

Susan Shyne (Bar No. 13708)  
Patrick Daugherty (*pro hac vice* pending)  
Maranda Compton (*pro hac vice* pending)  
719 Second Avenue Suite 1150  
Seattle, WA 98104  
[sus@vnf.com](mailto:sus@vnf.com)  
[pod@vnf.com](mailto:pod@vnf.com)  
[mcompton@vnf.com](mailto:mcompton@vnf.com)  
Ph.: (206) 623-9372  
Fax: (206) 623-4986  
*Attorneys for Amicus Curiae Native  
American Financial Services Association  
and the State of Oklahoma*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
GREAT FALLS DIVISION

CONSUMER FINANCIAL  
PROTECTION BUREAU,

Plaintiff,

v.

THINK FINANCE, LLC, et al.,

Defendants.

Case No. 4:17-cv-00127-BMM

BRIEF AS *AMICUS CURIAE* BY  
THE NATIVE AMERICAN  
FINANCIAL SERVICES  
ASSOCIATION AND THE STATE  
OF OKLAHOMA IN SUPPORT OF  
DEFENDANTS' MOTION TO  
DISMISS

## TABLE OF CONTENTS

|  |    |
|--|----|
| TABLE OF AUTHORITIES .....   | ii |
| SUMMARY OF ARGUMENT .....  | 1  |
| REASONS FOR GRANTING THE MOTION TO DISMISS .....   | 2  |
| I.    The Motion to Dismiss correctly argues that the CFPB is<br>unconstitutionally structured. ....                                     | 2  |
| II.   The Motion to Dismiss correctly argues that tribes and tribal<br>lenders are not subject to the CFPB’s regulatory authority. ....  | 4  |
| III.  The CFPB’s actions threaten tribes’ sovereign economic<br>development efforts. ....  | 7  |
| a)  Tribal governments have legal sovereign authority to<br>engage in commercial activity for governmental economic<br>development. .... | 7  |
| b)  The CFPB’s actions disregard federal law and policy and<br>constitute clear overreach. ....  | 10 |
| IV.  TLEs Are Helping to Alleviate Tribal Poverty Among Native<br>Americans. ....  | 11 |
| CONCLUSION .....   | 13 |
| CERTIFICATE OF COMPLIANCE .....  | 15 |
| CERTIFICATE OF SERVICE .....   | 16 |

## TABLE OF AUTHORITIES

### CASES

|   |    |
|---|----|
| <i>Breakthrough Management Group, Inc. v. Chukchansi Gold Casino &amp; Resort</i> ,<br>629 F.3d 1173 (2010).....  | 10 |
| <i>Bynon v. Mansfield</i> ,<br>No. 15-00206, 2015 WL 2447159 (E.D. Pa. May 21, 2015) .....  | 10 |
| <i>Carnival Cruise Lines, Inc. v. Shute</i> ,<br>499 U.S. 585 (1991).....   | 10 |
| <i>Churchill Financial Management Corp. v. ClearNexus, Inc.</i> ,<br>802 S.E.2d 85 (Ga. Ct. App. 2017).....   | 10 |
| <i>County of Yakima v. Confederated Tribes &amp; Bands of Yakima Indian Nation</i> ,<br>502 U.S. 251 (1992) .....   | 5  |
| <i>Erie Railroad Co. v. Tompkins</i> ,<br>304 U.S. 64 (1938) .....  | 5  |
| <i>Everette v. Mitchem</i> ,<br>No. 15-1261, 2016 WL 470840 (D. Md. Feb. 8, 2016).....  | 10 |
| <i>Finn v. Great Plains Lending</i> ,<br>No. 16-415, 2016 WL 6537986 (W.D. Okla. Nov. 3, 2016), <i>vacated</i> ,<br>689 F. App'x 608 (10th Cir. 2017) .....   | 10 |
| <i>Great Plains Lending v. Connecticut Department of Banking</i> ,<br>Memorandum of Decision, No. HHB-CV-15-6028096-S (Conn.<br>Super. Ct. Nov. 23, 2015) .....   | 10 |
| <i>In the Matter of: Zero Parallel, LLC</i> ,<br>No. 2017-CFPB-0017, Consent Order ¶ 26 (CFPB Sept. 6, 2017),<br><a href="http://files.consumerfinance.gov/f/documents/201709_cfpb_zero-parallel-llc_consent-order.pdf">http://files.consumerfinance.gov/f/documents/201709_cfpb_zero-parallel-<br/>llc_consent-order.pdf</a> ..... | 11 |
| <i>Marquette National Bank of Minneapolis v. First of Omaha Service Corp.</i> ,<br>439 U.S. 299 (1978).....   | 10 |

