No. 22-227

In The Supreme Court of the United States

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

Petitioners,

v.

BRIAN W. COUGHLIN,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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The brief in opposition underscores the need for this Court's review. Respondent concedes the deepening of an "irreconcilable" circuit split on whether the Bankruptcy Code unequivocally abrogates tribal sovereign immunity. Respondent admits that the divided First Circuit's reversal of immunity has led the bankruptcy court to open discovery against Petitioners, among other real harms tribal sovereign immunity is meant to prevent. And Respondent acknowledges that the legal standard at issue has substantial bearing not only for the "importance of tribal immunity," but also "for other sovereigns including the federal and state governments." That confluence of factors demands a grant of certiorari—as another debtor represented by Respondent's counsel told the Court four Terms ago (in a petition dismissed upon settlement).

In opposing further review, Respondent distracts with a one-sided factual account that is irrelevant to the pure question of law at issue; with arguments downplaying the critical nature of tribal sovereign immunity that are at odds with this Court's decisions on tribal self-governance; and with pleas for further "percolation" that ignore that contentions on both sides of the issue have been fully ventilated (including in a lengthy dissent below). The only purported vehicle defect Respondent identifies is that this case comes to the Court in an "interlocutory posture." But the fact that the First Circuit denied immunity and that the bankruptcy court has declined to stay proceedings is more of a reason to grant review, not less, given this Court's long-held principle that tribal sovereign immunity is immunity from suit altogether.

Tellingly, Respondent devotes the bulk of his opposition to recycling the First Circuit's views on the merits. None of his arguments changes the undisputed fact that the Bankruptcy Code lacks any reference to tribes, let alone an unequivocal abrogation of tribal sovereign immunity. At a minimum, Respondent's misapprehension of this Court's precedents reinforces the need for review of the serious question presented.

I. RESPONDENT ACKNOWLEDGES A CLEAR CIRCUIT SPLIT

Respondent admits that "the First and Ninth Circuits now disagree with the Sixth Circuit" over the question presented. BIO 2. That reality of a deepening circuit conflict—indeed, one that is even broader than Respondent's characterization—is undeniable. Pet. 12-18.

1. The First Circuit's decision below recounts that "[t]wo of [its] sister circuits have already considered the question" of "whether the Bankruptcy Code abrogates tribal sovereign immunity" and have "reached opposite conclusions." Pet. App. 3a; *see Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004); *In re Greektown Holdings, LLC*, 917 F.3d 451 (6th Cir. 2019). The First Circuit expressly adopted the Ninth Circuit's established position in *Krystal Energy* that "the Bankruptcy Code unequivocally strips tribes of their immunity," Pet. App. 3a, before rejecting not only the Sixth Circuit's contrary conclusion in *In re Greektown Holdings* but also the Seventh Circuit decision upon which *In re Greektown Holdings* relied, Pet. App. 13a n.8 ("[W]e

reject [*Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818 (7th Cir. 2016),] for the same reasons we reject *Greektown*."). The Sixth Circuit, in turn, used the word "irreconcilable" to describe its disagreement with *Krystal Energy*. *In re Greektown*, 917 F.3d at 457.

Respondent's attempts to head off certiorari are unavailing. Aside from blithely suggesting the circuit conflict "may still resolve without this Court's intervention" because the Sixth Circuit "may yet change its contrary position through *en banc* review," Respondent simply calls for "further percolation." BIO 9-10. But further percolation is unnecessary in light of the unusually well-developed arguments on the question presented. The Ninth Circuit's decision in *Krystal Energy* dates back to 2004, and in the intervening years courts have either agreed or disagreed with the Ninth Circuit's reasoning, as the Sixth Circuit has catalogued. Pet. 30 (citing *In re Greektown Holdings*, 917 F.3d at 457 & nn.4-5). The First Circuit likewise added majority and dissenting opinions of considerable length covering the same central ground—and then some, as Respondent notes (BIO 10)—and ultimately picked one side of the circuit split.

A pending case in the Ninth Circuit illustrates the entrenched nature of the conflict. As here, the question presented there is whether tribal sovereign immunity bars enforcement of the Bankruptcy Code's automatic stay against a tribal corporation. "[T]he bankruptcy court explicitly relied on the controlling Ninth Circuit case, *Krystal Energy*, and held that the sovereign immunity defense was abrogated for [the

tribal corporation] as an Indian tribe." Appellee Br. 11, *NUMA Corp. v. Diven*, No. 22-15298 (9th Cir. July 18, 2022), ECF No. 16.

