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Abrogating Tribal Sovereign Immunity Via the Bankruptcy Code

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I. INTRODUCTION

Indian tribes have been considered separate governments "since the Founding" of the New World,[1] and are "separate sovereigns pre-existing the Constitution."[2] As a result, Indian tribes have historically been held to have many of the same rights as any nation to govern themselves and to enjoy sovereign immunity.[3] A government enjoying the privilege of sovereign immunity cannot be sued without its consent.[4] Even though today's Indian tribes are "no longer possessed of the full attributes of sovereignty,"[5] they still possess sovereign immunity. However, Congress holds superior[6] and exclusive plenary power[7] over tribes. This allows Congress to abrogate tribes' sovereign immunity.[8]

In order to abrogate the sovereign immunity of Indian tribes, Congress must express this intent "unequivocally" in a statute.[9] Any *ambiguity* in such an expression must "be resolved in favor of the Indians."[10] However, Congress does not need to expressly list tribes or use the word "Indian" to meet this standard.[11]

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1. Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum,* 69 STAN. L. REV. 491, 494 (2017). The "Founding" encompasses the Europeans first invasions and subsequent settling in America in the fifteenth century. *See 1492: An Ongoing Voyage,* LIBR. OF CONG. https://www.loc.gov/exhibits/1492/eurocla.html (last visited April 9, 2023). Use of the terms "Indian" and "tribe" are standardized in United States statutory and case law. *See* LEGAL INFO. INST., *American Indian Law,* CORNELL L. SCH., https://www.law.cornell.edu/wex/american_indian_law (last visited April 9, 2023).

2. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

3. *See* Michael Bevilacqua, Note, *Silent Intent? Analyzing the Congressional Intent Required to Abrogate Tribal Sovereign Immunity,* 61 B.C. L. REV. 156, 156 (2020).

4. *Sovereign Immunity*, BLACK'S LAW DICTIONARY (11th ed. 2019).

5. *Santa Clara Pueblo*, 436 U.S. at 55.

6. *Id.* at 58.

7. United States v. Lara, 541 U.S. 193, 200 (2004).

8. Kiowa Tribe v. Mfg. Techs., 523 U.S. 751, 754 (1998).

9. *Santa Clara Pueblo*, 436 U.S. at 58.

10. Scott C. Hall, *The Indian Law Canons of Construction v. The Chevron Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem,* 37 CONN. L. REV. 495, 495 n.3 (2004).

11. *See* Bryan H. Wildenthal, *Indian Sovereignty, General Federal Laws, and the Canons of Construction: An Overview and Update,* 6 AM. INDIAN L.J. 99, 163 (2017). Wildenthal notes that a number of landmark Supreme Court cases have applied these canons with favorable outcomes for tribes, but that a troubling trend of "outrageous" dissents, led by the conservative wing of the court, exists within these holdings. *Id.* at 111–12.

Section 106(a)(1) of the United States Bankruptcy Code states that "[n]otwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit"[12] as defined by section 101 of the Code.[13] Section 101(27) provides that the term "governmental unit" encompasses the "United States . . . a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or *other* foreign or *domestic government*."[14] The United States circuit courts are split over whether the phrase "other . . . domestic government" encompasses American Indian tribes with sufficient clarity to conclude that section 106 of the Code abrogates tribal sovereign immunity.[15] The disagreement between the circuits flows from emphasizing different elements of the statutes, resulting in contradictory holdings. The Ninth Circuit has held that Indian tribes are obviously "domestic governments"[16] and thus that their immunity is abrogated.[17] The Sixth Circuit has held that the term "domestic governments" is too ambiguous to establish "unequivocal" intent on the part of Congress to abrogate tribal immunity.[18]

This Note argues that section 106(a)(1)[19] abrogates Indian tribal sovereign immunity for purposes of applying the Bankruptcy Code because the language in sections 106(a)(1) and 101(27)[20] is sufficiently specific to demonstrate that Congress intended such abrogation and, therefore, the Supreme Court should adopt the Ninth Circuit position to resolve the current split. Part II of this Note sets forth the background principles generally governing sovereign immunity, tribal sovereign immunity, and congressional abrogation of that immunity.[21] Part III describes the current circuit split concerning whether the term "domestic government" in section 101(27)[22] encompasses Indian tribes.[23] Part IV argues that the Ninth Circuit has the bet-

12. 11 U.S.C. § 106(a)(1).
13. *Id.* § 101(27).
14. *Id.* (emphasis added).
15. Justin W. Aimonetti, Note, *"Magic Words" and Original Understanding: An Amplified Clear Statement Rule to Abrogate Tribal Sovereign Immunity,* 2020 PEPP. L. REV. 1, 3–4 (2020).
16. Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1059 (9th Cir. 2004).
17. *Id.* at 1061.
18. Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians, 917 F.3d 451, 461 (6th Cir. 2019) [hereinafter *In re* Greektown Holdings, LLC III]. Because there are three separate *In re* Greektown cases, they are herein labeled I, II, and III; I and II are the district bankruptcy court cases from 2014 and 2015, respectively, and III is the circuit case.
19. 11 U.S.C. § 106(a)(1).
20. *Id.;* 11 U.S.C. § 101(27).
21. *See infra* Part II.
22. 11 U.S.C. § 101(27).
23. *See infra* Part III.

ter view of section 101(27);[24] thus, section 106(a)(1)[25] abrogates the sovereign immunity of all tribes for purposes of applying the provisions in the Bankruptcy Code.[26] Part V concludes by discussing the best option for improved clarity on this issue for tribes.[27]

II. BACKGROUND

Indian tribes have enjoyed aspects of sovereign immunity since the Founding.[28] Yet over time, this privilege has been diminished by actions of the Supreme Court and Congress.[29] These actions have left tribes vulnerable to loss of this historical protection in critical realms like bankruptcy.

A. Sovereign Immunity in the Colonial Period

The doctrine of sovereign immunity shields sovereign governments "from nonconsensual suit," with some exceptions.[30] By the time of the establishment of the United States and the creation of the Constitution, it was "well established in English law that the Crown could not be sued without consent in its own courts."[31] This stemmed from the idea that the monarch was perfect.[32]

Upon encountering "hundreds of indigenous, sovereign nations"[33] as they settled the New World, the English Crown and its colonies treated the Indian tribes as separate nations enjoying a sovereign immunity at "common law, which has been recognized as integral to the sovereignty and self-governance of tribes."[34] The tribes had their own governmental structures that varied from relaxed to "very complex and even hierarchical."[35] The

