IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Consumer Financial Protection Bureau,	)	
	)	
Plaintiff,	)	**Case No. 2:17-cv-02521-JAR-JPO**
	)	
vs.	)	Hon. Julie A. Robinson
	)	
Golden Valley Lending Inc., et al.,	)	
	)	
Defendants.	)	

BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTEREST OF AMICUS CURIAE

The National Congress of American Indians ("NCAI"), founded in 1944, is the nation's oldest and largest association of Native American and Alaska Native tribal governments, representing hundreds of federally recognized Indian tribes and many individuals.[1] NCAI serves as a forum for consensus-based policy development among its member tribes from every region of the country. Its mission is to inform the public and all branches of the federal government about tribal self-government, treaty rights, and a broad range of federal policy issues affecting Native nations, tribes and pueblos.

PRELIMINARY STATEMENT

In the instant action, the Consumer Financial Protection Bureau ("CFPB" or the "Bureau") has asserted jurisdiction over commercial, small-dollar consumer lending activities conducted by the Habematolel Pomo of Upper Lake Tribe ("Tribe"), with respect to which the

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[1] CORPORATE AND COUNSEL DISCLOSURE STATEMENTS. Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae makes the following disclosure: NCAI has no parent corporation and issues no stock. No counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made any monetary contribution toward the preparation or submission of this brief.

Tribe exercises its governmental authority. The Bureau incorrectly asserts the power to dictate the Tribe's contractual relations with its customers – purporting to enforce state laws to protect consumers from utilizing financial. The Bureau miscomprehends the sovereign role of tribes in our federalism while ignoring tribes' and individual Americans' freedoms of trade and contract enshrined in the United States Constitution.

The Bureau's interpretation of the Consumer Financial Protection Act of 2010 ("CFPA" or the "Act"), extending the Act to tribal operations, cannot be sustained. In view of the unique status of Indian tribes under federal law, the historical context in which the CFPA was enacted, the Bureau's inclusion of all other governments (including all state instrumentalities) as within its regulatory and enforcement ambit under the Act, and the central role that federal Indian law and policy have long assigned to commercial enterprises operated by tribal governments, it is clear that tribes do not fall within the class of persons covered by the Act. Defendants and other amici curiae have explained why this is true relating to the Act itself and its legislative history. In addition, numerous federal policies fostering tribal self-government and self-determination through economic development, reinforce that conclusion and NCAI's brief focuses on those matters. Moreover, the Bureau's decision to assert jurisdiction over tribal activities finds no home in the statute, strays well beyond the Bureau's expertise, and ignores federal policy and United States Supreme Court precedent.

This case involves an issue of great importance for tribal economic welfare, self-government, and self-sufficiency: the extent to which a tribal entity's contracts may be regulated by a federal agency lacking an express jurisdictional grant of authority from Congress. This significant issue implicates the very basis of federal Indian law. NCAI submits this *amicus curiae* brief to provide a greater understanding of the historical and interpretive context of those Indian

law arguments. Those issues are at the core of NCAI's mission and daily work. Accordingly, NCAI seeks to protect tribal sovereignty from being degraded as the CFPB has done in this case.

I. ARGUMENT

A. THE INHERENT SOVEREIGN AUTHORITY OF TRIBES AND SUPREME COURT PRECEDENT APPLYING SUCH SOVEREIGN AUTHORITY PREVENT APPLICATION OF THE FEDERAL REGULATORY REGIME THE CFPB SEEKS TO ENFORCE.

i. The CFPB has Mischaracterized the Historical and Political Character of Tribal Sovereignty.

In its Complaint, the Bureau identifies a series of unremarkable business practices to cast aspersions on the Tribe's ability to engage in commercial activities which only Congress, not state governments, may lawfully restrict. These observations include: that Defendants utilize services from Tribal and non-Indian technology and other service vendors and also access the national banking system to conduct their business (Complaint, ¶¶ 38-39, 68); that some aspects of the lending business were acquired, as opposed to originated, by the Tribe (*id*., at ¶¶ 85-94); and that Tribal law is identified as governing law in the Tribal-consumer contracts (*id*. at ¶¶ 95-105). Utilizing vendors, accessing national payment systems and banking services and invoking the law of one's home forum in contracts are routine occurrences for many businesses and for virtually every government.

