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 et al.,
Defendants-Appellants,

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

BRIEF FOR THE NATIONAL CONGRESS OF AMERICAN INDIANS, THE NATIONAL INDIAN GAMING ASSOCIATION, AND THE NATIONAL CENTER FOR AMERICAN INDIAN ENTERPRISE DEVELOPMENT AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

LEWIS ROCA ROTHGERBER CHRISTIE LLP
PILAR M. THOMAS
One South Church Avenue, Suite 2000
Tucson, Arizona 85701
(520) 629-4455

NATIONAL CONGRESS OF AMERICAN INDIANS
DERRICK BEETSO
1516 P Street NW
Washington, D.C. 20005
(202) 466-7767

Counsel for Amici

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 18-1827 Caption: Williams, et al. v. Big Picture Loans, LLC, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Congress of American Indians
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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: /s/ Derrick Beetso Date: January 24, 2019

Counsel for: Amicus

CERTIFICATE OF SERVICE

****

I certify that on January 24, 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/ Pilar M. Thomas (signature) January 24, 2019 (date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 18-1827 Caption: Williams, et al. v. Big Picture Loans, LLC, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Indian Gaming Association
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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No. 18-1827 Caption: Williams, et al. v. Big Picture Loans, LLC, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Center for American Indian Enterprise Development
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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INTEREST OF AMICI CURIAE

The National Congress of American Indians ("NCAI"), founded in 1944, is the nation's oldest and largest organization made up of Alaska Native and American Indian tribal governments and their citizens to represent their own collective interests. As such, NCAI serves as a consensus-based forum for policy development among its member tribes from every region of the country. Its mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights, and a broad range of federal policy issues affecting tribal governments.

The National Indian Gaming Association ("NIGA"), established in 1985, is a non-profit organization of 184 federally recognized Indian Nations, as well as other non-voting associate members representing organizations, tribes, and businesses engaged in tribal gaming enterprises from around the country. NIGA's member tribes are located throughout Indian country and operate Class II and Class III gaming enterprises.

The National Center for American Indian Enterprise Development ("NCAIED") is a 501(c)(3) non-profit organization with over 50 years of assisting American Indian/Alaska Native owned Businesses, American Indian Tribes and their enterprises with business and economic development. NCAIED is actively engaged in assisting Native American communities to develop economic self-

sufficiency through business ownership, the increase of workforce, viable tribal businesses, and positive impacts on reservation communities.

Collectively, *Amici* share a fundamental purpose: to advance the lives of Indian people, economically, socially and politically. *Amici* strive to protect tribes' opportunity to incorporate or otherwise acquire and operate tribally-owned governmental enterprises in Indian Country to further tribal economies, self-sufficiency, and strong tribal governance and to preserve and protect tribal sovereign governmental authority over tribally-owned governmental enterprises.

* * *

Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* state that no party's counsel authored this brief, either in whole or in part, nor did any party or party's counsel contribute any money to any of the amicus, and in particular none that was intended or used to fund preparing or submitting the brief. The Habematolel Pomo Tribe of Upper Lake contributed money that was used to fund the preparation and submission of this brief.

SUMMARY OF THE ARGUMENT

The formation, development, expansion and success of tribal government enterprises has been supported and encourage by Congress through the enactment of federal laws over the last 85 years and remains official federal Indian policy. Tribal government enterprises serve a critical role for tribal governments – they are the public fisc for tribal government programs and services for tribal citizens. The revenue generated by tribal government enterprises supports tribal governance and other essential tribal government functions. In rural America, tribal government enterprises are often the driving economic force supporting the extended local community. A federal court decision that will impact tribal government enterprises and their ability to contribute revenues to tribal governments should strictly adhere to current federal legal principles on tribal sovereign immunity.

