TRIBAL SOVEREIGNTY & SOVEREIGN IMMUNITY IN BANKRUPTCY

INTRODUCTION

In July 2019, Brian Coughlin borrowed $1,100 from a payday lender named Lendgreen.[1] Later that year, Mr. Coughlin filed for bankruptcy and listed his outstanding balance of about $1,600 owed to Lendgreen among his debts.[2] Debt collection during a bankruptcy case is prohibited by the Bankruptcy Code's automatic stay.[3] Despite the stay, Lendgreen continued to try to collect Mr. Coughlin's debt.[4] Lendgreen's alleged "regular and incessant telephone calls, emails and voicemails" eventually caused Mr. Coughlin to attempt suicide.[5]

After his suicide attempt, Mr. Coughlin tried to enforce the automatic stay against Lendgreen and collect damages.[6] Lendgreen's alleged conduct was prohibited, and Mr. Coughlin would normally be entitled to damages.[7] However, Lendgreen asserted that because it was owned by the Lac du Flambeau Band of Lake Superior Chippewa Indians, it was entitled to tribal sovereign immunity.[8]

Sovereign immunity renders sovereigns (like the federal government, foreign countries, U.S. states, and Indian tribes) immune to lawsuits.[9] Tribal sovereign immunity is fundamental to tribal sovereignty and Indian tribes' self-governance.[10] The "immunity is thought necessary to promote the federal policies of tribal self[-]determination, economic development, and

1. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689, 1694 (2023).

2. Coughlin v. Lac du Flambeau Band of Lake Superior Chippewa Indians (*In re* Coughlin), 33 F.4th 600, 604 (1st Cir. 2022) [hereinafter *Coughlin Circuit Opinion*], *aff'd sub nom.* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689 (2023).

3. *See* 11 U.S.C. § 362(a) (prohibiting "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case"). The stay is imposed at the start of all bankruptcy cases upon the filing of the bankruptcy petition. *Id.*

4. *Coughlin Circuit Opinion*, 33 F.4th at 604.

5. *Id.*

6. *Coughlin*, 143 S. Ct. at 1694.

7. The Bankruptcy Code allows damages for willful violations of the stay. 11 U.S.C. § 362(k). Violations are willful when a party has knowledge of the bankruptcy case and commits an intentional act violating the stay. *E.g.*, Young v. Repine (*In re* Repine), 536 F.3d 512, 519 (5th Cir. 2008). Mr. Coughlin alleged he repeatedly informed Lendgreen of his ongoing case, but Lendgreen intentionally continued to try to collect the debt. *Coughlin*, 143 S. Ct. at 1694. So, as alleged, Lendgreen willfully violated the stay and would have been liable to Mr. Coughlin.

8. *Coughlin*, 143 S. Ct. at 1694.

9. *See generally* Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine*, 43 WAKE FOREST L. REV. 765 (2008) (describing federal, foreign, state, and tribal sovereign immunity).

10. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014).

cultural autonomy."[11] Though normally a bulwark against liability, sovereign immunity is not absolute. Congress can abrogate tribal sovereign immunity,[12] but it must express its unequivocal intent to do so.[13]

The Bankruptcy Code waives the sovereign immunity of all "governmental unit[s]" for fifty-nine enumerated sections of the Code, including the automatic stay.[14] Had Mr. Coughlin borrowed from a state or even a foreign country, there would have been no doubt that sovereign immunity was abrogated, and the automatic stay would have prohibited any collection efforts.[15] Unfortunately for Mr. Coughlin, the Code's definition of a governmental unit does not explicitly cover Indian tribes.[16]

The lack of an explicit mention of tribes led circuit courts to disagree on whether the Bankruptcy Code demonstrates the requisite unequivocal intent to abrogate tribal sovereign immunity.[17] The First and Ninth Circuits had found that the Code expresses unequivocal intent to abrogate, whereas the Sixth Circuit had found that the Code does not.[18] In *Coughlin*, the Supreme Court resolved these conflicting interpretations, finding that the Bankruptcy Code abrogates tribal sovereign immunity.[19]

To understand this issue, Part I reviews bankruptcy law, including the Bankruptcy Code's treatment of governmental units. Part II then reviews the contours of tribal sovereignty and sovereign immunity, including the standard for Congress to abrogate tribal sovereign immunity. Part III then discusses the cases that ruled on the issue of whether the Bankruptcy Code abrogates tribal sovereign immunity. It first discusses the varying circuit court decisions and then summarizes the Supreme Court's *Coughlin* decision.

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11. Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378 (8th Cir. 1985).

12. *Bay Mills*, 572 U.S. at 790. The term abrogate is "legalspeak for eliminate[]." Fin. Oversight & Mgmt. Bd. v. Centro de Periodismo Investigativo, Inc., 143 S. Ct. 1176, 1180 (2023).

13. *Bay Mills*, 572 U.S. at 790 (quoting C & L Enters., Inc. v. Citizen Band Potawatomi Tribe, 532 U.S. 411, 418 (2001)).

14. 11 U.S.C. § 106(a).

15. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 378–79 (2006) (no state sovereign immunity); Tuli v. Republic of Iraq (*In re* Tuli), 172 F.3d 707, 711–12 (9th Cir. 1999) (no foreign sovereign immunity). Courts agree that the automatic stay applies internationally, but debtors may face other jurisdictional hurdles to enforce the stay abroad. *See* David P. Stromes, Note, *The Extraterritorial Reach of the Bankruptcy Code's Automatic Stay: Theory vs. Practice*, 33 BROOK. J. INT'L L. 277, 283–93 (2007).

16. 11 U.S.C. § 101(27).

17. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689, 1694–95 (2023).

18. *Coughlin Circuit Opinion*, 33 F.4th at 603–04; Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1061 (9th Cir. 2004); Buchwald Cap. Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (*In re* Greektown Holdings, LLC), 917 F.3d 451, 460–61 (6th Cir. 2019), *overruled in part by Coughlin*, 143 S. Ct. 1689.

19. *Coughlin*, 143 S. Ct. at 1696.

Part IV argues that the *Coughlin* decision correctly interpreted the Bankruptcy Code based on the text of the waiver of sovereign immunity and the definition of a governmental unit. While minimally discussed by the Court, the broader structure of the Bankruptcy Code requires this abrogation of tribal sovereign immunity to balance the concerns of sovereigns with the goals of bankruptcy law. This conclusion is clarified by analyzing the use of "governmental unit" throughout the Code and considering the impact if tribes were not a governmental unit.

Finally, Part V discusses the broader issue of balancing tribal sovereignty with the concerns of the bankruptcy system. It first argues that abrogating tribal sovereign immunity in bankruptcy was necessary, considering the issues related to tribal payday lending. It then notes that the *Coughlin* decision is limited and should not disturb the broader doctrine of tribal sovereign immunity. Part V concludes by discussing how tribes can exercise their sovereignty in bankruptcy because of how the bankruptcy system implements local law. Altogether, the Court's holding balances tribal sovereignty with the needs of the bankruptcy system, as the system already had for other governmental units.

I. UNDERSTANDING BANKRUPTCY LAW AND HOW IT APPLIES TO GOVERNMENTAL UNITS

Understanding the Bankruptcy Code's treatment of Indian tribes requires a broader understanding of bankruptcy law. This Part first discusses broad principles of bankruptcy law. It then gives an overview of the basic processes of a few types of bankruptcy cases, which is necessary to understand the special treatment that governmental units receive. Finally, this Part reviews the treatment of governmental units under the Bankruptcy Code.

A. The Principles and Purpose of Bankruptcy Law

A central feature of U.S. bankruptcy law is its uniformity. The Supreme Court emphasized the constitutional importance of a uniform bankruptcy system in *Central Virginia Community College v. Katz*.[20] The Court noted that the Bankruptcy Clause of the Constitution "provides that Congress shall have the power to establish 'uniform Laws on the subject of Bankruptcies throughout the United States.'"[21] The requirement of uniformity reflects that

20. 546 U.S. 356, 363–69 (2006).
21. *Id.* at 359 (quoting U.S. CONST. art. I, § 8, cl. 4).

regulating competing sovereigns (the states) was one of the primary purposes of the Bankruptcy Clause.[22]

Uniformity helps realize the Bankruptcy Code's purpose "to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character."[23] In *Katz*, the Supreme Court noted the difficulties debtors faced in receiving a fresh start before the ratification of the Bankruptcy Clause by reviewing two pre-ratification cases.[24] In those cases, debtors received debt relief in one state but were later arrested in a different state for those same, supposedly discharged, debts.[25] Debtors could not enjoy their fresh start when bankruptcy laws were inconsistent between states, and creditors could evade bankruptcy laws.[26] Uniformity resolves these problems.

The other primary purpose of bankruptcy law is to administer an orderly, centralized, and equitable process for compensating creditors.[27] A bankruptcy case is a collective and compulsory proceeding designed to achieve that goal.[28] By forcing all creditors into the same proceeding, bankruptcy eliminates the costs of a race to the courthouse to collect debts and reduces variance in debt recovery.[29] Bankruptcy cases also benefit from centralizing the debtor's assets, which may be worth more when kept together.[30] Bankruptcy proceedings reduce administrative costs to debtors and creditors alike.[31] There is broad agreement among bankruptcy practitioners and scholars that collecting all claims into one forum maximizes the benefits of the bankruptcy system.[32]

To maximize the power of the collective proceeding and the debtor's fresh start, Congress designed the Bankruptcy Code to address the broadest possible set of legal claims against the debtor.[33] The Code defines "claim"

22. *Id.* at 373.

23. Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1758 (2018) (quoting Stellwagen v. Clum, 245 U.S. 605, 617 (1918)); *see also* Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1050–57 (1987) (noting ways fresh start is limited to worthy debtors).

24. *Katz*, 546 U.S. at 366–69.

25. *Id.* (first citing James v. Allen, 1 U.S. (1 Dall.) 188 (Pa. Ct. C.P. Phila. Cnty. 1786); and then citing Millar v. Hall, 1 U.S. (1 Dall.) 229 (Pa. 1788)).

26. *See* Nathalie Martin, *Brewing Disharmony: Addressing Tribal Sovereign Immunity Claims in Bankruptcy*, 96 AM. BANKR. L.J. 145, 156 (2022).

27. 1 COLLIER ON BANKRUPTCY ¶ 1.01 (Richard Levin & Henry J. Sommer eds., 16th ed. 2023), LexisNexis.

28. Martin, *supra* note 26, at 151–56.

29. Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 861–62 (1982).

30. *See id.* at 861–68. In corporate bankruptcy, keeping the debtor's assets together and forcing creditors to cooperate benefits creditors by allowing the preservation of a debtor's value as a going concern. *Id.* at 864–65.

31. *Id.* at 866.

32. Martin, *supra* note 26, at 152.

33. H.R. REP. NO. 95-595, at 309 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6266.

using an extensive list of types of claims.[34] Describing this definition, the Code's legislative history notes, "the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court."[35] The definition is so broad as to include future creditors of the debtor.[36] As a result, all creditors, ranging from large banks to tort victims and the Internal Revenue Service, can participate in the same bankruptcy case.[37]

Though bankruptcy aggregates diverse legal claims into one federal proceeding, the substance of those claims is governed by the local law that created them.[38] The Bankruptcy Code only impacts local law when a federal bankruptcy interest requires it.[39] This principle is known as the *Butner* Principle. The principle was first articulated in *Butner* when the Supreme Court found bankruptcy courts must apply state law property rights.[40] Though *Butner* was concerned with the Bankruptcy Act of 1898, the Supreme Court has extended the *Butner* Principle to the modern Bankruptcy Code.[41] Based on this principle, the Court has required bankruptcy courts to apply state burdens of proof and state contract law when determining the value and validity of claims.[42] Multiple statutory provisions in the Bankruptcy Code also require the application of non-bankruptcy law.[43] As a result, local non-bankruptcy law will resolve many issues in a bankruptcy case.[44]

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34. 11 U.S.C. § 101(5). Specifically, the Bankruptcy Code defines claim as:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Id.

