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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

The Citizen Equal Rights Foundation ("CERF") was established by the Citizens Equal Rights Alliance ("CERA"). Both CERA and CERF are South Dakota non-profit corporations. CERA has both Indian and non-Indian members in 34 states. CERF was established to protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members.[1] CERF is primarily writing this *amicus curiae* brief to explain why federalism as engineered in the structure of the Constitution was fundamentally broken after the Civil War when the United States was allowed to retain what have become permanent federal territorial war powers over Native Americans. CERF with this brief will explain why it is now necessary to fundamentally address the 1871 Indian policy and stop allowing separate territorial laws to apply to Native Americans and non-Indians. The United States effectively has two sets of laws. The first set of laws are the regular domestic laws that respect the constitutional limitations and apply to all. The second set of laws are those based on continuing territorial war powers over Indians deemed "plenary"

[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amicus curiae*, CERF, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

powers of Congress that include the 1871 Indian war power policy. These laws which began as laws that only applied in a territory are not subject to constitutional or individual rights constraints are applied to a specific class of persons as defined by Congress. This second set of territorial laws include the Indian Civil Rights Act, the Indian Child Welfare Act and many federally mandated laws like federal child support in the Social Security system and virtually every federal health care law since Medicaid. Most attorneys and certainly Congress and the Executive Branch do not realize these laws are based on the territorial war powers. Amicus submits this *amicus curiae* brief in this case because having two sets of laws that sometimes protect individual rights and property interests and other times deny all individual rights and interests have made people very angry that the Constitution no longer restricts the federal government.

SUMMARY OF ARGUMENT

The standard to abrogate tribal sovereign immunity claimed by the Lac du Flambeau tribe is not only overstated but is actually based on several false assumptions by the tribal attorneys. First, the Tribes' opening brief on page 17 starts with the statement "The governing legal principles in this case are undisputed." As this amicus brief will prove, with the decision last June in *Oklahoma v. Castro-Huerta*, (Dkt. No. 21-429, Jun. 29, 2022), there is no part of Indian law today, except possibly inherent tribal sovereignty, that is undisputed. Tribal sovereignty as delegated by the

Congress to the Indian tribes from the Indian Reorganization Act of 1934 (25 U.S.C. § 461 et seq.) forward, is in question because the plenary powers of Congress over the Indians is in question. As CERF has argued for over twenty years, Congress should not have plenary powers over any group or classification of persons because the plenary powers are by definition extra-constitutional. All persons should be subject to the equal enforcement of law under the Constitution of the United States.

Second, as discussed in *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998), this Court recognized tribal sovereign immunity in *United States v. U.S. Fidelity Co.*, 309 U.S. 506, 512-513 (1940), not Congress. Counsel admits that the argument being made by the tribal attorneys is very clever but points out that this should look familiar because it is the same ploy designed by William Veeder to preserve tribal jurisdiction to the boundaries of their original reservations as this Court held in *Solem v. Bartlett*, 465 U.S. 463 (1984). Even though Congress was never the only federal entity that could create an Indian reservation or open an Indian reservation for sale after a land act of Congress, this Court was convinced to give Congress an exclusive trust responsibility for altering Indian reservation boundaries. As the Tribes' argument clearly shows, the only way for the plenary power of Congress to include this "Unequivocal Expression of Congress' Intent to Abrogate tribal sovereign immunity" is for this Court to again expand Congress' responsibility under the Indian trust relationship to include it. How this Court has the authority to assign

specific requirements to the Indian trust responsibility of Congress that is supposed to be plenary under the case law prior to *Castro-Huerta* demonstrates the contradiction this Court has created for itself.

Lastly, how long will it be before this Court admits that preserving the concept that the Indian tribes are not subject to the Constitution of the United States has allowed federal powers to be asserted that are depriving all Americans of their civil rights and liberties? The right of access to bankruptcy proceedings to seek relief under the bankruptcy laws is a constitutional right. *See e.g.*, *In re Donaldson Ford, Inc.*, 19 B.R. 425, 430 (Bankr. N.D. Ohio 1982), *infra*. But the harm this tribal entity is causing Respondent Coughlin because of the indebtedness it has imposed amounts to intentional infliction of emotional distress and a cancellation of all of Coughlin's liberty interests to be secure in his person and property without due process of law and equal protection under the law. This tribe can do anything to try to collect this outrageous debt without legal recourse, unless this Tribe is subject to the laws of the United States. The Indian tribes today are not the ignorant victims they once were. Lac du Flambeau is openly asserting that it has the right to be beyond the law and all the requirements, including political accountability, of a civilized nation. Two wrongs never make anything right.