|   |      |
|---|------|
| <i>Montana v. Blackfeet Tribe of Indians</i> ,<br>471 U.S. 759 (1985) .....   | 5    |
| <i>Perez v. Mortgage Bankers Ass’n</i> ,<br>135 S. Ct. 1199 (2015).....   | 2    |
| <i>PHH Corp. v. CFPB</i> ,<br>839 F.3d 1 (D.C. Cir. 2016), <i>reh’g en banc granted</i> ,<br><i>order vacated</i> (Feb. 16, 2017) ..... | 3    |
| <i>PHH Corp. v. CFPB</i> ,<br>881 F.3d 75 (D.C. Cir. 2018) (en banc).....   | 4, 5 |
| <i>Rice v. Santa Fe Elevator Corp.</i> ,<br>331 U.S. 218 (1947) .....   | 5    |
| <i>Seminole Nation v. United States</i> ,<br>316 U.S. 286 (1942).....   | 11   |
| <i>United States v. Kagama</i> ,<br>118 U.S. 375 (1886).....  | 2    |
| <i>United States v. Mitchell</i> ,<br>463 U.S. 206 (1983).....  | 11   |
| <i>Vermont Agency of Natural Resources v. United States ex rel. Stevens</i> ,<br>529 U.S. 765 (2000) .....                              | 5    |
| <i>Whitman v. Am. Trucking Ass’n, Inc.</i> ,<br>531 U.S. 457 (2001) .....   | 6    |
| <i>Wyeth v. Levin</i> ,<br>555 U.S. 555 (2009) .....  | 5    |
| <i>Younger v. Harris</i> ,<br>401 U.S. 37 (1971) .....  | 5    |

## STATUTES

|                                    |   |
|------------------------------------|---|
| 12 U.S.C. § 5481(19) .....         | 5 |
| 12 U.S.C. § 5481(27) .....         | 4 |
| 12 U.S.C. § 5493(c)(2)(B) .....    | 4 |
| 12 U.S.C. § 5493(e)(1)(B)-(C)..... | 4 |
| 12 U.S.C. § 5493(g)(3).....        | 4 |
| 12 U.S.C. § 5495 .....             | 4 |
| 12 U.S.C. § 5497(a)(1)-(2).....    | 3 |
| 12 U.S.C. § 5512(c)(6)-(7).....    | 4 |
| 12 U.S.C. § 5514(b)(3).....        | 4 |
| 12 U.S.C. § 5515(b)(2).....        | 4 |
| 12 U.S.C. § 5515(e)(2).....        | 4 |
| 12 U.S.C. § 5551(a)-(b) .....      | 4 |
| 12 U.S.C. § 5552(a) .....          | 4 |
| 12 U.S.C. § 5562(c)(1) .....       | 5 |

## OTHER AUTHORITIES

|  |   |
|--|---|
| Randall K.Q. Akee & Jonathan B. Taylor, <i>Social and Economic Change on American Indian Reservations: A Databook of the US Censuses and the American Community Survey 1990–2010</i> (2014),<br><a href="https://perma.cc/P9YK-ZEUE">https://perma.cc/P9YK-ZEUE</a> .....  | 8 |
| Kate Berry, <i>CFPB’s Mulvaney shows lighter touch with tribal lenders</i> , AM. BANKER (Mar. 16, 2018), <a href="https://www.americanbanker.com/news/cfpbs-mulvaney-shows-lighter-touch-with-tribal-lenders">https://www.americanbanker.com/news/cfpbs-mulvaney-shows-lighter-touch-with-tribal-lenders</a> ..... | 7 |
| Gavin Clarkson & James K. Sebenius, <i>Leveraging Tribal Sovereignty for Economic Opportunity: A Strategic Negotiations Perspective</i> , 76 MO. L. REV. 1045 (2011) .....   | 9 |
| Gavin Clarkson et al., <i>Online Sovereignty: The Law and Economics of Tribal Electronic Commerce</i> , 19 VAND. J. OF ENT. & TECH. LAW 1 (2016).....  | 9 |
| Cohen’s Handbook of Federal Indian Law (2012) .....  | 8 |
| ICT Staff, <i>Tribal Incubator Bill to Foster Entrepreneurship, Close the Employment Gap in Native Communities</i> , INDIAN COUNTRY TODAY (July 19, 2016),   |   |