35. H.R. REP. NO. 95-595, at 309.

36. Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 787 (1987). For example, this includes "future tort claimants who have not yet discovered their injuries." *Id.* at 786.

37. *See* 2 COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 101.05 (reviewing diverse types of claims).

38. Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20 (2000) (citing Butner v. United States, 440 U.S. 48, 55 (1979)).

39. *Id.* This principle, favoring local rules where Congress is silent, reflects the *Erie* Doctrine. Thomas E. Plank, *The* Erie *Doctrine and Bankruptcy*, 79 NOTRE DAME L. REV. 633, 651 (2004).

40. *Butner*, 440 U.S. at 54–55.

41. *Raleigh*, 530 U.S. at 20 (citing *Butner*, 440 U.S. at 55).

42. *Id.* at 17; Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 448–54 (2007).

43. *See, e.g.*, 11 U.S.C. §§ 522, 544(b), 553(a) (referring to state or local law exemptions; allowing the application of state voidable transfer and preference law; and preserving non-bankruptcy setoff rights).

44. *See* DOUGLAS G. BAIRD, THE ELEMENTS OF BANKRUPTCY 5 (7th ed. 2022).

B. The Process of a Bankruptcy Case

Nearly all bankruptcy cases start with a debtor filing a petition.[45] Once a petition is filed, the automatic stay is imposed.[46] The automatic stay enjoins a broad range of debt collection and legal actions against a debtor, including "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the [bankruptcy] case."[47] Most courts find that automatic stay violations are void *ab initio* and have no legal effect.[48] For example, judgments entered outside of bankruptcy court in violation of the stay have been held void.[49] Courts can enforce the automatic stay through their contempt power,[50] and the Bankruptcy Code provides for damages for willful stay violations.[51] The automatic stay forces creditors into the collective proceeding because they can no longer attempt to collect their debts outside of bankruptcy.[52] The stay also protects the bankruptcy estate,[53] which is created at the start of every bankruptcy case and holds nearly all the debtor's property.[54] Though broad, the automatic stay has exceptions, such as allowing governmental units to exercise police powers.[55]

The automatic stay gives debtors the necessary time and space to organize their affairs for the bankruptcy case.[56] The facts in the *Coughlin* case are an illustrative, albeit extreme, example of the importance of the automatic stay. The automatic stay should have prevented Lendgreen from harassing Mr. Coughlin until he attempted suicide. Lendgreen's stay

45. *See* 11 U.S.C. § 301; Richard M. Hynes & Steven D. Walt, *Revitalizing Involuntary Bankruptcy*, 105 IOWA L. REV. 1127, 1128 (2020) (noting 99.95% of petitions are voluntary).

46. 11 U.S.C. § 362(a).

47. *Id.* § 362(a)(6).

48. *See* Kalb v. Feuerstein, 308 U.S. 433, 438–39 (1940) (finding foreclosures violating automatic stay void under Bankruptcy Act of 1898). Under the modern Bankruptcy Code, "the First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits all hold that actions taken in violation of the automatic stay are void." Donna Renee Tobar, *The Need for a Uniform Void* Ab Initio *Standard for Violations of the Automatic Stay*, 24 WHITTIER L. REV. 3, 4 n.5 (2002). Only the Fifth and Federal Circuits hold violations of the stay are merely voidable. *Id.* at 4 n.6. Though apparently semantic, the void or voidable distinction is significant. Finding violations void places the burden of validating them on the offending party, while finding violations voidable requires the debtor to challenge the violation. Soares v. Brockton Credit Union (*In re* Soares), 107 F.3d 969, 976 (1st Cir. 1997). Many consider reading that violations of the stay are void is the better reading. *See, e.g.*, 3 COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 362.12[1].

49. *Soares*, 107 F.3d at 976.

50. 3 COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 362.12.

51. 11 U.S.C. § 362(k).

52. *See* Martin, *supra* note 26, at 153–54 (quoting *Soares*, 107 F.3d at 975).

53. 11 U.S.C. § 362(a).

54. *See id.* § 541; *see also* 5 COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 541.01 (noting broad definition of property of the estate). *But see* 11 U.S.C. § 522 (exempting certain property). A trustee administers and represents the estate, including prosecuting legal claims held by the estate. *See* 11 U.S.C. § 323; 3 COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 323.01.

55. 11 U.S.C. § 362(b)(4).

56. *See* Martin, *supra* note 26, at 154.

violations led to procedural delays in Mr. Coughlin's original bankruptcy case.[57] The stress and suicidal ideation caused by Lendgreen's collection efforts made Mr. Coughlin miss an important meeting with his creditors.[58] The automatic stay normally prevents these aggressive collection techniques that harm debtors and derail proceedings. In preventing these delays, the automatic stay enables the collective proceedings core to the Bankruptcy Code.

All Bankruptcy cases distribute limited assets to competing creditors.[59] However, these cases differ significantly depending on their type. Chapter 7 cases are the simplest. In a Chapter 7 case, the estate's assets are sold to pay its creditors.[60] In Chapter 11 and 13 cases, debtors must work with their creditors to "confirm" a plan that restructures their debt and provides for the future payment of creditors.[61] The Bankruptcy Code lays out requirements that the plan must follow, many of which concern the treatment of prioritized debts.[62]

Bankruptcy does not treat all creditors equally.[63] Knowing that it would be impossible to fully pay all debts in most bankruptcy cases, Congress categorized certain claims as priority claims.[64] Priority claims reflect a wide range of public policy concerns, including creditors' relative ability to bear the costs of default.[65] Priority claims include unpaid child support, contributions to employee benefit plans, and taxes.[66] Depending on the type of case, priority claims are treated differently. In Chapter 7 cases, priority claims are paid in order of priority before other unsecured claims.[67] In Chapter 11 and 13 cases, many priority claims must receive special treatment for a plan to be confirmed.[68] For example, Chapter 11 cases apply a strict "absolute priority rule," which requires that certain higher-priority

57. Affidavit of Debtor in Support of Motion of the Debtor to Enforce the Automatic Stay at 3, *In re* Coughlin, 622 B.R. 491 (Bankr. D. Mass. 2020) (No. 1:19-bk-14142), *rev'd and remanded sub nom. Coughlin Circuit Opinion*, 33 F.4th 600 (1st Cir. 2022), *aff'd sub nom.* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689 (2023).

58. *Id.*

59. *See, e.g.*, Warren, *supra* note 36, at 785.

60. *See* 6 COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 700.01.

61. *See, e.g.*, 11 U.S.C. §§ 1129, 1325 (describing plan confirmation).

62. *See, e.g.*, *id.* §§ 1129, 1322(a)(4) (describing treatment of certain priority claims in Chapter 11 and 13 plans).

63. *See, e.g.*, *id.* § 507(a) (categorizing priority claims).

64. 4 COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 507.02; *see also* Warren, *supra* note 36, at 785–89 (noting bankruptcy law presumes creditors will not all be fully paid, so bankruptcy law makes decisions on how to distribute losses between different creditors).

65. Warren, *supra* note 36, at 788–90.

66. 11 U.S.C. § 507(a)(1), (5), (8).

67. *Id.* § 726. This provision also supports the value of priority claims in Chapter 11 and 13 cases because, in those cases, nonconsenting creditors must receive at least as much as they would have in a Chapter 7 case. *Id.* §§ 1129(a)(7), 1325(a)(4).

68. *See id.* §§ 1129, 1322.

claims are paid in full before any lower-priority claims receive any payment.[69]

At the successful conclusion of a bankruptcy case, the debtor's debts are discharged.[70] The discharge effectuates bankruptcy's fresh start and is the Bankruptcy Code's primary source of relief for debtors.[71] The discharge is an injunction that voids the debtor's personal liability for the discharged debts and enjoins the collection of that debt.[72] Violations of the discharge can be sanctioned as contempt of court.[73] While bankruptcy law aims to give debtors a fresh start, Congress has made some debts non-dischargeable.[74] Congress determined that enforcing those debts was more important than the fresh start.[75] Non-dischargeable debts include student loan debt, tax debt, and debts incurred through fraud.[76]

C. Bankruptcy and Governmental Units

Governmental units receive special privileges throughout a bankruptcy case. These privileges affect the automatic stay, the prioritization of claims, whether certain debts may be discharged, and several other elements of bankruptcy law.[77] Section 101(27) of the Code defines governmental unit, stating:

> "[G]overnmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.[78]

Though this definition is expansive, it does not mention Indian tribes. Similarly, the congressional reports from the passage of the Bankruptcy Code state that the Code "defines 'governmental unit' in the broadest sense," but do not mention Indian tribes.[79]

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69. *Id.* § 1129(b)(2)(B)(ii); *see also* Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 984–87 (2017) (describing absolute priority rule and rejecting exception to absolute priority rule).
70. 11 U.S.C. §§ 727(a), 1141(d), 1328.
71. Howard, *supra* note 23, at 1047–48; 1 COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 1.02.
72. 11 U.S.C. § 524.
73. 4 COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 524.02[2].
74. *See* Howard, *supra* note 23 *passim*.
75. *See id.*
76. 11 U.S.C. § 523.
77. *See, e.g.*, *id.* §§ 362(b)(4), 507(a)(8), 523.
78. *Id.* § 101(27).
79. H.R. REP. NO. 95-595, at 311 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6268; S. REP. NO. 95-989, at 24 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5810.

Section 106(a) of the Bankruptcy Code abrogates sovereign immunity for any governmental unit for the purposes of fifty-nine enumerated sections of the Bankruptcy Code.[80] This abrogation is essential to ensure uniformity and that governmental units respect a debtor's fresh start.[81] Though § 106(a) lists many sections of the Code, notable exclusions exist. One excluded section preserves sovereign immunity against claims that arose before the bankruptcy case began.[82] Section 106(a) also does not waive immunity for punitive damages.[83]

Many sections of the Bankruptcy Code grant special privileges to governmental units.[84] These privileges support governmental units' police powers and ability to tax.[85] The automatic stay, the prioritization of claims, whether certain debts may be discharged, and several other elements of bankruptcy law are all impacted by whether a party is a governmental unit.[86]

Governmental units can use an exception to the automatic stay, which allows them to exercise their police and regulatory powers in civil proceedings.[87] Governmental units enforcing their police power are exempt from the stay's prohibitions on the use of legal processes; the enforcement of judgments; the possession of property of the estate; and any acts to collect, assess, or recover claims against the debtor.[88] The exception is limited in that it prohibits governmental units from enforcing monetary judgments, forcing them to seek declaratory or injunctive relief.[89] Permitted conduct under this exception includes "labor law enforcement proceedings, rent regulation enforcement, the enforcement of the minimum wage laws and enforcement of water quality control standards."[90]

There are also exceptions to the automatic stay for several taxation-related activities.[91] Governmental units can perform tax audits and issue tax deficiency notices.[92] They may also create statutory liens for certain

80. 11 U.S.C. § 106(a).

81. *See* Martin, *supra* note 26, at 156 (emphasizing uniformity's importance to debtor's fresh start); *see also* Leonard H. Gerson, *A Bankruptcy Exception to Eleventh Amendment Immunity: Limiting the* Seminole Tribe *Doctrine*, 74 AM. BANKR. L.J. 1, 12 (2000) (noting "the irreconcilable nature of the constitutional mandates of state sovereign immunity and uniformity in bankruptcy law").

82. 2 COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 106.04[1].

83. 11 U.S.C. § 106(a)(3). This parallels the Federal Tort Claims Act and other waivers of sovereign immunity. 2 COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 106.04[2] (citing 28 U.S.C. § 2674).

84. *See, e.g.*, 11 U.S.C. §§ 502, 503, 507, 523.

85. *See id.* § 362(b)(4), (9) (exempting governmental units enforcing regulations or auditing taxes).

86. *See, e.g.*, *id.* §§ 362(b)(4), 507(a)(8), 523.

87. *Id.* § 362(b)(4). There is a separate exception to the automatic stay that allows for criminal prosecutions which is not conditioned on being a governmental unit. *Id.* § 362(b)(1).