ARGUMENT

I. CLAIMS OF SOVEREIGN TRIBAL IMMUNITY ARE BASED ON *WORCESTER'S* FALSE CHARACTERIZATION THAT THE TERRITORIAL WAR POWERS OF THE DISCOVERY DOCTRINE CREATED A "SPECIAL TRUST RELATIONSHIP" BETWEEN THE UNITED STATES AND INDIAN TRIBES

A. United States Disavows 'Special' and 'Unique' Federal-Tribal Trust Relationship

As CERF recently argued in *Arizona v. Navajo Nation* (Dkt. Nos. 21-1484, 22-51), Chief Justice John Marshall had previously invoked this Court's general equity powers and cited the treatise of international law expert Emer de Vattel as grounds for drawing several conclusions. First, he concluded that Indian tribes or bands could be considered 'sovereign' nations or states able to enter into enforceable treaties with independent sovereigns so long as they retained one facet of sovereignty – political and administrative self-governance. Second, he concluded that unequal treaties and alliances could be entered into between the evolving United States government and Indian tribes or bands not otherwise "acknowledged or treated as independent nations by the European governments." *See Worcester v. Georgia*, 31 U.S. 515, 543-551, 581 (1832); *United States v. Rogers*, 45 U.S. 567, 572 (1846). *See* CERF Amicus Curiae Brief in *Arizona v. Navajo*

Nation Supporting Neither Party, (Dkt. Nos. 21-1484, 22-51) (Dec. 27, 2022) at 5-6. Justice Marshall also simultaneously construed these indicia as evidencing the dependent and 'ward' status of said tribal nations in the eyes of the U.S. government as establishing a sort of domestic protectorate, 31 U.S. at 555-557, which served as the basis for creating a fictional "special tribal trust" relationship ostensibly for their benefit.

The political branches rejected the *Worcester* decision and continued to refine and apply Indian removal as part of the assimilation policy through the Civil War. Secretary of War Edwin Stanton's 1871 Indian policy adopted the *Worcester* view as used in *Dred Scott v. Sandford* that as "politically distinct, independent political communities" – i.e., as foreign alien nations – "[t]he very term 'nation,' so generally applied to them, means 'a people distinct from others.'" *Worcester*, 31 U.S. at 559, while at the same time ending all treaty making with the Indian tribes. This allowed the United States government to exercise unlimited domestic territorial war powers against tribal belligerents under the Territory Clause in "Indian country." *See* CERF Amicus Curiae Brief in *Oklahoma v. Castro Huerta* Supporting Petitioner (Dkt. No. 21-429) (Mar. 7, 2022), at 3-4, 14-15, 17-18 (discussing the relationship between the Court's *Worcester*, *Dred Scott v. Sanford*, 60 U.S. 393 (1857), and *Fellows v. Blacksmith*, 60 U.S. 363, 371 (1857) opinions in

concretizing Indian tribes' distinct, separate and/or foreign status).[2]

Notably, the United States brief in *Navajo Nation* expressly confirms the establishment of only a general trust relationship with Indian tribes that assumed the form of a protectorate,[3] and it expressly disavows the existence of a "special relationship" with Indian tribes. It states that, although "[t]he United States has a general trust relationship within Indian tribes[,…] the existence of that general relationship does not itself establish any judicially enforceable duties against the United States. […] This Court has made clear that a tribe may sue to enforce only those trust responsibilities that the United States has "expressly accept[ed]." *See* Federal Parties Brief, in

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[2] The pre-Civil War *Worcester* decision, in recognizing a "special trust relationship" between the United States and the Indian tribes under international law principles based on the Pope's doctrine of discovery (*infra*), contradicted the two prior decisions of the so-called trilogy from a land status perspective and caused an uproar in the original States. President Andrew Jackson refused to enforce *Worcester* by saying it was made without jurisdiction, and no presidential administration through the Presidency of Abraham Lincoln treated the decision as legitimate. The Court ignored that these very same war powers employed by King George III had made it impossible for the American colonists (who were treated as a "politically distinct" people) to ever have the same legal status as "Englishmen," which had triggered the Revolutionary War. (*infra*). *See Id.* at 12-15.

[3] "The United States has a general trust relationship with Indian tribes, dating to the founding of this country, to protect them and further best interests consistent with that relationship." *See* Federal Parties Brief, in *Arizona v. Navajo Nation* (Dkt. Nos. 21-1484, 22-51) at 20.

State of Arizona v. Navajo Nation (Dkt. Nos. 21-1484, 22-51) (Jul. 15, 2022), at 17 (citing and quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011)); *Arizona v. Navajo Nation*, (Dkt. Nos. 21-1484, 22-51), Oral Argument (Mar. 20, 2023), Tr. at 4:24-6:9; CERF Amicus Curiae Brief in *Arizona v. Navajo Nation* Supporting Neither Party, *supra* at 6.

B. In *Castro Huerta* This Court Rejected the Erroneous *Worcester* Perspective Justifying Tribal Separateness as Grounds for the Government Exercising Perpetual Domestic Territorial War Powers Over Indians

Significantly, however, in *Oklahoma v. Castro Huerta*, this Court rejected the view long ago espoused in *Worcester*, that Indian tribes and their reservations are racially "distinct nations." Instead, this Court held that "'a reservation [and the Indian tribe(s) occupying it] was [/were] in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law.'" *See* CERF Amicus Curiae Brief in *Arizona v. Navajo Nation* Supporting Neither Party, *supra* at 9 (citing *Castro Huerta*, Slip op. at 21) and (quoting *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962)). Thus, the Court now recognizes that "Indian country is part of a State, not separate from a State," and that "Indian country" includes "'all Indian allotments the Indian titles to which have not been extinguished.'" *Castro Huerta*, slip op. at 21-22. From this position CERF argues that individual tribal

and nontribal members, alike, on Indian reservations are both State and Federal citizens that should be guaranteed **full** constitutional, criminal and civil rights, including, but not limited to, equal protection under law, due process of law, and private property rights protections. *See* CERF Amicus Curiae Brief in *Arizona v. Navajo Nation* Supporting Neither Party, *supra* at 11 (citing *Castro Huerta*, slip op. at 23) (citing *Kake*, 369 U.S. at 67-68, 72, 75-76; *United States v. McBratney*, 104 U.S. 621, 623-624 (1881); *Draper v. United States*, 164 U.S. 240, 242-246 (1896)).

