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

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, NATIONAL CONSUMER LAW CENTER, AND NATIONAL ASSOCIATION OF CONSUMER ADVOCATES IN SUPPORT OF RESPONDENT

ALLISON M. ZIEVE
Counsel of Record
SCOTT L. NELSON
MICHAEL MIGIEL-SCHWARTZ
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org
Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Public Citizen is a nonprofit consumer advocacy organization with members in all fifty states. Since its founding in 1971, Public Citizen has worked before Congress, administrative agencies, and courts for enactment and enforcement of laws protecting consumers from unfair or deceptive practices, including predatory lending practices. Public Citizen has also long sought to preserve and expand access to courts for individuals harmed by corporate or government wrongdoing, and to maintain the federal courts' authority to provide appropriate redress efficiently and effectively. Accordingly, Public Citizen has a longstanding interest in the scope of government immunity from suit, which diminishes the ability of individuals injured by state actors to seek redress.

The National Consumer Law Center (NCLC) is a national research and advocacy organization focused on the legal needs of consumers, especially low-income and elderly consumers. For more than 50 years, NCLC has been the consumer-law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policymakers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned. NCLC publishes a series of twenty-one practice treatises and annual supplements on consumer credit laws, including *Consumer Bankruptcy Law and Practice* (13th ed. 2023).

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae made a monetary contribution to preparation or submission of the brief.

are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary practice or area of study involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members and consumers in the ongoing struggle to curb unfair and oppressive business practices.

Amici submit this brief because of their concern that interpreting the Bankruptcy Code to preserve tribal sovereign immunity would undermine the Bankruptcy Code's equal treatment of creditors and would stifle consumer debtors' ability to obtain finality and certainty from the bankruptcy process, to the particular detriment of low-income consumer debtors targeted by predatory lenders.

SUMMARY OF ARGUMENT

The Bankruptcy Code's automatic stay provision, 11 U.S.C. § 362(a), is "applicable to all entities"—whether private or governmental. The stay is also enforceable through a damages action by "an individual injured by any willful violation of a stay." *Id.* § 362(k)(1). And the Code broadly abrogates the sovereign immunity of all "governmental unit[s]" against actions to enforce a bankruptcy stay. *Id.* § 106(a). The question here is whether tribal creditors, alone among all sovereigns, have sovereign immunity from that enforcement mechanism.

This Court has made clear that Congress need not use "magic words" to effect a waiver of sovereign immunity. *FAA v. Cooper*, 566 U.S. 284, 291 (2012). Rather, the Court discerns the scope of Congress's

waiver "from the statutory text in light of traditional interpretive tools." *Id.* Although the Bankruptcy Code does not use the word "tribes," its text expressly states Congress's intent to abrogate the sovereign immunity of all "governmental unit[s]," 11 U.S.C. § 106(a), defined to include any "foreign or domestic government," *id.* § 101(27). An Indian tribal government falls within the ordinary meaning of that phrase: There can be no dispute that Congress recognizes tribal authorities as "governments," and tribal governments are plainly "domestic" because, as this Court has often stated, they govern "domestic dependent nations." *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014).

The purposes of bankruptcy and, in particular, the automatic stay confirm the plain meaning of the waiver. The automatic stay protects debtors, but just as importantly it "benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of the others." *City of Chicago v. Fulton*, 141 S. Ct. 585, 589 (2021). Reading "foreign or domestic government" to exclude tribes would make tribes the lone category of creditors not subject to the stay, thus undermining one of the fundamental protections provided by the bankruptcy laws.