88. *Id.* § 362(a)(1)–(3), (6).

89. *Id.* § 362(b)(4).

90. 3 COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 362.05[5][b][i] (citations omitted).

91. 11 U.S.C. § 362(b)(9), (18), (26).

92. *Id.* § 362(b)(9).

property taxes that become due after the start of the bankruptcy case.[93] Governmental units can also set off income tax refunds against certain tax debts.[94] These exceptions make it easier for governmental units to receive taxes from a debtor in bankruptcy. Governmental units' taxation efforts are also supported by the prioritization of many tax claims.[95] Taxes incurred by the bankruptcy estate during a case are also prioritized through their treatment as priority administrative expenses.[96]

In Chapter 7 cases, these priority tax claims will be paid before certain other claims.[97] To confirm a Chapter 11 plan, holders of priority administrative claims must receive the cash equivalent of the value of their claim.[98] For priority tax claims, a Chapter 11 plan must provide cash installment payments of at least the present value of the tax claims, with a deadline no later than five years after the commencement of the bankruptcy case.[99] The plan also cannot treat lower priority claims better than tax claims.[100] The special treatment of tax claims is valuable to governmental units.

The Bankruptcy Code also protects governmental units' police and taxation powers by making certain debts non-dischargeable.[101] Priority tax claims are non-dischargeable when a debtor has failed to file a tax return on time or attempted to evade taxation.[102] Any "fine, penalty, or forfeiture payable to and for the benefit of a governmental unit" is also non-dischargeable, with limited exceptions.[103] That provision makes "traditional criminal fines" non-dischargeable.[104] These provisions help governmental units collect taxes and enforce the law by allowing them to pursue these debts even after a discharge has been granted.

Several other provisions in the Bankruptcy Code preserve a governmental unit's police and taxation powers. For example, a governmental unit may prevent confirmation of a Chapter 11 plan if the plan's purpose is to avoid taxes or to avoid enforcement of the Securities Act of 1933.[105] Governmental units can also access filings that are

93. *Id.* § 362(b)(18).
94. *Id.* § 362(b)(26).
95. *See id.* § 507(a)(8).
96. *Id.* §§ 503(b)(1)(B)(i), 507(a)(2).
97. *Id.* § 726.
98. *Id.* § 1129(a)(9)(A).
99. *Id.* § 1129(a)(9)(C).
100. *Id.*
101. *See id.* § 523(a)(1), (7).
102. *Id.* § 523(a)(1).
103. *Id.* § 523(a)(7). Those exceptions are for certain tax penalties or where the debt is compensation for actual pecuniary loss. *Id.*
104. Kelly v. Robinson, 479 U.S. 36, 51 (1986) (holding criminal restitution non-dischargeable under § 523(a)(7)).
105. 11 U.S.C. § 1129(d).

inaccessible to the public as needed to enforce their police and regulatory power.[106] To help governmental units collect taxes, the Bankruptcy Code requires certain trustees to file tax returns.[107] It also permits governmental units to file claims for taxes that become due during some cases.[108] These provisions reflect the Code's respect for governmental units' powers to regulate and tax.[109]

The Bankruptcy Code also gives procedural benefits to governmental units.[110] The Code has relaxed requirements for governmental units filing claims.[111] This preferential treatment is reflected in the Federal Rules of Bankruptcy Procedure,[112] which use the same defined terms as the Bankruptcy Code.[113] Typically, claims must be filed within seventy days of the debtor filing for bankruptcy.[114] However, governmental units have an additional 110 days to file their claims.[115] Unlike other creditors, when governmental units cannot meet their deadlines, they can request extra time to file their claims.[116] Governmental units are afforded similar extra time to file claims for administrative expenses if a case converts into a Chapter 7 case.[117] Additionally, governmental units are relieved from requirements to make certain filings and disclosures.[118] These relaxed procedural requirements make it simpler for governmental units to participate in bankruptcy cases.

The major disadvantage of being a governmental unit is that governmental units cannot file for bankruptcy.[119] Municipalities are the main exception to this rule.[120] They may file under Chapter 9 of the

106. *Id.* § 107(c)(2).

107. *Id.* §§ 704(a)(8), 1106(a)(6).

108. *Id.* § 1305. Those taxes would then be priority administrative expenses. *Id.* § 503(b)(1)(B)(i).

109. The code's prioritization of tax claims is consistent with the long history of insolvency law prioritizing taxes, in a wide range of legal systems. *See* Barbara K. Morgan, *Should the Sovereign Be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy*, 74 AM. BANKR. L.J. 461, 462–65 (2000). In common law countries this tradition dates all the way back to the Magna Carta. *Id.* at 463 n.4.

110. *See, e.g.*, 11 U.S.C. § 502(b)(9).

111. *Id.*

112. *See* FED. R. BANKR. P. 3002(c).

113. FED. R. BANKR. P. 9001.

114. FED. R. BANKR. P. 3002(c).

115. *Id.*

116. *Id.* Governmental units must have cause to request an extension and must file requests before the original 180-day deadline. Gardenhire v. IRS (*In re* Gardenhire), 209 F.3d 1145, 1148 (9th Cir. 2000).

117. FED. R. BANKR. P. 1019(6).

118. FED. R. BANKR. P. 2019(b)(2)(D); 11 U.S.C. § 503(b)(1)(D).

119. *See* 11 U.S.C. § 109(a). Debtors must either be a person or a municipality. *Id.* In the Bankruptcy Code "person" excludes governmental units. *Id.* § 101(41).

120. *See* 6 COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 900.01.

Bankruptcy Code, a unique chapter designed for municipalities.[121] A few other minor burdens are placed on governmental units. For example, when a trustee requests a governmental unit to determine a debtor's tax liability, those taxes are discharged if the governmental unit does not respond within 180 days.[122] Also, the Code's prohibitions on discriminating against former debtors restrict governmental units more than private entities.[123]

The Bankruptcy Code favors governmental units by enabling them to exercise their police and taxation powers. However, the Code restricts governmental units as well. One of the most significant impositions is the Code's waiver of sovereign immunity. When viewed together, these privileges and the waiver of sovereign immunity can be seen as a "carefully calibrated" scheme that balances the necessities of the bankruptcy system with the typical functions of governments.[124]

II. TRIBAL SOVEREIGNTY AND SOVEREIGN IMMUNITY

A. Tribal Sovereignty and the Origins of Tribal Sovereign Immunity

Indian tribes have inherent sovereignty. Tribes existed as independent sovereigns who governed their lands and people long before contact with European colonists.[125] Indian tribes' powers to govern were not delegated to them by the Constitution and instead are derived from their inherent sovereignty.[126] Tribal sovereignty can be understood as "the full bundle of tribal powers contained in the concept of sovereignty that is understood around the world as nationhood."[127] This sovereignty was evident in the

121. *Id.* Potentially governmental units may also file for bankruptcy under Chapter 15 of the Bankruptcy Code. *See* 11 U.S.C. § 1501(c) (defining Chapter 15 eligibility without regard to being a governmental unit). *But see* 8 COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 1501.03 (describing debate over whether general eligibility requirements apply in Chapter 15); Tristan Axelrod & Fouad Kurdi, *Get Ready for Petro State Bankruptcy: Chapter 15 Debtor Eligibility in the Era of State Capitalism*, 2018 ANN. SURV. BANKR. L., 2018 NRTN-ASBL 11, West ("The statutory basis for Chapter 15 relief for any entity controlled by a foreign government is tenuous at best.").

122. 11 U.S.C. § 505(b)(2).

123. *See id.* § 525 (preventing governmental units from withholding licenses and permits from a debtor in addition to the lesser prohibitions placed on private actors); Burnett v. Stewart Title, Inc. (*In re* Burnett), 635 F.3d 169, 173 (5th Cir. 2011) (allowing private entities to deny employment based on prior bankruptcy whereas governmental units cannot deny employment on that basis).

124. *See* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689, 1697–98 (2023).

125. *See* Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 683 (2002); STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 81 (4th ed. 2012).

126. 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01[1][a] (Nell Jessup Newton ed., 2019), LexisNexis [hereinafter COHEN'S HANDBOOK].

127. Angelique A. EagleWoman, *Tribal Values of Taxation Within the Tribalist Economic Theory*, 18 KAN. J.L. & PUB. POL'Y 1, 2 (2008).

British Crown's treatment of Indian tribes as foreign nations and the historic American practice of signing treaties with Indian tribes.[128]

The Supreme Court first formally recognized tribal sovereignty in 1832 in *Worcester v. Georgia*.[129] In *Worcester*, Samuel A. Worcester was jailed for violating a Georgia law forbidding white people from residing in Cherokee territory.[130] He challenged the law, arguing that the Cherokee were sovereign and that Georgia's law infringed on that sovereignty.[131] In affirming the tribe's sovereignty and striking down Georgia's law, Chief Justice John Marshall noted, "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights."[132] Despite the original recognition of sovereignty, the Court has dramatically constrained tribal sovereignty concerning tribes' ability to self-govern.[133] However, courts have continually recognized one element of tribal sovereignty, tribal sovereign immunity.[134]

Tribes enjoy immunity to suit, like the immunity enjoyed by other sovereigns.[135] Tribal sovereign immunity "has long been recognized by all three branches of the federal government as an essential and inherent element of tribal sovereignty."[136] Though the Supreme Court did not mention tribal sovereign immunity by name, it afforded tribes immunity from suits as early as 1850.[137] Tribal sovereign immunity is a longstanding feature of American law, and the Supreme Court has a long history of affirming it.[138]

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128. Seielstad, *supra* note 125, at 684–85.

129. 31 U.S. (6 Pet.) 515, 559 (1832), *abrogated by* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022).

130. *Id.* at 537–38.

131. *Id.*

132. *Id.* at 559.

133. *See* Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751, 767–69 (2012). Tribal sovereignty has been diminished through stripping tribes of their ability to impose taxes and through the plenary powers doctrine. *See infra* notes 151–61 and accompanying text (describing plenary powers doctrine). *See generally* EagleWoman, *supra* note 127 (describing how reduction in tax jurisdiction infringes on tribal sovereignty).

134. *See generally* Seielstad, *supra* note 125 (reviewing history of tribal sovereign immunity and sovereignty and noting sovereign immunity has remained intact despite major contractions in tribal sovereignty).

135. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788–89 (2014).

136. Seielstad, *supra* note 125, at 683.

137. *See* Parks v. Ross, 52 U.S. (11 How.) 362, 374 (1851); Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 ARIZ. ST. L.J. 137, 148–55 (2004) (comparing *Parks* to recent tribal sovereign immunity cases).

138. *Bay Mills*, 572 U.S. at 804 (Sotomayor, J., concurring) (first citing *Parks*, 52 U.S. 362; then citing Struve, *supra* note 137, at 148–55; then citing William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1640–41 (2013); then citing United States v. U.S. Fid. & Guar. Co., 309 U.S. 506 (1940); then citing Puyallup Tribe, Inc. v. Dep't of Game of Wash., 433 U.S. 165 (1977); and then citing C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411, 418 (2001)).

B. The Value and Scope of Tribal Sovereign Immunity

Tribal sovereign immunity is fundamental to tribes' sovereignty and self-governance.[139] The immunity supports self-governance by "protect[ing] the integrity of the tribe, its ability to function, and its financial health."[140] Some tribes view sovereign immunity as vital for their economic development because it enables them to engage in business activities without the threat of costly litigation.[141] The ability of tribes to engage in commercial activity to raise revenues is crucial, given the impediments tribes face in raising tax revenue.[142]

Tribal sovereign immunity is broad. Tribes enjoy the same "common-law immunity from suit traditionally enjoyed by sovereign powers."[143] This means tribes enjoy immunity from suits and legal process in state and federal courts.[144] Tribal sovereign immunity extends from Indian tribes to officials acting within the scope of tribal authority and to "arms of the tribes."[145] Tribal sovereign immunity even protects commercial activity, whether or not that activity occurs on Indian tribal land.[146]

Courts limit the extension of tribal sovereign immunity to commercial entities to "arm[s] of the tribe."[147] *Breakthrough* sets out an influential test to determine when a commercial entity is an arm of the tribe.[148] The test focuses on the relationship between the entity, the tribe, and the tribe's

139. *See Bay Mills*, 572 U.S. at 788.

