No. 18-1827

In the United States Court of Appeals for the Fourth Circuit

Lulu Williams, *et al.,* on behalf of themselves and all individuals similarly situated,

Plaintiffs-Appellees,

v.

Big Picture Loans, LLC *et al.*,

Defendants-Appellants,

and

Matt Martorello; Daniel Gravel; James Williams, Jr.; Gertrude McGeshick; Susan McGeshick; Giiwegiizhigookway Martin,

Defendants.

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

AMICUS BRIEF OF THE CONFERENCE OF TRIBAL LENDING COMMISSIONERS IN SUPPORT OF DEFENDANTS-APPELLANTS, SUPPORTING REVERSAL

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

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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
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Signature: /s/ Luke A. Hasskamp Date: 01/25/2019

Counsel for: The Conf. of Tribal Lending Comm'r's

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I certify that on January 25, 2019 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:

/s/ Luke A. Hasskamp
(signature)

01/25/2019
(date)

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I. BACKGROUND AND STATEMENT OF INTEREST

Amicus Curiae, the Conference of Tribal Lending Commissioners ("CTLC" or "Amicus") is an inter-tribal association of tribal government agencies that regulate the offering of financial products from their tribes' respective tribal lands. Each CTLC member is a regulatory agency of a federally-recognized American Indian tribe. [1] The regulatory agencies derive their authority from their respective tribes' lending codes, each of which created the agency charged with enforcing consumer financial protection laws.

The tribal government regulators that comprise the CTLC routinely examine the operations, books, and records of the tribal lenders they supervise. Collectively, we have more experience with tribally-owned financial services businesses than any other organization in the United States. Thus, we appear as friends of the court to share our insight and observations with this Court.

About the CTLC

Through education and collaboration with government leaders, co-regulators and industry participants, the CTLC promotes the safety, soundness, and consumer protection of tribal-government-owned financial services. No commercial businesses have a vote in the conduct of the organization. To join the CTLC, a

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[1] The tribes regulated by CTLC members are: Tunica-Biloxi Tribe of Louisiana, Habematolel Pomo of Upper Lake, Guidiville Rancheria of California, Fort Belknap Indian Community, Lac Vieux Desert Band of Chippewa Indian Community, and the Turtle Mountain Band of Chippewa Indians (together, "Amicus Tribes").

tribe must have established a regulatory body that oversees the offering of financial services from tribal land. The CTLC provides continuing education to tribal lending regulators. And its members engage with state and federal regulators and government officials to expand and improve the overall understanding of tribal self-governance and regulation.

Interest in this Matter

Amicus has a substantial interest in this appeal (and the underlying district court action) because our authority to regulate tribal lenders derives from the very tribal laws that class action-attorneys attack as a "loophole". (Doc. 33 at 16). Moreover, the opinion below and briefs filed with this Court in favor of Appellees evidence an extreme lack of information and understanding about tribal governance, tribal self-regulation, and the complexity of tribal financial institutions like Big Picture Loans. In particular, the Amici States explain their state's concerns about "payday" loans without mentioning that most internet loans (including Big Picture Loans) aren't payday loans. Nor do the Amici States acknowledge that tribal lending is heavily regulated by the respective tribe.[2] In addition, CTLC members are concerned that the lower court's decision will cause tribally-owned businesses to operate without the professional expertise and leadership they need for fear of not meeting the "control" factor elucidated by that court.

[2] Br. District of Columbia et. al. ("Amici States"), Doc. 37-1, at 2, 15-17.

For many reasons, financial services is an ideal business for tribal governments to enter, but it must be done safely and professionally in order to avoid consumer harm. The proposed amicus brief provides the court information and rationale supporting this perspective.

Rule 29(4)(E) Statement

Pursuant to Rule 29(4)(E) of the Federal Rules of Appellate Procedure and Local Rules of the Fourth Circuit, Amicus states as follows: The foregoing brief was authored in its entirety by the CTLC's counsel; no party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person (other than the amicus curiae, its members, or its counsel) contributed money that was intended to fund preparing or submitting the foregoing brief.

