SUPREME COURT

OF THE

STATE OF CONNECTICUT

SC 20340

GREAT PLAINS LENDING LLC, CLEAR CREEK LENDING AND JOHN R. SHOTTON

PLAINTIFFS/APPELLANTS/CROSS-APPELLEES

v.

STATE OF CONNECTICUT, DEPARTMENT OF BANKING, JORGE PEREZ, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE DEPARTMENT OF BANKING

DEFENDANTS/APPELLEES/CROSS-APPELLANTS

REPLY BRIEF OF PLAINTIFFS/APPELLANTS ON THE APPEAL AND BRIEF OF CROSS-APPELLEES ON THE CROSS-APPEAL

TO BE ARGUED BY:

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INTRODUCTION

In response to the reasoned claims presented in the appellants' opening brief, the appellee/cross-appellant Department of Banking ("DOB") presents myriad inconsistent arguments – championing the trial court in one section of its brief and condemning the same court's analysis in another – and presents numerous irrelevant tangents, leveling inflammatory, inaccurate, and irrelevant charges. DOB Brf. at 1-3. All of this schizophrenic effort is simply designed to distract this Court's attention from the main legal questions at issue in this appeal:

- What test applies when determining whether an entity qualifies as an "arm" of a recognized Native American tribe?
- Is the Chairman of the tribe immune from the DOB's regulatory actions?

It has been five years of battling – and besting – the DOB's efforts to exert regulatory authority over the appellants, two lawful, wholly-owned tribal businesses and the tribe's duly-elected Chairman (the "Tribal Parties"); the time has come to end this litigation.

STANDARD OF REVIEW

In their opening brief, the Tribal Parties cited to this Court's clear statement that the determination of whether an entity is an arm of the tribe and therefore covered by tribal immunity is a legal question and is accorded plenary review on appeal. Appellants' Brf. at 12 (citing *Lewis v. Clarke*, 320 Conn. 706, 710 (2016), *rev'd on other grounds*, 137 S. Ct. 1285 (2017)). The DOB had earlier in this action acknowledged that this was a legal question, as was noted by the trial court in its ruling. MOD at 10, Appendix ("App.") I at A276.

Now, the DOB has performed a 180° turn and argues that, as an administrative agency, it is entitled to deference on these legal issues. DOB Brf. at 11-12. The DOB does not distinguish, or even cite to, this Court's holding in *Lewis v. Clarke*. The decision the DOB does rely on is irrelevant as it neither concerns the arm-of-the-tribe test nor any other legal (as opposed to administrative) issue. DOB Brf. at 12 (citing *Goldstar Med. Servs., Inc. v. Dep't of Soc. Servs.*, 288 Conn. 790, 800 (2008)).

Because the issue of sovereign immunity is a purely legal issue and does not concern the statutory framework over which the Commissioner has a special expertise, his ruling on the arm-of-the-tribe issue is not entitled to any deference by this Court.

> "Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion . . .. Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny, . . . the agency is not entitled to special deference."

Great Plains Lending, LLC v. Conn. Dep't of Banking, 2015 WL 9310700, at *3, App. II at 314-15 (*Great Plains I*) (Schuman, J.) (quoting *Conn. Med. Exam. Bd. v. FOIC*, 310 Conn. 276, 281-83 (2013)). In such cases, where the question is purely legal, this Court has said

that the agency's opinion is "of little value" to its ultimate resolution of the matter. *Aaron v. Conservation Comm'n*, 178 Conn. 173, 178-79 (1979). *See also Okeke v. Comm'r of Pub. Health*, 304 Conn. 317, 324 (2012) (court reviews questions of law under a *de novo* standard with no deference to the agency). *See also infra* at 10-12.

ARGUMENT[1]

This administrative appeal is about one issue: sovereign immunity. The DOB has repeatedly refused to recognize that the Tribal Parties are protected by tribal sovereign immunity, and the trial court erred in failing to correct that fundamental error. The trial court's analysis was flawed from the moment it stated that the Tribal Parties bore the burden of proof to disprove the DOB's authority over them. This flaw was then compounded by the trial court's holding that the arm-of-the-tribe determination should be governed by an overly-intrusive test that fails to adhere to longstanding principles of tribal sovereignty, and then further worsened by the order remanding the matter to the DOB for yet another proceeding, involving not only application of the wrong legal standard but also allowing the taking of new evidence. Finally, while the trial court correctly held that Chairman Shotton is not the "real party in interest" in the underlying administrative action, the court failed to order the DOB to dismiss him as a party. Each of these analytic errors is addressed in turn.

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[1] The DOB did not divide its brief into sections addressing, on the one hand, its arguments as an appellee and, on the other, its arguments as a cross-appellant, instead intermixing the two throughout its brief. *See* Prac. Bk. §§ 67-5(e) & (f) (proscribing how issues on a cross-appeal are to be briefed). Because of this intermixing, the Tribal Parties have retained their initial brief's organizational structure, however, their response to the DOB's argument on cross-appeal that the trial court erred in refusing to adopt the *Sue/Perior* arm-of-the-tribe analysis is presented herein at 9 to 14.

I. THE TRIAL COURT SHOULD HAVE ENTERED JUDGMENT IN THE TRIBAL PARTIES' FAVOR AND ENDED THIS INTERMINABLE LITIGATION

A. The Trial Court Should Not Have Ordered A New Evidentiary Hearing

The trial court properly held that the DOB had committed errors of law which impaired the substantial rights of the Tribal Parties. MOD at 19, 22-23; App. I at A285, A288-89. This holding required the court to sustain the appeal. *See* Conn. Gen. Stat. § 4-183(j). The action should have ended at this juncture and judgment should have entered in favor of the Tribal Parties.