140. PEVAR, *supra* note 125, at 308.

141. *See* Brief for The Navajo Nation et al. as Amici Curiae Supporting Petitioner at 5–6, Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689 (2023) (No. 22-227).

142. *Id.* at 6; *see also Bay Mills*, 572 U.S. at 810–11 (Sotomayor, J., concurring) (describing impediments to tribes imposing taxes).

143. *Bay Mills*, 572 U.S. at 788 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)).

144. *See* 1 COHEN'S HANDBOOK, *supra* note 126, § 7.05[1][a].

145. *Id.*

146. *Bay Mills*, 572 U.S. at 790 (citing Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 758 (1998)).

147. Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1185 n.9 (10th Cir. 2010) (quoting Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006)).

148. People *ex rel.* Owen v. Miami Nation Enters., 386 P.3d 357, 367 (Cal. 2016) (noting the influence of *Breakthrough*). *But see* Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp., 25 N.E.3d 928, 941 (N.Y. 2014) (Rivera, J., dissenting) (noting majority opinion contradicts *Breakthrough*).

The *Breakthrough* test itself considers:

> (1) the method of the [entities'] creation; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the Tribe has over the entities; (4) whether the Tribe intended for them to have tribal sovereign immunity; (5) the financial relationship between the Tribe and the [entities]; and (6) whether the purposes of tribal sovereign immunity are served by granting them immunity.

Breakthrough, 629 F.3d at 1191. The Fourth, Seventh, and Ninth Circuits use a similar test that excludes the sixth factor. Williams v. Big Picture Loans, LLC, 929 F.3d 170, 177 (4th Cir. 2019); Mestek v. Lac Courte Oreilles Cmty. Health Ctr., 72 F.4th 255, 259 (7th Cir. 2023); White v. Univ. of Cal., 765 F.3d 1010, 1025 (9th Cir. 2014).

sovereignty. This limitation on the extension of sovereign immunity has prevented non-tribal businesses from paying a nominal fee to a tribe to effectively rent that tribe's immunity.[149] The extension of tribal sovereign immunity to commercial entities is relevant in the context of bankruptcy because those entities may become a party to a bankruptcy case. For example, the cases addressing whether the Bankruptcy Code abrogates tribal sovereign immunity involved a tribe-owned payday lender and a tribe-run casino.[150]

C. Congress's Authority to Abrogate Tribal Sovereign Immunity

Despite the importance of tribal sovereign immunity, Congress has plenary authority to abrogate that immunity and allow suits against Indian tribes.[151] This power has been criticized, but the Supreme Court has continually recognized Congress's authority to abrogate tribal sovereign immunity.[152] This power is part of Congress's plenary power to legislate "on health, safety, and morals within Indian country, similar to the states' police powers over non-Indians."[153]

The Court has continually reaffirmed the plenary powers doctrine. The Court did so in *Haaland v. Brackeen*, which was decided on the same day as *Coughlin*.[154] In *Brackeen*, the Court reviewed a century-long line of cases holding that Congress has plenary authority to legislate concerning Indian tribes.[155] The Court found that Congress's power here is so "muscular" that it supersedes tribal and state authority.[156] Though unable to identify a single source of the plenary powers, the Court noted that these powers derive from the Indian Commerce Clause, the Treaty Clause, the structure of the Constitution, and the "trust relationship between the United States and the Indian people."[157]

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149. *See* Martin, *supra* note 26, at 166–70.

150. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689, 1694 (2023); Buchwald Cap. Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (*In re* Greektown Holdings, LLC), 917 F.3d 451, 466 (6th Cir. 2019), *overruled in part by Coughlin*, 143 S. Ct. 1689.

151. *Bay Mills*, 572 U.S. at 790. Congress has abrogated tribal sovereign immunity in a variety of contexts, including to allow the Navajo and Hopi tribes to sue each other in federal court, to allow suits for certain violations of the Safe Drinking Water Act, and to allow states to sue tribes under the Indian Gaming Regulatory Act of 1988. PEVAR, *supra* note 125, at 308–09.

152. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); *Bay Mills*, 572 U.S. at 790.

153. COHEN'S HANDBOOK, *supra* note 126, § 5.02[1].

154. *See Coughlin*, 143 S. Ct. at 1689; Haaland v. Brackeen, 143 S. Ct. 1609, 1627–29 (2023). In *Brackeen* the Court found Congress had the power to enact the Indian Child Welfare Act under the plenary powers doctrine. *Id.*

155. *Brackeen*, 143 S. Ct. at 1627.

156. *Id.* (citing *Santa Clara Pueblo*, 436 U.S. at 56).

157. *Id.* at 1628 (quoting United States v. Mitchell, 463 U.S. 206, 225–26 (1983)).

Supreme Court Justices and academics alike have criticized the plenary powers doctrine.[158] Justices Gorsuch and Thomas have argued that the plenary powers doctrine was judicially invented and is not grounded in the Constitution.[159] Some scholars have argued that this invention arose to permit Congress's "sharp, historic rupture" in policy from using diplomacy to regulate affairs with Indian tribes to using legislation.[160] Professor Maggie Blackhawk notes, "[t]he plenary power doctrine had also been used in the twentieth century to justify abuse by the courts."[161]

Despite criticisms, the Supreme Court considers Congress's plenary power to abrogate tribal sovereign immunity settled.[162] To abrogate sovereign immunity, Congress "must 'unequivocally' express that purpose."[163] However, Congress does not have to use any particular words to abrogate sovereign immunity.[164] The Supreme Court has explained:

> Although this canon of interpretation requires an unmistakable statutory expression of congressional intent to waive the Government's immunity, Congress need not state its intent in any particular way. We have never required that Congress use magic words. To the contrary, we have observed that the sovereign immunity canon "is a tool for interpreting the law" and that it does not "displac[e] the other traditional tools of statutory construction."[165]

158. *E.g.*, Adoptive Couple v. Baby Girl, 570 U.S. 637, 659 (2013) (Thomas, J., concurring); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 36 (1996) (questioning constitutionality of plenary power doctrine); PEVAR, *supra* note 125, at 58 (noting lack of basis in the Constitution and summarizing similar critiques by scholars).

159. *Adoptive Couple*, 570 U.S. at 659 (Thomas, J., concurring) ("[N]either the text nor the original understanding of the Clause supports Congress' claim to such 'plenary' power."); *Brackeen*, 143 S. Ct. at 1653 (Gorsuch, J., concurring) ("Notably, our founding document does not include a plenary federal authority over Tribes.").

160. Justin W. Aimonetti, *"Magic Words" and Original Understanding: An Amplified Clear Statement Rule to Abrogate Tribal Sovereign Immunity*, 2020 PEPP. L. REV. 1, 13; *see also* Seielstad, *supra* note 125, at 686 (noting the Court's use of the doctrine after Congress's shift in policy).

161. Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1835 (2019).

162. *See* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790 (2014).

163. *Id.* at 790 (quoting C & L Enters., Inc. v. Citizen Band Potawatomi Tribe, 532 U.S. 411, 418 (2001)).

164. FAA v. Cooper, 566 U.S. 284, 291 (2012). *But see* Aimonetti, *supra* note 160, at 29–34 (arguing doubtful validity of plenary power doctrine justifies adopting magic words requirement to abrogate tribal sovereign immunity).

165. *Cooper*, 566 U.S. at 291 (quoting Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 589 (2008)). While *Cooper* concerned federal sovereign immunity, the same standard of interpretation applies to Indian tribes and other entities that assert sovereign immunity. Fin. Oversight & Mgmt. Bd. v. Centro De Periodismo Investigativo, Inc., 143 S. Ct. 1176, 1183 (2023).

Although it rejects requirements to use specific words, the Supreme Court had never found Congress intended to abrogate tribal sovereign immunity without explicitly mentioning Indian tribes before *Coughlin*.[166]

III. THE CIRCUIT SPLIT AND THE SUPREME COURT'S *COUGHLIN* OPINION

Before the Supreme Court held that the Bankruptcy Code abrogates tribal sovereign immunity, three circuits had weighed in on the issue. The Sixth Circuit held that the Bankruptcy Code does not abrogate tribal sovereign immunity.[167] In contrast, the First and Ninth Circuits held that the Bankruptcy Code does abrogate tribal sovereign immunity.[168] This Part summarizes these cases and their reasoning.

A. The Sixth Circuit's Greektown *Opinion*

In *Greektown*, the debtor, Greektown Holdings, owned a casino.[169] Greektown Holdings was owned and managed by the defendants (Sault Ste. Marie Tribe of Chippewa Indians) and its political subdivision (Kewadin Casinos Gaming Authority).[170] The bankruptcy estate's trustee alleged that the debtor's $177 million transfer to the defendants was a fraudulent transfer.[171] The defendants responded by asserting tribal sovereign immunity.[172]

The Sixth Circuit held that the Bankruptcy Code does not abrogate tribal sovereign immunity.[173] It reasoned that Congress knew of existing precedent requiring an "unequivocal expression of congressional intent" based on cases decided shortly before the Bankruptcy Code was enacted.[174] The circuit noted, "there is not one example in all of history where the Supreme Court has found that Congress intended to abrogate tribal sovereign immunity *without* expressly mentioning Indian tribes somewhere in the statute."[175] Despite this, Congress included no provision of the

166. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689, 1704 (2023) (Gorsuch, J., dissenting) (quoting Buchwald Cap. Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (*In re* Greektown Holdings, LLC), 917 F.3d 451, 460 (6th Cir. 2019), *overruled in part by Coughlin*, 143 S. Ct. 1689).

167. *Greektown*, 917 F.3d at 467.

168. *Coughlin Circuit Opinion*, 33 F.4th at 603; Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1056 (9th Cir. 2004).

169. *Greektown*, 917 F.3d at 453.

170. *Id.* at 453–54.

171. *Id.* at 454–55. The trustee used § 550 of the Bankruptcy Code, which authorizes recovering fraudulent transfers. *See id.*; 11 U.S.C. § 550. The Code's waiver of sovereign immunity includes § 550. *Id.* § 106(a).

172. *Greektown*, 917 F.3d at 455.

173. *Id.* at 463.

174. *Id.* at 456.

175. *Id.* at 460 (quoting Meyers v. Oneida Tribe of Indians, 836 F.3d 818, 824 (7th Cir. 2016)).

Bankruptcy Code mentioning Indian tribes, leaving doubt as to whether Congress intended to abrogate tribal sovereign immunity.[176]

The Sixth Circuit framed its reasoning on whether Congress's intent was unequivocal, as opposed to whether tribes should be governmental units.[177] In framing its analysis this way, the Sixth Circuit rejected the argument that being a governmental unit might benefit tribes.[178] The circuit also reasoned that "Congress has shown *greater* respect for Indian tribes than for other sovereigns by *not* abrogating their immunity in the first place—and thus not necessitating the provision of any special rights."[179]

The circuit made a unique argument that the amount of debate between courts demonstrates that Congress was not unequivocal.[180] The circuit then discussed that debate by reviewing the Ninth Circuit's *Krystal* opinion and rejecting its reasoning.[181] It noted *Krystal* was the sole case where a court of appeals had found that Congress abrogated tribal sovereign immunity without explicitly mentioning Indian tribes.[182]

The Sixth Circuit then compared its case to *Meyers*.[183] In *Meyers*, the Seventh Circuit ruled that the Fair and Accurate Credit Transactions Act of 2003 (FACTA) did not abrogate tribal sovereign immunity.[184] The *Meyers* decision found that when FACTA made "any government" liable, Congress did not express the requisite unequivocal intent to abrogate tribal sovereign immunity.[185] The plaintiff in *Meyers* had argued for the Seventh Circuit to follow *Krystal* as the Bankruptcy Code's language abrogating sovereign immunity was equivalent to FACTA.[186] The Sixth Circuit extended the reasoning in *Meyers* (that a provision making "any government" liable did not abrogate tribal sovereign immunity) to the Bankruptcy Code, holding that Congress failed to express the requisite intent to abrogate tribal sovereign immunity.[187]

176. *Id.* at 461.

