
In The
Supreme Court of the United States

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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,

Petitioners,

v.

BRIAN W. COUGHLIN,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The First Circuit**

◆

**BRIEF OF *AMICI CURIAE*
THE NAVAJO NATION, GILA RIVER INDIAN
COMMUNITY, AGUA CALIENTE BAND OF
CAHUILLA INDIANS, CEDARVILLE RANCHERIA
NORTHERN PAIUTE TRIBE, LYTTON RANCHERIA
OF CALIFORNIA, MASHANTUCKET PEQUOT
NATION, THE NATIONAL CONGRESS OF
AMERICAN INDIANS, AND THE
UNITED SOUTH AND EASTERN TRIBES
SOVEREIGNTY PROTECTION FUND,
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

The Navajo Nation is a sovereign tribal nation with ratified treaties with the United States from 1849 and 1868. The Nation has more than 400,000 citizens. The Nation's sovereign territory extends across Arizona, New Mexico, Utah, and Colorado, encompassing over 27,000 square miles, and taking 5 hours to traverse its contiguous base East to West. The Nation's sovereign territory is home to approximately 175,000 people. As more fully discussed below, the Nation interacts with a number of potential debtors in bankruptcy, as a government, landowner, and business owner. The Nation has also been subject to involuntary suits in bankruptcy courts in the Ninth Circuit, based on that court's opinion in *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004).

The Gila River Indian Community is a sovereign Indian nation and federally-recognized Indian tribe in Arizona comprised of two peoples—the Akimel O'otham and Pee-Posh—who have lived and farmed along the Gila River from time immemorial. The Community presently has more than 23,000 enrolled members. Approximately 14,000 Community members live on the Gila River Indian Reservation, which was established in 1859, and now comprises over 370,000 acres in southern Arizona and borders the Phoenix

¹ Pursuant to Supreme Court Rule 37.6, *amici curiae* and their counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

metropolitan area. The Community interacts with potential bankruptcy debtors through its government and several wholly owned tribal entities in areas ranging from health care (Gila River Healthcare) to utilities (Gila River Indian Community Utility Authority) to gaming (Gila River Gaming Enterprises). These interactions include agreements which are carefully structured to account for the Community's sovereign immunity and generally utilize alternative dispute resolution processes.

The Agua Caliente Band of Cahuilla Indians is located on the Agua Caliente Indian Reservation in the Coachella Valley of California. The Agua Caliente Indian Reservation was created by two Executive Orders (1876 and 1877) and is comprised of roughly 30,000 acres encompassing large portions of the cities of Palm Springs, the City of Cathedral City, the City of Rancho Mirage, and unincorporated areas of Riverside County. The tribal government provides essential services throughout the Reservation. The tribal government employs nearly 3,000 people at various tribal government enterprises on the Agua Caliente Indian Reservation including, the Agua Caliente Casinos (Palm Springs, Rancho Mirage, and Cathedral City), Indian Canyons Golf Resort, the Agua Caliente Cultural Museum, the Spa at Séc-he, Agua Caliente Fuel, and the Indian Canyons Heritage Park. Additionally, the Agua Caliente Band of Cahuilla Indians engages in extensive residential and commercial leasing throughout the Agua Caliente Indian Reservation. The Agua Caliente Band of Cahuilla Indians is one of the largest

employers in the Coachella Valley. Protecting the Agua Caliente Band of Cahuilla Indians' economic activity is crucial to the economic health of the tribal government, its members, and the surrounding non-tribal communities.

The Cedarville Rancheria Northern Paiute Tribe is a federally recognized tribe located on a portion of its ancestral grounds in the rural, northeastern corner of California in what is known as Surprise Valley. The Cedarville Tribe has limited opportunities for economic development, but it owns and operates a fueling station on tribal trust lands that functions as a hub and source of employment for the people of the Surprise Valley Community, tribal member and non-member alike. The Cedarville Tribe also operates numerous governmental programs that benefit its members, and it often uses the services of contractors and consultants to help operate these programs. In operating its fueling station and government, the Cedarville Tribe, like the Navajo Nation, interacts with a number of potential debtors in bankruptcy, and, as a result, it has been subject to involuntary suit in bankruptcy court in the Ninth Circuit, as detailed below.