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24. 11 U.S.C. § 101(27).
25. *Id*. § 106(a)(1).
26. *See infra* Part IV.
27. *See infra* Part V.
28. Krakoff, *supra* note 1, at 494.
29. *See* U.S. v. Kagama, 118 U.S. 375, 379–80 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553, 566–67 (1903); 11 U.S.C. § 106(a)(1); *id.* § 101(27).
30. 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, 662 (2013).
31. Alden v. Maine, 527 U.S. 706, 715 (1999).
32. Aimonetti, *supra* note 15, at 7.
33. Angela R. Riley, *The History of Native American Lands and the Supreme Court,* 38 J. SUP. CT. HIST. 369, 369 (2013).
34. Bucher v. Dakota Fin. Corp., 474 B.R. 687, 690 (B.A.P. 8th Cir. 2012) [hereinafter *In re* Whitaker].
35. Robert J. Miller, *Consultation or Consent: The United States Duty to Confer with American Indian Governments,* 91 N.D. L. REV. 37, 41 (2015). Miller notes that "nomadic" tribes tended to have more informal governmental structures, while some more "settled"

colonies, as well as the Crown, "signed scores of treaties with tribes . . . and in England, the Crown even received diplomatic visits from North American tribal representatives."[36] Such visits were also the practice in Europe at large, providing an additional guide when the fledgling United States set about creating official Indian policy.[37] The treaties "engendered a set of legal traditions,"[38] showing that the colonies and the Crown "dealt with the Indian tribes as wholly independent foreign nations."[39] Normally, such treaties "were preceded by lengthy consultation sessions" and were agreed to by all parties involved.[40]

B. Sovereign Immunity Under the U.S. Constitution

Alexander Hamilton advocated for the continuance of sovereign immunity in the new American government when he stated that sovereign immunity is "the general practice of mankind."[41] Although sovereign immunity does not appear in the text of the original 1787 Constitution, the Eleventh Amendment clarified and extended protections for states from suit by individuals.[42] More recently, the United States Supreme Court explained that this immunity is "a fundamental aspect of the sovereignty" that the states have always enjoyed, even before the Constitution existed, and that consequently the Eleventh Amendment should never be interpreted to limit this inherent immunity.[43]

The federal government is able to extend similar sovereign immunity protection to other sovereigns worldwide because of the concept of "foreign sovereign immunity."[44] It is widely accepted in international law that "a

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tribes had governmental structures that rivaled modern-day governments in complexity and efficiency, including "the power to mobilize labor and manufacture" and "to build roads and cities." *Id.*

36. *Id.* at 43.

37. *See* S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 1 (1st ed. 1973) ("The formal and official actions taken by representatives of European nations in their relations with Indian groups were . . . used as precedents in the establishment of [the United States'] own Indian policy.").

38. Robert A. Williams, Jr., *"The People of the States Where They Are Found Are Often Their Deadliest Enemies": The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981, 988 (1996).

39. William C. Canby, Jr., *The Status of Indian Tribes in American Law Today,* 62 WASH. L. REV. 1, 2 (1987).

40. Miller, *supra* note 35, at 44.

41. THE FEDERALIST No. 81 (Alexander Hamilton).

42. U.S. CONST. amend. XI.

43. Alden v. Maine, 527 U.S. 706, 713 (1999).

44. William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story,* 62 AM. U.L. REV. 1587, 1611 (2013). Wood notes that foreign sovereign immunity as a concept has

sovereign should enjoy protections in other nations' courts similar to those it receives at home," a belief linked to "sovereign independence, equality, and dignity."[45] The Framers of the Constitution accordingly recognized that an individual having the ability to sue any kind of "state" without the consent of the entity in question "was a thing unknown to the law."[46]

Although "tribes and foreign nations" were excluded from "the constitutional design," they retained "an inherent, natural sovereignty" that is separate from federal authority.[47] In ratifying the Constitution, the fledgling states of the United States "recognized tribes among the family of sovereigns"[48] and theoretically intended to accord tribes a level of respect, in the form of sovereign immunity, equal to that accorded to all other nations.

C. Indians Tribal Status Under the U.S. Constitution

Indian tribes retained their sovereignty within the United States because they were "sovereigns predating the Constitution."[49] The unique status of Indian tribes as a sovereign physically existing within the bounds of another sovereign nation means that "the United States has needed to integrate sovereign Indian nations into the American system of jurisprudence since its inception."[50] As the Framers created the Constitution, they intended that tribes would be like separate nations, handling their own internal affairs and working only with the federal government, not states, regarding external affairs.[51]

The Supreme Court has said that tribal sovereign immunity is based on "common law immunity from suit traditionally enjoyed by sovereign powers."[52] An Indian tribe existing within the sovereign United States is also a

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unclear origins but was widely accepted by the time of the founding of the United States. *Id.* at 1614.

45. *Id.*

46. Seielstad, *supra* note 30, at 672.

47. *Id.* at 675.

48. Wood, *supra* note 44, at 1625.

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

50. Stephan A. Hoover, Note, *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, 270 (2013).

51. *See* TYLER, *supra* note 37, at 34. This book was the first full published history of Federal Indian history. *Id.* at v. In the book's foreword, the then-Secretary of the Interior posited that "American Indians have determined many of the characteristics of American life as it is lived today" as a result of their unique culture and "resistance to white expansion." *Id.*

52. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)).

"domestic dependent nation"[53] that may not be sued in federal or state court unless the tribe gives permission or the tribe's immunity is abrogated by Congress.[54] Sovereign immunity for Indian tribes in the United States "is a necessary corollary to Indian sovereignty and self-governance."[55]

Indian tribal sovereign immunity specifically and the independent status of tribes generally was circumscribed by more recent Supreme Court decisions in the late nineteenth and early twentieth centuries. These holdings (1) found that Congress possesses plenary regulatory authority over tribes, (2) named Congress as the authority which grants power to the tribes, and (3) noted that those powers could be "withdrawn, modified, or repealed" by Congress as well.[56] In particular, the Court's 1886 holding in *United States v. Kagama* greatly extended Congress's power over Indian tribes by allowing Congress to control tribes directly through statutes.[57] The 1903 case of *Lone Wolf v. Hitchcock* further eroded Indian autonomy via its holding that Congress's "plenary power" under the Commerce Clause means that Congress can unilaterally disregard treaty obligations already established between the United States and Indian tribes.[58] Following these holdings, every affair concerning Indian tribes may be governed by congressional legislation, meaning that tribes are now essentially a lesser sovereign than the United States.[59]

Over time, federal law regarding Indians "evolved from a species of international law to a body of domestic law" aimed at tightening control over tribes.[60] Professor Robert A. Williams, Jr. refers to this derisively as the "White Man's Indian Law" because federal creation, interpretation, and enforcement of Indian law have occurred almost exclusively without the participation of Indians.[61] Though tribes may be a small part of the larger American landscape, their continued separate existence "over 450 years

53. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); *see also Our Government Tribal Sovereignty*, PAUMA TRIBE, https://www.paumatribe.com/government/tribal-sovereignty/ (last visited Jan 30, 2022) (interpreting Chief Justice Marshall's opinion in *Cherokee Nation* designating tribes as "domestic dependent nations" to mean that tribes "remained subject to the paternalistic powers of the United States").

54. Miner Elec., Inc. v. Muscogee (Creek) Nation, 505 F.3d 1007, 1009 (10th Cir. 2007).

55. Three Affiliated Tribes of the Fort Berthold Rsrv. v. Wold Eng'g, 476 U.S. 877, 890 (1986).

56. United States v. Kagama, 118 U.S. 375, 379–80 (1886) ("[T]erritorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by [C]ongress.").

57. *Id.* at 375.

58. Lone Wolf v. Hitchcock, 187 U.S. 553, 563 (1903).

59. *Id.* at 568.

