INDIANS – SOVEREIGN IMMUNITY: THE U.S. SUPREME COURT'S INTERPRETATION OF THE BANKRUPTCY CODE

Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382 (2023).

ABSTRACT

In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, the U.S. Supreme Court addressed whether the Bankruptcy Code expressly abrogates sovereign immunity for federally recognized Indian tribes in bankruptcy proceedings. The Lac du Flambeau Band of Lake Superior Chippewa Indians is a federally recognized tribe and owns multiple businesses. Lendgreen, one of the businesses owned by the tribe, loaned Brian Coughlin eleven hundred dollars. Mr. Coughlin filed for Chapter Thirteen bankruptcy before he could repay the loan. The automatic stay under the Bankruptcy Code prevented Lendgreen from collecting the money from Mr. Coughlin. However, Lendgreen continued trying to collect. Mr. Coughlin petitioned the bankruptcy court to enforce the automatic stay. The bankruptcy court determined that they did not have subject-matter jurisdiction. Creating a split in the court of appeals, the First Circuit disagreed with the bankruptcy court and held that federally recognized tribes should have sovereign immunity privileges in bankruptcy proceedings. The U.S. Supreme Court granted certiorari. Under 11 U.S.C. Section 101(27) of the Bankruptcy Code, the Court *held* that federally recognized tribes are a "governmental unit" because they make their own laws and have the power to tax. Therefore, the Code's abrogation provision Section 106(a) also applies to federally recognized tribes. Justice Thomas wrote a concurring opinion, arguing instead that Lendgreen lacked sovereign immunity because the transaction occurred off the reservation. Justice Gorsuch dissented, noting that Congress has historically identified tribes by name when abrogating sovereign immunity. Additionally, Justice Gorsuch argued that tribes do not constitute domestic or foreign governments and, therefore, should be entitled to sovereign immunity in bankruptcy proceedings. Ultimately, *Lac du Flambeau Band* clarifies that federally recognized tribes are a "governmental unit" within the Bankruptcy Code. As such, their sovereign immunity is abrogated in bankruptcy proceedings.

I. FACTS

In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, the Lac du Flambeau Band of Lake Superior Chippewa Indians' ("the Band") business entity, Lendgreen, loaned Brian Coughlin ("Mr. Coughlin") "$1,100 in the form of a high-interest, short-term loan."[1] Before Mr. Coughlin repaid the loan he filed for Chapter Thirteen bankruptcy, which prevented creditors from further collection efforts.[2] However, Lendgreen continued its attempts to collect.[3] Mr. Coughlin filed a motion in bankruptcy court to enforce the stay against Lendgreen and the Band.[4] The bankruptcy court dismissed the case because "the Bankruptcy Code did not clearly express Congress's intent to abrogate tribal sovereign immunity."[5] The First Circuit Court of Appeals reversed the lower court's decision on the conclusion that "the Bankruptcy Code 'unequivocally strips tribes of their immunity.'"[6] This decision deepened an existing circuit split, so the U.S. Supreme Court "granted certiorari to address the lower courts' inconsistent holdings."[7] Agreeing with the First Circuit, the Court held that the

1. 599 U.S. 382, 385 (2023).
2. *Id*.
3. *Id.*
4. *Id.* at 386.
5. *Id.*
6. *Id.* (citing *In re* Coughlin, 33 F.4th 600, 603 (1st Cir. 2022)).
7. *Id.*

Bankruptcy Code clearly abrogates federally recognized tribes' rights to sovereign immunity.[8]

II. LEGAL BACKGROUND

The Supreme Court looked at two provisions of the Bankruptcy Code to render a decision on the dispute between Mr. Coughlin and the Band.[9] The Court's decision rested on "whether the abrogation provision in § 106(a) and the definition of 'governmental unit' in § 101(27), taken together, unambiguously abrogated the sovereign immunity of federally recognized tribes."[10]

A. A GENERAL OVERVIEW OF THE BANKRUPTCY CODE AND SOVEREIGN IMMUNITY

In the United States, bankruptcy is federally governed by Title Eleven of the United States Code.[11] The Bankruptcy Code provides "formal legal procedures for dealing with the debt problems of individuals and businesses."[12] Furthermore, the Bankruptcy Code provides for six types of bankruptcy cases: Chapter Seven–Liquidation, Chapter Nine–Adjustment of Debts of a Municipality, Chapter Eleven–Reorganization, Chapter Twelve–Adjustment of Debts of Family Farmer or Fisherman with Regular Annual Income, Chapter Thirteen–Adjustment of Debts of an Individual With Regular Income, and Chapter Fifteen–Ancillary and Other Cross-Border Cases.[13] *Lac du Flambeau Band* concerns a dispute arising from a Chapter Thirteen bankruptcy case dispute.[14] Chapter Thirteen "enables individuals with regular income to develop a plan to repay all or part of their debts."[15]

