No. 18-1827

In the
United States Court of Appeals
For the Fourth Circuit

LULA WILLIAMS, GLORIA TURNAGE, GEORGE HENGLE, DOWIN COFFY, AND FELIX GILLISON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED
Plaintiffs-Appellees,

v.

BIG PICTURE LOANS, LLC AND ASCENSION TECHNOLOGIES, LLC
Defendant-Appellants,

and

MATT MARTORELLO, DANIEL GRAVEL, JAMES WILLIAMS, JR., GERTRUDE MCGHESHICK, SUSAN MCGHESHICK, AND GIIWEGIIZHIGOOKWAY MARTIN
Defendants

AMICUS BRIEF OF THE CENTER FOR RESPONSIBLE LENDING AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLEES, URGING AFFIRMANCE

William Corbett
Center for Responsible Lending
302 W. Main Street
Durham, NC 27701

Diane M. Standaert
Center for Responsible Lending
302 W. Main Street
Durham, NC 27701

December 27, 2018

Counsel for Amicus

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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(appellant/appellee/petitioner/respondent/amicus/intervenor)

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2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
   If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
   If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
   If yes, identify any trustee and the members of any creditors' committee:

Signature: William R. Corbett Date: December 27, 2018

Counsel for: Center for Responsible Lending, Amic

CERTIFICATE OF SERVICE

****

I certify that on December 27, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

William R. Corbett
(signature)

December 27, 2018
(date)

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STATEMENT OF INTEREST[1]

The Center for Responsible Lending (CRL) is a non-profit, non-partisan research and policy organization that works to protect homeownership and family wealth by helping to eliminate abusive financial practices. CRL seeks to focus public and policymaker attention on abusive practices in consumer lending, including charging excessive interest and fees that strip wealth from consumers of modest means. As part of this advocacy, CRL works with community groups, advocates, and other non-profit organizations to encourage strong state protections against abusive payday lending. CRL's research, policy reports, and recommendations[2] frequently address issues related to payday or installment loans. CRL previously has submitted amicus briefs in appellate matters involving state regulation of payday or installment loans. See e.g., Brief of Amicus Curiae Center for Responsible Lending, *Otoe-Missouria Tribe of Indians, et al. v. New York State Dep't of Financial Services, et al.*, 769 F.3d 105 (2nd Cir. 2015) (No. 13-3769); Brief of Amici Curiae National Consumer Law Center, Center for Responsible Lending, and the National Association of Consumer Bankruptcy Attorneys, *Hayes et al. v. Delbert*, 811 F.3d 666 (4th Cir. 2016) (Nos. 15-1170, 15-1217); Brief of Amici Center for Responsible Lending, et al., *De La Torre et al., v. CashCall, Inc.*, 904 F.3d 866 (9th Cir. 2018) (Nos. 14-17571, 15-15042).

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E)(5), amicus curiae states that no counsel for a party authored this brief in whole or in part, and no party or its counsel contributed money that was intended to fund the preparation or submission of the brief. All parties have consented to the filing of this brief.
[2] Available at www.responsiblelending.org.

CRL is affiliated with the Center for Community Self-Help, a non-profit community development financial institution (CDFI) whose other affiliates include the Self-Help Credit Union. For thirty years, Self-Help has focused on creating asset-building opportunities for low-income, rural, women-headed, and minority families, primarily through safe, affordable home loans and small business loans. Self-Help has provided $6 billion in financing to 70,000 homebuyers, small businesses and non-profit organizations and serves more than 80,000 mostly low-income families through 30 retail credit union branches in California, Florida, Illinois, North Carolina, South Carolina, Wisconsin. As a member of the Opportunity Finance Network, Self-Help works closely with Native-led and focused CDFIs to share knowledge about fair and responsible lending activities and practices as well as to advocate for federal CDFI Fund resources that support Native CDFIs. There are approximately 50 Native-led or Native-focused CDFIs working as community development lenders across the country.