II. ISSUE PRESENTED

Did the district court commit clear error in finding facts and applying the relevant factors to determine that the entities are not arms of the tribe?

III. ARGUMENT

The Dodd-Frank Wall Street Reform Act recognizes tribes as co-regulators to states in regard to regulating lending activity from tribal jurisdiction.[3] CLTC

[3] Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Title X (Pub. L. 111-203, H.R. 4173).

tribes and others have comprehensive codes that regulate financial services, which require licenses, oversight, and audits by the regulator. In fact, some states have entered into Memorandum of Understanding with tribes that respect tribal sovereignty and promote consumer protection.[4] To assume that customers choosing to access products from tribal jurisdictions lack consumer protection is simply wrong.

CLTC understands state concerns over unscrupulous actors that preyed on tribes in the industry's early history.[5] But lending emanating from CLTC tribes, and the Lac Vieux Desert Band of Lake Superior Chippewa Indians in the present case, are not the sham operations of the past. Like gaming, natural resources, and other economic ventures performed by arms of federally-recognized American Indian tribes, interstate internet lending is heavily regulated by its home jurisdiction.

The CLTC maintains that the Tenth Circuit's factors, set forth in *Breakthrough Mgmt. Grp. Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d

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[4] Br. State of New Mexico as Amicus Curiae in Support of Def. Second Mot. to Dismiss, Case No. 17-cv-2521-JAR (D. Kansas Nov. 27, 2017).

[5] *See, e.g.*, *Hunter v. Redhawk Network Security*, LLC, No. 6:17-cv-0962-JR, 2018 WL 4171612, at *5 (D. Or. Apr. 26, 2018) (a business was not an "arm of the Tribe" citing, among others reasons, the lack of evidence that the Tribe "is involved in the management of the company" and the fact that the company's "assertion of tribal immunity appears to be an afterthought, indicating the corporate officers of [the company] are not so connected to the [Tribe] that they immediately assumed [the company] could avoid suit by asserting sovereign immunity."); *State ex. rel. Swanson v. CashCall, Inc.*, Nos. A13-2086, A14-0028, 2014 WL 4056028, at *3 (Minn. Ct. App. 2014) (denied immunity to a business that was merely owned by a tribal member, whose creation was not approved by the Tribe, and whose profits did not flow directly to the Tribe).

1173, 1181 (10th Cir. 2010), that indicate "whether economic entities qualify as subordinate economic entities entitled to share in a tribe's immunity," are sensible in the particular context of tribally-owned financial services businesses. Employing these factors has uncovered some true frauds masquerading as tribal entities.

But the lower court in the instant matter did not apply the *Breakthrough* factors consistent with precedent or in a reasonable manner. The decision reads as if the lower court was searching for excuses to deny Big Picture's motion to dismiss. This clear error should be reversed. The appeal of the lower court's decision has significance beyond just the tribal lender at issue—the decision of this court will affect not only CLTC members but, due to the nature of the question presented, will also affect all of economic development in Indian Country beyond just the lending industry.

A. <u>Tribal Economic Development is Essential to America's Native Tribes</u>

The ability for tribes to extend their tribal sovereign immunity to their economic arms is essential to preserving tribal cultures, offering essential services to members, and funding tribal government. Due to their lack of a traditional tax base, tribes must raise revenue through their businesses to support government services that keep their members safe and healthy. Also, the notion of the separation of church, state, and industry is foreign to tribes. Tribal councils have been supervising trade and commercial relationships between their tribes and non-

tribal members since the dawn of time. The CLTC's member regulatory bodies are merely a modern take on a long tradition of supervising such relationships.