The law of tribal sovereign immunity is well-settled; the application of tribal sovereign immunity to tribal governmental enterprises is also well-established. Subject only to Congress's authority (or tribal government waiver), tribal government enterprise sovereign immunity cannot be limited by the courts or the states. In the decision below, the lower court erroneously adopted an analysis from a state court decision that impermissibly limits the Appellants' sovereign immunity and would also create an unworkable and unwarranted burdensome test that would erroneously restrict the sovereign authority of tribes to structure their tribal

governmental enterprises. This test also usurps Congress's authority to limit tribal sovereign immunity. The Court should rein in this expansive test and adhere to the predominately legal test its sister Circuits have adopted.

ARGUMENT

I. Federal Law and Policy Have Encouraged Tribal Business Formation Since At Least 1934

A. The Indian Reorganization Act of 1934 Authorized the Creation of Tribal Corporations.

After over 100 years of federal policy destroyed tribal economies and left most tribal citizens destitute, New Deal programs addressed rampant poverty in Indian Country by recognizing that Indian sovereigns could best address the needs of their people. Among the New Deal reforms was the Wheeler-Howard Act, also known as the Indian Reorganization Act of 1934 ("IRA"). Since at least 1934, federal Indian policy has encouraged tribal business formation as a means of developing tribal economies and improving tribal communities. The Act explicitly states that one of its purposes is to "extend to Indians the right to form business and other organizations."

To support this purpose, the IRA creates two mechanisms for tribes to organize: Section 16, which authorizes tribes to adopt constitutions and by-laws for the governmental functions of the tribe; and Section 17, which authorizes the

Secretary of the Interior ("Secretary") to issue a charter for incorporation to a tribe to conduct its commercial business. 25 U.S.C. §§ 5123, 5124.

Section 17 reads, in part:

> "The Secretary of the Interior may . . . issue a charter of incorporation to such tribe . . . . Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal . . . and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law . . . ."

See also, S. REP. NO. 1080, 73d Cong., 2d Sess., 1 (one purpose of the 1934 Act was "(t)o permit Indian tribes to equip themselves with the devices of modern business organization, through forming themselves into business corporations…"). The IRA also authorized funding to encourage the creation of tribal corporations. 25 U.S.C. § 5112. As a result, over 70 tribes received charters of incorporation under Section 17 of the IRA within 10 years of its enactment. T. Hass, Ten Years of Tribal Government Under I. R. A., (January 1947).

Over the course of the last 85 years, Indian tribes have not only received federal charters for Section 17 corporations, but tribes have also created tribally-chartered enterprises – created and organized under tribal law pursuant to the tribe's inherent sovereignty – and state-chartered enterprises organized under state law. *See* K. Atkinson and K. Nilles, Tribal Business Structure Handbook (2009 ed.), at I-4 – I-6.

This development of tribal government-linked corporations is not unlike the creation of a government corporation by the federal government. "Federal or government corporations are a type of public corporation that refers to corporations incorporated by or under an act of Congress, such as banks, railroads, and various insurance or relief corporations. These corporations are created to address the needs of the public, usually while remaining financially independent." 1 William Meade Fletcher et al., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 69.10 at 2-3 (2006). *See also M'Culloch v. Maryland*, 17 U.S. 316, 423 (1819) (upholding Congress' power to establish the Second Bank of the United States as "a means to effect the legitimate objects of government."). A tribal government enterprise, likewise, is created to address the needs of a tribe's membership. Revenues from tribal government corporations allow tribes to fund essential tribal government programs, and to move away from dependence on federal funding.

B. Congress Continues to Actively Encourage the Formation and Development of Tribal Enterprises.

Congress has consistently exercised its authority under the Indian Commerce Clause, U.S. Const., Art. I, Sec. 8, to pass a host of statutes intended to further tribal economies and enterprises. In 1910, Congress adopted the Buy Indian Act, 25 U.S.C. § 47, which authorizes the Secretary to give preference to the government procurement of goods and services from tribal economic enterprises. Title IV of the Indian Financing Act of 1974 establishes Indian business

development grant programs to "expand profit-making Indian-owned economic enterprises." 25 U.S.C. § 1521. The 1986 amendments to the Small Business Act ("SBA") authorized tribally owned enterprise to participate in the SBA Section 8(a) program and thus to be given preference for federal government contracting. 15 U.S.C. §§ 637(a)(4), 637(a)(13). Tribally Designated Housing Authorities, as separate entities for housing development, are authorized to receive funding under the Native American Housing Assistance and Self-Determination Act, 25 U.S.C. §§ 4103(22), 4111, 4131.

