IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

GEORGE HENGLE, SHERRY BLACKBURN, WILLIE ROSE, ELWOOD BUMBRAY, TIFFANI MYERS, STEVEN PIKE, SUE COLLINS, LAWRENCE MWETHUKU, *on behalf of themselves and all individuals similarly situated*,	)	
Plaintiffs,	)	Civil Action No. 3:19-250
v.	)	
SCOTT ASNER; JOSHUA LANDY; SHERRY TREPPA, CHAIRPERSON OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*; TRACEY TREPPA, VICE-CHAIRPERSON OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*; KATHLEEN TREPPA, TREASURER OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*; IRIS PICTON, SECRETARY OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity;* SAM ICAY, MEMBER-AT-LARGE OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in his official capacity*; AIMEE JACKSON-PENN, MEMBER-AT-LARGE OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*; AMBER JACKSON, MEMBER-AT-LARGE OF THE HABEMATOLEL POMO OF UPPER LAKE EXECUTIVE COUNCIL, *in her official capacity*;	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF TRIBAL DEFENDANTS'
MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' First Amended Complaint is based on an astounding proposition: that they can end-run the sovereign immunity of tribal lending businesses by repackaging their meritless claims into a lawsuit against *the tribal government itself*. That proposition is as wrong as it sounds. Plaintiffs cannot escape the sovereign immunity recognized by the Fourth Circuit simply by changing the case caption.

This new complaint is Plaintiffs' latest effort to halt the pursuit of self-determination and self-reliance by the Habematolel Pomo of Upper Lake (the "Tribe"), a sovereign Indian nation. To combat generations of poverty and oppression stemming from its tragic history, the Tribe has sought to use e-commerce to establish a self-sustaining economy, consistent with modern Congressional policy. *See* Native American Business Development, Trade Promotion, and Tourism Act, 25 U.S.C. § 4301. Since 2012, the Tribe has offered, from Tribal land, unsecured, small-dollar loans to consumers who seek out and connect with Tribal businesses through the internet and sign contracts fully disclosing the loan terms and that the loans are offered by arms of a Tribe and governed by Tribal law. Acting through its elected governing body, the Executive Council, the Tribe has always controlled all aspects of these operations. Today, the Tribe operates a fully integrated lending operation that funds the vast majority of its operating budget, and thus the programs and benefits the Tribe offers to its citizens—many of which are designed to reverse the disastrous effects of nearly 200 years of failed federal Indian policy.

Sovereign immunity barred Plaintiffs' first effort to grind the Tribe's progress to a halt. Plaintiffs' original complaint sued four Tribal lending entities and one of the Tribe's wholly owned service providers (the "Tribal businesses"), claiming their loans violated Virginia law and, by extension, the federal RICO statute. In response, the Tribal businesses submitted an 87-page

affidavit from Sherry Treppa, the Tribe's Chairperson, along with 111 accompanying exhibits, proving that the Tribal businesses are arms of the Tribe. Shortly thereafter, the Fourth Circuit issued *Williams v. Big Picture Loans*, 929 F.3d 170 (4th Cir. 2019). There, the court dismissed similar claims by the same plaintiff's counsel (and one of the same plaintiffs) against another tribe's lending businesses because those businesses are arms of a tribe. Denying immunity, the court concluded, would undermine "the underlying policies of tribal sovereign immunity, which include tribal self-governance and tribal economic development." *Id.* at 185. Given the robust record developed by the Tribal businesses here, *Big Picture* would have compelled dismissal of Plaintiffs' claims against them in the original complaint.

Plaintiffs' response was remarkable. They dropped all claims against the Tribal businesses, effectively conceding that those businesses are immune. They then filed a virtually identical complaint against all of the members of the Tribe's Executive Council in their official capacity (the "Tribal Defendants"). In other words, Plaintiffs replaced the Tribal businesses with the entire elected Tribal government itself. Plaintiffs made few other changes. Nor did they grapple with any of the facts in the 87-page Treppa Affidavit establishing that the actions of Tribal Defendants—who enacted laws to create and govern online lending, and established and control the Tribal businesses—advance the policies tribal sovereign immunity is meant to protect. *See id.*

The First Amended Complaint does nothing to cure the existential flaws of Plaintiffs' case.

First, despite extensive prior briefing on the issue, Plaintiffs have not addressed the fact that all of their claims against Tribal Defendants rest on a false premise. Plaintiffs seek to enforce Virginia's usury limitations, both directly (Counts 7 and 8) and through RICO (Count 5). But Virginia law does not apply. Each Plaintiff signed loan agreements specifying that Tribal law applies. Tribal law—like federal law and the laws of states such as Arizona, Idaho, Massachusetts,

Nevada, South Dakota, and Utah—does not contain a maximum interest rate. There is no reason for this Court to override these agreements. Indeed, the Virginia Supreme Court has held that such agreements should be enforced, even where the chosen law does not include a cap on interest rates. *See Settlement Funding, LLC v. Von Neumann-Lillie*, 645 S.E.2d 436 (Va. 2007).

Second, the Court lacks jurisdiction over this suit against government officials. There can be no question that Tribal Defendants are entitled to absolute immunity for their legislative actions (including establishing the businesses and the laws that govern them), and that the Tribe and its lending businesses are immune from suit. Plaintiffs cannot evade these well-established principles by suing Tribal Defendants for forward-looking relief. Sovereign immunity is an absolute bar to a lawsuit against governmental officials that is in substance a lawsuit against the government itself. That standard is easily met here: Plaintiffs have sued the entire Tribal government to shutter lending businesses that were established by the Tribe, are controlled by its governmental officials, and fund virtually all of the Tribe's budget. Only Congress could permit such a sweeping intrusion on the Tribe's immunity, and Plaintiffs can point to no such authorization.

Big Picture underscores why sovereign immunity bars Plaintiffs' suit. In dismissing all claims against the lending entities, including the equitable claims for "declaratory and injunctive relief," 929 F.3d at 175, the Fourth Circuit reasoned that allowing those claims to proceed "would weaken the Tribe's ability to govern itself according to its own laws, become self-sufficient, and develop economic opportunities for its members," *id.* at 185. Just so here. Allowing Plaintiffs who are foreclosed from enjoining Tribal businesses to obtain the exact same relief by enjoining the Tribal governmental officials who are charged with legislating policy and directing those businesses would make a mockery of the Fourth Circuit's ruling.

Plaintiffs cannot avoid this straightforward reasoning by analogy to *Ex parte Young*. That decision allows federal courts to pierce governmental officials' general immunity from suit for the limited purposes of enjoining violations of *federal* law. All of Plaintiffs' claims, however, derive from *state* law. And the Supreme Court has made clear time and again that there is no justification for a similar intrusion on governmental sovereignty in cases alleging only a state-law violation. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). Plaintiffs can present no valid basis for disregarding this well-established principle.

Plaintiffs' invocation of RICO changes nothing, either. RICO's prohibition on collecting unlawful debts does not apply, because there is no federal limit on interest rates and the state law cited by Plaintiffs does not apply to the loans. Moreover, the Fourth Circuit has expressly held that RICO does not permit the type of injunctive relief sought here. *Johnson v. Collins Entm't Co., Inc.*, 199 F.3d 710, 726 (4th Cir. 1999). And RICO does not apply to lawsuits against sovereign governments, such as a suit against the elected legislative body of a sovereign Tribe. *See, e.g.*, *Gil Ramirez Grp., L.L.C. v. Houston Indep. Sch. Dist*., 786 F.3d 400, 412 (5th Cir. 2015).