The Bureau's intimations that such routine practices are somehow inappropriate attempt to diminish the doctrine of tribal sovereignty and isolate it from its historical and political relevance. To the contrary, viewed in proper context, tribal sovereignty is not a nefarious bulwark; it is a well-established legal principle and the cornerstone of the legal and political existence of American Indian and Alaska Native tribes. Unless and until Congress chooses to restrict tribes' involvement in the consumer lending business, the CFPB is powerless to interfere. Indeed, the Bureau has an obligation not to interfere with the Tribe's sovereign prerogatives as part of the federal

government's trust responsibility toward tribes.

From the earliest years of the republic, courts have recognized the political independence and self-governing status of Indian tribes. *See Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (classifying tribes as "domestic dependent nations"); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (explaining that the tribes are "distinct independent political communities, retaining their original natural rights" and not dependent on federal law for their powers of self-government). An Indian nation's sovereignty is not the result of reparations or a specific grant of authority by Congress, but rather the "inherent powers of a limited sovereignty which has never been extinguished." *U.S. v. Wheeler*, 435 U.S. 313, 322-23 (1978). Because a tribe retains all inherent attributes of sovereignty that have not been divested by Congress, the proper inquiry with respect to a tribe's exercise of its sovereignty is whether *Congress*—which exercises plenary power over Indian affairs—has limited that sovereignty in any way. *See Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148-49 n.11 (1982); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 6.02[1] (2005). Further, "[I]n the absence of federal authorization .... *tribal sovereignty* is privileged from diminution by the States." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 894 (1986) (emphasis supplied).

The CFPB evades this controlling federal legal framework. Article I, Section 8 of the United States Constitution expressly delegates to Congress exclusive authority to regulate commerce with Indian tribes. Laws enacted by Congress beginning in the 1790s regulating sales, leases and other conveyances of tribal land and trade with Indian tribes remain substantially in effect. *See* 25 U.S.C. §§ 177 and 261-264. Many treaties between the United States and Indian tribes – which like laws enacted by Congress, are the law of the land under the Supremacy Clause

of the Constitution – secure and regulate trade by and with Indian tribes. Federal laws, regulations, executive orders, and policies too numerous to list promote and regulate commerce by and with Indian tribes. This remains true in the modern context. For example, Congress in 2000 presented definite and unambiguous support for the unencumbered development of tribal economies. In the Native American Business Development, Trade Promotion and Tourism Act, Congress made specific findings regarding tribal economic development and the role of the federal government and federal agencies in that nation-building pursuit.[2]

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[2] Specifically, the Native American Business Development Act found that:

> (1) Clause 3 of Section 8 of Article I of the United States Constitution recognizes the special relationship between the United States and Indian tribes;
> (2) beginning in 1970, with the inauguration by the Nixon Administration of the Indian Self-Determination Era, each President has reaffirmed the special government-to-government relationship between Indian tribes and the United States;
> (3) in 1994, President Clinton issued an Executive memorandum to the heads of departments and agencies that *obligated all Federal departments and agencies, particularly those that have an impact on economic development, to evaluate the potential impacts of their actions on Indian tribes*;
> (4) consistent with the principles of inherent tribal sovereignty and the special relationship between Indian tribes and the United States, *Indian tribes retain the right to enter into contracts and agreements to trade freely, and seek enforcement of treaty and trade rights*;
> (5) Congress has carried out the responsibility of the United States for the protection and preservation of Indian tribes and the resources of Indian tribes through the endorsement of treaties, and the enactment of other laws, including laws that provide for the exercise of administrative authorities;
> (6) the United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes;
> (7) the capacity of Indian tribes to build strong tribal governments and vigorous economies is hindered by the inability of Indian tribes to engage communities that surround Indian lands and outside investors in economic activities on Indian lands;
> (8) despite the availability of abundant natural resources on Indian lands and a rich cultural legacy that accords great value to self-determination, self-reliance, and independence, Native Americans suffer higher rates of unemployment, poverty, poor health, substandard housing, and associated social ills than those of any other group in the United States;
> (9) the United States has an obligation to assist Indian tribes with the creation of appropriate economic and political conditions with respect to Indian lands to—
> (A) encourage investment from outside sources that do not originate with the tribes; and
> (B) facilitate economic ventures with outside entities that are not tribal entities;