Congress itself provides the most succinct summary of federal policy regarding tribal economic development in its twelve findings of Congress outlined in the Native American Business Development, Trade Promotion, and Tourism Act of 2000, which created programs in the Department of Commerce to support access by tribal enterprises to domestic and international markets. 25 U.S.C. §§ 4301 *et seq*. Among the findings, Congress explicitly recognized:

> (4) consistent with the principles of inherent tribal sovereignty and the special relationship between Indian tribes and the United States, Indian tribes retain the right to enter into contracts and agreements to trade freely, and seek enforcement of treaty and trade rights;
> (5) Congress has carried out the responsibility of the United States for the protection and preservation of Indian tribes and the resources of Indian tribes through the endorsement of treaties . . .;
> (6) the United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency . . . ;
> (7) the capacity of Indian tribes to build strong tribal governments and vigorous economies is hindered by the inability of Indian tribes to engage

> communities that surround Indian lands and outside investors in economic activities on Indian lands;
>
> * * *
>
> (12) the twin goals of economic self-sufficiency and political self-determination for Native Americans can best be served by making available to address the challenges faced by those groups—
>
> (A) the resources of the private market;
> (B) adequate capital; and
> (C) technical expertise

25 U.S.C. § 4301(a).

In short, it has been consistent federal policy to promote the creation, development, and success of tribally-owned economic enterprises while recognizing that tribal economies must be integrated into the national and international economies for sustainable results. Isolating tribal economies simply relegates them to a lesser, non-sustainable status and defeats the goal of supporting tribal sovereignty, tribal self-governance and economic self-sufficiency.

II. Tribally-Owned Enterprises Serve the "Revenue Generating Functions" of Tribal Governments, and Thus Constitute the "Tribal Public Fisc."

Tribal government enterprises serve multiple roles for tribal governments — they generate much needed revenue for tribal governments, they provide much needed jobs for tribal citizens, they provide much needed services, and they contribute to overall tribal and regional economies.

A. Tribal Enterprises Fund the Tribal Public Fisc.

Tribal enterprises serve the same function for tribal government treasuries as do taxes for state governments. Outside of grants, tribal enterprises are the primary means for raising revenue to support tribal governmental functions, programs and services for tribal citizens and for participation in and contributions to regional economies. *See* Policy Basics: Taxes in Indian Country, Part 2, Montana Budget and Policy Center (November 2017) ("While tribal governments operate many of the same public services as other levels of government, they must operate without the usual tax revenue other levels of government rely on. . . [M]any tribes must rely on their natural resources and tribally owned business enterprises as their only source of revenue outside federal dollars."); *see also*, Securing our Futures Report, National Congress of American Indians (2013) ("The increasing contributions of tribes demonstrate that in many locations tribal nations are a major economic force."); *accord*, Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2702(1) ("The purpose of [IGRA] is to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.").

Other than generating revenue for basic and essential governmental functions from tribally owned businesses, tribes are left with only the impractical options of taxing income of tribal members, who are often at the low end of the

income ladder or unemployed, or taxing economic activity within their jurisdictions. However, attempts by tribes to tax economic activity within their jurisdictions is fraught with limitations as well. Not only do many tribes lack an economic activity base on which to assess taxes, but in many states — including in several of the amici states — state and local governments impose their own taxes on economic activity on tribal lands. *See*, Policy Basics, infra, at p. 4.; *Mashantucket Pequot v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013) (authorizing town's imposition of personal property tax on gaming devices in tribal casino); *Department of Taxation and Finance of New York, et al. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61 (1994) (approving state authority to tax cigarettes sold on the Seneca reservation); *Oklahoma State Tax Comm'n v. Citizen Potawatomi*, 498 U.S. 505 (1991); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). In these instances, the state's assertion of tax authority results in double taxation and discourages outside investment on tribal lands. *See Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 807 (2012) (J. Sotomayor concurring) ("Tribes face a number of barriers to raising revenue in traditional ways. If Tribes are ever to become more self-sufficient, and fund a more substantial portion of their own governmental functions, commercial enterprises will likely be a central means of achieving that goal."); *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008).

