No. 22-227

In the Supreme Court of the United States

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, ET AL.,
Petitioners,

v.

BRIAN W. COUGHLIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF THE NATIVE AMERICAN FINANCIAL SERVICES ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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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] All of NAFSA's voting members are federally recognized tribes and all of NAFSA's board members are tribal leaders. NAFSA was formed to provide better economic opportunity in Indian country and has advocated on behalf of its members in *amicus* briefs filed in the U.S. Supreme Court, the U.S. Courts of Appeals for the First, Third, Fourth, Sixth, and Ninth Circuits, and other federal courts. Because NAFSA's members have customers located throughout the United States, NAFSA also has a distinct interest in having a federal Bankruptcy Code that operates uniformly regardless of a customer's geographic location.

NAFSA's member tribes, including the Lac du Flambeau Band of Lake Superior Chippewa Indians (the "Tribe" or "Lac du Flambeau"), face numerous barriers to economic prosperity, including rural isolation, which inhibits their ability to leverage gaming and other brick-and-mortar consumer-based

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[1] Pursuant to Supreme Court Rule 37.2(a), NAFSA timely notified counsel of record of its intent to file this *amicus curiae* brief and all parties provided written consent. Pursuant to Supreme Court Rule 37.6, NAFSA offers the following additional statement: No counsel for any party authored the brief in whole or in part; no party or party's counsel contributed money intended to fund preparation or submission of this brief; and no person other than *amicus* made monetary contributions intended to fund preparation or submission of the brief.

industries as effective tools to stimulate their economies. 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 gaps in the federal funding tribes receive for basic social services. NAFSA is committed to defending tribes' sovereign rights to determine their own economic futures.

Tribal sovereign immunity is the cornerstone of tribal economic development and self-determination. The decision of the First Circuit that is the subject of the Petition for a Writ of Certiorari ("the Petition") erroneously abrogated tribal sovereign immunity in that jurisdiction by implication based on the generic phrase "other . . . domestic government." In addition to conflicting with this Court's long-established rule that Congress may only diminish tribal sovereign immunity through an unequivocal expression of that purpose, this decision deepens a circuit split regarding application of the Bankruptcy Code that 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.

INTRODUCTION AND SUMMARY OF ARGUMENT

The founders of this nation recognized that governmental revenues play an essential role in the exercise of sovereign authority.[2] This fundamental truth holds true today for American Indian tribes that seek to exercise their rights to self-determination. Often lacking traditional tax bases, to truly exercise self-determination, tribes must use commercial enterprises to raise revenue and fund their own priorities. As exacerbated by the First Circuit decision, and the existing circuit split, a non-uniform Bankruptcy Code undermines those efforts and Congress's intent to promote tribal self-government. Tribes and tribal businesses have sovereign immunity under the Bankruptcy Code in some parts of the country and do not in others. In support of the Petition for a Writ of Certiorari, and the arguments therein, NAFSA submits this brief to emphasize three additional, important factors relevant to its members that should further inform this Court's consideration and granting of the Petition.

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

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

recognized Indian tribes, courts may not find clear congressional intent to abrogate sovereign immunity.

Second, Congress has recognized that tribal economic development is essential to the realization of Indian self-determination. Successful tribal economic development depends on a tribe's ability to exercise its sovereign immunity to protect tribal businesses and tribes from unconsented suits that have the potential to drain tribal treasuries and degrade the ability of tribes to exercise self-determination.

Third, permitting courts to abrogate tribal sovereign immunity 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 considering the special status of Indian tribes.

ARGUMENT

I. The Sovereign Authority of Tribes and Tribal Businesses Is Fundamental to Self-Government and May Only Be Diminished by Clear and Unequivocal Language from Congress.

As this Court has long recognized, 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).[3] 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 Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting *Santa Clara Pueblo*, 436 U.S. at 58)). *See also Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991); *Kiowa Tribe of Okla.*

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[3] 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).

v. Mfg. Techs., Inc., 523 U.S. 751, 754-56 (1998).[4] This is the "baseline" from which judicial analysis proceeds. *Bay Mills*, 572 U.S. at 790.

Congress has repeatedly recognized that economic development is a crucial component to tribal self-governance. Through federal statutes such as the Indian Reorganization Act of 1934, 25 U.S.C. § 5101 et seq., the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 5301 et seq., and the Indian Financing Act of 1974, 25 U.S.C. § 1451 et seq., Congress has expressed its intent to "rehabilitate the Indian's economic life" and provide opportunities for tribes to "develop the initiative destroyed by a century of oppression and paternalism." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 n.10 (1980) (citations omitted). This Court has also recognized that immunity from suit is "a necessary corollary to Indian sovereignty and self-governance." *Bay Mills*, 572 U.S. at 788 (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986)). That 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*

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[4] 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.'" 1 F.4th 1153, 1159 (9th Cir. 2021) (quoting *Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 774 (9th Cir. 2018)). Notably, 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 1160.

Gold Casino & Resort, 629 F.3d 1173, 1181 (10th Cir. 2010); *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 178 (4th Cir. 2019).

Instead of the clear and unequivocal abrogation of sovereign immunity that this Court requires, the First Circuit found that the inclusion of the generic phrase "other . . . domestic government" in the Bankruptcy Code was sufficient. In dissent from the First Circuit decision, and as recognized by other courts in declining to find abrogation, Chief Judge Barron observed that the Bankruptcy Code does not mention Indian tribes "even though Congress has expressly named them when abrogating their sovereign immunity in every other instance in which a federal court has found [tribal] immunity to have been abrogated." App. at 23a (citations omitted).[5] Instead of respecting Congress's intent, the First Circuit's decision finds clarity where none exists and paves the way for courts to more frequently find diminishment of tribal sovereignty. The potential consequences are far-reaching for tribes and impede their ability engage in commercial activities that are critical to the exercise of their rights to self-government.