177. *Id.* at 459 ("The real question is whether Congress . . . unequivocally expressed an intent to abrogate tribal sovereign immunity.").

178. *Id.*

179. *Id.*

180. *Id.* at 457.

181. *Id.* at 457–60 (citing Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055 (9th Cir. 2004)).

182. *Id.* (citing Meyers v. Oneida Tribe of Indians, 836 F.3d 818, 826 (7th Cir. 2016)).

183. *Id.* at 458–59.

184. *Meyers*, 836 F.3d at 824–27.

185. *Greektown*, 917 F.3d at 459 (citing *Meyers*, 836 F.3d at 826).

186. *Id.* at 458 (citing *Meyers*, 836 F.3d at 826). Though *Meyers* discussed the Bankruptcy Code's waiver of sovereign immunity in *dicta*, the Seventh Circuit was explicitly "not 'weigh[ing] in' on the precise issue of 11 U.S.C. §§ 106, 101(27)." *Id.* at 459 (quoting *Meyers*, 836 F.3d at 826).

187. *Id.* at 459.

B. The First Circuit's and Ninth Circuit's Opinions in Krystal *and* Coughlin

The First and Ninth Circuits both held that the Bankruptcy Code abrogates tribal sovereign immunity.[188] As discussed above, the *Coughlin* case concerned a tribe-affiliated payday lender violating the automatic stay through its aggressive collection tactics to the point where the debtor attempted suicide.[189] In *Krystal*, Krystal Energy Co. filed for Chapter 11 bankruptcy.[190] As a part of its case, Krystal Energy Co. filed for a determination of taxes owed and for the turnover of certain assets from the Navajo Nation.[191] In both cases, the circuits found that Indian tribes are "domestic governments" under the definition of governmental unit, and so Congress had unequivocally expressed its intent to abrogate tribal sovereign immunity.[192]

The First Circuit noted that the plain meaning of the phrase "domestic government" would include Indian tribes, based on the meaning of the words "domestic" and "government."[193] The circuit noted that "there is no real disagreement that a tribe is a government."[194] It then reasoned tribes are domestic "because they 'belong[] or occur[] within the sphere of authority or control or the . . . boundaries of' the United States."[195]

Both circuits noted the historical use of the phrase "domestic dependent nations" to describe Indian tribes.[196] There is a long history of the Supreme Court describing Indian tribes as "domestic dependent nations," beginning with Chief Justice Marshall's first use of the phrase in 1831.[197] The Court has continued to use this phrase in recent cases concerning tribal sovereign immunity.[198] The circuits reasoned that based on the use of that phrase,

188. *Coughlin Circuit Opinion*, 33 F.4th at 603; Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1056 (9th Cir. 2004).

189. *Coughlin Circuit Opinion*, 33 F.4th at 604.

190. Krystal Energy Co. v. Navajo Nation (*In re* Krystal Energy Co.), 308 B.R. 48, 50 (D. Ariz. 2002), *rev'd and remanded sub nom.* Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055 (9th Cir. 2004).

191. *Id.* Section 542 requires the turnover of property to the estate. 11 U.S.C. § 542. Section 505 governs a governmental unit's determination of tax liability. *Id.* § 505(b)(2). The Bankruptcy Code waives sovereign immunity for both these sections. *Id.* § 106(a).

192. *Coughlin Circuit Opinion*, 33 F.4th at 605–06; *Krystal*, 357 F.3d at 1057–58.

193. *Coughlin Circuit Opinion*, 33 F.4th at 606.

194. *Id.* at 605.

195. *Id.* at 606 (ellipses in original) (quoting *Domestic*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 671 (1961)) (using definition 4a).

196. *Id.* at 606–07; *Krystal*, 357 F.3d at 1057–58 (first citing Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe, 498 U.S. 505, 509 (1991); and then citing Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991)).

197. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); *see also* COHEN'S HANDBOOK, *supra* note 126, § 2.02[2] (noting first use of "domestic dependent nation").

198. *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014) (quoting *Okla. Tax Comm'n*, 498 U.S. at 509).

Congress knew that courts considered Indian tribes domestic governments when it passed the relevant sections of the Bankruptcy Code.[199]

Alternatively, the Ninth Circuit argued that § 101(27) should be read expansively. The Ninth Circuit reasoned, "logically, there is no other form of government outside the foreign/domestic dichotomy, unless one entertains the possibility of extra-terrestrial states."[200] In that case, whether Indian tribes are foreign or domestic, they are governments and thus are governmental units.

The circuits also reasoned that Indian tribes are governmental units based on the usage of "governmental unit" throughout the Bankruptcy Code.[201] Both circuits noted that governmental units receive benefits throughout the Code.[202] Those benefits support Indian tribes' self-governance by empowering them to collect taxes and fines.[203]

The First Circuit disregarded the Sixth Circuit's countervailing *Greektown* precedent.[204] The First Circuit suggested that the Sixth Circuit required magic words, contrary to the Supreme Court's precedent.[205] *Greektown* purports not to require magic words by proposing that "Congress could avoid using the word tribe if it said that 'sovereign immunity is abrogated as to all parties who could otherwise claim sovereign immunity.'"[206] However, the First Circuit found that reasoning "goes astray because Congress essentially adopted that formulation."[207]

C. The Supreme Court's Decision in Coughlin

The Supreme Court affirmed the First Circuit's decision and found that the Bankruptcy Code abrogates tribal sovereign immunity.[208] The Court noted that to abrogate tribal sovereign immunity, Congress must express "its intent to abrogate in unequivocal terms."[209] Like the First and Ninth

199. *Coughlin Circuit Opinion*, *supra* note 2, at 606–07; *Krystal*, 357 F.3d at 1059.

200. *Krystal*, 357 F.3d at 1057. *But see* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689, 1707–09 (2023) (Gorsuch, J., dissenting) (noting the Court has, on occasion, treated Indian tribes as having a unique status that is neither foreign nor domestic).

201. *Coughlin Circuit Opinion*, 33 F.4th at 607–08; *Krystal*, 357 F.3d at 1060.

202. *Coughlin Circuit Opinion*, 33 F.4th at 607–08; *Krystal*, 357 F.3d at 1060.

203. *Coughlin Circuit Opinion*, 33 F.4th at 607–08; *Krystal*, 357 F.3d at 1060.

204. *Coughlin Circuit Opinion*, 33 F.4th at 608 (citing Buchwald Cap. Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (*In re* Greektown Holdings, LLC), 917 F.3d 451, 460–61 (6th Cir. 2019), *overruled in part by Coughlin*, 143 S. Ct. 1689).

205. *Id.* (first citing *Greektown*, 917 F.3d at 460–61; and then citing FAA v. Cooper, 566 U.S. 284, 291 (2012)).

206. *Id.* at 608 n.9 (quoting *Greektown*, 917 F.3d at 461 n.10).

207. *Id.* at 609 n.9.

208. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689, 1702 (2023).

209. *Id.* at 1694.

Circuits below, the Supreme Court focused its analysis on whether § 101(27)'s definition of a governmental unit included Indian tribes.[210]

Analyzing § 101(27), the Court noted that it "exudes comprehensiveness from beginning to end."[211] The long list of different types of governments, coupled with the phrase "foreign or domestic government[s]," should be read as including all governments.[212] The Court echoed the Ninth Circuit's argument that "foreign or domestic" must cover every type of government.[213]

The Court then argued that the structure of the Bankruptcy Code supports its reading of § 101(27).[214] It noted that the broad scope of the automatic stay is required to "facilitate the Code's 'orderly and centralized' debt-resolution process."[215] Although the stay is broad, limited exceptions exist that are "finely tuned to accommodate essential governmental functions."[216] The Court concluded that Congress did not indicate that certain types of governments should be excluded from this carefully calibrated scheme.[217]

Unlike in the lower courts, the *Coughlin* opinion did not distinguish whether Indian tribes were foreign or domestic.[218] Instead, the Court treated "foreign or domestic" as an expansive "catchall phrase" meant to capture all governments.[219] This interpretation follows the Bankruptcy Code's own rules of construction, which provide that "the word 'or,' as used in the Code, 'is not exclusive.'"[220] As a result, the Court concluded that the best reading of the definition of a governmental unit includes all governments.[221] Thus, "[t]he Code unequivocally abrogates the sovereign immunity of all governments, categorically."[222]

Finding that all governments are "governmental units," the Court turned to whether Indian tribes should be considered governments.[223] The Court

210. *See id.* at 1696–99.
211. *Id.* at 1696.
212. *Id.* (quoting 11 U.S.C. § 101(27)).
213. *See id.*; Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1057 (9th Cir. 2004).
214. *Coughlin*, 143 S. Ct. at 1697.
215. *Id.* (quoting 1 COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 1.01).
216. *Id.* at 1698.
217. *Id.*
218. *Compare id.* at 1696–97, *with Coughlin Circuit Opinion*, 33 F.4th at 605–07, *and Krystal*, 357 F.3d at 1057–59.
219. *Coughlin*, 143 S. Ct. at 1700–01. *But see id.* at 1710–12 (Gorsuch, J., dissenting) (arguing against this broad interpretation). In his dissent, Justice Gorsuch argued that the Bankruptcy Code's rules of interpretation should be read as a preference for reading "or" as inclusive. *Id.* He then listed a variety of other phrases where "or" should not be read as inclusive, such as "chocolate or vanilla ice cream." *Id.* at 1711. The majority opinion rebuked this argument noting, "these hypotheticals are not remotely analogous to 'foreign or domestic.' For one thing, the terms 'foreign' and 'domestic' are two poles on a spectrum." *Id.* at 1700 n.7 (majority opinion).
220. *Id.* at 1700 (quoting 11 U.S.C. § 102(5)).
221. *Id.* at 1698.
222. *Id.*
223. *Id.*

found that Indian tribes are governments, noting neither party would dispute that.[224] Tribes have the power to exercise governmental functions, like making laws.[225] The Court listed numerous examples where it and Congress recognized Indian tribes as governments.[226] The Court rejected the petitioner's argument that Congress must mention Indian tribes by name to abrogate their immunity, recognizing that this would be a magic words requirement.[227] Because Congress's definition of governmental units includes Indian tribes and the Code unequivocally abrogates the sovereign immunity of governmental units, the Court held that the Bankruptcy Code abrogates tribal sovereign immunity.[228]

IV. THE BANKRUPTCY CODE ABROGATES TRIBAL SOVEREIGN IMMUNITY

The Supreme Court was correct in *Coughlin*. The Bankruptcy Code waives sovereign immunity for governmental units. The decision was correct regarding the statutory interpretation of the definition of a governmental unit. A thorough review of the use of "governmental unit" throughout the Bankruptcy Code demonstrates Congress's goal to balance governmental units' sovereignty with bankruptcy law concerns. This review confirms that Indian tribes must be governmental units, so their sovereign immunity is abrogated.

A. The Bankruptcy Code's Waiver of Sovereign Immunity and Definition of Governmental Unit Abrogate Tribal Sovereign Immunity

Congress's intent to abrogate sovereign immunity is evident from using the phrases "sovereign immunity" and "abrogated" in the Bankruptcy Code.[229] The Code explicitly abrogates sovereign immunity for governmental units. So, the relevant question here is whether Indian tribes

224. *Id.*

225. *Id.* (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55–56 (1978)).

226. *Id.* at 1698 & n.3 (first citing Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788–89 (2014); then citing *Santa Clara Pueblo*, 436 U.S. at 57–58; then citing Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, § 104(a)(1), 88 Stat. 2203, 2207 (1975); then citing Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, § 202(2), (5)(A), 108 Stat. 4270, 4271; and then citing Compact of Self-Governance Between the Duckwater Shoshone Tribe and the United States of America art. I, § 2(c), Sept. 1995, https://www.tribalselfgov.org/slug/1995-self-governance-compact-duckwater-shoshone-tribe/ [https://perma.cc/93Z4-A6AF]).