The type of payday loans at issue in this matter target financially vulnerable individuals, exacerbate financial distress, and strip desperately needed resources from struggling families and communities. The Center for Responsible Lending submits this brief, in support of the Appellees and affirming the decision of the district court, to underscore for the Court the consumer harms of payday lending and the importance of preserving states' efforts to enforce protections against abusive high-cost loans.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Commonwealth of Virginia's longstanding public policy has been to regulate the rates that lenders may charge on loans through both criminal penalties and civil remedies that render loans that exceed these rates loan void. See John W. Edmonds III, *Virginia Law of Interest and Usury*, U. Rich Law Review Vol. 77, 77-78 (1975) (discussing history of Virginia interest rate caps, starting in 1730). Relevant to this case, Virginia prohibits any entity that does not first obtain a license from making loans that charge in excess 12% interest per year; any loan made by an unlicensed lender that charges interest in excess of 12% annually is void. Va. St. § 6.2-303(A), 6.2-1501(A). Virginia actively enforces its consumer protections and rate limits through actions brought by the Virginia Attorney General, having successfully prosecuted lenders engaged in usurious lending, resulting in over $25 million in restitution and forgiven debts from online lenders. See *Herring Warns Virginians About Dangers of Predatory Loans*, Attorney General Mark Herring, (March 8, 2018) https://bit.ly/2QR5d0h. Appellees are individuals who reside in Virginia and whom Appellant Big Picture Loans charged annual percent rates (APR) in excess of 600%. Appellees' Brief, 15. Even if Big Picture Loans were a licensed consumer finance lender in Virginia, these loans would exceed the 36% annual rate of interest that Virginia permits consumer finance licensees to charge on loans of less than $2,500. Va. St. § 6.2-1520(A)(1).

Simply put, if the laws of Virginia apply, there is no question that these loans are illegal. To avoid that consequence, Defendants have devised a well-known scheme

among lenders, particularly payday lenders and others seeking to evade state law requirements, by partnering with third-party entities claiming to be exempt from state law. See *infra*, Section II (b). On appeal from the district court's decision recognizing the scheme for what it is, Appellants urge this court to limit its inquiry and to avert its eyes from the actual operations of these entities, which primarily occur off tribal land, mostly employ individuals who are not members of the tribe, and primarily enrich one individual who sought out the Lac Vieux Desert Band of Lake Superior Chippewa Indians to shield his high-cost lending operation from liability.

While Amicus acknowledges tribal sovereign immunity is a fundamental common law principle crucial to the self-determination and economic development of Native Nations, Amicus agrees with the Appellees that the purpose and history behind Defendants' scheme must be considered here. As Appellees' brief shows, the district court appropriately placed the burden of proof on Defendants to establish "arm-of-the-tribe" immunity and correctly denied immunity after an analysis of the actual relationship between the tribe and the enterprise. An analysis of the realities of the arrangement and loan transactions is not only consistent with established principles of tribal immunity, but also consistent with how courts have analyzed other evasive schemes utilized payday lenders.

High-cost loans, such as payday loans and high-cost installment loans, exact a devastating toll on borrowers that affects their families and their communities. States such as Virginia, as well as some Native Nations themselves, seek to protect their residents from the harms of these loans by enacting limits on interest rates and

charges and requiring licensing and related supervision. These policies reflect the judgment of these states and Native Nations, with ample supporting evidence, that the economic and social harms arising from high-cost loans undermine attempts to build strong economies and fight poverty.

Appellants seek a decision that would deprive consumers of remedies that states such as Virginia intend to compensate harmed borrowers and to deter proliferation of illegal and usurious loans. If lending schemes developed by non-tribal entities can easily gain immunity from the application of state laws, it will encourage similar schemes at the expense of the most vulnerable residents of these states and Native Nations.