|   |    |
|---|----|
| <a href="https://indiancountrymedianetwork.com/news/business/tribal-incubator-bill-to-foster-entrepreneurship-close-the-employment-gap-in-native-communities/">https://indiancountrymedianetwork.com/news/business/tribal-incubator-bill-to-foster-entrepreneurship-close-the-employment-gap-in-native-communities/</a> .....   | 9  |
| Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs,<br>83 Fed. Reg. 4235 (Jan. 30, 2018) .....   | 7  |
| John Koppisch, <i>Why Are Indian Reservations So Poor? A Look At The Bottom 1%</i> ,<br>FORBES MAG. (Dec. 13, 2011),<br><a href="https://www.forbes.com/sites/johnkoppisch/2011/12/13/why-are-indian-reservations-so-poor-a-look-at-the-bottom-1/#4924de4d3c07">https://www.forbes.com/sites/johnkoppisch/2011/12/13/why-are-indian-reservations-so-poor-a-look-at-the-bottom-1/#4924de4d3c07</a> .....                     | 9  |
| NAFSA, <i>Lac Vieux Desert Tribe—Frozen Homeland</i> ,<br><a href="https://nativefinance.org/media/">https://nativefinance.org/media/</a><br>(last visited May 14, 2018) .....  | 12 |
| NAFSA, <i>Otoe-Missouria Tribe—Sovereignty Through Economic Development</i> ,<br><a href="https://nativefinance.org/media/">https://nativefinance.org/media/</a><br>(last visited May 14, 2018) .....   | 12 |
| NAFSA, <i>Rocky Boy Chippewa Cree Tribe—Prosperity on the Plains</i> ,<br><a href="https://nativefinance.org/media/">https://nativefinance.org/media/</a><br>(last visited May 14, 2018) .....  | 12 |
| Naomi Schaeffer Riley, <i>One Way to Help Native Americans: Property Rights</i> , THE ATLANTIC (July 30, 2016),<br><a href="https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/">https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/</a> .....  | 8  |
| Ronald L. Rubin, <i>The Tragic Downfall of the Consumer Financial Protection Bureau</i> , NAT’L REV. ONLINE (Dec. 21, 2016),<br><a href="http://www.nationalreview.com/article/443227/consumer-financial-protection-bureau-tragic-failures">http://www.nationalreview.com/article/443227/consumer-financial-protection-bureau-tragic-failures</a> .....   | 5  |
| Vincent Shilling, <i>And Now There Are 573! Six VA Tribes Get Federal Recognition as President Signs Bill</i> , INDIAN COUNTY TODAY (Jan. 30, 2018),<br><a href="https://indiancountrymedianetwork.com/news/politics/now-573-six-va-tribes-get-federal-recognition-president-signs-bill/">https://indiancountrymedianetwork.com/news/politics/now-573-six-va-tribes-get-federal-recognition-president-signs-bill/</a> ..... | 7  |
| THE FEDERALIST NO. 47 (James Madison) (Clinton Rossiter ed. 1961) .....   | 2  |

*Unemployment on Indian Reservations at 50 Percent: the Urgent Need to Create Jobs in Indian Country: Hearing Before the S. Comm. on Indian Affairs, 111th Cong. (2010),*  
<https://www.indian.senate.gov/sites/default/files/upload/files/January2820102.pdf> .....9

## SUMMARY OF ARGUMENT

The Consumer Financial Protection Bureau (CFPB) threatens our government's separation of powers—both horizontal and vertical. First, the very existence of the CFPB represents a serious violation of the horizontal separation of the powers of the federal government. As the Department of Justice now recognizes, the concentration of power in the hands of one unelected individual in the Executive Branch, unaccountable to the elected head of that Branch or to the Legislative Branch, violates the horizontal separation of powers. Second, this case is about the vertical separation of powers, because the CFPB—without statutory authority—is attempting indirectly to regulate federally recognized Indian tribes, while elsewhere claiming the authority to *directly* regulate tribes and sovereign States. This is a threat to our structure of government, and it disregards the U.S. Supreme Court's command that federal statutes should not be construed to apply to sovereign entities absent a clear statement from Congress.

Amici agree with Defendants that this case is *not* truly about the Defendant's actions, but rather is a thinly veiled attempt by the CFPB to exercise jurisdiction over tribes and their economic development and to obstruct tribal efforts to provide financial services. By filing vexatious litigation against non-Native entities with whom tribes have made the sovereign determination to contract, the CFPB is circumventing Congress's sole authority to regulate tribal



affairs.<sup>1</sup> If not curtailed, this will undoubtedly chill financial lending activity by Tribal Lending Entities (TLEs) on behalf of tribes and their members, economic development activity that is essential to tribal governments. Two of the tribes named in the complaint, the Otoe-Missouria and Chippewa Cree of Rocky Boy, have no real tax base, no nearby population centers to draw from for gaming revenue, and no resources to harvest. Thus, e-commerce and the ability to create a favorable and responsibly managed regulatory environment are perhaps their sole avenue to achieve economic independence and self-sufficiency.