The Lytton Rancheria is a band of Pomo Indians located north of San Francisco in Sonoma County, California. In 1959, Congress passed legislation to terminate the government-to-government relationship between the Tribe and the United States, which resulted in the Tribe losing its remaining homelands and its members becoming impoverished. In 1991, the Tribe's wrongful termination was reversed through

federal court litigation. Since that time, the Tribe has worked to regain its economic independence and restore a portion of its homelands. Today, the Tribe operates a successful Class II bingo facility on its land in San Pablo, California and other business ventures in and around its newly-acquired homeland in Sonoma County. These business activities are critical to the Tribe's ability to achieve self-determination and provide for its members.

The Mashantucket Pequot Tribal Nation is a sovereign tribal nation recognized by the United States. The Pequot Tribe has a small land base geographically located in the State of Connecticut comprised of land held in trust by the United States. The Tribe protects the health, safety, and welfare of its citizens through a comprehensive range of government services that are necessarily funded by numerous business endeavors, including in the healthcare, gaming, entertainment and hospitality sectors. The tribal government operations provide necessary programs and services to tribal citizens and non-citizens who live and work on, and visit tribal lands. Included in the government structure are administrative agencies and a tribal court system that hear a wide variety of legal claims involving the Tribe, its citizens, and non-citizen individuals and businesses. The Pequot Tribe necessarily interacts with individuals and businesses, some that become debtors in the bankruptcy courts located in the First and Second Circuits, and has been threatened with involuntary suits in these venues.

The National Congress of American Indians, founded in 1944, is the oldest, largest and most representative American Indian and Alaska Native organization serving the broad interests of tribal governments and communities, and is devoted to protecting and enhancing tribal sovereignty.

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized tribal nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico. USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of tribal nations and in assisting its membership in dealing effectively with public policy issues.



SUMMARY OF THE ARGUMENT

The lower court's decision abrogates the sovereign immunity of tribal nations, including their businesses and related entities, in more than 50 separate sections of the United States Bankruptcy Code. The lower court does this in contravention of both the principles of statutory construction and the precedent of this Court.

Tribal nations are engaged in extensive governmental and regulatory activities. In this role, they interact regularly with individuals and businesses that may become debtors under the United States Bankruptcy Code. Preserving the sovereign immunity of

tribal nations in these instances is essential to preserving their rights to self-determination and self-governance.

Tribal nations' ability to raise governmental revenue via taxation is severely limited. Yet, the needs of the tribal citizenry are often disproportionately high due to the historic lack of investment in tribal infrastructure and economies.

Given these circumstances, many tribal nations have pursued economic ventures spearheaded by tribal businesses and enterprises to fund government operations, stimulate local economic development and provide much-needed employment opportunities for tribal members and non-members. Tribal enterprises are a vital tool of tribal nations in ensuring the safety, security, health, and welfare of tribal members. Those businesses regularly transact with individuals and entities who can later become debtors under the United States Bankruptcy Code. Absent sovereign immunity, tribal nations and their businesses can be dragged into costly bankruptcy litigation.

Tribal nations have experienced first-hand the detrimental impact of the abrogation of sovereign immunity in bankruptcy cases. Following the Ninth Circuit's decision in *Krystal Energy* that subjected tribal nations to section 106 of the Bankruptcy Code, tribal nations have been forced to spend significant time and resources litigating in United States Bankruptcy Court regarding issues that should have been resolved under tribal law. Absent the Ninth Circuit's decision,

those issues never would have been raised in the bankruptcy court.

Given the harm caused by the abrogation of tribal sovereign immunity in bankruptcy and likely future additional damage this will cause, this Court should not lower the “unequivocal” standard and read terms like “Indian” or “tribe” or “tribal” into the definition of “governmental units” in 11 U.S.C. § 101(27), when no such terms appear anywhere in the United States Bankruptcy Code. Congress knows how to abrogate tribal sovereign immunity and it is Congress’s duty—not the courts—to do so clearly in legislation after reasoned consideration and debate when making such a damaging and far-reaching determination in contravention of sovereign immunity.

The decision of the lower court must be overruled.

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ARGUMENT

I. TRIBAL NATIONS REGULARLY ENGAGE IN A MYRIAD OF REGULATORY AND BUSINESS ACTIVITIES THAT COULD SUBJECT THEM TO INVOLUNTARY SUITS UNDER THE BANKRUPTCY CODE.