ARGUMENT

I. PAYDAY LOANS ARE A NET FINANICAL HARM FOR INDIVIDUALS AND COMMUNITIES.

a. Payday Loans Trap People in Long-Term Debt Cycles that Lead to Significant Financial Harms.

Big Picture Loans originates payday loans, which, as the Appellees show, carried annual percentage rates (APR) of over 600%. Appellees' Brief, 21, ECF No. 33. While these loans are payable in installments, the borrower will still end up paying significantly more than the original amount borrowed. Big Picture's website provides an example—a borrower who takes out a $1,000 with an APR of 344.85%, repayable in 13 monthly installments, would make 12 monthly payments of $174.95 each, then a final payment of $175.08. *Learn about Loan Installment Loan Interest Rates-Big Picture Loans*, https://www.bigpictureloans.com/loan-rates (last visited December 26,

2018). Though this hypothetical borrower would be charged an APR significantly lower than Appellees were charged on their actual Big Picture loans, the borrower would nonetheless end up paying a total of $2,274.48, including $1,274.48 in loan charges over the 13-month period.

These loans are typical of the payday market, where lenders make loans without assessing a borrower's ability to repay in light of the borrower's income and expenses, gain access to a borrower's bank account to ensure repayment, and charge APRs well in excess of 36%. See Consumer Financial Protection Bureau, *Supplemental Findings on Payday, Payday Installment, and Vehicle Title Loans, and Deposit Advance Products*, 6-9 (June 2016) (CFPB Supplemental Report), https://bit.ly/2AgmHc4 (noting that average APRs on these loans are over 200%). Most payday loan borrowers cannot afford to pay the loan and the high-fees associated with it. A Consumer Financial Protection Bureau (CFPB) analysis of high-cost loans found that online payday loans "have the highest default rates of all the products in this analysis. Over 40 percent of online payday installment loans and more than half (55%) of all online payday installment loan sequences experience a default." CFPB Supplemental Report, 9. The business model is such that the lender benefits even as the borrowers are unable to repay the loan. After a few regular payments, the lenders may have received back more than the total amount originally loaned, but the borrower remains trapped, with barely any principal repaid on their debt and many more payments to make. Moreover, preauthorized payments and aggressive debt collection tactics may make it difficult for borrowers to stop payments when they lack

the resources to repay. See e.g., Pew Charitable Trusts, *Fraud and Abuse Online: Harmful Practices in Internet Payday Lending*, (October 2014) https://bit.ly/2RjKiT0; and Letter from Center for Responsible Lending, et al., to Janet Yellen, Bd. Of Governors of Federal Reserve System, et al., 3-8 (September 29, 2014) https://bit.ly/2Tdw0AN (describing difficulties payday loan borrowers experience in attempting to stop payments on unaffordable payday loans).

In addition to a staggering 40% default rate for online payday installment loans, CFPB's analysis also found that their refinancing rate—another sign of unaffordability, as borrowers often refinance in order to continue making payments on the loan—was 22% for these loans. CFPB Supplemental Report, 15. Furthermore, another CFPB analysis found that half of borrowers with high-cost online payday installment loans incurred overdraft or non-sufficient funds fees from their bank within an 18-month period. Consumer Financial Protection Bureau, *Online Payday Loan Payments*, 3, (April 2016) https://bit.ly/2V8P30N. These borrowers paid an average of $185 in overdraft or non-sufficient fund fees during this period, with 10% paying $432 or more. Id. at 11-12. CFPB further found that 36% of these borrowers who incurred overdraft or non-sufficient funds fees later had their bank account involuntarily closed by the bank, while noting still more borrowers closed their accounts themselves as the only way to stop payday lenders from debiting their accounts. Id. at 23-24.

