No. 22-15298

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NUMA CORPORATION; CEDARVILLE RANCHERIA OF NORTHERN PAIUTE INDIANS,

Appellants,

v.

JASON DIVEN,

Appellee.

On Direct Appeal from the United States Bankruptcy Court
for the Eastern District of California
No. 2:20-bk-24311, Hon. Ronald H. Sargis

BRIEF OF NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* National Consumer Bankruptcy Rights Center states that it is a nonprofit organization and that it has no parent corporation and issues no stock, and *amicus curiae* National Association of Consumer Bankruptcy Attorneys states that it is a nonprofit organization and that it has no parent corporation and issues no stock.

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IDENTITY AND INTEREST OF *AMICI CURIAE*[*]

Amicus National Consumer Bankruptcy Rights Center ("NCBRC") is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are 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 in the appellate process. NCBRC files *amicus curiae* briefs in systemically important cases to ensure courts have a full understanding of applicable bankruptcy law, the case, and its implications for consumer debtors.

The National Association of Consumer Bankruptcy Attorneys ("NACBA") is also a nonprofit organization that advocates on issues that may not adequately be addressed by individual member attorneys. It is the only national association of attorneys organized to protect the rights of consumer bankruptcy debtors. NACBA files *amicus curiae* briefs in various cases seeking to protect those rights.

This case is of special interest to NCBRC and NACBA because it involves the enforceability of the automatic stay. That stay "has been described as 'one of

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[*] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amici* represent that no counsel for any of the parties authored any portion of this brief and that no entity, other than *amici* or their counsel, monetarily contributed to the preparation or submission of this brief.

the fundamental debtor protections provided by the bankruptcy laws.'" *Midlantic Nat'l Bank v. N.J. Dep't of Env't Prot.*, 474 U.S. 494, 503 (1986) (quoting S. Rep. No. 95-989, at 54 (1978)). It "plays a vital role in bankruptcy" and allows "debtors . . . [to] attempt to regain their financial footing." *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992). It "provides the debtor with a 'breathing spell' from the harassing actions of creditors" and "protects the interests of all creditors by preventing 'dismemberment' of the debtor's assets." *In re Schwartz-Tallard*, 803 F.3d 1095, 1100 (9th Cir. 2015) (en banc). Because of the importance of the stay, Congress has "provid[ed] robust remedies for debtors who prevail" in enforcing it, so as to "deter creditors from violating the automatic stay in the first instance." *Id.*

Appellant NUMA Corporation ("NUMA") argues that a tribal corporation has immunity from enforcement of the automatic stay and may pursue an action in tribal court against an individual debtor who allegedly failed to carry out a construction contract and then sought personal bankruptcy protection. For the reasons set forth in Appellee's brief and this *amicus* brief, the issue that NUMA raises was settled in this Circuit by *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004). Because of the importance of the automatic stay to consumer debtors and the harm to their interests that would follow a tribal-business exception to the automatic stay, NCBRC and NACBA seek to participate as *amici curiae* to provide the Court with a full view of all relevant issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The Bankruptcy Code clearly abrogates tribal sovereign immunity from the jurisdiction of a federal bankruptcy court. It does so by "abrogat[ing]" the "sovereign immunity . . . as to a governmental unit," 11 U.S.C. § 106(a), and by defining the term "governmental unit" to include a "foreign or domestic government," *id.* § 101(27). *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), settled that proposition as a matter of Circuit law.

II. *Krystal Energy*'s holding remains good law, and NUMA errs in urging this Court to depart from it. NUMA does not and cannot point to any intervening Supreme Court precedent. Its claim that a panel of this Court "tacitly overruled" *Krystal Energy* in *Daniel v. National Park Service*, 891 F.3d 762 (9th Cir. 2018), both misapplies principles of *stare decisis* and misreads *Daniel*. In any event, even if the binding precedential effect of *Krystal Energy* were up for debate (which it is not), NUMA's criticisms of that decision lack any force.

III. Congress's clear mandate giving bankruptcy courts jurisdiction over tribes and tribal entities is important to protect consumer debtors. Those debtors need the bankruptcy automatic stay to shield them from financial distress and harassment by collectors. As tribal entities increasingly become involved in payday lending activities that threaten consumer welfare, *Krystal Energy*'s holding has taken on even greater importance.