A. Tribal Governments Exercise Regulatory Authority and Engage in Economic Development That Triggers Regular Interaction with Potential Debtors.

While population, land base, governmental structure, and level of commercial activity vary among

tribal nations, each possesses sovereign authority over its members and territories. This sovereign authority is undisputed. *Okla. Tax Com'n v. Citizen Bank Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). Each tribal nation exercises its authority in distinct ways and to varying degrees, including through the use of traditional governance, development of statutory and regulatory frameworks, and pursuit of commercial and economic activities.²

As sovereign nations, tribal nations determine their own governmental organization and internal legal systems. Many tribal governments utilize a three-branch government structure. Some tribal nations operate under more traditional forms of government. Regardless of the chosen structure, tribal nations are empowered to regulate activities within their tribal territory to govern all areas of sovereign interest. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (“[Indian tribes] have power to make their own substantive law in internal matters and to enforce that law in their own forums”) (internal citations omitted); *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (“Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . ”). Tribal nations regulate activities through taxation, hunting and fishing permitting,

² The principles of tribal sovereign immunity, tribal authority to make laws and be governed by them, and the power of Congress to regulate affairs involving tribal nations have been covered in detail by Petitioners’ Brief and the Indian Law Professors’ Amicus Brief. *Amici* agree and incorporate herein their analysis of tribal sovereign immunity.

environmental and natural resources regulations, and other rules and laws, which can involve fees and fines owed by individuals or business entities to the tribe.

Tribal nations also own land and natural resources that they lease or sell to others. Tribal nations lease land to tribal and non-tribal individuals and entities for all kinds of commercial and industrial purposes, including retail businesses, telecommunications, energy projects, and office and warehouse developments, and tribal nations collect rent from those lessees. *See* 25 C.F.R. §§ 162.001 *et seq.* (2013). Tribal nations also lease mineral and other natural resource rights and collect royalties for such use. *See* 25 C.F.R. §§ 211.1 *et seq.* (1996).

Importantly, tribal nations also engage in their own business operations. Many tribal nations have developed tribal businesses to create jobs, generate revenue, and combat challenges specific to tribal economic development. A common obstacle among many tribal nations is a remote or small land base and inadequate infrastructure, which hinders a tribal government's ability to provide economic opportunity to its citizens.³

³ For example, over a third of Navajo homes lack electricity, and another third lack piped water. The overall infrastructure needs of the Nation are estimated to exceed \$20 billion just to reach parity with off-reservation communities. Further, on the Navajo Nation, an area about the combined size of Massachusetts, New Hampshire, and Vermont, only thirteen full-service grocery stores serve Navajo residents. Matilda Kreider, *13 Grocery Stores: The Navajo Nation is a Food Desert*, PLANET FORWARD AT GW (Dec. 10, 2019), <https://www.planetforward.org/idea/13-grocery-stores-the-navajo-nation-is-a-food-desert>; *see also* Emily

In more isolated areas, tribal nations face high unemployment and low potential for economic growth. See U.S. Gov. Accountability Office, GAO-22-105215, *Tribal Economic Development, Action is Needed to Better Understand the Extent of Federal Support*, at 1 (Aug. 30, 2022); see also 25 U.S.C. § 4301(a)(7) (recognizing that Indian tribes’ inability to engage communities surrounding their lands hinders the capacity to build strong governments and economies).⁴ As Congress has found, “the capacity of Indian Tribes to build strong Tribal governments and vigorous economies is hindered by the inability of Indian Tribes to engage communities that surround Indian lands and outside investors in economic activities on Indian lands.” 25 U.S.C. § 4301(a)(7).

Even tribal nations with a larger land base contend with barriers to economic development due to the unique status of tribal land. Most real property located within sovereign tribal territories fails to provide property tax revenue to tribal nations, either by virtue of its federal trust status or because it is owned by non-Indians. In the absence of tax-sharing agreements or

M. Piltch *et al.*, *The Complexities of Selling Fruits and Vegetables in Remote Navajo Nation Retail Outlets: Perspectives from Owners and Managers of Small Stores*, 23(9) PUB. HEALTH NUTRITION 1638, 1638 (Jun. 2020) (“There are thirteen grocery stores across the 27,000 square mile Navajo Nation.”).