As stated by a host of U.S. Supreme Court decisions, sovereignty is not delegated; it is a reservation of powers. *See Merrion*, 455 U.S. at 152; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). Absent express Congressional divestiture, a tribe retains its natural rights of political independence. *See id*.

In the consumer lending context, Congress has not acted to constrain tribal authority in any way. In fact, in the CFPA, Congress defined "state" to include "any federally recognized Indian tribe," 12 U.S.C. § 5481(27), and in so stating included Indian tribes among the governmental units working with the Bureau for consumer protection purposes.

Article I, Section 8 of the United States Constitution delegates to Congress exclusive authority "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This power was intended to address a fundamental flaw in the text of the Articles of Confederation, which read: "The United States in Congress assembled shall also have the sole and exclusive right and power of…regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated."[3] This provision in the Articles gave authority to regulate trade

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> (10) the economic success and material well-being of Native American communities depends on the combined efforts of the Federal Government, tribal governments, the private sector, and individuals;
> (11) the lack of employment and entrepreneurial opportunities in the communities referred to in paragraph (7) has resulted in a multigenerational dependence on Federal assistance that is—
> (A) insufficient to address the magnitude of needs; and
> (B) unreliable in availability; and
> (12) the twin goals of economic self-sufficiency and political self-determination for Native Americans can best be served by making available to address the challenges faced by those groups—
> (A) the resources of the private market;
> (B) adequate capital; and
> (C) technical expertise.

25 U.S.C. § 4301(a)(emphasis supplied to highlight federal consultation obligations and tribal rights to trade freely).

[3] 1 U.S.C. Organic Laws

with Indians to both the Continental Congress, and to the states within their borders. In the Federalist No. 42, James Madison described the purpose of the Indian Commerce Clause:

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.

The degree to which Defendants' utilize vendors or employ non-Indians or their degree of commercial success bear in no way on the sovereign nature of their activities, nor the reality that the Tribe has made the sovereign determination to engage in lending activity and regulate that activity under Tribal law.

ii. The Historical and Fundamental Reservation of a Tribe's Sovereign Authority Provides for Modern Tribal Policies of Political and Economic Self-Sufficiency, Specifically Sovereign Immunity and the Right to Self-Government.

This history of tribal sovereignty forms the basis for the exercise of modern powers. In its modern legal application, sovereignty is captured by two interrelated concepts: sovereign immunity from suit and tribal self-governance. *Santa Clara Pueblo*, 436 U.S. at 58-60. The application of sovereign immunity to the activities of tribes is instructive in determining the scope of the second concept and the issue in this case: self-governance.

In a contemporary context, tribes must surmount many developmental challenges – including physical remoteness, lack of any property or income tax base, capital access barriers, and the paternalistic attitudes of policymakers – to assert their rights to self-determination. Many

tribes exist in territorial isolation, far from centers of traditional commerce and capital. Lacking a tax base[4] and the means to develop and invest in their tribal lands, these Indian communities have not been able to obtain a sustainable capital base from which to provide basic governmental services for their citizens. Resultantly, many tribes have struggled for decades to fulfill their duty to develop businesses and infrastructure, healthcare, and other vital services for their members. Because of these barriers, tribal governments increasingly and necessarily rely on tribally-owned and controlled businesses, engaging in commercial activities, to generate revenue to support tribal government and services to tribal members, crucial to breaking the cycle of poverty created by decades of failed federal policy has created for Native Americans.