The Court in *Castro Huerta* reached this conclusion because it effectively embraced the long buried but recently revealed Lincoln Indian policy of assimilation by limiting the reach of "Indian country" set forth in President Lincoln's annual addresses of December 1, 1862, and of December 8, 1863, and in the Removal Act of March 3, 1863, 37th Cong. Sess. III, Ch. 99, 12 Stat. 792-794 (attached to the Indian appropriations act). The Lincoln Indian assimilation policy directed toward non-hostile tribes *inter alia* expanded upon and further softened the harsh assimilation policy of the Removal Act of May 28, 1830, 21st Cong. Sess. I, Ch. 148, 4 Stat. 411-412, by focusing on **individual Indian bands within tribes and individual Indians**. It gave Native Americans direct land ownership once the surveys were complete. *See* CERF Amicus Curiae Brief in *United States v. Cooley* Supporting Respondent (Dkt. 19-1414), (Feb. 19, 2021) at 16-22. The Lincoln Indian policy was intended to end the territorial war power over Indians that sets apart "Indian country" from State jurisdiction and to confer

upon them full citizenship rights. *See* CERF Amicus Curiae Brief in *Oklahoma v. Castro Huerta*, *supra* at 22.

Indeed, the United States, in *McGirt v. Oklahoma*, 140 S.Ct. 2452 (2020), argued that it was the intent of Congress and President Lincoln in this new policy of trying to make all the Indians State citizens subject to a single State and Municipal Government structural framework, by "replac[ing] the separate domains and governments of the Five Tribes with a single state domain and state and municipal governments that would govern all persons, Indians and non-Indians alike." *See* United States Amicus Curiae Brief in *McGirt v. Oklahoma* Supporting Respondent (Dkt. No. 18-9526) (Mar. 20, 2020) at 10.[4] President Lincoln's inclusive Indian assimilation policy was thereafter extended to other Indian tribes that had been hostile to the United States during the Civil War.

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[2] *See Id.* ("In [Congress's] view, when the Indians 'invit[ed] white people to come within their jurisdiction, to become traders, farmers, and to follow professional pursuits,' they 'must have realized that' they had 'abandoned forever' the 'policy of maintaining an Indian community isolated from' non-Indians. 1894 Senate Report 7. Congress concluded that the law-enforcement and other challenges in the Indian Territory had a single solution – statehood. It therefore acted to replace the separate national domains and governments of the Five Tribes with **a single domain and state and municipal governments that would govern *all* persons, Indians and non-Indians alike**. In particular, Congress saw the breaking up of the Five Tribes' territories as a critical prerequisite to statehood."). (italics in original; boldfaced emphasis added).

See Act of July 20, 1867, 40th Cong., Sess. I, Ch. 312, 15 Stat. 17-18, discussed in the Response Brief of Mr. Cooley. *See* Respondent Joshua James Cooley's Brief in *United States v. Cooley* (Dkt. No. 19-1414) at pp. 31-32.

The Court, in *Castro Huerta*, thus recognized that individual Indian tribes are **not** "foreign" sovereigns **and** that individual Indian tribal members are **not** members of a "distinct people" that cannot become part of the American people and polity as discussed in *Dred Scott*. The *Castro Huerta* opinion, thus, effectively undermines the Court's prior contradictory conclusion in *Puerto Rico v. Sanchez Valle*, 579 U.S. 59 (2016) that properly limited the interpretation of the Territory Clause but held Indian tribes are "sufficiently separate sovereigns" that they remain subject to the plenary authority of Congress. 136 S.Ct. at 1872. The Court's *Castro Huerta* opinion also effectively undermines the Court's decades-old opinions in *United States v. Wheeler*, 435 U.S. 313 (1978), holding that "[a]lthough physically within the territory of the United States and subject to ultimate federal control they [Indian tribes] nonetheless remain a separate people," and in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting *Worcester*, 31 U.S. at 559, holding that "Indian tribes 'are 'distinct, independent political communities retaining their original natural rights' in matters of local self-government").

II. THE DECISIONS OF THIS COURT CREATED TRIBAL SOVEREIGN IMMUNITY AND SEPARATED THE INDIAN TRIBES FROM THE CONSTITUTION.

This Court since the *Worcester* decision in 1832 has continually found that Congress has plenary power over the Indians and Indian tribes. *See e.g., United States v. Kagama*, 118 U.S. 375 (1885). But neither the Constitution nor any act of Congress claims plenary power over Indians. That Congress has plenary power over individual Indians and Indian tribes is exclusively a judicially made and preserved conclusion. The Territory Clause, Art. IV, Sec. 3, Cl. 2, could have given Congress more defined authority over indigenous persons in the territorial lands. But as has been often discussed and maligned, the original Indian policy of the nascent United States was assimilation of the indigenous people into the emerging American society, as Sec. 8 of the Northwest Ordinance of 1787 provided.[5] Just as the Territory Clause required disposal of the territorial lands to prevent the territorial war powers of the doctrine of discovery from becoming permanent