⁴ For example, the unemployment rate on the Navajo Nation fluctuates, with estimates in the high teens up to 49%, but always is significantly higher than the national average. See Navajo Nation Human Rights Commission, *Assessing Race Relations Between Navajos and Non-Navajos, 2008-2009: A Review of Border Town Race Relations*, at xv (Jul. 2, 2010).

other accommodations between tribal and state governments, economic activity conducted by non-Indians on tribal land is subject to state taxation as well as tribal taxation. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989). This potential double taxation discourages meaningful investment by non-Indians in on-reservation business activities. Moreover, land, as a primary resource for many tribal nations, is not a viable source of economic leverage because of its restricted trust status and prohibitions against pledges and encumbrances. See U.S. Gov. Accountability Office, GAO-22-105215, *Tribal Economic Development, Action is Needed to Better Understand the Extent of Federal Support*, at 5-6 (Aug. 30, 2022); see also NELL JESSUP NEWTON, JOSEPH W. SINGER, *et al.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.06[1] (2012) (discussing the restraint on alienation of tribal land when held in trust by the federal government).

In order to fund their governments, and to provide much-needed jobs, many tribal nations have formed business entities. For example, the Navajo Nation's fourteen business enterprises operate in a number of areas, including agriculture, arts and crafts, retail development, and hospitality.⁵ These economic activities require these tribal business entities to enter into various agreements with vendors, lessors, and contractors.

⁵ These include, among others, Navajo Arts and Crafts Enterprise, <https://www.gonavajo.com/>; Navajo Hospitality Enterprise, <https://www.explorenavajo.com/>; and Navajo Agricultural Products Industry, <https://napi.navajopride.com/>; see also Navajo Nation Gaming Enterprise, <https://www.navajogaming.com/> and Navajo Nation Shopping Centers, Inc., <https://www.nnscinc.com/en/>.

These counterparties, many of whom are non-Indians entering onto tribal land specifically to transact with tribal nations or their businesses, can become debtors under the United States Bankruptcy Code (11 U.S.C. §§ 101 *et seq.*) (the “Bankruptcy Code”). Absent the preservation of their sovereign immunity, tribal nations may be swept into unanticipated bankruptcy proceedings and stripped of their ability to protect their sovereign interests when interacting with counterparties.

B. The Bankruptcy Code Imposes a Complicated Scheme Which May Involuntarily Entangle Tribal Nations.

The Bankruptcy Code does not mention Indian tribes or tribal nations at all. However, because of their regulatory, land, and business interests, tribal nations inevitably interact with individuals and entities that become debtors under the Bankruptcy Code. There are various mechanisms in the Bankruptcy Code that debtors can utilize to subject tribal nations to suit.

For example, when a telecommunications, natural gas or oil company, or similar business files bankruptcy, that debtor may have leases, property access agreements, and easements on tribal lands. When a mining company files bankruptcy, that debtor may have operating agreements, reclamation agreements, regulatory obligations, audit requirements, and other legal relationships with a tribe. When an individual or business files bankruptcy, that debtor may have purchase contracts or other agreements to provide goods and services to a tribe. Further, they may have

outstanding debts owed to a tribe for regulatory fees or fines for violations of tribal law.

With sovereign immunity intact, tribal officials are empowered to work within the confines of tribal law to craft solutions that are respectful of the debtors' bankruptcy proceedings. However, with sovereign immunity from suit abrogated, tribal nations are involuntarily subjected to the Bankruptcy Code and can become the target of aggressive forum shopping.

The first subsection of section 106 of the Bankruptcy Code provides over 50 Bankruptcy Code sections to which the abrogation of sovereign immunity of "governmental units" applies. 11 U.S.C. § 106(a)(1). This abrogation, if extended by the courts to tribal nations, will have widespread negative effects on the ability of tribal nations to self-govern and remain self-sufficient.

For example, section 362 of the Bankruptcy Code implements an "automatic stay" which "halts efforts to collect prepetition debts from the bankrupt debtor outside the bankruptcy forum." *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 589 (2020) (citing 11 U.S.C. § 362(a)). Section 362 allows an individual to recover "actual damages, including costs and attorneys' fees." 11 U.S.C. § 362(k). This section of the Bankruptcy Code could subject a tribal government to a money judgment if a tribe did something as routine as terminating a defaulted lease on tribal land, removing an entity (even one formed under tribal law) from the list of priority contractors entitled to contracting preference, or seeking to collect payments for oil, gas, or minerals removed from tribal lands. It could also prevent

a tribe from enforcing bonding and surety obligations designed under tribal law or policy to protect the tribe's sovereign territory and its members.