227. *Id.* at 1699.

228. *Id.* at 1698–99.

229. Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1059–60 (9th Cir. 2004). Notably, the title of the relevant section is "Waiver of sovereign immunity." 11 U.S.C. § 106. This is not like cases where Congress's intent to abrogate sovereign immunity was a question. *E.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (finding a general authorization for suit is insufficiently unequivocal to abrogate sovereign immunity), *superseded by statute*, Rehabilitation Act Amendments of 1986, Pub L. No. 99-506, § 1003, 100 Stat. 1807, 1845.

are governmental units. *Coughlin* correctly answered this question. The Code's preference for using the inclusive "or" and the expansive language of the definition require finding that all governments are governmental units.[230] Indian tribes are governments. Indian tribes call themselves governments.[231] Though tribal nations vary in form, they maintain the power to create and enforce laws.[232] The basis for tribal sovereign immunity is inextricably tied to tribes' status as sovereign governments.[233] Indian tribes must be considered governments and, therefore, governmental units. As such, their sovereign immunity is abrogated by the Bankruptcy Code.

B. Reading the Bankruptcy Code as a Whole

The Court touched on how the Bankruptcy Code's broader structure supports its finding.[234] A more thorough review of the term's use throughout the Code confirms that Indian tribes are governmental units. This kind of review may be the best way to understand the meaning of defined terms in the Bankruptcy Code. The Supreme Court has emphasized the importance of interpreting terms in the Bankruptcy Code by considering their use throughout. [235] While interpreting the Code, the Court has noted:

> A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.[236]

Thus, interpreting "governmental unit" requires looking at its use throughout the Code.

This holistic review is critical considering the Code's pervasive use of "governmental unit." The term is used in twenty-two sections of the

230. 11 U.S.C. § 102(5) (stating that in Title 11 "'or' is not exclusive"); *see id.* § 101(27).

231. *See* NAT'L CONG. OF AM. INDIANS, TRIBAL NATIONS AND THE UNITED STATES 18–22 (2020), https://archive.ncai.org/tribalnations/introduction/Indian_Country_101_Updated_February_2019.pdf [https://perma.cc/J9PL-KW9M] (describing Indian tribes as nations and governments).

232. *Id.* at 10–15 (reviewing various tribal governments).

233. *See* COHEN'S HANDBOOK, *supra* note 126, § 7.05[1][a] (describing tribal sovereign immunity as reflecting "treatment of Indian tribes as governments in the Indian [C]ommerce [C]lause" (italics omitted)).

234. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689, 1697–98 (2023).

235. *See* United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371–73 (1988).

236. *Id.* at 371 (citations omitted); *see also* Rake v. Wade, 508 U.S. 464, 474–75 (1993) (following the *Timbers* approach and reviewing the use of a phrase throughout Chapter 13), *superseded by statute*, Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 305(c), 108 Stat. 4106, 4134.

Bankruptcy Code.[237] The Federal Rules of Bankruptcy Procedure use the term in seven different rules.[238] Whether Indian tribes are governmental units affects their treatment under all these provisions.[239] The following Section considers the impact of excluding Indian tribes from being a governmental unit by reviewing many of these provisions. This analysis shows a clear legislative intent to treat Indian tribes as governmental units. If tribes were not governmental units, the Code would produce the incompatible effect of disrespecting tribal sovereignty despite the Code's respect for sovereigns.[240]

C. What if Indian Tribes Were Not Governmental Units?

The application of the automatic stay to governmental units clarifies that Indian tribes are governmental units. If Indian tribes were not governmental units, then they could not use the exceptions to the automatic stay to exercise their police and taxation powers.[241] Though a tribe's retained sovereign immunity would prohibit lawsuits, it would not require that federal courts validate a tribe's illegal acts against the automatic stay.[242] In that hypothetical, most state and federal courts would treat tribes' regulatory enforcement efforts that violate the stay as void *ab initio*.[243] This would invalidate tribes' use of judicial process, foreclosures, repossessions, and

237. 11 U.S.C. §§ 101, 107, 346, 362, 502–503, 505, 507, 523, 525, 557, 704, 1106, 1129, 1141, 1146, 1222, 1231–1232, 1305, 1519, 1521.

238. *See* FED. R. BANKR. P. 1007, 1019, 2019, 3002, 3012, 4002, 5003. The Tenth Circuit's Bankruptcy Appellate Panel also has a local rule that uses the term. *See* B.A.P. 10th Cir. L.R. 8003-2.

239. The Sixth Circuit in *Greektown* had argued that tribes may be considered governmental units for some sections, but not the waiver of sovereign immunity. *See* Buchwald Cap. Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (*In re* Greektown Holdings, LLC), 917 F.3d 451, 461 (6th Cir. 2019), *overruled in part by Coughlin*, 143 S. Ct. 1689. However, this contradicts the Supreme Court's respect for defined terms, *see* Van Buren v. United States, 141 S. Ct. 1648 (2021), how the Court applies terms consistently in statutes, *see* Robers v. United States, 572 U.S. 639, 643 (2014), and how the Court interprets the Bankruptcy Code, *see Rake*, 508 U.S. at 474–75; *Timbers*, 484 U.S. at 371–73.

240. This analysis is not a comparison of whether sovereign immunity or being a governmental unit is more valuable. What it shows is that it would be incoherent for the Code to exclude tribes from being governmental units, given the Code's respect for sovereigns. In terms of relative value, the tribes that voiced their opinion on this case valued their sovereign immunity over being a governmental unit. *See* Transcript of Oral Argument at 28–29, Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689 (2023) (No. 22-227). *See generally* Brief for The Navajo Nation et al., *supra* note 141 (arguing costs of losing tribal sovereign immunity in bankruptcy are high).

241. 11 U.S.C. § 362(b)(4), (9), (18), (26).

242. *See In re* Montoya, 547 B.R. 439, 446 n.8 (Bankr. D.N.M. 2016) (tax lien void regardless as to whether Indian tribe was sovereignly immune).

243. *See id.*; Tobar, *supra* note 48, at 4 n.5; Kalb v. Feuerstein, 308 U.S. 433, 438–39 (1940) (finding violation void under prior bankruptcy regime).

other debt collection efforts to enforce tribal law.[244] Effectively, Indian tribes could not use state or federal courts to enforce their police power.

Indian tribes could not even avoid the stay by using their own tribal courts. Cases related to an ongoing bankruptcy are removable to the federal district court handling said bankruptcy.[245] There is an exception to prevent removal, but only governmental units can use it.[246] So, if Indian tribes were not a governmental unit, any case they brought related to an ongoing bankruptcy would be removable to federal court, even if the case originated in tribal court. The automatic stay will limit those cases once brought into federal court. This means tribes could not use courts and would be limited to using extra-judicial methods—like the aggressive debt collection in *Coughlin*—to enforce their regulations. Congress could not have intended to prevent tribes from using the courts to enforce their laws and to make bankruptcy a haven to avoid tribal law.

If Indian tribes were not governmental units, they would also be unable to receive the priority claims afforded to governmental units for taxes and fines.[247] These provisions make it far easier for governmental units to receive compensation for taxes and fines during a bankruptcy case.[248] For example, in Chapter 7 cases, these claims are paid before non-priority claims.[249] In Chapter 11 cases, the plan must provide special treatment for these claims.[250] If Indian tribes were not a governmental unit, their ability to collect taxes and fines would be impeded, undermining their ability to self-govern.

The Bankruptcy Code also preserves the ability of governmental units to collect taxes and enforce fines by preventing fines and taxes from being discharged.[251] If Indian tribes were not governmental units, taxes and fines

244. *See, e.g.*, Ellis v. Consol. Diesel Elec. Corp., 894 F.2d 371, 371 (10th Cir. 1990) (void judgement); 48th St. Steakhouse, Inc. v. Rockefeller Grp., Inc. (*In re* 48th St. Steakhouse, Inc.), 835 F.2d 427, 431 (2d Cir. 1987) (void lease cancelation); Smith v. First Am. Bank (*In re* Smith), 876 F.2d 524, 525 (6th Cir. 1989) (void sale of collateral); Schwartz v. United States (*In re* Schwartz), 954 F.2d 569, 570 (9th Cir. 1992) (void tax penalty).

245. *See* 28 U.S.C. §§ 1334, 1452(a). Multiple cases in tribal courts have been removed to federal court under these provisions. *See, e.g.*, Adams v. Grand Traverse Band of Ottawa & Chippewa Indians Econ. Dev. Auth. (*In re* Adams), 133 B.R. 191, 193–95 (Bankr. W.D. Mich. 1991); Chickaway v. Bank One Dayton, N.A., 261 B.R. 646, 648–49 (S.D. Miss. 2001).

246. 28 U.S.C. § 1452(a) (excepting proceedings "by a governmental unit to enforce such governmental unit's police or regulatory power" from removal). "Governmental unit" is used in this section as defined in the Bankruptcy Code. *See* Mayor of Balt. v. BP P.L.C., 31 F.4th 178, 224 (4th Cir. 2022). This exception to removal reflects the exception to the automatic stay for governmental units enforcing their police power. *See* 11 U.S.C. § 362(b)(4).

247. *See* 11 U.S.C. §§ 503(b)(1), 507(a)(2), (8).

248. *See supra* notes 95–100 and accompanying text.

249. *See* 11 U.S.C. § 726.

250. *See id.* § 1129(a)(9).

251. *See id.* § 523(a)(1), (7).

owed to tribes would be discharged.[252] Tribes would violate the discharge injunction if they pursued discharged taxes and fines at the successful conclusion of the bankruptcy case.[253] Federal courts generally view violations of the discharge as being void, like violations of the automatic stay.[254] Between the impact of the discharge and the automatic stay, once a debtor filed for bankruptcy, nearly any legal action by the tribe outside the bankruptcy court would be void.[255] Tribes would be limited to participating in the bankruptcy case to pursue those taxes and fines. In contrast, as a governmental unit, tribes can continue to pursue those debts for taxes and fines post-bankruptcy.[256] Excluding Indian tribes from being a governmental unit would limit the ability of tribes to pursue fines and tax debts outside of the bankruptcy courts. Such an interpretation would be inconsistent with the Bankruptcy Code's support for sovereigns.

Governmental units also receive procedural benefits in bankruptcy.[257] The Federal Rules of Bankruptcy Procedure exclude governmental units from certain disclosure requirements and provide them with extended deadlines.[258] Other procedural provisions support governmental units' regulatory and police power, such as their ability to access non-public filings.[259] Governmental units' taxation efforts are also supported by requirements for bankruptcy trustees to file tax returns.[260] If tribes were not governmental units, they could not take advantage of these privileges that support their ability to regulate and tax.

Collecting taxes is already challenging for Indian tribes. Tribes face a "double taxation" problem where states may tax the same activity as the tribes.[261] This discourages businesses from operating on tribal land and reduces tax revenue.[262] The Supreme Court has also limited tribes' ability

252. *See id.* §§ 523(a)(1), (7), 524; *supra* notes 101–04 and accompanying text (describing non-dischargeable debts held by governmental units).

253. 11 U.S.C. § 524.

254. *See* Hamilton v. Herr (*In re* Hamilton), 540 F.3d 367, 374–76 (6th Cir. 2008) (finding state-court judgement which violated discharge was *void ab initio*).

255. *See id.*; *In re* Montoya, 547 B.R. 439, 446 (Bankr. D.N.M. 2016). The stay continues from the start of the bankruptcy case until the case is dismissed, closed, or the debtor receives a discharge. *See* 3 COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 362.06. Effectively, if a discharge is granted, debtors are continually protected from collection efforts of discharged debts from when they originally filed their petition.

256. *See* 11 U.S.C. § 523.

257. *See supra* notes 110–18 and accompanying text.

258. *See* FED. R. BANKR. P. 2019(b)(2)(D), 3002.

259. 11 U.S.C. § 107(c)(2).

260. *Id.* §§ 704(a)(8), 1106(a)(6).

261. Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 771 (2004).