Instead, the trial court ordered a remand to the DOB for a third bite at the apple, a remand that was particularly troubling because it ordered a hearing where the DOB would be free to introduce new evidence.[2] The Tribal Parties outlined in their opening brief why this order was not only improper, but ill-advised. Appellants' Brf. at 13-15 (citing Conn. Gen. Stat. §§ 4-183(j) & (h); *Salmon v. Dep't of Pub. Health and Addiction Servs.*, 259 Conn. 288 (2002); *Clark v. Comm'r of Motor Vehicles*, 183 Conn. App. 426, 441 (2018); *Wakefield v. Comm'r of Motor Vehicles*, 90 Conn. App. 441, *cert. denied*, 275 Conn. 931 (2005)). The DOB's brief offers no response to these arguments, neither distinguishing nor even citing to the authorities offered by the Tribal Parties. For the DOB to now have the opportunity—five years later—to search for evidence to support its rulings, would be patently unfair to the

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[2] When this matter was remanded back in 2016 to the DOB for resolution of the arm-of-the-tribe issue, it was with an explicit judicial direction from Judge Schuman forbidding the DOB from entertaining new evidence. App. II at 351. The DOB raised no objection to this order and, eventually, complied with it.

The Tribal Parties have always been adamantly opposed to the idea that–having intentionally chosen to forego the introduction of evidence of its own–the DOB should be given a chance to rescind this choice. Surprisingly, however, the DOB also opposes a remand for a new evidentiary hearing, arguing that such an order conflicts with the 2016 order issued by Judge Schuman. DOB Brf. at 32.

Tribal Parties and would violate their right to fundamental fairness in administrative proceedings. *See FairwindCT, Inc. v. Conn. Siting Council*, 313 Conn. 669, 710-11 (2014).

B. The DOB Has The Burden Of Proof On The Question Of Its Own Jurisdiction

The DOB makes the false charge that the Tribal Parties failed to "take the opportunity to meet their burden by presenting evidence on the jurisdictional issue of whether they are entitled to sovereign immunity as arms of the tribe (and afford the Department the same opportunity)." DOB Brf. at 12. As the record shows, only the Tribal Parties "presented evidence on the jurisdictional issue." MOD at 24, App. I at 290; *see also* App. I at 86-184 (evidence submitted with motion to dismiss). The DOB–having instituted this regulatory proceeding–offered no evidence in support of its jurisdiction, nor even attempted to obtain information regarding the Tribal Parties' status.

In their opening brief, the Tribal Parties explained why the trial court's holding that the Tribal Parties bore the burden of proof in this case was inappropriate. Appellants' Brf. at 15-19. The trial court paid little attention to this critical issue, supporting its one-paragraph discussion with citations to only two cases, this Court's decision in *Rocky Hill v. SecureCare Realty, LLC*, 315 Conn. 265, 279 (2015), and the California Supreme Court's decision in *Owen v. Miami Nation Enterprises*, 386 P.3d 357 (Cal. 2016). The Tribal Parties explained that neither authority was persuasive as the language relied on from *SecureCare* was dicta, Appellants' Brf. at 16; and, moreover, both decisions are dependent on an Eleventh Amendment Immunity arm-of-the-state analysis which is a poor fit in a case addressing concepts of Indian law. *Id.* at 16-18 (quoting *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1208 (11th Cir. 2012) ("[T]ribal immunity implicates wholly different concerns than are raised by Eleventh Amendment immunity.")

(emphasis added)).

The DOB not only disregards the more-appropriate authorities offered by the Tribal Parties,[3] it even ignores the California Supreme Court's acknowledgement in *Miami Nation* that there is a "lack of consensus across jurisdictions" regarding the use of state sovereignty principles to decide tribal sovereignty issues. 386 P.3d at 368.

As seems evident from the decisions it has chosen to rely on, the DOB endorses the idea that an assertion of Eleventh Amendment immunity is akin to proof of an affirmative defense and should be treated as such for purposes of assigning the burden of proof on the issue. *See generally* DOB Brf. at 14-16. For example, in *Miami Nation*, the California Supreme Court, after noting that "[f]ew arm-of-the-tribe cases have closely considered which party bears the burden of proof," 386 P.3d at 369, elects to follow the precedent of those decisions analyzing "arm of the state" immunity as the equivalent of an affirmative defense. *Id.* at 369-70. Similarly, the DOB depends on *Woods v. Rondout Valley Central School District Board of Education*, 466 F.3d 232 (2d Cir. 2006), asserting that it represents the leading Second Circuit decision in this area. DOB Brf. at 14-15.[4] Again, as an Eleventh

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[3] *See generally* Appellants' Brf. at 17-18 (citing *Cash Advance and Preferred Cash Loans v. Colorado*, 242 P.3d 1099, 1113 (Colo. 2010); *Bales v. Chicksaw Nation Indus.*, 606 F. Supp. 2d 1299, 1301 (D.N.M. 2009); *Sungold Gaming USA, Inc. v. United Nation of Chippewa*, 2002 WL 522886 at *2 (Mich. Ct. App.), *cert. denied*, 467 Mich. 910 (2002)).

[4] The DOB claims *Woods* is the controlling authority on this issue, but *Woods* (1) does not involve tribal sovereign immunity; and (2) fails to cite to or distinguish two earlier Second Circuit decisions which did involve tribal sovereign immunity and placed the burden on the plaintiff to establish jurisdiction, not the tribal entity. *See, e.g., Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 84 (2d Cir. 2001) ("On a motion invoking sovereign immunity to dismiss for lack of subject matter jurisdiction, the plaintiff [*i.e.*, the non-tribal entity] bears the burden of proving by a preponderance of the evidence that jurisdiction exists."); *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004) (case involving claims against Mashantucket Pequot Tribal Council). This Court should not place any reliance on *Woods*.

Amendment decision, the *Woods* Court analogized the issue before it to the pleading of an affirmative defense. 466 F.3d at 237-39.