## **REASONS FOR GRANTING THE MOTION TO DISMISS**

### **I. The Motion to Dismiss correctly argues that the CFPB is unconstitutionally structured.**

In Federalist No. 47, James Madison wrote that the “accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny.”<sup>2</sup> The vertical and horizontal separations of power were crafted to avoid such a result. To the Framers, the separation of powers and the system of checks and balances it enabled “were more than just theories”; rather, “[t]hey were practical and real protections for individual liberty in the new Constitution.”<sup>3</sup> As a result, the Supreme Court “has repeatedly invoked the ‘separation of powers’ and

---

<sup>1</sup> U.S. Const. art. I, § 8, cl. 3; *see generally United States v. Kagama*, 118 U.S. 375 (1886).

<sup>2</sup> THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed. 1961).

<sup>3</sup> *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1216 (2015) (Thomas, J., concurring).

‘the constitutional system of checks and balances’ as core principles of our constitutional design.”<sup>4</sup>

Unlike most other independent agencies, the CFPB is “headed not by a multi-member commission but rather by a single Director.”<sup>5</sup> And because the CFPB is an independent entity, the President can only remove this Director for cause.<sup>6</sup> The CFPB also controls its own budget and is therefore immune from Congress checking it with the power of the purse.<sup>7</sup>

In October 2016, after finding that the CFPB’s structure “represents a gross departure from settled historical practice,” the U.S. Court for Appeals for the D.C. Circuit panel struck down the requirement that the CFPB director be fired “for cause” as unconstitutional.<sup>8</sup> The “concentration of enormous executive power in a single, unaccountable, unchecked Director,” Judge Kavanaugh wrote, “poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty, than does a multi-member independent agency.”<sup>9</sup> Although the *en banc* D.C. Circuit would later reverse that panel’s decision in a

---

<sup>4</sup> *Id.* at 1215 (citation omitted).

<sup>5</sup> *PHH Corp. v. CFPB*, 839 F.3d 1, 6 (D.C. Cir. 2016), *reh’g en banc granted, order vacated* (Feb. 16, 2017).

<sup>6</sup> *Id.* at 5-6.

<sup>7</sup> *See* 12 U.S.C. § 5497(a)(1)-(2).

<sup>8</sup> *PHH Corp.*, 839 F.3d at 8.

<sup>9</sup> *Id.*

divided opinion,<sup>10</sup> the Department of Justice has expressed its agreement with the original panel that the CFPB as structured is unconstitutional.<sup>11</sup> Moreover, the panel's decision, and the dissents from the *en banc* decision, remain persuasive authority.

**II. The Motion to Dismiss correctly argues that tribes and tribal lenders are not subject to the CFPB's regulatory authority.**

Not content with the enormous clout it already claims over individual citizens and corporate entities, the CFPB has unilaterally sought to exert its will over sovereign tribes and States.

Defendants in this case argue that the tribes are necessary parties to this suit, and they quite correctly point out that the tribes and their lending entities are not subject to the CFPB's authority. Under the Consumer Financial Protection Act (CFPA), "State[s]" are to be co-regulators with the CFPB.<sup>12</sup> The CFPA defines "State" to include sovereign States, such as Oklahoma, as well as Indian tribes and their arms.<sup>13</sup> Elsewhere, the CFPA grants the CFPB the authority to investigate "any person" who provides consumer financial products or services or violates

---

<sup>10</sup> See *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

<sup>11</sup> Br. for the United States as Amicus Curiae, *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Mar. 17, 2017).

<sup>12</sup> 12 U.S.C. § 5495; see also *id.* §§ 5493(c)(2)(B), 5493(e)(1)(B)-(C), 5493(g)(3), 5512(c)(6)-(7), 5514(b)(3), 5515(b)(2), 5515(e)(2), 5551(a)-(b), 5552(a).

<sup>13</sup> *Id.* § 5481(27).

federal consumer financial laws.<sup>14</sup> The term “person” is defined as “an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.”<sup>15</sup> Notably absent from this list are States and tribes.

As part of a series of legal rules designed to protect and promote federalism,<sup>16</sup> the Supreme Court has held that, absent a clear statement from Congress, federal statutes do *not* subject sovereign entities to regulation.<sup>17</sup> The Supreme Court has also held that ambiguous language is to be interpreted in favor of Indian tribes.<sup>18</sup>

But the CFPB is not exactly known for respecting well-established legal rules.<sup>19</sup> Instead, ignoring the guidance of the Supreme Court, as well as the plain

---

<sup>14</sup> *Id.* § 5562(c)(1).