The Eleventh Amendment of the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[16] In *Hans v. Louisiana*, the Court expanded the interpretation

---

8. *Id.* at 388.
9. *Id.* at 387.
10. *Id.*
11. *Process – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics [https://perma.cc/DG5S-AMS5] (last visited Sept. 14, 2023).
12. *Id*.
13. *Id*.
14. 599 U.S. at 385.
15. *Chapter 13 – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics [https://perma.cc/KZR6-7HFC] (last visited Sept. 14, 2023).
16. U.S. CONST. amend. XI.

of the Eleventh Amendment to prohibit suits arising from a state's own citizens and cases under federal law.[17] Before *Hans,* the Court interpreted the Eleventh Amendment as preventing states from claiming any exemption from suits arising under the Constitution, laws, or treaties of the United States.[18] However, years later, the Court placed limitations on how far Congress could go in abrogating states' sovereign immunity power.[19] Ultimately, the Court decided that Congress may only abrogate sovereign pursuant to their powers of enforcement via the Fourteenth Amendment and in certain types of cases which includes bankruptcy.[20]

"Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign immunity.'"[21] Because tribes are considered domestic dependent nations, they are subject to congressional control, but unless "'Congress acts, the tribes retain' their historic sovereign authority."[22] One of the "core aspects of sovereignty that tribes possess . . . is the 'common law immunity from suit traditionally enjoyed by sovereign powers.'"[23] Because tribes possess this common law immunity, the Court treats the "'doctrine of tribal immunity [as] settled law' and dismiss[es] any suit against a tribe absent congressional authorization (or a waiver)."[24] Congressional decisions to abrogate tribal sovereign immunity requires that Congress "'unequivocally' express that purpose."[25] *Lac du Flambeau Band* specifically deals with abrogation by Congress "'unequivocally express[ing] that purpose.'"[26]

B. 11 U.S.C. SECTION 106(A): THE ABROGATION PROVISION

Section 106(A) of the Bankruptcy Code "abrogates the sovereign immunity of 'governmental unit[s]'" and provides a list of the applicable Bankruptcy Code provisions.[27] The previous rule the Court set in *Martinez* and repeated in *Bay Mills* stated that "to abrogate [tribal] immunity, Congress

---

17. 134 U.S. 1, 20-21 (1890).

18. *Id*. at 9-10.

19. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996).

20. *Id.* at 77 (Stevens, J., dissenting) (indicating the majority opinion "prevents Congress from providing a federal forum for a broad range of actions against States . . . [including] those concerning bankruptcy").

21. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014) (quoting Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509 (1991)).

22. *Id.* (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)).

23. *Id.* (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978)).

24. *Id.* at 789 (quoting Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998)).

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

26. *See* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 385 (2023).

27. *Id.* (quoting 11 U.S.C. § 106(a)) ("Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to [Section 106].").

must 'unequivocally' express that purpose."[28] Using *Martinez* and *Bay Mills*, the Court applied a clear-statement rule, meaning Congress must clearly state its intent in statutory language to abrogate sovereign immunity.[29] As the Court in *Lac du Flambeau Band* stated, "[i]f 'there is a plausible interpretation of the statute' that preserves sovereign immunity, Congress has not unambiguously expressed the requisite intent."[30] However, "[t]he rule is not a magic-words requirement"; Congress need not state its intent using specific words or phrases.[31] The clear-statement rule only requires that after "applying 'traditional' tools of statutory interpretation, Congress's abrogation of tribal sovereign immunity is 'clearly discernable' from the statute itself."[32]

C. 11 U.S.C. SECTION 101(27): DEFINING GOVERNMENTAL UNIT

Section 101(27) of the Bankruptcy Code defines "governmental unit" to include

> [the] 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.[33]

The Court recognized this all-encompassing scope, specifically "other foreign or domestic government[s]," in other provisions with similar structures and contexts.[34] Due to this viewpoint, the Court considered the broad scope of the "governmental unit" definition significant in the present dispute between the Band and Mr. Coughlin.[35]

---

28. *Bay Mills*, 572 U.S. at 790 (quoting *Potawatomi Tribe*, 532 U.S. at 418).

29. *See Lac du Flambeau Band*, 599 U.S. at 388; Fin. Oversight & Mgmt. Bd. for P.R. v. Centro de Periodismo Investigativo, Inc., 598 U.S. 339, 351 (2023) (The statutory language in question did not "make[] Congress's intent to abrogate the Board's sovereign immunity 'unmistakably clear.'" (quoting Kimel v. Fl. Bd. of Regents, 528 U.S. 62, 73 (2000))).

30. *Lac du Flambeau Band*, 599 U.S. at 388 (quoting FAA v. Cooper, 566 U.S. 284, 290 (2012)).

31. *Id.*; *Cooper*, 566 U.S. at 291; *Kimel*, 528 U.S. at 76.