ARGUMENT

I. Congress Unequivocally Abrogated Tribal Sovereign Immunity in the Bankruptcy Code, as This Court Held in *Krystal Energy*

A. The Text of the Bankruptcy Code Abrogates Tribal Immunity

"Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) ("*Potawatomi Tribe*")). They have "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). But tribal sovereignty is "qualified": "a tribe's immunity, like its other governmental powers and attributes," is "in Congress's hands." *Bay Mills*, 572 U.S. at 789. Congress may therefore "abrogate tribal immunity" through a statute that "'unequivocally' express[es] that purpose." *C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418 (2001) (quoting *Santa Clara Pueblo*, 436 U.S. at 58).

The Bankruptcy Code expresses through two connected provisions Congress's clear intent to abrogate all kinds of sovereign immunity – federal, state, foreign, and tribal – from federal bankruptcy jurisdiction. *First*, § 106(a) provides that, "[n]otwithstanding 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" a list of other Code sections. 11 U.S.C. § 106(a). That list includes

"[s]ection[] . . . 362," *id.* § 106(a)(1), which automatically stays collection efforts, *see id.* § 362(a)(6), and authorizes the bankruptcy court to enforce that stay, *see id.* § 362(k)(1). For each listed provision, § 106(a) authorizes the court to "hear and determine any issue arising with respect to the application of such sections to governmental units," *id.* § 106(a)(2); and to "issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages," *id.* § 106(a)(3).

Second, § 101(27) defines the phrase "governmental unit" – the key term used in § 106(a) to declare the scope of abrogation – with unambiguous breadth:

> The term "governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

Id. § 101(27). An Indian tribe falls within the plain meaning of the concluding phrase "other . . . domestic government." Tribes are governments because they have "governmental powers and attributes" – including the very "immunity" that NUMA seeks to invoke. *Bay Mills*, 572 U.S. at 789. And federal courts have long recognized tribes as "domestic." *See*, *e.g.*, *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 782 (1991) ("Respondents argue that Indian tribes are more like States than foreign sovereigns. That is true in some respects: They are, for

example, domestic."); *United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100, 103 (1855) (reasoning that "the Cherokee territory" is "not . . . foreign, but . . . domestic," because it "originated under our constitution and laws").

B. *Krystal Energy* Holds That Congress's Intent To Abrogate Tribal Immunity Is Clear from the Code's Text

This Court's decision in *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), found it "clear from the face of §§ 106(a) and 101(27) that Congress . . . intend[ed] to abrogate the sovereign immunity of *all* 'foreign and domestic governments.'" *Id.* at 1057. *Krystal Energy* reasoned that "Indian tribes are certainly governments, whether considered foreign or domestic"; and, relying on *Blatchford* and *Potawatomi Tribe*, that tribes fall into the "domestic" side of "the foreign/domestic dichotomy." *Id.* at 1057-58. Accordingly, this Court held that, "[b]ecause Indian tribes are domestic governments, Congress has abrogated their sovereign immunity in 11 U.S.C. § 106(a)." *Id.* at 1061. It also observed that classifying tribes as governmental units under § 101(27) provides them with important benefits as well as burdens, describing the "myriad" provisions of the Code that treat governmental units more favorably than nongovernmental creditors. *Id.* at 1060 (citing as an example the discharge exemption for many governmental "fine[s], penalt[ies], or forfeiture[s]" under 11 U.S.C. § 523(a)(7)).

Krystal Energy considered and rejected the counterargument that the Bankruptcy Code is equivocal because it does not "actually list[] 'Indian tribes' as

either a foreign or domestic government." *Id.* at 1059; *see also id.* at 1061 ("[T]he Supreme Court's decisions do not require Congress to utter the magic words 'Indian tribes' when abrogating tribal sovereign immunity."). This Court reasoned that "Congress was legislating against the back-drop of prior Supreme Court decisions, which . . . define Indian tribes as domestic nations, i.e., governments, as well as against the ordinary, all-encompassing meaning of the term 'other foreign or domestic governments.'" *Id*. at 1059. Relying on the clear abrogation of § 106(a) and the broad definition of § 101(27), *Krystal Energy* distinguished cases in which Congress had abrogated the immunity of the states but not of other domestic governments, *see id.*, or had "simply provided a general cause of action" without addressing sovereign immunity at all, *id.* at 1059-60.