<sup>15</sup> *Id.* § 5481(19).

<sup>16</sup> See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971) (abstention); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (presumption against preemption); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (choice of law).

<sup>17</sup> *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000).

<sup>18</sup> *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767-68 (1985); cf. *Wyeth v. Levin*, 555 U.S. 555, 565 (2009) (requiring clear statement before interpreting federal law to preempt State law).

<sup>19</sup> See *PHH Corp.*, 881 F.3d at 150 (Henderson, J., dissenting) (noting that, along with its constitutional reversal, the *en banc* D.C. Circuit majority had actually *reinstated* the panel’s ruling that the CFPB had “flunked ‘Rule of Law 101’” on four statutory issues that were “not a close call” and had engaged in “‘gamesmanship’ and ‘absurd[]’ reasoning”) (citation omitted); see also Ronald L.

text of the statute, the CFPB has elsewhere interpreted “person” under the CFPA as including both Indian tribes *and* States, such that the CFPB could send extensive civil investigative demands to these sovereigns.<sup>20</sup> If this is correct, the CFPB would be able to regulate, investigate, and coerce entities operated by the State of Oklahoma. Allowing the CFPB—an independent, unchecked, and virtually unaccountable bureaucratic agency—to regulate tribes and States in this manner would significantly alter the balance of power in our federalist system of government. It is certain Congress did not implement so fundamental a change through such oblique statutory language.<sup>21</sup>

The CFPB’s decision to unleash its regulatory armory against tribes, States, and their agencies is without textual support. It is contrary to binding precedent of

---

Rubin, *The Tragic Downfall of the Consumer Financial Protection Bureau*, NAT’L REV. ONLINE (Dec. 21, 2016), <https://www.nationalreview.com/article/443227/consumer-financial-protection-bureau-tragic-failures> (“For two decades, HUD had interpreted the law and provided guidance . . . . Cordray’s decision was stunning: HUD’s interpretation was wrong.”).

<sup>20</sup> See Br. of Petitioner-Appellee CFPB at 30, *CFPB v. Great Plains Lending, LLC*, No. 14-55900 (9th Cir. Feb. 20, 2015) (“As an initial matter, states and state-owned companies are neither exempt from regulation under the CFPA, nor exempt from complying with the Bureau’s CIDs.”); Amended Mem. in Support of Defs.’ Mot. to Dismiss at 2, *CFPB v. Golden Valley Lending, Inc.*, No. 2:17-cv-02521 (D. Kan. Oct. 10, 2017) (“[I]nstead of engaging in meaningful consultation with the Tribe or its regulatory commission regarding Defendants’ business practices, the Bureau filed this lawsuit[.]”).

<sup>21</sup> Cf. *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 468 (2001) (“Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”) (citation omitted).

the U.S. Supreme Court, which declines to assume that generally applicable statutes apply to Indian tribes in the absence of clear statutory intent. Seemingly recognizing this, in February the CFPB dropped its lawsuit against tribal entities in the District of Kansas, an action CFPB Acting Director Mick Mulvaney attributed to Oklahoma and New Mexico's *amici* arguments in favor of tribal and State sovereignty.<sup>22</sup> Although the CFPB is no longer going after tribes directly, it is still obviously attempting to indirectly impose upon tribal lending activity.

### **III. The CFPB's actions threaten tribes' sovereign economic development efforts.**

#### *a) Tribal governments have legal sovereign authority to engage in commercial activity for governmental economic development.*

Tribal governments have a sovereign legal right to engage in commercial activity as an essential government function. And Congress has not given the CFPB authority to impede lawful tribal economic development by targeting tribal business associates.

There are 573 federally recognized Indian tribes in the United States,<sup>23</sup> each actively working to provide basic social services to its members through the

---

<sup>22</sup> See Kate Berry, *CFPB's Mulvaney shows lighter touch with tribal lenders*, AM. BANKER (Mar. 16, 2018), <https://www.americanbanker.com/news/cfpbs-mulvaney-shows-lighter-touch-with-tribal-lenders>.

