No. 18-1827

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LULU WILLIAMS, *et al.*, on behalf of themselves and all individuals similarly situated,
PLAINTIFFS-APPELLEES,

v.

BIG PICTURE LOANS, LLC, *et al.*,
DEFENDANTS-APPELLANTS.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE DISTRICT OF COLUMBIA AND THE STATES OF CONNECTICUT, HAWAII, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW JERSEY, NEW YORK, NORTH CAROLINA, PENNSYLVANIA, VERMONT, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

KARL A. RACINE
Attorney General for the District of Columbia

LOREN L. ALIKHAN
Solicitor General

CAROLINE S. VAN ZILE
Deputy Solicitor General

RICHARD S. LOVE
Senior Assistant Attorney General
Office of the Solicitor General

Office of the Attorney General
441 4th Street, NW, Suite 630 South
Washington, D.C. 20001
(202) 727-6287
Loren.AliKhan@dc.gov

Additional counsel listed on signature page

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INTEREST OF *AMICI CURIAE*

The District of Columbia and the States of Connecticut, Hawaii, Iowa, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Pennsylvania, Vermont, and Virginia ("the *Amici* States") file this brief under Rule 29(a)(2) of the Federal Rules of Appellate Procedure. Together, the *Amici* States seek to protect their ability to enforce state usury and consumer lending statutes, including those governing "payday" loans. Of relevance to this appeal, *Amici* States have the authority to investigate potential violations of laws they enforce and to pursue enforcement or other action against lenders where appropriate.

Collectively, the *Amici* States have obtained millions of dollars in settlements and judgments to remedy the harms unscrupulous payday lenders have caused their residents—particularly the low-income, vulnerable borrowers who tend to rely on fringe lending companies. However, regulating payday lenders in the Internet age has not always been easy. Enforcing consumer protection laws has only become more difficult with the advent of tribal payday lending schemes, in which non-tribal lenders affiliate with Indian tribes to attempt to benefit from their tribal immunity. Ensuring that lenders who violate usury and consumer protection laws are held liable is crucial to the *Amici* States, and they are concerned that the arguments advanced by the appellants would tie their hands in future investigations and enforcement proceedings by making it unduly difficult to overcome an assertion of arm-of-the-tribe immunity.

Accordingly, the *Amici* States submit this brief to provide background on the payday loan industry and a context within which to view the importance of the government's ability to pursue its investigative and, if warranted, enforcement authority to protect vulnerable borrowers in their respective jurisdictions.

SUMMARY OF THE ARGUMENT

This appeal involves critical issues that implicate the *Amici* States' ability and duty to protect their citizens from predatory payday and other lenders that violate state laws. Recently, predatory lenders have begun to claim that they are subdivisions of federally recognized Indian tribes entitled to sovereign immunity; such immunity would bar enforcement of state consumer protection laws as well as, potentially, investigations into their activities. As such, it should not be granted lightly.

Payday lenders target vulnerable borrowers who cannot access traditional sources of credit and, rather than helping them handle a short-term crisis, exacerbate their financial distress. While these are the people for whom the *Amici* States have enacted usury, small loan, and other interest rate limits, the companies that make these loans historically have engaged in various practices designed to evade those laws. The relationships that Big Picture Loans and Ascension Technologies claim to have with the Lac Vieux Desert Band of the Lake Superior Chippewa Indians are merely the most recent version of decades-old attempts to avoid coverage of District of Columbia and State laws.

As such, it is vital that courts recognize arm-of-the-tribe immunity only when it is truly warranted. Here, appellants argue that plaintiffs challenging an assertion of immunity should bear the burden of negating arm-of-the-tribe immunity. They also argue that the standards for determining whether to grant immunity should be limited to the tribe's official actions—how the tribal legislature organized its relationship with the lenders—and should not include functional considerations, such as "the practical operation of the [lenders] in relation to the tribe." *People* ex rel. *Owen v. Miami Nation Enters.*, 386 P.3d 357, 365 (Cal. 2016) ("*Miami Nation*"). But placing the burden of proving a tribal arm's entitlement to sovereign immunity on the entity seeking it and including both functional and official considerations is critical to courts' ability to determine whether such immunity is truly merited, and doing so does not undermine the purpose of tribal immunity. Moreover, placing the burden on the lender is consistent with the test for arm-of-the-state immunity—a standard with which *Amici* States are intimately familiar. Treating states and tribes similarly when extending immunity to their instrumentalities shows appropriate respect for both sovereigns. At bottom, allowing a non-tribal entity to benefit from a tribe's sovereign immunity without a rigorous demonstration, both formally and functionally, of substantial economic and other benefit to the tribe does not promote and may well undermine the purpose for tribal immunity. It would also have serious consequences for States' ability to protect consumers.

