No. 22-227

IN THE

Supreme Court of the United States

LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, *et al.*,

Petitioners,

v.

BRIAN W. COUGHLIN,

Respondent.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICI CURIAE* NACBA, NCBRC, LEGAL AID CHICAGO, HON. JUDITH FITZGERALD, HON. JOAN FEENEY, HON. PHILLIP SHEFFERLY, HON. EUGENE WEDOFF, HON. STEVEN RHODES AND HON. CAROL KENNER IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are former bankruptcy judges and non-profit organizations interested in protecting the rights of consumers in bankruptcy.[1]

The retired bankruptcy judges serving as *amici curiae* are the Honorable Judith Fitzgerald, formerly of the United States Bankruptcy Court for the Western District of Pennsylvania; the Honorable Joan Feeney, formerly of the United States Bankruptcy Court for the District of Massachusetts; the Honorable Phillip Shefferly, formerly of the United States Bankruptcy Court for the Eastern District of Michigan; the Honorable Eugene Wedoff, formerly of the United States Bankruptcy Court for the Northern District of Illinois; the Honorable Steven Rhodes, formerly of the United States Bankruptcy Court for the Eastern District of Michigan; and the Honorable Carol Kenner, formerly of the United States Bankruptcy Court for the District of Massachusetts.

Legal Aid Chicago is a non-profit organization providing free legal representation and counsel to disadvantaged people and communities throughout Cook County, Illinois. Each year advocates at Legal Aid Chicago represent thousands of clients who live in poverty, or are otherwise vulnerable, in a wide range of civil legal matters. Legal Aid Chicago's areas of practice include bankruptcy and consumer law, as

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel contributed any money to fund its preparation or submission.

well as family, employment, housing, and public benefits.

The National Association of Consumer Bankruptcy Attorneys ("NACBA") is the Nation's leading non-profit organization serving consumer bankruptcy attorneys and advocating for consumer debtors' rights. NACBA is nationally recognized for, among other things, filing *amicus curiae* briefs in this Court and the federal courts of appeals in important consumer bankruptcy cases. Many notable decisions have relied on contributions made in NACBA's briefs. *E.g.*, *In re Schwartz-Tallard*, 803 F.3d 1095, 1100 (9th Cir. 2015) (en banc).

The National Consumer Bankruptcy Rights Center ("NCBRC") is a non-profit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the integrity of the bankruptcy process. The Bankruptcy Code grants financially distressed debtors rights critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights, particularly in the appellate process. NCBRC files *amicus curiae* briefs to provide the courts with a balanced view of bankruptcy law, the case, and its implications for consumer debtors.

PRELIMINARY STATEMENT

Petitioner ("the Band"), together with its payday lending affiliate ("Lendgreen"), concedes that its debt-collection activities are subject generally to the Bankruptcy Code's restrictions. Pet. Br. 49 n.5.

This includes the "automatic stay," a statutory injunction generally barring debt-collection activity during the pendency of a bankruptcy case. 11 U.S.C. § 362(a). Further, the Band concedes that "tribal sovereign immunity 'would supply no defense with respect to provisions of the Code . . . that do not authorize *in personam* suits against Indian tribes.'" Pet. Br. 49 n.5 (citations omitted). Moreover, the Band concedes that "'equitable relief could . . . provide an avenue for a debtor to enforce certain provisions of the Code against tribal actors' that otherwise violate the automatic stay." *Id.* (citations omitted). Nonetheless, the Band theorizes that it may avoid enforcement of the automatic stay in this case based on its characterization of Respondent's motion to enforce the stay as a proscribed *in personam* legal action for which Congress has failed to abrogate the Band's immunity. The Band is doubly wrong.

To begin with, Congress *has* abrogated the Band's immunity, as Respondent ("Coughlin") explains in his brief. Resp. Br. 32-46. More fundamentally, Coughlin's motion to enforce the automatic stay is not a legal *in personam* action. Rather, it involves an ancillary *in rem* proceeding in equity in which a sovereign immunity defense does not arise.

Like the Band here, the State in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 450 (2004), conceded that it was bound by the Bankruptcy Code's discharge provision—another form of equitable, injunctive relief in bankruptcy. *See* 11 U.S.C. § 524(a); *Hood*, 541 U.S. at 447 (the discharge "operat[es] as an injunction to prohibit creditors from attempting to collect or to recover the debt"); *Taggart*

v. Lorenzen, 139 S. Ct. 1795, 1800 (2019) (same). Nonetheless, Tennessee contended that the process used to determine the dischargeability of a student-loan debt—*i.e.*, a summons and complaint—violated its sovereignty. Rejecting this argument, the Court reasoned that "the bankruptcy court's jurisdiction is premised on the res, not on the persona . . . ." *Hood*, 541 U.S. at 450. Unlike *in personam* actions, proceedings *in rem* are "'one against the world,'" *id.* at 448 (citations omitted), and the exercise of *in rem* jurisdiction to adjudicate a debtor's discharge simply does not equate to "*in personam* jurisdiction over the State," *id.* at 453; *see also id.* at 451, 452 (observing that the Court has long endorsed individualized *in rem* determinations of otherwise sovereign interests in both admiralty and bankruptcy); *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 368-70 (2006) (recognizing that the bankruptcy court's exercise of *in rem* jurisdiction "does not, in the usual case, interfere with state sovereignty even when States' interests are affected"). Likewise, the similarity of process with *in personam* actions was immaterial: "Our precedent has drawn a distinction between *in rem* and *in personam* jurisdiction, even when the underlying proceedings are, for the most part, identical." *Hood*, 541 U.S. at 453. Accordingly, the Court concluded, "whether an *in rem* adjudication in bankruptcy court is similar to civil litigation in the district court is irrelevant." *Id.*