60. Krakoff, *supra* note 1, at 532.

61. *See* Williams, *supra* note 38, at 984–85.

after the first Spanish contacts . . . suggests that Indian societies have great holding power" and must continue to be accorded unique consideration by the federal government.[62]

D. Statutory Interpretation Generally in the Context of Indian Tribes

The Supreme Court has provided some guidance in holding that *ambiguities* in federal law should favor Indian tribes.[63] The "ambiguity canon" dictates that because of historical practice and policy goals that strive to support the economic solvency and independence of Indian tribes, the practice of courts is to interpret any *ambiguous* statutory provision to favor Indian tribes.[64] Hence, "standard principles of statutory construction do not have their usual force" where Indian tribes are concerned.[65] Even Justice Scalia, who did not usually favor Indian tribes when interpreting legislation that impacted tribes,[66] acknowledged that this canon has power concerning "*ambiguous* provisions."[67] Clear statement rules, like the one applicable to Indian tribes, require courts to "treat all statutes as maintaining the status quo" unless Congress' intention is unambiguously expressed otherwise.[68] Yet even though courts regularly use clear statement rules to help guide their analysis, courts remain divided on just how precise expression must be under such rules.[69]

The clear trend over time, unfortunately, is that "the Court has expanded its own discretion in being able to find clear congressional intent . . . to diminish Indian rights."[70] Since 1987, only four of the "twenty-six cases involving Federal Indian law" discussed the traditional Indian statutory interpretation canon, "and only one invoked it in its holding."[71] Perhaps as a result of "biases permeating the judiciary and the legal system," courts in practice view these canons and rules as optional, and "some judges refuse to respect the canons at all."[72]

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62. TYLER, *supra* note 37, at 10–11.

63. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

64. *Id.* (citing McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1993); Choate v. Trapp, 224 U.S. 665, 675 (1912)).

65. *Id.*

66. *See* Wildenthal, *supra* note 11, at 103.

67. Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992) (quoting *Montana*, 471 U.S. at 766).

68. Aimonetti, *supra* note 15, at 29 (quoting John C. Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules,* 1995 WIS. L. REV. 771, 772 (1995)).

69. *Id.* at 29–30.

70. Hall, *supra* note 10, at 496.

71. Alexander Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, 55 U. MICH. J.L. REFORM 267, 270 (2022); Wildenthal, *supra* note 11, at 100 (citing Skibine's scholarship as "crucial" in its importance to the modern legal rights of tribes.).

72. Matthew L.M. Fletcher, *Textualism's Gaze,* 25 MICH. J. RACE & L. 111, 138 (2020).

E. Abrogation of Tribal Sovereign Immunity Generally and Under the Bankruptcy Code

Congress may abrogate the sovereign immunity of Indian tribes only by expressing this intent with clarity in a statute.[73] But even if this precept is followed, there is no need to include the terms "Indian" or "tribe" to successfully accomplish the abrogation.[74] In 1978, the Supreme Court held in *Santa Clara Pueblo v. Martinez* that the lawsuit in question against the Santa Clara Pueblo tribe was "barred" because Congress had not created a cause of action against the tribe in the Indian Civil Rights Act (ICRA) at issue.[75] "Nothing on the face" of the Act said that tribes were subject "to the jurisdiction of the federal courts," the Court stated.[76] By contrast, in *Colorado River Water Conservation Dist. v. U. S.*, the Supreme Court held that a suit could be brought against a tribe where there was even an "implied" grant of congressional "authority to sue."[77] There was no danger, the Court asserted, that doing so would somehow "imperil" the rights of tribes or "breach" any "special obligation of the Federal Government to protect Indians."[78]

According to section 106 of the Bankruptcy Code, federal bankruptcy courts may "hear and determine any issue" regarding the Code's application to "governmental units,"[79] including awarding financial judgment against such a unit.[80] "[G]overnmental units" include "domestic governments"[81] under the Code. The United States circuit courts have disagreed about whether "domestic governments" is sufficiently specific to establish that Congress must have intended the words to abrogate the sovereign immunity of Indian tribes in bankruptcy.[82]

To elaborate, when Congress enacted the Bankruptcy Code in 1978, it included section 106(a)(1), which generally abrogates sovereign immunity.[83] Section 106(a)(1) provides that "sovereign immunity is abrogated as to a governmental unit"[84] and section 101(27) of the Code then defines governmental unit to include essentially all worldwide government types currently

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73. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).
74. *See* Wildenthal, *supra* note 11, at 163.
75. *Santa Clara Pueblo*, 436 U.S. at 59.
76. *Id.*
77. Colo. River Water Conservation Dist. v. U.S., 424 U.S. 800, 812 (1976) (quoting Turner v. U.S., 248 U.S. 354, 358 (1919)).
78. *See id.*
79. 11 U.S.C. § 106(a)(2).
80. *Id.* § 106(a)(3).
81. *Id.* § 101(27).
82. Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1061 (9th Cir. 2004); *In re* Greektown Holdings, LLC III, 917 F.3d 451, 461 (6th Cir. 2019).
83. 11 U.S.C. § 106(a)(1).
84. *Id.*

in existence: "[The] United States . . . a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; *or other foreign or domestic government*."[85] Accordingly, the specific phrase "Indian tribes" is not included in the law.[86]

Under current doctrine, the Supreme Court uses a two-step test to decide whether Congress has abrogated sovereign immunity. First, has Congress "unequivocally expressed" an intention to waive tribal sovereign immunity?[87] To satisfy this standard, Congress need not mention tribes by name or by category in the statute,[88] though historically, it has usually chosen to do so.[89] Secondly, did Congress act "pursuant to a valid exercise of power"?[90]

III. CIRCUIT SPLIT OVER WHETHER THE BANKRUPTCY CODE ABROGATES TRIBAL SOVEREIGN IMMUNITY

The Ninth Circuit in *Krystal Energy Co. v. Navajo Nation* and the Sixth Circuit in *In re Greektown Holdings, LLC II* came to differing conclusions on the first part of the two-step test, primarily because each applied different interpretive standards.[91] The holdings in *Krystal Energy* in the Ninth Circuit in 2004 and *Greektown* in the Sixth Circuit in 2019 are the touchstones of the debate regarding whether the Bankruptcy Code abrogates tribal sovereign immunity. The way in which they applied part one of the two-step test—determining whether Congress has clearly expressed intent to waive tribal sovereign immunity—is critical to their holdings.

A. The Ninth Circuit and Other Courts That See "Unequivocal" Abrogation

The Ninth Circuit weighed in on the debate over section 106(a)(1), ruling unanimously that this section of the Bankruptcy Code abrogates the sov-

85. 11 U.S.C. § 101(27) (emphasis added).

86. *Id.* § 106(a)(1).

87. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (citing United States v. Testan*,* 424 U.S. 392, 399 (1976)).

88. Fed. Aviation Admin. v. Cooper, 566 U.S. 284, 291 (2018).

89. Buchwald Capital Advisors, LLC v. Papas, 532 B.R. 680, 693 (E.D. Mich. 2015) [hereinafter *In re* Greektown Holdings, LLC II].