262. *Id.*

to tax non-tribe members on tribal reservations.[263] However, tribes have not given up on taxation. Tribes continue to express strong desires for legislation to improve their ability to collect taxes.[264] Despite limitations, many tribes continue to use taxes to regulate and promote economic development.[265] The Supreme Court has recognized that the "power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government."[266] If tribes were not governmental units, it would limit their ability to tax, further eroding this core element of their sovereignty. This would be incompatible with the Code's respect for sovereigns and cannot be the correct interpretation.

Being a governmental unit does have a major disadvantage aside from the abrogation of sovereign immunity. Being a governmental unit limits tribes' ability to file for bankruptcy as a debtor. The only governmental units that may file for bankruptcy are municipalities and foreign governments.[267] Indian tribes are neither, so they are ineligible to file.[268] There are steps tribes can take to use the bankruptcy system. Tribal corporations and other entities owned by tribes have routes to file for bankruptcy.[269] These entities may be persons under the Bankruptcy Code and, therefore, eligible to file as a debtor.[270]

The limitation on governmental units filing for bankruptcy prevents Indian tribes themselves from filing for bankruptcy.[271] This places Indian tribes on the same level as states. The inability of most governmental units

263. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 647 (2001); *see also* EagleWoman, *supra* note 127, at 12–15 (detailing history of state and federal encroachment onto tribal sovereignty within realm of taxation).

264. *See* Urging the Secretary of the Treasury to Assist in Ending Dual Taxation of Economic Activity in Indian Country, Nat'l Cong. of Am. Indians Res. #ABQ-19-015, at 3 (2019), https://archive.ncai.org/attachments/Resolution_LkQTZurnehEkDFmoZXhntmxoKQKEROQUbLLtflbXCHaDieVMCQd_ABQ-19-015.pdf [https://perma.cc/VWW6-A36F].

265. COHEN'S HANDBOOK, *supra* note 126, § 8.04[1] (first citing Bay Mills Indian Cmty. Use Tax on Accommodations §§ 1–4; then citing 105 Eastern Band of Cherokee Code §§ 1–37 (sales, hotel, lease, and gasoline taxes); then citing 4 Grand Traverse Band Code §§ 407–408 (sales and gasoline taxes); then citing Navajo Nation Code §§ 401–445, 601–624, 901–923 (sales, business activity, and fuel taxes); then citing Nisqually Tribal Code §§ 38.01–38.04 (tobacco taxes); then citing Sisseton-Wahpeton Sioux Ch. 67 (sales, services, use, motor fuel, cigarette, and possessory interest taxes); and then citing White Mountain Apache Bus. Code § 1.8 (business license tax)).

266. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).

267. *See* 11 U.S.C. §§ 109(a), 1501(c).

268. Indian tribes might be able to act like foreign governments and file under Chapter 15. *See generally* Blake F. Quackenbush, *Cross-Border Insolvency & the Eligibility of Indian Tribes to Use Chapter 15 of the Bankruptcy Code*, 29 T.M. COOLEY L. REV. 61 (2012).

269. *See* Laura N. Coordes, *Beyond the Bankruptcy Code: A New Statutory Bankruptcy Regime for Tribal Debtors*, 35 EMORY BANKR. DEVS. J. 363, 377 (2019).

270. *Id.*; *see also* Stephan A. Hoover, Comment, *Forcing the Tribe to Bet on the House: The Limited Options and Risks to the Tribe When Indian Gaming Operations Seek Bankruptcy Relief*, 49 CAL. W. L. REV. 269, 279–94 (2013) (reviewing bankruptcy treatment of various tribal business entities).

271. *See* Coordes, *supra* note 269, at 375.

to file for bankruptcy reflects that the bankruptcy system is not fit to review a sovereign's financial decisions.[272] The current bankruptcy system is a bad fit for overseeing sovereign governments.[273] In order to maintain the political independence of states and tribes, a new legal regime would need to be created to allow states to file for bankruptcy.[274] The existing ineligibility of governmental units is necessary to prevent federal overreach into the political independence of states and Indian tribes.

Reviewing the use of "governmental unit" throughout the Bankruptcy Code reveals how the Code balances sovereigns' concerns with the goals of bankruptcy law. Considering these policies, Congress must have intended to include Indian tribes as governmental units. Excluding tribes would limit their power to self-govern, disrespect tribal courts, and impose procedural burdens. Such a result would be inconsistent with the Code's carefully calibrated scheme to balance the power of sovereigns and cannot be the correct interpretation.

V. BALANCING TRIBAL SOVEREIGNTY AND THE BANKRUPTCY CODE

Coughlin balances tribal sovereignty with the goals of bankruptcy law. *Coughlin*'s constraint on tribal sovereign immunity in bankruptcy was warranted, given the broader concerns related to tribal payday lending and the need to balance the concerns of debtors and sovereigns.[275] Conscious of the importance of sovereign immunity, Congress limited the Bankruptcy Code's waiver of sovereign immunity, and *Coughlin* does not disturb the broader doctrine of tribal sovereign immunity.[276] To improve this balance in favor of Indian tribes, tribes can further flex their sovereignty by making laws with the understanding that bankruptcy courts will apply those laws. Bankruptcy Courts should empower this law as it is consistent with tribes' status as governmental units and sovereigns.[277]

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272. *See* Daniel Gill, *State Bankruptcies May Be Legal if System Structured Correctly*, BLOOMBERG L. (Apr. 23, 2020, 3:37 PM), https://news.bloomberglaw.com/bankruptcy-law/state-bankruptcies-may-be-legal-if-system-structured-correctly [https://perma.cc/56HC-PFVV] ("'How can you have independent review of government financial decisions?' [Professor Bruce] Markell asked. 'It's all political—where do you raise taxes or force concessions by creditor blocks, consisting primarily of bond holders, pension plans, and labor contracts?'").

273. *See generally* Anna Gelpern, *Bankruptcy, Backwards: The Problem of Quasi-Sovereign Debt*, 121 YALE L.J. 888 (2012) (discussing unique features of state "quasi-sovereign" debt and how bankruptcy can and cannot contribute to solving state debt problems).

274. *See* Gill, *supra* note 272; Coordes, *supra* note 269, at 402–15 (proposing debt relief legislation for Indian tribes). Some have criticized that if Congress were to allow states to file for bankruptcy, such a law would impermissibly interfere with state sovereignty. David A. Skeel Jr, *States of Bankruptcy*, 79 U. CHI. L. REV. 677, 707 (2012). However, a state bankruptcy law that ensures states have "principal decision-making authority" would likely be upheld. *Id.* at 710–11.

275. *Infra* Section V.A.

276. *Infra* Section V.B.

277. *Infra* Section V.C.

A. Balancing Tribal Sovereign Immunity with the Rights of Payday Loan Borrowers

The debt in *Coughlin* was one of many payday loans made by lenders associated with Indian tribes.[278] Tribal lending data is challenging to obtain because of limited disclosure requirements, but one expert estimated that tribes lent around $420 million in online payday loans in 2010, amounting to about 12,500 new loans monthly.[279] The most concerning version of tribal payday lending is called "rent-a-tribe."[280] This practice involves non-tribal lenders paying a nominal amount in exchange for using a tribe's sovereign immunity as "a legal shield against usury law, bankruptcy law, and other regulatory requirements."[281] In exchange for renting out their sovereignty, tribes receive minimal economic benefits, often "as little as 1 percent of the revenue."[282]

Payday loans provide borrowers with small amounts of cash lent at interest rates as high as 400–600%.[283] People seeking payday loans often have severe financial problems and limited access to credit.[284] These borrowers are more likely to be low-income earners and racial minorities.[285] Payday loans can exacerbate existing financial difficulties. Economists have estimated that when an individual receives a payday loan, it nearly doubles their likelihood of filing for bankruptcy.[286]

Considering the significant impact payday loans have on already distressed borrowers, bankruptcy courts must be able to address these loans.

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278. *See* Jessica Silver-Greenberg, *Payday Lenders Join with Indian Tribes*, WALL ST. J. (Feb. 10, 2011, 12:01 AM), https://www.wsj.com/articles/SB10001424052748703716904576134304155106320 [https://perma.cc/Q8DZ-G5CY] (describing prevalence of such loans).

279. *Id.*

280. Brief for NACBA et al. as Amici Curiae Supporting Respondent at 29, Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689 (2023) (No. 22-227).

281. *Id.*

282. Julia Harte & Joanna Zuckerman Bernstein, *Payday Nation*, AL JAZEERA AM. (June 17, 2014), http://projects.aljazeera.com/2014/payday-nation/index.html [https://perma.cc/UGP9-XH5K]; *see also* Martin, *supra* note 26, at 164–70. There are examples of short-term lending done by tribes that are not a rent-a-tribe scenario and that provide important economic resources to tribes. *See* Adam Crepelle, *Tribal Lending and Tribal Sovereignty*, 66 DRAKE L. REV. 1, 14–16 (2018).

283. Paige Marta Skiba & Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy?*, 62 J.L. & ECON. 485, 485–86 (2019). The loans at issue in *Coughlin* had an annual interest rate of 108%. Brief for NACBA et al., *supra* note 280, at 27. This is in violation of the local usury restrictions which limit interest rates to 20%. *Id.* (citing MASS. GEN. LAWS ch. 271, § 49(a) (2021)).

284. Skiba & Tobacman, *supra* note 283, at 513.

285. *See* PEW CHARITABLE TRS., PAYDAY LENDING IN AMERICA: WHO BORROWS, WHERE THEY BORROW, AND WHY 35 tbl.14 (2012), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf [https://perma.cc/7QXW-5ZD6] (comparing demographics of payday borrowers to the United States as a whole, revealing that racial minorities and low-income earners borrow from payday lenders at disproportionately high rates).

286. Skiba & Tobacman, *supra* note 283, at 486. *But see id.* at 513 (summarizing conflicting research on whether payday loans increase bankruptcy rates).

The facts of *Coughlin* exemplify the risk of a sovereignly immune payday lender violating the automatic stay and interfering with a bankruptcy case.[287] A sovereignly immune creditor can cut ahead of other creditors and profit from a debtor's misfortune.[288]

Other areas of consumer financial law have balanced concerns of tribal sovereign immunity with debtors' rights by limiting who can assert immunity.[289] The arm of the tribe test and the "true lender rule" have been applied against tribal payday lenders, primarily in the context of usury.[290] The rule requires courts to determine who the true lender is based on the substantive economic terms of the loan.[291] "If the true lender is not a tribe, there is no right to [sovereign] immunity."[292] Bankruptcy scholar Nathalie Martin argued that applying similar tools would have better addressed the issues in *Coughlin* by preventing abusive practices without constraining tribal sovereign immunity.[293] In most tribal payday lending arrangements, tribes do not risk their own capital and receive only one to five percent of profits.[294] Those lending businesses are not arms of the tribes.[295]

Initially, this solution is attractive. It would leave tribal sovereign immunity intact while preventing the worst abuses of the rent-a-tribe practice. However, it would have continued to allow identical practices as those in *Coughlin*, so long as tribes were the true lenders and those lenders were an arm of the tribe. Indeed, the lender in *Coughlin* would likely be considered an arm of the tribe.[296] Retaining tribal sovereign immunity in bankruptcy would continue to raise problems where an immune creditor could jump ahead of other creditors to the detriment of everyone else involved.[297]

Employing an arm of the tribe test may also be unfair to financially struggling debtors. Requiring payday borrowers to prove their lender was

287. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689, 1694 (2023).

288. *See* Martin, *supra* note 26, at 156 (describing opportunity to profit by avoiding automatic stay).

289. *See id.* at 176–78.

290. *See id.* at 176.

291. *See id.* at 176–82. There are three types of factors the courts have used to apply the true lender rule: "1. Which party exerts ownership and control over the loans and the loan enterprise; 2. Which party has the primary burden and risk of loss from the loan transactions; and 3. Which party receives most of the revenue generated by the loans and enjoys any potential upside." *Id.* at 178–79 (footnotes omitted).

292. *Id.* at 177.

293. *Id.* at 149–50, 164.

294. *Id.* at 167.