Contrary to the Band's argument, the process employed in this case—a *motion* filed in an *in rem* proceeding seeking ancillary, equitable relief enforcing the automatic stay—implicates no sovereign immunity concern. *See id.* at 453-54 (observing that, but for a procedural rule requiring a

summons and complaint, the debtor could have proceeded by motion "which would raise no constitutional concern"); *id.* at 460 (Thomas, J., dissenting) ("I do not contest the assertion that in bankruptcy, like admiralty, there might be a limited *in rem* exception to state sovereign immunity from suit. Nor do I necessarily reject the argument that this proceeding could have been resolved by motion without offending the dignity of the State."); *see also Lewis v. Clarke*, 581 U.S. 155, 164 (2017) (tribal sovereign immunity "is no broader than the protection offered by state or federal sovereign immunity"). Accordingly, wholly apart from the fact that Congress has abrogated the Band's immunity in bankruptcy proceedings, the Band has no sovereign defense to Coughlin's motion in the first instance.

This case is vitally important to the administration of bankruptcy proceedings. Payday lenders like Lendgreen have systematically sought shelter within the umbrella of tribal immunity to evade enforcement of the Bankruptcy Code. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 825 (Thomas, J., dissenting) ("[P]ayday lenders . . . often arrange to share fees or profits with tribes so they can use tribal immunity as a shield for conduct of questionable legality."). And if they may do so, so may any other lender by the simple expedient of securing a tribal affiliation. Because Congress has abrogated whatever immunity the Band possesses in this instance, and, in any event, because no such immunity exists in *in rem* matters of this kind, the judgment of the Court of Appeals should be affirmed.

BACKGROUND

I. STATUTORY BACKGROUND

The filing of a bankruptcy case triggers the creation of a bankruptcy estate consisting of all of the debtor's property, *see* 11 U.S.C. §§ 103(a), 541(a), including, in a Chapter 13 case such as this one, the debtor's earnings during the course of the case, *see id.* § 1306(a)(2). The commencement of the case likewise vests the bankruptcy court with *in rem* jurisdiction over the debtor and all property of the estate, which property is constituted *in custodia legis*—in the custody of the court. *See* 28 U.S.C. §§ 157(a), 1334(e); *Hood*, 541 U.S. at 447-48; *Straton v. New*, 283 U.S. 318, 321 (1931); *Lazarus Michel & Lazarus v. Prentice*, 234 U.S. 263, 266 (1914); *Acme Harvester Co. v. Beekman Lumber Co.*, 222 U.S. 300, 307 (1911) ("The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition.").

A bankruptcy filing also ordinarily triggers the "automatic stay," a statutory injunction ancillary to the *in rem* proceeding that bars "any act to obtain possession of property of the estate . . . [and] any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case . . . ." 11 U.S.C. § 362(a); *see City of Chicago v. Fulton*, 141 S. Ct. 585, 589 (2021) (discussing the stay); *Board of Governors of Fed. Res. Sys. v. McCorp Fin., Inc.*, 502 U.S. 32, 39 (1991).

The automatic stay is essential to the sound functioning of the bankruptcy process. *See* H.R. Rep. No. 95-595, at 340-41 (1977). With certain exceptions,

it is the primary means of protecting the debtor and estate property; the competing rights of creditors; the bankruptcy court's exclusive jurisdiction over the administration of the case; and the debtor's ultimate entitlement to relief from unmanageable indebtedness. *See, e.g.*, *Fulton*, 141 S. Ct. at 589 ("The automatic stay serves the debtor's interests by protecting the estate from dismemberment, and it also benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of the others."); S. Rep. No. 95-989, at 55 (1978); 11 U.S.C. § 362(k) (authorizing relief for violations of the stay). Because a debtor's earnings during the course of a Chapter 13 case are also property of the estate, the automatic stay specifically shelters these earnings from debt-collection activity.

In cases involving individual debtors, the automatic stay generally continues until "the time a discharge is granted or denied." 11 U.S.C. § 362(c)(2)(C); *see Taggart*, 139 S. Ct. at 1799. If a discharge is granted, the provisions of the automatic stay enjoining debt-collection activity are replaced by the provisions of the permanent discharge injunction that operates to the same effect. 11 U.S.C. § 524(a); H.R. Rep. No. 95-595, at 365-66 (1977) ("The injunction is to give complete effect to the discharge and to eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection efforts."). The automatic stay is thus, in essence, a preliminary form of injunctive relief until the permanent discharge injunction is obtained. *See Taggart*, 139 S. Ct. at 1804 (the automatic stay "aims to prevent damaging disruptions to the administration of a bankruptcy case in the short run,

whereas a discharge is entered at the end of the case and seeks to bind creditors over a much longer period"). Notably, the automatic stay is critical to the successful completion of Chapter 13 plans; it protects the debtor's post-bankruptcy earnings from debt-collection activity so they may be dedicated, in part, to plan payments. *See* 11 U.S.C. § 1306(a)(2).

Under the Bankruptcy Code, a debtor's pre-bankruptcy ("pre-petition") monetary obligations become "claims" against the bankruptcy estate. 11 U.S.C. §§ 101(5), 502(b); *Katchen v. Landy*, 382 U.S. 323, 336 (1966) (bankruptcy "converts the creditor's legal claim into an equitable claim to a pro rata share of the *res*"). Creditors holding claims, like the Band here, are entitled to file a "proof of claim" with the bankruptcy court. 11 U.S.C. §§ 101(10), 501(a); Fed.R.Bankr.P. 3001, 3002. They are not entitled to ignore the process and proceed on their own. If they could, Congress's carefully crafted bankruptcy scheme would be upended. This restriction applies to governmental entities: if a governmental agency wishes to collect a claim against a debtor in bankruptcy, it is obliged to follow applicable bankruptcy procedures and cannot avoid those procedures on the ground that it is a sovereign entity. *See New York v. Irving Trust Co.*, 288 U.S. 329, 333 (1933) ("If a state desires to participate in the assets of a bankrupt, she must submit to the appropriate requirements by the controlling power."); *see also* 11 U.S.C. § 106(a) (abrogating sovereign immunity).