90. Green v. Mansour, 474 U.S. 64, 68 (1985).

91. Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1056 (9th Cir. 2004); *In re* Greektown Holdings, LLC III, 917 F.3d 451, 461 (6th Cir. 2019). The second part of the test regarding whether Congress has acted pursuant to a valid exercise of power is, following the rulings in *Kagama* and *Lone Wolf,* satisfied by congressional passage of a valid statute. United States v. Kagama, 118 U.S. 375, 379–80 (1886); Lone Wolf v. Hitchcock, 187 U.S. 553, 563 (1903).

ereign immunity of Indian tribes, including the Navajo Nation.[92] This case arose when Krystal Energy filed for bankruptcy protection and wanted to know how much tax Krystal owed the Navajo Nation.[93] Krystal Energy also wanted to know what assets Krystal could get back from the Navajo Nation under the Bankruptcy Code.[94] The Navajo Nation filed a motion to dismiss, citing the sovereign immunity of the tribe.[95] The district court ruled for the Navajo Nation by dismissing the suit, holding that Congress has not abrogated the tribe's immunity in section 106(a)(1) of the Bankruptcy Code.[96]

The Ninth Circuit reversed.[97] The court explained that although tribal immunity is "integral" to those tribes' "self-governance,"[98] such immunity was not "absolute."[99] Certainly, any congressional legislation abrogating this immunity must be "explicit"[100] rather than "implied,"[101] the court acknowledged. But then the court looked to the text of the Bankruptcy Code,[102] the precedents set by Congress in abrogating state sovereign immunity,[103] and extensive prior rulings on the issue of tribal sovereign immunity as it relates to the Code.[104] Based on these, the court concluded that the immunity of the Navajo Nation, "like that of all individual domestic governments,"[105] had been "unequivocally" abrogated.[106]

The court felt that the logic of abrogation was inescapable: "Congress explicitly abrogated the immunity of *any* 'foreign or domestic government'" and "tribes are domestic governments," hence, "Congress expressly abrogated the immunity of Indian tribes."[107] The Ninth Circuit essentially concluded that there were no other types of government in the world apart from those listed in section 101(27); therefore, the statute's plain meaning was that Indian tribes were included.[108]

The Ninth Circuit also held that section 106(a)(1), backed by the definition in section 101(27), was *not* in any way ambiguous, and accordingly

92. *Krystal Energy Co.*, 357 F.3d at 1061.
93. Krystal Energy Co. v. Navajo Nation, 308 B.R. 48, 50 (Bankr. D. Ariz. 2002) [hereinafter *In re* Krystal Energy Co.].
94. *Id.*
95. *Id.*
96. *Krystal Energy Co.*, 357 F.3d at 1056.
97. *Id.*
98. *Id.* (citing Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 756–58 (1998)).
99. *See Krystal Energy Co.*, 357 F.3d at 1056.
100. *Id.* (citing *Kiowa Tribe*, 523 U.S. at 759).
101. *Id.* (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)).
102. *Id.* at 1057.
103. *Id.* at 1056, 1058.
104. *Id.* at 1058.
105. *Krystal Energy Co.*, 357 F.3d at 1059.
106. *Id.* at 1061.
107. *Id.* at 1058.
108. *Id.* at 1057.

not subject to the dictates of the ambiguity canon.[109] The court acknowledged that "[i]mmunity from suit has been recognized by the courts of this country as integral to the sovereignty and self-governance of Indian tribes."[110] The court also noted that it took seriously the need to "tread lightly" when considering whether to declare that an abrogation of such immunity had taken place.[111] "Proper respect" for the power of tribes and for the power of Congress was rightly ordained.[112] Yet, the court found that it was "clear from the face of §§ 106(a)(1) and 101(27) that Congress intended to abrogate the sovereign immunity of *all* 'foreign and domestic governments'"[113] and that there was no need to "utter the magic words 'Indian tribes'" to abrogate the sovereign immunity of those tribes.[114]

The Delaware Bankruptcy Court expanded on the Ninth Circuit's *Krystal Energy* reasoning in a 2017 case, choosing to emphasize that the "Supreme Court has recognized that Indian tribes are 'domestic dependent nations.'"[115] This meant that "Congress enacted sections 106 and 101(27) with that reference in mind" and therefore it was impossible to conclude anything other than that Congress had intentionally included Indian tribes within the groups for whom sovereign immunity was now abrogated.[116]

A dissent in 2003 by the chief judge in a Tenth Circuit bankruptcy appellate panel case argued that "as manifest in the language of the statute and the maxims of statutory construction," Congress desired to abrogate the immunity of Indian tribes "and legitimately did so in § 106(a)."[117] The two-step test for abrogation in this situation "is the same as the test applied to the States" in that the abrogation must be both clearly expressed and within Congress' power.[118] While acknowledging that there was not much case law to help define what "clear and unequivocal" should look like, the chief judge insisted that the majority had missed the mark by failing to consider "statutory maxims of construction" and the histories of tribes.[119] Further, he noted, bankruptcy law was designed "not only to regulate bankruptcy but to make

109. *Id.* at 1061.
110. *Id.* at 1056.
111. *Krystal Energy Co.*, 357 F.3d at 1060 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978)).
112. *See id.*
113. *Id.* at 1057 (emphasis added).
114. *Id.* at 1061.
115. Casino Caribbean, LLC v. Money Ctr. of Am., Inc., 565 B.R. 87, 102 (Bankr. D. Del. 2017) [hereinafter *In re* Money Ctr. of Am., Inc.].
116. *Id.*
117. *In re* Mayes, 294 B.R. 145, 157 (B.A.P. 10th Cir. 2003) (McFeeley, C.J., dissenting).
118. *Id.* at 157–58.
119. *Id.* at 158.

it uniform," so it would be absurd of Congress to exclude only tribes and include everyone else.[120]

Uniformity of bankruptcy laws is not simply a congressional prerogative: It is a constitutional command.[121] Among the powers conferred upon Congress by Article I, Section 8 is the provision that Congress make "uniform Laws on the subject of Bankruptcies throughout the United States."[122] "Uniform" means "identical or consistent,"[123] and if the law did not apply in this manner, "Congress could not fulfill its mandate to make uniform the laws because some entities would be treated differently."[124] As a result, the nation would be "back at our historical starting point" with no consistent national law governing bankruptcy.[125]

B. The Sixth Circuit and Other Courts That See No Abrogation

The leading decision finding that the Bankruptcy Code does not abrogate tribal sovereign immunity was issued by the Sixth Circuit in *In re Greektown Holdings, LLC III*.[126] This case arose when Buchwald Capital Advisors (the litigation trustee for the Greektown Litigation Trust) felt that the Chippewa tribe had fraudulently transferred money prior to filing for Chapter 11 bankruptcy in May 2008 regarding the Greektown Casino in Detroit.[127] The Chippewas filed a motion to dismiss, citing the sovereign immunity of the tribe.[128] Much like the Ninth Circuit, the bankruptcy court held for Buchwald, stating that the phrase "domestic government" in section

120. *Id.* at 160.

121. *Id.*; U.S. CONST. art 1, § 8, cl. 4.

122. U.S. CONST. art 1, § 8, cl. 4.

123. *Uniform*, BLACK'S LAW DICTIONARY (11th ed. 2019).

124. *In re Mayes*, 294 B.R. at 160.