Whether the Bankruptcy Code abrogates tribal sovereign immunity is of particular importance to low-income consumers because tribal sovereignty has increasingly been invoked in connection with payday and other high-cost consumer lending that can drive borrowers into bankruptcy. In recent years, non-tribal predatory lenders have sought out tribes to establish lending operations structured in ways that the lenders hope will insulate their activities from consumer

protection laws. Evidence suggests that, in many and likely most instances, the *non*-tribal entity controls the operations and the tribe receives only a small portion of the profits. In some cases, consumer debtors may eventually be able to prove that the true lender is a non-tribal entity not covered by tribal sovereign immunity. Doing so, however, requires discovery and litigation to resolve potential issues of fact—adding cost and taking time that is not practical in the context of the immediate stay needed to ensure the orderly functioning of the bankruptcy system. Allowing one set of creditors to ignore the stay with impunity would undermine the efficiency of a bankruptcy system premised on the requirement that all creditors—including government creditors—play by the same rules.

ARGUMENT

I. The Bankruptcy Code's plain language abrogates tribal sovereign immunity.

"Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Bay Mills*, 572 U.S. at 788 (citation omitted). As with other sovereigns, Congress may abrogate the tribes' sovereign immunity by "unequivocally express[ing] that purpose." *Id.* at 790 (internal quotation marks omitted). To do so, "Congress need not state its intent in any particular way" and is "never required" to use "magic words." *Cooper*, 566 U.S. at 291.

An abrogation of sovereign immunity is construed "in light of traditional interpretive rules." *Id.* The clear-statement rule for abrogation of sovereign immunity is one "canon of construction," applied along with "the other traditional tools of statutory construction." *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571,

589 (2008). If, after applying "traditional tools of statutory construction …, there is no ambiguity left for [courts] to construe," courts must apply a statute abrogating immunity as written. *Id.* at 590.

The Bankruptcy Code specifies that "sovereign immunity is abrogated as to a *governmental unit* to the extent set forth in this section with respect to" dozens of provisions of the Code, 11 U.S.C. § 106(a) (emphasis added), explicitly including section 362. Section 362 creates the automatic stay and authorizes bankruptcy courts to enforce it through actions for damages. *Id.* §§ 362(a), 362(k). Another Code provision defines "governmental unit" to mean "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." *Id.* § 101(27).

Traditional tools of statutory construction leave no doubt that tribes are "other … domestic government[s]" and that section 106(a) thus abrogates tribal sovereign immunity, thereby permitting actions against tribes to enforce the automatic stay. As sovereign authorities, tribes are both "domestic" and "governments."

"Domestic" means "belonging or occurring within the sphere of authority or control or the fabric or boundaries of [an] indicated nation or sovereign state." *Webster's Third New International Dictionary* 671 (1965); *see also Black's Law Dictionary* 500 (11th ed. 2019) ("Of or relating to one's own jurisdiction."). Tribes exist both within the geographical "boundaries"

of the United States and within its "sphere of authority." *See Bay Mills*, 572 U.S. at 788 ("[T]he tribes are subject to plenary control by Congress."); *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831) (Indian lands "compose a part of the United States" and are "within [its] jurisdictional limits"). In that way, tribes are "domestic" in the same way as states. *See Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991) ("Respondents argue that Indian tribes are more like States than foreign sovereigns. That is true in some respects: They are, for example, domestic."); *see also Bay Mills*, 572 U.S. at 808 (Sotomayor, J., concurring) ("Both States and Tribes are domestic governments."). That tribal governments are "domestic" is confirmed by this Court's longstanding description of tribes as "*domestic* dependent nations." *See, e.g.*, *Bay Mills*, 572 U.S. at 788 (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) (quoting *Cherokee Nation*, 5 Pet. at 17 (emphasis added)).

A "government" is "the organization, machinery, or agency through which a political unit exercises authority and performs functions." *Webster's Third New Int'l Dictionary* at 982; *see Black's Law Dictionary* (defining "government" as "[a]n organization through which a body of people exercise political authority; the machinery by which sovereign power is expressed"). Tribes as legal entities are governments, within the ordinary meaning of that term, as they exercise "sovereignty by way of tribal self-government and control over [many] aspects of [their] internal affairs." *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 425 (1989). Indeed, to be recognized as a "tribe" under federal law, a tribe must possess the attributes of government. *See*

25 C.F.R. § 83.11 (listing "criteria for acknowledgment as a federally recognized Indian tribe"). For example, a tribe must demonstrate that it maintains "political influence or authority," meaning use of "a council, leadership, internal process, or other mechanism as a means of influencing or controlling the behavior of its members in significant respects, making decisions for the entity which substantially affect its members, and/or representing the entity in dealing with outsiders in matters of consequence." *Id.* § 83.11(c).