Third, even if Plaintiffs could state claims against Tribal Defendants, their failure to join the Tribal businesses dooms their lawsuit. The businesses are necessary and indispensable parties because their contractual interests are at stake, and the relief Plaintiffs seek cannot be granted without them. That Plaintiffs cannot join those businesses in light of their immunity is not an unfair bar to suit, but a natural outgrowth of Plaintiffs' attempt to do indirectly what the Fourth Circuit has already held they may not do directly.

Finally, several of Plaintiffs' claims should be dismissed for failure to present an Article III controversy. Plaintiffs seek to enjoin the origination of new loans to consumers who reside in Virginia at a rate above the state's interest cap. But despite already amending their Complaint

once, Plaintiffs have not pleaded that they intend to obtain future loans from the Tribal businesses. They accordingly lack standing to stop the issuance of such loans, and the injunction they seek is a textbook example of an impermissible advisory opinion. Moreover, Plaintiffs also ask the Court to enjoin collection of existing debts, but three Plaintiffs have a zero balance on their loans. There is no debt collection to be enjoined as to these Plaintiffs and no justiciable dispute between them and Tribal Defendants.

The Court should take this lawsuit for what it is—an end-run around binding Circuit precedent and the Tribe's hard-fought sovereignty—and dismiss these claims.

ARGUMENT

The materials submitted in support of the motion to dismiss the original complaint confirm that the Tribal businesses are entitled to sovereign immunity—a fact Plaintiffs no longer appear to dispute. Tribal Defendants incorporate those materials by reference and submit a short supplemental affidavit from Ms. Treppa that addresses new issues raised by the First Amended Complaint. *See* Supplemental Affidavit of Sherry Treppa ("Supp. Treppa Aff."). But the Court need not dwell on the extensive factual record demonstrating the Tribe's ownership and control of its lending businesses. Plaintiffs' suit invokes inapplicable laws and targets parties protected by immunity. Those fundamental flaws, and others set forth below, require dismissal.

I. THE LOANS ARE LAWFUL UNDER TRIBAL LAW, WHICH PLAINTIFFS AGREED APPLIES.

Plaintiffs' claims depend on the applicability of Virginia law to their loans. That point is obvious for the effort to enforce and obtain a declaration regarding "Virginia's general usury law" against Tribal Defendants. First Am. Compl., ECF No. 54, ¶ 209; *see also id.* at ¶ 232. It is likewise true for the RICO claims, which allege an "unlawful debt." *Id.* at ¶ 186. RICO defines that term as a debt incurred "at a rate usurious under State or Federal law, where the usurious rate

is at least twice the enforceable rate." 18 U.S.C. § 1961(6). There is no federal usury rate, *see* 12 U.S.C. §§ 85, 5517(o), so Plaintiffs' loans could be "unlawful" only if they violate Virginia law.

The loans do not. Plaintiffs agreed when taking out the loans that Tribal law, not Virginia law, would govern. And there is no dispute that, under Tribal law, the loans are lawful. Because Virginia law does not apply, there is no "unlawful debt," and all of Plaintiffs' claims must be dismissed. *See, e.g.*, *Wagner v. Farmers & Merchs. State Bank of Bloomfield, Neb*., 787 F.2d 444, 445 (8th Cir. 1986) (RICO action was "clearly without merit" where plaintiffs "could allege no set of facts establishing that . . . the defendants conspired to create unlawful debts").

A. Plaintiffs' Loan Agreements Expressly Provide That Tribal Law Governs.

Each agreement signed by Plaintiffs stated that the loan is "governed by applicable tribal law, including but not limited to the Habematolel Tribal Consumer Financial Services Regulatory Ordinance." Treppa Aff., ECF No. 44, ¶ 237.[1] The Tribe's law—like federal law and the laws of states such as Arizona, Idaho, Massachusetts, Nevada, South Dakota, and Utah—sets no cap on interest rates. *See* Treppa Aff. Ex. 103, ECF No. 45-53 (HPUL Tribal Consumer Financial Services Regulatory Ordinance), at 20-21;[2] 12 U.S.C. §§ 85, 5517(o) (no federal usury rate).

Under Fourth Circuit precedent, Virginia conflict-of-law rules govern whether Tribal law applies in this case. *See In re Merritt Dredging Co.*, 839 F.2d 203, 205-06 (4th Cir. 1988);

[1] The Court may consider Plaintiffs' loan agreements in resolving Tribal Defendants' Rule 12(b)(6) motion. *See Sec'y of State for Defence v. Trimble Navigation Ltd*., 484 F.3d 700, 705 (4th Cir. 2007) (courts may "consider documents attached to the . . . motion to dismiss, so long as they are integral to the complaint and authentic") (citations omitted). Plaintiffs' loan agreements are of unquestioned authenticity, and they are integral to the complaint because Plaintiffs' claims "turn on, [or] are . . . otherwise based on" the agreements' terms. *Goines v. Valley Community Services Board*, 822 F.3d 159, 166 (4th Cir. 2016).

[2] The content of foreign law is a legal issue, so Tribal laws may be considered on a motion to dismiss. *See, e.g.*, *de Fontbrune v. Wofsy*, 838 F.3d 992, 996-1000 (9th Cir. 2016); *Eagle Paper Int'l, Inc. v. Expolink, Ltd.*, No. 2:07cv160, 2008 WL 170506, at *6 (E.D. Va. Jan. 17, 2008).

DiFederico v. Marriott Int'l, Inc., 714 F.3d 796, 807 (4th Cir. 2013). Virginia law is unequivocal: Where, as here, "parties to a contract have expressly declared that the agreement shall be construed as made with reference to the law of a particular jurisdiction, [Virginia courts] will recognize such agreement and enforce it, applying the law of the stipulated jurisdiction." *Paul Bus. Sys., Inc. v. Canon U.S.A., Inc.*, 397 S.E. 2d 804, 807 (Va. 1990).

This rule makes good sense. It "gives effect to the legitimate expectations of the parties" by making it possible for the parties to know in advance what rules will govern any disputes. *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 654 (4th Cir. 2010) (citation omitted); *see also JAAAT Tech. Servs., LLC v. Tetra Tech Tesoro, Inc.*, No. 3:15CV235, 2017 WL 4003026, at *6 (E.D. Va. Sept. 11, 2017) (respecting parties' choice of law "encourages predictability and uniformity"). As the Fourth Circuit has explained, contractual choice-of-law provisions are "an almost indispensable precondition to achievement of the orderliness and predictability essential to" economic relations. *Albemarle Corp.*, 628 F.3d at 654 (internal quotation marks and citation omitted).

The Virginia Supreme Court has applied these principles to determine that another state's laws governed a consumer loan, even where, as here, that law did not include a usury limitation. In *Settlement Funding*, the plaintiff alleged that a lender charged an unreasonable interest rate on a loan collateralized by Virginia lottery winnings. 645 S.E.2d at 437. The parties had agreed that Utah law would apply, and that state allows lenders and borrowers to agree to interest rates with no cap. *Id.* at 438. Even though Virginia law imposes usury limits, the Supreme Court enforced the agreement, concluding that "the parties' choice of substantive law should be applied." *Id*.

There is no basis for a different outcome here. If the parties had agreed to apply Utah law, the interest rates charged would be lawful under *Settlement Funding*. The parties' choice of Tribal

law is indistinguishable. The Tribe exercised its sovereign right to make the same policy choice regarding interest rates as Utah, and the choices of Tribal sovereigns are entitled to the same weight as those of a state like Utah. *See, e.g.*, *Montana v. United States*, 450 U.S. 544, 565 (1981) (tribes "retain inherent sovereign power" to order their interactions with consenting non-members); 12 U.S.C. § 5481(27) (Consumer Financial Protection Act defines "State" to include states and tribes). Indeed, Virginia has acknowledged the Tribe's sovereignty in concluding that the Tribal businesses are "not required to be licensed" under Virginia law and are not subject to regulation by the state. Treppa Aff., ECF No. 44, ¶ 25; *id.* Ex. 2, ECF No. 44-3, at 2.