As noted, a critical feature of any bankruptcy proceeding is the "ultimate discharge," which "gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts." *Katz*, 546 U.S. at

346 (citing *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)). With enumerated exceptions, the discharge releases the debtor from all pre-petition debts whether or not a proof of claim was filed. *See* 11 U.S.C. §§ 524, 727(b), 944, 1141(d), 1227-28, 1328; *see also Hood*, 541 U.S. at 447 ("The discharge order releases a debtor from personal liability with respect to any discharged debt by . . . operating as an injunction to prohibit creditors from attempting to collect or to recover the debt."); *Taggart*, 139 S. Ct. at 1800 (same). Critically, the bankruptcy court's adjudication of the discharge is "an *in rem* proceeding" binding on creditors "whether or not they choose to participate," *Hood*, 541 U.S. at 447-48, and as to which principles of sovereign immunity are not implicated, even when state interests are affected. *Katz,* 546 U.S. at 369-70 (citing *Hood*, 541 U.S. at 447).

As has been recognized since the Eighteenth Century, "the jurisdiction of courts adjudicating rights in the bankrupt estate [has] included the power to issue compulsory orders to facilitate the administration and distribution of the res." *Katz*, 546 U.S. at 362. Thus, while the principal focus of bankruptcy proceedings is "always the res," the exercise of *in rem* jurisdiction in bankruptcy also properly subsumes ancillary forms of process and relief in furtherance of the courts' *in rem* jurisdiction, including orders mandating the turnover of property. *Id.* at 372, 378; *see also id.* at 370 ("[C]ourts adjudicating disputes concerning bankrupts' estates historically have had the power to issue ancillary orders enforcing their *in rem* adjudications."). These forms of process and relief necessarily include, for

example, orders of enforcement directed against state actors "free and clear of the State's claim of sovereign immunity" because the power to enforce the Code historically included not only orders directing the turnover of property, but writs of habeas corpus directing the release from state custody of debtors imprisoned for debt. *Id.* at 372-73.

As this Court has also explained, the bankruptcy courts are "courts of equity and 'appl[y] the principles and rules of equity jurisprudence.'" *Young v. United States*, 535 U.S. 43, 50 (2002) (quoting *Pepper v. Litton*, 308 U.S. 295, 304 (1939)). That is all the more so when enforcing an injunction, which is quintessentially a form of equitable relief. *See, e.g.*, *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-98 (1946) (jurisdiction "to enjoin acts and practices made illegal by the Act and to enforce compliance . . . is an equitable one"). Such equitable jurisdiction necessarily includes the ability to award "complete relief even though the decree includes that which might be conferred by a court of law." *Id.* at 399. As the Court explained over two centuries ago, "[t]o fine for contempt—imprison for contumacy—inforce [*sic*] the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others . . . ." *United States v. Hudson*, 11 U.S. 32, 34 (1812); *see also Taggart*, 139 S. Ct. at 1801 (recognizing that the bankruptcy court has the authority to enforce the discharge injunction and "the bankruptcy statutes incorporate the traditional standards in equity practice for determining when a party may be held in civil contempt for violating an injunction"); *Celotex Corp. v. Edwards*, 514 U.S. 300, 303 (1995)

(recognizing that the bankruptcy court has the equitable authority to enter an order enforcing the automatic stay).

Finally, the automatic stay is enforced by motion, not summons and complaint. *See* Fed.R.Bankr.P. 9013; *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 18 (1995) (noting debtor proceeded by filing a motion to enforce the automatic stay). Consistent with equity practice generally, *see Porter*, 328 U.S. at 398 (discussing a court's equitable authority to shape the process in accordance with the circumstances of the case), process under Rule 9013 may issue as "the court directs . . . ." Fed.R.Bankr.P. 9013(b).

II. SUMMARY STATEMENT OF THE CASE

A. Background and Proceedings in the Bankruptcy Court

In July 2019, Coughlin took out a $1,100 "payday" loan from Lendgreen. App. 3a. Coughlin thereafter filed for bankruptcy relief. App. 3a-4a, 54a. Notwithstanding Coughlin's bankruptcy filing (of which Lendgreen was aware), and in direct violation of the automatic stay, 11 U.S.C.§ 362(a), Lendgreen continued to call Coughlin, seeking repeatedly to collect payment of the debt. Lendgreen's harassment "compounded" the effects of Coughlin's financial distress, and his "mental and financial agony" led him to "attempt[] suicide." App. 4a. Nonetheless, Lendgreen persisted in calling him both in the hospital and after his release. COA App. 89-90, 146.

Thereafter, Coughlin moved to enforce the automatic stay. App. 4a. The Band asserted tribal immunity. App. 3a n.1. The bankruptcy court ruled in the Band's favor, App. 53a-58a, concluding that, although the Bankruptcy Code contains "a broad abrogation of sovereign immunity," it would follow the Sixth Circuit's decision in *In re Greektown Holdings, LLC*, 917 F.3d 451 (6th Cir. 2019), holding that "§§ 106 [and] 101(27) lack the requisite clarity of intent to abrogate tribal sovereign immunity," App. 55a; 57a (quoting *Greektown Holdings*, 917 F.3d at 461).