Not surprisingly, then, Congress refers to tribes as "governments" in statutory text. *See*, *e.g.*, 25 U.S.C. § 3601(1) ("Congress finds and declares that there is a government-to-government relationship between the United States and each Indian tribe."); *id.* § 2011(b)(1) ("The United States acting through the Secretary and tribes shall work in a government-to-government relationship to ensure quality education for all tribal members."). The executive branch also recognizes tribes as governments.[2]

Because tribal governments are, unambiguously, domestic governments, the Bankruptcy Code's abrogation of tribal sovereign immunity is express.

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[2] *See, e.g.*, President's Memo on Relations with Tribal Governments, 1994 WL 157588 (Apr. 29, 1994) (referring to the federal government's "government-to-government relationship" with Native American tribes); *Roger St. Pierre and the Original Chippewa Cree of the Rocky Boy's Reservation v. Comm'r of Indian Affairs*, 9 IBIA 203, 215, 222 (1982) (same); *United Keetoowah Band of Cherokee Indians in Okla. v. Muskogee Area Director*, 22 IBIA 75, 83 (1992) (same).

II. Congress's decision to waive the immunity of all governments, including tribal governments, was necessary to the effective functioning of the bankruptcy system.

"One of the most important features of bankruptcy law is the stay of creditor actions that comes into effect automatically when a bankruptcy petition is filed." Robert E. Ginsberg, et al., *Ginsberg & Martin on Bankruptcy* § 3.01 (6th ed. 2023); *see In re Nicole Gas Prod., Ltd.*, 916 F.3d 566, 578 (6th Cir. 2019) (describing the automatic stay as "one of the most important and powerful features of the bankruptcy system"); *Price v. Rochford*, 947 F.2d 829, 831 (7th Cir. 1991) ("Section 362 is the central provision of the Bankruptcy Code."); *In re Cenargo Int'l, PLC*, 294 B.R. 571, 597 (Bankr. S.D.N.Y. 2003) (stating that the automatic stay is the "cornerstone" of the Bankruptcy Code). Aside from certain express exceptions, such as for collection of a domestic support obligation or the interception of a tax refund, "the petition 'operates as a stay, applicable to all entities,' of efforts to collect from the debtor outside of the bankruptcy forum." *City of Chicago*, 141 S. Ct. at 589 (quoting 11 U.S.C. § 362(a)); *see* 3 *Collier on Bankruptcy* ¶ 362.03 (16th ed. 2022) ("The stay of section 362 is extremely broad in scope and, aside from the limited exception of subsection (b), should apply to almost any type of formal or informal action against the debtor or property of the estate.").

The automatic stay has three basic purposes: "(1) to provide the debtor a breathing spell from his or her creditors by stopping all collection efforts; (2) to protect creditors from each other by stopping the race for the debtor's assets and preserving the assets for the benefit of all creditors; and (3) to provide for an

orderly liquidation or administration of the estate." *Matter of Cowin*, 864 F.3d 344, 352 (5th Cir. 2017) (citation and brackets omitted); *see City of Chicago*, 141 S. Ct. at 589 ("The automatic stay serves the debtor's interests by protecting the estate from dismemberment, and it also benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of the others."); *see also Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986) (describing the automatic stay as "one of the fundamental debtor protections provided by the bankruptcy laws" (quoting S. Rep. No. 95–989, at 54 (1978); H.R. Rep. No. 95–595, at 340 (1977)).