Tribally-owned businesses are often left as the best or only option for funding governmental services. Like state and local governments working to "diversify" their tax base to promote tax efficiency and decrease over-reliance on certain tax bases, Indian tribes also work to "diversify" their tribal revenues by participating in commerce through various industries. *See* M. Hanif, Thesis, An Analysis of Tax-Revenue Diversification of State Governments (2000-2011), 2014; *see also,* C. Lee, E. Pome, M. Beleacov, D. Pyon, and M. Park, State Government Tax Collections Summary Report, U.S. Dept. of Commerce, Census Bureau (Apr. 16, 2015).

This tribal revenue diversification, which for many tribes is largely dependent on their tribal gaming efforts, is intended to ensure sufficient revenue for tribal government functions, services and programs for tribal citizens. In other words, tribal revenue diversification is intended to achieve the same goals that states have in diversifying their tax base. *See* K. Rand, A. Meister, and S. Light, Indian Gaming and beyond: Tribal Economic Development and Diversification, 54 S.D. L. REV. 375 (2009). For tribes relegated to rural areas without a large population for gaming enterprises, diversifying into non-gaming industries is a practical necessity. *See*, D. Robertson, The Myth of Indian Casino Riches, April 19, 2017, (https://newsmaven.io/indiancountrytoday/archive/the-myth-of-indian-casino-riches-3H8eP-wHX0Wz0H4WnQjwjA/) (last visited January 23, 2019).

B. The Tribal Enterprise Public Fisc is Substantial But Not Enough.

Tribal enterprises contribute billions of dollars to tribal fiscs. Such enterprises participate in hundreds of different industries across the country, including federal and state government contracting, construction, professional services, retail, manufacturing, energy development, medical services, agriculture, tourism, and forestry, to name only a few. *See*, S. Plumer, Turning Gaming Dollars Into Non-Gaming Revenue: Hedging For The Seventh Generation, JOURNAL OF THEORY AND PRACTICE, Univ. of Minn. Law School (May 27, 2016); *see also*, M. Fogarty, The Growing Economic Might of Indian Country, Indian Country Today (Mar. 15, 2013) (https://newsmaven.io/indiancountrytoday/archive/the-growing-economic-might-of-indian-country-KGUkmGfbBkG4HLylzWq-Ow/ (last visited January 20, 2019).

The two largest sources of revenues for tribal enterprises are tribal government gaming, with gross revenues of over $32 billion, and federal government contracting, with gross revenues of over $6 billion. National Indian Gaming Commission, FY 2017 Report on Gross Gaming Revenue (2018); J. Taylor, A Report on the Economic, Social and Cultural Impacts of the Native 8(a) Program (NACA Report), (Native American Contracting Association, 2012).

While no one to date has prepared a sufficiently comprehensive survey of all tribal economic enterprise revenues, a few state and regional studies reflect the

value of tribal economic enterprises to tribal governments within a state or region. *See, e.g.*, J. Taylor, The Economic and Fiscal Impacts of Indian Tribes in Washington (Washington Report) (2012), pp. 4-5 ("[T]oday self-determined economic activity provides the bulk of tribal government funding. Statewide, enterprise profits, taxes, leases, and natural resource support more than two-thirds of tribal government budgets."); S. Peterson, Tribal Economic Impacts: The Economic Impacts of the Five Idaho Tribes on the Economy of Idaho (Idaho Report) (2014), p. 5 (estimating tribal enterprise revenues of $677 million across gaming, housing, retail trade, medical services, recreation, tourism and agriculture).