The First Circuit has recently followed *Krystal Energy*. *In re Coughlin*, 33 F.4th 600 (1st Cir. 2022), did so in "hold[ing] that the Bankruptcy Code unequivocally strips tribes of their immunity." *Id.* at 603. Like this Court, the First Circuit found "no real disagreement that a tribe is a government" and found it "also clear that tribes are domestic, rather than foreign" because they are "within the sphere of authority or control or the . . . boundaries of" the United States. *Id.* at 605-06 & n.4 (quoting *Webster's Third New International Dictionary* 671 (2002) ("*Webster's Third*") and citing other sources). It also reviewed many legislative, executive, and judicial descriptions of tribes as "domestic dependent nations," a

phrase equivalent to "domestic governments," *see id.* at 606-07, and "dr[e]w additional support from the Bankruptcy Code's structure," which "grant[s] benefits" to governmental units such as protecting their ability to "collect taxes," *id.* at 607-08. Further, like this Court, the First Circuit rejected the argument that Congress had to "use magic words," *id.* at 605 (quoting *FAA v. Cooper*, 566 U.S. 284, 291 (2012)); *see also id.* at 608-09, 610-11, such as the specific phrase "Indian tribe," to abrogate immunity.

The Sixth Circuit has disagreed. *In re Greektown Holdings, LLC*, 917 F.3d 451 (6th Cir. 2019), contended that "[e]stablishing that Indian tribes are domestic governments does not lead to the conclusion that Congress unequivocally meant to include them when it employed the phrase 'other foreign or domestic government.'" *Id.* at 460 (emphasis omitted). It criticized this Court's decision in *Krystal Energy* as the "only . . . example at the circuit court level" of a case finding that "Congress intended to abrogate tribal sovereign immunity without expressly mentioning Indian tribes." *Id.* (quoting *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 824 (7th Cir. 2016)) (emphasis omitted). Although *Greektown* purported to stop short of "hold[ing] that specific reference to Indian tribes is in all instances required to abrogate tribal sovereign immunity," *id.* at 461, the lack of such a reference in the Bankruptcy Code was the core of its reasoning.

II. NUMA Errs in Urging This Court To Depart from *Krystal Energy*

A. *Krystal Energy* Is Binding Precedent in This Circuit

The bankruptcy court in this case correctly observed that *Krystal Energy* is "[e]stablished law in the Ninth Circuit," ER19, ER21; and that judges in this Circuit "cannot just disagree [with] and then not follow[]" this Court's rulings, ER35, as NUMA had urged that court to do. As this Court has explained, "[t]he first panel to consider an issue sets the law not only for all the inferior courts in the circuit, but also future panels of the court of appeals." *Silva v. Garland*, 993 F.3d 705, 717 (9th Cir. 2021) (quoting *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001)); *Murray v. Cable Nat'l Broad. Co.*, 86 F.3d 858, 860 (9th Cir. 1996) ("[O]nly a panel sitting en banc may overturn existing Ninth Circuit precedent.") (quoting *United States v. Camper*, 66 F.3d 229, 232 (9th Cir. 1995)).

Because *Krystal Energy* is the law of this Circuit, NUMA's contention (at 19) that "*Krystal Energy* . . . [is] severely flawed as it relates to the application of the Supreme Court's federal Indian law precedent" is inappropriate (as well as incorrect). An argument that an earlier panel decision misapplied Supreme Court precedent is merely an argument that the earlier panel erred, and *stare decisis* bars a later panel from reaching that conclusion. *See Koerner v. Grigas*, 328 F.3d 1039, 1050 (9th Cir. 2003) ("[E]ven if we agreed that [an earlier panel decision] contravenes Supreme Court precedent, we would still be bound to follow it.").

Otherwise, circuit law could never be settled; panels could go on disagreeing indefinitely about the correct application of the same Supreme Court cases.

To be sure, a later panel may consider an argument that an earlier panel's decision is "clearly irreconcilable" with an "intervening United States Supreme Court decision." *Miller v. Gammie*, 335 F.3d 889, 892-93 (9th Cir. 2003) (en banc), *recognized as abrogated on other grounds by Hernandez v. Garland*, 38 F.4th 805 (9th Cir. 2022). But a litigant attacking Circuit precedent on this basis must meet a "high standard" and cannot rely on arguments that intervening authority is in "some tension" with or "'cast[s] doubt' on" the earlier panel case. *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (quoting *United States v. Orm Hieng*, 679 F.3d 1131, 1140-41 (9th Cir. 2012), and *United States v. Delgado-Ramos*, 635 F.3d 1237, 1239 (9th Cir. 2011)).

Here, NUMA does not suggest that intervening Supreme Court precedent is clearly irreconcilable with *Krystal Energy*. Nor could it do so. NUMA cites (at 20, 24) only one Supreme Court case decided after *Krystal Energy*: the 2014 decision in *Bay Mills*, 572 U.S. 782. *Bay Mills* held that tribal sovereign immunity barred a suit under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*., through which the State of Michigan sought to halt certain off-reservation gaming activities. In so doing, *Bay Mills* reaffirmed existing law that tribes enjoy "common-law immunity from suit"; that Congress's "plenary authority over tribes"

includes the power to "abrogate . . . immunity"; but that Congress "must 'unequivocally' express [its] purpose" to do so. 572 U.S. at 788-90 (quoting *Santa Clara Pueblo*, 436 U.S. at 58, and *C&L Enters.*, 532 U.S. at 418). Those are the same principles that this Court recognized and applied in *Krystal Energy*. *See* 357 F.3d at 1056. Because the language of the Bankruptcy Code is different from IGRA's, the two cases reached different results; but nothing about them is irreconcilable.