125. *Id.* at 163–64. Other federal courts have used similar reasoning to reach the same conclusion as the Ninth Circuit regarding the impact of section 106(a)(1). *See also In re* Vianese, 195 B.R. 572, 575 (Bankr. N.D.N.Y. 1995) (pointing out that a 1994 amendment to section 106(a)(1) had made it plain that Congress fully intended to abrogate tribal sovereign immunity, which "exists only at the sufferance of Congress and is subject to complete defeasance" and had been accomplished by the statute); *In re* Davis Chevrolet, Inc., 282 B.R. 674, 683 n.5 (Bankr. D. Ariz. 2002) (concluding that "[i]t seems to this court that 'other domestic government' is broad enough to encompass Indian tribes"); *In re* Russell, 293 B.R. 34, 44 (Bankr. D. Ariz. 2003) (stating that "other foreign or domestic government" qualified as Congress's unambiguous expression of abrogation); *In re* Platinum Oil Props., LLC, 465 B.R. 621, 642–43 (Bankr. D.N.M. 2011) (holding that the Jicarilla Apache Nation was not protected by sovereign immunity from the "binding effect of a confirmed chapter 11 plan," which flowed from the court's holding that 11 U.S.C. § 106(a)(1) and 11 U.S.C. § 101(27) together established "Congress' clear and unequivocal abrogation of tribal sovereign immunity").

126. *In re* Greektown Holdings, LLC III, 917 F.3d 451, 461 (6th Cir. 2019).

127. *Id.* at 454.

128. *Id.* at 455.

101(27), and incorporated into 106(a)(1), indicated clear congressional intent to abrogate the sovereign immunity of Indian tribes.[129]

The Federal District Court for the Eastern District of Michigan reversed,[130] and the Sixth Circuit affirmed the district court, holding that the Chippewas could not be sued.[131] Certainly, Indian tribes could theoretically be construed to be included within the term "domestic government," the court acknowledged.[132] Congress also retains total freedom to waive tribal sovereign immunity "to the extent it wishes."[133] Still, "courts will not lightly assume" that this has been done unless Congress is explicit in its clarity.[134] The court held that the phrasing Congress used in the Code was not enough to prove congressional intent to abrogate the sovereign immunity of Indian tribes.[135]

The court highlighted the Indian tribes' history as "separate sovereigns"[136] and noted that under the Supreme Court's current doctrine, Congress must "unequivocally" express its intent to abrogate the sovereign immunity of Indian tribes in explicit legislation.[137] The panel next described "unequivocal" as a demanding standard since the term means "admits no doubt."[138] The Sixth Circuit majority conceded that the Ninth Circuit's conclusion that "domestic government" *logically* encompassed Indian tribes was not in dispute while nevertheless insisting that this was not enough to abrogate the sovereignty of those tribes.[139] The "real question," it said, was whether this phrase amounted to an unambiguous expression of intent to rescind tribal sovereignty.[140]

To answer this question, the Sixth Circuit relied heavily on the Seventh Circuit's reasoning in a case about the Fair and Accurate Credit Transaction Act (FACTA).[141] In that case, the Seventh Circuit said, by way of example, that the phrase "any government" would certainly include the United States

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129. Buchwald Capital Advisors, LLC v. Papas, 516 B.R. 462, 473 (Bankr. E.D. Mich. 2014) [hereinafter *In re* Greektown Holdings, LLC I].

130. *In re* Greektown Holdings, LLC II, 532 B.R. 680, 684 (E.D. Mich. 2015).

131. *In re Greektown Holdings, LLC III*, 917 F.3d at 461.

132. *Id.* at 459.

133. *Id.* at 456.

134. *Id.* at 462.

135. *Id.* at 461. The Supreme Court subsequently denied a petition for writ of certiorari. *See* Buchwald Capital Advisors, LLC v. Sault Ste. Marie Tribe of Chippewa Indians, 917 F.3d 451 (6th Cir. 2019), *cert. denied*, 140 S.Ct. 2638 (April 2, 2020) (mem.).

136. *See In re Greektown Holdings, LLC III*, 917 F.3d at 456 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978)).

137. *Id.*

138. *Id.* at 457 (quoting Addington v. Texas, 441 U.S. 418, 432 (1979)).

139. *Id.* at 459–60.

140. *Id.* at 459.

141. *Id.* (citing Meyers v. Oneida Tribe of Indians, 836 F.3d 818, 826–27 (7th Cir. 2016)).

but that the phrase might be considered "equivocal" regarding Indian tribes because of the "long-held tradition of tribal immunity."[142]

The Sixth Circuit agreed with the Seventh Circuit's reasoning and insisted that the words "Indian tribes" ought to be mentioned somewhere in the Bankruptcy Code if the court was expected to rule for abrogation. [143] Subsequently, the *Greektown Holdings* court backed away from this assertion, stating that the "magic words" "Indian" and "tribes" were not required to abrogate tribal sovereign immunity.[144] The court also asserted that Indian tribes *are* covered by other provisions of the Bankruptcy Code, despite not being explicitly named.[145] The majority acknowledged that its holding might be perceived as unjust to parties harmed by transacting with tribes,[146] but claimed that this was for Congress and the Supreme Court to deal with if they chose.[147]

In a strong dissent, Judge Zouhary said that the function of the court was "not to hold Congress to a standard of speaking as precisely as it possibly can."[148] Nor was it the court's job to "demand that [Congress] use the same words today as it has in the past."[149] He pointed to Justice Scalia's concurrence in a separate case, wherein Justice Scalia emphasized that abrogation by Congress of any group's sovereign immunity did not need to make "explicit reference" to that group in words.[150] The obligation of Congress was, therefore, only to use words that "clearly subject the sovereign to suit."[151]

Using "traditional tools of statutory construction," Judge Zouhary found that "right off the bat," Congress had made a statement that was "explicit" and "unmistakable" in section 106(a)(1) when it said that "sovereign immunity is abrogated as to a governmental unit."[152] All that remained was to determine precisely whose sovereign immunity had been abrogated, and the answer to this was found in section 101(27) in the definition of a "governmental unit" that encompassed every form of "foreign or domestic government."[153] Congress exercised its prerogative to "speak broadly" in these

142. *See In re Greektown Holdings, LLC III*, 917 F.3d at 459 (citing *Meyers*, 836 F.3d at 826).
143. *See id.* at 460–61.
144. *Id.* at 461.
145. *Id.*
146. *Id.* at 459 (citing *Kiowa Tribe*, 523 U.S. at 758).
147. *See id.* at 461.
148. *In re Greektown Holdings, LLC III*, 917 F.3d at 470 (Zouhary, J., dissenting).
149. *Id.*
150. *Id.* (quoting Dellmuth v. Muth, 491 U.S. 223, 233 (1989) (Scalia, J., concurring)).
151. *See id.* at 470 (Zouhary, J., dissenting).
152. *Id.* at 467; 11 U.S.C. § 106(a)(1).
153. *See In re Greektown Holdings, LLC III,* 917 F.3d at 467 (Zouhary, J., dissenting); 11 U.S.C. § 101(27).

statutes to take away the immunity of "any government, of any type, anywhere in the world."[154]