B. Proceedings in the Court of Appeals

On appeal, the Court of Appeals reversed (with one judge dissenting), concluding that "the Bankruptcy Code unequivocally strips tribes of their immunity." App. 3a. The court observed that, under § 106(a), "sovereign immunity is abrogated as to a governmental unit,'" App. 6a, and under § 101(27), "governmental unit" encompasses "essentially all forms of government," *id.* 7a. The court found "no real disagreement" that tribes met the definition of a "governmental" unit. App. 7a-8a. Further, tribes fall within the plain meaning of "domestic" entities because they operate "within the sphere of authority or control or the . . . boundaries of' the United States." App. 8a & n.4 (internal marks omitted). The court concluded that Congress "understood tribes to be domestic governments" when it "enacted §§ 101(27) and 106," and those provisions "unmistakably abrogate[] the sovereign immunity of tribes." App. 11a.

SUMMARY OF THE ARGUMENT

The Court of Appeals determined correctly that, in enacting § 106(a), Congress plainly abrogated whatever immunity the Band may claim to possess in bankruptcy. *See* 11 U.S.C. § 106(a). As elaborated in Coughlin's brief, the Band is a domestic government, and hence a governmental unit, for which Congress has expressly waived immunity. More fundamentally, however, under this Court's precedents, the Band has no claim to immunity from the bankruptcy court's exercise of its equitable *in rem* jurisdiction in this matter.

For over a century, this Court has recognized that sovereign immunity from *in personam* adjudication does not thwart a federal court's *in rem* bankruptcy or admiralty jurisdiction. *See Hood*, 541 U.S. at 448-51 (surveying cases). As the Court observed in *Hood*, "[t]he issuance of process . . . is normally an indignity to the sovereignty of a State because its purpose is to establish personal jurisdiction over the State." *Id.* at 453. Proceedings in bankruptcy to adjudicate such matters as the debtor's discharge, however, are not *in personam*; rather, they fall squarely "within the bankruptcy court's *in rem* jurisdiction . . . ." *Id.* at 451-52. The same applies to the automatic stay, which, like the discharge, also falls squarely within the ambit of the bankruptcy court's *in rem* authority. As this Court observed in *Hood*, the Court has long endorsed the exercise of *in rem* adjudicative authority in bankruptcy and admiralty, even in proceedings involving sovereign interests. *Id.* at 450-51 (surveying cases). Additionally, *in rem* adjudications

initiated by motion seeking a determination of a debtor's essential bankruptcy entitlements "raise no constitutional concern." *Id*. at 453.

That Coughlin seeks to enforce the automatic stay rather than the discharge does not alter the analysis. The automatic stay is a statutory injunction ancillary to Coughlin's *in rem* bankruptcy case integral to its administration. A motion seeking to enforce such an injunction is not converted into an *in personam* legal action because it seeks an order directing the Band to comply with the law or sanctioning the Band for willful non-compliance.

In any event, and as the Court further explained in *Katz*, regardless of whether the relevant process and relief are labelled *in rem* or *in personam*, they remain ancillary to the *in rem* proceeding, not separate from it. Inasmuch as proceedings to enforce the core administrative provisions of the Bankruptcy Code (such as the automatic stay) are "necessary to effectuate the *in rem* jurisdiction of the bankruptcy court," *Katz*, 546 U.S. at 378, no claim to immunity arises, *see id.* at 373 (concluding that, regardless of how they are labelled, ancillary processes at the core of the administration of bankruptcy cases operate "free and clear of the State's claim of sovereign immunity").

The *in rem* principles summarized above have been a basic feature of bankruptcy and admiralty jurisprudence for centuries. Just as a governmental entity may not assert sovereign immunity to thwart the exercise of admiralty jurisdiction, it may not assert sovereign immunity to circumvent enforcement of critical provisions of the Bankruptcy Code. Because

Congress has abrogated whatever immunity the Band possesses in this instance, and, in any event, because no such immunity exists in ancillary proceedings to enforce core provisions of the Code like the automatic stay, the judgment of the Court of Appeals should be affirmed.

ARGUMENT

I. There Is No Sovereign Immunity Defense to a Motion to Enforce the Automatic Stay.

A. Sovereign Immunity Does Not Restrict the Bankruptcy Court's Exercise of *In Rem* Jurisdiction.

"Bankruptcy jurisdiction, at its core, is *in rem*." *Katz*, 546 U.S. at 362; *see also Hood*, 541 U.S. at 447-48 (the bankruptcy "court's jurisdiction is premised on the res," and the discharge of a debt by an order of the bankruptcy court is an "*in rem* proceeding") (citing *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947); *Straton*, 283 U.S. at 320–321; *Hanover Nat. Bank v. Moyses*, 186 U.S. 181, 192 (1902); *New Lamp Chimney Co. v. Ansonia Brass & Copper Co.*, 91 U.S. 656, 662, (1876)). As the Court elaborated in *Straton*:

> The purpose of the Bankruptcy Act (11 USCA) passed pursuant to the power of Congress to establish a uniform system of bankruptcy throughout the United States, is to place the property of the bankrupt, whereever [*sic*] found, under the control of the court, for equal distribution among the creditors. The

> filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. This jurisdiction is exclusive within the field defined by the law, and is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition.

Straton, 283 U.S. at 320-21; *see also Pepper*, 308 U.S. at 304; *Lazarus*, 234 U.S. at 266; *Acme*, 222 U.S. at 307.

Moreover, the bankruptcy court's *in rem* jurisdiction is crucial to the proper functioning of the bankruptcy process. As the Court explained in *Hood*, among other things, "[a] bankruptcy court is able to provide the debtor a fresh start . . . despite the lack of participation of all of his creditors, because the court's jurisdiction is premised on the debtor and his estate, and not on the creditors." *Hood*, 541 U.S. at 447; *see also Katz*, 546 U.S. at 363-64 ("Critical features of every bankruptcy proceeding are the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a 'fresh start' by releasing him, her, or it from further liability for old debts.") (internal quotation omitted).