32. *Lac du Flambeau Band*, 599 U.S. at 388 (quoting *Cooper*, 566 U.S. at 291); *Kimel*, 528 U.S. at 76.

33. 11 U.S.C. § 101(27).

34. *Lac du Flambeau Band*, 599 U.S. at 388-89 (quoting 11 U.S.C. § 101(27)). The Court provides the example of a "criminal statute defining 'commerce' to include a list of specific instances in which the Federal Government would have jurisdiction, followed by a broad residual phrase." *Id.* at 389 (citing Taylor v. United States, 579 U.S. 301, 305-06 (2016)).

35. *Lac du Flambeau Band*, 599 U.S. at 389; 11 U.S.C. § 101(27).

III. COURT'S ANALYSIS

A. MAJORITY OPINION

The U.S. Supreme Court asserted that other parts of the Bankruptcy Code reinforce the plain text conveyed in Sections 106(a)—abrogation provision—and 101(27)—definition of a governmental unit—to provide "debtors a fresh start by discharging and restructuring their debts in an 'orderly and centralized' fashion."[36] The Court held that the Code's provisions for an "'orderly and centralized' debt-resolution process . . . generally appl[ies] to *all* creditors."[37] "Courts can also enforce these requirements against any noncompliant creditor" through Section 106(a)'s abrogation provision.[38] Simultaneously, the Code contains limited exceptions to "avoid impeding the functioning of governmental entities when they act as creditors."[39] The Court acknowledged the petitioners' argument that the statute should be read "to carve out a subset of governments from the definition of 'governmental unit'"; however, the Court cautioned against this argument because doing so "risks upending the policy choices that the Code embodies in this regard."[40]

Next, the Court addressed the petitioners' proposition that certain government creditors should be immune from important enforcement proceedings despite others facing penalties for noncompliance.[41] The Court stated that this argument ultimately suggested that certain governments should be excluded from the provisions' reach even though those governments also engage in tax and regulatory activities.[42] The Court concluded that Congress did not intend to categorically exclude certain governments from the Code's provision enforcement mechanisms and exceptions.[43]

---

36. *Lac du Flambeau Band*, 599 U.S. at 390; 1 COLLIER ON BANKRUPTCY ¶ 1.01 (16th ed. 2023) (punctuation omitted) ("One of the 'chief purposes of the bankruptcy laws is to secure a prompt and effectual administration and settlement of the estate of all bankrupts within a limited period . . . .' In this process, through orderly and centralized liquidation or through reorganization or rehabilitation, creditors of equal priority receive ratable and equitable distributions designed to serve 'the prime bankruptcy policy of equality of distribution among creditors of the debtor.'").

37. *Lac du Flambeau Band*, 599 U.S. at 391 (quoting COLLIER, *supra* note 36).

38. *Id.*

39. *Id.* (citations omitted) ("For instance, the automatic-stay requirement does not preclude 'governmental unit[s]' from enforcing their 'police and regulatory power[s]' in certain proceedings, or from pursuing specific tax-related activities.").

40. *Id.*

41. *Id.* at 391-92.

42. *Id.*

43. *Id.* at 392 (*Law v. Siegel* "declin[ed] to read into the Code an exception Congress did not include in its 'meticulous' and 'carefully calibrated' scheme." (quoting Law v. Siegel, 571 U.S. 415, 424 (2014))).

Based on the Court's definition and analysis of "governmental unit," the Court concluded that *all* government entities are subject to the Section 106(a) abrogation provision; however, the question of whether federally recognized tribes are governmental units under Section 101(27) remained.[44] The petitioners did not dispute that federally recognized tribes should be considered governments.[45] The Court quoted *Martinez*, noting that federally recognized tribes "have power to make their own substantive law in internal manners, and to enforce that law in their own forums."[46] Federally recognized tribes also have the power to "tax activities on the reservation."[47] The Court further noted that Congress and the U.S. Supreme Court have historically categorized tribes as governments in general and sovereign immunity contexts.[48] Based on this reasoning, the Court concluded that "[t]ribes are indisputably governments. Therefore, § 106(a) unmistakably abrogates [tribes'] sovereign immunity too."[49]

The Court then discussed two arguments raised by the petitioners attempting to create doubt about the clear meaning of Sections 106(a) and 101(27).[50] First, because neither provision specifically mentioned any tribe by name, the petitioners argued that Congress did not intend to abrogate tribal sovereign immunity.[51] However, the Court reiterated that Congress is not required to include a specific reference to federally recognized tribes to convey clear intent that the abrogation provision covers tribes.[52] Second, the petitioners argued that Congress has historically specifically mentioned Indian tribes in sovereign immunity abrogation contexts.[53] The Court reasoned that even though Congress has referenced tribes specifically in some statutes, it does not mean that Congress must do so in every statute to convey the same intent.[54]