B. This Case Presents No "Exceptional Circumstances" To Warrant Setting Aside Plaintiffs' Agreement That Tribal Law Governs.

Virginia "presumes contracts to be valid"—even if "entered into by parties of unequal bargaining power"—and thus a choice of law provision can be set aside only if the party seeking to invalidate it demonstrates "exceptional circumstances." *Global One Comm. v. Ansaldi*, No. C165948, 2000 WL 1210511, at *2 (Va. Cir. Ct. May 5, 2000); *see also*, *e.g.*, *Colgan Air, Inc. v. Raytheon Aircraft Co*., 507 F.3d 270, 275 (4th Cir. 2007) ("Virginia law looks favorably upon choice of law clauses in a contract, giving them full effect except in unusual circumstances."). Plaintiffs thus must demonstrate that the provision is "unconscionable or in contravention of public policy." *Canal Ins. Co. v. Lebanon Ins. Agency, Inc.*, 504 F. Supp. 2d 113, 118 (W.D. Va. 2007).

The Tribal businesses previously demonstrated that Tribal law applies here. *See* ECF No. 43 at 24-29. Plaintiffs' only response was to add a summary allegation that the choice-of-law provision in the loan agreements is "unconscionable." First Am. Compl., ECF No. 54, ¶ 211. Plaintiffs do not back up that conclusory statement in any way. Plaintiffs' silence on this issue is not surprising: Established precedent requires that Plaintiffs' agreements be enforced.

1. ***Applying Tribal Law Is Not Contrary To Virginia's Public Policy.***

Settlement Funding precludes any showing by Plaintiffs that applying Tribal law would be "contrary to the public policy of [Virginia]." *Willard v. Aetna Cas. & Sur. Co*., 193 S.E.2d 776, 778 (1973). The plaintiff there sought to invalidate the choice-of-law clause because it exposed a Virginia borrower to an interest rate that, although legal under the chosen law, was contrary to Virginia's "public policy to protect its citizens from usurious and high rate loans." *Settlement Funding*, Brief of Appellee at *4, *available at* 2006 WL 4701777. The Virginia Supreme Court rejected that argument. *See* 645 S.E.2d at 439. Nothing about the agreements here warrants a different conclusion.

If anything, the federal policy in favor of developing tribal self-sufficiency makes this an even more clear-cut case. In *Settlement Funding*, there was no reason to privilege Utah law over Virginia's usury statute other than the parties' agreement. Utah's connection to the transaction was simply its licensing relationship with the lender. *See* 645 S.E.2d at 438. Here, the Tribe licensed the operations of the Tribal lending entities. And both Congress and the courts have made clear that the Tribe has a special interest in enforcing its own lending laws. Time after time, Congress has recognized the importance of tribal "self-determination regarding governmental authority and economic development." 25 U.S.C. §§ 5601-02; *see also* 25 U.S.C. § 4301(a)(6) (similar); 25 U.S.C. § 5302(b) (similar); 25 U.S.C. § 2701(4) (similar). Tribal enterprises are "critical to the goals of tribal self-sufficiency because such enterprises in some cases may be the only means by which a tribe can raise revenues," due to the "insuperable (and often state-imposed) barriers [t]ribes face in raising revenue through more traditional means, such as income and property taxes." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 810 (2014) (Sotomayor, J., concurring) (internal quotation marks and citation omitted); *see also* 25 U.S.C. § 4301(a)(7), (8).

The Fourth Circuit has recognized the same basic point. *See Big Picture*, 929 F.3d at 179. If the Tribe is not allowed to make the same sovereign legal policy choices as Utah and the other states, the judicial system will have imposed an improper barrier to economic development and tribal self-determination, contrary to Congress's controlling policy determination.

2. *The Choice-Of-Law Clauses Are Not Unconscionable.*

Plaintiffs also cannot carry their burden of demonstrating that the choice of law provision is unconscionable. Establishing unconscionability requires extraordinary proof. The provision must "shock[] the conscience"; in other words, Plaintiffs must demonstrate that the provision is "one that no man in his senses and not under a delusion would make, on the one hand, and [that] no fair man would accept on the other." *Fransmart, LLC v. Freshii Dev., LLC*, 768 F. Supp. 2d 851, 870-71 (E.D. Va. 2011) (quoting *Mgmt. Enters., Inc. v. Thorncroft Co.*, 416 S.E.2d 229, 231 (Va. 1992)); *see also*, *e.g.*, *Sydnor v. Conseco Fin. Servicing Corp*., 252 F.3d 302, 305 (4th Cir. 2001) (an unconscionable contract provision is "one which no reasonable person would enter into, and the 'inequality must be so gross as to shock the conscience'") (citation omitted). Plaintiffs must demonstrate unconscionability with "clear and convincing evidence." *Fransmart*, 768 F. Supp. 2d at 871 (citing *Pelfrey v. Pelfrey*, 487 S.E.2d 281, 284 (Va. Ct. App. 1997)).

Plaintiffs do not allege that only someone "under a delusion" would agree to Tribal law. Plaintiffs' challenge to Tribal law is based entirely on the absence of a usury limit. But as noted above, other states have made the same policy choice, and the Virginia Supreme Court held in *Settlement Funding* that—as a matter of law—it was not delusional for a borrower to agree to the application of one of those states' laws. The same must be true with respect to Tribal law, which provides added benefits to consumers by incorporating a number of federal consumer protections, a regulatory regime that involves licensing requirements and audits of the Tribe's lending

operations, and a fair and neutral arbitration process. *See* Treppa Aff., ECF No. 44, ¶¶ 69-70, 228-35. Choosing to apply a set of laws that promise certain consumer protections and not others—as consumers throughout this country have elected to do—cannot be called "delusional."

Solomon v. American Web Loan does not compel a different result. The court there declined to apply Tribal law at the motion to dismiss stage because the complaint "*alleged facts* supporting a claim" of unconscionability. No. 17cv145, 2019 WL 1320790, at *8 (E.D. Va. Mar. 22, 2019) (emphasis added). For example, the *Solomon* plaintiffs alleged that "the choice of law provisions were not disclosed to them." *Id*. Plaintiffs have not made, and cannot make, similar allegations here, as (1) Plaintiffs received the loan agreements as part of the application process, *see* Treppa Aff., ECF No. 44, ¶¶ 224-25, (2) those agreements state unequivocally that Tribal law governs, *see id.* ¶ 237, and (3) each Plaintiff acknowledged reviewing the agreement, *see id.* ¶¶ 224-25. In these circumstances, Plaintiffs have not carried their heavy burden to invalidate their agreement to apply Tribal law. And under Tribal law, the loans are lawful, precluding these claims.

II. THE COURT LACKS JURISDICTION OVER PLAINTIFFS' CLAIMS AGAINST OFFICIALS OF A SOVEREIGN GOVERNMENT.

Plaintiffs' decision to replace tribal businesses with tribal government officials makes their case weaker, not stronger, from a sovereign immunity perspective.

Indian tribes are "separate sovereigns pre-existing the Constitution" that "exercise inherent sovereign authority." *Bay Mills*, 572 U.S. at 788 (internal quotation marks omitted). "Among the core aspects of sovereignty that tribes possess" is "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Id.* at 782 (internal quotation marks omitted). Only Congress can overcome that immunity: "[T]he doctrine of tribal immunity [is] settled law" that requires "dismiss[al of] any suit against a tribe absent congressional authorization (or a waiver)." *Id.* at 789.