The automatic stay is likewise integral to the functioning of the bankruptcy process. *See, e.g.*, *Taggart*, 139 S. Ct. at 1804 (observing that the stay "aims to prevent damaging disruptions to the administration of a bankruptcy case"). And as the

Court has explained, a bankruptcy court's jurisdiction properly extends to enforce the stay as necessary to ensure its effectiveness. *See, e.g.*, *Celotex*, 514 U.S. at 306, 313; *see also Taggart*, 139 S. Ct. at 1801 (recognizing that the bankruptcy court has the authority to enforce the discharge injunction).

In *Celotex*, the Court upheld a bankruptcy court's injunction reaffirming the protections of the stay and prohibiting creditors from proceeding further against the debtor's assets. In approving the injunction, the Court reasoned that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Celotex*, 514 U.S. at 308 (internal marks and citation omitted). Notably, the Court characterized the order in question as "augment[ing]" the relief afforded by the statutory stay, which, as the Court concluded, fell within the bounds of the bankruptcy court's jurisdiction. *Id.* at 303. That analysis is entirely consistent with the Court's subsequent decision in *Katz*, reaffirming the historic understanding that the various equitable devices available to the bankruptcy court in bankruptcy administrations (*e.g.*, turnover orders, etc.) are properly forms of process and relief ancillary to the court's exercise of its *in rem* authority. And as noted, such "operate[] free and clear of [a] claim of sovereign immunity." *Katz*, 546 U.S. at 373.[2]

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[2] *See also PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244, 2266 (2021) (Barrett, J., dissenting, joined by Thomas, J., Kagan, J., and Gorsuch, J.) ("We have recognized but one exception to this general limit on Congress' Article I powers: the Bankruptcy

In *Katz*, the Court recognized that, although "[b]ankruptcy jurisdiction, as understood today and at the time of the framing, is principally *in rem*," 546 U.S. at 369-70, 372, a bankruptcy court's authority ancillary to its *in rem* jurisdiction includes the power to enter orders necessary to administer the case, enforce the Bankruptcy Code, and protect its own jurisdiction. *See, e.g.*, *Katz*, 546 U.S. at 362 (explaining that that the exercise of *in rem* jurisdiction includes "the power to issue compulsory orders to facilitate the administration and distribution of the res" and that this "was as true in the 18th century as it is today"). As recognized in *Celotex*, such equitable authority is expressly conferred by statute. *See Celotex*, 514 U.S. at 303 (observing that "the Bankruptcy Court exercised its equitable powers under 11 U.S.C. § 105(a) and issued an injunction . . . to augment the protection afforded Celotex by the automatic stay"); *see also Taggart*, 139 S. Ct. at 1801 (similarly citing § 105 in discussing the bankruptcy court's authority to enforce the discharge injunction).

The specific question addressed in *Katz* was whether an action brought by a bankruptcy trustee to set aside and recover preferential transfers to various state agencies was barred by principles of sovereign immunity. The Court concluded that "courts adjudicating disputes concerning bankrupts' estates

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Clause. Based on the principally *in rem* nature of bankruptcy jurisdiction and the unique history of that clause, we reasoned that States already agreed in the plan of the Convention not to assert any sovereign immunity defense in bankruptcy proceedings.") (citations and quotations omitted).

historically have had the power to issue ancillary orders enforcing their *in rem* adjudications," *Katz,* 546 U.S. at 370, and that such orders do not infringe state sovereignty, *id.* at 372.

As in *Hood*, the Court in *Katz* recognized that the kinds of processes a bankruptcy court uses may resemble those used in *in personam* matters. But this resemblance is not dispositive: "Our precedent has drawn a distinction between *in rem* and *in personam* jurisdiction, even when the underlying proceedings are, for the most part, identical." *Hood*, 541 U.S. at 453. Accordingly, "whether an *in rem* adjudication in bankruptcy court is similar to civil litigation in the district court is irrelevant." *Id.* Any overlap with characteristics of *in personam* process does not alter the fundamental character of an *in rem* proceeding, which, once again, operates free of claims of sovereign immunity. *Katz,* 546 U.S. at 372; *see also id.* at 378 (noting that a bankruptcy court's *in rem* jurisdiction does not "implicate state sovereignty to nearly the same degree as other kinds of jurisdiction").

The Court's specific analysis in *Hood* is instructive. Congress amended the bankruptcy laws in 1976 to except from the bankruptcy discharge a debtor's student loan obligations absent a showing of "undue hardship." *Hood,* 541 U.S. at 449. The amendment, together with the rules promulgated to implement it, created a new procedure for seeking an "undue hardship" determination, including the requirement that the debtor commence an "adversary proceeding" within the bankruptcy case—a form of proceeding similar to the commencement of a traditional lawsuit. *Id.* at 451. Complying with the relevant procedural rules, the debtor in *Hood* served

a summons and complaint on the state agency involved in administering the debtor's student loans. *Id.* (citing Fed.R.Bankr.P. 7001(6), 7003, 7004 (detailing the procedural requirements for instituting an undue hardship proceeding)). The dissent in *Hood* concluded that this process too closely resembled *in personam* civil litigation against the state. *Id.* at 459 (Thomas, J., dissenting) ("I simply cannot ignore the fact that respondent filed a complaint in the Bankruptcy Court."). The majority, however, concluded that the form of process was not controlling. It would have been entirely appropriate, the Court reasoned, for the undue hardship matter to have been resolved by motion. *Id.* at 454. And if the debtor had proceeded by motion, such "would raise no constitutional concern." *Id.* at 453. The Court reiterated that, once again, "[n]o matter how difficult Congress has decided to make the discharge of student loan debt, the bankruptcy court's jurisdiction is premised on the res, not on the persona." *Id.* at 450. Thus, notwithstanding the form of process employed, the relevant proceeding remained *in rem* in nature as to which no claim of sovereign immunity applied. *Id.* at 451 n.5 ("[T]he court's exercise of *in rem* jurisdiction to discharge a student loan debt is not an affront to the sovereignty of the State.").