The Court also addressed the petitioner's argument that even if the provisions applied to tribes, the statute could be interpreted such that the tribe's immunity was preserved.[55] The petitioners argued that the catchall phrase "other foreign or domestic government" could only cover entities created through "interstate compacts," which would not match the definition

---

44. *Id.*
45. *Id.*
46. *Id.* (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56 (1978)).
47. *Id.* (quoting Plains Com. Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 327 (2008)).
48. *Id.* at 392-93.
49. *Id.* at 393.
50. *Id.*
51. *Id.*
52. *Id.* at 394.
53. *Id.*
54. *Id.* at 395.
55. *Id.*

of a "State" under 101(27).[56] Interpreted this way, the petitioners reasoned "the catchall phrase would exclude governmental entities that are not purely foreign or domestic—like tribes."[57] The Court quickly determined that this argument was unreasonable because it would require "a rigid division between foreign . . . and domestic governments . . . leaving out any governmental entity" with characteristics of both.[58] The Court also pointed out that Congress "expressly instructed that the word 'or,' as used in the Code, 'is not exclusive.'"[59] The Court further reasoned that it would not make sense for the Code to "subject purely foreign or domestic governments to enforcement proceedings while at the same time immunizing government creditors that have both foreign and domestic attributes."[60]

The Court stated that the Section 101(27) catchall phrase that includes "foreign" and "domestic" is notable in and of itself because "[f]ew phrases in the English language express all-inclusiveness more than the pairing of two extremes."[61] Since "foreign" and "domestic" are joined together and placed at the end of the comprehensive list in Section 101(27), the Court concluded that "Congress unmistakably intended to cover all governments in § 101(27)'s definition, whatever their location, nature, or type."[62] Additionally, the Court emphasized the importance of the abrogation provision in Section 106(a), which applies to all "governmental unit[s]" as defined by 101(27).[63] Congress did not intend to select "*certain* governments from § 101(27)'s capacious list and only abrogate immunity with respect to those it had selected."[64] Nor did Congress imply that Section 106(a)'s abrogation provision should treat "some *types* of governments . . . differently than others."[65] The Court concluded that "Congress categorically abrogated the sovereign immunity of *any* governmental unit that might attempt to assert it."[66] Every single entity listed in Section 101(27) has a similar governmental nature, which is "the same characteristic that matters when the Code

---

56. *Id.* (quoting Brief for Petitioners at 40-41, *Lac du Flambeau Band*, 599 U.S. 382 (2023) (No. 22-227)).

57. *Id.* (citing Transcript of Oral Argument at 8-9, *Lac du Flambeau Band*, 599 U.S. 382 (2023) (No. 22-227)).

58. *Id.*

59. *Id.* at 395-96 (quoting 11 U.S.C. § 102(5)).

60. *Id.* at 397.

61. *Id.* at 389 ("'Rain or shine' is a classic example: If an event is scheduled to occur rain or shine, it will take place whatever the weather that day might be."); *see also* 11 U.S.C. § 101(27).

62. *Lac du Flambeau Band*, 599 U.S. at 390 (The Court mentions 5 U.S.C. Section 3331 which "pertains to enemies anywhere" because it requires new congressional members to 'solemnly swear [to] support and defend the Constitution of the United States against all enemies, foreign and domestic.'"); *see also* 11 U.S.C. § 101(27).

63. *Lac du Flambeau Band*, 599 U.S. at 390; *see also* 11 U.S.C. § 101(27), 106(a).

64. *Lac du Flambeau Band*, 599 U.S. at 390; *see also* 11 U.S.C. § 101(27).

65. *Lac du Flambeau Band*, 599 U.S. at 390; *see also* 11 U.S.C. § 101(27).

66. *Lac du Flambeau Band*, 599 U.S. at 390; *see also* 11 U.S.C. § 101(27).

addresses 'governmental unit[s]' from one provision to the next."[67] Therefore, the Court concluded that it is highly unlikely that "Congress distinguished *between* governments in the way the petitioners suggest."[68]

Additionally, the Court examined the petitioners' contention "that Congress has historically treated various types of governments differently for purposes of bankruptcy law."[69] The petitioners stated that years before the Bankruptcy Code's enactment, "bankruptcy law afforded certain benefits to 'the United States or any State or any subdivision thereof,' leaving out entities that did not fall into one of those enumerated categories."[70] While the petitioners' understanding of history may be correct, the Court indicated the petitioners' argument fails to demonstrate how the Code continues to apply differential treatment.[71] When enacting the Code, Congress changed much of the prior bankruptcy law history, including Section 101(27)'s definition of "governmental unit" and Section 106(a)'s abrogation provision.[72] Previously, Section 106(a) did not include a provision that expressly abrogated a government's sovereign immunity.[73] The provision only provided a basic definition of "States," which included "Territories, possessions, and the District of Columbia."[74] If a provision mentioned a governmental entity, Congress specified the concerned entity.[75] The definition of governmental entities provided by Section 101(27) is more expansive than past provisions.[76] Because of the apparent changes in the statute, the Court re-emphasized that the "provisions unequivocally extend to *all* governments" and the statute does not contain ambiguity.[77]

---

67. *Lac du Flambeau Band*, 599 U.S. at 397; *see also* 11 U.S.C. § 101(27).