The automatic stay benefits all parties, including "by avoiding wasteful, duplicative, individual actions by creditors seeking individual recoveries from the debtor's estate." *In re Tribune Co. Fraudulent Conv. Litig.*, 946 F.3d 66, 76 (2d Cir. 2019); *see In re Fogarty*, 39 F.4th 62, 80 (2d Cir. 2022) (stating that section 362 "sets a bright-line rule that represents 'one of the fundamental debtor protections provided by the bankruptcy laws'"). The inclusiveness and enforceability of the automatic stay is key to its effectiveness. After all, Chapter 7 "[b]ankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race … by creditors for the debtor's assets prevents that." H.R. No. 95-595, at 340. If only some creditors are subject to the automatic stay, others may "destroy the bankrupt estate in their scramble for relief." *United States v. Inslaw, Inc.*, 932 F.2d 1467, 1473 (D.C. Cir. 1991).

Similarly, in a Chapter 13 bankruptcy, the ability of the debtor to make required payments under the

court-approved repayment plan, which is based on the debtor's disposable income, depends on the stay. *See* 11 U.S.C. § 1325(b)(1)(B) (stating that "the court may not approve the plan unless … the plan provides that all of the debtor's projected disposable income ... will be applied to make payments to unsecured creditors under the plan"). Exempting certain lender-creditors would undermine "one of the core purposes of bankruptcy" by preventing the court from "centraliz[ing] all disputes concerning property of the debtor's estate so that reorganization can proceed efficiently." *SEC v. Miller*, 808 F.3d 623, 630 (2d Cir. 2015).

Because of the importance of applying the stay to all creditors and because governmental entities are often creditors, Congress aimed to "define[] 'governmental unit' in the broadest sense," thus subjecting governmental units to the automatic stay. S. Rep. 95-989, at 24; H. Rep. No. 95-595, at 311. Accordingly, when this Court held that a prior version of section 106 did not clearly abrogate state and federal sovereign immunity, Congress acted swiftly to amend the law to do so more clearly. 140 Cong. Rec. 27693 (Oct. 4, 1994) (citing *Hoffman v. Conn. Dep't of Income Maint.*, 492 U.S. 96 (1989), and *United States v. Nordic Vill., Inc.*, 503 U.S. 30 (1992)), *cited in* Pet. App. 6a. The 1994 amendment shows Congress's intent to ensure that the automatic stay provision would apply to *all* governmental creditors, by using broad and inclusive language that covers any "foreign or domestic government," without exceptions. 11 U.S.C. § 101(27). Nothing in the legislative text, record, or purpose supports the notion that Congress intended to exclude governmental entities of any sort. *See Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir. 2004) ("[L]ogically, there is no

other form of government outside the foreign/domestic dichotomy, unless one entertains the possibility of extra-terrestrial states.").

Many tribes have, at least nominally, entered the business of payday and other high-cost consumer lending. *See* Chico Harlan, *Indian Tribes Gambling on High-Interest Loans to Raise Revenue*, Wash. Post (Mar. 1, 2015).[3] Whether or not the tribes are the true lenders, accepting the proposition that tribal governments are *neither* "foreign [nor] domestic government[s]" within the scope of 11 U.S.C. § 101(27) would leave tribes and their instrumentalities as the sole governmental units immune from a federal bankruptcy court's authority to enforce the automatic stay. That proposition strays from ordinary principles of textual interpretation and undermines the functioning of bankruptcy—to the detriment of debtors and creditors alike.

III. Excluding high-cost lenders affiliated with tribes from coverage under the Bankruptcy Code would pose a significant threat to debtors, other creditors, and the smooth operation of bankruptcy.