Borrowers often come to the payday lender with substantial existing debt, including student loan and medical debt (though payday lenders make no assessment

of these existing debt obligations when originating the loan). Frequently the impetus for taking out these expensive loans is not an isolated emergency expense, but simply the next regular expense that occurs after the borrower's paycheck funds are exhausted. See Pew Charitable Trusts, *Payday Lending in America: Who Borrows, Where They Borrow, and Why*, 4-5 (2012) https://bit.ly/2V7qrFM (finding 69% used payday loans to cover a recurring expense and 16% dealt with an unexpected expense, such as a car repair or emergency medical expense). The nature of these loans—no documentation, no credit checks, and no wait—make them seem like a viable option in the moment despite the more likely harmful long-term consequences. Tom Feltner, et al., Center for Responsible Lending, *Sinking Feeling: Colorado Borrowers Describe their Experiences with Payday Loans*, 8 (July 2018).

Earlier this year, CRL published a report on focus groups conducted in Colorado, which, until recently, had permitted payday loans structured with six-month installment payments, with costs averaging 129% APR and as high as 214% APR. Id. at 1. These borrowers reported facing significant additional financial hardships related to these loans, either immediately or down the road, such as not having enough money remaining to meet other basic expenses, aggressive debt collection, and damaged credit reports. Id. at 10-13. Defendants' loan rates reach three times as high as Colorado previously allowed.

Many tribal groups and Native American spokespersons have actively opposed payday lending because these loans have inflicted severe financial harms on Native American communities just as they have done to other struggling families. See, e.g.,

Comments of First Nations Development Institute to Consumer Financial Protection Bureau on Payday Lending, Docket ID: CFPB-2012- 0009 (April 23, 2012), https://bit.ly/2VaLhnN ("First Nations Development Institute (FNDI) and our many partner organizations work to create assets and wealth in Indian Country with financial literacy training, safe financial products and pathways to asset building. Payday loans undermine these efforts and the financial health of Native communities."). Relatedly, some Native Nations such as the Blackfeet Tribe and the Navajo Nation have enacted rate caps in their code, which also must not be undermined by lending schemes such as those at issue here. See First Nations Development Institute, *Borrowing Trouble: Predatory Lending in North America*, 29 (2008) https://bit.ly/2Rhe0YN.

b. Payday Loans Undermine Investments in Poverty Reduction Efforts by States

States have recognized that high-cost loans represent a threat to the financially lives of their residents, particularly those who are financially vulnerable, and on balance, harm the overall economy by diverting dollars that could be spent on goods to paying off excessive debt. The large majority of states have interest rate limits on installment loans that would likely prohibit Defendants' loans. For example, as of August 2017, 33 states generally cap the APR on loans of $2,000 at 36% or less. See National Consumer Law Center, *Predatory Installment Lending in 2017*, 7 (August 2017) https://bit.ly/2VaHGWN. Sixteen states plus the District of Columbia expressly cap rates on payday loans at about 36%. These caps save people in those states over $2.2 billion in fees annually, including over $444 million of yearly savings in

Maryland, North Carolina, and West Virginia alone. See Delvin Davis & Susan Lupton, Center for Responsible Lending, *States without Payday and Car-title Lending Save Over $5 Billion in Fees Annually*, 1-2 (January 2017) https://bit.ly/2SnrmAh. In November 2018, Colorado joined this list of states, with 76% of voters passing a referendum that imposes a 36% rate cap on payday loans. Coloradoan, *Colorado election: Proposition 111, capping interest on payday loans, passes* (November 6, 2018), https://bit.ly/2EQTdEK (last visited December 21, 2018).