The same is true of Coughlin's *motion* to enforce the automatic stay at issue here. *See Fla. Dep't of Revenue v. Diaz* (*In re Diaz*), 647 F.3d 1073, 1086 (11th Cir. 2011) ("[W]e have no difficulty concluding that contempt motions alleging that a creditor has violated the automatic stay *generally* qualify as 'proceedings necessary to effectuate the *in*

rem jurisdiction of the bankruptcy courts.'" (quoting *Katz*, 546 U.S. at 378)). Lendgreen's post-bankruptcy debt-collection efforts plainly violated the stay by, among other things, seeking payment from property of the estate (*i.e.*, funds belonging to the estate) subject to the bankruptcy court's exclusive *in rem* jurisdiction, custody, and control. The court's authority to vindicate its control from such interference is likewise *in rem*. Among other reasons, it fits squarely within the scope of the court's *in rem* "power to issue compulsory orders to facilitate the administration and distribution of the res." *Katz*, 546 U.S. at 362; *see also id.* at 370 (the bankruptcy court may hear, decide, and issue "ancillary orders" in furtherance of its *in rem* jurisdiction).

The Court's analysis in *Hood* and *Katz* was not novel, but rather the culmination of a long line of decisions recognizing that *in rem* adjudications in bankruptcy operate free of sovereign immunity constraints. In *Hood,* for example, the Court cited its prior decision in *Irving Trust*, in which the Court sustained a bankruptcy court's order disallowing a State's untimely tax claim. *Hood,* 541 U.S. at 448 (citing *Irving Trust*, 288 U.S. at 333 (holding that "[i]f a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated")). The Court also cited its prior decision in *Van Huffel*, holding that a bankruptcy court's order authorizing the sale of the debtor's property free and clear of a state tax lien did

not conflict with the Eleventh Amendment. *Id.* (citing *Van Huffel v. Harkelrode*, 284 U.S. 225, 228–29 (1931)). Finally, the Court relied on *Gardner*, in which the Court concluded that a proof of claim filed by the state comptroller had the effect of waiving the state's sovereign immunity defense. *Id.* (citing *Gardner*, 329 U.S. at 574 ("When the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim.")).

The rule that sovereign immunity offers no defense to the exercise of a court's *in rem* jurisdiction recurs throughout the Court's *in rem* admiralty jurisprudence, with even deeper roots. In *Deep Sea Research*, the Court observed that the Eleventh Amendment did not bar federal jurisdiction over the adjudication of a state's interests in a sunken vessel outside the state's control. *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 507-08 (1998). In particular, the Court grounded its decision in the long-held understandings of *in rem* admiralty jurisprudence articulated in *The Davis* and other foundational admiralty cases. *Id.* at 507 (discussing *The Davis, The Siren,* and *The Pesaro,* which all support the principle that *in rem* jurisdiction does not impugn sovereign immunity). In *The Davis*, the Court recounted the "doctrine . . . that proceedings *in rem* to enforce a lien against property of the United States are only forbidden in cases where, in order to sustain the proceeding, the possession of the United States must be invaded under process of the court." *The Davis*, 77 U.S. (10 Wall.) 15, 20 (1869). As the Court noted, possession meant "actual possession . . . which is consistent with the principle which exempts

government from suit . . . ." *Id.* at 21. Thus, in both the bankruptcy and admiralty contexts, the Court has long understood sovereign immunity to pose no barrier to an adjudication *in rem* of sovereign interests, so long as the *res* is not in the actual physical possession of the sovereign. *See Hood*, 541 U.S. at 451 (there is "no reason why the exercise of the federal courts' *in rem* bankruptcy jurisdiction is more threatening to state sovereignty than the exercise of their *in rem* admiralty jurisdiction").[3]

Both the Band and the dissent below concede that the Band has no sovereign immunity defense to the exercise of the bankruptcy court's *in rem* power. *See* Br. Pet. 49, n.5 (citing App. 44a (Barron, C.J., dissenting) ("[T]ribal sovereign immunity would supply no defense with respect to provisions of the Code (such as the one that permits a bankruptcy court to order the discharge of debts) that do not authorize *in personam* suits against Indian tribes." (internal quotations omitted))). They simply assume, incorrectly, that a motion to enforce the stay is something other than the exercise of *in rem* jurisdiction.

Unlike the adversary proceedings at issue in *Katz* and *Hood* (both commenced by summons and complaint), the proceeding here is nothing more than a motion to enforce the stay by process ancillary to the

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[3] This possessional caveat has no bearing in bankruptcy, where the commencement of the case vests the bankruptcy court with exclusive *in rem* jurisdiction over all property of the estate, *i.e.*, the *res*. *See* 28 U.S.C. §§ 157(a), 1334(e); *Hood*, 541 U.S. at 447-48; *Straton*, 283 U.S. at 321.

court's *in rem* jurisdiction, occurring before the same judge, and entered on the same docket as Coughlin's bankruptcy case. *See* App. 53a. A motion to enforce the automatic stay bears little resemblance to more traditional forms of *in personam* civil litigation that caused disagreement between the majorities and dissents in *Hood* and *Katz*. Rather, the automatic stay may be enforced against the Band because it is "bound by a bankruptcy court's . . . order no less than other creditors." *Hood*, 541 U.S. at 448.[4]

B. Petitioner's Prayer for Monetary Relief Does Not Convert this Equitable *In Rem* Matter into an *In Personam* Legal Proceeding.