A. High-cost lending targeted at financially vulnerable consumers is associated with an increase in bankruptcies.

Predatory consumer lending includes both short-term payday loans and high-cost installment loans. Payday loans are "ostensibly short-term cash advances for people who face unexpected obligations

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[3] www.washingtonpost.com/business/economy/indian-tribes-gambling-on-high-interestloans-to-raiserevenue/2015/03/01/8551642d-e51b-4d3a-89c6-4de0d3bdf385_story.html.

or emergencies." *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 117 (2d Cir. 2019). Such "loans are typically structured with a single balloon payment of the amount borrowed and fees, timed to coincide with the borrower's next payday or other receipt of income."[4] Over the past decade, the high-cost small-dollar loan market—once dominated by shorter-term payday loans—has seen a rise of high-cost installment loans with longer terms.[5] Payday and installment loans "share similar characteristics," including "a lack of underwriting; access to a borrower's bank account or car as security; structures that make it difficult for borrowers to make progress repaying; excessive rates and fees; and a tendency toward loan-flipping or stressed re-borrowing."[6]

Marketed to financially vulnerable consumers who typically cannot make timely payments,[7] online high-cost loans often have borrowing rates exceeding 300, 500, or even 1,000 percent. *Gingras*, 922 F.3d at 117. For instance, Petitioner Lac du Flambeau, the

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[4] CFPB, Payday Loans and Deposit Advance Products 6 (Apr. 24, 2013) https://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf.

[5] *See* Sunny Glottmann, et al., *Unsafe Harbor: The Persistent Harms of High-Cost Installment Loans*, Ctr. for Responsible Lending (Sept. 2022), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-safe-harbor-low-sep2022.pdf.

[6] *Id*.

[7] *See* Pew Charitable Trusts, *Fraud and Abuse Online: Harmful Practices in Internet Payday Lending* 4 (Oct. 2014), https://www.pewtrusts.org/-/media/assets/2014/10/payday-lending-report/fraud_and_abuse_online_harmful_practices_in_internet_payday_lending.pdf ("[A]verage household income for an online borrower is $30,000 to $40,000.").

nominal lender here, offers a $400 loan at a 775.85 annual percentage rate through one of its trade names, Sky Trail Cash.[8]

The impact of predatory loans on borrowers, as well as their families and communities, is often severe. Because of the astronomical interest rates, borrowers are often unable to both pay off the loans and cover their basic living expenses.[9] When borrowers cannot repay the full amount of the loan on time, they often renew the loan or take out a new loan, creating a "cycle of debt."[10] Indeed, more than four out of five payday loans are renewed within a month.[11] People with credit cards are nearly twice as likely to become delinquent on them if they take out a payday

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[8] *See* Sky Trail Cash, Sample Loan Information, https://www.skytrailcash.com/Web/sample-loan-table (last visited Mar. 8, 2023) (stating that Sky Trail Cash is "Organized Under The Laws Of The Lac Du Flambeau Band Of Lake Superior Chippewa Indians").

[9] *See* Abbey Meller, *Young People Are Payday Lenders' Newest Prey*, Ctr. for Am. Progress (Dec. 23, 2019), https://www.americanprogress.org/article/young-people-payday-lenders-newest-prey/.

[10] Nicole Goodkind, *Predatory Lenders Are Making Money Off Rising Gas and Food Prices*, CNN (June 30, 2022), https://www.cnn.com/2022/06/23/business/money/payday-predatory-lending-inflation-gas/index.html; *see* Kaitlyn Hoevelmann, *How Payday Loans Work*, Fed. Reserve Bank of St. Louis (July 30, 2019), https://www.stlouisfed.org/open-vault/2019/july/how-payday-loans-work.

[11] Scott Astrada, *Payday Lenders Trap Americans in Debt Every Christmas. Let This Be Their Last*, Ctr. for Responsible Lending (Dec. 24, 2018), https://www.responsiblelending.org/media/payday-lenders-trap-americans-debt-every-christmas-let-be-their-last.

loan.[12] And high-cost installment loans often "create even bigger, deeper debt traps" than short-term payday loans.[13] Like others who take out such loans, Native Americans often get caught in the "cycle of insurmountable debt created by the high interest structure of predatory loans" that "drains financial resources from individuals, families, and [Native] communities, and causes great personal and financial turmoil." LaDonna Harris and Notah Begay III, *Native communities need legislative action to end predatory lending*, Carlsbad Current Argus (Jan. 28, 2022) (urging New Mexico to enact 36% rate cap).[14]