There can be no doubt that Tribal Defendants have absolute immunity for their legislative actions, including enacting a lending ordinance to govern all lending operations, Treppa Aff., ECF No. 44, ¶ 69, and incorporating several lending businesses and service providers under Tribal law, *id.* ¶¶ 72-76. "The principle that legislators are absolutely immune for their liability for their legislative activities has long been recognized in Anglo-American law." *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) (recognizing absolute legislative immunity for local legislators); *Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985) (extending legislative immunity to "individual members of [a] Tribal Council"). There likewise is no doubt that the Tribal businesses themselves are entitled to sovereign immunity in light of *Big Picture*'s clear holding and Plaintiffs' decision to drop all claims against the Tribal businesses.

Those well-established forms of immunity would be reduced to mere pleading formalities if Plaintiffs' suit were allowed to proceed. The ability to enact laws and set policy is a core aspect of sovereignty, and yet the relief Plaintiffs seek would nullify the Tribe's laws and policies by dictating that it must comply with the contrary law of a state that has no political or regulatory power over the Tribe. The businesses' sovereign immunity as arms of the Tribe would be meaningless if their operations could be enjoined by suing the government officials who direct and control those operations. And the recognized benefits immunity is meant to secure—including political self-determination and economic self-reliance, *see Big Picture*, 929 F.3d at 185—would be illusory if Plaintiffs could obtain the exact relief they initially sought by changing a handful of words in the Complaint.

Plaintiffs' theory of the case is thus at odds with common sense. As explained below, it is also at odds with the law. Plaintiffs have not offered anything—let alone the requisite Congressional authorization—allowing them to abrogate Tribal Defendants' immunity.

A. Because Plaintiffs' Lawsuit Seeking To Enjoin Tribal Officials Is Really A Suit Against The Tribe, Sovereign Immunity Precludes It.

Sovereign immunity does not just apply to suits against the government itself—it "also extends to . . . officers acting in their official capacity." *Martin v. Wood*, 772 F.3d 192, 195 (4th Cir. 2014) (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res*., 532 U.S. 598, 609 n.10 (2001)). That principle applies with full force to Tribal governmental officials. *See, e.g.*, *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985) ("Because all the individual defendants here were acting within the scope of their delegated authority, Hardin's suit against them is also barred by the Tribe's sovereign immunity."); *Wallett v. Anderson*, 198 F.R.D. 20, 24 (D. Conn. 2000) (similar).

This principle reflects the fact that "lawsuits brought against employees in their official capacity represent only another way of pleading an action against an entity of which an officer is an agent, and they may also be barred by sovereign immunity." *Lewis v. Clarke*, 137 S. Ct. 1285, 1290-91 (2017) (internal quotation marks omitted); *see also*, *e.g.*, *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978); *Andrews v. Daw*, 201 F.3d 521, 524 (4th Cir. 2000) ("[A] suit against a government official in his official capacity is in reality nothing more than a suit against the government."). A plaintiff thus "cannot circumvent tribal immunity by merely naming officers or employees of the Tribe." *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004).

As both the Supreme Court and the Fourth Circuit have made clear, a court confronting an official capacity lawsuit must determine "whether the sovereign is the real party in interest," such that sovereign immunity applies. *Lewis*, 137 S. Ct. at 1290-91; *see also Martin*, 772 F.3d at 195 (similar). "The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Pennhurst*, 465 U.S. at 101; *see also Lewis*, 137 S. Ct. at 1290 (court must evaluate if "the remedy sought is truly against the

sovereign"). The Fourth Circuit has adopted a slightly more fulsome analysis, requiring courts to "examin[e] *the substance* of the claims," including with respect to (1) whether the allegedly unlawful actions of the officials were tied to their official duties; (2) whether the sovereign will bear the burden of any relief granted; (3) whether a judgment against the official would be institutional and official in character, such that it would operate against the sovereign; (4) whether the actions at issue were taken to further the sovereign's interest; and (5) whether the individual's actions were *ultra vires*. *Martin*, 772 F.3d at 196 (emphasis in original). *Martin* provides one example of how this analysis works: There, the court concluded that Plaintiffs' lawsuit truly was against the sovereign itself because it sought to enjoin conduct by government officials that had been authorized and funded by the state. *Id.*

Applying these principles, courts have repeatedly dismissed claims seeking injunctive relief against Tribal officials based on a determination that the Tribe would bear the weight of the injunction. For example, in *Taylor v. Ala. Intertribal Council Title IV J.T.P.A.*, the Eleventh Circuit rejected an attempt to bring *Ex parte Young* claims regarding alleged employment discrimination against board members of an intertribal council. 261 F.3d 1032, 1036 (11th Cir. 2001). As the court explained, "a review of the claim shows" that "there is no question that the [council] is the real party of interest," because "any equitable and injunctive relief provided (such as reinstatement) would conflict with the [council's] right to hire persons in accordance with its desire to promote Indian self government." *Id.*; *see also*, *e.g.*, *Kenai Oil & Gas, Inc. v. Dept. of Interior*, 522 F. Supp. 521, 531 (D. Utah 1981) (rejecting *Ex parte Young* claim against members of a tribe's Business Committee that were "essentially against the tribe itself" and sought relief "the court would be powerless to order the tribe to do"), *aff'd on other grounds*, 671 F.2d 383 (10th Cir. 1982); *Great Plains Lending, LLC v. Conn. Dep't of Banking*, 17 CV 6038913, 2018

WL 6622189, at *8 (Conn. Super. Ct. Nov. 19, 2018) (rejecting an official capacity suit against a tribal member; the tribe was "the real party in interest because the cease and desist orders directed at [the tribal member] would restrain not just [the member] but also the tribe from acting").

Under this analysis, whatever remains of Plaintiffs' claims, *see supra* at 11-12, must be dismissed. Plaintiffs aim to stop the Tribe from operating its lending businesses; Tribal Defendants are simply the latest vehicles for that effort. That was evident from the fact that the First Amended Complaint is virtually identical to the original complaint. But it is also clear as day in Plaintiffs' allegations: Plaintiffs assert that by suing the "members comprising the Tribal Council," they hope "to shut down the operations of the Tribal Lending Entities." First Am. Compl., ECF No. 54, ¶ 54. There is no dispute that the actions Tribal Defendants take are authorized by and designed to benefit the Tribe. And the Tribe will bear the burden of the injunction; Tribal Defendants may be the ones named in any court order, but it will be the Tribe's laws that are disregarded, the Tribe's budget that dwindles, and the Tribe's programs that have to be cut as a result of reduced means. Because any injunction would, for all practical purposes, "operate against" the Tribe, Plaintiffs' lawsuit is barred by sovereign immunity. *Pennhurst*, 465 U.S. at 101.

The Fourth Circuit's ruling in *Big Picture* underscores this point. The court there clarified the arm-of-the-tribe analysis to emphasize the "policies underlying tribal sovereign immunity." 929 F.3d at 177. As the court explained, "the extent to which arm-of-the-tribe immunity promotes the purposes of tribal sovereign immunity is too important to constitute a single factor and will instead inform the entire analysis." *Id.* The court then stressed that the lending entities at issue there had "increased the Tribe's general fund, expanded the Tribe's commercial dealings, and subsidized a host of services for the Tribe's members"—the goals immunity is meant to facilitate. *Id.* at 185. "A finding of no immunity," the court found, would weaken the Tribe's ability to

govern itself according to its own laws, become self-sufficient, and develop economic opportunities for its members." *Id.* The court thus foreclosed *all* claims against the lending businesses, including the plaintiffs' claims for "declaratory and injunctive relief." *Id.* at 175.