As expressed in the Tribal Parties' opening brief, the DOB fails to acknowledge that there are critical differences between an Eleventh Amendment analysis and the issue now brought to this Court. Even the cases the DOB relies on concede the thorniness of the question whether an entity claiming immunity must prove its entitlement. *Cf. Miami Nation*, 386 P.3d at 369 ("Few arm-of-the-tribe cases have closely considered which party bears the burden of proof.").

Many of the cases the DOB relies on have placed the burden of proof on the tribal entities on the ground that the tribal immunity claim is akin to an affirmative defense. *See* DOB Brf. at 25-29 (citing *Woods*, 466 F.3d at 237-39; *Miami Nation*, 386 P.3d at 369-70). However, rather than an affirmative defense, the Tribal Parties ask this Court to analogize consideration of this issue to a motion to dismiss for lack of personal jurisdiction. There, although there is a presumption of the regularity of a sheriff's return of service to commence suit,

> "[w]hen a motion to dismiss for lack of personal jurisdiction raises a factual question which is not determinable from the face of the record, the burden of proof is on the plaintiff to present evidence which will establish jurisdiction. [*Standard Tallow Corp. v. Jowdy*, 190 Conn. 48, 54 (1983)]. If the defendant challenging the court's personal jurisdiction is a foreign corporation or a nonresident individual, it is the plaintiff's burden to prove the court's jurisdiction.

Cogswell v. Am. Transit Ins. Co., 282 Conn. 505, 515 (2007) (emphasis added). *See also id.* at 515-16 ("Thus, once the defendant contested personal jurisdiction in the present case, it was the plaintiff's burden to produce evidence adequate to establish such jurisdiction."). It should be noted that *Cogswell* involved an administrative enforcement

proceeding as the plaintiff was Susan Cogswell, the then-Insurance Commissioner who was trying to assert regulatory jurisdiction over the defendant insurer.

Cogswell's application of a burden-shifting mechanism was recently put to use by our Appellate Court in *Stevens v. Khalily*, 194 Conn. App. 626, 629 (2019), where a motion to dismiss (accompanied by affidavits) had raised the claim that the defendants had not been properly served. Over the plaintiff's claims that the affidavits were "conclusory and self-serving," the trial court held that the filing of the affidavits had served to shift the burden of proof to the plaintiff to rebut the averments contained therein. *Id.* at 627-628. The Appellate Court affirmed the trial court, on the basis of this Court's holding in *Cogswell. Id.* at 629.

The DOB did not respond to the Tribal Parties' argument that, at the very least, even if they bore some responsibility to prove their immunity, they had done so by supplying affirmative evidence to support their claim. Appellants' Brf. at 19. This Court should treat the DOB's failure to respond to that evidence (or even conduct a hearing to contest it) as an implicit concession that the Tribal Parties had successfully carried any initial burden they may have had. It was the Department's sole prerogative whether to perform an investigation at the administrative level; it chose not to do so nor to furnish any evidence of its own and therefore failed to rebut the only evidence in the record.

II. THIS COURT SHOULD ADOPT AN ARM-OF-THE-TRIBE TEST CONSISTENT WITH *BREAKTHROUGH* AND *WILLIAMS*

Regardless of which party ultimately bears the burden of proof, the Tribal Parties should prevail in this appeal because they met the legal standard to demonstrate their sovereign status for immunity purposes. As argued in their opening brief, the trial court erred in adopting the arm-of-the-tribe test drawn from *Miami Nation* as that test necessarily

calls for intrusion upon tribal self-governance. Appellants' Brf. at 19-24. And yet the test the DOB proposes, derived from the New York Court of Appeals' outlier decision in *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 24 N.Y.3d 538 (2014), is even worse, representing a distortion of the basic principles of federal Indian law. As explained in more detail below, rather than follow either, this Court should adopt the variant of the Tenth Circuit's broadly-accepted test outlined in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010), which was just recently reaffirmed and applied in *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019).

A. The DOB's Choice Of The *Sue/Perior* Test Is Not Entitled To Deference

The DOB's initial justification for the *Sue/Perior* test is simply that its decision to apply *Sue/Perior* should be given deference as a "determination of policy or judgment." *See* DOB Brf. at 21. This position contradicts longstanding Connecticut administrative law, and if endorsed by this Court, would result in absurdities. Any legal issue decided by an agency, no matter how far outside that agency's realm of expertise, would be accepted by the judiciary under the banner of "deference." Nothing in Connecticut law justifies such a concession by the judicial branch.

To be sure, it is common practice for Connecticut courts to give some measure of deference to decisions by administrative agencies in an appropriate case: "An agency's factual and discretionary determinations are to be accorded considerable weight by the courts." *See Conn. Light & Power Co. v. Texas–Ohio Power, Inc.*, 243 Conn. 635, 643 (1998). But this deference has never risen to the level of infallible administrative agencies, nor has it extended to every type of decision an agency may make.

Typically, agency deference is reserved for "factual and discretionary determinations," not legal determinations. On pure issues of law, agency deference is limited to matters of statutory interpretation regarding the provisions the agency enforces. *Griffin Hosp. v. Comm'n on Hosps. and Health Care*, 200 Conn. 489, 496-97 (1986); *see also Conn. Light & Power Co.*, 243 Conn. at 642 ("Ordinarily, this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes."). Even then, the interpretation must be "time-tested by the [agency]." *Longley v. State Emp. Ret. Comm'n*, 284 Conn. 149, 166 (2007). Purely legal determinations that have "not previously been subject to judicial scrutiny [are] . . . not entitled to deference." *State v. State Emps.' Review Bd.*, 239 Conn. 638, 645 (1997).

In this case, citing the fact that this Court has not announced a "single, definitive, and inflexible [arm-of-the-tribe] test," *see* DOB Br. at 22, the DOB suggests its interpretation is exempt from judicial scrutiny. Nothing in Connecticut law supports this; determination of the proper arm-of-the-tribe test is a purely legal issue. *Breakthrough*, 629 F.3d at 1181 ("This case presents a legal issue—the appropriate test to determine whether economic entities associated with a tribe may share in the tribe's immunity."). In addition, because that legal issue is a matter of federal Indian law—as to which the DOB has no special expertise—agency deference is entirely inappropriate in this context.