Section 365 of the Bankruptcy Code provides another opportunity for misuse. It allows a debtor, "subject to the court's approval, [to] assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365. This restructuring tool allows a debtor to assume beneficial contracts and leases and reject those it considers burdensome. Tribal governments and businesses regularly enter into contracts and leases with both tribal and non-tribal third parties for everything from trash collection and vehicle leasing to major water supply contracts and mineral leases. Without the protections of sovereign immunity, a debtor can weaponize section 365 of the Bankruptcy Code to put tribal parties' rights at risk in bankruptcy court. Rights to access and use tribal lands and resources can be taken out from under the purview of tribal law and instead examined by a distant bankruptcy court. In fact, as discussed below, debtors may intentionally attempt to skirt tribal regulations and requirements by rushing into bankruptcy court and attempting an end-run around tribal authority by invoking section 365.

Another seemingly harmless section of the Bankruptcy Code, section 505(a)(1), provides that, subject to limited exceptions, a bankruptcy court "may determine the amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid, and whether or not contested before and adjudicated by a judicial or

administrative tribunal of competent jurisdiction.” 11 U.S.C. § 505(a)(1). With sovereign immunity judicially abrogated, debtors like Krystal Energy *see infra*, Section II, can challenge taxes imposed by tribal nations in bankruptcy court rather than in appropriate tribal forums. Although “governmental units” may be allowed to collect taxes that the bankruptcy court deems due, 11 U.S.C. § 505(c), this restriction on tribal nations’ ability to determine and assess tax revenue in the first place is a direct threat to tribal nations’ rights to economic self-sufficiency, self-determination, and self-governance.

Chapter 5 of the Bankruptcy Code offers one of the most likely avenues for harm to tribal nations and their interests. It provides bankruptcy trustees and debtors-in-possession with unique powers to avoid transfers of property and claw assets from third parties back into the bankruptcy estate. *See, e.g.*, 11 U.S.C. §§ 544, 547, 548, 550. These sections of the Bankruptcy Code allow a debtor to recover payments made to third parties prior to the bankruptcy filing. Suits to recover these payments can be initiated years after the payments are actually made. *Id.* With sovereign immunity intact, these “clawback” claims against tribal nations and entities either are not pursued or easily defeated.

For example, in *Subranni v. Navajo Times Publ’g Co.*, 568 B.R. 616, 624 (Bankr. D.N.J. 2016), the bankruptcy court held that a newspaper wholly owned by the Navajo Nation could assert sovereign immunity against a bankruptcy trustee seeking to recover preferential transfers because Section 106(a) did not

include the Navajo Nation within the list of governmental units whose sovereign immunity was abrogated. *Id.*; see also *Casino Caribbean, LLC v. Money Centers of Am., Inc.*, 565 B.R. 87, 103 (Bankr. D. Del. 2017) (“This Court concludes that Congress has not unequivocally abrogated the sovereign immunity of Indian tribes under sections 106(a) and 101(27) of the Bankruptcy Code.”).

Finally, five Bankruptcy Code sections involving Chapter 11 would also be enforceable against tribal nations. 11 U.S.C. § 106(a)(1) (abrogating sovereign immunity as to 11 U.S.C. §§ 1107, 1141, 1142, 1143 and 1146). These sections include the implementation of Chapter 11 plans and the effect of confirmation of such plans. See 11 U.S.C. §§ 1141-1142. Chapter 11 plans can establish property rights, discharge claims, assign claims and litigation rights, and grant broad releases. Under these plans, a tribe could be directed to comply with detrimental confirmation orders that impact its assets, discharge its claims, and subject it to litigation and damages. Such confirmation orders are likely also to involve leases and other restricted grants of interests in tribal lands, which are governed by specific federal statutes and tribal regulations.

In the absence of immunity, tribal nations and their related entities can become targets under these provisions and be forced to litigate in bankruptcy court and potentially repay significant funds to a bankruptcy estate, years after relying on those funds to provide basic governmental services or jobs to tribal members.