Studies show that individuals fare better without payday loans. In states that prohibit payday loans, they employ a variety of strategies to address cash-flow shortfalls at a fraction of the costs of payday loans—turning to family, accessing cheaper credit, and, frequently, cutting back on expenses. See Center for Responsible Lending, *Shark Free Waters: State are Better Off without Payday Lending* ("Shark Free Waters"), 2-3 (August 2016, updated September 2017) https://bit.ly/2RfxuNI (summarizing various studies and surveys investigating consumers' response to tightening of payday lending restrictions). North Carolina had a short-lived experiment with payday loans, from 1997 to 2001. The state quickly recognized the harms of these loans and decided to allow the sunset of the statute enabling payday lenders' exemption from the state's usury laws. See Delvin Davis & Susan Lupton, Center for Responsible Lending, *North Carolina State, County, and Congressional District Annual Fees Savings without Payday and Car Title Lending*, 3 (North Carolina Savings) (May 2018) https://bit.ly/2LBgQ5U; see also N.C. G.S. § 53-281 (repealed 2001). In the years following, payday lenders deployed numerous schemes

to evade North Carolina's interest rate limits, such as by seeking the shield of preemption through sham partnerships with out-of-state banks. See Davis & Lupton, North Carolina Savings, 3. Through litigation and regulatory action to enforce the rate cap, these schemes came to an end in 2006. Id. One year later, a study by the University of North Carolina's Center for Community Capital surveyed low-income households and former payday loan borrowers. Borrowers reported borrowers reported that the absence of payday lending had a positive rather than a negative effect on them; nearly 90% of households thought that payday loans were bad for their finances. University of North Carolina Center for Community Capital, *North Carolina Consumers After Payday Lending*, 4 (November 2007), https://unc.live/2SgvLoq.

In states that permit payday lending, the decreased spending by borrowers paying excessive interest rates exceeds the economic activity generated by payday lending. Nationally, payday lending leads to a net negative impact of nearly $1 billion and loss of 14,000 jobs. Tim Lohrentz, Insight Ctr. for Community Econ. Dev., *The Net Economic Impact of Payday Lending in the U.S.*, 3 (March 2013) https://bit.ly/2LCsTzJ. On a state level, the economic benefit from prohibiting these high-cost loans can be significant. For example, North Carolina's payday lending ban saves upwards of $457 million per year in fees that residents would otherwise pay to payday and car-title lenders. See Davis & Susan Lupton, North Carolina Savings, 3.

Payday loans undermine states' investment in anti-poverty programs and ultimately increases the state's tax burden. Research indicates that "households with

payday loan access are also more likely to use food assistance benefits and less likely to make child support payments required of non-resident parents." Brian Melzer, *Spillovers from Costly Credit*, Review of Financial Studies, Volume 31, Issue 9, 3568–3594 (September 2018) https://bit.ly/2EPdkU7. These findings suggest that borrowers in distress turn to government assistance programs to supplement the household's resources and prioritize payday loan payments over other liabilities like child support. Id. The effects of high-cost loans also strain charitable anti-poverty initiatives as well, with the costs of rescuing borrowers from high-cost loans draining funds from broader relief efforts. See Russ Bynum, Daily Citizen News, *Soldier Claims He Was a Predatory Lending Victim* (November 23, 2011) https://bit.ly/2CAuxPG (last visited December 23, 2018) (reporting that the Navy Marine Corps Relief Society spent $1.4 million helping active duty service members in 2006—the year before Congress enacted a 36% rate cap for payday loans to active duty military families— but in 2011 spent just $168,000); Texas Catholic Conference and the Center for Health and Social Policy, LBJ School of Public Affairs, *2010 Catholic Charities Survey on Payday and Auto Title Loan Use*, (February 2011) https://bit.ly/2GGF7bE (finding that 47% of payday or car title loan users indicated that resulting financial stressed was part of reason for their needing charitable assistance and that 77% of loan users believed the loans made it harder to cover other bills.)

II. STATES HAVE A STRONG INTEREST IN ENFORCING THEIR USURY LAWS.

a. States Have a Strong Interest in Enforcing Their Usury Laws to Ban Payday Lending.