The U.S. Supreme Court has recognized that the doctrine of tribal immunity (and Congress's overt choice to leave it unfettered) as applied to a tribe's commercial activities promotes the goal of Indian self-government, including the overriding goal of encouraging tribal self-sufficiency and economic development. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)). As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.,* 523 U.S. 751, 754 (1998). In applying this doctrine, the Supreme Court has expressly declined to confine sovereign immunity to transactions on reservations or to strictly governmental activities. *Kiowa Tribe,* 523 U.S. at 755 ("To date, our cases have sustained tribal immunity from

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[4] Tribes are unable to structure a strong tax base around the property taxes and income taxes typically found at local and state government level. Property taxes cannot be assessed because of the trust status of their land and income taxes are not a viable source of funds when many reservations are battling unemployment levels of upwards of seventy-five percent. *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian County: Hearing Before the S. Comm. on Indian Affairs*, 11th Cong. (2010), *available at* http://www.indian.senate.gov/public/_files/January2820102.pdf.

suit without drawing a distinction based on where the tribal activities occurred. . . . [or] between governmental and commercial activities of a tribe").

Similarly, a tribe's right to self-governance should extend to all activities of the tribal government. Congress has not limited, nor has the Supreme Court qualified, a tribe's self-governing authority to apply only to intramural matters. Just as the doctrine of sovereign immunity exists without distinction to both tribes and tribally-owned and operated entities engaged in governmental and commercial activities conducted both on and off the reservation, so should the tribe's ability to create tribal opportunities for economic development exist free from the burdens of federal regulation. Specifically, as applied to the facts of this case, a tribe's regulatory authority over a tribal enterprise's operation directly affects a tribe's ability to contract and engage in economic development activities to sustain its own governance. Because Congress has not abrogated the tribes' ability to contract for the provision of lending services, on their own terms, nor have the tribes waived that right, it is a reserved sovereign authority.

In *Michigan v. Bay Mills Indian Community*, the Supreme Court upheld the Court's previous recognition of American Indian tribes' sovereign immunity and rejected the request of more than a dozen states for Court's creation of a common law rule allowing states to sue tribes in connection with tribal economic activities. 134 S. Ct. 2024 (2014). In a concurring opinion, Justice Sotomayor explained: "A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding." *Id*. at 2040. She further explained the policies established by Congress:

> [T]ribal business operations 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,' Struve, *36 Ariz. St. L. J., at 169*. This is due in large part to the insuperable (and often state-imposed) barriers Tribes face in raising revenue through more traditional means.

134 S. Ct. at 2043. *See also* Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759 (2004).

Consistent with the legal underpinnings of tribal sovereignty, there is nothing unusual or untoward about the Tribe's sovereign determination to make its territory a favorable forum for credit practices that might be disfavored by other sovereigns. This sort of economic engineering is commonplace for corporate-friendly forums like Delaware and South Dakota, which routinely "export" their corporate-favorable state laws to out-of-state customers who live in states or territories with more restrictive state laws (e.g., South Dakota exports its less restrictive usury laws to agreements with customers in states that, under their state law, cap interest rates). This practice is common and does not subject Delaware or South Dakota to collateral attacks by sister sovereigns. *See Marquette Nat'l Bank v. First of Omaha Serv. Corp*., 439 U.S. 299 (1978) (concluding that that national banks can charge the highest interest rate allowed in the bank's home state, regardless of where the borrower lives). And, moreover, this practice does not subject states to attacks by the CFPB as an avatar for sister sovereigns. The varying credit practices and policies between sovereigns are not illegal and they do not give rise to a right of one sovereign to invade the sovereign domain of another. Pursuant to federal law, the Tribe is entitled to regulate its lending enterprises – and it does so.[5]