68. *Lac du Flambeau Band*, 599 U.S. at 397.

69. *Id.*

70. *Id.* (quoting Reply Brief for Petitioners at 21, *Lac du Flambeau Band*, 599 U.S. 382 (2023) (No. 22-227)).

71. *Id.* at 397-98.

72. *Id.* at 398; N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 52-53 (1982) (plurality opinion) (The Court mentions this case describing the Code as a "comprehensive revision of bankruptcy laws."), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in* Wellness Intern. Network, Ltd. v. Sharif, 575 U.S. 665 (2015).

73. *Lac du Flambeau Band,* 599 U.S. at 398; *see* 11 U.S.C. § 106 (1993), *amended by* 11 U.S.C. § 106(a) (1994).

74. *Lac du Flambeau Band,* 599 U.S. at 398; *see* Bankruptcy Act of 1898, ch. 575, 52 Stat. 842 (1938) (codified as amended at 11 U.S.C. § 101(27)) ("'States' shall include the Territories and possessions to which this Act is or may hereafter be applicable, Alaska, and the District of Columbia.").

75. *Lac du Flambeau Band,* 599 U.S. at 398.

76. *Id.*

77. *Id.* at 399.

B. CONCURRING OPINION: JUSTICE THOMAS

In his concurrence, Justice Thomas reasoned that the petitioners lacked sovereign immunity regardless of Section 106(a)'s abrogation provision "[b]ecause [Mr. Coughlin's] stay-enforcement motion arose from [the Band's] off-reservation commercial conduct."[78] Tribal immunity "developed almost by accident"[79] and is not a reflection of modern-day tribal realities, which furthers the idea that any tribal sovereign immunity is just common law immunity.[80] Justice Thomas concluded that the petitioners were not immune because federal law does not grant sovereign immunity to tribes in federal court.[81] Common law immunity is not a freestanding right as "it 'normally depends on the second sovereign's law' as a matter of comity."[82] Even if the courts could grant immunity to tribes "as a matter of comity," comity would not help because it is not considered a valid reason to grant immunity for commercial acts.[83] Furthermore, Justice Thomas stated that a tribe engaging in off-reservation commercial activity acts "within the territory of a sovereign State."[84] This would give tribes unjustified immunity that could potentially create conflict between states and tribes throughout the country.[85] Thus, the petitioners' argument for common-law immunity fails because tribes do not have immunity in federal court for their off-reservation commercial conduct.[86]

Justice Thomas pointed out that in recent decisions, the Court has treated tribal immunity like state immunity, which should only be afforded to the states and is different from common law immunity.[87] The "Court's tribal immunity doctrine continues to artificially exempt tribes from generally applicable laws."[88] Justice Thomas believed that the petitioners were attempting to avoid state and federal payday loan regulations.[89] Sovereign

---

78. *Id.* (Thomas, J., concurring in the judgment) ("[I]mmunity does not extend to 'suits arising out of a tribe's commercial activities conducted beyond its territory.'" (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 815 (2014) (Thomas, J., dissenting))).

79. *Id.* (quoting Upper Skagit Tribe v. Lundgren, 138 S. Ct. 1649, 1662 (2017) (Thomas, J. dissenting)).

80. *Id.* (citing *Bay Mills*, 572 U.S. at 816-17 (Thomas, J., dissenting)).

81. *Id.* (citing *Bay Mills*, 572 U.S. at 816 (Thomas, J., dissenting)).

82. *Id.* (quoting *Bay Mills*, 572 U.S. at 816 (Thomas, J., dissenting)).

83. *Id.* (citing *Bay Mills*, 572 U.S. at 817 (Thomas, J., dissenting)).

84. *Id.* (quoting *Bay Mills*, 572 U.S. at 818-19 (Thomas, J., dissenting)).

85. *Id.*

86. *Id.*

87. *Id.* at 400-01 (Thomas, J., concurring in the judgment) ("[T]he 50 states possess a unique form of immunity that applies of its own force in the courts of sister States, as well as those of the Federal Government." (citations omitted) (citing Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1493-99 (2019))). *See also* Alden v. Maine, 527 U.S. 706, 713 (1999); *Bay Mills*, 572 U.S. at 816-17 (Thomas, J., dissenting).

88. *Lac du Flambeau Band,* 599 U.S. at 401 (Thomas, J., concurring in the judgment).