Notwithstanding current revenues flowing into tribal government treasuries, Indian tribal citizens remain mired in unemployment, poverty, and low income. According to the 2010 Census, real per capita income on reservations is $11,400, compared to $26,900 off reservation. The family poverty rate on reservations is 32% and child poverty rate is 44%, compared to 10% and 20% respectively off reservation. The unemployment rate on the reservation is 20%, while off reservation the rate is 8%. Randall K. Q. Akee & Jonathon Taylor, Social and Economic Change on American Indian Reservations, A Databook of the U.S. Censuses and the American Community Survey 1990-2010 (May 15, 2014). Tribes work to address these persistent conditions through tribal enterprises and

economic development that employ tribal citizens and raise revenues for tribal governments to provide much-needed services and programs for their citizens while also contributing greatly to their state and regional economies.

III. Tribal Enterprise Sovereign Immunity Flows from the Inherent Sovereign Authority of the Tribe Which Only Congress Can Diminish

Tribes retain their inherent sovereign authority which includes immunity from suit. Like other sovereigns, tribes have the authority to extend tribal privileges and immunities to tribal governmental enterprises, unless such authority and immunity has been diminished by Congress.

A. Tribes' Inherent Sovereign Immunity Arises Under Federal Law.

A fundamental component of federal Indian law derives from the well-established principle that Indian tribes are "distinct, independent political communities, retaining their original natural rights" of self-governance. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 52 (1978) (describing tribes as "separate sovereigns pre-existing the Constitution."). Moreover, an Indian nation's sovereignty is not the result of a grant of authority from Congress, but rather the "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *see also*, *United States v. Winans*, 198 U.S. 371, 381 (1905) (a treaty is "not a grant of rights to the Indians, but a grant of rights from them . . . .").

From this inherent sovereignty, tribes derive their authority "to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). Tribes act pursuant to their inherent sovereign authority and organic laws to take actions that address issues of importance to their government and citizens, such as operating governmental programs and services, implementing revenue generation efforts, establishing political subdivisions, creating tribally-owned enterprises, and creating regulatory systems for business operations and other conduct within their jurisdictions.

It is virtually black letter law that inherent in this sovereignty is the "common law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. 49, 58 (1978); *Bay Mills*, 572 U.S. at 78214); *Kiowa Tribe of Okla. v. Mfg. Tech, Inc.*, 523 U.S. 749 (1998); *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 553 (4th Cir. 2006). The Supreme Court has also explicitly held that tribal sovereign immunity is not coextensive with that of the states, is a matter of federal law, and is not subject to diminution by the states. *Kiowa*, 523 U.S. at 755-56 (disapproving Oklahoma Supreme Court decision in *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995) that tribal sovereign immunity for off-reservation commercial activity is a matter of comity).

B. Tribal Sovereign Immunity Extends to Tribal Enterprises Formed to Fund Tribal Governmental Purposes.

For more than five decades, courts have addressed the sovereign immunity of tribes and tribal enterprises operating commercial activities off the tribe's lands. *See, Maryland Casualty Co. v. Citizens Nat'l Bank of West Hollywood*, 361 F.2d 517, 521 (5th Cir. 1966) ("The fact that the Seminole Tribe was engaged in an enterprise private or commercial in character, rather than governmental, is not material. . . The Supreme Court has not hesitated to hold the immunity applicable in actions for liabilities arising out of private transactions."); *Kiowa*, 523 U.S. at 754-55 (refusing to draw a distinction between governmental and commercial activities and whether the activity occurs on or off the reservation); *Bay Mills*, 572 U.S. at 783 (upholding tribal sovereign immunity for commercial activity occurring off the reservation); *see also Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680 (8th Cir. 2011); *Sac and Fox Nation v. Hanson*, 47 F.3d 1061, 1064 (10th Cir. 1995) ("We do not believe the location of the commercial activity is determinative."). To hold otherwise would be to isolate tribal economies from the broader regional and national economy, thus undermining Congress's intent that tribes participate in economic activities outside their territories.