B. *Daniel*'s Reasoning and Result Are Consistent with *Krystal Energy*

Rather than suggesting any conflict with intervening Supreme Court authority, NUMA instead argues (at 6, 30, 37-38) that *Daniel v. National Park Service*, 891 F.3d 762 (9th Cir. 2018), "tacitly overruled" *Krystal Energy*. *Daniel* did no such thing. Indeed, it could not properly have tried: it was decided by "a three-judge panel . . . without authority to 'overrule a circuit precedent.'" *Newdow v. Lefevre*, 598 F.3d 638, 644 (9th Cir. 2010) (quoting *Robbins v. Carey*, 481 F.3d 1143, 1149 n.3 (9th Cir. 2007)). But there is no reason to read *Daniel* as transgressing, or even coming close to, that limit on its authority. It does not cite *Krystal Energy*, does not cite any provision of the Bankruptcy Code, and does not adopt any holding about tribal immunity in a bankruptcy or any other context.

Instead, *Daniel* addressed whether the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"), abrogates federal sovereign immunity. *See* 891 F.3d at

765. FCRA authorizes suits and enforcement actions against "any person" who violates it, and includes "any . . . government" in its definition of a "person." *Id.* at 769-70 (quoting 15 U.S.C. §§ 1681a(b), 1681n) (emphasis omitted). Reading the statute "as a whole," *Daniel* concluded that it was "ambiguous with respect to whether Congress waived immunity" against suits under § 1681n. *Id.* at 769. Among other things, *Daniel* observed that the statute uses the term "person" in many places where including the United States would lead to "implausible results," *id.* at 770; that it contains a separate, narrower waiver of federal sovereign immunity, *id.* at 771-72 (citing 15 U.S.C. § 1681u(j)); and that other cases have held that a mere authorization of "suit . . . against a 'person,' without listing the United States," does not waive federal sovereign immunity, *id.* at 772-73 (quoting *Al-Haramain Islamic Found., Inc. v. Obama*, 705 F.3d 845, 852 (9th Cir. 2012)).

Daniel's reasoning in no way conflicts with *Krystal Energy*. The Bankruptcy Code and FCRA are different statutes, and reading them as a whole leads to different conclusions. Most importantly, FCRA contains no language comparable to 11 U.S.C. § 106(a), the Bankruptcy Code's broad and clear "abrogat[ion]" of "sovereign immunity" with respect to a detailed list of Code sections. Further, reading the term "governmental unit" consistently throughout the Bankruptcy Code to include tribal governments produces plausible and desirable results: for example, it allows tribes to receive "special treatment" such

as priorities and exemption from discharge for tax debts owed them. *Krystal Energy*, 357 F.3d at 1060; *see also Coughlin*, 33 F.4th at 607-08. Nor is there a specific, narrower abrogation of tribal immunity in the Bankruptcy Code comparable to 15 U.S.C. § 1681u(j)'s waiver of federal sovereign immunity.

In addition, *Krystal Energy* acknowledged and distinguished authorities holding that a "general authorization for suit in federal court" against a class of defendants that includes, but is not limited to, sovereign entities is not an "unequivocal" abrogation or waiver of sovereign immunity. 357 F.3d at 1060 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245-46 (1985)) (emphasis omitted). As *Krystal Energy* explained, § 106(a) "does not simply 'authorize suit in federal court,'" but instead "specifically abrogates the sovereign immunity of governmental units, a defined class that is largely made up of parties that could claim sovereign immunity." *Id.* That explanation shows how *Daniel*, which construed a statute that did simply authorize suit in federal court against a broad class of defendants, coherently reached a different result.