Hence, the trial court properly rejected the DOB's attempt to use the doctrine of agency deference to shoehorn the *Sue/Perior* test into Connecticut case law. And, as shown below, the *Sue/Perior* test is not the proper choice for this Court to adopt.

B. The Sue/Perior Test Is Inconsistent With Federal Common Law

The DOB's proposed *Sue/Perior* arm-of-the-tribe test should be rejected on its own accord. Its placement of near-dispositive weight on a single factor—an irrelevant factor at that—is contrary to basic tenets of federal Indian law.

Sue/Perior masquerades as a multifactor test not so different than the other tests used by most of the state and federal courts that have encountered the arm-of-the-tribe issue. It is comprised of nine factors that (in some ways) resemble the factors found in other tests—generally pertaining to tribal ownership, structure, method of formation, purpose, financial relationship, and various forms of control. Where *Sue/Perior* deviates from other tests is the primacy on the issue of the vulnerability of the tribal treasury. In fact, under the *Sue/Perior* test, "[i]f a judgment against a corporation created by an Indian tribe will not reach the tribe's assets, because the corporation lacks the power to bind or obligate the funds of the tribe, then the corporation is not an arm of the tribe." 24 N.Y.3d at 550 (citing *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.*, 86 N.Y.2d 553, 559 (1995) (internal quotation marks omitted)).

Sue/Perior found the issue of direct liability of the tribal treasury to be important based on the reasoning that "[t]he tribes' use of the corporate form protects their assets from being called upon to answer the corporation's debt. But this protection means that they are not the real party in interest." *See id.* at 550–51. This reasoning—lifted from the decision in *Runyon v. Association of Village Council Presidents*, 84 P.3d 437, 441 (Alaska 2004)— has an obvious circularity to it insofar as protection of the tribe's treasury is motivation for using the corporate form in the first place. And, in addition to its substantive analytical shortcoming, *Runyon* is also factually distinguishable, as that case involved an entity formed under *state law*, not tribal law. It is naturally unremarkable that a tribal entity

formed *under state law* would not qualify as an arm of the tribe. As explained by then-Judge Gorsuch:

> Of course, Indian tribes are entitled to sovereign immunity absent congressional abrogation. And, of course, this immunity is not limited by the type of activity involved or where it takes place. But no matter how broadly conceived, sovereign immunity has never extended to a for-profit business *owned by one sovereign but formed under the laws of a second sovereign when the laws of the incorporating second sovereign expressly allow the business to be sued.* And it doesn't matter whether the sovereign owning the business is the federal government, a foreign sovereign, state—or tribe.

Somerlott v. Cherokee Nation Distrib., Inc., 686 F.3d 1144, 1154 (10th Cir. 2012) (Gorsuch, J., concurring). Thus, the principal decision upon which *Sue/Perior* was based, *Runyon*, does not even support the majority's analysis, as the *Sue/Perior* dissent cogently pointed out. *See* 24 N.Y.3d at 560 (Rivera, J., dissenting).

Perhaps wary of its analytical weaknesses, the DOB offers little substantive rationale to support its proposed test. One reason offered by the DOB is that "vulnerability of the tribe's coffers . . .. indicates that the real party in interest is the tribe." DOB Brf. at 28. To be sure, in instances where the tribal treasury is vulnerable, that would in fact indicate that the tribe is the real party in interest. But to say that direct liability of the tribal treasury is *sufficient* to indicate that the tribe is the real party in interest is not equivalent to saying that direct liability is *necessary* for the tribe to be considered the real party in interest. In other words, even this real-party-in-interest reasoning is just yet another way of overemphasizing the role of direct vulnerability of the tribal treasury.

The DOB also argues that *Sue/Perior*'s primacy on direct liability of the tribal treasury is "consistent with federal precedent on the Eleventh Amendment immunity of the States." *See* DOB Brf. at 29. This argument is flawed because Eleventh Amendment

immunity has never hinged upon the "vulnerability of the State's purse." *See id.* Again, vulnerability of the treasury can be *sufficient*, but has never been held to be *necessary*.

Indeed, as the U.S. Supreme Court has explained, even if a State's treasury is not *directly* exposed, a suit can still be considered to be against the State "if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *See Dugan v. Rank*, 372 U.S. 609, 620 (1963). Insofar as the DOB has cited authority suggesting otherwise, those authorities are plainly *dicta.*[5]

Try as it might, ultimately, the DOB cannot provide any sound rationale in defense of *Sue/Perior*. The near-dispositive treatment of direct liability of the tribal treasury is antithetical to the policies underlying the doctrine of tribal sovereign immunity—*i.e.*, tribal self-sufficiency and economic development. After all, it is well known that tribes, unlike their State counterparts, simply cannot raise governmental revenue through the usual means of taxation. Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz. St. L.J. 137, 169 (2004) (noting that "few tribes have any significant tax base"). And it is therefore unsurprising that tribes rely on business revenue to fund their government operations. *Id.* ("[S]uch enterprises may be essential to the fulfillment of the tribe's governmental obligations."). Financial judgments against those entities would have the same (if not greater) devastating impact to tribal budgets as the nullification of income or property taxes would have to state governments. The corporate form of those entities is largely immaterial

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[5] For example, the DOB cites the Second Circuit's ruling in *Woods* for the proposition that "in determining whether a governmental entity qualifies as an arm of the state for Eleventh Amendment immunity purposes, the 'determining factor is the effect of any judgment against the governmental entity.'" 466 F.3d at 243. DOB Brf. at 29. But this quote is taken out of context, as the Second Circuit was merely explaining that liability to the state treasury would be essentially a tie-breaker "if the outcome remains in doubt" after considering a multitude of other factors. 466 F.3d at 243.

when it comes to the impact a judgment would have on the tribal treasury. So, while *Sue/Perior* overlooks the importance of tribal enterprises (and uses corporate form as outcome-determinative), the more holistic *Breakthrough* test, explained *infra*, specifically considers the extent to which the tribe "depends . . . on [the entity] for revenue to fund its governmental functions, its support of tribal members, and its search for other economic development opportunities." *Breakthrough*, 629 F.3d at 1195. Indeed, the trial court correctly declined to adopt the *Sue/Perior* test, in large part because of its "overemphasis on the vulnerability of the tribe's treasury." MOD at 22, App. I at 288. This Court should do the same.