ARGUMENT

I. States Have A Vital Interest In Regulating High-Interest Loans, Which Target Vulnerable Residents.

A. Fringe lenders prey on low-income consumers.

Low-income consumers and borrowers whom mainstream lenders view as high risk often cannot obtain credit in the traditional market. Instead, they must rely on non-traditional sources of credit, most often offered by the fringe banking industry. *See* Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 S.C. L. Rev. 589, 591 (2000). One of the most common products offered in this market is payday loans. Payday loans allow consumers to obtain a small amount of cash for a short period, often two weeks.

> The practice of short-term deferred deposit lending—often called "payday" or "cash advance" lending—generally involves small sums that become due on the borrower's next payday. In return for the loan, the borrower provides the lender with a personal check for the amount of the loan plus fees or with direct access to his or her checking account. The lender then waits a specified amount of time to deposit the borrower's check or debit his or her account—hence the deferred deposit. Because of the short-term nature of these loans and the relatively high fees involved, effective annual percentage rates of 700 percent or higher are not unusual.

Miami Nation, 386 P.3d at 361. Payday loans are generally marketed to low-income consumers with poor credit histories who cannot access traditional sources of money or credit.

In addition to high annual percentage rates ("APR"), if the borrower cannot repay the loan on time, he can pay another fee to extend the loan period in a "rollover," but this leads to even higher costs that borrowers can ill afford. *See, e.g.*, *Turner v. E-Z Check Cashing of Cookeville, TN, Inc.*, 35 F. Supp. 2d 1042, 1046 (M.D. Tenn. 1999) (unable to repay the original debt of $405, borrower paid a $105 monthly service charge for eight months); *Johnson v. Cash Store*, 68 P.3d 1099, 1102 (Wash. Ct. App. 2003) (15 rollovers in seven months on a $500 loan resulting in over $1,100 in fees alone). Similar problems occur when lenders, sometimes to circumvent state restrictions on rollovers, permit "back to back" transactions where borrowers pay off their first loan but immediately take out another loan until their next payday.[1] *See* Keith Ernst et al., Ctr. for Responsible Lending, *Quantifying the Economic Cost of Predatory Payday Lending* 3-4 (revised Feb. 24, 2004).[2]

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[1] For example, Colorado's Deferred Deposit Loan Act permits borrowers to renew a loan only once by paying an additional finance charge. Colo. Rev. Stat. § 5-3.1-108(2). But the law does not prevent a borrower from paying off one loan in full on its due date and then immediately taking out a new loan, usually for the same amount and term as the prior one.

[2] *Available at* https://www.responsiblelending.org/payday-lending/research-analysis/CRLpaydaylendingstudy121803.pdf.

Yet another permutation is a high-interest installment loan, which is of a longer duration than a traditional payday loan (and thus a way to circumvent state laws limiting the number of payday loans that may be issued to a borrower in a given year) but often comes with triple-digit APRs. *See* Pew Charitable Trs., *From Payday to Small Installment Loans* (Aug. 11, 2016).[3] These schemes "lock[] borrowers into revolving, high-priced short-term credit instead of meeting the need for reasonably priced, longer-term credit." Ernst, *supra*, at 2. And since "payday lenders collect the vast majority of their fees from borrowers trapped in a cycle of repeated transactions," there is considerable incentive for fringe lenders to find new and innovative ways of ensuring that consumers remain on a debt treadmill. *Id*.

The predatory practices of fringe lenders go well beyond the usurious rates charged. *See* Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 Minn. L. Rev. 1, 32-54 (2002). In addition to "charg[ing] fees amounting to triple digit interest rates irrespective of state law," *id*. at 31, many fringe lenders "violate mandatory disclosure requirements" including:

> refusing to provide customers with basic written information about the payday loan transaction, giving customers false or misleading information about the cost of credit, failing to advertise the cost of credit using APRs, refusing to provide customers with written disclosures prior to contract consummation . . . representing that consumers have the right to rescind the contract at no cost, allowing

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[3] *Available at* https://www.pewtrusts.org/en/research-and-analysis/issue-briefs /2016/08/from-payday-to-small-installment-loans.

> consumers to rollover payday loans in violation of state law, [and] representing to consumers that the lenders have the ability to collect treble damages from defaulting consumers[.]

Id. at 32-33. Such practices prevent consumers from fully understanding the transactions into which they are entering. *Id.* at 33.

Since its emergence early in the 1990s, the payday lending industry has experienced explosive growth, much of which can be attributed to offers made on the Internet. *See, e.g.*, Jean Ann Fox & Anna Petrini, Consumer Fed'n of Am., *Internet Payday Lending: How High-priced Lenders Use the Internet to Mire Borrowers in Debt and Evade State Consumer Protections* (2004) (surveying 100 Internet sites offering payday loans and finding rapid growth in websites marketing small loans).[4] In 2010, "12 million Americans used a storefront or online payday loan." Pew Charitable Trs., *Payday Lending in America*, 4 (Jul. 2012).[5] "Payday loan borrowers spend approximately $7.4 billion annually," taking "out eight payday loans a year, [and] spending about $520 on interest with an average loan size of $375." *Id.* at 2, 4; *see also* Ernst, *supra*, at 2 (2004 study finding that 91% of all payday loans were made to borrowers with five or more payday loans per year; 31% received twelve or more per year; and on average, borrowers received eight to

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[4] *Available at* http://www.consumerfed.org/pdfs/Internet_Payday_Lending113004.pdf.