NUMA's attempt (at 29-30) to establish a conflict between *Krystal Energy* and *Daniel* ignores almost all of *Daniel*'s reasoning, focusing solely on *Daniel*'s discussion of the Seventh Circuit's decision in *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818. *Meyers* had held that a different provision of FCRA (the Fair and Accurate Credit Transactions Act, or FACTA) did not abrogate tribal

sovereign immunity, reasoning that "[a]brogation of tribal sovereign immunity may not be implied." *Id.* at 826-87. In another part of its opinion, which *Daniel* did not cite, *Meyers* discussed *Krystal Energy* and observed that other courts had reached different results. *See id.* at 824-26 (citing, among other cases, *In re Whitaker*, 474 B.R. 687, 695 (B.A.P. 8th Cir. 2012)). Ultimately, *Meyers* declined to "weigh in on the conflict between these courts on how to interpret the breadth [of] the term 'other domestic governments' under the Bankruptcy Code." *Id.* at 826; *see Coughlin*, 33 F.4th at 608 n.8 (disagreeing with *Meyers*, but observing that it "dealt with a different statute").

Neither *Daniel* nor *Meyers* casts doubt on the reasoning – much less on the precedential authority – of *Krystal Energy*. *Daniel* did not purport to adopt the entire *Meyers* opinion as the law of this Circuit. And *Meyers* explicitly declined to address whether *Krystal Energy*'s interpretation of the Bankruptcy Code was correct. Because it did not confront that issue, *Meyers* never engaged with the Bankruptcy Code's sweeping definition of "governmental unit[s]," 11 U.S.C. § 101(27), nor the clear "abrogat[ion]" in § 106 that dispenses with the immunity of all governmental units as a class. *Krystal Energy*, which did address those issues, remains the law this Court should apply.

C. NUMA's Other Criticisms of *Krystal Energy* Lack Weight

In addition to its erroneous reliance on *Daniel*, NUMA also advances other criticisms of *Krystal Energy*, mostly taken from the Sixth Circuit's decision in *Greektown*. Although this Court need not consider those arguments because *Krystal Energy* is binding precedent, it is still worth showing that NUMA's points are misconceived and that *Krystal Energy* correctly held that the Bankruptcy Code clearly abrogates tribal sovereign immunity. In addition to *Krystal* Energy's own analysis, the First Circuit's recent and well-reasoned decision in *Coughlin* further supports that decision and responds to several arguments NUMA makes. Despite its heavy reliance on out-of-Circuit authority, NUMA fails to address *Coughlin*, citing (at 21) only the dissent.

1. Tribal Governments Are "Domestic" Governments Within the Common and Ordinary Meaning of That Phrase

NUMA erroneously contends (at 20) that tribes are not "similar to a 'domestic government.'" NUMA does not appear to contest that tribes are "governments." Instead, it argues (at 20) that "domestic governments are typically interpreted to have territorial ties to the United States, with origins in the United States Constitution, whereas Indian tribes are nations in and of themselves, without such territorial and constitutional ties to the United States." NUMA cites no authority for its assertion that tribes are not "domestic." Even *Greektown* admitted that "[t]here cannot be reasonable debate that Indian tribes are both 'domestic' . . .

and also that Indian tribes are fairly characterized as possessing attributes of a 'government.'" 917 F.3d at 459 (quoting *In re Greektown Holdings, LLC*, 532 B.R. 680, 692 (E.D. Mich. 2015), and endorsing it as "correct[]"). And NUMA's unsupported argument cannot be squared with the meaning of Congress's words.

As an initial matter, the phrase "foreign or domestic" indicates that the definition of "governmental unit" is not limited to governments either inside or outside the borders of the United States. "Foreign" and "domestic" are opposites: using them with the disjunctive "or" shows the definition's breadth, as one might refer to "any time, day or night," or to "odd or even numbers." *Cf. Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018) (noting repeated use of the "disjunctive word 'or'" as evidence that a statutory provision "bespeaks breadth"). As *Krystal Energy* put it, "logically, there is no other form of government outside the foreign/domestic dichotomy, unless one entertains the possibility of extra-terrestrial states." 357 F.3d at 1057.

Tribes also fit neatly into the "domestic" half of that dichotomy. The ordinary meaning of "domestic" – especially when contrasted to "foreign" – is "belonging or occurring within the sphere of authority or control or the fabric or boundaries of [an] indicated nation or sovereign state." *Webster's Third* at 671. Here, the indicated nation is the United States; Indian tribes are within both its sphere of authority and control and its geographical boundaries. *See Washington v.*

Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 470 (1979) (recognizing plenary and exclusive power over tribal affairs); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Marshall, J.) (observing that tribal lands "compose a part of the United States" and are within its "jurisdictional limits"); *see also Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493 (2022) (holding that tribal lands – referred to in 18 U.S.C. § 1151 as "Indian country" – are "part of the State" in which those tribes reside, "not separate from the State").