C. The Correct Multifactor Arm-Of-The-Tribe Test Demands Respect For Tribal Sovereignty And Decision Making

Whether properly described as "functional," MOD at 29, App. I at 295, the trial court erred in adopting an arm-of-the-tribe test that requires second-guessing the Tribe's business decisions and supplants an objective arm-of-the-tribe analysis with a subjective judgment of whether the Tribe's businesses are financially successful. This is a stark departure from the analyses adopted by a majority of court rulings, as well as the law and policy on which those decisions are based. Contrary to the DOB's accusation, the Tribal Parties do not "seek a rule where they merely have to assert that they are associated with a tribe and the inquiry stops there." *See* DOB Brf. at 2. Rather, Tribal Parties advocate for a sensible approach, one designed to weed out plainly sham organizations, but preserving the sovereignty and integrity of *bona fide* tribal economic subdivisions.

The correct arm-of-the-tribe test, which the Tribal Parties have argued for throughout this protracted litigation, is a variant of the test set forth in *Breakthrough Management*

Group, Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173 (10th Cir. 2010). Under that framework, courts making arm-of-the-tribe determinations look to six factors:

(1) the method of creation of the economic entities;

(2) their purpose;

(3) their structure, ownership, and management, including the amount of control the tribe has over the entities;

(4) the tribe's intent with respect to the sharing of its sovereign immunity;

(5) the financial relationship between the tribe and the entities; and

(6) the policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities.

Id. at 1187.

In the absence of U.S. Supreme Court precedent, *Breakthrough* has become the "most influential" of the various tests used throughout state and federal courts. *Miami Nation*, 386 P.3d at 367. *Breakthrough*'s predominance is unsurprising, as it represents a logically sound approach to determining arm-of-the-tribe status. Unlike cases such as *Sue/Perior* (which are few and far between and give inordinate weight to the issue of direct liability of the tribal treasury), *Breakthrough* equitably balances multiple factors.

Breakthrough thus leaves sufficient flexibility in the analysis such that courts have room to differentiate between genuine tribal economic subdivisions and entities that have no legitimate and meaningful connection to a tribal government. And unlike cases such as *Miami Nation*—which grossly intrude upon tribal decision-making—*Breakthrough* supports

tribal sovereignty by encouraging self-governance and economic development. Appellants' Brf. at 19-24.

The crux of the problem with the *Miami Nation* test endorsed by the trial court is that it requires courts to delve into the minutiae of a tribal business, including its budget, operations, etc. For example, with regard to the "purpose" factor, *Miami Nation* instructs courts to look to "the number of jobs [the entity] creates for tribal members or the amount of revenue it generates for the tribe." *Miami Nation*, 386 P.3d at 373. And as to the "control" factor, although *Miami Nation* does indicate some willingness to defer to a tribe's outsourcing of management, the court still found "day-to-day management" to be one of the "[r]elevant considerations." *Id.* The court even suggested (albeit in *dicta)* that it is appropriate to analyze the financial savvy of the deal the tribe negotiated with its vendors. *Id.* at 374. Collectively, these inquiries boil down to intrusive second-guessing of the tribe's business acumen and the financial success (or lack thereof) of the tribal business entity—considerations that have no place in a proper, objective, arm-of-the-tribe analysis.

In their opening brief, the Tribal Parties advocated for a *Breakthrough*-style test patterned after the recent decision in *Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019), which refined the test. Specifically, while both *Breakthrough* and *Williams* call for analysis of five identical factors,[6] *Williams* helpfully clarifies the proper application of those

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[6] Both *Breakthrough* and *Williams* explicitly analyzed the factors relating to: (1) method of creation; (2) purpose; (3) control; (4) tribal intent; and (5) financial relationships. *See Williams*, 929 F.3d at 177. The only difference between the two is that *Williams* rejected consideration of "whether the purposes underlying tribal sovereign immunity would be served by granting an entity immunity" as a sixth and separate factor. *Id.* The *Williams* Court reasoned that this factor "overlaps significantly" with the first five factors, and that in any event it is "too important to constitute a single factor and will instead inform the entire analysis." *Id.* Hence, materially, the multifactor test is the same in both cases.

factors. In fact, *Williams*' clarification of the arm-of-the-tribe framework is particularly relevant here, as both this case and *Williams* involve the tribal lending industry.

Essentially, *Williams* explains the mistakes of an overly "functional" test, such as the one espoused in *Miami Nation* and adopted by the trial court, addressing the five factors. First, as to the "method of creation" factor, *Williams* explains that the sole focus should be on the law under which the entities are formed, *e.g.,* by tribal resolution. 929 F.3d at 177. It is thus a *formal* approach. If the entities were formed under tribal law (*e.g.*, Tribal Council resolution), this factor weighs in favor of immunity, full stop. The Tribal Parties satisfied this factor in providing, *inter alia*, the Tribal Council resolutions pursuant to which Great Plains and Clear Creek were formed. *See* App. I at 106, 152–55.