In light of the well-documented impact of predatory lending, it is unsurprising that predatory lending is associated with a "significant increase in personal bankruptcy rates." Paige Marta Skiba & Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy?*, 62 J.L. & Econ. 485, 486 (2019). One study found that payday borrowing is associated with "a near doubling of the annual bankruptcy rate." *Id.* ("The mechanism supported most strongly is that the

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[12] Valenti & Schultz, *How Predatory Debt Traps Threaten Vulnerable Families*, Ctr. for Am. Progress (Oct. 6, 2016), https://www.americanprogress.org/article/how-predatory-debt-traps-threaten-vulnerable-families/.

[13] Consumer Fed. of Am. & Woodstock Inst., *Report: Alternatives to High-Cost Loans and Policy Solutions to Expand Affordable Options* 7 (Dec. 2022), https://consumerfed.org/wp-content/uploads/2022/12/Report-Alternatives-to-High-Cost-Loans-and-Policy-Solutions-to-Expand-Affordable-Options-1.pdf.

[14] https://www.currentargus.com/story/opinion/columnists/2022/01/28/native-communities-need-legislative-action-end-predatory-lending/9257671002/.

bankruptcies could arise because of the cash flow burden of pressing payday finance charges.").[15]

B. Predatory lenders affiliate with tribes in an effort to shield their activities from regulation and liability.

As states responded to these problems by adopting and enforcing protections against payday lending and installment loan abuses, predatory lenders devised ways to shield themselves from regulation and liability. One method to try to avoid state usury caps and potential liability is affiliating with tribes to "use tribal immunity as a shield." *See Bay Mills*, 572 U.S. at 825 (Scalia, J. dissenting) (citing 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, 758–59, 777 (2012)). Under these arrangements, internet lenders engage tribes to establish tribal shell corporations to act as fronts. Creola Johnson, *America's First Consumer Financial Watchdog Is on a Leash: Can the CFPB Use Its Authority to Declare Payday-Loan Practices Unfair, Abusive, and Deceptive?*, 61 Cath. U.L. Rev. 381, 399 (2012). The "non-tribal payday lender makes an arrangement with [the] tribe under which the tribe receives a percentage of the profits, or simply a monthly fee, so that otherwise forbidden practices of the lender are

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[15] *See* Uriah King & Leslie Parrish, *Phantom Demand: Short-Term Due Date Generates Need for Repeat Payday Loans, Accounting for 76% of Total Volume*, Ctr. for Responsible Lending 16 & n.27 (July 9, 2009), http://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf ("Research has shown that payday borrowers are more likely to become delinquent on their credit cards and file for bankruptcy than similarly-situated people who do not use payday loans.").

presumably shielded by tribal immunity." Martin & Schwartz, 69 Wash. & Lee L. Rev. at 777. In this way, predatory lenders continue to take the lion's share of the profit, while ignoring state rate caps and claiming tribal sovereign immunity from liability. *See, e.g.*, *Solomon v. Am. Web Loan*, 375 F. Supp. 3d 638, 645 (E.D. Va. 2019).[16]

Payday and other high-rate lenders take advantage of tribes experiencing difficult financial conditions to cut deals that are extremely favorable to the private lenders. *See* Nathalie Martin, *Brewing Disharmony: Addressing Tribal Sovereign Immunity Claims in Bankruptcy*, 96 Am. Bankr. L.J. 145, 174 (2022); Harlan, *supra* p.10. Although the debtor in this case did not question the lender's connection to the tribe, when the structure of a tribal lending company is parsed, a *non*-tribal lender is often the "true lender." In many cases, "[t]ribes have little control over these lending arrangements, even if the lender claims to be '100% ow[n]ed' by the tribe." Martin, 96 Am. Bankr. L.J. at 174. The lack of control is confirmed in the distribution of profit. For instance, when the Chippewa Cree partnered with Think Finance Inc. and Plain Green, LLC, Think Finance and its subsidiaries received more than 95 percent of