Judge Zouhary dismissed the Sixth Circuit majority's comparison to the Seventh Circuit ruling in *Meyers* as inapposite, especially given that *Meyers* dealt with a completely different statute.[155] He asserted that the court failed to "[c]onsider how different the FACTA text is from that of the Bankruptcy Code."[156] FACTA targeted "person[s]" rather than governments and did not discuss sovereign immunity at all.[157] FACTA's definition section, too, was markedly different from that of the Bankruptcy Code in that the FACTA definitions consisted mainly of entities that were not entitled to sovereign immunity, whereas every entity listed in the Bankruptcy Code's definitions would otherwise be entitled to such immunity.[158] Moreover, the "legislative scheme" of the Bankruptcy Code was that all be treated "equally" under its provisions.[159] Such uniform equality could only be accomplished, the dissent insisted, if "all governments must play by the rules."[160]

Two other decisions are in accord with the Sixth Circuit. First, the Eighth Circuit in *Whitaker* ruled that Congress had not abrogated tribal sovereign immunity.[161] In doing so, the court leaned heavily on the Supreme Court's past designation of tribes as "domestic dependent nations," concluding that this was not the same as "governments."[162] The Eighth Circuit also noted that it *would* have required a specific mention of "Indian tribes" in order to reach a ruling of abrogation.[163] The Eighth Circuit acknowledged that the Supreme Court has designated Indian tribes "as a form of 'domestic sovereign,'"[164] yet the court insisted that this was not the same thing as a "government."[165] Second, the 2020 decision by the Massachusetts bankruptcy court in *In re Coughlin* also followed the Sixth Circuit.[166] There, the bankruptcy judge concluded that the reasoning by the Ninth Circuit in *Krystal Energy* and by the dissent in the Sixth Circuit in *Greektown* is less persuasive than that offered by the two-judge majority in *Greektown*, the ma-

154. *See In re Greektown Holdings, LLC III,* 917 F.3d at 467 (Zouhary, J., dissenting).
155. *Id.* at 469.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 471.
160. *In re Greektown Holdings, LLC III,* 917 F.3d at 471 (Zouhary, J., dissenting).
161. *In re* Whitaker, 474 B.R. 687 (B.A.P. 8th Cir. 2012).
162. *Id.* at 695.
163. *Id.* at 691.
164. *Id.* at 695 (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 780, 782 (1991)).
165. *Id.*
166. *In re* Coughlin, 622 B.R. 491, 494 (Bankr. D. Mass. 2020).

jority in the Seventh Circuit FACTA case, and the 2012 holding in an Eighth Circuit bankruptcy case.[167]

IV. ARGUMENT

Regarding the first element of the two-step test to decide whether Congress has abrogated sovereign immunity, the Ninth Circuit in *Krystal Energy* found that the name "domestic government" was "unequivocal" enough to include Indian tribes, while the Sixth Circuit in the later *Greektown Holdings, LLC III* found that the same expression did not unequivocally encompass tribes.[168] The question of which interpretation is correct has been argued thoroughly enough in these holdings—and in the corresponding holdings of other courts—to allow a clear answer to emerge.

A. Plain Meaning: Generally

The two courts that anchor this debate, the Ninth Circuit in *Krystal Energy* and the Sixth Circuit in *Greektown,* agree that sections 106(a)(1) and 107(27) of the Bankruptcy Code take away sovereign immunity from governmental units, including domestic governments.[169] Where they disagree is respecting whether domestic governments include Indian tribes.

Currently, "congressional intent to abrogate tribal sovereign immunity need only 'be clearly discernable from the statutory text in light of traditional interpretive tools'"[170] and there is nothing ambiguous about the phrase "domestic governments."[171] Accordingly, the canons and clear statement rules directing special considerations for tribes are not triggered by sections 106(a)(1) and 101(27).[172] The phrase "domestic government" is clear, particularly when the language of the statute abrogates sovereign immunity for any and all foreign and domestic governments.[173] Notably, the Sixth Circuit holding that opposed this was supported only by a two-judge majority, against which Chief Judge Zouhary vigorously dissented.[174] In that dissent, Judge Zouhary said that it was inappropriate to hold Congress to a standard any more stringent than that of "clearly subject[ing] the sovereign to suit."[175] After all, as Justice Scalia noted in his concurrence in *Dellmuth*, no precise

167. *Id.*
168. Krystal Energy Co. v. Navajo Nat., 357 F.3d 1055, 1056, 1061 (9th Cir. 2004); *In re* Greektown Holdings, LLC III, 917 F.3d 451, 461 (6th Cir. 2019).
169. *In re* Greektown Holdings, LLC III, 917 F.3d 451, 459 (6th Cir. 2019).
170. Aimonetti, *supra* note 15, at 28.
171. *Id.*
172. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).
173. *In re Greektown Holdings, LLC III*, 917 F.3d at 467; 11 U.S.C. § 101(27).
174. *See In re Greektown Holdings, LLC III,* 917 F.3d at 470 (Zouhary, J., dissenting).
175. *Id.*

naming of any group should be required to accomplish abrogation, and the Sixth Circuit did agree with this.[176]

Although the Supreme Court has acknowledged the importance of special canons and clear statement rules favoring tribes[177] as well as sovereign immunity's protective function for tribes,[178] Congress in sections 106(a)(1) and 101(27)[179] of the Bankruptcy Code made such an explicit statement of abrogation that these considerations are not implicated. Congress was well aware of Supreme Court holdings designating Indian tribes as "nations" [180] and "domestic sovereigns" when Congress wrote the Bankruptcy Code.[181] This indicates that Congress knew that Indian tribes are understood as included in a phrase such as "other foreign or domestic government," especially when the remainder of the statute listed all other possible governments, leaving Indian tribes as the only form of government that could meet such a definition within the context of the statute.[182]

Also, FACTA is inapposite as a comparative statute to the Bankruptcy Code.[183] In advocating so strongly for FACTA as a comparative statute to section 106(a)(1) of the Bankruptcy Code, the Massachusetts district bankruptcy court failed to acknowledge that the Ninth Circuit's logic had not been "rejected" by the Seventh Circuit court's interpretation of FACTA.[184] Instead, FACTA was simply too different in structure and wording from the Bankruptcy Code to allow the use of FACTA to interpret the Code.[185] This is because FACTA makes no mention of sovereign immunity, and it applies to "person(s)" rather than governmental units.[186] FACTA's definition section defines "person" by naming mainly "entities that would not otherwise be entitled to sovereign immunity."[187] This is all in opposition to the nature of sections 106(a)(1) and 101(27)[188] of the Bankruptcy Code, which is why the

176. Dellmuth v. Muth, 491 U.S. 223, 233 (Scalia, J., concurring).

177. *Montana*, 471 U.S. at 766 (citing McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174 (1973); Choate v. Trapp, 224 U.S. 665, 675 (1912)); Aimonetti, *supra* note 15, at 29 (quoting John C. Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules,* 1995 WIS. L. REV. 771, 801 (1995)).

178. Three Affiliated Tribes of the Fort Berthold Rsrv. v. Wold Eng'g, 476 U.S. 877, 890 (1986).

179. 11 U.S.C. § 106(a)(1).

180. *In re* Money Ctr. of Am., Inc., 565 B.R. 87, 102 (Bankr. D. Del. 2017).

181. *In re* Greektown Holdings, LLC III, 917 F.3d 451, 456 (6th Cir. 2019) (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978)).