89. *Id.* (citing *Bay Mills*, 572 U.S. at 825 (Thomas, J., dissenting)).

immunity would provide an unfair advantage to the petitioners as other creditors would still be required to follow the stay order.[90] Justice Thomas concluded by saying that "the Court should simply abandon its judicially created tribal sovereign immunity doctrine" because the doctrine only creates more problems.[91]

C. DISSENTING OPINION: JUSTICE GORSUCH

Justice Gorsuch argued that the majority's understanding of the Bankruptcy Code violates the Court's clear statement rule because federally recognized tribes have a unique status in the law.[92] Justice Gorsuch pointed to the Court's prior decision in *Kiowa* and emphasized that "the doctrine of tribal immunity is settled law."[93] He used this point to establish that the majority reformed this idea with its decision in the current case.[94] Furthermore, Justice Gorsuch asserted that the meaning of "other foreign or domestic government" can be construed multiple ways, with some interpretations of the statute not including tribes.[95] Justice Gorsuch cited to *Bay Mills* to outline the role of the Court and Congress in statutory interpretation by citing that the "Court has long left all decisions about tribal and other sorts of sovereign immunity 'in Congress's hands.'"[96] Additionally, he used *Bay Mills* to re-emphasize the principle in *Kiowa* by stating Indian sovereign immunity is "an 'enduring principle of Indian Law' that [the Court] 'will not lightly assume that Congress in fact intends to undermine Indian' sovereignty" in the absence of clear evidence to the contrary.[97] Justice Gorsuch also used the principles in *Bay Mills* to emphasize that Congress should include a clear statement abrogating sovereign immunity if the Court wishes to interpret the law in a way which abrogates sovereign immunity.[98] The majority indicated that Congress intended "domestic" to relate to the geographical position of the government; however, Justice Gorsuch suggested that Congress intended "domestic" to relate to its political sense, which would require Mr. Coughlin to show the political relationship between the tribes and the United States for "domestic" to apply.[99] Justice Gorsuch

---

90. *Id.*

91. *Id.* at 402.

92. *Id.* at 402-03 (Gorsuch, J., dissenting).

93. *Id.* at 403 (quoting Kiowa Tribe of Okla. v. Mfg. Tech., Inc., 523 U.S. 751, 756 (1998)).

94. *Id.*

95. *Id.* at 402 (The catchall phrase could mean "every government, everywhere, . . . every 'other foreign . . . government,' every 'other domestic . . . government.'").

96. *Id.* at 404 (quoting Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 789 (2014)).

97. *Id.* (quoting *Bay Mills*, 572 U.S. at 790).

98. *Id.*

99. *Id.* at 406-07 (quoting Cherokee Nation v. Georgia, 30 U.S. 1, 55 (1831) (Thompson, J., dissenting)).

also argued that Congress did not intend for "foreign or domestic" to encompass all governments because foreign and domestic are two extremes, and tribes typically fall outside of either extreme.[100] Finally, Justice Gorsuch emphasized that Congress has included many other types of sovereigns and argued that if the abrogation provision applied to federally recognized tribes, Congress would have listed it.[101] Justice Gorsuch further noted that in numerous other statutory contexts, Congress had included tribes in the statutory language.[102] The final point that Justice Gorsuch suggested was that Congress could identify tribes within the language using a description, or Congress could write a more precise statement to indicate a tribe's sovereign immunity is abrogated.[103] Thus, Justice Gorsuch's dissent would allow the Band to invoke the doctrine of sovereign immunity in this case.[104]

IV. IMPACT OF DECISION

North Dakota is home to "five federally recognized Tribes and one Indian community . . . includ[ing] the Mandan, Hidatsa, & Arikara Nation (Three Affiliated Tribes), the Spirit Lake Nation, the Standing Rock Sioux Tribe, the Turtle Mountain Band of Chippewa Indians, the Sisseton-Wahpeton Oyate Nation, and the Trenton Indian Service Area."[105] The decision in *Lac du Flambeau Band* will directly impact the tribes and North Dakota practitioners. Together, *State* ex rel. *Workforce Safety and Insurance v. Cherokee Services Group, LLC*[106] and *Lac du Flambeau Band* provide practitioners with a sense of how far sovereign immunity extends to tribal entities that conducts business outside the reservation.

In *Cherokee Services*, the Workforce Safety and Insurance ("WSI") initiated an administrative proceeding against Cherokee Entities, Steven Bilby ("Mr. Bilby"), and Hudson Insurance Company ("Hudson Insurance").[107] The WSI determined that "Cherokee Entities were employers subject to North Dakota's workers' compensation laws and were liable for unpaid workers' compensation premiums."[108] Furthermore, WSI decided that Mr. Bilby, the executive general manager of Cherokee Entities, was

---

100. *Id.* at 413-14 (The reader could emphasize the *or* in "foreign or domestic," or the reader could interpret "foreign and domestic" to mean the same thing.).

101. *Id.* at 416.

102. *Id.* at 417.

103. *Id.* at 417-18.