[5] "App." refers to pages in the Appendix of the Petition.

II. The Ability of Tribes to Exercise Their Sovereign Right of Self-Determination and Support Their Communities Depends Largely on the Ability of Tribal Businesses to Raise Revenue.

Like many of NAFSA's members, Lac du Flambeau has made substantial strides towards self-sufficiency through its Tribal Businesses, which provide critical revenue for the Tribe's essential operations and depend in large part on the Tribe's ability to exercise its sovereign authority. The First Circuit decision threatens to undermine those gains and obstruct the ability of tribes throughout the nation to engage in vital economic development.

Tribal governments' sovereign right to self-determination depends largely on tribes' ability to engage in economic-development activities. The ability to exercise sovereign immunity under the Bankruptcy Code bolsters the few opportunities tribes have to raise revenues to support their governments and provide vital services to their citizens. For instance, 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 encumbered tribes' taxing powers. Because states have authority to tax economic activity occurring on tribal lands that involves non-Indians, *Cotton Petroleum v. New Mexico*, 490 U.S. 163, tribes are 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, but without that revenue, many tribes will struggle to

succeed. 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-292020.pdf. These challenges are compounded by comprehensive legal restrictions that 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 fund tribal budgets and services despite the barriers tribes face to raising revenue in traditional ways. *See Bay Mills*, 572 U.S. at 807 ("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."). That critical revenue source depends, however, on the preservation of tribal sovereign immunity and adherence to the strict rules that govern its abrogation, as described above.

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[6] The unique status of tribal trust lands and practical (if not legal) limits on tribal taxation powers provide further counterweight to the First Circuit's conclusion that the Bankruptcy Code's general taxation benefits support tribal self-determination and suggest tribes are "governmental units." App. at 11a-12a.

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-sufficiency and self-determination. *See, e.g.*, 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"); 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 ("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.") (citation omitted); *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 use that revenue to 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), 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 makes it possible for tribes to fulfill the goal of self-determination, which the federal government encourages and promotes.

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)). This 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.*, 629 F.3d 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 bankruptcy court and Sixth Circuit[7] arrived at the correct result when they concluded that 11 U.S.C. §§ 106, 101(27) do not unequivocally waive tribal sovereign immunity. The contrary decision of the First Circuit undercuts long-standing fundamental principles and deepen an unworkable conflict that makes application of the Bankruptcy Code dependent on a tribal business's customer's geographic location.

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[7] As detailed in the Petition at 14-15, the Sixth Circuit held that the Bankruptcy Code does not abrogate tribal sovereign immunity. *See In re Greektown Holdings, LLC*, 917 F.3d 451 (6th Cir. 2019).

III. The First Circuit's Decision Constrains Tribal Economic Development for NAFSA Member Tribes and Deepens an Irreconcilable Circuit Split.

The First Circuit's interpretation of the Bankruptcy Code undermines the sovereign authority of federally recognized Indian tribes to engage in commercial activity and exacerbates an already unworkable division amongst the circuits. As previously mentioned, many NAFSA member tribes, including Lac du Flambeau, are located in 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 places yet another burden on their economic development efforts—and one that Congress has never expressed a clear intent to impose.

Exacerbating the existing circuit split on this issue, the First Circuit decision further burdens tribes by introducing additional uncertainty and inconsistency into tribal economic endeavors. NAFSA's members serve customers located in various states (and circuits) throughout the country. The circuit split requires NAFSA members to apply different versions of the Bankruptcy Code based on each customer's geographical location. Such an approach is confusing, burdensome, and invites error. It also frustrates Congress's intention to promote tribal self-government.

Today's American Indian tribes have survived removal, forced assimilation, and unlawful termination. Modern Congresses have repeatedly disavowed the unjust policies of the past in favor of self-determination. In this context, it is not at all surprising that courts require Congress to speak plainly and unequivocally when diminishing tribal sovereignty. For reasons stated in the Petition, Congress made no such clear expression here. Additionally, as Chief Judge Barron noted in his dissent, even if this Court believes that the term "other . . . domestic government" could be read to include Indian tribes, that is insufficient to find an abrogation of tribal sovereign immunity. Instead, this Court "must be convinced that there is no plausible way of reading those words to exclude Indian tribes." App. at 32a. Anything less would constitute an abrogation of sovereign immunity by mere implication, which is counter to current federal law and policy and undermines congressional authority. Such a conclusion would also discourage tribes from engaging in commercial activity essential to tribal governments' self-sufficiency.

Congress speaks broadly and generally on many topics. But out of respect for the sovereignty of tribes, courts have repeatedly declined to find an abrogation of tribal sovereign immunity based on general and broad terms. Because the First and Ninth Circuits erred when they did exactly that and because their error has resulted in an irreconcilable circuit split that will have far-reaching and detrimental consequences for tribes, this Court should grant the Petition.

CONCLUSION

Alexander Hamilton recognized that a "nation cannot long exist without revenues." Yet tribes lack the traditional tax bases of other governments, and they are prevented from raising funds through traditional governmental revenue sources. Tribal governments depend on their inherent sovereign authority to raise revenue through tribally owned businesses and provide many of the public goods and services their members need. Preserving the sovereign status of tribal businesses is therefore critical to effectively support tribal communities. The bankruptcy court and Sixth Circuit are correct that Congress did not unequivocally abrogate the sovereign immunity of American Indian tribes in the Bankruptcy Code and, given Congress's special treatment of Indian tribes and the importance of economic development to their success, their conclusion makes sense. This Court should grant the Petition because the First Circuit's decision deepens an irreconcilable circuit split and threatens the ability of tribal businesses to sustain their communities.

Respectfully submitted,

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