Second, with respect to the "purpose" factor, *Williams* explains that courts should primarily look to the Tribe's "stated purposes"—such as written pronouncements that the entity was created for economic development—without requiring the Tribe to produce "exacting information" to demonstrate the fulfillment of that stated purpose. 929 F.3d at 179. After all, the doctrine of tribal sovereign immunity is intended to promote self-governance, a goal that would be undermined by demanding the Tribe to provide data regarding "minutiae of [its] budget." *Id.* The Tribal Parties satisfied this factor in providing both the resolutions (which state the Tribe's purpose of tribal economic development) as well as a declaration from the Tribe's Vice-Chairman, Ted Grant, in which he stated that "both Great Plains and [Clear Creek Lending] were created to advance the Tribe's economic development and to aid in addressing the issues of public health, safety, and welfare." *See* App. I at 107.

Third, as to the "control" factor, *Williams* recognizes that the relevant considerations are "the entities' formal governance structure, the extent to which the entities are owned by the tribe, and the day-to-day management of the entities." 929 F.3d at 182. *Williams* also goes further to explain that this factor should *not* be read as requiring micromanagement. Rather, a tribe can outsource day-to-day management so long as it retains some oversight over the vendors that carry out those managerial activities. *See id.* The Tribal Parties met this factor by providing evidence that both entities are 100% owned by the Tribe, that the Tribe has the power to control all business decisions (including through its Board of Directors), and that officers of both entities "may be removed by the Tribal Council with or without cause." *See* App. I at 107.

Fourth, regarding the "intent" factor, *Williams* explains that the analysis "focuses solely on whether the Tribe intended to provide its immunity to the Entities." 929 F.3d at 184. Subjective allegations of the "driving force" behind the creation of the entity is irrelevant to consideration of this factor. *Id.* The Tribal Parties met this factor by showing that the Tribe clearly intended to vest both Great Plains and Clear Creek with all of the privileges and immunities enjoyed by the Tribe. *See* App. I at 107.

Fifth and finally, with respect to the "financial relationship" factor, *Williams* recognized that direct liability of the tribal treasury "has little significance." 929 F.3d at 184. The most important consideration under this factor is "the extent to which the Tribe depends on [the] Entities for revenue to fund its governmental functions and other tribal development." *Id.* And, in accordance with the principles of self-governance described in the "purpose" factor, exact figures are unnecessary. *Id.* (explaining that this factor can weigh in favor of immunity "even if it is unclear what the exact repercussions of [the] impact

might be"). The Tribal Parties satisfied this factor by providing documents as well as the Vice-Chairman's sworn declaration showing that the Tribe is the sole shareholder of both entities, and thus the sole recipient of the profits those entities generate. *See* App. I at 107.

This analysis of the *Breakthrough* factors is all the more germane here given the similarity of the subject matter in this case and in *Williams.* Although *Williams* involved a federal court putative class action, and this is a state regulatory proceeding, the gravamen of the legal claims is identical: Can a tribal online lending business invoke the protections of tribal sovereign immunity as an arm of the tribe?

Through this thoughtful explication of the *Breakthrough* factors, *Williams* lays bare the missteps in the trial court's analysis. For example, the trial court held that consideration of specific data points regarding the number of jobs created and the dollar amount of revenue generated for the Tribe might be pertinent to the arm-of-the-tribe determination. *See* App. I at 294. *Williams* made it clear that the demand for such "exacting information" is an intrusion upon tribal sovereignty. In fact, but for this demand for such "exacting information," the trial court was poised to rule in the Tribal Parties favor. MOD at 26, App. I at 292 ("Mr. Grant's affidavit, along with the supporting documents, addresses most of the five factors identified by *Miami Nation Enterprises* as indicative of a right on the part of Great Plains and Clear Creek to share in the tribe's immunity."). The trial court should have stopped there and held that Great Plains and Clear Creek *are*, in fact, arms of the Tribe based on the evidence in the record.

For its part, the DOB discounts the relevance of *Williams* on the theory that the parties there "had engaged in jurisdictional discovery, which created a record that included formal organizational documents and functional evidence of the *actual* arrangements

between the tribe and the entity." *See* DOB Brf. at 20. This alleged distinction grossly misreads *Williams*, as the whole theme of the Fourth Circuit's analysis was that exacting information—*i.e.*, "functional evidence"—of the "actual arrangements between the tribe and the entity" is irrelevant to the arm-of-the-tribe inquiry. *See Williams*, 929 F.3d at 179. In fact, the "functional evidence" in *Williams* that the DOB cites to was explicitly held to be irrelevant. For instance, the DOB refers to "evidence describing how the tribe *actually* used those revenues [derived from the lending entities]," DOB Brf. at 20, but *Williams* specifically noted that "[s]uch [evidentiary] requirement is at odds with policy considerations of tribal self-governance and economic development." 929 F.3d at 180.

Furthermore, as a factual matter, aside from the DOB's misunderstanding of the role of "functional evidence" in the arm-of-the-tribe determination, the lack of jurisdictional discovery was a consequence of the DOB's own choice not to conduct any investigation before or during its administrative regulatory action. *See supra* p.8. That the administrative record includes *no* evidence contradicting the sovereign immunity of Tribal Parties is because the DOB introduced no such evidence. As federal courts have noted in analogous circumstances, "given the repeated and relatively egregious nature of the shortcomings in the agency's investigation in this case, the [agency] cannot justify its failure to reach a correct determination by pleading the limitations of an administrative record that the agency itself failed to properly develop." *Former Emps. of Invista v. Sec'y of Labor*, 34 Ct. Int'l Trade 781, 817 (2010); *see also Hess Mech. Corp. v. NLRB*, 112 F.3d 146, 150 (4th Cir. 1997) (explaining that an agency "cannot decline to conduct further inquiry and then plead [its] own failure to investigate as reason to conclude that [its] position was substantially justified").