The courts have consistently held — albeit under slightly different tests — that sovereign immunity extends to tribal corporations and other tribal enterprises that are sufficiently close to the tribe. *Allen v. Gold Country Casino*, 464 F.3d 1044

(9th Cir. 2006); *Breakthrough Management Group v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 183 (10th Cir. 2010); *Ninigret Dev. Corp. v. Narragansett Indian Weuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000); *Hagen v. Sisseton-Wahpeton Comty. Coll.*, 205 F.3d 1040 (8th Cir. 2000); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir. 1993).

While no one test for required closeness predominates, the lower court here conducted its analysis with the six factors outlined by the Tenth Circuit in *Breakthrough*. Under this legal analysis, the court should look to: 1) the method of the tribal enterprise's creation; 2) the tribal enterprise's purpose; 3) the structure, ownership, and management, including amount of tribal government control; 4) the tribe's intention for the tribal enterprise to have sovereign immunity; 5) the financial relationship between the tribe and the tribal enterprise; and 6) whether purposes of tribal sovereign immunity are served by the tribal enterprise having the tribe's immunity. *Breakthrough*, 629 F.3d at 1181.

C. Only Congress May Limit Tribal Sovereign Immunity.

When analyzing the appropriate test for relevant closeness, the Court must take into account that a tribe retains all inherent attributes of sovereignty that have not been divested by Congress. *United States v. Wheeler*, 435 U.S. 313, 323 (1978); *see also Native Am. Dist. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1293 (10th Cir. 2008) ("While the Supreme Court has expressed misgivings about

recognizing tribal immunity in the commercial context, the Court has also held that the doctrine "is settled law" and that it is not the judiciary's place to restrict its application."). As such, the proper inquiry with respect to a tribe's sovereign immunity is whether Congress has acted to authorize a lawsuit or limit sovereign immunity in any way. *See, Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'ng*, 476 U.S. 877 (1986); -53 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148-49 n.11 (1982); *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957); FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 6.02[1] (2005).

Congress has shown its willingness to abrogate tribal sovereign immunity in the past. *See* IGRA, 25 U.S.C. § 2710(d)(7) (giving federal courts jurisdiction over a cause of action brought by state or tribe to enjoin gaming in violation of a gaming compact); Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450f(c)(3); Indian Contracts Act, 25 U.S.C. § 81(d)(2)(c) (requiring an explicit waiver of sovereign immunity in contracts that encumber Indian lands). Whatever the wisdom of tribal sovereign immunity in the context of tribal commercial activity or off-reservation activities, the Supreme Court has consistently held that it is only for Congress — not the courts or any States — to limit or abrogate tribal enterprise sovereign immunity. *Kiowa*, 523 U.S. at 759-760; *Bay Mills*, 572 U.S. at 789.

IV. The Lower Court's Analysis Was An Impermissible Limit on Tribal Enterprise Sovereign Immunity

Contrary to federal law, the lower court erroneously expanded the *Breakthrough* analysis to limit the tribe's sovereign authority to extend the tribe's sovereign immunity to its tribal enterprises.

A. As a Matter of Federal Law, the "Arm of the Tribe" Analysis is a Legal Test, not an Operational Test.

Current "arm of the tribe" federal jurisprudence, at is core, is a legal test of whether the tribal sovereign intended to create a subordinate entity with the tribal sovereign's privileges and immunities; whether the tribal sovereign exercises legal control over the enterprise; and whether there could be a financial impact on the tribal sovereign's treasury if the tribal enterprise were stripped of its immunity. *See, e.g.*, Brief for the United States as Amicus Curiae, *Inyo County v. Paiute-Shoshone Indians of the Bishop Community*, No. 02-281 (U.S. 2002).

Over the course of time, federal courts have expanded this basic test in other ways. *Compare Sac and Fox*, 47 F.3d at 1064 (applying two factors) with *Breakthrough*, 629 F.3d at 1181 (expanding analysis to six factors). In amici's view, if this Court adopts the *Breakthrough* factors, it should do so with an emphasis on the core elements of the test: a tribe's express intent to extend its immunities; the legal control exercised by the tribe over the tribal government enterprise; and the financial impact of reduced revenues to the tribal treasury.