Tribal sovereign immunity is not a loophole to avoid state laws. An essential component of tribal governance is caring for tribal members' economic well-being—not only for the moment—for generations to come. In fact, tribes chose lending operations for reasons that are core to preserving their lands and culture: a financial services business causes no waste or environmental impact on Tribal lands; they can be run from the most remote Indian reservations; and aspects of the business—like call center jobs—are ideal for the presently available tribal member workforce. Moreover, to keep cultures intact, tribes must keep young members nearby. Fintech "coding" and IT jobs can be taught online and at community colleges, which is a nearby and affordable option for many tribes. And once financial services ecommerce is established, tribes can offer a greater number of products than simply consumer loans. What Appellees cast as evasion of state law is in fact a vision for the future of American Indian tribes.

Financial services is a highly-regulated industry at the tribal, state and federal level. As with many states, most tribes require lenders to apply for licenses; they restrict the types of products offered, and dictate prices. In fact, most tribal lenders offer closed-end installment loans over 120 days in duration, not "payday"

balloon loans. These loans are perfectly legal under Virginia and many other state laws.[6]

Regardless, when consumers choose to access loans from tribal jurisdictions via the internet, they access a highly regulated product and have a very low complaint rate. The ability of tribes to enter into consensual relationships with third parties is widely accepted.[7] The concept that tribal lending entities are preying on the consumers located in states is simply wrong. There are mechanisms such as the Memorandum of Understanding used by New Mexico to address state concerns over consumer protection than imposing expanded draconian tests on tribal business entities.[8]

The fact that Lac Vieux Desert has empowered and employed a Tribal Financial Services Regulatory Authority is a testament to the Tribe's desire to exercise its sovereignty in the financial services arena. It also signals that there is a regulatory commission with whom states may interact to address any consumer concerns.

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[6] *C.f.* Va. Rev. Stat. § 6.2-1800 (defining a "payday loan" as "a small, short-maturity loan on the security of (i) a check, (ii) any form of assignment of an interest in the account of an individual at a depository institution, or (iii) any form of assignment of income payable to an individual, other than loans based on income tax refunds.")

[7] *See*, 25 U.S.C. §4301(a)(7); *see also*, *Montana v. United States*, 450 U.S. 544, at 565-66 (1981).

[8] *See supra*, n.4.

It should be noted that this case is a class action by plaintiffs' attorneys, not by a state regulatory body. It clearly attempts to ignore the realities of tribal sovereignty by clouding the issue in an "arm of the tribe" attack.

B. Legitimate "Arm of the Tribe" Lenders are Entitled to Immunity

At a high level, *Breakthrough* stands as a warning against flippantly denying immunity to a tribal business upon the court's perception that the business is leveraging tribal sovereignty to its advantage. Tribal sovereign immunity serves a legitimate purpose and is not merely a legal "loophole" to avoid complying with state laws or providing services that may otherwise be prohibited. Numerous federal courts have recognized this fact, stating that "Indian tribes are neither states, nor part of the federal government, nor subdivisions of either . . . [r]ather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002) (citing *McClanahan v. State Tax Comm'n of Az.*, 411 U.S. 164, 172 (1973)).

Immunity from suit and state regulation is an inherent aspect of a Tribe's sovereign status, though courts have also justified it as "necessary to promote the federal policies of tribal self[-]determination, economic development, and cultural autonomy." *Am. Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985). These bedrock principles are derived

from decades of Supreme Court precedent and the historical fact that Indian tribes existed as sovereign nations before the establishment of the United States and the Constitution.

An increasing number of federal circuit courts have expressly acknowledged that tribal subdivisions engaged in economic activities are also entitled to immunity. *See, e.g.*, *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292-1299 (10th Cir. 2008); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000). In announcing its decision in *Breakthrough Mgmt.*, the Tenth Circuit acknowledged and cited to these cases and legal principles, and opined on a number of factors that indicate "whether economic entities qualify as subordinate economic entities entitled to share in a tribe's immunity." *Breakthrough Mgmt.*, 629 F.3d at 1181.