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[5] The Tribe is not unique among sovereigns in providing financial services. States too engage in thousands of consumer-facing lending activities each year, from housing to student loans. *See e.g.*, Arkansas Student Loan Authority, www.asla.info/home; Rhode Island Student Loan Authority, www.risla.com. Some also have lending programs for state employees, veterans and other targeted populations. *See e.g*., CalVet Home Loans, www.calvet.ca.gov/HomeLoans; New Jersey Pension Loans, www.nj.gov/treasury/pensions/loanshome.shtml; North Dakota Veterans Aid Loan Program, www.nd.gov/veterans/benefits/loan-programs. And all fifty States plus the District of Columbia have housing finance agencies. *See e.g.*, Alabama Housing Finance Authority, www.ahfa.com; Alaska Housing Finance Corporation, www.ahfc.us; Colorado Housing and Finance Authority, www.chfainfo.com; District of Columbia Housing Finance Agency, www.dchfa.org Likewise, there are numerous federally-charted and state-chartered lending institutions. *See* http://www.occ.gov/topics/licensing/national-bank-lists/index-active-bank-lists.html (listing National Banks, Credit Card Banks, trust banks; and Federal Savings Associations);

B. THERE IS NO APPLICABLE STATE LAW FOR THE CFPB TO ENFORCE BY PROXY, AS CONFLICTS OF LAWS DETERMINATIONS MUST BE MADE BY STATE OR TRIBAL COURTS.

The Bureau essentially alleges that the Defendants' lending activities are deceptive and that the Tribe, as a sovereign government, cannot invoke its own laws in contracts. The Bureau offers the repeated flat assertion that state law is relevant, despite the express terms of Defendants' consumer contracts indicating that Tribal law applies to the exclusion of the law of the consumer's jurisdiction of residence. Complaint, ¶¶2, 95-105, 111-131. The Bureau's central error is encapsulated in Complaint Paragraph 131, when the Bureau refers to "applicable state law." There is no applicable state law here.

i. The CFPB fails to explain which body of state law applies, let alone why those laws are applicable here or should usurp consumers' voluntary decision-making.

The Bureau offers no explanation for the relevance of state law. It could be that the Bureau assumes a simple long-arm analysis might serve to displace Tribal law with the law of the state of the consumer's residence because of the singular fact that some loan monies are received by consumers and payments are reciprocally made to from those same consumers' bank accounts. Complaint, ¶¶ 12, 18, 23, 28. That assumption, if it is in fact the predicate for the Bureau's instant enforcement action, is incorrect.

Defendant's consumer documents provide for the application of Tribal law, which the Bureau acknowledges. Complaint, ¶ 96. And as other amici address, Tribal law requires Defendants' compliance with the exact same consumer protection provisions required by federal

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https://www5.fdic.gov/idasp/warp_download_all.asp (listing many thousands of state-charted, FDIC-insured financial institutions). There are also numerous sovereign-owned banks. *See e.g.*, http://www.potawatomi.org/enterprises/banking. Moreover, the Supreme Court has expressly held that an entity that engages in commercial lending activities can be an arm of the sovereign. *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd*., 527 U.S. 666 (1999).

law, as well as with the consumer protection measures the Tribe has established. Therefore, Defendants' compliance with applicable Tribal law makes their debits to consumer accounts entirely consistent with the rules governing access to the national banking system. This also means that there is no "void" to fill by analyzing the place of contract.

Nor is there a policy basis to set aside the choice-of-law provision of Defendants' consumer contracts. Generally, an express provision contained in an agreement to have that agreement governed by the law of a particular jurisdiction will be honored unless either: "(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2). Considering that arms of the Tribe – Defendants – themselves are parties to the consumer contracts, the chosen Tribal law in this case clearly has a substantial relationship to the transactions. Likewise, there is no allegation that Defendants have not acted in good faith, consistent with Tribal law, to deliver their services to their customers.

If parties to a contract were in dispute, state and tribal courts apply their own legal principles in determining whether a given policy is a fundamental one within the meaning of the rule and whether their jurisdiction has a materially greater interest than that of the chosen law in the determination. In the United States, both state and tribal courts generally apply the Restatement and their own local laws in resolving questions in conflict of laws. None of this is new; there have been consumer loan contracts crossing state boundaries for many decades, and the CFPA did not preempt traditional contract choice-of-law principles.