Coughlin's request for monetary relief for the Band's violation of the automatic stay does not alter the analysis. The power to issue a monetary sanction for violating the stay inures as part of the bankruptcy court's authority to enter an order necessary or appropriate "to carry out" the provisions of the

[4] The Court's decision in *United States v. Nordic Village Inc.*, 503 U.S. 30 (1992), concerning whether Congress had clearly waived the United States' immunity under a prior version of section 106, is not to the contrary. In that case, which did not involve enforcement of the automatic stay, the Court observed in passing that "respondent did not invoke, and the Bankruptcy Court did not purport to exercise, *in rem* jurisdiction." *Id*. at 39. As elaborated above, however, this case involves exactly that. The Court's brief discussion in *Nordic Village* did not cite or address its many precedents regarding the nature of a bankruptcy court's *in rem* jurisdiction. These precedents, together with the relevant principles on which they rest, were subsequently elaborated in detail, and reaffirmed, in *Hood* and *Katz*.

Bankruptcy Code. *Taggart*, 139 S. Ct. at 1801 (quoting 11 U.S.C. § 105(a)). Just as the administration of a case under the Code is properly *in rem*, so too are the orders necessary "to carry out" such *in rem* provisions. Once again, as the Court elaborated in *Hood*, "[o]ur precedent has drawn a distinction between *in rem* and *in personam* jurisdiction, even when the underlying proceedings are, for the most part, identical. Thus, whether an *in rem* adjudication in a bankruptcy court is similar to civil litigation in a district court is irrelevant." *Hood*, 541 U.S. at 453. Regardless of the label affixed to Coughlin's motion, no claim of sovereign immunity attaches to the ancillary relief he seeks. *Katz*, 546 U.S. at 372.

A request for monetary relief for the violation of a core administrative provision of the Bankruptcy Code does not somehow convert the matter into an impermissible *in personam* action. *See Davis v. California* (*In re Venoco LLC*), 998 F.3d 94, 106 (3d Cir.), *cert. denied*, *Cal. State Lands Comm'n v. Davis*, 142 S. Ct. 231 (2021) (denying state's sovereign immunity defense against inverse condemnation claim and holding that "even if the action 'may resemble money damage lawsuits in *form*, it is their *function* that is critical'") (quoting *Diaz*, 647 F.3d at 1085). Rather, even in a proceeding seeking money relief, the bankruptcy court has jurisdiction to adjudicate such proceedings precisely because they are ancillary to the court's *in rem* authority. *See Diaz*, 647 F.3d at 1085-86 (11th Cir. 2011) (motions seeking contempt and sanctions against state agencies for violations of the discharge injunction meet the "necessary to effectuate" standard articulated in *Katz*,

and bankruptcy courts may exercise jurisdiction) (quoting *Katz*, 546 U.S. at 378). Critically, this applies to violations of the automatic stay as much as the discharge; both are integral to bankruptcy administration. To hold otherwise would gut the enforcement mechanism, hobble the bankruptcy court's administrative powers, and permit the routine violation of key Code provisions.

II. Orderly Operation of the Bankruptcy Code Is Essential to Protect Consumer Debtors from Unlawful Abuse.

Amici agree with Coughlin that there is nothing equivocal or ambiguous about Congress's decision in the Bankruptcy Code to globally waive sovereign immunity for all foreign and domestic governmental units, including the Band. That waiver is essential to achieving the bedrock purposes of the Bankruptcy Code: equitable treatment of creditors; orderly, collective resolution of debtor-creditor relationships in insolvency; and discharge. Nothing in § 106(a) even vaguely suggests that Indian tribes alone among all foreign and domestic governmental units should be exempt from this express global waiver. And this case in particular, set in the context of a claim of sovereign immunity to shelter exploitative lending practices,[5] perfectly illustrates

[5] The Consumer Finance Protection Bureau (CFPB) reports that the mean annual percentage rate on payday loans was 339%. CFPB, *Payday Loans and Deposit Advance Products: A White Paper of Initial Data Findings* at 17 tbl. 1 (Apr. 24, 2013); *see*

the wisdom of Congress's decision not to carve out any special exemption in § 106(a) for tribes.

Coughlin is a consumer debtor resident in Massachusetts with no connection to the Band other than his two online payday loans from entities affiliated with the Band.[6] The Lendgreen loan at issue carries an interest rate of 108% per annum, violating Massachusetts law, which criminalizes lending at interest rates in excess of 20% per annum. MASS. GEN. LAWS CH. 271 § 49. Lendgreen, which extended this loan and is asserted to be an arm of the Band, could not lawfully operate in Massachusetts or make its loan there. The Band nevertheless claims to operate Lendgreen over the internet from Lac du Flambeau, Wisconsin, along with various other payday lending entities.[7] Avoiding scrutiny from local

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also CFPB, *Market Snapshot: Consumer Use of State Payday Loan Extended Payment Plans* (Apr. 2022).

[6] Appellant's Appendix (COA App.), *Coughlin* v. *Lac du Flambeau Band of Lake Superior Chippewa Ind, et al*, No. 21-1153, 20-70 (1st Cir. June 1, 2021).

[7] On August 28, 2020, the Washington State Department of Financial Institutions (DFI) reported that the Band has been doing business under multiple names, none of which were registered to do business in Washington State. DFI then listed websites for twelve lenders and warned their customers to watch for unauthorized transfers from their bank accounts. *See Lac du Flambeau Band of Lake Superior Chippewa Indians Tribal Lender Not Licensed in Washington*, WASH. STATE DEP'T OF FIN. INSTS. (Aug. 28, 2020), https://dfi.wa.gov/consumer/alerts/lac-du-flambeau-band-lakesuperior-chippewa-indians-tribal-lender-not-licensed. Moreover, in addition to the Lendgreen loan at issue in this case, Coughlin's Ch. 13 bankruptcy petition also lists a second payday loan from an entity described as Vlizhwaaswi, LLC d/b/a Loan at Last with a Lac du Flambeau, Wisconsin post office box at the same post office as Lendgreen.

authorities, the Band entities only lend over the internet to persons, like Coughlin, who are neither members of the Band nor residents of the state of Wisconsin in which its reservation is located.[8]

The Band is not the only Native American tribe that has emerged to become a nationwide force in the payday loan business in the last ten years. The Public Justice Foundation exposed the scope of the "Rent-a-Tribe" loophole exploited by shadowy offshore payday lenders operating unlawful and unlicensed business models skirting judicial and regulatory policing of their businesses.[9] It lists, as of November 2017, 23 different tribes (including the Band) among the 97 lending websites listing tribal affiliations.[10] The Foundation's November 2017 209-page report, *supra* n.9, bears reading in full to understand the scope and nature of the exploitation of sovereign immunity that

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COA App. 70. *See also* COA App. 285 (Lac du Flambeau Band Tribal Res. 550(12) authorizing the creation of various entities to operate payday lending businesses).