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[5] *See An Ordinance for the Government of the Territory of the United States North-West of the River Ohio* (Jul. 13, 1787) at Sec. 8 ("…and for the execution of process, criminal and civil, the governor shall make proper divisions [of the district]; and he shall proceed, from time to time, as circumstances may require, to lay out **the parts of the district in which the Indian titles shall have been extinguished, into counties and townships**, subject, however, to such alterations as may thereafter be made by the legislature"). (emphasis added).

domestic powers of the elected branches, so too, did the Indian assimilation policy function to imbue Native Americans will the full affirmative civil, criminal and constitutional rights of American citizens. Preserving the Indians as separate from the Constitution has allowed the elected branches the domestic use of the territorial war powers in perpetuity exactly as the United States claims in its *Brackeen v. Haaland and Texas v. Haaland* cert petition briefs.[6] And, each of these briefs falsely cite *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974) as holding that the Constitution is both the explicit and implicit source of the 'plenary power of Congress' over Indian affairs."

A. Granting Internet-Based Payday Lending Tribes Sovereign Immunity from the Bankruptcy Code's Automatic Stay Provision Would Enable Them to Assert Jurisdiction Over Non-Indians Far from "Indian Country"

Congress in defining 11 U.S.C. §§ 101(27) and 106 of the bankruptcy code has applied the provision to every possible definition of an entity they could include. As the Tribe points out, every definition is included

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[6] *See* Federal Respondents Brief in Opposition, *Brackeen v. Haaland*, on Petition for a Writ of Certiorari to the Fifth Circuit Court of Appeals (Dec. 2021), Dkt. No. 21-380, at 24-25; Federal Respondents Brief in Opposition, *Texas v. Haaland*, on Petition for a Writ of Certiorari to the Fifth Circuit Court of Appeals (Dec. 2021), Dkt. No. 21-378, at 13-14.

except "Indian tribe." The Tribe says that to include them under this provision requires a special test in this Court because of the special trust relationship between the Tribe and the United States. Isn't this the very reason that Congress avoids writing legislation that specifically uses the terms “Indians” or “Indian tribes” in general legislation? While this Court has granted “plenary authority” over the Indians to Congress, it has not in any way restricted its judicial review of Congress' authority to legislate over Indian tribes. The reality of all this is that it is exclusively this Court that defines the reach of the special Indian trust relationship, not Congress. If Congress had included the words "Indian tribe" in the bankruptcy statute, it would still be up to this Court to decide whether the Indian tribe could be included. If Congress really has plenary authority then this Court would have no judicial review over their inclusion or exclusion of an Indian tribe in any statute. The real source of this special trust relationship is this Court’s initial overbroad assertion of equity authority in *Worcester*, and its subsequent willingness to exercise such authority to interpret the “right” place for the Indian Tribes consistent with its deemed “paramount judicial authority” to interpret “the laws and treaties of the United States” “and the powers granted to the Federal Government” to ensure “its very existence as a Government,” *See Ableman v. Booth*, 62 U.S. 506, 518-520 (1858), which is well beyond what the Framers had envisioned as necessary to preserve “internal tranquil[]ity,” let alone, separation of powers or individual liberties.

By claiming tribal sovereign immunity to defeat the application of the U.S. Bankruptcy Code's automatic stay provision (11 U.S.C. § 362), the Lac du Flambeau Band of Lake Superior Chippewa Indians, and their internet-based Lendgreen online payday lending business operations,[7] which are each located on the tribe's Vilas County, Wisconsin reservation, are effectively calling for this Court to grant the tribe jurisdiction over Mr. Coughlin, a non-Indian resident of Boston, Massachusetts,[8] who is located more than one thousand miles beyond the exterior boundaries of that reservation and of "Indian country," as if this contract was entered into on the Tribe's reservation in contravention of *Montana v. United States*, 450 U.S. 544 (1981).

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[7] *See* Respondent Brian W. Coughlin's Brief in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, (Dkt. No. 22-227) (Nov. 8, 2022) at 1, 3.

[8] *See* LexisNexis Legal News, *Tribe Says Question of Immunity In Bankruptcy Code Is Congress' Job, Not Courts* (Feb. 24, 2023) (referring to Respondent Brian W. Coughlin as "a resident of Massachusetts") at <https://www.lexislegalnews.com/articles/87094>; Caleb Symons, *Tribes Owed Immunity Bankruptcy Cases, High Court Told*, Law360 (Feb. 23, 2023) (referring to Respondent Brian W. Coughlin as a "Boston resident"), at <https://www.law360.com/articles/1578987/tribes-owed-immunity-in-bankruptcy-cases-high-court-told>; LexisNexis Legal News, *Certiorari Granted in Row Over Bankruptcy Code's Abrogation of Tribal Immunity* (Jan. 17, 2023) (referring to Respondent Brian W. Coughlin as "a resident of Massachusetts") at <https://www.lexislegalnews.com/articles/85364/certiorari-granted-in-row-over-bankruptcy-code-s-abrogation-of-tribal-immunity>.