295. *Id.*

296. *See* Transcript of Oral Argument, *supra* note 240, at 19. Whether Lendgreen was an arm of the tribe was never formally briefed or argued. *Id.* at 20. But the Lac du Flambeau Band's lawyer noted during oral argument that this was not a case of rent-a-tribe and that Mr. Coughlin never alleged it was. *Id.* at 19–20.

297. *See* Martin, *supra* note 26, at 156.

not an arm of the tribe pushes procedural hurdles in front of already struggling borrowers. These hurdles can be costly to overcome. Some rent-a-tribe schemes have involved complex ownership and payment structures, requiring sophisticated legal work and months of discovery to untangle.[298] It is unfair and impractical to place this burden on struggling debtors as a threshold matter in bankruptcy controversies.

The Court in *Coughlin* was correct to directly answer whether tribes were a governmental unit because whether Indian tribes are a governmental unit has significant collateral effects. Whether tribes are governmental units impacts the enforcement of tribal laws and regulations, the collection of taxes, and tribes' procedural rights in bankruptcy court.[299] Furthermore, payday lending is not the only commercial activity by Indian tribes that may be a concern of bankruptcy courts. Tribal gaming is another prominent economic activity between Indian tribes and non-tribe members. In 2007, tribal gaming and casinos employed 670,000 people in twenty-eight states, 75% non-Indians.[300] These economic relationships could become issues in a bankruptcy case. Considering this broader impact, the Court was correct to directly decide whether tribal sovereign immunity was abrogated in bankruptcy.

B. Tribal Sovereign Immunity Remains Intact

Some may fear that *Coughlin* chips away at the larger doctrine of tribal sovereign immunity.[301] However, ruling that the Bankruptcy Code abrogates tribal sovereign immunity minimally reduces the immunity enjoyed by Indian tribes. The Ninth Circuit found that the Code's waiver of sovereign immunity is unique.[302] So, no other statutes should be affected by *Coughlin*. The Sixth Circuit had argued that finding the Bankruptcy Code abrogates tribal sovereign immunity would be equivalent to finding that a statute that abrogates sovereign immunity for "any government" abrogates

298. *See, e.g.*, Solomon v. Am. Web Loan, 375 F. Supp. 3d 638, 644–47 (E.D. Va. 2019) (involving three months of discovery and "extensive briefing").

299. *Supra* Section IV.C.

300. *See generally* ROBERT J. MILLER, RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 71 (2012).

301. *See* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689, 1704 (2023) (Gorsuch, J., dissenting) (noting this is first time Court ruled sovereign immunity abrogated without explicit mention of Indian tribes).

302. Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1059 (9th Cir. 2004) ("We can find no other statute in which Congress effected a generic abrogation of sovereign immunity and because of which a court was faced with the question of whether such generic abrogation in turn effected specific abrogation of the immunity of a member of the general class.").

tribal sovereign immunity.[303] The Sixth Circuit could only find FACTA as an example of such a statute.[304]

It is unclear whether FACTA abrogates tribal sovereign immunity. FACTA abrogates sovereign immunity by authorizing suit against "[a]ny person."[305] The act defines "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity."[306] The Supreme Court recently ruled that this was sufficient to abrogate the sovereign immunity of federal government agencies.[307] Although the analyses of sovereign immunity for tribes and government agencies are parallel, it is unclear if tribal sovereign immunity would be abrogated. At least Justice Gorsuch appears to be considering that different standards apply for Congress to abrogate the federal government's sovereign immunity as compared to the immunity of other sovereigns.[308] Also, it is unclear whether Indian tribes should be considered a government under FACTA because "person" lacks a broad definition like "governmental unit" in the Bankruptcy Code.[309] *Coughlin* may have made it more likely that FATCA abrogates tribal sovereign immunity, but that result is unclear. Otherwise, the impact of *Coughlin* is limited to bankruptcy.

Even within bankruptcy, *Coughlin* effects a limited abrogation of sovereign immunity. Section 106(a) waives sovereign immunity for a fixed, albeit significant, number of sections of the Bankruptcy Code.[310] Outside of those enumerated sections, sovereign immunity is untouched. Notably, sovereign immunity is preserved for claims that arose before the bankruptcy case, so governmental units can assert immunity against those claims.[311] The Code's waiver of sovereign immunity also does not waive immunity for punitive damages.[312]

303. Buchwald Cap. Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians (*In re* Greektown Holdings, LLC), 917 F.3d 451, 459 (6th Cir. 2019), *overruled in part by Coughlin*, 143 S. Ct. 1689.

304. *Id.* at 458.

305. 15 U.S.C. §§ 1681n, 1681o.

306. *Id.* § 1681a.

307. Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz, 144 S. Ct. 457 (2024).

308. *See* Transcript of Oral Argument at 34–36, Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz, 143 S. Ct. 2636 (2023) (No. 22-846) (contrasting Congress's ability to abrogate another sovereign's immunity with Congress abrogating its own sovereign immunity).

309. *Compare* 15 U.S.C. § 1681a ("any . . . government or governmental subdivision or agency"), *with* 11 U.S.C. § 101(27) ("United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States . . . , a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government").

310. *See* 11 U.S.C. § 106(a)(1).

311. 2 COLLIER ON BANKRUPTCY, *supra* note 27, ¶ 106.04[1].

312. 11 U.S.C. § 106(a)(3).

The limited abrogation of sovereign immunity in the *Coughlin* majority opinion starkly contrasts Justice Thomas's concurrence in the judgment.[313] Justice Thomas continues to argue that tribes should not have sovereign immunity for claims that concern commercial activity outside of Indian tribal land.[314] Thomas's view would tear up decades of precedent and stall economic development.[315] In rejecting this view, the majority refused to destroy tribal sovereign immunity. Instead, it only abrogated tribal sovereign immunity as provided in the Code.

Coughlin does not change the language Congress must use to abrogate sovereign immunity. Congress still needs to express its unequivocal intent to abrogate tribal sovereign immunity. *Coughlin* only clarifies that when Congress expressly abrogates sovereign immunity for a comprehensive list of governments, including any "other foreign or domestic government," Congress has made its intention to abrogate tribal sovereign immunity unequivocally clear.[316]

C. Empowering Tribal Law in Bankruptcy

The Bankruptcy Code is a carefully calibrated statutory scheme where the interests of sovereign governments often need to be balanced against the priorities of bankruptcy law.[317] Much of this balancing occurs within the Bankruptcy Code through the term "governmental unit." However, bankruptcy courts also manage this balance by applying state law, so long as there is no countervailing bankruptcy policy.[318]

Bankruptcy courts have applied this principle when considering issues where tribal law governs.[319] For example, multiple cases have addressed whether tribe members' rights to receive periodic payments from tribal

313. Lac du Flambeau Band of Lake Superior Chippewa Indian v. Coughlin, 143 S. Ct. 1689, 1702–03 (2023) (Thomas, J., concurring).

314. *Id.* at 1702 (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 815 (2014) (Thomas, J., dissenting)).

315. *See* Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 760 (1998) (holding tribal sovereign immunity covers off-reservation commercial activity); *Bay Mills*, 572 U.S. at 809–13 (Sotomayor, J., concurring) (describing need for tribes to raise funds commercially because of difficulty in raising tax revenues).

316. In fact, at least one circuit court has used the *Coughlin* opinion's description of the expansive "cover[] the waterfront" language defining governmental unit to demonstrate less expansive language is insufficient to abrogate tribal sovereign immunity. *See* Mestek v. Lac Courte Oreilles Cmty. Health Ctr., 72 F.4th 255, 259 (7th Cir. 2023) (quoting *Coughlin*, 143 S. Ct. at 1695, 1700 n.7).

317. *Coughlin*, 143 S. Ct. at 1701.

318. *See* Butner v. United States, 440 U.S. 48, 55 (1979).

319. *See, e.g.*, *In re* Musel, 631 B.R. 744, 748 (Bankr. D. Minn. 2021); Ho-Cak Fed. v. Herrell (*In re* DeCora), 396 B.R. 222, 225 (W.D. Wis. 2008).

gaming income are property.[320] In those cases, bankruptcy courts applied relevant tribal law.[321] However, in cases where tribal law has been unclear, bankruptcy courts have tended to follow state law.[322] To remedy any confusion, tribes can state whether these per capita payments are property rights in tribal laws.[323] That way, bankruptcy courts effectuate tribes' sovereign power.

To maximize their benefits from being a governmental unit in bankruptcy, tribes can create clear laws about their taxes and fines and assert those laws in bankruptcy courts. Recently, a bankruptcy court wanted to follow Blackfeet Nation law to determine the allowable amount of the tribe's priority tax claims.[324] Unable to find any relevant binding Blackfeet Nation law, the court relied on outside persuasive sources instead.[325] Ultimately, that court found that some of the tribe's claims were allowed as priority claims and others were not.[326]

Tribes can flex their sovereignty in bankruptcy by making law. Tribes can decide the best treatment of the rights that their laws create.[327] Crafting such laws may put tribes in a difficult position, where they must be responsive to internal and external concerns, but there is evidence that tribes can meet this challenge.[328] The *Eagle Bear* Court's treatment of the Blackfeet Nation was consistent with treating them as a governmental unit and a sovereign. Bankruptcy courts apply tribal law, as many have. Applying tribal law will allow tribes to exercise the full force of their taxes and regulations as governmental units. Treating tribes as sovereign governments means treating them as a governmental unit and empowering tribal law within bankruptcy courts.

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320. *See Musel*, 631 B.R. at 756; *DeCora*, 396 B.R. at 225. Many tribes that engage in gaming will pay each tribe member a part of gaming earnings as "per capita payments" which are an authorized use of gaming revenue under the Indian Gaming Regulation Act. *See* Adam Crepelle, *The Tribal Per Capita Payment Conundrum: Governance, Culture, and Incentives*, 56 GONZ. L. REV. 483, 493 (2020).

321. *See, e.g.*, *Musel*, 631 B.R. at 753 (applying the Pokagon Band's Revenue Allocation Plan); *DeCora*, 396 B.R. at 223 (applying Title 2, § 8 of the Ho–Chunk Nation Code).

322. Connor D. Hicks, *Without Reservation: Ensuring Uniform Treatment in Bankruptcy While Keeping in Mind the Interests of Native American Individuals and Tribes*, 28 FORDHAM J. CORP. & FIN. L. 341, 365 (2023); *see, e.g.*, *In re* Howley, 446 B.R. 506, 513 (Bankr. D. Kan. 2011).

323. Hicks, *supra* note 322, at 365.

324. *See In re* Eagle Bear Inc., 656 B.R. 249, 260–61 (Bankr. D. Mont. 2023).

325. *See id.*

326. *See id.* at 281.

327. In addition to the intrinsic value of self-governance, compelling evidence shows that tribal governments exercising their sovereignty to displace federal control improves economic development. *See* MILLER, *supra* note 300, at 141.

328. *See generally* Sandra Day O'Connor, Remarks, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1 (1997) (describing tribal court systems successfully balancing varying concerns). Improved legal clarity may also help tribes attract outside investment. *See* MILLER, *supra* note 300, at 96–108.

CONCLUSION

Coughlin correctly interpreted that "governmental unit" should be read broadly to include all governments, including Indian tribes. Reviewing the use of "governmental unit" throughout the Code confirms this is the correct interpretation. If tribes were not governmental units, the Bankruptcy Code would further interfere with tribal sovereignty by interfering with their rights to tax and enforce their police power. The Code carefully balances the concerns of sovereigns with the goals of bankruptcy law. This balance requires abrogating of sovereign immunity. However, that abrogation is not absolute. The Code's abrogation of sovereign immunity is limited, and *Coughlin* does not disturb the broader doctrine of tribal sovereign immunity. Treating tribes as sovereigns requires that they are governmental units and their sovereign immunity is abrogated. This places Indian tribes on the same level as other sovereigns to balance their police and taxation powers with the needs of the bankruptcy system. Part of ensuring that balance requires a limited abrogation of sovereign immunity. That way, when governmental units improperly collect debts or interfere with the bankruptcy system, debtors and creditors are treated fairly.

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