On a certified direct appeal to the Ninth Circuit, the debtor defended the judgment below by arguing:

- "[t]he matters *** are not new, and may be dispensed with by following *Krystal Energy*, the decades-old Ninth Circuit case on-point";
- *Krystal Energy*'s "logic has been applied by other Ninth Circuit courts in rejecting claims of sovereign immunity by Indian tribes";
- while the tribal corporation cited a "collection of district, bankruptcy appellate panel, and circuit cases in the Sixth, Seventh, and Eighth Circuits," the "First Circuit adopted the reasoning of the Ninth Circuit" and "courts in the Tenth Circuit have long held that Indian tribes could not assert sovereign immunity based on the language of § 106."

NUMA Br., *supra*, at 12, 17-20. The Ninth Circuit has signaled its agreement as to the developed nature of the legal landscape by expressing its "unanimous opinion" that "the decisional process would not be significantly aided by oral argument." Order, *NUMA Corp. v. Diven*, No. 22-15298 (9th Cir. Sept. 28, 2022), ECF No. 32.

Respondent is therefore wrong to paint (BIO 9, 12) *Krystal Energy* as an isolated decision that has not given rise to bankruptcy-related litigation, save for two other appeals. To be clear, because debtors may file bankruptcy cases in a venue different from where

a tribal creditor is located, *see* 28 U.S.C. § 1408, *Krystal Energy* does not govern just the 574 federally recognized Indian tribes (and countless tribal enterprises) that find themselves in the Ninth Circuit. BIO 12. And with several other courts embracing the Ninth Circuit's position, tribal creditors around the country have confronted—and will continue to confront—the stifling effects of *Krystal Energy*'s immunity-stripping holding. There can be no plausible dispute that *Krystal Energy* has spawned a circuit conflict ripe for this Court's review.

2. The acknowledged conflict between the First, Sixth, and Ninth Circuits is reason enough for this Court to grant review. But it also encompasses the Seventh Circuit's decision in *Meyers* and extends beyond the bankruptcy context—making this Court's intervention even more imperative. Pet. 16-18.

Although Respondent asserts that it would be "inaccurate[]" to include *Meyers* in the split, Respondent accepts that "*Meyers* criticized *Krystal Energy*" and that "the First Circuit in this case declined to follow the 'logic' of *Meyers*." BIO 10-11. The Sixth Circuit's decision in *In re Greektown Holdings*, by contrast, expressly embraced *Meyers*: the Sixth Circuit analyzed the immunity question as a choice between "two irreconcilable conclusions," represented by *Krystal Energy* and *Meyers*, and found *Meyers* "persuasive." 917 F.3d at 457-459. None of the courts of appeals to have resolved the question presented here believe *Meyers* to be inapposite.

If there were any doubt, the certiorari petition filed in *In re Greektown* on behalf of the debtor

(represented by Respondent's counsel in this case) should dispel it. According to that petition, which was later dismissed pursuant to a settlement, the "result" of *Krystal Energy*, *In re Greektown*, and *Meyers* "is a conceded circuit conflict on a pure question of federal statutory law." Petition for a Writ of Certiorari 2, *Buchwald Cap. Advisors LLC v. Sault Ste. Marie Tribe*, No. 18-1218 (U.S. Mar. 18, 2019). Indeed, *Meyers* "supports review, at a minimum, by confirming that the arguments supporting each side of the circuit conflict have been evaluated by multiple appellate courts, giving this Court confidence that it can expect to hear tested arguments on both sides of the issue." *Id.* at 14-15.

With the decision below, the circuit conflict has only deepened, and the arguments on both sides have only matured. Accordingly, Respondent's characterization (BIO 9) of a "recent and shallow" split unworthy of this Court's review is wishful thinking—and contradicts its counsel's assertions to this Court four Terms ago on the identical question presented.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

Unable to dispute the existence of an "irreconcilable" circuit split, Respondent devotes the bulk of his opposition to parroting the First Circuit on the merits. He acknowledges that courts may construe a statute to abrogate tribal sovereign immunity "only where Congress has 'unequivocally express[ed] that purpose.'" BIO 13 (alteration in original) (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 790 (2014)). But he urges that tribes "need[] some reason"

to establish their exclusion from § 101(27)'s catch-all phrase "other *** domestic government." BIO 18. Disregarding "other [clearer] phrases Congress might have used" if it had had tribal sovereign immunity in mind, *id.*, and ignoring alternative definitions, *see* Pet. App. 35a-36a, 39a (Barron, C.J., dissenting), Respondent embraces the First Circuit majority's blinkered logic that the term "domestic" necessarily "encompasses tribes because they are 'within the sphere of authority or control,' as well as within the 'boundaries,' of the United States," BIO 14.