[5] *Available at* https://www.pewtrusts.org/-/media/legacy/uploadedfiles/pcs_assets/2012/pewpaydaylendingreportpdf.pdf.

thirteen payday loans per year). The volume, history, and circumstances of payday lending highlight the need to protect consumers through effective government oversight and enforcement.

B. Fringe lenders have a troubling history of evading state regulation.

Payday lenders are only the latest in a series of fringe lending schemes dating back decades in American history. Over time, states have attempted to protect their consumers through reasonable regulation, investigation, and enforcement.

A direct precursor to payday loans were loans made against a borrower's wages. In the early 1900s, salary lenders would advance small amounts of cash, for example five dollars, that would be loaned "at the beginning of the week, to be repaid with six dollars" on the borrower's next payday, one or two weeks later. Drysdale & Keest, *supra*, at 618. In one form of this practice, the borrower would sign a check covering the loan principal and interest, drawn on a bank in which he had no account, which the lender held as security and returned when the loan was repaid. If the borrower defaulted, the lender would deposit the check and when the bank refused payment the borrower would be threatened with criminal prosecution unless the debt was paid. *Id*. at 619. Interest rates on these loans ranged from 270% to 955%, but despite these usurious rates there was little enforcement because borrowers did not know their rights or have access to the courts. *Id*. Moreover, borrowers in financial distress often renewed these loans, starting a downward spiral similar to today's payday borrowers. *Id*. at 620.

These dire situations led states to pass early legislation to regulate the lenders. A legal framework was created "that permitted a return high enough to attract legitimate businesses into the small borrower market, but also included sufficient safeguards to prevent the kind of abuses that were all too evident." *Id*. at 621. For example, "New York's usury prohibitions date back to the late 18th century" and "protect impoverished debtors from improvident transactions drawn by lenders and brought on by dire personal financial stress." *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 110 (2d Cir. 2014) (internal quotation marks omitted). Indeed, "from time immemorial," governments like New York and the *Amici* States have sought to "protect desperately poor people from the consequences of their own desperation." *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 974 F. Supp. 2d 353, 356 (S.D.N.Y. 2013) (quoting *Schneider v. Phelps*, 359 N.E. 2d 1361, 1365 (N.Y. 1977)).

A Uniform Small Loan law was recommended in 1916 and by the late 1930s many states had adopted it. F. B. Hubachek, *The Development of Regulatory Small Loan Laws*, 8 L. & Contemp. Probs. 108, 113 (1941). It included provisions that created "important new standards of usury in small loans" and included "prohibitions against false, misleading, and deceptive advertising." *Id*. at 115, 117.

"Ultimately, every state except Arkansas enacted small loan laws." Drysdale & Keest, *supra*, at 621.

Over the years, fringe lenders have devised various methods to support their assertions that usury and other laws do not apply to them. Initially, lenders argued that they simply charged fees to cash checks, but courts rejected the pretense that payday lenders were not making loans when they agreed to hold a consumer's check in exchange for a fee. *See, e.g.*, *Livingston v. Fast Cash USA, Inc.*, 753 N.E. 2d 572 (Ind. 2001); *Hamilton v. York*, 987 F. Supp. 953 (E.D. Ky. 1997).

When the courts rejected these ruses, payday lenders began, in the early 2000s, to associate with out-of-state banks to make high-interest loans. This method became known as "rent-a-bank" lending because the bank participated only by lending its name and charter to the transaction. Payday lenders would claim the bank was the lender, allowing it to take advantage of the bank's ability to export its home state's interest rate and evade the usury and other interest rate caps in the state where the borrower resides. *See Pennsylvania v. Think Finance, Inc.*, No. 14-7139, 2016 WL 183289, at *1 (E.D. Pa. 2016) (describing rent-a-bank scheme, where payday lender partners with "an out-of-state bank" to act "as the nominal lender while the non-bank entity was the de facto lender" in a partnership that sought to take "advantage of federal bank preemption doctrines to insulate the [payday lending entities] from state regulations"); *see also Consumer Fin. Prot. Bureau v. CashCall, Inc.*, No. 15-7522, 2016 WL 4820635, at *1-2 (C.D. Cal. 2016) (same).