<sup>23</sup> Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 83 Fed. Reg. 4235 (Jan. 30, 2018); See Vincent Shilling, *And Now There Are 573! Six VA Tribes Get Federal Recognition as President Signs Bill*, INDIAN COUNTY TODAY (Jan. 30, 2018),

exercise of its sovereign right to self-determination. While federal law recognizes tribal sovereignty and tribal self-determination, tribal governments nevertheless face significant hurdles in achieving economic independence and self-sufficiency. Tribal governments cannot match the revenue-raising abilities of fellow sovereigns. States and municipalities have the capacity to leverage revenue from direct taxes, business tax credits, mortgages on real estate, and other traditional state-owned enterprises—tools that are not fully available to tribes. Comprehensive legal and bureaucratic restrictions render reservation trust lands incapable of being leveraged to raise capital or support community development,<sup>24</sup> and create almost insurmountable hurdles for tribal governments vying for economic independence. This reality leaves tribal governments with limited opportunities to mitigate the widespread poverty, stagnant economies, and lack of basic social services and infrastructure that continue to plague tribal communities.<sup>25</sup>

---

<https://indiancountrymedianetwork.com/news/politics/now-573-six-va-tribes-get-federal-recognition-president-signs-bill/>.

<sup>24</sup> See Cohen's Handbook of Federal Indian Law § 15.06[1] (2012); Naomi Schaeffer Riley, *One Way to Help Native Americans: Property Rights*, THE ATLANTIC (July 30, 2016), <https://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941/>.

<sup>25</sup> See Randall K.Q. Akee & Jonathan B. Taylor, *Social and Economic Change on American Indian Reservations: A Databook of the US Censuses and the American Community Survey 1990–2010* (2014), available at <https://perma.cc/P9YK-ZEUE> (providing a general overview of the poverty of tribal communities).

Facing geographic isolation<sup>26</sup> and incredible unemployment,<sup>27</sup> tribal governments must seek innovative revenue streams to supplement these extensive federal-funding gaps that leave unaddressed numerous, basic infrastructure and social service needs unparalleled anywhere else in the country.<sup>28</sup> Today, the internet and e-commerce offer tribes the chance for a more even playing field. Through the internet, a tribe can allow consumers, domestic and international, access to on-reservation goods and services.<sup>29</sup> In every other context, the use of internet technologies to develop geographically distant commercial relationships and the ability to extend a sovereign's jurisdiction through contracting are well-

---

<sup>26</sup> See Gavin Clarkson et al., *Online Sovereignty: The Law and Economics of Tribal Electronic Commerce*, 19 VAND. J. OF ENT. & TECH. LAW 1, 21-23 (2016). Dr. Clarkson is the former Deputy Assistant Secretary for Policy and Economic Development—Indian Affairs at the Department of Interior.

<sup>27</sup> See generally *Unemployment on Indian Reservations at 50 Percent: the Urgent Need to Create Jobs in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. (2010),

<https://www.indian.senate.gov/sites/default/files/upload/files/January2820102.pdf>.

<sup>28</sup> John Koppisch, *Why Are Indian Reservations So Poor? A Look At The Bottom 1%*, FORBES MAG. (Dec. 13, 2011),

<https://www.forbes.com/sites/johnkoppisch/2011/12/13/why-are-indian-reservations-so-poor-a-look-at-the-bottom-1/#4924de4d3c07>; see also ICT Staff, *Tribal Incubator Bill to Foster Entrepreneurship, Close the Employment Gap in Native Communities*, INDIAN COUNTRY TODAY (July 19, 2016),

<https://indiancountrymedianetwork.com/news/business/tribal-incubator-bill-to-foster-entrepreneurship-close-the-employment-gap-in-native-communities/>; see generally Gavin Clarkson & Jim Sebenius, *Leveraging Tribal Sovereignty for Economic Opportunity: A Strategic Negotiations Perspective*, 76 MO. L. REV. 1045 (2011).

<sup>29</sup> See Clarkson et al., *supra* note 26, at 17.



recognized legal principles.<sup>30</sup> Gaining a foothold in emerging markets is essential if tribes are to be successful in providing basic services to their members and, in turn, produce industrious citizens capable of promoting the welfare of their tribes and the nation.

*b) The CFPB's actions disregard federal law and policy and constitute clear overreach.*

Under the CFPA and well-settled legal precedent, TLEs are to be treated as the arms-of-sovereigns engaged in government revenue development efforts.<sup>31</sup> As

---

<sup>30</sup> The Supreme Court has consistently found that consumers may negotiate contracts subject to geographically distant laws and jurisdictions. *See, e.g., Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 592-95 (1991); *see also Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978) (holding that the National Banking Act authorizes the charging of out-of-state credit card customers an interest rate allowed by the bank's home state).