Historically, states have strictly limited the interest rate lenders may charge through usury caps in place that prevented payday and other high-cost loans. "For nearly three-hundred years, American states were nearly unanimous in their prohibition of usurious lending through double- or even single-digit interest rate caps. Every signatory to the Declaration of Independence returned to colonies that aggressively capped interest rate." Christopher L. Peterson, *Warning: Predatory Lender* 69 Wash. L. Rev. 893, 896 (2012) (footnotes omitted). Virginia's own usury restrictions predate the constitution. See Edmonds, *supra*, 77-78. Through the 1970s, when a Supreme Court decision ushered in an era of exportation by national banks of the higher interest rates permitted by their home state and pressures related to excessively high inflation, most states had severely limited the rate of interest on any loan for most of the 20th Century. Peterson, at 897-898 (discussing *Marquette National Bank v. First Omaha Services Corp.*, 439 U.S. 299 (1978)).

In the early 1990s, states began making narrow exceptions from this policy to permit high-cost loans in excess of previous rate caps based on claims by payday lenders that these loans were for emergency, short-term use, and were thus entitled to a far higher interest rate limit than otherwise allowed under state usury laws. In the early 2000s, amidst growing concerns that payday loans were actually resulting in greater harms to borrowers, many states reversed course. Since that time, several

states have repealed payday loans' exemptions from their usury laws—Arizona, Arkansas, Colorado, Montana, New Hampshire, North Carolina, South Dakota, and the District of Columbia—joining states that never allowed payday lending at all. And since 2005, no new state has passed enabling legislation to allow for high-cost payday loans.

Indeed, state usury protections, properly understood, represent *the will of the people* who live within those states. These protections enjoy substantial support across the political spectrum. For example, North Carolina's prohibition against payday lending has remained in place despite wholesale change in control of the Governor's office and legislature since the prohibition was put in place in 2001. Similarly, Virginia's rate cap on installment loans also has been resilient to shifts in political control. Elsewhere, each time the question has been presented to voters via recent statewide referendums, large majorities have voted in favor of referendums seeking to limit the cost of payday loans to 36%. See CRL, Shark Free Waters, p. 7-8.

At the heart of most of the failed attempts by payday lenders to develop evasive schemes is courts' recognition of the fundamental nature of state usury protections and the importance of preserving a state's role in consumer protection. In rejecting evasive schemes, courts have expressed a reluctance to adopt formalistic approaches that would immunize an otherwise illegal scheme by merely relying upon transaction documents. See e.g., *Radford v. Community Mortg. and Inv. Corp.*, 226 Va. 596, 602 (Va. 1984) ("In determining whether a transaction is usurious, the court has both the right and the duty to probe behind the written instruments and to examine all facts

and circumstances which shed light on the true nature of the transaction."); *CashCall, Inc. v. Morrisey,* No. 12-1274, 2014 WL 2404300, at *14 (W. Va. May 30, 2014) ("The usury statute contemplates that a search for usury shall not stop at the mere form of the bargains and contracts relative to such loan, but that all shifts and devices intended to cover a usurious loan or forbearance shall be pushed aside, and the transaction shall be dealt with as usurious if it be such in fact." Quoting *Crim v. Post*, 41 W.Va. 397 (1895)).

b. Payday Lenders, Having Been Denied in Other Attempts, Have Turned to Tribal Lending to Evade State Law.

The attempt by certain payday lenders to evade state law is nothing new. Indeed, "the archetype for evading regulation through shape-shifting is high-priced small-dollar lending, such as payday lending." Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. Chi. Law Rvw. 1309, 1327 (2015). The high-cost loan industry has developed various schemes over the years to offer loans at rates that exceed what the applicable state law allows. Id. at 1328; see also Diane Standaert & Brandon Coleman, Center for Responsible Lending, *Ending the Cycle of Evasion: Effective State and Federal Payday Lending Enforcement* (November 2015) https://bit.ly/2SltLvf.