When the rent-a-bank scheme began to falter, the latest chapter in the lenders' efforts to circumvent payday lending laws—tribal payday lending—began. Under this method, "a non-tribal payday lender makes an arrangement with a tribe under which the tribe receives a percentage of the profits, or simply a monthly fee, so that otherwise forbidden practices of the lender are presumably shielded by tribal immunity." Kyra Taylor et al., Pub. Justice Found., *Stretching the Envelope of Tribal Sovereign Immunity? An Investigation of the Relationships Between Online Payday Lenders and Native American Tribes* 6 (2017) (internal quotation marks omitted);[6] *see also CashCall*, 2016 WL 4820635, at *2-3 (describing the "tribal model," where a tribal lender makes and then sells the loans to a non-tribal entity which then collects on the loans at its "contract rate" without being subject to state regulation); *Think Finance*, 2016 WL 183289, at *1-2 (describing scheme in which "the tribe acts as the nominal lender and the Defendants benefit from the tribe's immunity").

"Online payday lenders—particularly after they are investigated by state authorities or find themselves defending lawsuits brought by borrowers—are

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[6] *Available at* https://www.publicjustice.net/wp-content/uploads/2018/01/SVCF-Report-FINAL-Dec-4.pdf.

increasingly seeking relationships with Native American tribes" in an attempt "to benefit from the tribes' special status as sovereign nations under the law, and thereby avoid liability for violating consumer protection laws." Pub. Justice Found., *supra*, at 1. For example, in *Consumer Financial Protection Bureau v. Great Plains Lending, LLC*, 846 F.3d 1049 (9th Cir. 2017), the tribal lending entities claimed that as arms of sovereign tribes they were not required to comply with the Bureau's investigative demands, but the district court's order enforcing those demands was affirmed. *Id*. at 1058. Similarly, in *Otoe-Missouria Tribe of Indians*, the Second Circuit affirmed the district court's denial of the request of two Native American tribes (including the Lac Vieux Desert Band of Lake Superior Chippewa Indians, the tribe that is affiliated with Big Picture Loans) for a preliminary order enjoining the New York State Department of Financial Services from barring them from making loans to New York residents or otherwise interfering with their online payday lending business. 769 F.3d at 118.

Tribally affiliated lenders have also sought to circumvent applicable usury and other lending laws by using loan agreements that include provisions that purport "to disavow the authority of all state or federal law." *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 669-70 (4th Cir. 2016) (loan agreement purported to be "subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe" and provided that neither the "Agreement nor Lender is subject to the laws of any state of the United States of America").

C. Many States regulate payday lenders to protect consumers.

The District of Columbia and many states have enacted laws to protect consumers from the abuses often associated with fringe lenders, including those offering payday loans. For example, the District, through its Attorney General, has express authority under the Consumer Protection Procedures Act, D.C. Code § 28-3909 *et seq*., to seek injunctive relief, consumer restitution, and civil penalties for violations of the District's debt collection law, D.C. Code § 28-3814. That law prohibits the collection of debts that are not "legally chargeable to the consumer," which includes interest on "an instrument in writing for the payment of money at a future time" at a rate that exceeds "24% per annum." D.C. Code §§ 28-3301(a), 3814(g)(4).

According to the Consumer Financial Protection Bureau ("CFPB"), at least 19 States cap payday loan amounts between $500 and $600 (Alabama, Alaska, Florida, Hawaii, Iowa, Kansas, Kentucky, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, and Virginia). *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472, 54477 n.27 (Nov. 2017) (to be codified at 12 C.F.R. pt. 1041). California limits payday loans to $300 (including the fee), and

Delaware caps loans at $1,000. *Id*. Several states limit loan amounts to the lesser of a percent of the borrower's income or a fixed-dollar amount including "Idaho—25 percent or $1,000, Illinois—25 percent or $1,000, Indiana—20 percent or $550, Washington—30 percent or $700, and Wisconsin—35 percent or $1,500." *Id*. "At least two States cap the maximum payday loan at 25 percent of the borrower's gross monthly income (Nevada and New Mexico)." *Id*. Several State laws, including those in Utah and Wyoming, are silent as to the maximum loan amount. *Id*. Some States—such as Georgia and North Carolina—ban payday lending entirely. *Id*. at 54485.

Also according to the CFPB, of the states that expressly authorize payday lending, "Rhode Island has the lowest cap at 10 percent of the loan amount." *Id.* at 54477 n.31. "Florida has the same fee amount but also allows a flat $5 verification fee." *Id*. "Oregon's fees are $10 per $100 capped at $30 plus 36 percent interest." *Id*. "Some States have tiered caps depending on the size of the loan," where the cap generally declines with the loan size. *Id*. "However, in Mississippi, the cap is $20 per $100 for loans under $250 and $21.95 for larger loans (up to the State maximum of $500)." *Id*. "Six States do not cap fees on payday loans or are silent on fees (Delaware, Idaho, Nevada, and Texas (no cap on credit access business fees) and Utah and Wisconsin (silent on fees))." *Id*. "Depending on State law, the fee may be referred to as a 'charge,' 'rate,' 'interest,' or other similar term." *Id*.