<sup>31</sup> *See Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1183-84 (2010) (noting that "tribal governments directly control or participate in commercial activities more frequently than other types of governments. The tribal organization may be part of the tribal government and protected by tribal immunity, even though it may have a separate corporate structure.") (citation and internal alterations omitted); *Finn v. Great Plains Lending*, No. 16-415, 2016 WL 6537986, at \*3 (W.D. Okla. Nov. 3, 2016) (mere accusations of "renting" a Tribe are insufficient to overcome the sovereign immunity of a TLE), *vacated*, 689 F. App'x 608 (10th Cir. 2017); *Everette v. Mitchem*, No. 15-1261, 2016 WL 470840 (D. Md. Feb. 8, 2016) (case dismissed for failure to state a claim stemming from sovereign immunity imputed from Tribe to TLEs); *Bynon v. Mansfield*, No. 15-00206, 2015 WL 2447159, at \*2 (E.D. Pa. May 21, 2015) (tribal sovereign immunity extends to the manager of a TLE acting in his/her official capacity); *Churchill Fin. Mgmt. Corp. v. ClearNexus, Inc.*, 802 S.E.2d 85 (Ga. Ct. App. 2017) (sovereign immunity of TLE applies to arbitration proceedings); *Great Plains Lending v. Conn. Dep't of Banking*, Mem. of Decision, No. HHB-CV-15-6028096-S (Conn. Super. Ct. Nov. 23, 2015) (tribal sovereign immunity of a TLE extends to administrative actions by state agencies).

arms-of-sovereigns it would be logically reasonable to assume that TLEs are going to engage in standard business contracts with third-party service providers and vendors in order to maximize operational capacity. Allowing the CFPB to target these legal business relationships chills the ability of TLEs to engage in this type of government revenue generation and deprives tribal members of the myriad benefits these tribal enterprises provide.<sup>32</sup>

This Court must grant the Defendants' motion to ensure that the CFPB acts in accordance with the CFPA, federal Indian law and policy, and with the general trust relationship between the United States and the tribal nations that the Supreme Court has long recognized.<sup>33</sup>

#### **IV. TLEs Are Helping to Alleviate Tribal Poverty Among Native Americans.**

E-commerce and online tribal lending activities bring consumers to remote, isolated tribes where other markets fail to thrive. This virtual trading route is immensely important to many tribal economies. In particular, the online financial services industry is creating jobs on tribal land and is putting money back into

---

<sup>32</sup> Discussed *infra* Section IV. See also *In the Matter of: Zero Parallel, LLC*, No. 2017-CFPB-0017, Consent Order ¶ 26 (CFPB Sept. 6, 2017), [http://files.consumerfinance.gov/f/documents/201709\\_cfpb\\_zero-parallel-llc-consent-order.pdf](http://files.consumerfinance.gov/f/documents/201709_cfpb_zero-parallel-llc-consent-order.pdf) (“[N]o Person may take into consideration any contention that state or federal law is inapplicable, or that lenders are not subject to state or federal law, because of lender sovereignty or a lender’s . . . tribal status or affiliation, or because of choice of . . . tribal law.”).

<sup>33</sup> *United States v. Mitchell*, 463 U.S. 206, 225 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (the United States “has charged itself with moral obligations of the highest responsibility and trust” towards Indian tribes).

social services, including education, healthcare, housing, public safety, and infrastructure development.<sup>34</sup> Some tribes are able to support nearly 50% of their government's general fund through its TLEs,<sup>35</sup> while other tribal governments are 100% funded by TLE revenues.<sup>36</sup>

The experiences of three tribes illustrate the positive impact of e-commerce. The Lac Vieux Desert Band of Lake Superior Chippewa is located in isolated Watersmeet, Michigan, 30-50 miles from the nearest towns. The long, harsh winters can isolate tribal members for months at a time. The tribe's TLEs directly support programs such as housing, education, community health clinics, scholarships, and propane assistance. With extreme winter temperatures dropping under 40 degrees below zero, and propane peaking at \$9/gallon at times, without the housing and propane assistance provided by TLE revenues the health and safety of many tribal members would be at risk.<sup>37</sup>

The Otoe-Missouria Tribe, in rural Red Rock, Oklahoma, has found success with its TLEs. During the first years of lending, the tribe was able to invest 100% of TLE profits into tribal housing renovation and creation. Later, the tribe invested

---

<sup>34</sup> Clarkson et al., *supra* note 26, at 16-17. See, e.g., NAFSA, *Rocky Boy Chippewa Cree Tribe—Prosperity on the Plains*, <https://nativefinance.org/media/> (last visited May 14, 2018); NAFSA, *Otoe-Missouria Tribe—Sovereignty Through Economic Development*, <https://nativefinance.org/media/> (last visited May 14, 2018).

<sup>35</sup> NAFSA, *Lac Vieux Desert Tribe—Frozen Homeland*, <https://nativefinance.org/media/> (last visited May 14, 2018).