If this lawsuit were allowed to proceed, *Big Picture* would not be worth the paper it is printed on. The Fourth Circuit held that the lending arms of a Tribe are entitled to sovereign immunity where their activities are controlled by Tribal officials. *Id*. at 182 ("Big Picture is answerable to the Tribe at every level, which supports immunity."). Allowing Plaintiffs to enjoin those Tribal officials nullifies not only the lending entities' immunity but also the recognized rationale for it. The injunction sought here also sweeps further than *Big Picture* because it would prevent the Tribe from *ever* availing itself of this critical economic opportunity. *See* First Am. Compl., ECF No. 54, ¶ 235. And there can be no doubt that such an injunction would have similarly devastating effects on the Tribe. Under the direction of Tribal Defendants, the Tribal businesses have expanded in size and scope and funded virtually the entire Tribal operating budget and the beneficial programs that the budget funds. *See* Treppa Aff. ¶¶ 255-78. It is impossible to imagine the Fourth Circuit intended to allow Plaintiffs, through artful pleading, to eviscerate these successes in "tribal self-governance and tribal economic development," *Big Picture*, 929 F.3d at 185, and obtain practically identical relief to what its decision foreclosed.

B. Plaintiffs Cannot Overcome The Tribe's Sovereign Immunity By Invoking Ex parte Young.

Plaintiffs' claim that they can overcome the Tribe's sovereign immunity by seeking to "enjoin the tribal officials from their ongoing violations of federal and state law" is a non-sequitur. First Am. Compl., ECF No. 54, at ¶ 6. *Ex parte Young* created a limited pathway around sovereign immunity for suits seeking forward-looking relief against specific government officials that have violated the law. *See Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1092-93 (9th

Cir. 2007). It is not a license for suing *the sovereign itself*, which is what Plaintiffs have done by suing every member of the Tribe's governing body. Moreover, *Ex parte Young* permits injunctions to vindicate substantive *federal* rights. 209 U.S. 123 (1908). The Supreme Court and the Fourth Circuit have since made clear—several times over—that federal courts cannot order similar relief under state law or RICO.

1. *There Is No Legal Basis For Plaintiffs' Efforts To Enjoin Alleged Violations Of State Law By Tribal Governmental Officials.*

Even if Virginia law applied here (and it does not, *see supra* at I), the Supreme Court has repeatedly held that *Ex parte Young*'s limited intrusion on sovereign immunity does not extend to cases involving claimed state-law violations. The *Ex parte Young* theory protects the "interest in having *federal* rights vindicated in federal courts." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 274 (1997) (emphasis added). The doctrine is "inapplicable in a suit against state officials *on the basis of state law.*" *Pennhurst*, 465 U.S. at 106 (emphasis added); *see also*, *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 262 (2011) (Kennedy, J. concurring) ("*Pennhurst* declined to extend *Young* to suits alleging a state-law violation, for without the need to ensure the supremacy of *federal law* there was no justification for restricting state sovereignty.") (emphasis added).

Plaintiffs have provided no basis for departing from this well-established precedent. They cling to an out-of-circuit case, *Gingras v. Think Finance, Inc.*, that purported to create a new, "*Ex parte Young*-by-analogy" claim for alleged state-law violations by tribal officials. 922 F.3d 112, 121 (2d Cir. 2019). But that decision—and the gerrymandered cause of action it created—is based

on a fundamentally incorrect reading of *Bay Mills*, 572 U.S. 782.[3] And even if *Gingras* were correct, it does not extend to the on-reservation conduct challenged in this lawsuit or create a right to an injunction where none exists under Virginia law.

Bay Mills involved a question that has nothing to do with the issues presented here. The question there was one of statutory interpretation—whether the Indian Gaming Regulatory Act ("IGRA") abrogated immunity for a suit by Michigan seeking to enjoin off-reservation tribal gaming within the state. The Court held that IGRA did not, concluding that the statute abrogated immunity only for on-reservation violations, and that the tribe's immunity could not be diminished further without clear Congressional direction. *Id*. The Court then remarked, in two lines of *dicta*, that Michigan could regulate off-reservation gaming in other ways, such as by "bring[ing] suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license." *Id.* at 796.[4] Those two lines of *dicta* are what *Gingras*, and now Plaintiffs, invoke in support of their novel riff on *Ex parte Young*.

Those stray sentences cannot sanction Plaintiffs' claims. *First*, there is no reason to think *Bay Mills* created a new state-law cause of action of any sort. Under the Second Circuit's

[3] Notably, the Second Circuit had previously affirmed a decision rejecting state-law claims against tribal officials because "the doctrine of *Ex parte Young* applies to violations of *federal law only*." *Warren v. United States*, 859 F. Supp. 2d 522, 543 (W.D.N.Y. 2012) (emphasis added), *aff'd*, 517 F. App'x 54 (2d Cir. 2013).

[4] *Gingras* suggested that "[t]he ability to sue tribal officials for violations of state law" was "necessary to [the *Bay Mills*] holding" because the concurring and dissenting opinions also discussed this issue. 922 F.3d at 122. That is wrong. Whether language in an opinion is a holding or *dicta* is not determined by counting the number of opinions that discuss the issue, but by whether that language was "necessary to [the] result" in the opinion for the Court. *Seminole Tribe of Fla. v. Fla*., 517 U.S. 44, 66-67 (1996). The Court resolved the only issue in *Bay Mills*—the IGRA statutory interpretation question—by looking to IGRA itself. *See* 572 U.S. at 791-95. Any stray comments about how the Court might address injunctions against tribal officials were not necessary to that holding, making them *dicta*.

interpretation, these two sentences of *dicta* run squarely contrary to a long line of Supreme Court *holdings* preventing the enforcement of state law against sovereigns through *Ex parte Young*. *See supra* at 17-18.[5] The Supreme Court surely did not overrule those cases by implication. *See Bowles v. Russell*, 551 U.S. 205, 209 n.2 (2007) ("Given the choice between calling into question some dicta in our recent opinion and effectively overruling a century's worth of practice, we think the former option is the only prudent course."). Nor is it reasonable to assume that the Court intended so cavalierly to create a new cause of action in clear tension with those precedents and Congressional Indian policy.[6]

Second, interpreting *Bay Mills* to create a new state-law cause of action only against *tribes*, as *Gingras* did, 922 F.3d at 122-23, would contravene several other principles of black-letter law. As the Supreme Court made clear in *Bay Mills* itself, only Congress can abrogate tribal sovereign immunity. 572 U.S. at 788 ("[U]nless and until Congress acts, the tribes retain their historic sovereign authority.") (internal quotation marks omitted); *see also Big Picture*, 929 F.3d at 185 ("It is Congress—not the courts—that has the power to abrogate tribal immunity"). The *Bay Mills* Court went on to describe the "enduring principle of Indian law" that "courts will not lightly assume that Congress in fact intends to undermine Indian self-government," and made clear that

[5] The *Gingras* court's suggestion that it could avoid *Pennhurst* simply by creating a new cause of action "analogous to *Ex parte Young*," 922 F.3d at 120-21, is startling. Lower courts cannot evade binding precedent by making up a new claim that (they assert) is not subject to restrictions the Supreme Court has placed on a fundamentally identical cause of action. If it were otherwise, there would be nothing stopping a court from applying the same logic in *Gingras* to *state* government officials.

[6] The two cases *Bay Mills* cited along with these sentences confirm the point. *See Bay Mills*, 572 U.S. at 796. One was *Ex parte Young*, which, as discussed above, does not extend to state-law violations. The other was *Santa Clara Pueblo v. Martinez*, which recognized in passing that tribal officers may be subject to declaratory injunctive suits to enforce *federal law*—in other words, an *Ex parte Young* suit. 436 U.S. 49, 59 (1978). Plaintiffs' reasoning is apparently that the Supreme Court did not just invent a new cause of action in *Bay Mills* that overruled decades of precedent, but did so without citing any supporting authority.