It is difficult to know the full extent of damage that the abrogation of tribal sovereign immunity in bankruptcy proceedings will wreak. However, it is almost certain that this abrogation will contravene federal and tribal laws and policies designed to protect tribal self-determination and self-governance. Indeed, allowing tribal nations to be sued in bankruptcy court would create a loophole for parties who intend to avoid those very laws and policies.

II. DEBTORS IN THE NINTH CIRCUIT HAVE USED THE BANKRUPTCY CODE TO SUE TRIBAL NATIONS AND EVADE TRIBAL LAW.

The concerns discussed in Section I are not theoretical. Tribal nations like the Navajo Nation and the Cedarville Rancheria Northern Paiute Tribe have already experienced the negative effects of abrogation of tribal immunity in bankruptcy court, due to the Ninth Circuit's opinion in *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004).

In *Krystal Energy*, the debtor filed an adversary proceeding in the District of Arizona Bankruptcy Court to compel the Navajo Nation to turn over assets, to seek damages from the Nation for the alleged seizure of those assets, and to determine the amount of taxes owed to the Nation. *In re Krystal Energy Co., Inc.*, 30 B.R. 48, 50 (D. Ariz. 2002). As Respondent argues in this case, the Ninth Circuit held that the Bankruptcy Code's use of the term "domestic government"

in defining “governmental unit” was proof of “unequivocal” congressional intent to waive tribal sovereign immunity. 357 F.3d at 1059-61. As such, the Ninth Circuit deemed the Nation was not immune, subjecting it to Krystal Energy’s adversary proceeding. *Id.*

Since *Krystal Energy*, the Navajo Nation and other tribal nations in the Ninth Circuit have been sued under the Bankruptcy Code, and have had to defend those suits in costly litigation and in distant court-houses without the ability to assert immunity.

In 2016, Recon Oil, Inc., a business owned by an individual Navajo tribal member and incorporated under the Navajo Nation Corporation Code, filed for Chapter 11 bankruptcy. *In re Recon Oil, Inc.*, Case No. 2:16-09516-EPB, ECF No. 1 (Bankr. D. Ariz. Aug. 17, 2016). Prior to the filing, Recon trespassed twice on the Nation’s land and appropriated the Nation’s sand and gravel without the Nation’s permission, and without payment to the Nation, in clear violation of Navajo law.⁶ See 18 N.N.C. § 1002. As authorized by the Nation’s Trespass Act, the Navajo Nation Division of Natural Resources issued two notices of trespass, and civil

⁶ In one of the two trespass incidents, Recon was selling sand and gravel owned by the Nation to a contractor for the State of New Mexico to provide fill material for a highway expansion project on the Nation’s land. See *Navajo Nation Div. of Natural Resources v. Recon Oil, Inc.*, Case No. OHA-DNR-01-16, Order at 5 (Navajo Office of Hearings and Appeals June 13, 2016). However, the Nation had agreed to provide such material to the State for free as part of the approval of the State’s right-of-way over the Nation’s lands. Resources and Development Committee of the Navajo Nation Council Resolution No. RCJY-70-09, Exhibit A, § 8.

assessments totaling \$75,000. *In re Recon Oil, supra*, Minute Entry/Order, ECF No. 140 at 2; 16 N.N.C. §§ 2253(A), 2283(A). As was its right under Navajo law, Recon appealed the notices and civil assessments to the Nation's Office of Hearings and Appeals (OHA). *See Navajo Nation Div. of Natural Resources v. Recon Oil, Inc.*, Nos. OHA-DNR-01-15, 01-16.

While those appeals were pending, Recon sought several procurement contracts from the Nation's Department of Transportation. *In re Recon Oil, Inc.*, Motion for Abstention under 11 U.S.C. § 305, ECF No. 29 at 4 (Oct. 14, 2016). Under the Nation's Business and Procurement Act, Recon was ineligible for those contracts if it or its officers owed money to the Nation. *See* 12 N.N.C. § 1505. Based on outstanding debts, the Nation held the contracts to review for compliance with the Act. Motion for Abstention, *supra*, at 4.