This scheme at issue in this case is merely the latest in a series of iterations in the form of a model predicated on evasion of state law. In the early 2000s, payday lenders partnered with a state- or federally-chartered bank which operated as the nominal lender, allowing the enterprise to claim preemption under the National Banking Act or the Federal Deposit Insurance Act. Over time, courts recognized that

these schemes were a charade intended to inoculate non-bank, high-cost lenders, so that they could fleece the consumers of states that had enacted strong protections against high-cost loans. See, e.g. *West Virginia v. CashCall, Inc.*, 605 F.Supp.2d 781, 787 (S.D. W.Va. 2009) (holding that although the bank had the right to lend in West Virginia at South Dakota interest rates, the payday lender did not if it was "found to be a de facto lender"); *Flowers v. EZPawn*, 307 F.Supp.2d 1191, 1205 (N.D. Okla. 2004) (finding that a class action brought against a payday lender did not improperly infringe upon the affiliated bank's right to lend at out-of-state rates where plaintiff's alleged the payday lender "exert[ed] ownership and control over these loans[,] . . . carries out all interactions with the borrowers, accepts the ultimate credit risk, collects and pockets virtually all of the finance charges and fees, and owns and controls the branding of the loans"); *Goleta Nat'l Bank v. Lingerfelt*, 211 F.Supp.2d 711, 718-19 (E.D. N.C. 2002) (finding that National Bank Act does not preempt state's claims against payday lender, because although the bank had a right to make loans at an out-of-state rate, its payday lender agent did not); *Salazar v. ACE Cash Express, Inc.*, 188 F.Supp.2d 1282, 1285 (D. Colo. 2002) (concluding that a state enforcement action against a payday lender was not preempted, because the payday lender "and the national bank are separate entities"); *Matter of People v. County Bank of Rehoboth Beach, Del.* 45 A.D.3d 1136, 1138 (N.Y. App. Div. 2007). Generally, banks pulled back from direct involvement in these schemes, in part because their regulators had concluded that banks should not engage in the kind of unsafe, unsound, and abusive lending proposed by payday lenders. See Susanna Montezemolo, Center for

Responsible Lending, *The State of Lending in America & Its Impact on U.S. Households: Payday Lending Abuses & Predatory Practices*, 18 (2013) https://bit.ly/2AgttPc.

As regulators and courts clamped down on the lenders' rent-a-bank schemes, these lenders simply jumped to another similarly structured scheme to partner with third-party entities. In this next iteration, payday lenders posed as credit repair organizations, purporting to broker loans with third-party lenders. Here, the broker fees charged by the lenders, combined with the interest on the loan, resulted in the 500% APR or greater debt trap loans See Diane Standaert & Sara Weed, Center for Responsible Lending, *Payday Lenders Pose as Brokers to Evade Interest Rate Caps* (July 2010) https://bit.ly/2Mqj6zJ. As in the rent-a-bank scheme, state legislatures and regulators moved to prevent lenders from using this device to evade their state usury limits. States in which lenders utilized these schemes have rejected them in preservation of state rate limits for these loans for these Ohio, California, Michigan, Florida, and Maryland. See id..

As these other evasive schemes fell into disfavor with the courts and regulators, payday lending industry consultants began marketing their services to lenders as a sort of "matchmaker" and encouraging them to associate with Native American tribes for the express purpose of asserting the tribes' immunity from suit. See, e.g., Tribe, PaydayLoanIndustryBlog, https://bit.ly/2QPOP06 (last visited December 26, 2018). An advertisement by one payday lender explains further:

> Due to the strict regulations that are hitting the payday loan industry hard, many lenders are now turning to Indian Tribes to

> help them out....It is no surprise that many lending companies are currently seeking out American Indian Tribes in an effort to save their businesses by escaping US lending laws.

Advertisement posted by Online Cash Advance as of January 2012, as quoted in 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, 766-67 (2012).