The CFPB has likewise provided no support for any intimation that the location at which a consumer accesses the internet or the location of a consumer's bank account activity is dispositive such that it can displace an arms-length contractual relationship between a sovereign American Indian tribe and a consumer. To the contrary, the electronic transfer system is an integral part of the federal banking and payment system and commerce. State action to invalidate the contracts of its citizens would directly interfere with the Tribe's rights as a participant in commerce. There is nothing in federal or state law that would purport to allow a public official unilaterally to countermand a citizen's debit authorization. There is no court ruling or order that permits the CFPB or any state to declare an Indian tribe's consumer contracts unlicensed or illegal, let alone permitting a state, or the CFPB on a state's behalf, to interfere with those contracts.

Instead, federal law permits national banks, FDIC-insured state-chartered banks and certain other classes of lenders (e.g., preferred ship-mortgage lenders), to make loans to residents of states without being subject to that resident state's usury laws or the so-called "void or voidable" laws recited by the CFPB here (Complaint, ¶¶ 128-131). Loans by Indian tribes as sovereigns represent another category of loans under the laws of the United States that may be made to residents of states without regard to state usury law.

ii. Longstanding federal law and policy prevents states from interfering with tribes absent express Congressional authorization.

The federal policy of "leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history." *McClanahan v. State Tax Comm'n of Ariz.,* 411 U.S. 164, 168 (1973). Historically, states could not impose their laws on Indians living in Indian country. *See Worcester*, 31 U.S. at 520 ("[T]he laws of [the state could] have no force ... but with the assent of the [Indians] themselves, or in conformity with treaties, and with the acts of congress"). The Supreme Court recognized that Indian tribes have long been considered "wards" of the federal

government, which owes a continual duty to protect them from the states because "[t]hey owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies." *U.S. v. Kagama*, 118 U.S. 375, 383-84 (1886).

This tradition is anchored to the Constitution, which expressly mandates that the power to regulate Indian commerce is held exclusively in the hands of Congress. The Indian Commerce Clause (Art. 1, § 8, cl. 3) states that Congress alone has the power "[t]o regulate Commerce . . . with the Indian Tribes." *Kagama*, 118 U.S. at 383-84. Accordingly, "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985). The Supreme Court has confirmed repeatedly that the Indian Commerce Clause "vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985). For all of these reasons, the Supreme Court has "consistently recognized" that "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Cabazon*, 480 at 207 (citations and quotations omitted).

The contract clause, found in Article I, section 10 of the Constitution, prohibits the states from impairing the obligations of contracts. States have no power to generally restrict their citizens' freedom of contract or ability to shop for credit across jurisdictional boundaries, as the Bureau suggest here it may due in states' stead. Governments cannot generally substitute their judgments for those of their citizens. *See, e.g.*, *Frisbie v. U.S.*, 157 U.S. 160 (1895) ("generally speaking, among the inalienable rights of the citizen is that of the liberty of contract"); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (invalidating state law as violation of liberty of contract where Louisiana violated the due process clause when it penalized a domestic company for contracting

for maritime insurance with a New York company); *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating New York law imposing maximum hours for bakers); *Adair v. U.S.*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating laws prohibiting so-called yellow-dog contracts, contracts that prohibited employees from joining labor unions); *Buchanan v. Warley*, 245 U.S. 60 (1917) (unanimously invalidating a Louisville law prohibiting individuals of one race from buying a house on a block populated mostly by those of a different race); *Ogden v. Saunders*, 25 U.S. 213 (1827) (states cannot create retroactive impairments of existing contracts); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (law that allowed only licensed funeral directors to sell caskets violated the due process clause).