Each factor announced in *Breakthrough Mgmt.* speaks to the greater question of whether a business is a legitimate tribal subdivision. However, this does not mean that the decision can be used to deny immunity to a business that is fully owned by and provides economic benefit to a Tribe. To the contrary, *Breakthrough Mgmt.* unequivocally recognizes the importance of tribal sovereign immunity and chastises the lower court for relying on one factor to deny immunity to a tribal subdivision. *Breakthrough Mgmt.*, 629 F.3d at 1187-1188.

We are therefore concerned about the District Court's use of *Breakthrough Mgmt.* to strip immunity from a business the Tribe itself identifies as a subdivision. The District Court appears to view this case as an example of a business exploiting tribal sovereignty to circumvent state law rather than a Tribe exercising its inherent sovereign authority to provide loan products that are legal under its laws. This cynical perspective is inconsistent with *Breakthrough Mgmt.* Furthermore, it fails to adequately account for the fact that Tribes are not subordinate to states, and that there is no basis for viewing tribal lending laws with greater skepticism than the lending laws enacted by states when Dodd-Frank recognizes tribes as states regarding financial services regulation.[9]

C. Rigidly Applying the *Breakthrough* Factors Undermines Tribal Sovereignty and Congressional Intent

Successful businesses exist in a nearly limitless number of configurations. Even in the same industry, businesses use different corporate forms and business models to their advantage while remaining subject to the laws and jurisdiction of their home jurisdictions. This variety promotes innovation and provides a basis for sovereign governments (tribes and states alike) to enact regulations that both protect and support local industry. The same is true in Indian Country. Tribal business can only thrive if they have the flexibility to structure themselves in a manner that allows them to operate competitively in the market, in accordance with

[9] *See supra*, note 3.

tribal law, and with the confidence that they will only be subject to tribal jurisdiction. Given that each Tribe has its own distinct laws and each tribal business has its own business model, variation is inevitable and should not be punished.

The entities that Amicus regulates and oversees represent a variety of forms successful tribal businesses can take. Some of the businesses are structured as a single company, while others have multiple companies supporting one another. Some of the businesses were established using outside capital, while others were formed using revenue from pre-existing tribal ventures. Some of the businesses were expanded through the acquisition and incorporation of third parties, while others were not. Some businesses rely on third party consultants (as suggested by Congress—*See* 25 U.S.C. §4301(a)(12). Despite these differences, there is no question that each business is owned by the Tribe, regulated by the Tribe, operated for the Tribe's benefit, and effectively an arm of the Tribe.

Yet the District Court's analysis, taking the lead from a state court decision, uses differences in structure and corporate history as justification for stripping immunity from some of these businesses and not others. Amicus contends that this approach twists *Breakthrough Mgmt.* to favor some corporate forms and business models over others and denies tribal businesses the right to operate with the same level of confidence as businesses based in states. A court should not be permitted

to forgo an evenhanded application of the *Breakthrough Mgmt.* factors based on subjective values when addressing existential issues of sovereignty and immunity. Indeed, one of the greatest values of legal tests and precedent is to ensure that a court's personal beliefs are not dispositive.

D. In Evaluating the Tribe's Control of Big Picture, the Lower Court Failed to Recognize that Internet-Lending is Complex

Big Picture Loans is not a gas station or a cigarette shop; it is a high-tech, financial institution (often referred to as "fintech") with services as complex as some FDIC-insured banks and requiring as much or more liquidity, capital, and financial services expertise. Nevertheless, the lower court determined that the Tribe's commercial borrowing and engagement of specialized experts for the start-up of its business was a sure sign of a sham.[10] This runs afoul of Congress's clear directive that tribes must be able to access "(A) the resources of the private market; (B) adequate capital; and (C) technical expertise."[11]

Lenders like Big Picture require specific expertise in many functional areas of consumer finance. To lend and collect on its loans, internet lenders must perform or sub-contract with others to perform nearly one dozen different subspecialty financial services: market its products with appropriate regulatory disclosures; electronically accept and underwrite loan applications; filter

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[10] Order (Doc. 146) at 61-63, 68-69, 73, 75.
[11] 25 U.S.C. §4301(a)(12).

applications for potential identity theft or fraud; arrange for electronic loan processing and funds transfer; manage a call center to respond to consumer inquiries and address issues; address consumer complaints; accept and properly credit loan payments; collect on past due loans; liquidate charged-off debt; perform quality-assurance; and monitor for compliance with Tribal and federal law. Each of these functions requires managers with both education and experience in their chosen fields.