The CFPB also notes that "States that prohibit rollovers include California, Florida, Hawaii, Illinois, Indiana, Kentucky, Michigan, Minnesota, Mississippi, Nebraska, New Mexico, Oklahoma, South Carolina, Tennessee, Virginia, Washington, and Wyoming." *Id*. at 54478 n.37. "Other States such as Iowa and Kansas restrict a loan from being repaid with the proceeds of another loan." *Id.* Alabama, North Dakota, Wisconsin and Rhode Island allow only one rollover; Alaska and Oregon allow two; Idaho allows three; Delaware allows four; under certain circumstances Missouri allows six rollovers; in Nevada loans may be extended up to 60 days after the end of the initial loan term; and Utah allows up to 10 weeks after the execution of the first loan. *Id*.

D. States have had great success in enforcing their laws against predatory lenders.

State lending laws and "State interest rate caps have been very effective at eliminating payday loan abuses." Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 Wash. & Lee L. Rev. 751, 766 (2012).

For example, the District took legal action against CashCall, Inc. and Western Sky Funding, LLC for collecting interest in excess of its maximum lawful interest rate of 24 percent APR. Since early 2010, those companies had been purchasing, servicing, and collecting on loans made through the Internet to consumers who they knew were District residents while failing to comply with District law. Consent

Order & Judgment at 2, *District of Columbia v. CashCall, Inc.*, No. 2015 CA 006904 B (D.C. Super. Ct. Jan. 6, 2017).[7] CashCall and Western Sky made an argument similar to that of appellants here, contending that their status as a tribal affiliate and language in the loan agreements immunized them from the District's law. Press Release, D.C. Office of the Attorney Gen., "CashCall Agrees to Provide Nearly $3 Million in Refunds and Debt Forgiveness to District Consumers in Settlement" (Jan. 11, 2017).[8] The court rejected their claim of tribal sovereign immunity and later entered a consent order and judgment in which CashCall and Western Sky agreed to discharge any existing consumer loan owed by District consumers; pay over $1.8 million in restitution to eligible District consumers; and cease offering or making any consumer loans to District consumers, directly or indirectly, unless they complied with District law. *See* Consent Order & Judgment, *supra*, at 5-7.

Similarly, Georgia's Attorney General sued CashCall and Western Sky, among others, alleging that they violated Georgia law "by engaging in a small-dollar lending enterprise that collects illegal usurious interest from Georgia borrowers." *W. Sky Fin., LLC v. Georgia*, 793 S.E. 2d 357, 361 (Ga. 2016). Western Sky also argued there that it was entitled to tribal sovereign immunity, but the Georgia

[7] *Available at* http://oag.dc.gov/sites/default/files/2018-02/Release-January-11-2017-CashCall-Consent-Order.pdf.

[8] *Available at* https://oag.dc.gov/release/cashcall-agrees-provide-nearly-3-million-refunds.

Supreme Court soundly rejected the claim. *Id*. at 366. Thereafter, the trial court approved a stipulated final judgment and order that, among other relief, required Western Sky and its affiliates to stop all collections, pay $23.5 million in restitution, and provide another $17 million in loan relief by forgiving all outstanding loans to Georgia consumers. Stipulated Final Judgment & Order, *Georgia v. CashCall, Inc.*, No. 2013-CV-23410 (Ga. Super. Ct. executed and agreed Jan. 23, 2017).[9]

In early 2017, Virginia secured a settlement with CashCall that provided over $9 million in restitution to Virginia borrowers who were charged illegal interest of up to 230 percent on online loan amounts between $700 and $10,000. The complaint alleged that CashCall had collected on Western Sky loans subject to usurious interest rates and that Western Sky misrepresented itself as a Native American business not subject to Virginia or federal law. Press Release, Va. Office of the Attorney Gen., "CashCall to Refund Millions to Virginia Consumers Over Illegal Online Lending Scheme" (Jan. 31, 2017).[10]

North Carolina sued CashCall, Western Sky, and related companies for loans made to consumers that charged annual interest at rates from 89 to 342 percent, far

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[9] *Available at* https://law.georgia.gov/sites/law.georgia.gov/files/related_files/press_release/State%20v%20Western%20Sky%20Judgment%20Order%20With%20Signatures.pdf.

[10] *Available at* https://www.oag.state.va.us/media-center/news-releases/877-january-31-2017-cashcall-to-refund-millions-to-va-consumers-over-illegal-online-lending-scheme.

greater than permissible under state law. In reaching a settlement, the Attorney General announced that it "mark[ed] North Carolina's first successful effort to ban an online payday-type lender that tried to evade the law by claiming affiliation with an Indian tribe." Press Release, N.C. Dep't of Justice, "CashCall, Western Sky to Pay $9 Million Plus For Illegal Loans" (June 21, 2016).[11] The settlement required defendants to refund over $9 million to consumers, cancel all outstanding loans made to North Carolina consumers, and cease unlicensed lending. *Id*.