Further, since Justice Marshall's 1831 opinion in *Cherokee Nation*, the Supreme Court has consistently referred to tribes as "domestic dependent nations," *Krystal Energy*, 357 F.3d at 1057 (quoting *Potawatomi Tribe*, 498 U.S. at 509, and other examples); as has the Executive Branch "[s]ince at least 1853," and "Members of Congress . . . since at least 1882," *Coughlin*, 33 F.4th at 606-07. That usage continues to the present day: the Court used the phrase again in *Bay Mills*, 572 U.S. at 788, and Justice Sotomayor's concurrence – a vigorous policy defense of tribal sovereignty – even used the specific phrase "domestic government" to refer to tribes. *See id.* at 808 ("[b]oth States and Tribes are domestic governments"). NUMA offers no reason to believe that Congress intended a narrower meaning of the term "domestic" in § 101(27) that would exclude tribal governments.

2. Section 106(a) Need Not Use the Words "Indian Tribe" To Refer Clearly to Tribal Governments

NUMA returns repeatedly to an argument (at 6-7, 14, 18-19, 27, 31), echoing the Sixth Circuit in *Greektown*, that the Bankruptcy Code does not clearly abrogate tribal immunity because it does not "mention" – that is, does use the specific words – "Indian tribes." *Krystal Energy* correctly rejected that argument, reasoning that "the category 'Indian tribes' is simply a specific member of the group of domestic governments, the immunity of which Congress intended to abrogate." 357 F.3d at 1058. *Coughlin* likewise concluded that "Congress . . . abrogate[d] immunity explicitly" by "expressly eliminating immunity as to governmental units, which . . . include tribes." 33 F.4th at 608.

FAA v. Cooper, 566 U.S. 284 (2012), decided after *Krystal Energy*, confirms the point. *Cooper*, which concerned federal sovereign immunity, explained that the Supreme Court "ha[s] never required that Congress use magic words" to waive immunity. *Id.* at 291. Instead, the "sovereign immunity canon 'is a tool for interpreting the law' . . . that . . . does not "displac[e] the other traditional tools of statutory construction." *Id.* (quoting *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008)). If a "waiver [is] clearly discernable from the statutory text in light of traditional interpretive tools," *id.*, that is sufficient for it to be clear. Similar interpretive principles also apply to abrogation of state sovereign immunity. *See Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring)

(no "explicit reference to state sovereign immunity or the Eleventh Amendment" is required for "congressional elimination of sovereign immunity" where the "statutory text . . . clearly subjects States to suit for monetary damages").

To be sure, *Greektown* purported to avoid holding that "specific reference to Indian tribes is in all instances required to abrogate tribal sovereign immunity" and to limit its ruling to the point that the Bankruptcy Code "lack[s] the requisite clarity of intent to abrogate tribal sovereign immunity." 917 F.3d at 461. But, as noted above, the Sixth Circuit admitted (as beyond "reasonable debate") that "tribes are both 'domestic'" and "are fairly characterized as possessing attributes of a 'government.'" *Id.* at 459. The only reason that court gave for nevertheless finding the phrase "domestic government" unclear was that the Bankruptcy Code did not use the particular words "Indian tribe." *See id.* at 459-60. That reasoning, like NUMA's, amounts to a magic-words requirement despite the disclaimer.

3. Other Statutory Provisions Referring to Indian Tribes Do Not Support NUMA's Position

NUMA also errs in relying on a series of other statutes and regulatory provisions in which Congress or federal agencies have used the specific phrase "Indian tribe," sometimes with reference to tribal immunity and sometimes not. Even when comparing provisions in a single enactment, the Supreme Court has declined to adopt "any canon of interpretation that forbids interpreting different words used in different parts of the same statute to mean roughly the same thing."

Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 540 (2013). When comparing different statutes, any inference of different intent from different language becomes even weaker. *See United States v. Beasley*, 12 F.3d 280, 284 (1st Cir. 1993) (Breyer, C.J.) ("Congress can embody a similar scope-of-coverage intent in different ways in different statutes.").

Further, NUMA fails to account for differences in context that explain why Congress used the specific words "Indian tribe" in some contexts but not in § 101(27). As one example, NUMA cites (at 15, 21) the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), which refers to "natural resources" owned by an "Indian tribe" as well as those owned by "the United States . . . , any State or local government, [or] any foreign government." 42 U.S.C. § 9601(16). But CERCLA also has a special definition of the phrase "Indian tribe" which carves out "any Alaska Native regional or village corporation." *Id.* § 9601(36). Because Congress wanted to include some tribal entities but not others, it needed to define the phrase "Indian tribe" and then use that defined phrase in § 9601(16). In § 101(27), it faced no similar concern.