"[u]nless Congress has authorized [plaintiffs'] suit, . . . precedents demand that it be dismissed." 572 U.S. at 790-91. It is impossible to fathom that pages later, the Court arrogated to itself a role reserved for Congress and adopted a position contrary to its expressed intent. *See* 12 U.S.C. § 5481(27) (act of Congress regarding financial services defining "State" to include states and federally recognized Indian tribes); *see supra* at 9-10.

Recognizing a tribal-only cause of action would also vitiate the long-standing principle that tribal and state sovereigns should be treated alike—which was reaffirmed by the Supreme Court *after Gingras* was briefed and argued. *Lewis*, 137 S. Ct. at 1291 (examining precedents governing suits against state officials and concluding that "[t]here is no reason to depart from these general rules in the context of tribal sovereign immunity"). The Fourth Circuit recognized this same principle in *Big Picture*, as have many other courts. *See* 929 F.3d at 176-77 (analogizing tribal immunity to state sovereign immunity principles); *N. States Power Co. v. Prairie Island Mdewakanton Sioux Indian Cmty*., 991 F.2d 458, 460 (8th Cir. 1993) ("*Ex parte Young* applies to the sovereign immunity of Indian tribes, just as it does to state sovereign immunity."); *Vann v. U.S. Dep't of the Interior*, 701 F.3d 927, 929-30 (D.C. Cir. 2012) (similar); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1153-54 (10th Cir. 2011) (similar).

Third, even accepting the Second Circuit's misinterpretation of *Bay Mills*, nothing in the opinion supports allowing *private plaintiffs* to seek the type of injunction requested here. The plaintiff in the hypothetical lawsuit suggested by the Court was the State of Michigan, and contrary to the Second Circuit's cursory reasoning in *Gingras*, this distinction makes a difference. "States are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts v. E.P.A*., 549 U.S. 497, 518 (2007). Lawsuits brought by a state against governmental officials of another sovereign belong in federal court under the original design of the Constitution, and do not implicate

the same concerns about suits by private parties against state officials that led to the adoption of the Eleventh Amendment. *See* U.S. Const. art. III, § 1; *id.* Am. XI; *see also Franchise Tax Bd. of Ca. v. Hyatt*, 139 S. Ct. 1485, 1495, 1499 (2019) ("Article III [provides] a neutral federal forum in which the States agreed to be amenable to suits brought by other States," while holding that states "retain[] immunity from private suits, both in their own courts and in other courts"). Further, states seeking to sue officials of a foreign government will presumably give due consideration to principles of comity that inform productive relationships between sovereigns in our federal system. Private plaintiffs are under no obligation to consider these principles, which could visit serious harm on important intergovernmental relationships between states and tribes and potentially insert private plaintiffs into compacting and other negotiations between sovereigns. For all these reasons, there is no reason to view *Bay Mills* as providing Plaintiffs here with a cause of action to enforce Virginia law against the Tribal government.

Finally, even if *Gingras* permitted suits by private plaintiffs, it would not aid Plaintiffs here. For one thing, the Second Circuit was unequivocal that it was permitting suits involving only "conduct occurring off of the reservation." 922 F.3d at 120. But in *Big Picture*, this Court concluded the lending activities occurred *on* the tribe's reservation. 329 F. Supp. 3d 248, 264 (E.D. Va. 2018) ("[B]ecause all loan applications are approved by Big Picture employees on the Reservation, all consumer loans are originated there."). The same conclusion follows here. *See* Treppa Aff., ECF No. 44, ¶ 17.

Indeed, each loan agreement made clear that the loans were "made and accepted *in the sovereign territory of the Habematolel Pomo of Upper Lake*." Treppa Aff., ECF No. 44, ¶ 237 (emphasis added); *see also id*. ¶ 241. Plaintiffs' acknowledgement and acceptance of this fact precludes them from arguing that the loans originated elsewhere. In any event, holding that the

location of the transaction is based solely on "a mere determination of the [borrower's] physical location is improper" and would make little sense in the context of "many modern-day contracts involving a reservation-based business." *F.T.C. v. Payday Fin., LLC*, 935 F. Supp. 2d 926, 940 (D.S.D. 2013). Adopting that perspective would also eviscerate modern federal Indian policy and the purposes of sovereign immunity, which are designed to encourage Tribes to seek out new business ventures like e-commerce. *See Big Picture*, 929 F.3d at 180-81; *supra* at 9-10.

Moreover, *Ex parte Young* does not create a right to an injunction where the substantive law being enforced does not allow for one. *See Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015) ("The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations."). The Virginia laws Plaintiffs have invoked contemplate an injunction only against the "lender" to stop collections on usurious loans. *See, e.g.*, Va. Code § 6.2-1541(B). Tribal Defendants are not the lenders; the Tribal lending entities are, and they are no longer parties to this action. *See infra* at III. No Virginia statute authorizes the types of injunctive relief Plaintiffs seek, and so *Ex parte Young* does not either.

In short, the *Gingras* cause of action that Plaintiffs attempt to invoke is a legal fiction with no support in precedent, but even if real, it would not apply here. There is accordingly no valid basis for Plaintiffs' efforts to bring state-law claims against officials of a sovereign government.

2. *RICO Precludes Plaintiffs' Claims For Injunctive Relief Against Tribal Government Officials.*

Plaintiffs' invocation of RICO likewise does not provide a route around the Tribe's sovereign immunity. For starters, Plaintiffs' RICO claim does not invoke any federal right that might be enforceable through an *Ex parte Young* theory. Again, there is no federal usury rate; Plaintiffs' RICO claims merely seek to enforce the Virginia usury limitation. *See supra* at 5-6.

Even if the RICO claim involved a federal right, the statute forecloses the specific relief sought. Plaintiffs seek only "injunctive relief from the Tribal Council Defendants." First Am. Compl., ECF No. 54, ¶ 203. The Fourth Circuit has held that RICO does not provide equitable relief to private parties. *Johnson v. Collins Entm't Co*., 199 F.3d 710, 726-27 (4th Cir. 1999). As the court explained, "[w]hile section 1964(c) of RICO grants private parties a right to seek treble damages from a RICO violator, it makes no mention whatever of injunctive or declaratory relief." *Id*. at 726. If Congress had intended to provide for such remedies, it would have said so. Instead, each chamber considered and rejected a proposal that would have provided for private injunctive relief. *See* 116 Cong. Rec. 35,346-47 (1970); S. Rep. No. 1070, 92 Cong., 2d Sess. 10 (1972).[7]

Courts across the country have also held that government entities cannot be sued under RICO because "RICO requires demonstrating an underlying criminal act, which entails a *mens rea* requirement that a governmental entity cannot form." *Gil Ramirez Grp., L.L.C. v. Houston Indep. Sch. Dist*., 786 F.3d 400, 412 (5th Cir. 2015); *see also*, *e.g.*, *Pedrina v. Chun*, 97 F.3d 1296, 1300 (9th Cir. 1996); *Andrade v. Chojnacki*, 65 F. Supp. 2d 431, 449 (W.D. Tex. 1999); *Anderson v. Collins*, No. 2:96-CV-269, 1998 WL 1031496 (E.D. Ky. July 14, 1998), at *2-3, *aff'd*, 191 F.3d 451 (6th Cir. 1999) (unpublished).[8]

[7] Although the *Gingras* court allowed the plaintiffs to pursue their RICO claims under an *Ex parte Young* theory, it expressly recognized that it could do so only because the precedent in that circuit—unlike in the Fourth Circuit—allows private parties to seek equitable relief under RICO. 922 F.3d at 124.