Minnesota filed a lawsuit against CashCall for unlicensed and usurious lending in violation of state law. After the Minnesota Court of Appeals affirmed the trial court's rejection of CashCall's claim of tribal sovereign immunity, the parties reached a settlement. *Minnesota v. CashCall, Inc.*, Nos. A13-2086, A1-0028, 2014 WL 4056028 (Minn. App. Aug. 18, 2014). In settlement, CashCall and its owner were banned from conducting any further business in Minnesota. The company was also required to cease collecting on its illegal loans, void and cancel all of the illegal loans it had issued (totaling more than $5.2 million), notify third party companies that bought outstanding loan balances of nearly $2 million to cancel the debt, and correct all negative credit reporting related to the illegal loans. In addition, CashCall

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[11] *Available at* https://www.nccob.org/Public/docs/News/Press%20Releases/Western_Sky_2016.pdf.

provided a $4.5 million payment to Minnesota, which was distributed as refunds to harmed borrowers.

Finally, Maryland pursued a successful action against Western Sky Financial, LLC, CashCall, and several related entities for usurious and unlicensed internet lending activities involving Maryland consumers. As part of a settlement, the lenders were enjoined from conducting any financial-services-related business in Maryland and required to pay restitution of over $1.8 million, pay a monetary penalty, and completely forgive all loans previously made to consumers in Maryland. Press Release, Md. Dep't of Labor, Licensing & Regulation, "Maryland Commissioner of Financial Regulation Announces $2 Million Settlement with Western Sky Financial, CashCall, Inc. and Others" (June 23, 2014).[12]

Similar state investigations into payday lenders, as well as litigation to enforce state consumer protection laws, may be jeopardized if privately owned and operated entities can restructure, become nominally owned by a tribe, and thereby avoid liability. Setting a low threshold to establish immunity could affect not only states' ability to litigate, but also their ability to issue and enforce subpoenas to gather information on companies that may be violating state laws. *Amici* States' efforts in the public interest will be threatened if State attorneys general or plaintiffs who have

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[12] *Available at* https://www.dllr.state.md.us/whatsnews/frwesternsky2014 .shtml.

been defrauded by lenders bear the burden of negating a claim for immunity. That will be particularly true if the test for determining whether a relationship with an Indian tribe is sufficiently close to warrant tribal immunity is limited to a review of the "organizational arrangement on paper," which can easily be manipulated. *Miami Nation*, 386 P.3d at 375.

II. The District Court Correctly Placed The Burden On The Entities Seeking Arm-Of-The-Tribe Immunity To Satisfy Both Formal And Functional Standards.

A. The burden of proof should lie with the entity seeking arm-of-the-tribe immunity.

Appellants argue that "there is no reason to deviate from how the burden has been allocated" in federal sovereign immunity and other cases, where "the burden of proving subject matter jurisdiction is on the plaintiff." Big Picture Loans Br. 25 (internal quotation marks omitted). Although the district court recognized that "the plaintiff bears the burden of showing subject matter jurisdiction," it correctly observed that the "jurisdictional nature of tribal immunity has never been definitively settled" and that federal courts have "reached differing conclusions on the point." *Williams v. Big Picture Loans, LLC* ("*Big Picture*"), 329 F. Supp. 3d 248, 270 (E.D. Va. 2018) (quoting *Miami Nation*, 386 P.3d at 370). One federal court of appeals, for example, found that tribal sovereign immunity

> is not of the same character as subject matter jurisdiction. First of all, tribal sovereign immunity may be waived. . . . Second, sovereign immunity operates essentially as a party's possible defense to a cause

> of action. In contrast, subject matter jurisdiction is a primary and an absolute stricture of the court. Finally, a waiver of sovereign immunity cannot extend a court's subject matter jurisdiction.

In re *Prairie Island Dakota Sioux*, 21 F.3d 302, 304-05 (8th Cir. 1994) (citations omitted). Thus, tribal sovereign immunity is distinct from the court's constitutional authority to resolve the controversy itself. *Oglala Sioux Tribe v. C & W Enters.*, 487 F.3d 1129, 1131 n.4 (8th Cir. 2007) ("sovereign immunity is jurisdictional in nature but is not of the same character as subject matter jurisdiction"); *see also Florida v. Seminole Tribe*, 181 F.3d 1237, 1241 n.4 (11th Cir. 1999) ("tribal 'sovereign immunity is a jurisdictional consideration separate from subject matter jurisdiction'" (quoting In re *Prairie Island Dakota Sioux*, 21 F.3d at 305)).