Respondent offers two main "support[s] for [this] reading of 'domestic.'" BIO 14-16. Neither undermines the more natural conclusion that, given the absence of any reference to tribes in the text of the Bankruptcy Code and in light of the broader context, Congress did not provide the "perfect confidence" required to abrogate tribal sovereign immunity. *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989). Nor do Respondent's veiled policy contentions (BIO 16) about abrogation's supposed "benefits" for tribes "confirm[]" his interpretation. *See* pp. 11-12, *infra*.

1. Respondent relies heavily on *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831), characterizing Chief Justice Marshall's opinion as "holding that tribes were not 'foreign' precisely because they were 'domestic.'" BIO 17. Not so fast. *Cherokee Nation* holds that although the Cherokee Nation is "a state, as a distinct political society," the tribe is neither a "foreign state in the sense of the constitution," *nor* "a state of the union," but a "domestic dependent nation[]." 30 U.S. at 16-17. Respondent's reduction (BIO 17) of that highly qualified phrase apparently adopts the First

Circuit's understanding that "[d]ependent simply refers to a subset of nations or governments." Pet. App. 11a; *see id.* at 10a (equating "domestic governments" and "domestic dependent nations"). Yet *Cherokee Nation* employs the term to impart a more specialized meaning: tribes are "marked by peculiar and cardinal distinctions which exist no[]where else." 30 U.S. at 16.

Accordingly, it is irrelevant whether "it is not enough for *the Band* to assert *** that tribes are 'unique.'" BIO 18 (emphasis added). *This Court* has emphasized repeatedly, including before and at the time Congress enacted § 101(27) and amended § 106, that tribes "occupy a unique status under our law." *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985); *see* Pet. 20-22. That precedential backdrop renders dubious Respondent's and the First Circuit's binary reasoning that tribes must be wholly "domestic" because they are not wholly "foreign." *See Merck & Co. v. Reynolds*, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent.").

2. Respondent also draws "clear inference[s]" from the "context of the Bankruptcy Code." BIO 15-16. Beyond the fact that abrogation of tribal sovereign immunity "cannot be implied but must be unequivocally expressed," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), Respondent draws the wrong inferences. He cites "a long list of other types of governments and government agencies and instrumentalities" that precedes § 101(27)'s catchall phrase as evidence "that Congress intended to define

the term 'governmental unit' broadly to capture any form of government that might interact with a bankruptcy court." BIO 15. But Congress likely "included the list to make the general class more selective than the words that describe that class might otherwise suggest." Pet. App. 34a (Barron, C.J., dissenting); *see id.* at 35a-37a (noting "shared characteristic" that each "domestic" entity listed "traces its origin to the United States Constitution"). That narrowing construction is consistent with the fact that Congress amended § 106 in direct response to this Court's decisions requiring clearer language to abrogate only the federal government's and states' sovereign immunity. *See* Amicus Br. of Professors of Federal Indian Law 17-20.

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING AN UNMISTAKABLY IMPORTANT QUESTION

1. Respondent identifies but one purported vehicle defect: this case is "interlocutory." Nothing about that procedural posture counsels against review. Although Respondent predicts (BIO 10) that "fully developed facts" helpful to resolution of this case will emerge in ongoing bankruptcy court proceedings, those facts or proceedings obviously will have no bearing on the pure question of statutory interpretation the Petition cleanly presents. *See id.* (referencing "non-immunity grounds").