In *Montana*, this Court set the standard for tribal jurisdiction over non-Indians on non-Indian fee simple lands located within an Indian reservation, and it has led to many more opinions from this Court limiting the jurisdiction of Indian tribes over non-Indians. As this Court previously held in *Montana*, "[i]mplicit in the Supreme Court's decision in *Oliphant [v. Suquamish Indian Tribe*, 435 U.S. 191 [1978],] is the recognition that Indian tribes do **not** have the power, **nor** do they have the authority to regulate [...] non-Indians, unless so granted by an act of Congress." (emphasis added). *Montana*, 450 U.S. at 549. *See* accord *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008) (quoting *Montana*, 450 U.S. at 565, as holding "'the inherent sovereign powers of an Indian tribe do **not** extend to activities of nonmembers of the tribe'") and (quoting *Oliphant*, 435 U.S. at 209, as holding "the tribes have, **by virtue of their incorporation into the American republic**, lost 'the right of governing...person[s] within their limits except themselves'"). (emphasis added).

B. To Expand Tribal Sovereign Immunity to the Bankruptcy Code, the Lac du Flambeau Tribe Uses the Same Clever Argument Made in *Solem v. Bartlett* that this Court Can Require Congress to Expand the Special Trust Relationship as this Court Interprets it.

This Court is more responsible than Congress is for the expansion of the special trust relationship between the Indian tribes and the United States. Obviously, it was this Court that first acknowledged the special trust relationship in *Worcester v. Georgia* that has now been called into serious question by the *Castro-Huerta* decision as discussed above. In the courts below, this has been a case of statutory interpretation focused specifically on whether Indian tribes fall within the scope of 11 U.S.C.§§ 101(27) and 106. But as Petitioners demonstrate with their reliance on the dissent of First Circuit Appellate Judge C.J. Barron, who erroneously concluded that: (1) "a 'tribal government' is plausibly understood to be neither a 'domestic' nor a 'foreign government;'" (2) Indian tribes are not "an institutional component of the United States" […] governmental system that traces its origin to the United States Constitution;" and (3) there are "'relevant' or 'functional' differences between […] municipalities [….as] governmental units and Indian tribes," the tribes seek for this Court, once again, to expand such relationship for their unilateral benefit. *See* Petitioners' Merits Brief at 33, 35, 36.

Petitioners assert, for example, that this Court can use the clear-statement rule to find that Congress could **not** have meant to place the Indian tribes within the scope of 11 U.S.C. §§ 101(27) and 106. The Tribe is asking this Court to agree with Judge Barron and to interpret the Indian trust relationship as not allowing Congress to treat the Indian tribes as a "municipal" or "other domestic government." This Court, in *Solem*, **did** expand the Special tribal trust relationship to interpret federal law that clearly allowed both the President and the Secretary of the Interior to create and open Indian land within reservations into becoming a direct trust requirement that only Congress could disestablish reservation boundaries. *See* 465 U.S. at 468-470.[9]

Congress did **not** "risk altering the usual constitutional balance between federal and state powers" over bankruptcy matters *Cf.* Petitioners' Merits Brief, *supra* at 38; **nor** did it risk "the separation of powers between Congress and the federal courts." *Cf.* Brief on Behalf of Amici Curiae Professors of

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[9] Similarly, the Navajo Nation seeks more than Congress's ratification of applicable Indian treaties "properly understood" in their litigation against Arizona and other western States, by asking this Court to "find" the tribe's implied positive right to receive and the Government's corresponding affirmative duty to ensure access to water, based on the very same "special trust relationship" the Court previously determined, in *Castro Huerta*, did **not** really exist, and which the United States has since expressly disavowed. *See* Sec. I.A, *supra*; *Arizona v. Navajo Nation*, Oral Argument *supra*, at Tr. 75:19-76:6 (Kagan, J.); 77:11-22 (Barrett, J.); 110:16-112:14 (Kavanaugh, J.); 114:19-25 (Barrett, J.); 115:22-116:11 (Jackson, J.); 119:1-21.

Federal Indian Law in Support of Petitioners (Dkt. No. 22-227) (Oct. 12, 2022) at 7. It has been this Court interpreting the special Indian trust that has often interfered with and/or even been directly hostile toward the States and federalism issues. *See Herrera v. Wyoming*, 139 S. Ct. 1686 (2019). And, unfortunately, it has been the Supreme Court that has been the enemy of the States and the People by continuously following the false arguments of the United States Department of Justice ("USDOJ") to expand the "special" Indian trust relationship. It was USDOJ that made this very argument in *Solem* that the Lac du Flambeau attorneys are using here. Every time this Court expands this special tribal trust relationship it takes rights and liberties away from the People and expands the territorial powers of the federal government against the structure of the Constitution.

Rather, the Framers with the Northwest Ordinance, and President Lincoln with his inclusive Indian assimilation policy, had always envisioned Indian tribes as domestic political communities that are part and parcel of the Constitution's federalist structure. Functioning in this capacity, they would retain the residual capacity for self-governance and sovereignty at the municipal level over tribal lands and consenting tribal members physically located within State boundaries and remain subject to State and Federal concurrent legal jurisdiction, and thereby be held accountable for their conduct. *See Castro Huerta*, slip op. at 4, 18-19.