These factors should carry more weight because they are more respectful of tribes as sovereign authorities, they more closely align with federal policies meant to encourage tribal economic development, and this approach acknowledges the proper role of Congress — not the courts — as the body authorized to place limits on tribal sovereign immunity.

Courts have long acknowledged that one of the traditional purposes of sovereign immunity is to protect the sovereign's public fisc. *Alden v. Maine*, 527 US 706 (1999); *Edelman v. Jordan*, 415 U.S. 651 (1974). To protect the tribal public fisc, courts should consider the impact of the loss of tribal enterprise revenues on the tribal treasury and the impact to tribal citizen employment, and not just whether the tribe is responsible for paying the tribal enterprise's judgements or obligations. For tribes, losing a tribal enterprise's revenues or jobs, or receiving reduced revenues because of judgments against a tribal enterprise, will have a substantial impact on the tribal treasury. *Allen*, 464 F.3d at 1047 ("Immunity of the Casino directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general."); *Breakthrough*, 629 F.3d at 1183.

B. The District Court Erroneously Adopted both the Burden Shifting and the Non-Deferential Factual Inquiry from the California Supreme Court's *Miami Nation* Decision.

The lower court relied inappropriately on *People v. Miami Nation Enterprises*, 386 P.3d 357 (Cal. 2012) to analyze whether a tribal enterprise should

be considered an "arm of the tribe" and thus entitled to sovereign immunity. *Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248, 269 (E.D.Va. 2018). In the *Miami Nation* case, the California Supreme Court made two key holdings — adopted by the lower court in this case — that are not consistent with federal law.

First, the California Supreme Court improperly invoked the burden shifting requirement of Eleventh Amendment immunity decisions instead of adhering to the federal law principle that because tribal sovereign immunity is a threshold jurisdictional matter, the burden is on the plaintiff to show jurisdiction. *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015); *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 84 (2d Cir. 2001); *E.F.W. v. St. Stephen's Indian High School*, 264 F.3d 1297, 1302 (10th Cir. 2001); *Alvarado v. Table Mt. Rancheria*, 509 F.3d 1008, 1015-16 (9th Cir. 2007).

The lower court reasoned that "tribal immunity is a common-law immunity that operates the same way in state and federal court . . . ." *Williams*, 329 F. Supp. 3d at 269, fn.21. While this may well be the view of the California state courts, it is federal law — not state law — that controls the federal question of tribal sovereign immunity. *See, Kiowa*, 523 U.S. at 756 ("tribal immunity is a matter of federal law and is not subject to diminution by the States"). Therefore, this burden shifting is inconsistent with federal law on tribal sovereign immunity, and this Court should not adopt such a position.

The second holding, also adopted by the lower court here, was the creation of what the California Supreme Court called an "operational" or "functional" aspect to the "arm of the tribe" analysis. *Miami Nation Enters.*, 386 P.3d at 365 ("[T]his test takes into account both formal and functional considerations — in other words, not only the legal or organizational relationship . . . but also the practical operation of the entity in relation to the tribe.").

The California court's and the lower court's unprecedented manipulation of the *Breakthrough* factors is not only contrary to federal law, but both courts have, in effect, impermissibly substituted their policy judgment as to the proper scope of tribal enterprise sovereign immunity for that of Congress. Because this "operational" analysis impermissibly serves to diminish tribal sovereign immunity without any action by Congress, it encroaches on the tribes' and Congress's authority regarding tribal sovereign immunity and is thus inconsistent with federal law. Many aspects of the so-called "operational" analysis also undermine Congressional policy and intent regarding tribal economic development. And, it invites the use of "discovery as a fishing expedition" cautioned against by the *Breakthrough* court. 629 F.3d at 1190.