Indeed, cases involving arms of the state have provided "considerable support" to courts that have "concluded that an entity seeking tribal immunity must show by a preponderance of the evidence that it is entitled to that immunity." *Big Picture*, 329 F. Supp. 3d at 270-71 (citing *Gristede's Foods, Inc. v. Unkechuage Nation*, 660 F. Supp. 2d 442, 465 (E.D.N.Y. 2009); *City of New York. v. Golden Feather Smoke Shop, Inc.* ("*Golden Feather*"), No. 08-3966, 2009 WL 705815, at *4 (E.D.N.Y. 2009); *Miami Nation*, 386 P.3d at 371). For example, in *Miami Nation*, the California Supreme Court found that "tribal immunity, like Eleventh Amendment immunity, is not a true jurisdictional bar that automatically divests a court of the ability to hear or decide the case." *Id*. at 370 (internal quotation marks omitted).

Similarly, the Second Circuit in *Woods v. Rondout Valley Central School District Board of Education*, 466 F.3d 232, 237 (2d Cir. 2006), joined its "sister courts in holding that the governmental entity invoking the Eleventh Amendment bears the burden of demonstrating that it qualifies as an arm of the state entitled to share its immunity." *See also United States* ex rel. *Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 147 (4th Cir. 2014) (Traxler, C.J., concurring in part and dissenting in part) ("[T]he circuits that have considered similar assertions of arm-of-state status have uniformly concluded that it is an affirmative defense to be raised and established by the entity claiming to be an arm of the state."); *ITSI TV Productions, Inc. v. Agric. Ass'ns*, 3 F.3d 1289, 1291 (9th Cir. 1993) (Eleventh Amendment immunity "should be treated as an affirmative defense" and "must be proved by the party that asserts it"). And in *Golden Feather*, the court found that the reasoning in *Woods* "applies with equal force in the case of a party claiming tribal sovereign immunity as an 'arm of the tribe.'" 2009 WL 705815, at *4.

Appellants argue that "tribal and state immunities are different," Br. 28, but the district court correctly found that their "analyses are functionally identical in the sovereign immunity context" and therefore that it was "illogical to place the burden on different parties in each situation." *Big Picture*, 329 F. Supp. 3d at 271. Although the district court recognized that this Court has not "addressed which party bears the burden on the arm-of-the state question," it found that the "arm-of-the-state framework is just as influential here in determining which side has the burden in the arm-of-the-tribe inquiry as it was in *Miami Nation* and *Golden Feather*." *Id*.

In addition, the district court correctly concluded that "even assuming that tribal immunity is a question of subject matter jurisdiction," that does "not necessarily put the burden on Plaintiffs" because "[s]uch placement would effectively assume the truth of [the tribal entities'] assertion that they should be immune from suit in the same way as the Tribe itself." *Id*. at 270. "Arm-of-the-tribe cases, however, require the court to decide an antecedent question: 'whether [the entities] can claim sovereign immunity in the first instance.'" *Miami Nation*, 386 P.3d at 370 (quoting *Golden Feather*, 2009 WL 705815, at *3).

Moreover, placing the burden of proof on the entity seeking arm-of-the-tribe immunity aligns with "the traditional principle that a party in possession of facts tending to support its claim should be required to come forward with that information." *Woods*, 466 F.3d at 238. Neither a State attorney general nor, certainly, a group of borrowers can be expected to know the history and nature of a purported relationship between a federally recognized Indian tribe and a tribal affiliate. Furthermore, even when plaintiffs have "received extensive information from jurisdictional discovery," "one side must present it in" a convincing way and, as the district court found here, "there is no reason that" the lenders "should be freed from having to do so before the [c]ourt finds that they are entitled to tribal immunity." *Big Picture*, 329 F. Supp. 3d at 270. Indeed, "it would be odd to treat" lenders "as immune entities without making them show it first." *Id*. (citing *Miami Nation*, 386 P.3d at 371 (explaining that "until the entity has proven it should be treated as an extension of the tribe, it is no more entitled to a presumption of immunity than any other party")).

As a result of those considerations, the district court properly concluded "that the entities claiming tribal sovereign immunity—here, Big Picture and Ascension—bear the burden of establishing by a preponderance of the evidence that they are entitled to that immunity as arms of the tribe." *Id*. at 271.

B. The standards for determining arm-of-the-tribe immunity must include both official and functional considerations.

To determine whether a tribal-related entity shares in a tribe's immunity from suit, the district court adopted the test set forth in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010). There, the Tenth Circuit found that "[t]ribal sovereign immunity may extend to subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity." *Id.* at 1183. In designing a test to determine how close that relationship must be, the Tenth Circuit recognized that "[n]ot only is sovereign immunity an inherent part of the concept of sovereignty and what it means to be a sovereign, but immunity [also] is thought [to be] necessary to promote the federal policies of tribal self[-]determination, economic development, and cultural autonomy." *Id*. at 1182 (internal quotation marks omitted). Thus, it sought to determine whether the tribal entities were "analogous to a governmental agency, which should benefit from the defense of sovereign immunity, or whether [they are] more like . . . commercial business enterprise[s], instituted solely for the purpose of generating profits for [their] private owners." *Id*. at 1184 (internal quotation marks omitted).