104. *See id.* at 418.

105. *Tribal Nations*, N.D. INDIAN AFFS. COMM'N, https://www.indianaffairs.nd.gov/tribal-nations [https://perma.cc/D4FU-65LW] (last visited Aug. 13, 2023).

106. 2021 ND 36, ¶ 13, 955 N.W.2d 67, 72.

107. *Cherokee Servs.*, 2021 ND 36, ¶ 2, 955 N.W.2d at 70.

108. *Id.*

personally responsible for unpaid premiums.[109] "WSI ordered Cherokee Entities to pay the unpaid premiums" and issued a cease and desist order to Hudson Insurance that required them to stop "writing workers' compensation coverage in North Dakota."[110] After the order was issued "the Cherokee Entities, Mr. Bilby, and Hudson Insurance requested an administrative hearing" where the collections supervisor confirmed that "Cherokee Entities acted as an 'arm of the tribe.'"[111] The administrative law judge found that sovereign immunity was available to the Cherokee Entities when dealing with workers' compensation and held that "WSI had no authority to issue cease and desist orders to insurance companies."[112] WSI appealed the administrative law judge's order.[113] The state district court held that sovereign immunity was not available to the Cherokee Entities and Mr. Bilby, and WSI did have the authority to issue cease and desist orders to insurance companies.[114]

Like Justice Gorsuch's dissent in *Lac du Flambeau Band*,[115] the North Dakota Supreme Court referenced *Kiowa*, where the U.S. Supreme Court held that "tribes are entitled to sovereign immunity even when they engage in off-reservation commercial activity."[116] Furthermore, the North Dakota Supreme Court emphasized that unless Congress provides a statute or waiver that says sovereign immunity is not available, a tribe has every right to use sovereign immunity as a defense.[117]

While the two cases have different substantial laws governing the case—administrative versus bankruptcy law—both cases required a determination of whether sovereign immunity could be invoked when a tribe is engaging in commercial activities occurring outside the reservation.[118] In an article titled *Without Reservation: Ensuring Uniform Treatment in Bankruptcy while Keeping in Mind the Interests of Native American Individuals and Tribes*, written prior to *Lac du Flambeau*, Connor D. Hicks emphasized the principles outlined in *Bay Mills* and *Martinez* by stating that "tribal sovereign immunity applies to all activities of the tribe, even when commercial rather than governmental" and "tribal sovereign immunity stands unless abrogated

---

109. *Id.*
110. *Id.*
111. *Id.* ¶ 3.
112. *Id.*
113. *Id.* ¶ 4.
114. *Id.*
115. *Supra* Section III.C.
116. *Id.* ¶ 9; Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 403 (2023) (Gorsuch, J., dissenting). The North Dakota Supreme Court also pointed to *Bay Mills* in its analysis as *Bay Mills* also deals with commercial activity occurring outside of the reservation. *Cherokee Servs.*, 2021 ND 36, ¶ 9, 955 N.W.2d at 71-72.
117. *Cherokee Servs.*, 2021 ND 36, ¶ 11, 955 N.W.2d at 72.
118. *Id.* ¶¶ 5-6; *Lac du Flambeau Band*, 599 U.S. at 388.

by an unequivocal waiver by the tribe or an explicit act of Congress."[119] At the time the article was written, the author emphasized that tribes and individual debtors did not receive uniform treatment under the Bankruptcy Code.[120] The author points out that "clarification of the deference afforded to tribes by the Code is instrumental to ensure equal treatment in bankruptcy."[121] Furthermore, Congress's failure to include tribes in the definition of "governmental unit" created a loophole for financial institutions to work with tribes to avoid state usury and bankruptcy laws, which undermines the purpose of tribal sovereign immunity and financially abuses the tribes and their members.[122] For example, the issue in *Cherokee Services* is an example of how a business entity can use a tribe as a way to avoid state usury laws in the insurance context, which then requires the court to determine if tribal sovereign immunity may be invoked when the law does not clearly abrogate immunity or a waiver is not used.[123] Before the decision in *Lac du Flambeau Band*, courts that chose not to abrogate tribal sovereign immunity in a bankruptcy context ultimately stripped debtor protections that the bankruptcy code intends to protect.[124] Then Hicks points out that "[n]ot only are debtors rendered vulnerable to abusive collection attempts and legal proceedings, but other good-faith creditors may not receive treatment equal to the casino, payday loan shop, or other financial entity under the umbrella of a tribal government."[125] Ultimately, abrogation of a tribe's sovereign immunity in the bankruptcy context ensures that all government entities, including tribes, are treated equally as creditors, and further, abrogation "ensures that debtors—both registered tribal members and non-tribal—receive the same protections as those who do not transact business with tribal financial entities."[126] When debtors do not receive equal treatment under the Code, the Code's purposes and protections are considered ineffective.[127] Again, this article was written prior to *Lac du Flambeau Band*, but it outlines the concerns and loopholes

---

119. Connor D. Hicks, *Without Reservation: Ensuring Uniform Treatment in Bankruptcy while Keeping in Mind the Interests of Native American Individuals and Tribes*, 28 FORDHAM J. CORP. & FIN. L. 341, 347 (2023); *see* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790; Santa Clara Pueblo v. Martinez, 436 U.S. 58, 98 (1978).