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[16] *See Solomon*, 375 F. Supp. 3d at 645 ("At its core, this case involves a lending scheme … whereby [the individual defendant] and his corporate entities attempt to use the sovereign immunity of the [Tribe] to evade this lawsuit. Mindful of the strong federal policy favoring tribal immunity, self-governance, and a safe treasury, … Plaintiffs have produced enough evidence to show that [the defendant] shifted all of the risk of his scheme to the Tribe and kept the lion's share of the revenue for himself, through a scheme that infringed upon the Tribe's self-governance and placed the Tribe's treasury at risk.").

the loan profits while the tribe received 4.5 percent. *Id.*; *see also CFPB v. CashCall, Inc.* 35 F.4th 734, 744–45 (9th Cir. 2022) (finding that "the Cheyenne River Sioux Tribe 'has no substantial relationship to the parties' to the loans" and that CashCall, which bore nearly "all economic risk and benefits," used the tribe's limited liability company, Western Sky, as "a shell for CashCall's operations" (citation omitted)).

In another example, as the Department of Justice explained after winning a conviction against two non-tribal lenders, the lenders "targeted and exploited millions of struggling, everyday Americans by charging them illegally high interest rates on payday loans, as much as 700 percent. [The two men] sought to get away with their crimes by claiming that this $3.5 billion business was actually owned and operated by Native American tribes. But that was a lie."[17] Moreover, they "prepared false factual declarations from tribal representatives that were submitted to state courts, falsely claiming, among other things, that tribal corporations substantively owned, controlled, and managed the portions of [their] business targeted by state enforcement actions." DOJ, *supra* note 17. As a result, "several state courts dismissed enforcement actions against [their] payday lending businesses based on claims that they were protected by sovereign immunity. In reality, the Tribes neither owned nor operated any part of [the] payday lending business." *Id.*

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[17] DOJ, *Scott Tucker and Timothy Muir Convicted at Trial for $3.5 Billion Unlawful Internet Payday Lending Enterprise* (Oct. 13, 2017), https://www.justice.gov/usao-sdny/pr/scott-tucker-and-timothy-muir-convicted-trial-35-billion-unlawful-internet-payday.

In yet another case, a company allegedly "used a spurious affiliation with two Native American tribes to circumvent Virginia laws limiting the amount of interest that could be charged on loans." Jakob Cordes, *Fraudulent lenders in Virginia settle $44 million class-action suit over 'rent-a-tribe' scheme*, ABC8 News (Aug. 17, 2022).[18] In a scheme to evade state usury laws, the company allegedly "paid the Chippewa Cree and Otoe-Missouria tribes a flat fee to use their names—and tribal sovereignty," when "in fact the tribes had no involvement in the operations of the company and had no stake in the loan companies themselves." *Id.*[19] Such schemes are disturbingly common. *See Williams v. Martorello*, 59 F.4th 68, 74 (4th Cir. 2023) (noting an "increase" in "litigation and government enforcement actions against 'Rent-a-Tribe' lenders" since 2012); *Smith v. Martorello*, 2021 WL 1257941, at *1, *report and recommendation adopted as modified*, 2021 WL 981491 (D. Or. 2021) (listing examples of lawsuits challenging purportedly

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[18] https://www.wric.com/news/virginia-news/fraudulent-lenders-settle-44-million-class-action-suit-over-rent-a-tribe-scheme/.

[19] "Ironically, the Otoe-Missouria's own members could not borrow from the tribe's lender—charging members such astronomical interest rates is illegal under the tribal criminal code." Ryan Goldberg, *How a Payday Lender Partnered With a Native Tribe to Bypass Lending Laws and Get Rich Quick*, The Intercept (May 21, 2021), https://theintercept.com/2021/05/31/payday-lender-native-american-tribe-american-web-loan/; *see also Endless Debt: Native Americans Plagued by High-Interest Loans*, ABC News (Oct. 31, 2014) ("On Zuni and Navajo land near Gallup, tribal laws prohibit high-interest lending on reservations."), https://www.nbcnews.com/feature/in-plain-sight/endless-debt-native-americans-plagued-high-interest-loans-n236706.

tribal internet loan businesses in various jurisdictions).