Breakthrough identified six non-exhaustive factors to guide that determination: "(1) the method of creation of the economic entities; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) the tribe's intent with respect to the sharing of its sovereign immunity; and (5) the financial relationship between the tribe and the entities." *Id*. at 1187. It also emphasized a sixth factor that requires a factual inquiry into "the policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities." *Id*.

Appellants argue, briefly, to the contrary: that "the arm of a tribe is a *legal* inquiry, rather than a *factual* one, and it must be answered by looking at actions of the tribal legislature." Br. 31. Thus, although they do not appear to disagree with the *Breakthrough* factors, appellants argue that "they must be applied by looking at records that embody" the "different aspects of tribal decision-making." Br. 31. Confining a court's consideration of arm-of-the-tribe immunity to it official records is unduly restrictive and does not serve the purpose of tribal immunity.

Immunity is not a benefit that a sovereign may confer on a third party merely by stating its intent to do so. Instead, immunity is a legal protection the law recognizes for the sovereign itself, serving to protect the sovereign's fisc and its right to direct its governmental affairs. A valid arm-of-the-tribe test must ensure that a tribe's immunity extends to an entity only where that entity is, in certain essential respects, so closely aligned with the tribal sovereign that a suit against the entity is in practical effect a suit against the tribe itself.

Thus, in resolving "whether the entity acts as an arm of the tribe," "courts should 'take[] into account both formal and functional considerations—in other words, not only the legal or organizational relationship between the tribe and the entity, but also the practical operation of the entity in relation to the tribe.'" *Big Picture*, 329 F. Supp. 3d at 269 (quoting *Miami Nation*, 386 P.3d at 365). Further, as the district court recognized, "[t]hese functional considerations illuminate the degree to which imposition of liability on the entity would practically impair tribal self-governance." *Id*. (quoting *Miami Nation*, 386 P.3d at 371). Rigorous standards that include both formal and functional considerations are necessary to ensure that the federal policies behind the immunity doctrine are not subverted by unwarranted claims for arm-of-the-tribe immunity. *Cf. Great Plains Lending*, 846 F.3d at 1055 (regulating tribal lending entities "engaged in the business activity of small-dollar lending over the Internet, reaching customers who are not members of the Tribes" does not impact the Tribe's "rights of self-governance in purely intramural matters" (internal quotation marks omitted)).

The *Amici* States recognize that tribal immunity must continue to protect the legitimate interests of tribes as sovereigns, but the test for determining immunity must be able to draw a meaningful distinction between separate entities that are genuinely arms of tribes and those that are not. Failure to do so would improperly impair the *Amici* States' ability, in their own sovereign capacity, to enforce their laws against entities that are for all practical purposes private commercial ventures, operating without meaningful tribal oversight or control and generating primarily private profit.

CONCLUSION

This Court should affirm.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

/s/ Loren L. AliKhan
LOREN L. ALIKHAN
Solicitor General

CAROLINE S. VAN ZILE
Deputy Solicitor General

RICHARD S. LOVE
Senior Assistant Attorney General
Office of the Solicitor General

Office of the Attorney General
441 4th Street, NW, Suite 630 South
Washington, D.C. 20001
(202) 727-6287
(202) 730-1864 (fax)
Loren.AliKhan@dc.gov

December 2018

GEORGE JEPSEN
Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

RUSSELL A. SUZUKI
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

LISA MADIGAN
Attorney General
State of Illinois
100 W. Randolph Street, 12th Floor
Chicago, IL 60601

TOM MILLER
Attorney General
State of Iowa
1305 East Walnut Street
Des Moines, IA 50319

JANET T. MILLS
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

LORI SWANSON
Attorney General
State of Minnesota
445 Minnesota Street, Suite 1200
St. Paul, MN 55101

GURBIR S. GREWAL
Attorney General
State of New Jersey
25 Market Street
Trenton, NJ 08625

BARBARA D. UNDERWOOD
Attorney General
State of New York
28 Liberty Street
New York, NY 10005

JOSHUA H. STEIN
Attorney General
State of North Carolina
9001 Mail Service Center
Raleigh, NC 27699

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
Strawberry Square
Harrisburg, PA 17120

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

MARK R. HERRING
Attorney General
State of Virginia
202 North 9th Street
Richmond, VA 23219

CERTIFICATE OF SERVICE

I certify that on December 27, 2018, electronic copies of this brief were served through the Court's ECF system to:

Matthew W.H. Wessler
Kristi Cahoon Kelly
Casey Shannon Nash
Counsel for Plaintiff-Appellees

David Neal Anthony
William H. Hurd
Timothy James St. George
Justin Alexander Gray
Counsel for Defendant-Appellants

/s/ Loren L. AliKhan
Loren L. AliKhan

CERTIFICATE OF COMPLIANCE

I further certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 6,351 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point.

/s/ Loren L. AliKhan
Loren L. AliKhan