182. 11 U.S.C. § 101(27).

183. *In re Greektown Holdings, LLC III*, 917 F.3d at 469 (Zouhary, J., dissenting).

184. *Id; see also* Meyers v. Oneida Tribe of Indians, 836 F.3d 818, 826–27 (7th Cir. 2016).

185. *See In re Greektown Holdings, LLC III*, 917 F.3d at 469.

186. *Id.*

187. *Id.*

188. 11 U.S.C. § 106(a)(1); *Id.* § 101(27).

ruling in *Meyers* should have no influence on whether the Bankruptcy Code abrogates tribal sovereign immunity.[189]

Finally, neither the Massachusetts court nor the Eighth Circuit decision that the Massachusetts court relied upon chose to grapple with the significance of Congress' stated purpose that the Bankruptcy Code be "uniform."[190] Uniformity, as it relates to the Bankruptcy Code's provisions, is not optional: The Constitution provides that laws be uniform in application in large part because otherwise, as Judge Zouhary emphasized in his dissent to the Sixth Circuit *Greektown* case and as Chief Judge McFeeley stated in his dissent in the Tenth Circuit *Mayes* case, some parties would be treated unfairly.[191] This could lead to uneven, unpredictable results—the avoidance of which largely motivated the creation of the Bankruptcy Code—instead of the desired uniform nationwide application of bankruptcy law.[192]

Additionally, the avoidance canon decrees that when interpreting an ambiguous statute, interpretations consistent with the Constitution are preferred.[193] Bankruptcy laws are congressionally and constitutionally mandated to be uniform, but if tribal sovereign immunity is not abrogated by the Bankruptcy Code, then bankruptcy law cannot be applied uniformly.[194] This means that it could be unconstitutional to abrogate all governmental sovereign immunity except for that of the tribes. Therefore, the preferred interpretation of the Bankruptcy Code should be that the Code abrogates tribal sovereign immunity.

Congressional intent to abrogate sovereign immunity only needs to be clear; no magic phrases such as "Indian tribes" are required to demonstrate such clarity.[195] Additionally, Congress was aware when creating the Bankruptcy Code of prior Supreme Court decisions referring to Indian tribes as domestic nations,[196] and Congress also desired that the Code provide uniform guidance and protection in compliance with the Constitution.[197] There-

189. *In re Greektown Holdings, LLC III*, 917 F.3d at 470.

190. *Id.* at 471 (Zouhary, J., dissenting); *In re* Mayes, 294 B.R. 145, 160 (B.A.P. 10th Cir. 2003) (McFeeley, C.J., dissenting).

191. *See In re Greektown Holdings, LLC III*, 917 F.3d at 471 (Zouhary, J., dissenting); *In re Mayes*, 294 B.R. at 160 (McFeeley, C.J., dissenting).

192. *See In re Greektown Holdings, LLC III*, 917 F.3d at 471 (Zouhary, J., dissenting); *In re Mayes*, 294 B.R. at 160 (McFeeley, C.J., dissenting).

193. *See* Clark v. Martinez, 543 U.S. 371, 385 (2005). The court stated that "[t]he canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means* of *choosing between them*." *Id.*

194. *See In re Greektown Holdings, LLC III*, 917 F.3d at 471 (Zouhary, J., dissenting); *In re Mayes*, 294 B.R. at 160 (McFeeley, C.J., dissenting).

195. *See* Aimonetti, *supra* note 15, at 28.

196. *In re* Money Ctr. of Am., Inc., 565 B.R. 87, 102 (Bankr. D. Del. 2017).

197. *In re Mayes*, 294 B.R. at 160 (McFeeley, C.J., dissenting); U.S. CONST. art 1, § 8, cl. 4.

fore, it becomes impracticable to believe that Congress meant anything other than what they plainly wrote into the Code: the abrogation of tribal sovereign immunity with respect to that same Code.

B. Plain Meaning: Enfolding Indian Tribes

The Sixth Circuit, while seeming to advocate for a specific naming of "Indian tribes" in sections 106(a)(1) and 101(27), ultimately acknowledged that this was not required.[198] The Ninth Circuit drew an apt comparison, in this respect, to statutes that have abrogated the sovereign immunity of states to show that unnamed groups may be swept in by a congressional intent to abrogate.[199] States and tribes have "similar policy implications at stake" in the Bankruptcy Code, and consequently, such a comparison is appropriate.[200]

To elaborate, *Krystal Energy* and its counterparts relied heavily on logical reasoning, and in doing so followed a pattern established by the Supreme Court in a 2000 case, *Kimel v. Florida Board of Regents,* concerning the abrogation of state sovereign immunity.[201] In *Kimel,* no states were listed in the part of the Age Discrimination in Employment Act (ADEA) that related to abrogation of immunity, yet the Court held that Congress had demonstrated an unambiguous intent to abrogate states' sovereign immunity in the ADEA.[202] *Kimel* concluded that while intent to abrogate "did not appear in terms on the face of the ADEA," the existing abrogation, in combination with the definitions list in a different section of the Act, eliminated any doubt that the sovereign immunity of states had been abrogated by the ADEA.[203] The Act was meant to be "read as a whole," the Court said, and, once done, this "clearly demonstrate[d] Congress' intent to subject the States to suit for money damages."[204]

This pattern unmistakably matches that of both the Ninth and the Sixth Circuits in combining the major provisions of an act of Congress with its definitions section, as Congress intended. After all, as the Ninth Circuit noted, Congress is not required to "list all of the specific states, beginning with Alabama and ending with Wyoming" in order to conclude that the sovereign

198. *In re Greektown Holdings, LLC III*, 917 F.3d at 461.

199. Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1058 (9th Cir. 2004) (citing Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000)).

200. *In re Mayes*, 294 B.R. at 160 (McFeeley, C.J., dissenting).

201. *Kimel*, 528 U.S. at 73–74. *Kimel* was also cited favorably by the Ninth Circuit in *Krystal Energy*. *See Krystal Energy Co.*, 357 F.3d at 1058 (citing *Kimel*, 528 U.S. at 73).

202. *Id.*

203. *Id.*

204. *Id.*

immunity of states has been abrogated.[205] Instead, Congress has the ability to abrogate the immunity of states as a whole with a single phrase, just as Congress did with the sovereign immunity of Indian tribes in the Bankruptcy Code. Historically, it is true that courts have typically inferred abrogation of tribal sovereignty only where tribes are explicitly named.[206] But as Justice Scalia emphasized in his concurrence in *Dellmuth*, this is not a standard that has been said to be required of courts.[207]

The *Greektown* court also acknowledged that no "magic words" were needed to include tribes among the groups who lost sovereign immunity under the Code.[208] It was proper, the Sixth Circuit said, that "clarity of intent" rather than some "particular form of words" be at the heart of their inquiry.[209] The Sixth Circuit liked the Ninth Circuit's idea for an effective abrogation phrase: "[S]overeign immunity is abrogated as to all parties who could otherwise claim sovereign immunity."[210] Yet this phrase is quite similar to the language that Congress ultimately chose to include in the Bankruptcy Code: Using the Sixth Circuit's own "clarity of intent" standard, the phrasing in the code that sovereign immunity was abrogated as to all "governmental units" including "domestic governments" should have been enough to abrogate immunity for tribes.[211] The dissent in the Sixth Circuit seized on this discrepancy, stating that the two-judge majority in *Greektown* was essentially admitting that its "focus" was on whether the words "Indian tribes" were in the statute, despite expressly saying that these words were not required.[212]

An influencing factor for the Ninth Circuit and courts that held in accordance with its logic may have been the increasing difficulty of fairly applying sovereign immunity to all tribes in all applicable matters. Though tribes have an acknowledged interest in self-governance and self-sustainability that is theoretically supported by sovereign immunity,[213] that same immunity may harm parties in dealings with tribes, whether or not those parties are aware of the sovereign immunity doctrine.[214] In recent years, a marked expansion of tribal commercial activities has left some feeling taken aback upon realizing they have no recourse for alleged wrongdo-

205. *Id.* at 1059.