In sum, the trial court erred in directing the DOB to apply what it termed a "functional" arm-of-the-tribe test, as that test requires an intrusion into the minutiae of the Tribe's budget and turns the inquiry into an evaluation of the financial success of the underlying business. The trial court should have instead applied the more sensible test created in *Breakthrough*. That is, the trial court should have rejected the DOB's demand of "functional" evidence and instead found that the evidence already submitted by the Tribal Parties—which has not been contradicted by any part of the administrative record—sufficiently proved arm-of-the-tribe status. This Court can and should correct that error.

III. AS A MATTER OF LAW, CHAIRMAN SHOTTON IS IMMUNE FROM THE DOB'S ACTIONS

While the trial court was correct in noting that Chairman Shotton is *not* the real party in interest in this case, MOD at 23, App. I at 289, it should have gone one step further and ordered that he be dismissed from the action. No matter how the DOB's ever-changing jurisdictional theories are framed, the DOB simply does not have jurisdiction over Chairman Shotton. DOB Brf. at 33-40.

At the outset, it is necessary to point out that the DOB has not settled on a single, coherent theory of jurisdiction vis-à-vis Chairman Shotton. At some points, the DOB asserts that it is taking this action against Chairman Shotton in his "personal" (*i.e.*, individual) capacity. *See* DOB Brf. at 3, 33-34. At other points, the DOB asserts that it is taking this action against Chairman Shotton in his "official" capacity. *Id.* at 38-39. Indeed, throughout the DOB's brief there is language that appears to waver between the two theories. For example, the DOB contends that it "took action against [Chairman Shotton] in his individual capacity as Secretary and Treasurer of Great Plains." *Id.* at 33. Of course, the action

logically cannot be against Chairman Shotton both "in his individual capacity" and "as Secretary and Treasurer of Great Plains." After all, in an individual-capacity action, the *individual (i.e.*, John Shotton himself) is the real party in interest; his status as Secretary and Treasurer of Great Plains would be irrelevant.

Despite this confusion, for all of the reasons set forth below, the Tribal Parties urge this Court to order the dismissal of Chairman Shotton from these proceedings.

A. Chairman Shotton Is Immune From Monetary Damages Because The Tribe Is The Real Party In Interest

The DOB's position that Chairman Shotton is subject to monetary damages has no merit, as Chairman Shotton is clearly *not* the real party in interest in this case. The DOB alleges (without explanation) that Chairman Shotton is the "real party in interest" because this action was taken "against him in his individual capacity as Secretary and Treasurer of Great Plains." DOB Brf. at 33. As pointed out above, this statement is itself internally contradictory; in a true individual-capacity action, the defendant's status as *x* or *y* officer is essentially irrelevant. The allegations would have to be that John Shotton is making loans on behalf of himself, not through Great Plains or Clear Creek.[7] There is no evidence in the record to support such a claim.

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[7] The DOB's allegation that Chairman Shotton could not have been acting in his official capacity because "his actions violated the Tribe's own criminal usury law" is a gross misreading of the Tribe's law. *See* State's Br. at 33 n.15. The Tribe's usury law applies only when the loans in question are made "without the expressed written consent from the Otoe–Missouria Tribal Council." *See* DOB's App. at 291.

Given that both Great Plains and Clear Creek were formed by resolution of the Tribal Council and operating pursuant to Tribal law, App. I at 106, 152-55, it is blatantly incorrect to claim that the Tribe's Chairman is violating the Tribe's usury laws by acting as Secretary and Treasurer of those entities. Only by excising the critical language can the DOB make this baseless claim.

In arguing that Chairman Shotton is the real party in interest, the DOB relies heavily on the U.S. Supreme Court's decision in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017). There, the Court held that a tribal employee could not claim tribal sovereign immunity against a tort action in which the plaintiffs sought to recover monetary damages from the employee *personally*. 136 S. Ct. at 1291-92. The Court ruled in favor of the tort plaintiffs, reasoning that the doctrine of tribal sovereign immunity did not apply because the employee was the "real party in interest." *Id.* In doing so, the Court noted that making a real-party-in-interest determination is not always a simple task; just because a plaintiff claims that a government employee is the real party in interest does not make it so, as "courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign." *Id.* at 1290.

In this case, the DOB claims to be acting against Chairman Shotton "for his personal participation in violations of the state's usury and Banking laws." DOB Brf. at 36. But these sorts of unadorned statements cannot transform an official-capacity case into a personal-capacity case. This was made clear in the Appellate Court's decision in *Drabik v. Thomas*, 184 Conn. App. 238, *cert. denied*, 330 Conn. 929 (2018), where it explained that "[c]laimants may not simply describe their claims against a tribal official as in his individual capacity in order to eliminate tribal immunity." *Id.* at 247. *Drabik* further explained that, in order to make a personal-capacity claim against a tribal official, the pleading party must allege that the tribal official "acted beyond the scope of their authority." *Id.* at 248.[8]

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[8] The DOB's attempts to distinguish *Drabik* miss the mark. DOB Brf. at 36 n.19. Although the Appellate Court did focus part of its discussion on the unique features of a bill of discovery, that focus bore no connection to its real-party-in-interest analysis. And insofar as the DOB claims that *Drabik* advocates for an approach that "was expressly rejected by [*Lewis*]," *id.*, it bears noting that *Drabik* was issued after *Lewis*, and this Court denied

Furthermore, and to clarify a misrepresentation in the DOB's brief, even assuming *arguendo* that Chairman Shotton *is* the real party in interest, he would still be protected against monetary penalties by the doctrine of official (*i.e.*, qualified) immunity. Contrary to the DOB's claim, DOB Brf. at 37 n.20, the Tribal Parties explicitly raised this argument before the trial court in their March 23, 2018 merits brief, where the issue was discussed at length. *See* Appellant's Reply Cross-Appellees' Appendix at 28-31. In true individual-capacity suits, where sovereign immunity does not apply because the employee is the real party in interest, the doctrine of qualified immunity can still protect the government employee defendant. As the U.S. Supreme Court has explained, qualified immunity "protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). And while the DOB argues that it is "not objectively reasonable" to believe that a tribal business can make loans pursuant to tribal law, such an assertion rings hollow in light of the fact that not a single court has definitively held otherwise. Thus, Chairman Shotton would alternatively be protected by qualified immunity.