Instead, in the financial services context in particular, the concept of federal preemption of state interest rates is rooted in the power of Congress, and "has always been implicit in the structure of the National Bank Act, since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates." *Marquette Nat'l Bank*, 439 U.S. at 318. In the early years after the founding of the United States, national banks often faced regulatory challenges waged by hostile state regulators against national banks who made loans to out-of-state borrowers under terms that state regulators alleged were usurious. But nearly 200 years ago, in *McCulloch v. Maryland*, the Supreme Court held that federal law is "supreme over state law with respect to national banking." *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 10-11 (2007) (citing *McCulloch*, 4 L. Ed. 579 (1819)). Congress ended state interference in national banking by passing the National Bank Act ("NBA") in 1864 "to facilitate ... a national banking system." *Marquette Nat'l Bank.*, 439 U.S. at 315. The NBA "establishes nationally chartered banks and grants these banks certain powers, including 'all such incidental powers as shall be necessary to carry on the business of banking.'" *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 311-12 (2d Cir. 2005) (quoting 12

U.S.C. § 24).

Since the passage of the NBA, the Supreme Court has "repeatedly made clear that federal control shields national banking from unduly burdensome and duplicative state regulation." *Id*. at 11. In fact, "'the States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is an abuse, because it is the usurpation of power which a single State cannot give.'" *Id*. (quoting *Farmers' and Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875)).

Although the NBA has preempted state usury actions since 1864, a wave of litigation erupted in the 1970s as national banks in states such as South Dakota and Delaware sought to take advantage of their states' relatively lax usury laws by making loans and issuing credit cards to customers living in other states. Banks in neighboring states sued these national banks, arguing that the laws of the state where the borrower was located controlled the loans and credit cards issued by the national banks. These state law usury challenges were unsuccessful, of course, because the NBA controls the interest rates chargeable by national banks. And under the NBA, national banks "are afforded 'most favored lender' status, meaning a national bank may charge the highest rates allowed to any competing institution in the state in which it is located." *Hill v. Chem. Bank*, 799 F. Supp. 948, 951 (D. Minn. 1992). In addition, a national bank may "'export' a favorable interest rate from its home state in transactions with borrowers from other states." *Id.* (citing *Marquette Nat'l Bank*).

To this end, the National Bank Act "preempts actions challenging the lawfulness of the interest charged by a national bank." *Phipps v. F.D.I.C.*, 417 F.3d 1006, 1011 (8th Cir. 2005) (citation omitted). In *Beneficial National Bank v. Anderson*, the Supreme Court held that sections 85 and 86 of the National Bank Act "supersede both the substantive and the remedial provisions

of state usury laws and create a federal remedy for overcharges that is exclusive, even when a state complainant . . . relies entirely on state law." 539 U.S. 1, 10-11 (2003). As the Supreme Court explained, "[u]niform rules limiting the liability of national banks and prescribing exclusive remedies for their overcharges are an integral part of a banking system that needed protection from 'possible unfriendly State legislation.'" *Id.* at 10 (quoting *Tiffany v. Nat'l Bank*, 18 Wall. 409, 412 (1874)). Thus, there is "no such thing as a state-law claim of usury against a national bank." *Id.* at 11.

The Indian Commerce Clause,[6] broadly preempts state laws that interfere with tribal activities and business enterprises. In fact, "the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause" (e.g., greater than the transfer of power under the Commerce Clause predicating the National Bank Act and the complete absence of state authority over inter-jurisdictional financial products) because although the "States still exercise some authority over interstate trade," they "have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Florida*, 517 U.S. at 62. "The question of whether federal law, which reflects related federal and tribal interests, preempts state activity is not controlled by the standards of preemption developed in other areas." *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir. 1989).

Instead, "no specific congressional intention to preempt state activity is required." *Id.* As discussed above, the CFPA (12 U.S.C. § 5481(27)) clearly made provision for the tribes, as sovereign governments, to act as regulators of consumer lending, and the Native American

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6 U.S. Const., Art. I, § 8, cl. 3.