This was the result reached for the inclusion of Indian tribes under the legislation creating the

Department of Homeland Security. Following the terrorist attacks of September 11, 2001, Congress had to improve national security and reorganize all levels of national and state government to be able to work together under one integrated department. The attorney for CERA/CERF volunteered to help Congress find language to include the Indian tribes within this framework. In the Homeland Security Act, the Indian tribes are defined as self-governing municipalities as a matter of state and federal law. *See* Homeland Security Act of 2002, P.L. 107-296, 116 Stat. 2135 et seq. (Nov. 25, 2002), as amended, codified at 6 U.S.C. § 101 note; 116 Stat. 2141, as amended, 6 U.S.C. § 101(13)(B) (defining the term "local government" to include "an Indian tribe or authorized tribal organization") <https://www.govinfo.gov/content/pkg/USCODE-2021-title6/pdf/USCODE-2021-title6-chap1-sec101.pdf>.[10]

The Indian tribes were not pleased and attempted for many years to alter this designation. But each attempt to draft a bill to alter the designation ran into major issues of national security because every definition they tried rendered them unaccountable even as to the

[10] This is consistent with the Property/Territory Clause (Art. IV, Sec. 3, Cl.2) which expressly sets the authority of Congress to acquire and dispose of territorial lands of the United States, and to establish local tribal municipal governments to prepare the people in those areas for citizenship. *See* CERF Amicus Curiae Brief in *Madison County v. Oneida Indian Nation of New York* Supporting Petitioner (Dkt. No. 10-72), at 16 (citing *United States v. Gratiot et al.*, 39 U.S. 526, 529, 530 (1840)).

Federal government under the Constitution of the United States.

And since the United States recently disavowed (in its *Arizona v. Navajo Nation* brief) the existence of the special and "unique 'government-to-government'" tribal trust "relationship"/"obligation" upon which the Indian canons of construction and the status of "federally recognized tribes" are said to be "rooted," Petitioners and amici are now hard pressed to show injury to the Lac du Flambeau Indian tribe. Specifically, they must show how treatment of the tribe as a self-governing domestic "governmental unit" **not** entitled to sovereign immunity under Section 106 of the U.S. Bankruptcy Code will "imping[e] on tribal sovereignty" *Cf.* Petitioners' Merits Brief in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, (Dkt. No. 22-227) (Feb. 22, 2023) at 39, n.3 (citing C.J. Barron and *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)), or otherwise impair "promot[ion of] the federal policies of tribal self[-]determination, economic development, and cultural autonomy." *Cf. Id.* at 18-19, (quoting *Three Affiliated Tribes of Fort Berthold Reserv. v. Wold Eng'g, P.C.*, 467 U.S. 877, 890 (1986), holding "'[t]he common law sovereign immunity [….] is a necessary corollary to Indian sovereignty and self-governance") and (quoting *Kiowa Tribe of Okla.*, 523 U.S. at 757 (holding "[b]y protecting tribal businesses, tribal sovereign immunity 'promote[s] economic development and tribal self-sufficiency'"); *Cf.* Brief on Behalf of Amici Curiae Professors of Federal Indian Law in Support of

Petitioners (Dkt. No. 22-227), *supra* at 6-7 (citing *Mancari*, 417 U.S. at 541-542, 552,[11] 555 (1974)).

C. This Court's Reaffirmation of Inherent Tribal Sovereignty in *Ysleta Del Sur Pueblo* and in *Denezpi* Undermines Petitioners' Claim that Sovereign Immunity is Needed to Preserve Tribal Self-Governance in this case

The Court also recently reaffirmed, in *Ysleta Del Sur Pueblo v. Texas*, 142 S.Ct. 1929, 1934 (2022), that "Native American Tribes possess 'inherent sovereign authority over their members and territories," and that Indian tribes are "self-governing political communities" possessing the "inherent sovereignty" and "power of self-government" to create and enforce their own laws (tribal ordinances) over tribal members. *Denezpi v. United States*, 142 S.Ct. 1838, 1845 (2022). Petitioners' and Amici's arguments in this action fail primarily

[11] As this Court well recognizes, it need **not**, in a single wholesale ruling, hold that "all laws derived" from the now disavowed "solemn commitment of the Government toward the Indians" (*inter alia* the Indian Reorganization Act of 1934 (25 U.S.C. § 461 et seq.), the Indian Civil Rights Act of 1968 (25 U.S.C. § 1301 et seq.), the Indian Self-Determination and Education Assistance Act of 1975 (25 U.S.C. § 5301 et seq.), and the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.)) constitute "invidious racial discrimination" such that "an entire Title of the United States Code (25 U.S.C.) would be effectively erased." *Cf. Mancari*, 417 U.S. at 552. Instead, this Court should embrace a studied incremental approach to reviewing and ruling on each of these laws individually in their proper contexts.

because they ignore this Court's important rulings in *Castro Huerta*, *Denezpi*, and *Yselta Del Sur Pueblo*, pursuant to which the Lac du Flambeau Indian tribe should properly be deemed a self-governing "municipality" or "other foreign or domestic government," within the meaning of 11 U.S.C. § 101(27) defining the term "governmental unit" for purposes of the U.S. Bankruptcy Code. Since the inclusive Lincoln Indian assimilation policy was first enacted by Congress in 1863, the inherent sovereignty of Indian tribes **as self-governing but integrated domestic communities falling within State boundaries should properly be recognized and respected as part and parcel of the American federalist system of governance**. And since the enactment of the Fourteenth Amendment and of the Indian Citizenship Act of 1924 (8 U.S.C. § 1401(b), **the full State and Federal citizenship of individual tribal members bearing full civil and constitutional rights should be properly recognized and respected without contest**. Thus, contrary to this Court's prior opinion in *Santa Clara Pueblo*, all Indian tribes, including the Lac du Flambeau tribe, are indeed "[]constrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Cf.* 436 U.S. at 56.