Specifically, these services require expertise in marketing and advertising; law and compliance; electronic payments; call center management; information technology; software engineering; finance; accounting; financial analysis; human resources; and debt collections. Although, it is the goal of all tribes to employ tribal members, the unfortunate reality of the history of treatment of Indians, including multigenerational dependence on Federal assistance does not provide a realistic pool from which to staff all professional positions. In addition, the Amicus find such a standard discriminatory toward non-members and highly restrictive—meeting these standards would end any viable business development opportunity.

Even more, Amicus are regulators charged with protecting consumers of these financial institution's products. Without doubt, it is in the best interests of the Tribe and consumers for lending businesses to be run by experienced

professionals. Any decision from this Court that would require a tribally-owned company to dismiss third-party experts and replace them with tribal-member novices is dangerous and misguided. Moreover, it would trap tribes into engaging only in businesses that tribes could fully staff with available tribal-member personnel.

E. The District Court Applied *Breakthrough Mgmt.* in a Rigid and Unprecedented Manner

Amicus does not believe that courts should take a business's claims of tribal affiliation or immunity at face value, but objects to the District Court's efforts to dig through the facts to justify denying immunity. By taking this approach and expressly imposing a burden on Appellants that was not included in *Breakthrough Mgmt.*, the District Court has set a precedent that could impact tribal businesses nationwide. Effectively, the District Court announced a new, rigid set of requirements and standards that a tribal lending business must meet in order to be recognized as possessing immunity. Although theoretically premised on the broader, more flexible *Breakthrough Mgmt.* factors, the District Court's approach vastly restricts how Tribes may structure their businesses, acquire new businesses, and contract with vendors.

1. First Breakthrough Factor

Although the court correctly recognized that the first factor weighed in favor of immunity because Big Picture and Ascension were organized under tribal law, it

searched for a basis to minimize the weight of this factor. *See Williams, et al. v. Big Picture Loans, LLC, et al.*, 329 F.Supp.3d 248, 271-73 (E.D. Va. 2018). Specifically, the District Court conducted a detailed inquiry into the motives underlying the creation of Big Picture and Ascension. *See id.* at 272-73 ("the first *Breakthrough* factor supports a finding of sovereign immunity . . . albeit with the caveat noted above"). The tribe's motives are outside the scope of how the entities were actually created. In essence, the court decided to impose its prejudices and opinions over the stated objectives of the sovereign.

2. Second Breakthrough Factor

In its analysis of the second factor, the District Court started from the uncontested fact that both Big Picture and Ascension have the stated purposes of furthering the Tribe's economic self-sufficiency. *Id.* at 273. But the court again probed further, noting that the purpose factor also implicates the extent to which a business actually serves its stated purpose. *Id.* In doing so, the District Court placed inordinate weight on the non-tribal principals' purported goals, even though this consideration does not speak to whether the tribal businesses further the tribe's stated goals. *See id.*

When the District Court actually assessed whether the tribal entities achieved their purposes in practice, the court found that although Big Picture had provided more than $5 million to the Tribe, that did not "serve[] its stated purpose

very well." *Id.* at 276. Moreover, in deciding that Ascension does not sufficiently serve its stated purpose, the court reviewed the alleged inequities in compensation given to non-tribal employees versus the compensation given to tribal employees. *Id.* In essence, although the explicit purpose of both entities is to further the tribe's economic independence, and both entities in practice did further this goal, the District Court only focused on specific aspects of each entity in finding that this factor did not weigh in favor of immunity. *Id.* at 277.

