

No. 17-184

In the Supreme Court of the United States

GREAT PLAINS LENDING, LLC, *et al.*,
Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

**BRIEF OF THE NATIVE AMERICAN FINANCIAL
SERVICES ASSOCIATION AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

Michael F. McBride
Counsel of Record
Patrick O. Daugherty
Van Ness Feldman LLP
1050 Thomas Jefferson St., N.W.
Suite 700
Washington, D.C. 20007
(202) 298-1800
mfm@vnf.com

*Counsel for Amicus Curiae
Native American Financial
Services Association*

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STATEMENT OF INTEREST¹

The Native American Financial Services Association (“NAFSA”) is a non-profit trade association advocating for tribal sovereignty, responsible financial services, and better economic opportunities in Indian Country. NAFSA protects Native American tribal sovereignty by fighting discriminatory practices against tribal government-owned businesses that operate in compliance with federal laws.

NAFSA members have formed Tribal Lending Entities (“TLEs”). Acting as arms of the Tribes, TLEs provide financial services to members of our society that traditional banking interests have been unwilling to serve. TLEs generate revenue that funds crucial tribal governmental activities and alleviates deprivation in tribal communities. Increased tribal self-sufficiency in turn reduces the burden on American tax payers and the federal government. NAFSA members have promulgated and enforced financial service laws and regulations for many years. The stability of these tribal laws and their consistent application is a normal function of modern governance. NAFSA must defend the right of sovereign tribal governments to regulate their own economic entities.

¹ This brief is filed with the consent of the parties. Copies of the consents have been filed with the Clerk. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties have received timely notice of *amicus curiae*’s intent to file this brief. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amicus curiae*, its members, or counsel made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The decision of the U.S. Court of Appeals for the Ninth Circuit (“Ninth Circuit”) will harm tribal governance and sovereignty for all 567 federally recognized Indian Tribes, not just those that have entered the financial services industry. NAFSA agrees with the arguments presented by the Petitioner that a federal statute of general applicability, which is silent to its application to Indian Tribes, does **not** apply to Indian Tribes. The Ninth Circuit added to the split of the Circuits on this issue, making this case appropriate for the Court’s review to resolve this controversy. The holding of the Ninth Circuit below is also squarely contrary to this Court’s holdings that the term “person” does not include sovereigns, like Tribes, absent an affirmative showing of intent to the contrary. *Inyo Cty., Cal. v. Paiute-Shoshone Indians of the Bishop Cmty.*, 538 U.S. 701, 709 (2003); *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000).

This is an important case for granting a writ because the actions of the Consumer Financial Protection Bureau (“CFPB”) threaten to prevent financial lending activity by TLEs on behalf of Tribes and their members. TLEs and e-commerce generally offer Tribes a way to overcome the federal policies that isolated Tribes, limited economic opportunities for Indians, and led to institutionalized poverty in tribal communities. They also support tribal sovereignty and self-sufficiency by generating revenue needed to provide basic social services to tribal members.

REASONS FOR GRANTING THE WRIT

I. The Writ Should Be Granted for the Reasons Stated by Petitioners.

NAFSA agrees with reasons for granting the writ stated by Petitioners. In the interest of brevity, it hereby adopts and incorporates those reasons by reference.

II. The CFPB's Overreach Threatens Tribes' Economic Development Efforts.

There are 567 federally recognized Tribes in the United States,² each actively working to provide basic social services to its members while they exercise their sovereign right to self-determination. The majority of those Tribes are located in remote, isolated areas.³ Geographic isolation limits economic opportunities.⁴ While a handful of Tribes have successful gaming operations, the lack of access to local consumers from larger population centers virtually eliminates the

² Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915 (Jan. 17, 2017).

³ Gavin Clarkson, Katherine A. Spilde, and Carma M. Clah, *Online Sovereignty: The Law and Economics of Tribal Electronic Commerce*, 19 Vand. J. Ent. & Tech. L. 1, 4 (2016) (hereinafter "Clarkson, Spilde and Clah"). Dr. Clarkson currently serves as the Deputy Assistant Secretary for Policy and Economic Development—Indian Affairs at the Department of Interior, but was not consulted about this brief.

⁴ Donald L. Barlett & James B. Steele, *Wheel of Misfortune*, TIME, Dec. 16, 2002, at 44; see also Clarkson, Spilde and Clah, *supra* note 3, at 6-7.

potential for tribal gaming to positively impact most tribal economies.⁵

States and municipalities have the capacity to leverage revenue from direct taxes, business tax credits, from mortgages on real estate and from other traditional state-owned enterprises. These tools are not fully available to Tribes because of federal Indian law and policy,⁶ and because legal restrictions render reservation trust lands incapable of being leveraged to raise capital.⁷ This reality leaves tribal governments with limited opportunities to mitigate the widespread poverty, stagnant economies, and lack of basic social

⁵ See Barlett & Steele, *supra* note 4, at 44; see also Clarkson, Spilde and Clah, *supra* note 3, at 6-7, 36.