III. IT IS TIME TO ADMIT THAT THE POPE'S CREATION OF THE DOCTRINE OF DISCOVERY AND THE TERRITORIAL WAR POWERS IT VESTED IN THE BRITISH SOVEREIGN INTERFERE WITH CONSTITUTIONAL GOVERNANCE AND CAN ONLY APPLY TO ACTUAL SEPARATE TERRITORIES

A. Congress has plenary power over bankruptcy.

In addition, Petitioners and Amici fail to recognize "Congress' plenary power over bankruptcy" under the Bankruptcy Clause of the U.S. Constitution *United States v. Kras*, 409 U.S. 434, 442 (1973),[12] and consequently, over "the federal government's compelling interest in maintaining the [uniform] bankruptcy system [...] established by the Bankruptcy Code." *See In re Hodge*, 220 B.R. 386, 392 (D. Idaho 1998). Although "[t]here is no constitutional right to obtain a discharge of one's debts in bankruptcy[, because t]he Constitution, Art. I, § 8, cl. 4 merely authorizes the Congress to 'establish...uniform laws on the subject of Bankruptcies throughout the United

[12] *See Id.* (citing *Kalb v. Feuerstein*, 308 U.S. 433, 438-439 (1940), holding "[t]he Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction of which courts, state or federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law.'").

States" *Kras*, 409 U.S. at 446, debtors are recognized as having a "constitutional right to seek relief in the federal courts under the provisions of the Bankruptcy [laws]." *In re Donaldson Ford, Inc.*, 19 B.R. at 430. *See also In re Knepp*, 229 B.R. 821, 842-43 (Bankr. N.D. Ala. 1999) (quoting *In re Mount Forest Fur Farms of America, Inc.*, 103 F.2d 69, 71 (6th Cir. 1939); *In re Pine Tree Feed Co.*, 112 F. Supp. 124, 126 (D. Me. 1953); *In re Adana Mortg. Bankers*, 12 B.R. 989 (Bankr. N.D. Ga. 1980), each holding that "debtors have an 'inviolate right of access to the courts of bankruptcy to seek rehabilitation'"). Indeed, this Court has recognized that "[t]he automatic stay provision of the Bankruptcy Code, § 362(a) has been described as 'one of the fundamental debtor protections provided by the bankruptcy laws.'" *Midlantic Nat. Bank v. N.J. Dept. of Environmental Protection*, 474 U.S. 494, 503 (1986) (quoting S. Rep. No. 95-989, p. 54 (1978); H.R. Rep. No. 95-595, p. 340 (1977)). Thus, Petitioners, by arguing they are entitled to sovereign immunity from the Bankruptcy Code's automatic stay provision, effectively seek to deprive Mr. Coughlin of his constitutional right to seek access to federal bankruptcy court to obtain potential relief under the Bankruptcy Code. This would both cancel out Mr. Coughlin's liberty interests and upset the careful balance of "the two principal ends" served by the Bankruptcy Code: "(1) ensuring the equitable treatment of the creditors of bankrupt debtors; and (2) providing debtors with a fresh start financially." *In re Hodge*, 220 B.R. at 392.

B. This Court's Ruling in *Mancari* Evidencing a Deliberate Manipulation of the USDOJ No Longer Justifies Political Preferences for Domestically Integrated Self-Governing Tribes Vested with Inherent Sovereignty

As CERF disclosed to this Court in its amicus brief in *Madison County v. Oneida Indian Nation of New York*, 562 U.S. 42 (2011), there is an actual Memoranda from 1973 found in the Nixon papers explaining how fungible "Indian title" (over preserved and/or reclaimed reservation lands) within the context of an expanded "Indian trust" could be used as "the underlying basis for [claiming] tribal sovereign immunity."[13] It also discloses how USDOJ deliberately lied to and set up the Court, in *Morton v. Mancari*, *supra*, to establish the judicially unreviewable doctrine of political versus racial separatism,[14] based on the

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[13] *See* CERF Amicus Curiae Brief in *Madison County v. Oneida Indian Nation of New York* Supporting Petitioner (Dkt. No. 10-72), *supra* at 19-20, 22-23.

[14] *See* U.S. Department of the Interior Bureau of Indian Affairs, Assistant Comm'r Economic Development, *Memorandum Respecting Federal Trust Responsibilities and Managing Indian Forests With Points and Authorities in Support* (Sept. 19, 1968), at 13-16 (noting how the judiciary may **not** encroach, by means of judicial review, upon the Interior Secretary's exercise of broad discretionary executive functions, including ensuring protection of a federally recognized tribe's political status in fulfillment of the tribal trust relationship) <https://www.millelacsequalrightsfoundation.org/downloads/docs/VEEDER-FOREST-MANAGEMENT-MEMORANDUM.pdf>;

fictional "special trust relationship" recognized in *Worcester*[15] to enable President Nixon to exploit the unlimited domestic territorial war powers.

Contrary to Amici's assertions, this Court's prior ruling in *Mancari* no longer justifies the continued maintenance of **any** "political" (disguised racial) preference for domestically integrated self-governing Indian tribes vested with inherent sovereignty that already are effectively functioning in the capacity of sovereign municipal governments, because it

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Memorandum, *The Native American: At What Level Sovereignty?*, James Spaith for Leonard Garment, The White House (Aug. 29, 1974) at 61-65 (noting how the Court in *Worcester* had, as a matter of "American legal precedent" "afforded a special status, based on race, to Indians," treating them as "separated, legally, from non-Indians") <https://citizensalliance.org/legal-topics-23.html>.