3. Third Breakthrough Factor

The District Court determined that the tribe did not possess the requisite degree of control over the business because the knowledge of the tribal members charged with managerial oversight over Big Picture's operations was "narrow in both scope and depth." *Id.* at 278-79. Given the complexity of a tribal lender's operations, it is unreasonable to expect that a Native American tribe with no prior experience in financial services has within its membership—much less its government—the education and experience to immediately manage all aspects of a financial services organization.

Rather, Amicus more often observe that overall business management exists within the acumen of particular Members initially; but particularized industry experience requires experience and long-term planning and education, which must occur before the more complicated and specialized aspect of the business are

manned by tribal Members. Not only does this align with the goals of the tribe—to develop industry that is attractive for upcoming generations—it also aligns with the case relied upon by District Court, which recognizes that "control of a corporation need not mean control of business minutiae; the tribe can be enmeshed in the direction and control of the business without being involved in the actual management." *People v. Miami Nation Enters.*, 386 P.3d 357, 373 (Cal. 2016). The salient inquiry should include both general managerial control as well as corporate governance.

This approach yields better public policy as it allows financial institutions to hire the best people for the future of the enterprise and quality of the products offered, and it prevents a situation where a tribe is held hostage by a tribal-member who is literally irreplaceable. It nevertheless requires the lending operation to defer to the tribal government in areas customary for boards of directors to determine.

4. Fourth Breakthrough Factor

Finally, when reviewing element four of the *Breakthrough Mgmt.* test, the District Court initially noted that "Big Picture's and Ascension's formation documents show that the tribe intended for both entities to share in its immunity." *Williams, et al.*, 329 F.Supp.3d at 279. But again, this was not enough for the District Court. *Id.* at 280. Similar to its analysis with respect to the first element, the District Court looked to the purported invidious purposes of non-tribal

members in forming both entities. *Id.* Despite the unequivocal intent of the Tribe to share its immunity with Big Picture and Ascension, the District Court found this factor weighed against immunity because of the alleged "context" leading to the formation of both entities.

Amicus does not believe that courts should take a business's claims of tribal affiliation or immunity at face value, but objects to the District Court's efforts to dig through the facts to justify denying immunity. By taking this approach and expressly imposing a burden on Appellants that was not included in *Breakthrough Mgmt.*, the District Court has set a precedent that could impact tribal businesses nationwide. Effectively, the District Court announced a new, rigid set of requirements and standards that a tribal lending business must meet in order to be recognized as possessing immunity—a standard that allows the intent of all parties involved in a transaction to be second-guessed by the court. This would be an untenable standard for all tribal businesses and have a chilling effect on Congressionally-endorsed tribal economic development far beyond this case and industry. Although theoretically premised on the broader, more flexible *Breakthrough Mgmt.* factors, the District Court's approach vastly restricts and redefines how Tribes may structure their businesses, acquire new businesses, and contract with vendors.

IV. CONCLUSION

Fundamentally, *Breakthrough Mgmt.* and other court-created tests were meant to weed out fraudulent entities seeking to cloak themselves in tribal immunity—not to impact how Tribes operate their businesses. Allowing the District Court's decision to stand will inevitably impact the way in which tribes structure their businesses and partner with third partners, and in turn, disincentivize tribes from innovating or even expanding their operations. It mutates the *Breakthrough Mgmt.* test factors (originally favoring tribes) into new standards highly impactful to all tribal businesses. Indeed, the District Court's decision could influence how tribes govern and regulate their businesses, thereby allowing state laws and interests to implicitly dictate tribal policy. Amicus thus urges this Court to not only consider how the District Court's decision will impact the parties, but how it will undermine the most central aspect of tribal sovereignty: the right of Tribes to "make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

Respectfully submitted, this 25th day of January, 2019.

/s/ Sarah J. Auchterlonie	/s/ Luke A. Hasskamp
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CERTIFICATE OF COMPLIANCE

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Dated: January 25, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system.

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