⁶ See, e.g., *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2042-45 (2014) (Sotomayor, J., concurring) (general discussion of economic development obstacles for Tribes, including the likelihood of double taxation). States may manipulate tax rates to attract out-of-state business, but prior rulings of this and other courts deny these opportunities to Tribes. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976); *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008).

⁷ 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/>.

services and infrastructure continuing to plague Tribes.⁸

In addition to geographic isolation and disadvantageous policies, there have been cuts to federal funding for Tribes for decades.⁹ The proposed Fiscal 2018 budget continues this long-term trend, proposing to cut an additional 303.3 million dollars from the Bureau of Indian Affairs, roughly 150 million dollars from the Indian Health Service, and more than 50 million dollars from Indian country housing programs, further reducing funding for tribal social services and programs.¹⁰ These cuts disenfranchise

⁸ See Riley, *supra* note 7; see also 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), <http://static1.squarespace.com/static/52557b58e4b0d4767401ce95/t/5379756ce4b095f55e75c77b/1400468844624/AkeeTaylorUSDatabook2014-05-15.pdf> [<https://perma.cc/P9YK-ZEUE>] (providing a general overview of the poverty of tribal communities).

⁹ National Congress of American Indians, *Fiscal Year 2015 Indian Country Budget Request: An Honorable Budget for Indian Country: Equitable Funding for Tribes*, at 19 & fig.2 (Jan. 2014), http://www.ncai.org/ncai_2014_budget_request.pdf (showing Indian Affairs funding declining from 0.20 percent of the federal budget in 1979 to 0.08 percent of the federal budget in 2012).

¹⁰ U.S. Dep't of the Interior, Bureau of Indian Affairs, *Indian Affairs–Bureau Highlights*, at BH-77 & BH-81, https://www.doi.gov/sites/doi.gov/files/uploads/fy2018_bib_bh077.pdf (last visited Sept. 5, 2017); Kevin K. Washburn, *Trump Proposes Hundreds in Millions in Cuts to Federal Appropriations to Indian Country*, *Indian Country Today* (May 25, 2017), <https://indiancountrymedianetwork.com/news/opinions/trump-proposes-hundreds-millions-cuts-federal-appropriations-indian-country/>.

Native Americans, endanger the viability of tribal communities, and perpetuate generational poverty among tribal members.¹¹

Facing these obstacles, tribal governments are forced to be entrepreneurial in seeking new revenue streams to fill extensive federal-funding gaps that leave unaddressed numerous tribal infrastructure and social service needs.¹² The internet and e-commerce offer Tribes a ray of hope, eliminating the traditional separation between a Tribe and the consumer by providing tribal government enterprises direct access to the home of any consumer, anywhere in the world.¹³ Unfortunately, when Tribes fight to carve a niche for

¹¹ Duane Champagne, *Breaking the Cycle of Poverty and Crime in Indian Country*, Indian Country Today (Oct. 6, 2013), <https://indiancountrymedianetwork.com/news/politics/breaking-the-cycle-of-poverty-and-crime-in-indian-country/>; *See generally* Akee & Taylor, *supra* note 8; *see generally* Clarkson, Spilde and Clah, *supra* note 3, at 4.

¹² John Koppish, *Why Are Indian Reservations So Poor? A Look at the Bottom 1%*, Forbes Magazine (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* ICMN 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).

¹³ *See* Clarkson, Spilde and Clah, *supra* note 3, at 17.

themselves in an industry, they invariably are met with staunch opposition.¹⁴ 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.¹⁵

The actions of the CFPB at issue threaten to undermine TLEs and deprive tribal members of the benefits they provide (discussed in Section III, *infra*). The Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376, commands the CFPB to coordinate its regulatory efforts with Indian Tribes and their TLEs.¹⁶ If TLEs are to be treated as mere “persons” by CFPB, and not as the sovereigns they are,¹⁷ and are thereby to

¹⁴ See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (challenge to right of Tribes to engage in gaming activities on reservation land); see also *Rothe Dev., Inc. v. U.S. Dep’t of Defense*, 836 F.3d 57 (D.C. Cir. 2016) (challenging government contracting rules assisting historically disadvantaged communities including Native Americans), *pet. for cert. filed*, No. 16-1239 (Apr. 17, 2017); Vince Sliwoski, *Tribal Cannabis Update: First Peoples Move Ahead*, Cannalawblog.com (Mar. 28, 2017), <http://www.cannalawblog.com/category/native-american-tribes/> (discussing the challenges to Tribes considering entering the commercial cannabis industry).