[8] In reaching the opposite conclusion, *Gingras* relied only on *Genty v. Resolution Tr. Corp*., 937 F.2d 899 (3d Cir. 1991), in which the Third Circuit held that if corporations can be held liable under RICO, so too can governments. This decision, until *Gingras*, was a singular outlier to the broader consensus discussed above. Moreover, *Gingras* speculated that the limitation on RICO other courts have recognized may be limited to cases involving money damages, because it may stem from fear of punishing the taxpayer for a public official's wrongdoing. This assumption is misplaced. Whether a person or entity can form the requisite *mens rea* depends *only* on intent, and

Plaintiffs cannot evade these established precedents by claiming they are suing individual government officers. That is a distinction without a difference in this case, as Plaintiffs have sued every member of the Tribe's Executive Council—in other words, the government itself. Plaintiffs themselves do not respect any such distinction, alleging that their lawsuit targets the "Tribal Council," and seeks "[p]rospective relief enjoining the Tribal Council from continued participation in the enterprise." First Am. Compl., ECF No. 54, ¶ 54.[9] In any event, Plaintiffs are suing Tribal Defendants in their official capacity, meaning they are not suing individuals so much as the governmental seats they occupy. And governmental seats are not subject to liability under RICO. *Compare* 18 U.S.C. § 1961(3) (defining "person" as including "any individual or entity capable of holding a legal or beneficial interest in property") *with Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 ("Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself."). Seats of government are no more capable of forming *mens rea* than governments themselves—a point made clear in the RICO treatise that *Gingras* itself cited:

> Because governmental entities are not subject to RICO liability, governmental employees are also exempt from RICO liability to the extent that they are sued for acting in their official capacities. A lawsuit against a government official acting in his or her official capacity is in substance an attempt to end-run the governmental entity's insusceptibility to suit and to hold the entity liable on principles of respondeat superior in circumstances in which it has no direct liability.

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not on the effect of the relief sought. In any event, this suit would destroy the Tribe's finances, so *Gingras*'s purported justification for finding governments liable would not hold up.

[9] It is likewise no answer for Plaintiffs to evade this limitation by asserting that they have pleaded an enterprise consisting of Tribal Defendants and Defendants Landy and Asner. Count 5 is aimed solely at Tribal Defendants. And as the Tribal businesses already explained, even if Landy and Asner's financial participation in certain loans were enough to constitute an enterprise (it was not), that participation ended in 2014. Treppa Aff., ECF No. 44, ¶¶ 139-47. That precludes Plaintiffs from seeking *forward-looking* relief against Tribal Defendants.

Gregory P. Joseph, Civil RICO: A Definitive Guide § 11A (4th ed. 2015). Holding otherwise would sanction an easy end-run of the limitation on governmental liability under RICO and would mark an unwarranted expansion of the statute into a wide-ranging tool for private plaintiffs to attempt to restructure all manner of tribal, state, and local governmental operations.

III. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO JOIN THE TRIBAL LENDING ENTITIES, WHICH ARE NECESSARY AND INDISPENSABLE PARTIES FOR THE EXTRAORDINARY RELIEF PLAINTIFFS SEEK.

Because Plaintiffs' loan contracts are with the (now-absent) Tribal lending entities, the First Amended Complaint should be dismissed for failure to join necessary parties. Federal Rule of Civil Procedure 12(b)(7) requires dismissal of an action that fails to join an indispensable party as defined by Rule 19. Under Rule 19, dismissal is required if (1) joinder of the absent party is necessary; (2) the absent party cannot be joined, and (3) the absent party is indispensable. Fed. R. Civ. P. 19; *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 552 (4th Cir. 2006). The Tribal lending entities meet this standard.

The Tribal lending entities are necessary parties because they—not Tribal Defendants—have contractual relationships with Plaintiffs. In determining whether a party is "necessary," a court must consider whether "complete relief" can be accorded among the existing parties, and whether the absent party has a "legally protected interest" in the subject of the suit. Fed. R. Civ. P. 19(a). The Fourth Circuit has long recognized that the parties to a contract are necessary under this test. *See, e.g.*, *Teamsters Local Union No. 171 v. Keal Driveaway Co.*, 173 F.3d 915, 918 (4th Cir. 1999). And tribal entities are treated no differently. For example, in *Yashenko*, the Fourth Circuit determined that a tribe was a necessary party in an action by a casino employee against a casino management company that had contracted with the tribe. 446 F.3d at 553. As the court explained, "the plaintiff could not obtain complete relief without suing the tribe; a judgment in the

plaintiff's favor would only bind him and the private employer." *Id.* at 552-53. "Moreover, any judgment on such a claim would threaten to impair the [Tribe]'s contractual interests" and "its sovereign capacity to negotiate contracts and, in general, to govern the reservation." *Id.* at 553 (citing *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002)).

The same principles apply here. Because the Tribal lending entities originated, issued, and will collect on these loans, they are necessary for Plaintiffs to obtain "complete relief." And because this suit seeks to impair the lending entities' contractual relationships with Plaintiffs, the entities have a "legally protected interest" in the outcome. *See, e.g.*, *McClendon v. United States*, 885 F.2d 627, 633 (9th Cir. 1989) (tribe was necessary because it was "a party to the lease agreement sought to be enforced"); *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 546 (2d Cir. 1991) (tribe was necessary because "[a]s a party to an Agreement negotiated for over two decades, the Nation's interest in the validity of the lease agreement is significant"); *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 540 (10th Cir. 1987) (similar).

There is likewise no question that the Tribal lending entities cannot be joined. They are entitled to sovereign immunity in light of *Big Picture*—which Plaintiffs have effectively admitted by dropping their claims against them. *See, e.g.*, *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992) ("The absent tribes, while necessary, cannot be joined due to their sovereign immunity."). "It is wholly at odds with the policy of tribal immunity to put the tribe to this Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it." *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986).

Finally, the Tribal lending entities are indispensable, under Rule 19(b)'s balancing framework, for much the same reasons that they are necessary. The Fourth Circuit adopted this

precise reasoning in *Yashenko*, concluding that any judgment "would prejudice the Tribe's economic interests" and "its interests as a sovereign in negotiating contracts and governing its reservation," and that "there is no way to shape the relief sought in such a way as to mitigate this prejudice." 446 F.3d at 553; *see also*, *e.g.*, *Dawavendewa*, 276 F.3d at 1157 (dismissing action because the plaintiff's suit involved a contract to which the non-joined tribe was a party, and "[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable"); *Pit River Home & Agr. Co-op. Ass'n. v. United States*, 30 F.3d 1088, 1102 (9th Cir. 1994) (dismissing suit because the court "cannot address [plaintiff's] claims without prejudicing the rights of the [tribal party]").[10]

Once again, the same principles apply here. If Plaintiffs are successful, the Tribal lending entities will no longer be able to originate and collect on loans to consumers residing in Virginia, thereby preventing those businesses from exercising their sovereign right to pursue economic opportunities on behalf of the Tribe. There is no way to shape the relief to cure this prejudice; the whole point of the injunction is to stop those activities. And because the lending entities are the real target of Plaintiffs' proposed injunction, there is no way to award adequate relief without them.

[10] Indeed, courts have repeatedly held that where, as here, the necessary party is immune, "there is very little room for balancing of other factors set out in Rule 19(b), because immunity may be viewed as one of those interests compelling by themselves." *Enter. Mgmt. Consultants Inc. v. United States ex rel Hodel*, 883 F.2d 890, 894 (10th Cir. 1989) (quoting *Witchita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986)); *see also, e.g.*, *Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542, 548-49 (2d Cir. 1991).