More fundamentally, the "interlocutory" posture underscores, not undermines, the need for immediate review from a certiorari perspective. "Sovereign immunity does not merely constitute a defense to

monetary liability or even to all types of liability. Rather, it provides an immunity *from suit*." *Federal Maritime Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 766 (2002) (emphasis added). The benefit of that immunity "is effectively lost if a case is erroneously permitted to go to trial." *Scott v. Harris*, 550 U.S. 372, 376 n.2 (2007). That is why this Court "repeatedly ha[s] stressed the importance of resolving immunity questions at the earliest possible stage in litigation," and "held that an order denying *** immunity is immediately appealable." *Id.*

The harms of disregarding those rules are real. Here, for example, after "request[ing] that [Petitioners] deposit $750,000 with the Bankruptcy Court," Respondent filed a motion that would have restrained the Band from making disbursements from its general fund to any "subdivision and arms"—a result that would jeopardize the Band's ability to operate critical reservation services. ECF No. 158, at 10-11. Although Respondent has since (tentatively) withdrawn that motion, Petitioners were forced to litigate the issue—on top of having to produce books and records in discovery—despite their immunity claim. That is plainly an "imped[iment] *** to participat[ing] in commerce." BIO 12.

2. Respondent also skirts this Court's understanding that "[d]etermining the limits on the sovereign immunity held by Indian tribes is a grave question." *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018); *see* Pet. 26-30. "The general importance of tribal immunity" is unquestionably a sufficient justification for granting certiorari. *Contra* BIO 11. *Upper Skagit*'s remand for

a state supreme court to decide certain arguments "in the first instance," highlighted by Respondent (*id.*), has no bearing here. The First Circuit's dueling opinions—following the well-trodden path already laid by other courts—fully addressed the question presented.

For the same reason, granting review in this case would not be "hast[y]" (BIO 11) in any sense. As discussed above (pp. 2-6, *supra*), the question presented has been surfacing in the courts of appeals for almost two decades, without resolution. And pending cases make clear that the issue will not abate—particularly because "the commercial activities of tribes have increased dramatically" in recent years, thereby "increas[ing]" the potential for "conflict" with tribal sovereign immunity. *Bay Mills,* 572 U.S. at 822 (Thomas, J., dissenting).

Respondent makes light of the sovereign interests at stake, which are directly related to "promot[ing] economic development and tribal self-sufficiency." *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.*, 523 U.S. 751, 757 (1998). In Respondent's view, tribes "are merely in the same position as the federal government and its agencies" and "as state governments and their agencies." BIO 12. That may be true insofar as immunity abrogation for those governmental entities is evaluated under the clear-statement rule, BIO 13, but that crossover on the merits only serves to broaden the ramifications of the question presented.

More importantly, Respondent ignores this Court's precedent recognizing that the *consequences* of

abrogating the immunity of tribes and hindering their economic development is different than for the federal government or states due to tribes' limited ability to raise revenues. *See Bay Mills*, 572 U.S. at 810-811 (Sotomayor, J., concurring) (discussing states' advantages over tribes in taxation); Amicus Br. of Native Am. Fin. Servs. Ass'n 8-9 & n.6. The concerns over finding an abrogation of tribal sovereign immunity in the Bankruptcy Code are not "overblown," BIO 12; they come from this Court and are echoed by *amici*. And while Respondent would use (BIO 12-13) the alleged facts of this case—which Petitioners dispute [1]—as an invitation to decline review so that suits (including his own) may continue to proceed against tribal enterprises in bankruptcy courts, this Court has consistently refused to let such policy judgments drive its decisionmaking on immunity. *E.g.*, *Bay Mills*, 572 U.S. at 800-801.

At a minimum, *both* debtors and tribal creditors share an interest in clarifying the Bankruptcy Code's immunity-abrogating scope. To quote the debtor's petition in *In re Greektown Holdings*:

> The question is important both because it recurs frequently in the bankruptcy courts and because it involves two weighty, competing interests: the

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[1] Respondent's portrayal overlooks, for example, that the types of loans at issue are critical for the millions of high-risk unbanked and underbanked U.S. households that otherwise would have no access to credit to cover unexpected obligations and emergencies. *See* FDIC, *2021 National Survey of Unbanked and Underbanked Households*, https://tinyurl.com/2p9753kj (updated Nov. 14, 2022).

> uniformity and integrity of the federal bankruptcy system on one hand, and the autonomy of tribal governments on the other. Review is warranted to resolve the disagreement among the circuits about how Congress struck that balance.

Buchwald Pet., *supra*, at 12. Respondent provides no reason to draw a different conclusion in this case; indeed, the First Circuit's considered but divided decision only heightens the need for this Court's review.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 22, 2022