Instead of resolving its trespass appeals or procurement contract issues under tribal law, Recon filed a Chapter 11 petition in the United States Bankruptcy Court in Phoenix, Arizona, more than 250 miles away. Recon made no attempt to disguise its blatant attempt to evade tribal law. Indeed, Recon's counsel told the bankruptcy court it filed for bankruptcy specifically to compel the Nation to issue the procurement contracts. *Id.* at 4–5. Recon then invoked the contract assumption provision in section 365(a) of the Bankruptcy Code to attempt to force the Nation to do so. *In re Recon Oil, Inc.*, *supra*, Motion for Order Authorizing Assumption of Executory Contracts, ECF No. 28 (Oct. 10, 2016). The Nation asked the bankruptcy court to abstain from

taking up the case, and instead allow the Nation's courts to resolve the contract issues under Navajo law, as all parties were Navajo and all the relevant facts occurred within the Nation. Motion for Abstention, *supra*, at 8–9. The court declined.⁷

While the bankruptcy proceeding was pending, Recon sought certification as a Navajo-owned company with procurement priority under the Navajo Business Opportunity Act. Minute Entry/Order, *supra*, at 5–6. Again, consistent with Navajo law, the Nation's Business Regulatory Department informed Recon it could not certify it as a priority business, due to an outstanding debt to the Nation. *Id.*

Instead of resolving that issue under Navajo law, Recon went back to the bankruptcy court and asserted the Nation violated the Bankruptcy Code's automatic stay and sought sanctions. *Id.* at 5. The Nation argued the Business Regulatory Department's action did not violate the stay, as it was enforcing its police and regulatory powers, as authorized by Section 362(b)(4) of the Bankruptcy Code. *Id.* The bankruptcy court disagreed, found that the Nation violated the stay, and issued sanctions against the Nation, all while Recon

⁷ Though the court did ultimately find the contracts were unenforceable due to Recon's outstanding trespass debts, Minute Order, *supra*, at 8, the Nation accrued significant legal costs to defend the suit.

continued to fail to pay the Nation's trespass assessments.⁸ *Id.* at 7–8.

Importantly, Recon's actions against the Nation in the bankruptcy court were only possible because of the abrogation of immunity recognized by the Ninth Circuit in *Krystal Energy*. Because it lacked immunity, the Nation expended significant legal costs to defend its actions in a remote court against a corporation owned by a tribal member, and incorporated under tribal law, that blatantly violated Navajo law by repeatedly trespassing on the Nation's lands and misappropriating its resources.

The recent experience of the Cedarville Rancheria Northern Paiute Tribe (the "Cedarville Tribe") follows a similar pattern. In that case, a non-Indian contractor promised to build a home for a tribal member on tribal land. *NUMA Corp. v. Diven*, Case No. 22-15298, Appellant's Petition for Rehearing En Banc, ECF No. 49, at 5 (Jan. 5, 2023).⁹ The Cedarville Tribe advanced federal HUD funds to the contractor for the home's construction. *Id.* The contractor failed to complete the

⁸ The bankruptcy court eventually converted Recon's bankruptcy from Chapter 11 to Chapter 7. *In re Recon Oil, Inc.*, *supra*, Minute Entry/Order, ECF No. 173 (Aug. 8, 2018). The trustee for Recon finally resolved the trespasses by dismissing Recon's OHA appeals, but only after significant litigation against the Nation for assumption of the contracts and violation of the automatic stay. *See In re Recon Oil, Inc.*, *supra*, Notice of Intent to Dismiss Appeals, ECF No. 188 (Aug. 23, 2018).

⁹ The facts concerning the Cedarville Tribe's bankruptcy case are taken from its Petition for Rehearing En Banc filed in the Ninth Circuit. *NUMA Corp.*, *supra*, ECF No. 49.

home, and the Cedarville Tribe filed suit for breach of contract and construction negligence in tribal court. *Id.*

Without resolving the breach of contract claim in the tribal proceeding, the contractor filed for Chapter 13 bankruptcy. *Id.* When the Cedarville Tribe sought a status conference in the tribal court to discuss how to proceed in light of the bankruptcy, the contractor asserted a violation of the automatic stay. *Id.* at 6. Though the tribal court had stayed the case on its own, the bankruptcy court ruled the Cedarville Tribe violated the automatic stay simply by requesting the status conference, and issued sanctions. *Id.* Though the Rancheria argued it was immune from the suit, the bankruptcy court and the Ninth Circuit applied *Krystal Energy*, and held the contractor could compel the Cedarville Tribe to pay fines and fees under the Bankruptcy Code. *NUMA Corp. v. Diven*, Case No. 22-15298, 2022 WL 17102631, at *1 (9th Cir. Nov. 22, 2022).