Amici states support the burden-shifting and operational analysis of *Miami Nation* and the lower court. *See*, Brief of the Amici States, Doc. 37-1, at 22 - 23. The amici states also suggest a new and unprecedented legal test for tribal

enterprise sovereign immunity: "Immunity is not a benefit that a sovereign may confer on a third party merely by stating its intent to do so . . . A valid arm of the tribe test must ensure that a tribe's immunity extends to an entity only where that entity is, in certain essential respects, so closely aligned with the tribal sovereign that a suit against the entity is in practical effect a suit against the tribe itself." *Id.*

The amici states cite no legal authority for this proposition, and this formulation misconstrues the long line of federal cases recognizing that the sole authority to control or limit tribal enterprise sovereign immunity lies with the tribe itself or with Congress, not the courts or the states. *See* Section III, supra. Further, it ignores the differences created by the special relationship between the United States and the tribes, explicit Congressional policy regarding tribal economic development, and the extreme importance of tribal enterprises to the tribal fisc. *See* Section II, supra.

C. This Court Should Rein in the Lower Court's Expansive Factual Analysis of the Tribal Enterprises' Operational and Managerial Decision-Making, as These Are not Relevant to the "Arm of the Tribe"Legal Analysis.

Contrary to federal case law, the lower court's analysis here misplaced reliance on an aberrant California state court decision where federal law is controlling. *See, Kiowa*, 523 U.S. at 755. Furthermore, the lower court erroneously substituted its judgment for that of the tribe and of Congress. The result, which this Court should overturn, is unworkable and overly burdensome — not only for

tribes but also for future courts when conducting what should primarily be a legal analysis. The result is a very fact-intensive, fact specific inquiry — one that disregards tribal law, tribal intent, and tribal sovereignty — and that will effectively allow courts to second guess the "operational" and "financial" aspects of how tribes structure, finance, manage and operate wholly owned tribal enterprises. This expansive and intrusive factual inquiry is paternalistic overreach not supported by federal law.

This Court should confirm that, in the absence of Congressional action to the contrary, the lower court must give deference to the tribe's sovereign determinations and actions to structure tribal enterprises consistent with tribal law, and the tribe's intent to create an arm of the tribe that shares in the tribe's sovereign immunity. This would return the analysis to the appropriate legal test, as defined in *Breakthrough*. 629 F.3d at 1181.

To uphold the lower court's approach here — an intrusive, second-guessing analysis of the tribe's decisions, instead of a legal analysis of the factors — would condone the lower court's ignorance of the legal significance of the intent and action of tribes, as well as disregard tribes' sovereign authority, both of which are contrary to federal law and federal Indian policy. It would also, in effect, require tribes to structure their wholly owned and legally controlled enterprises in such a way as to limit the tribes' ability to hire whomever they want, engage in certain

businesses, and enter into certain types of agreements. The legal test is not, and cannot, be based on a tribal enterprise's transactional decisions.

The logical outcome of the lower court's analysis is that tribal enterprises could not hire experts or experienced managers to run their business, could not lose money, could not borrow money, could not buy businesses, and are not otherwise free to contract — for if the tribal enterprise made decisions that are not, in any court's view, good business decisions, they are not arms of the tribe. This outcome would inappropriately restrict and second guess tribal enterprise operations and business decision-making, and ultimately judicially harm important tribal revenue generation for tribal government services. This all runs contrary to federal law and the intent of Congress, the one authority that can alter tribal sovereign immunity.

CONCLUSION

For the above state reasons, the amici request that this Court overturn the lower court's decision and find that the Appellants are entitled to tribal sovereign immunity.

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Respectfully submitted,

/s/ Pilar M. Thomas
Pilar M. Thomas
Lewis Roca Rothgerber Christie LLP
One South Church Ave
Suite 2000
Tucson, Arizona 85701

/s/ Derrick Beetso
Derrick Beetso
General Counsel
National Congress of American Indians
1516 P Street NW
Washington, DC 2000

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I certify that on January 24, 2019, 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.

/s/Jeff A. Siatta

CERTIFICATE OF COMPLIANCE

I further certify that this brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 5,590 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point.

/s/ Jeff A. Siatta