In some cases, it will be evident that a tribal shell corporation is not the "true lender," and tribal sovereign immunity will not be implicated. *See* Martin, 96 Am. Bankr. L.J. at 176–82. Courts seeking to discern the true creditor have focused on which party exerts ownership and control over the loans, which party has the primary burden and risk of loss from the loan transactions, and which party receives most of the revenue generated. *See id.* at 178–79; *see also CFPB v. CashCall, Inc.*, 2016 WL 4820635, at *6 (C.D. Cal. 2016) ("In identifying the true or de facto lender, courts generally consider the totality of the circumstances and apply a 'predominant economic interest,' which examines which party or entity has the predominant economic interest in the transaction.").

Often, however, ascertaining the "true lender" requires discovery and motion practice to unravel "complicated lending scheme[s]" involving "several layers of corporate entities" woven "together in an attempt to avoid liability for allegedly usurious interest rates." *Solomon*, 375 F. Supp. 3d at 644–45. *See, e.g.*, *Smith*, 2021 WL 1257941, at *5 (noting discovery and evidentiary hearing that revealed "misrepresentations concerning the genesis of [the lender] and its lending process"); *Solomon*, 375 F. Supp. 3d at 647, 657 (following "extensive discovery, including document production and depositions," "extensive briefing," and an "evidentiary hearing that spanned two days," finding that a non-tribal entity "exercises virtually total control" and denying motion to dismiss based on sovereign immunity); *CashCall*,

2016 WL 4820635, at *6 (examining evidence to hold that private party, not the tribe, was the true lender).

In the context of bankruptcy, if tribes are "governmental units" within the meaning of the Bankruptcy Code, such discovery and motion practice is not necessary, because the true lender—whether it is the tribe or a non-tribal company—is subject to the automatic stay. If, however, tribes have the unique status of being the sole governmental unit exempt from the automatic stay, a debtor in bankruptcy will need to engage in time-consuming and potentially expensive discovery of complex corporate arrangements to determine whether the lender is subject to or exempt from the stay—if the court allows such discovery. *See Davila v. United States*, 713 F.3d 248, 264 (5th Cir. 2013) (stating that the burden to show the need for discovery is greater where "the party seeking discovery is attempting to disprove the applicability of an immunity-derived bar to suit"); *see, e.g.*, *Everette v. Mitchem*, 146 F. Supp. 3d 720, 722 (D. Md. 2015) (denying jurisdictional discovery where the plaintiff did not identify "specific facts to support her assertion that tribes do not own, operate, and control" the defendant-lenders).

Imposing this burden on a debtor in bankruptcy—and allowing a creditor to continue collection efforts with impunity during discovery and motion practice—would add cost, time, and complexity that are impractical in the context of the automatic stay and would undermine the efficiencies of the bankruptcy process. As this case illustrates, some consumer debtors will either choose to forgo or be unable to take on that burden—even where evidence suggests that the true lender may be a non-tribal company. *See* Martin, 96 Am. Bankr. L.J. at 174 n.151 (describing

"a lender called LendGreen," the same entity at issue in this case, "who claimed to have sold [its] loans to 4Finance, which is a Bulgarian-controlled bank in the high-cost loan business").

The decision below, recognizing that the Bankruptcy Code abrogates tribes' sovereign immunity, ensures that the automatic stay can be enforced against every creditor to which it applies. That holding harmonizes the Code's language and purpose and enables low-income consumer debtors, as well as their creditors, to obtain the finality and efficiency that the bankruptcy process promises.

CONCLUSION

The Court should affirm the court of appeals' decision.

Respectfully submitted,

ALLISON M. ZIEVE
Counsel of Record
SCOTT L. NELSON
MICHAEL MIGIEL-SCHWARTZ
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
azieve@citizen.org

Attorneys for Amici Curiae

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