These cases show the detrimental effect of the abrogation of tribal immunity imposed by *Krystal Energy*. Despite adequate remedies in tribal courts, contractors, lessees, taxpayers, and even trespassers can file bankruptcy petitions and subject tribal nations to involuntary suits. Such debtors can contest the tribe's possession of property, compel determination of taxes or other amounts owed, and seek to assume contracts properly denied under tribal law. Debtors further can leverage ministerial decisions by tribal programs in the ordinary course of their operations to claim violations of the automatic stay. Tribal nations must then hire specialty bankruptcy counsel to defend such

actions, regardless of their merit. Even if the tribe ultimately prevails, it may have expended significant amounts of money in legal fees it cannot recoup. If it does not prevail, it can be sanctioned and compelled to pay damages to those who circumvented tribal processes for resolving the debt, whether the debt has actually been paid back to the tribe or not.

III. THE POTENTIAL FOR ABUSE UNDERSCORES THE IMPORTANCE OF ADHERING TO THE REQUIREMENT THAT CONGRESS MAKE ITS INTENT UNEQUIVOCAL BEFORE SUBJECTING TRIBAL NATIONS TO INVOLUNTARY SUITS UNDER THE BANKRUPTCY CODE.

Whether Congress abrogated tribal sovereign immunity in the Bankruptcy Code depends on whether Congress's intent is "unequivocal." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014) (quoting *C&L Enters., Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001)). As shown in the Petitioners' Brief and the Indian Law Professors' Amicus Brief, there is no clear textual or other indication of intent to support that conclusion. Neither a plain reading of the statutory text as a whole nor a review of the broader history demonstrates that Congress intended to abrogate tribal sovereign immunity when it defined "governmental units" to include "other foreign or domestic government[s]" in 11 U.S.C. § 101(27). Based on the text alone, tribal nations are

immune, regardless of the types of claims brought against them under the Bankruptcy Code.

A conclusion that tribal sovereign immunity is abrogated by the Bankruptcy Code, in the absence of the requisite unequivocal expression of such Congressional intent, will have substantial negative effects on the ability of tribal nations to exercise self-governance and self-determination through unanticipated and unavoidable bankruptcy actions. As recounted above, abrogating tribal nations' immunity allows tribal members and non-members alike to evade tribal courts and laws instead of resolving matters in the appropriate tribal forum. Tribal nations whose businesses operate in multiple jurisdictions can be subject to suits in numerous bankruptcy courts. The costs in defending such suits, even if tribal nations ultimately prevail, can drain governmental revenues and negatively affect tribal members' economic welfare.

Given the potential consequences of an abrogation of tribal immunity, an undiluted unequivocal-expression standard is essential to protect tribal nations and their business enterprises from involuntary suits in bankruptcy court. Absent such a standard, tribal nations could be haled into bankruptcy court if they try to collect valid debts or bring damages claims against companies stealing their resources.

Further, a lowered standard can affect tribal immunity in other statutes where Congress has not unequivocally expressed its intent to abrogate tribal sovereign immunity. *See, e.g.*, 33 U.S.C. § 1365(a)

(Clean Water Act provision authorizing citizen suits against “any *person* (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution.”) (emphasis added).¹⁰

Given the unintended consequences of an overbroad interpretation of the definition of “governmental unit” in the Bankruptcy Code, the Court should not weaken the unequivocal-expression standard for abrogating tribal immunity. As discussed in Petitioners’ Brief and the Indian Law Professors’ Amicus Brief, the vague reference to “domestic government” in the Bankruptcy Code fails to meet that high standard. If Congress intended to subject tribal nations to suit under the full power of the Bankruptcy Code, it would have done so (and it is required to do so) with unmistakable clarity. It has not.



¹⁰ The Ninth Circuit recently held the Clean Water Act citizen suit provision did not abrogate tribal sovereign immunity, as it could not say “with perfect confidence” that Congress intended to do so by its definition of “person.” *Deschutes River Alliance v. Portland Gen. Elec. Co.*, 1 F.4th 1153, 1160-62 (9th Cir. 2021).

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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