<sup>36</sup> Clarkson et al., *supra* note 26, at 23.

<sup>37</sup> *Id.* at 19-20; see also *Frozen Homeland*, *supra* note 35.

in tribal programs, including education, building and infrastructure maintenance, elders' services, and economic development. TLEs' revenues also allowed for investment in cultural preservation and language revitalization.<sup>38</sup>

The Habematolel Pomo of Upper Lake in California currently generates 100% of its governmental budget from TLEs.<sup>39</sup> The tribe's TLEs fund services such as elder assistance, youth education, clothing, burial assistance, and other tribal charitable programs. Revenues also supplement the scholarship programs, culturally based education programs, and acquisition of historically significant tribal lands by the tribe.<sup>40</sup> TLEs' operations are a key factor in the economic stability of a tribe, and its profits are also used to pay down existing tribal debt, including the tribal casinos, which, as of 2014, were not profitable.<sup>41</sup>

As these examples show, tribes are utilizing TLEs' revenues to make their communities better—providing vital government social services to meet the needs of their members.

## CONCLUSION

The Motion to Dismiss should be granted.

---

<sup>38</sup> Clarkson et al., *supra* note 26, at 20-22.

<sup>39</sup> *Id.* at 22-24.

<sup>40</sup> *Id.* at 23.

<sup>41</sup> *Id.*

Respectfully submitted,

/s/ Susan A. Shyne

Susan A. Shyne (Bar No. 13708)  
Patrick Daugherty (*pro hac vice* pending)  
Maranda Compton (*pro hac vice* pending)  
Van Ness Feldman, LLP  
719 Second Avenue Suite 1150  
Seattle, WA 98104  
[sus@vnf.com](mailto:sus@vnf.com)  
[pod@vnf.com](mailto:pod@vnf.com)  
[mcompton@vnf.com](mailto:mcompton@vnf.com)  
Ph.: (206) 623-9372

*Attorneys for Amicus Curiae Native American  
Financial Services Association and the State  
of Oklahoma*

with

Joe Sarcinella  
Chief Operations Officer & General  
Counsel  
444 North Capitol Street NW, Suite 605  
Washington, DC 20001  
[joe@nativefinance.org](mailto:joe@nativefinance.org)  
Ph.: (202) 753-0300

and

Mike Hunter  
Attorney General  
Zach West  
Assistant Solicitor General  
Oklahoma Office of the Attorney General  
313 N.E. 21st Street  
Oklahoma City, OK 73105  
[zach.west@oag.ok.gov](mailto:zach.west@oag.ok.gov)  
Ph.: (405)522-4798

DATED: June 19, 2018

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Local Rules 7.1(b), (c), and 7.5(b)(2)(A), I certify that the BRIEF AS AMICUS CURIAE BY THE NATIVE AMERICAN FINANCIAL SERVICES ASSOCIATION AND THE STATE OF OKLAHOMA IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS is double spaced, is a proportionately spaced 14-point typeface, and contains 3,233 words, excluding the caption, signature block, tables of content and authorities, and certificates of compliance and service.

DATED June 19, 2018.

/s/ Susan A. Shyne

Susan A. Shyne (Bar No. 13708)

Patrick Daugherty (*pro hac vice* pending)

Maranda Compton (*pro hac vice* pending)

Van Ness Feldman, LLP

719 Second Avenue Suite 1150

Seattle, WA 98104

[sus@vnf.com](mailto:sus@vnf.com)

[pod@vnf.com](mailto:pod@vnf.com)

[mcompton@vnf.com](mailto:mcompton@vnf.com)

Ph.: (206) 623-9372

*Attorneys for Amicus Curiae Native  
American Financial Services Association  
and the State of Oklahoma*

### **CERTIFICATE OF SERVICE**

I hereby certify that on June 19, 2018, I electronically filed the foregoing and accompanying documents with the Clerk of the Court of the U.S. District Court for the District of Montana by using the Court's CM/ECF system. All participants in the case are registered CM/ECF users, and all documents will be served via the CM/ECF system.

/s/ Susan A. Shyne

Susan A. Shyne (Bar No. 13708)

Patrick Daugherty (*pro hac vice* pending)

Maranda Compton (*pro hac vice* pending)

Van Ness Feldman, LLP

719 Second Avenue Suite 1150

Seattle, WA 98104

[sus@vnf.com](mailto:sus@vnf.com)

[pod@vnf.com](mailto:pod@vnf.com)

[mcompton@vnf.com](mailto:mcompton@vnf.com)

Ph.: (206) 623-9372

*Attorneys for Amicus Curiae Native*

*American Financial Services Association*

*and the State of Oklahoma*