206. *See* Greggory W. Dalton, Comment, *A Failure of Expression: How the Provisions of the U.S. Bankruptcy Code Fail to Abrogate Tribal Sovereign Immunity,* 81 WASH. L. REV. 645, 645–46 (2006).

207. Dellmuth v. Muth, 491 U.S. 223, 233 (1989) (Scalia, J., concurring).

208. *In re* Greektown Holdings, LLC III, 917 F.3d 451, 461 (6th Cir. 2019).

209. *Id.*

210. *Id.*

211. 11 U.S.C. § 106(a)(2).

212. *In re* Greektown Holdings, LLC III, 917 F.3d at 470 (Zouhary, J., dissenting).

213. *In re* Whitaker, 474 B.R. 687, 690 (B.A.P. 8th Cir. 2012).

214. Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 758 (1998).

ing. Notably, Justice Stevens was moved to write a concurrence critiquing sovereign immunity as an "anachronistic fiction" and positing that "off-reservation commercial activity" should not be included within its bounds.[215]

C. Plain Meaning: All Statutory Terms Must Have Meaning

Even a theoretical acceptance of the Sixth Circuit's reasoning and that of related court verdicts leaves a striking question totally unanswered: If Congress did not intend the phrase "domestic government" to apply to Indian tribes, then why did they include the phrase in the Bankruptcy Code at all? After all, in the definitions listed in section 101(27), by the time one reaches the phrase "or other foreign or domestic government," every other possible domestic government apart from tribes is listed: "[The] United States . . . a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; *or other foreign or domestic government*."[216]

Interpreting this phrase to mean nothing "violate[s] a cardinal rule of statutory interpretation" that no part of a statute should "be construed to have no consequence."[217] Apart from the fact that the phrase "domestic government" is unambiguous, the *Greektown* court "likely failed to properly interpret the term" to cover Indian tribes as it was intended to, given the canon of construction.[218]

It is fair to say that the heavy weight the Sixth Circuit placed on "historical treatment and policy goals" influenced their holding that the Code did not abrogate tribes' immunity.[219] Yet they failed to address the vacuum left if "domestic government" was to mean nothing at all, as it must in light of their verdict.

Especially considering that Congress was intimately familiar with the Supreme Court's designation of tribes as domestic nations,[220] it makes no sense to believe that Congress included a definitional phrase in the Code that could point to nothing other than Indian tribes yet did not intend the phrase to refer to such tribes. A more plausible theory for the phrase's inclusion is that Congress desired to create uniform abrogation of sovereign immunity in accordance with the constitutional command and included the phrase to ensure that no one could escape such an abrogation under the Code.

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215. *Id.* (quoting Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 514 (1991) (Stevens, J., concurring)).

216. 11 U.S.C. § 101(27) (emphasis added); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978).

217. Aimonetti, *supra* note 15, at 28.

218. *Id.*

219. Bevilacqua, *supra* note 3, at 156.

220. *In re* Money Ctr. of Am., Inc., 565 B.R. 87, 102 (Bankr. D. Del. 2017).

In his dissent in *Mayes* in the Tenth Circuit, Chief Judge McFeeley explained the point this way: It is an "important statutory maxim" that "a court . . . give operative effect to every word Congress used."[221] It was thus inevitable that Congress meant Indian tribes to be included in those groups whose sovereign immunity was retracted by the Code because "all other forms of domestic government prior to the semicolon are enumerated."[222] Put another way, if the phrase is not read to refer to Indian tribes, it "becomes meaningless . . . [as] there are no other forms of domestic government that have not already been specified."[223] Chief Judge McFeeley also noted that such an interpretation was "not without precedent" because the Supreme Court and a then-recent Executive Order both called tribes "domestic dependent nations," which meant those tribes were "also . . . domestic government[s]."[224]

It is perhaps fair to ask why—if Indians are the only possible entity covered by the relevant language—Congress chose to use more general language instead of expressly identifying Indian tribes. Apart from the fact that Congress is not required to use such explicit language, it could also be that Congress chose broad terms deliberately in order to encompass future developments in governmental structures. Congress may also have desired to allow the specifics of the law to play out in court to make the law more responsive to reality-based, day-to-day concerns. Regardless, in the context of abrogating sovereign immunity, the Supreme Court has made clear that no "magic words" are needed in order to accomplish such an abrogation of any group.[225] The provision "domestic government" in section 101(27) must therefore be given meaning, and that meaning must encompass all Indian tribes.

By focusing on the plain meaning of the statute, including the enfolding of Indian tribes within its terms and the rule that all statutory terms must have meaning, it becomes clear that the language of sections 106(a)(1) and 101(27)[226] of the Code *does* abrogate the sovereign immunity of Indian tribes for purposes of applying the Bankruptcy Code.

V. CONCLUSION

The wording of section 106(a)(1) and section 101(27)[227] of the Bankruptcy Code, when considered in tandem, clearly abrogates the sovereign

221. *In re* Mayes, 294 B.R. 145, 159 (B.A.P. 10th Cir. 2003) (McFeeley, C.J., dissenting).
222. *Id.*
223. *Id.*
224. *Id.*
225. Dellmuth v. Muth, 491 U.S. 223, 233 (1989) (Scalia, J., concurring).
226. 11 U.S.C. § 106(a)(1); *Id.* § 101(27).
227. *Id.* § 106(a)(1); *Id.* § 101(27).

immunity of Indian tribes in the context of the Code. The phrase "domestic government" is not ambiguous, and tribes are the only domestic governments to which the final words of section 101(27)[228] could possibly apply. There is no requirement that the name of the group whose sovereignty is being abrogated appear anywhere within the statute. Also, at the time of the Code's creation, Congress was acutely aware that the Supreme Court had designated tribes as domestic dependent nations and that both their own impetus and that of the Constitution commanded them to make the laws uniform. Finally, interpreting any part of the Code to be meaningless violates a primary rule of statutory interpretation.

For Indian tribes, especially in light of expanded casino and other commercial tribal operations in recent years, this is unquestionably a bitter result. Yet it is up to Congress to change the Code if its desire was, in fact, to protect the ancient privilege of sovereign immunity for American Indian tribes in the context of bankruptcy.

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228. *Id.* § 101(27).

* Articles Editor, UA Little Rock Law Review. My advisor, Professor Josh Silverstein, was a tireless and brilliant guide, and for this and so much else I owe him more than I will ever be able to repay.