B. Chairman Shotton Is Immune From Prospective Injunctive Relief

The DOB's position regarding the availability of prospective injunctive relief against Chairman Shotton fails from the start. If as the DOB alleges, Chairman Shotton *is* in fact the "real party in interest," then the injunctive relief the DOB seeks—making no further

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certification from the Appellate Court. In the end, the DOB's argument boils down to nothing more than its unsupported opinion that *Drabik* was wrongly decided.

loans to Connecticut residents—is beyond the Chairman's capability. Again, at no point did the DOB allege that John Shotton himself was making loans to Connecticut residents; only Great Plains and Clear Creek were alleged to be making loans. App. I at 67. In his individual capacity, John Shotton has no ability to constrain the activities of those entities.

In support of its theory that Chairman Shotton is liable for prospective injunctive relief, the DOB relies on the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *See* DOB Brf. at 37. As Supreme Court precedent makes clear, *Ex parte Young* applies to certain suits brought against government officials "in their official capacities." *See Verizon Md. Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). Following that guidance, the Second Circuit has further explained that when a plaintiff "neglect[s] to name a state official acting in his or her official capacity as a defendant," the plaintiff may not avail themselves of the exception to sovereign immunity found in *Ex parte Young*. *See Palmer v. N.Y.S. Office of Court Admin.*, 526 F. App'x. 97, 99 (2d Cir. 2013). But *Ex parte Young* does not serve as a basis for individual-capacity suits. Thus, if the DOB's position is that it is taking this action against Chairman Shotton in his "individual capacity," then it cannot hold him subject to injunctive relief under the doctrine of *Ex parte Young*.

Pleading errors aside, even if the DOB properly framed this case as an official-capacity *Ex parte Young* action against Chairman Shotton, the relief the DOB seeks would be unavailable because *Ex parte Young* applies only to actions brought for prospective injunctive relief to enjoin the ongoing violation of federal law. 209 U.S. at 149. The DOB does not plead an ongoing violation of federal law; it has only alleged violations of state law. Accordingly, *Ex parte Young* does not provide an avenue for relief.

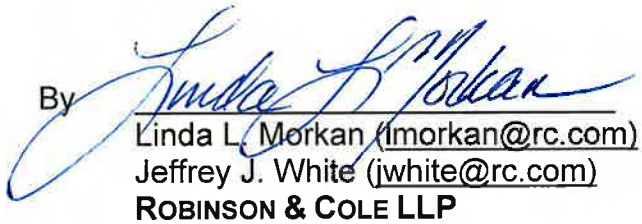
Ex parte Young is a narrow exception to sovereign immunity designed to reconcile the Eleventh Amendment's guarantee of state sovereign immunity with the Fourteenth Amendment's command that States provide due process of law. *See id.*; *see also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993) (emphasizing that "the exception is narrow"). The doctrine is intended to serve as an enforcement mechanism for the Supremacy Clause. *See In re Deposit Ins. Agency*, 482 F.3d 612, 618 (2d Cir. 2007). And under the Supremacy Clause, while federal law is the "Supreme Law of the Land," state law is not. *See* U.S. CONST. art. VI, cl.2. This limitation to the *Ex parte Young* doctrine was made clear in the Supreme Court's decision in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104-06 (1984), where the Supreme Court held that *Ex parte Young* does not authorize lawsuits alleging an ongoing violation of state law.

The DOB cites *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), for the proposition that the U.S. Supreme Court has authorized an expansion of *Ex parte Young* so as to cover state-law claims against tribal officials. DOB Brf. at 38-40. Contrary to the DOB's position, *Bay Mills* did not radically alter the sovereign immunity landscape in two lines of *dicta*. To be sure, the majority in *Bay Mills* referred to a hypothetical suit against a tribal official to enjoin violations of Michigan law. But the suit was just that—*hypothetical*. 572 U.S. at 798. The issues before the Supreme Court were whether sovereign immunity barred the suit by the State of Michigan against the *tribe*. There was no suit against a tribal official, and the Supreme Court's reasoning did not hinge on the existence of such a hypothetical action. *Id.* Because two lines of *dicta* did not subject sovereign tribes to state-law suits in the administrative forum, *Ex parte Young* does not authorize prospective injunctive relief against Chairman Shotton.

In sum, Chairman Shotton is *not* the real party in interest in this case. The DOB cannot credibly plead that this is an action against the Chairman in his "individual capacity," and therefore it cannot recover monetary damages against him personally. As to injunctive relief, although *Ex parte Young* can be used to enforce ongoing violations of *federal* law, it is not a device to enforce state law, let alone against Indian tribes (to which state law does not apply). Thus, Chairman Shotton is immune from the DOB's administrative enforcement action. The trial court erred in finding otherwise.

CONCLUSION AND STATEMENT OF RELIEF REQUESTED

For the reasons stated herein, it is respectfully submitted that this Court vacate that portion of the trial court's order which remands this matter to the DOB for further proceedings and direct the trial court to enter judgment in favor of the Tribal Parties. In the alternative, if a remand is necessary, the DOB should be ordered to consider the Tribal Parties' arm-of-the-tribe arguments applying the multi-factor *Breakthrough* test and should dismiss Chairman Shotton from further proceedings on remand.

By 

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CERTIFICATION

This is to certify that the foregoing Brief and separate Appendix comply with all provisions of Practice Book § 67-2, and that on this the 18th day of February 2020, they were mailed and electronically transmitted to the following:

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This is further to certify pursuant to § 67-2(i) that the Brief and Appendices are true copies of the materials submitted electronically to the Court on this day, and that they do not contain any information prohibited from disclosure by rule, statute, court order, or case law.

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