¹⁵ E.g., *Michigan*, 134 S. Ct. at 2043 (Sotomayor, J., concurring) (discussing the federal government’s desire that Tribes become more self-sufficient rather than rely on federal funding).

¹⁶ See 12 U.S.C. § 5495; see also *id.* § 5493(c)(2)(B).

¹⁷ *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

be made subject to civil regulation by the CFPB instead of by tribal governments, such regulation is likely to prevent at least some of the TLEs from engaging in business for the benefit of Tribes and their members. The CFPB has made clear that issuance of these civil investigative demands is merely the first step in its efforts to impose state laws on Tribes and drive TLEs out of the online consumer financial services industry.¹⁸ This Court's intervention is needed to ensure that the CFPB acts in accordance with the Consumer Financial Protection Act and with the general trust relationship between the United States and the Indian people that this Court has long recognized. *United States v. Mitchell*, 463 U.S. 206, 225 (1983); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (the United

are insufficient to overcome the sovereign immunity of a TLE), *vacated*, No. 16-6348, 2017 WL 2376550 (10th Cir. June 1, 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, 2016 WL 4089169, at *4 (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).

¹⁸ See Complaint for Permanent Injunction and Other Relief, *Consumer Financial Protection Bureau v. Golden Valley Lending, Inc., et al.*, No. 1:17-cv-03155 (N.D. Ill. Apr. 27, 2017), ECF No. 1, http://files.consumerfinance.gov/f/documents/201704_cfpb_Golden-Valley_Silver-Cloud_Majestic-Lake_complaint.pdf (alleging that TLEs are required to follow the laws of various states).

States “has charged itself with moral obligations of the highest responsibility and trust” towards Indian tribes.).

III. TLEs Are Helping to Alleviate Tribal Poverty Among Native Americans.

E-commerce and online tribal lending activities bring consumers to Tribes where other markets fail to thrive. The online financial services industry is creating jobs on tribal land and is putting money back into social services, including education, healthcare, housing, public safety, and infrastructure development.¹⁹ Some Tribes are able to support nearly 50 percent of their governments’ general funds through TLEs,²⁰ while other tribal governments are 100 percent funded by TLE revenues.²¹

For isolated rural Tribes, this type of financial success “extend[s] the opportunity for tribes to move beyond sheer subsistence and basic economic survival. Internet commerce gives tribal governments hope in their ability to depart from past struggles for survival

¹⁹ Clarkson, Spilde and Clah, *supra* note 3, at 16-17; *see, e.g.*, NAFSA, *Rocky Boy Chippewa Cree Tribe—Prosperity on the Plains*, <https://nativefinance.org/media/> (last visited Sept. 5, 2017); NAFSA, *Otoe-Missouria Tribe—Sovereignty Through Economic Development*, <https://nativefinance.org/media/> (last visited Sept. 5, 2017).

²⁰ NAFSA, *Lac Vieux Desert Tribe—Frozen Homeland*, <https://nativefinance.org/media/> (last visited Sept. 5, 2017).

²¹ Clarkson, Spilde and Clah, *supra* note 3, at 23.

to legitimate possibilities for continued economic growth, prosperity, and success.”²²

The experiences of three Tribes illustrate the positive impact of e-commerce. The Lac Vieux Desert Band of Lake Superior Chippewa is 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 forty degrees below zero, and propane peaking at \$9 a gallon at times, housing and propane assistance are necessities supported by TLE revenues.²³

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 percent of TLE revenues into tribal housing renovation and creation, after federal funding failed to be made available despite years of waiting. Later, the Tribe invested 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.²⁴

²² *Id.* at 17.

²³ *Id.* at 19-20; see also *Frozen Homeland*, *supra* note 18.

²⁴ Clarkson, Spilde and Clah, *supra* note 3, at 20-22.

The Habematolel Pomo Tribe of Upper Lake in California currently generates 100 percent of its governmental budget from TLEs.²⁵ 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.²⁶ The TLEs' operations are a key factor in the economic stability of the Tribe, and their profits are also used to pay down existing tribal debt, including debt from the tribal casino, which, as of 2014, was not profitable.²⁷

As these examples show, Tribes are utilizing TLEs' revenues to make their communities better—providing services and education to meet the needs of their members.

CONCLUSION

The petition for a writ of certiorari should be granted.

²⁵ *Id.* at 22-24.

²⁶ *Id.* at 23.

²⁷ *Id.*

Respectfully submitted,

Michael F. McBride
Counsel of Record
Patrick O. Daugherty
Van Ness Feldman LLP
1050 Thomas Jefferson St., N.W.
Suite 700
Washington, D.C. 20007
(202) 298-1800
mfm@vnf.com

Counsel for Amicus Curiae
Native American Financial
Services Association

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