, shall be paid as if it is a judgment rendered by a district court of the United States.

(5) Nothing in this section shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law.

* * * * *

11 U.S.C. § 362

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

* * * * *

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

* * * * *

(k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

* * * * *