This new model replaced claims of federal preemption or credit service organization status with claims of tribal sovereignty and immunity. Defendant Martorello first sought an early version of this new model through the creation of a tribal entity, Red Rock, to serve as the nominal lender, while most operations were conducted on non-tribal land by Martorello's non-tribal entities located in the Virgin Islands. Apellees' Brief, 1. This arrangement involved a modest fee for the Lac Vieux Desert Band of of Lake Superior Chippewa Indians, but overwhelmingly benefitted Martorello. Appellees' Brief, 10. Few members of the tribe were employed and the tribe received a relatively small fee for its involvement, with the immense portion of revenue from usurious loans made to borrowers far from tribal land never touching that tribal land. Appellees' Brief, 15.

It did not take long for courts to once again declare that these schemes were charades designed for evasion. See e.g., *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 769 F.3d 105, 115 (2d Cir. 2014) (agreeing with district court that payday lenders "built a wobbly foundation for their contention" that loan activity occurred on tribal lands); *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, 2016 WL 4820635, at 5 (C.D. Cal. Aug. 31, 2016) (finding that payday lender, not entity

owned by tribe member was "true lender"). Following the *Otoe* decision, the scheme at issue here was reorganized through new tribal entities and a nominal sale paid through an agreement which provides the tribe with just a 2% share of the enterprise while delivering the overwhelming bulk of revenue to the very same individual that first enticed the tribe to lend its name. See Appellees' Brief, 28.

To date, very few Native Nations have taken up the offer presented by payday lenders. The overwhelming majority of Native Nations have no affiliation with payday lending or with helping non-tribal lenders to evade state consumer protection laws. See Eamon Javers, *How Some Payday Lenders Charge Over 700% on Loans*, CNBC, Sept. 17, 2012, https://cnb.cx/2BG6UDC (describing the decision of the tribal council of the Wakpamni District of the Ogala Sioux tribe in South Dakota to decline the "opportunity" to work with a payday lender).

c. Permitting Payday Lenders to Design a Scheme to Circumvent State Lending Laws Will Make Such Schemes the Rule, and State Law the Exception.

As discussed above, *supra* I.a., borrowers who have been lured into these payday loans have very powerful remedies under state law. Those remedies serve both to compensate victims of usurious schemes and to deter lenders from engaging in harmful practices. Appellants seek to prevent any meaningful inquiry into whether an entity that claims tribal immunity is in fact a tribal entity entitled to that immunity. An inquiry as to the form of this arrangement and not its practical function threatens vulnerable consumers.

If these payday schemes are allowed to successfully reach into states with strong protections against abusive lending and originate loans with disregard for the law of those states, then more lenders will follow. Eventually the limits set by the states, limits that voters have uniformly endorsed when given the chance, will begin to erode. And consumers like Appellees will have little remedy for the financial harm done by the costs of these loans.

CONCLUSION

For all of the above reasons, the district court should be affirmed.

Dated: December 27, 2018

Respectfully submitted,
/s/William R. Corbett

William R. Corbett
Diane Standaert
Center for Responsible Lending
302 W. Main Street
Durham, NC 27701
(919) 313-8544
Will.corbett@responsiblelending.org

Counsel for Amicus

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and the 4th Circuit's Local Rule 29 because this brief contains 5,016 words, excluding the parts of the brief exempt by Federal Rule of Appellate Procedure 32(f)).

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Dated: December 27, 2018

Respectfully submitted,
/s/William R. Corbett
William R. Corbett

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: December 27, 2018

Respectfully submitted,
/s/William R. Corbett
William R. Corbett

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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COUNSEL FOR: Center for Responsible Lending

____________________ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s) ☐ movant(s)

William R. Corbett
(signature)

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William R. Corbett
Name (printed or typed)

919-313-8544
Voice Phone

Center for Responsible Lending
Firm Name (if applicable)

Fax Number

302 West Main Street
Durham, NC 27701
Address

will.corbett@responsiblelending.org
E-mail address (print or type)

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I certify that on December 27, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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