As another example, NUMA cites (at 21) a statutory provision directing the Secretary of Interior to prepare a "management plan" for the Valles Caldera National Preserve "in consultation with" entities including "State and local governments" and "Indian tribes and pueblos, including the Pueblos of Jemez,

Santa Clara, and San Ildefonso." 16 U.S.C. § 698v-11(b)(3)(C)(iii). By naming those specific pueblos (which presumably have a special interest in the Valles Caldera), Congress emphasized to the Secretary the need for consultation with those particular tribal governments. Having named those pueblos, Congress then needed to add a more general reference to "Indian tribes," to avoid an implication that other tribes were excluded from consultation. Those statute-specific considerations do not help the Court understand § 101(27)'s far broader definition.

Later in its brief (at 30), NUMA cites cases construing the Resource Conservation and Recovery Act of 1976 ("RCRA"), which authorizes suit against a "person," 42 U.S.C. § 6972(a)(1)(A), defined to include a "municipality," *id.* § 6903(15), in turn defined to include an "Indian tribe," *id.* § 6903(13). A tribe is not a "municipality" in the ordinary sense, so Congress used special words to expand RCRA's definition. The Safe Drinking Water Act of 1974, which NUMA also cites (at 30), has the same structure. *See id.* § 300j-9(i)(2)(A) (authorizing complaint against a "person"); *id.* § 300f(12) ("person" includes "municipality"); *id.* § 300f(10) ("municipality" includes "Indian Tribe").

The other statutes NUMA cites (at 15-16) all involve Congress defining the term "local government" to include tribes or else using both the term "local government" and the term "Tribe." No one contends that the phrase "local government," without more, unambiguously includes tribal governments. None of

NUMA's statutory examples include the phrase "governmental unit" or "foreign or domestic government," or shed any light on the meaning of those phrases.

4. Disagreement Among Courts About Whether a Statute Is Clear Does Not Change the Statute's Meaning

NUMA incorrectly suggests (at 31-32) that the abrogation of tribal sovereign immunity in the Bankruptcy Code cannot be clear because there is a "disparity among courts" and "many well-regarded judges" have disagreed about whether the Bankruptcy Code is clear. The observation that courts disagree about a statute does not show that the statute is unclear. The Supreme Court regularly grants certiorari, including in the context of sovereign immunity, to resolve disagreements among the circuits about whether a statutory provision is clear. If the disagreement itself showed ambiguity, the Supreme Court would always conclude that the statute was unclear. But the Court does not take that approach.

Instead, when the Court finds a statute's text clear, it applies that clear meaning without regard to whether judges have previously disagreed. *See*, *e.g.*, *Richlin*, 553 U.S. at 575, 589-90 (granting certiorari to resolve circuit split over scope of waiver of federal sovereign immunity, then finding "no ambiguity" in the statute); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72, 78 (2000) (granting certiorari to resolve circuit split over abrogation of state sovereign immunity, then holding that Congress's intent was "unequivocal[ ]," though Congress lacked power to abrogate). Further, a majority of the Court sometimes finds an abrogation

or waiver text clear over a dissent that disagrees. *See*, *e.g.*, *Kimel*, 528 U.S. at 99-109 (Thomas, J., dissenting in part). The test is not whether judges differ – a common occurrence – but whether the statute itself is clear.

5. Silence in the Bankruptcy Code's Legislative History Does Not Change the Clear Meaning of Its Text

NUMA errs in contending (at 32) that the "legislative history" of the Bankruptcy Code renders "Congressional intent to abrogate tribal immunity . . . far from unequivocal." (Emphasis omitted.) Its sole point is that the legislative history of the Bankruptcy Code does not mention tribes, with the exception of one reference to "Indian territory" in 1898, predating the current Code. It is well settled, however, that, where the "text" of a statute is "unambiguous," courts are "precluded from considering legislative history." *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 753 (9th Cir. 2003) (en banc). Further, the Supreme Court has forcefully rejected the use of "silence in . . . legislative history" as an interpretive tool under any circumstances. *Encino Motorcars*, 138 S. Ct. at 1143 ("If the text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity."). Those principles foreclose NUMA's argument.

III. Enforcement of the Automatic Stay Against Tribes and Tribal Entities Is Important To Protect Consumer Debtors

In recent years, tribes and tribal entities have engaged in an increasing number of off-reservation commercial activities that have brought them into greater contact with the federal courts generally and the federal bankruptcy system in particular. The Supreme Court acknowledged in *Bay Mills* the rising "trajectory of tribes' commercial activity," including a "strong rate of growth" in "tribal gaming revenues" and the "flourishing of other tribal enterprises." 572 U.S. at 799-800. The principal dissent in that case compiled further evidence that tribes' "commercial activities . . . have increased dramatically." *Id.* at 822-23 (Thomas, J., dissenting) (describing "[t]ribal enterprises" that "run the gamut: they sell cigarettes and prescription drugs online; engage in foreign financing; and operate greeting cards companies, national banks, cement plants, ski resorts, and hotels").