120. Hicks, *supra* note 119 at 358.

121. *Id*.

122. *Id.* at 387; *see also* Nathalie Martin, *Brewing Disharmony: Addressing Tribal Sovereign Immunity Claims in Bankruptcy*, 98 AM. BANKR. L.J. 145, 176-90 (2022) (Hicks refers to Martin's multiple commercial transaction examples where she points out the recent development of financial institutions using tribes to avoid usury laws and applicable bankruptcy laws.).

123. *See Cherokee Servs.*, 2021 ND 36, ¶ 2, 955 N.W.2d at 67.

124. Hicks, *supra* note 119 at 387 (Prior to *Lac du Flambeau Band*, a tribe could basically "ignore the Code, its debtor protections, and the interests of all other creditors by intentionally not filing a claim in the bankruptcy proceedings.").

125. *Id.* at 387-88.

126. *Id.* at 391-92.

127. *Id.* at 392.

that the Code contained because courts lacked consistency in deciding whether tribal sovereign immunity should be abrogated in a bankruptcy context.[128] The Court's decision in *Lac du Flambeau Band* provided a firm decision, which is what Hicks argued for in his article, and the Court's decision will create equal treatment under the Code between tribal and non-tribal creditors and debtors.[129]

Lac du Flambeau Band presents practitioners and tribes of North Dakota with a clear conclusion on the definition of "governmental unit" and whether a tribe is subject to the abrogation provision in Section 106(a).[130] Furthermore, *Lac du Flambeau Band* will not only apply to Chapter Thirteen of the Bankruptcy Code but also abrogate tribal sovereign immunity in other provisions of the Code.[131] The Court's decision will also "abrogate[] the sovereign immunity of all governmental entities, even if they have quasi-domestic and quasi-sovereign attributes."[132]

V. CONCLUSION

In *Lac du Flambeau Band*, the United States Supreme Court held that the Bankruptcy Code abrogates the sovereign immunity of federally recognized tribes because federally recognized tribes are governmental units.[133] Justice Thomas concurred, agreeing with the majority in the outcome, but instead reasoned that the Band lacked sovereign immunity regardless of the abrogation provision because the commercial activity occurred off the reservation.[134] Justice Gorsuch dissented, stating that tribes are entitled to unique status under the law, and the majority's interpretation of the Bankruptcy Code was not an accurate description of a federally recognized tribe.[135] This decision applies not only to tribes and Chapter Thirteen bankruptcy cases but also to *all* government entities and other provisions of the Bankruptcy Code.[136] Additionally, this decision furthers the purposes of the Bankruptcy Code because it closes loopholes created by the previous circuit split and provides equal treatment between tribal and non-

128. *See id.*

129. *Id.* at 391-92; *see* Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382 (2023).

130. *Lac du Flambeau Band*, 599 U.S. at 398-99.

131. Mike Andrews et al., *U.S. Supreme Court: Bankruptcy Code Abrogates Tribal Sovereign Immunity*, MCGUIREWOODS (June 26, 2023), https://www mcguirewoods.com/client-resources/alerts/2023/6/bankruptcy-code-abrogates-tribal-sovereign-immunity [https://perma.cc/HN75-NRRH].

132. *Id.*

133. *Lac du Flambeau Band*, 599 U.S. at 388.

134. *Id.* at 399 (Thomas, J., concurring in the judgment).

135. *Id.* at 402-03 (Gorsuch, J., dissenting).

136. Andrews et al., *supra* note 131.

tribal creditors and debtors.[137] Ultimately, *Lac du Flambeau Band* clarifies that tribal sovereign immunity may not be evoked in cases governed by the Bankruptcy Code.[138]

Erin Weightman∗

137. Hicks, *supra* note 119 at 387, 391-92.

138. *Lac du Flambeau Band*, 599 U.S. at 399.

∗ 2025 J.D. Candidate at the University of North Dakota School of Law. First, I would like to thank Professor Alexandra Sickler at the UND School of Law for providing me with an interesting topic and sparking my interest in bankruptcy law. Special thanks also go to the LondonEx program, and my mentor and barrister, Nigel Dougherty, for providing me with an unforgettable experience in London this past summer and for furthering my interests in bankruptcy law. I would also like to express my gratitude to the NORTH DAKOTA LAW REVIEW for their extensive work and assistance in the editing of this Case Comment. Finally, I would like to thank my family and friends, especially my best friend, Brady, for the continued support and constant encouragement in the pursuit of my legal career.