[8] *See* COA App. 106-07 (Lendgreen collection notice sent to Coughlin in violation of automatic stay noting that residents of Wisconsin and members of the military are not eligible for Lendgreen loans). *See also* Public Justice Foundation, *infra* n.9, at 147 fig. 20 (excerpting Lac du Flambeau Band 2013 Newsletter ("Tribal Members and residents of the state of Wisconsin will not be eligible for lending services.")).

[9] Kyra Taylor, Leslie Bailey & Victoria W. Ni, *Stretching the Envelope of Tribal Sovereign Immunity?: An Investigation of the Relationships Between Online Payday Lenders and Native American Tribes*, Public Justice Foundation (Nov. 2017), https://www.publicjustice.net/wp-content/uploads/2018/01/SVCF-Report-FINAL-Dec-4.pdf.

[10] *Id.* at 24 tbl. 6; 26-29 tbl. 9.

lies at the foundation of this segment of the modern payday lending industry. Nevertheless, the basics of "Rent-A-Tribe" are simple enough.

A non-Indian lender supplies all the capital and know-how to enable the tribe to set up a turnkey payday lender operating exclusively on the internet servicing out-of-state residents. A shell entity[11] owned by the tribe is created and then contracts with the non-Indian "partner," who in fact controls all the operations and absorbs all the credit risk in exchange for 95% to 99% of the profits. The sponsoring tribe passively accepts 1% to 5% of the profits in exchange for allowing its shell payday lending entity to furnish its asserted sovereign immunity to the venture, thereby purporting to erect a legal shield against usury law, bankruptcy law, and other regulatory requirements around the payday lender. Nathalie Martin, *Brewing Disharmony: Addressing Tribal Sovereign Immunity Claims in Bankruptcy*, 96 AM. BANKR. L.J. 145, 174 (2022) (citing Public Justice Foundation Report, *supra* n.9, at 157).

In her article, Professor Martin goes on to inquire into the sources of funding behind the loan made to Coughlin. The best she could determine was that an entity named Vivus may have funded the operation by selling the loans to 4Finance, a Bulgarian-controlled bank making high-cost loans

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[11] Lendgreen, the Band entity in this case, is just such a shell corporation. Its organizational documents forbid it to retain more than $500 in cash at any time. COA App. 298 (Operating Agreement of Niiwan LLC Art. 6.2 (immediate mandatory distribution of cash balances exceeding $500)); *id.* at 425 (argument of Mr. Gottleib).

that disclaims conducting business in the United States. *Id.* at 174 n.151. By waiving sovereign immunity globally, Congress has wisely obviated individual consumers' needs to pierce through these elaborate structures to enforce fundamental rights under the Bankruptcy Code. Particularly in Chapter 13 cases in which the automatic stay may remain in place for 3 to 5 years pending completion of a plan, creating an exception for tribe-affiliated lenders would practically doom many debtors' attempts to successfully complete a plan and earn a bankruptcy discharge by devoting their future disposable income to debt repayment. If tribe-affiliated lenders may seize Chapter 13 debtors' post-bankruptcy earnings regardless of the stay, debtors would find it impossible to fund their plans.

The payday lending industry has proven remarkably resilient in adapting to regulatory threats to its exploitive business model. Its creative attempt to expand and abuse Indian sovereign immunity, and to appropriate it to protect that business model, is another tawdry chapter in that saga. *Id.* at 164-70 (discussing payday lending industry efforts to evade regulation). If this Court were to countenance the distorted interpretation of § 106(a) proffered by the Band on behalf of the payday lending industry in this case, less aggressive and less inventive consumer lenders will undoubtedly jump on board, ultimately destroying the discharge and automatic stay protections for consumers built into the Bankruptcy Code to afford the "honest but unfortunate debtor," *Local Loan*, 292 U.S. at 244, a fresh start in bankruptcy. If tribal immunity is for sale to insulate

payday lenders from bankruptcy law, it is for sale to everyone else, too.[12]

CONCLUSION

For the foregoing reasons, and those elaborated by Respondent, the undersigned *amici curiae* respectfully request that the Court affirm the judgment below.

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[12] For the avoidance of doubt, Indian tribes, as "governmental units," 11 U.S.C. § 101(27), benefit from the special exemptions to bankruptcy's automatic stay for actions enforcing the regulatory powers of governmental units. *See* 11 U.S.C. §§ 362(b)(3)-(4). Accordingly, the suggestion of the *Brief Amici Curiae of the Navajo Nation et al*. at 8-9 that affirming this case would adversely affect tribal governments' exercise of their legitimate regulatory authority is baseless. Indeed, perversely, if the Navajo Nation's interpretation of § 101(27) were adopted, then Indian tribes would fall outside the statutory exemption in favor of the regulatory actions of "governmental units." With respect to Navajo Nation's other supposedly problematic examples, there is simply no reason to support a blanket exemption to bankruptcy law applicable to all other governmental units and persons in favor of tribes in the face of the express language of § 106(a) and its careful enumeration of Bankruptcy Code sections for which sovereign immunity has been abrogated for all domestic and foreign governmental units.

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