Bay Mills held that these changes did not warrant overruling *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), which recognized tribal immunity for commercial activity off tribal lands. The Court's primary reason for refusing to overrule was that "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity." 572 U.S. at 800. That reasoning underscores the importance of paying attention to Congress's decisions: as the First Circuit put it in *Coughlin*, the "clear-statement rule" that applies to statutory abrogation should be used as an "interpretive tool" rather than

becoming a "substantive hurdle for Congress to overcome." 33 F.4th at 610-11. Otherwise, courts risk intruding on policy decisions that the Supreme Court has directed should be left to the Legislative Branch.

Congress's clear directive that tribes are not immune from bankruptcy jurisdiction has become especially important to consumer debtors because of the growing number of tribes that have entered the payday lending industry. The defendants in *Coughlin* included one such tribal lender, an entity called Lendgreen that charged interest of more than 100% per year. *See id.* at 604 (describing growth of loan from $1,100 to nearly $1,600 in less than six months). Other courts in non-bankruptcy cases have encountered similar practices. *See*, *e.g.*, *Brice v. Haynes Invs., LLC*, 13 F.4th 823, 840 (9th Cir. 2021) (Fletcher, J. dissenting) (describing interest rates of "441.38% and 448.67% per annum"), *reh'g en banc granted, opinion vacated sub nom. Brice v. Plain Green, LLC*, 35 F.4th 1219 (9th Cir. 2022); *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 118 (2d Cir. 2019) (describing tribal payday loans at annual interest rates ranging from 59.83% to 376.13%); *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 332 (4th Cir. 2017) (describing loan at "interest rate of 440.18%").

Tribal payday lenders and their affiliates – which often include non-tribal individuals and entities – generally contend that they are governed only by tribal law and so may charge rates far exceeding those permitted by state law. *See*

United States v. Grote, 961 F.3d 105, 113 (2d Cir. 2020) (describing unsuccessful defense to racketeering charges on the basis that usurious loans were "authorized under tribal law"); *United States v. Neff*, 787 F. App'x 81, 92 (3d Cir. 2019) (rejecting argument that "[t]ribal sovereign immunity . . . transfigure[d] debts that are otherwise unlawful under RICO into lawful ones"). In some cases, tribal payday lenders have successfully escaped accountability for such actions by invoking the doctrine of tribal sovereign immunity. *See Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 185 (4th Cir. 2019) ("[T]he potential merit of the borrowers' claims against [tribal lenders] – and the lack of a remedy for those alleged wrongs – does not sway the tribal immunity analysis.").

If tribal payday lenders could assert immunity from enforcement of the automatic stay, it would magnify the harm their activities cause consumer debtors. Such debtors have an acute need for the "'breathing spell' from . . . harassing actions" that the stay provides, *In re Schwartz-Tallard*, 803 F.3d 1095, 1100 (9th Cir. 2015) (en banc), which this Court has described as reflecting "a human side to the bankruptcy process," *In re Dawson*, 390 F.3d 1139, 1147 (9th Cir. 2004), *recognized as abrogated on other grounds by In re Gugliuzza*, 852 F.3d 884, 896 (9th Cir. 2017). The legislative history to the Bankruptcy Code, which *Dawson* quoted, makes the point even more forcefully:

> Frequently, a consumer debtor is severely harassed by his creditors when he falls behind in payments on loans. The harassment takes the

> form of abusive phone calls at all hours, including at work, threats of court action, attacks on the debtor's reputation, and so on. The automatic stay at the commencement of the case takes the pressure off the debtor.

H.R. Rep. No. 95-595, at 125-26 (1977) (footnote omitted).

To be sure, as the bankruptcy court observed, NUMA's conduct in the present case did not involve harassment. *See* ER33. Because NUMA filed a motion in tribal court that it should not have filed, the bankruptcy court imposed a "modest" compensatory sanction of $7,291, declining to award either punitive damages or emotional-distress damages. ER33-40. Nevertheless, the arguments that NUMA advances, if accepted, would immunize tribal lenders from bankruptcy courts' authority to impose remedies for much more serious conduct that would cause much greater harm. Fortunately for debtors in this Circuit, Congress's clear language in the Bankruptcy Code, as this Court has already held in *Krystal Energy*, is sufficient to avert that result.

CONCLUSION

This Court should affirm the bankruptcy court's decision.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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