[15] *See* U.S. Department of Justice Memorandum, from Philp S. Fuoco to Carlton R. Stoiber, *Indian Preference Statutes (25 U.S.C. §§ 44-47, 472)* (Jun. 22, 1973), at 12-13 (disingenuously explaining that since Indian preference statutes impose a duty on the United States "to protect" the political rights of "the Indian peoples" and are based on the historic "special trust relationship" between Indians and the United States, "[t]hey are not so arbitrary as to violate the Fifth Amendment, " and they "are not given the strict review normally required of 'suspect' racial classifications") (citing *Board of Commissioners v. Seber*, 318 U.S. 705 (1943) and *Kagama*, *supra*, each of which cite to *Worcester* and describe the "special trust relationship" as being based on pre-constitutional discovery-era war powers and the 1871 Indian policy; *See Kagama*, 118 U.S. at 382-384; *Seber*, 318 U.S. at 715-16) and (citing *Katzenbach v. Morgan*, 384 U.S. 641, 657-58 (1966)), at https://citizensalliance.org/downloads/legal-topics/court-cases-and-briefs/memorandum-to-indian-preference-statutes.pdf.
Consequently, this Court's *Mancari* opinion also cites to *Worcester*. 417 U.S. at 554-555.

contravenes both the Fifth and Fourteenth Amendment equal protection clauses. In *Adarand Constructors v. Pena*, 515 U.S. 200, 215, 217-218 (1995), this Court held that, although the Fifth Amendment does not expressly contain an express guarantee of equal protection, it contains an implicit guarantee of equal protection by incorporating the more explicit Equal Protection Clause of the Fourteenth Amendment via the doctrine of reverse incorporation. And in *United States v. Vaello Madero*, (Dkt. No. 20-303) (Apr. 21, 2022), this Court reaffirmed its holding in *Adarand* by "maintain[ing] that the 'equal protection obligations imposed by the Fifth and Fourteenth Amendments [are] indistinguishable.'" (Thomas, J. concur. at 5, quoting *Adarand*, 515 U.S. at 217). Therefore, since the Court in *Castro Huerta* effectively rejected and the United States in *Navajo Nation* expressly disavowed the special Indian trust relationship, it's high time this Court expressly overruled *Mancari*'s unconstitutional political versus racial deference to the Nixon Indian policy based upon it.[16]

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[16] The Court, in *Rice v. Cayetano*, 528 U.S. 495 (2000), rejected "the *Mancari* case and the [congressional enactments, Indian treaty interpretation maxims, and tribal trust self-governance] theory upon which it rests," which the State of Hawaii had relied on to sustain electoral qualifications based on tribal ancestry. 528 U.S. at 517-20. The *Rice* Court correctly held that, "[u]nder the Fifteenth Amendment, voters are treated not as members of a distinct race, but as members of the whole citizenry." 528 U.S. at 523. *See* CERF Amicus Curiae Brief in *Haaland v. Brackeen* Supporting No Party (Dkt. Nos. 21-376, 21-377, 21-378, 21-380) (Jun. 2, 2022), at 22, n. 7. But it only implicitly held that a superficial political preference statute that is also a racial preference statute cannot be justified

The Lac du Flambeau Band of Lake Superior Chippewa Indians is effectively a domestically integrated self-governing political community vested with inherent sovereignty that is physically located within the boundaries of the State of Wisconsin. Since the tribe's individual members are full citizens of both the State of Wisconsin and of the United States who are entitled to full constitutional, civil and criminal law protections, Petitioners should properly be treated as either a "municipality" or "other domestic" government fully integrated into the fabric of the U.S. constitutional federalist system for purposes of the U.S. Bankruptcy Code. They would then more likely be held accountable for also recognizing the full constitutional rights, privileges and immunities, and liberty interests of both their individual payday lending business customers residing within Wisconsin State boundaries, and those, like Mr. Coughlin, residing beyond them in other States, like Massachusetts, all irrespective of their tribal affiliation. *See, e.g., Printz v, United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992); *Murphy v. Nat'l Collegiate Athletic Assn*, 138 S.Ct. 1461 (2018).

Since this Court constructed *Mancari* and effectively enabled the exercise of the unlimited domestic territorial war power, this Court also has the

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by the special trust relationship based on the mere appearance of a rational relationship between the "special Indian treatment" and Congress's fulfillment of its unique (trust) obligation towards the Indians. *Cf.* 528 U.S. at 527 (Ginsburg, J. dissent.); 528 U.S. at 528-531, 533-535 (Stevens, J. dissent.).

ability to correct its own judicial review misassumptions. This Court does not have the legal or equitable authority under the Constitution to permanently remove Indian bands or individual Indians as separate political entities from the Constitution of the United States or from being among We the People of the United States.

Political accountability federalism is as much about judicial review as it is about federalism. The reality is that the constitutional balance cannot be restored without this Court adding political accountability of the federal government as a due process right of the People. For too long the USDOJ was not required to say where this power came from because the Courts did not hold the United States Government accountable.

CONCLUSION

For all the aforementioned reasons, this Court should affirm the ruling of the First Circuit Court of Appeals, that Congress had all along intended for 11 U.S.C. §§ 101(27) and 106 to abrogate the sovereign immunity of Indian tribes, including the Lac du Flambeau Indian tribe.

Respectfully submitted,

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