IV. THE COURT LACKS SUBJECT-MATTER JURISDICTION OVER CERTAIN CLAIMS FOR INJUNCTIVE AND DECLARATORY RELIEF.

A. Plaintiffs Lack Standing To Enjoin Future Lending.

To establish standing, Plaintiffs must show they have a "personal stake in the outcome." *Bishop v. Bartlett*, 575 F.3d 419, 426 (4th Cir. 2009). Federal courts are courts of limited jurisdiction, permitted only to resolve actual controversies, not issue advisory opinions. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101, 103 (1998). In order to request injunctive and declaratory relief, Plaintiffs cannot simply show they have been harmed in the past—they must show that they suffer "present adverse effects" on account of Tribal Defendants' actions. *Bryant v. Cheney*, 924 F.2d 525, 529 (4th Cir. 1991) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-03 (1983)); *see also Friends of the Earth, Inc. v. Gaston Copper Recycling Corp*., 204 F.3d 149, 162-63 (4th Cir. 2000) (similar). Plaintiffs that lack such a present stake do not present a "live controversy of the kind that must exist if [the court is] to avoid advisory opinions on abstract propositions of law." *Incumaa v. Ozmint*, 507 F.3d 281, 287 (4th Cir. 2007) (internal quotation marks omitted). Indeed, the Fourth Circuit has cautioned that "courts should be especially mindful" of "Article III's command" that they "resolve disputes, rather than emit random advice," when "they are asked to award prospective equitable relief." *Bryant*, 924 F.2d at 529.

As a result, to have standing to enjoin a practice that affected them in the past, Plaintiffs must show that they "will again be subjected to" the allegedly unlawful practice. *Id.* Courts routinely dismiss injunctive relief claims where the plaintiff cannot make this showing. *See, e.g.*, *Herrera v. Finan*, 709 F. App'x 741, 745-46 (4th Cir. 2017) (unpublished) (graduating student's claim against university failed because student could not show that she would enroll at the same institution again); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 239 (2d Cir. 2016) (plaintiff lacked standing because, "[e]ven assuming his past purchases . . . resulted in injury and that he may

continue to suffer consequences as a result, he has not shown that he is likely to be subjected to further sales by [the defendant] of" the product in question); *see also City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 283 (2001) (Court lacked jurisdiction because plaintiff "neither now pursues nor currently expresses an intent to pursue a license under [the challenged] law").

Plaintiffs cannot make this showing with respect to their attempt to enjoin Tribal Defendants "from making any loans in Virginia" in excess of the state's usury limitations. First Am. Compl., ECF No. 54, ¶ 203; *see also id*. at ¶ 235. Despite already amending their Complaint, none of the Plaintiffs has made even the bare allegation that he or she intends to borrow from the Tribal lending entities again. Their request for an injunction against future lending activities thus amounts to a request for an advisory opinion to address an eventuality that may never come to pass. Article III precludes that relief.

B. Plaintiffs Bumbray, Blackburn, And Collins Lack Standing To Seek An Injunction Against Collection Efforts.

Three Plaintiffs—Bumbray, Blackburn, and Collins—have no outstanding debt to the Tribal lending entities. Treppa Suppl. Aff. ¶¶ 15-18.[11] As a result, these Plaintiffs also lack standing to stop collection on existing loan obligations. *See* First Am. Compl., ECF No. 54, ¶¶ 203, 223, 235.

Where "the parties lack a legally cognizable interest in the outcome," the Court lacks jurisdiction and may not grant injunctive relief. *Wicomico Nursing Home v. Padilla*, 910 F.3d

[11] Because Tribal Defendants "raise[] standing as the basis for a motion under Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction, . . . the district court may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005) (internal quotation marks omitted).

739, 749 (4th Cir. 2018) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).[12] Applying this principle, the Fourth Circuit in *Bryant* held that a plaintiff lacked standing to challenge an employment evaluation because the evaluation had been expunged and all potential *future* effects had been avoided. 924 F.2d at 529. Similarly, in *Incumaa*, the court dismissed a challenge to publication rules of a university the plaintiff no longer attended. 507 F.3d at 287. The plaintiff, having graduated, no longer "ha[d] a personal stake in the outcome" of the case. *Id.*

The same principle applies to the Plaintiffs here who owe nothing. The order Plaintiffs seek—an order preventing future collection efforts—would be meaningless to those Plaintiffs because they have no outstanding loans and thus face no risk of any future collection efforts. For this reason as well, there is no justiciable dispute between Tribal Defendants and these three individuals, and the Court should dismiss their claims.

CONCLUSION

For the reasons stated above, Plaintiffs' claims against Tribal Defendants should be dismissed with prejudice in their entirety.

[12] The same principle applies to the claims for declaratory relief. *See Int'l Coal. for Religious Freedom v. Maryland*, 3 F. App'x 46, 49-50 (4th Cir. 2001) (unpublished).

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Respectfully Submitted.

/s/ Matthew Skanchy
Matthew Skanchy (Bar No. 89575)
(mskanchy@wilkinsonwalsh.com)
Rakesh Kilaru (*pro hac vice*)
rkilaru@wilkinsonwalsh.com
James Rosenthal (*pro hac vice*)
jrosenthal@wilkinsonwalsh.com
Kosta Stojilkovic (*pro hac vice*)
kstojilkovic@wilkinsonwalsh.com
Beth Wilkinson (*pro hac vice*)
bwilkinson@wilkinsonwalsh.com
WILKINSON WALSH + ESKOVITZ LLP
2001 M Street NW
Washington DC, 20036
Telephone: (202) 847-4000
Fax: (202) 847-4005

Counsel for Tribal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2019, I electronically filed the foregoing document with the Clerk of Court using the ECF system, which will send notification of such filing to the following:

Kristi C. Kelly
kkelly@kellyguzzo.com
Andrew J. Guzzo
aguzzo@kellyguzzo.com
Casey S. Nash
casey@kellyguzzo.com
KELLY GUZZO, PLC
3925 Chain Bridge Road, Suite 202
Fairfax, VA 22030

Leonard A. Bennett
lenbennett@clalegal.com
Craig C. Marchiando craig@clalegal.com
Elizabeth W. Hanes elizabeth@clalegal.com
CONSUMER LITIGATION ASSOCIATES, P.C.
1800 Diagonal Road, Suite 600
Alexandria, VA 22314

James W. Speer
jay@vplc.org
VIRGINIA POVERTY LAW CENTER
919 East Main Street, Suite 610
Richmond, VA 23219

Counsel for Plaintiffs

Thomas J. Perrelli
TPerrelli@jenner.com
JanLarson@jenner.com
Jan A. Larson
JENNER & BLOCK LLP
1099 New York Avenue,NW
Washington DC, 20001
Telephone: (202) 639-6000
Facsimile: (202) 639-6066

Counsel for Defendants Scott Asner and Joshua Landy

DATED: August 9, 2019

Respectfully Submitted.

/s/ Matthew Skanchy
Matthew Skanchy (Bar No. 89575)
mskanchy@wilkinsonwalsh.com
Rakesh Kilaru (*pro hac vice*)
rkilaru@wilkinsonwalsh.com
James Rosenthal (*pro hac vice*)
jrosenthal@wilkinsonwalsh.com
Kosta Stojilkovic (*pro hac vice*)
kstojilkovic@wilkinsonwalsh.com
Beth Wilkinson (*pro hac vice*)
bwilkinson@wilkinsonwalsh.com
WILKINSON WALSH + ESKOVITZ LLP
2001 M Street NW, 10th Floor
Washington, D.C. 20036
Telephone: (202) 847-4000
Fax: (202) 847-4005

Counsel for Tribal Defendants