Business Development Act,[7] found that it was a policy of the United States to assist and encourage Indian tribes as they enter into economic arrangements with outside parties. "If the state law interferes with the purpose or operation of a federal policy regarding tribal interests, it is preempted." *Hoopa Valley Tribe*, 881 F.2d at 659. The varying credit practices and policies between sovereigns may not always seem equitable, but they are not illegal and they do not give rise to a right of one sovereign to invade the sovereign domain of another.

The CFPB's asserted ability to stand in the shoes of 16 or more states and supplant each state's sovereign judgments for that of another government, thus prohibiting the Tribe's commercial activity legal under all applicable law, is easily distinguished from other areas of regulation where a state may take a larger role – specifically, gaming and cigarette regulation. In these instances, courts upheld the principle of tribal sovereignty and inapplicability of state laws to tribal activities. It was the subsequent enactment of federal legislation that provided states with limited regulatory authority. Both gaming and cigarette regulation are subject to federal omnibus legislation, a federal activity entirely absent in the usury context.

In the gaming context, all tribal gaming enterprises are subject to the 1988 Indian Gaming Regulatory Act ("IGRA"). 25 U.S.C. §§ 2701-21. Among IGRA's numerous requirements, a tribe must authorize its casino through a tribal ordinance and an interstate gaming compact. 25 U.S.C. § 2701(d)(1). Therefore, states are provided a specific, congressionally-sanctioned forum to exert limited regulation of the activity.

Prior to the enactment of IGRA, the Supreme Court held that a state lacked the regulatory authority to prohibit tribal gaming. In *Cabazon*, the Supreme Court held that California had no

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[7] 25 U.S.C. § 4301(a).

right to regulate gaming on reservations within its borders even though the "games [were] open to the public and [were] played predominantly by non-Indians coming onto the reservations," and even though California's "otherwise regulatory law [was] enforceable by criminal as well as civil means." *Id.* at 205, 209. In upholding a tribe's inherent sovereign power to regulate the practice of gaming, the Court observed in passing that "[t]he games are a major source of employment for tribal members, and the profits are the Tribes' sole source of income." *Id*. at 205. Despite the enactment of IGRA a year later, the general principles articulated by *Cabazon* remain intact.

Similar to gaming, the ability of a state to participate in the taxes associated with the tribal sale of cigarettes is of no import in this context. First, as with gaming, cigarette taxation is subject to a massive and overarching federal taxation scheme. If anything, the cigarette regulation example clearly exemplifies that when, and if, Congress chooses to bolster state regulatory and enforcement authority it may do so through federal omnibus legislation, such as the Contraband Cigarette Trafficking Act ("CCTA") and Prevent All Cigarette Trafficking Act ("PACT Act"). *U.S. v. Morrison*, 686 F.3d 94, 106 (2d Cir. 2012) (noting that the CCTA was designed to provide federal support to the states in enforcing their tax laws). Such omnibus Congressional action is wholly absent in the usury context. Second, even if cigarette regulation was analogous, it is important to note that a state's enforcement authority is limited by its taxing authority. To put it another way, a state is only allowed to enforce a cigarette tax that falls upon a class of people whom the state has the power to tax – i.e., non-Indians purchasing tax-free cigarettes on reservations. *See Dep't of Taxation and Finance of New York v. Milhelm Attea & Bros. Inc.*, 512 U.S. 61, 71 (1994); *c.f. Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 687-689 (1965). In those situations, the State may "minimally burden" a tribal seller to impose the tax. *Dep't of Taxation and Finance of New York,* 512 U.S. at 71. In the instant case, allegedly standing

in for states, the Bureau does not seek to "minimally burden" tribal lenders to enforce a tax, rather it seeks to outright prohibit the tribal lenders' otherwise legal behavior. Such outright prohibition, as stated in *Cabazon*, is unlawful.

Amicus curiae submits it is certainly not the province of the Bureau to insert itself to do in the name of states that which states plainly could not do outright.

II. CONCLUSION

Tribal sovereignty and the right of a tribe to govern its own activities is a long-standing and well-settled principle of federal Indian law. Whatever the CFPB's intentions, the applicability of the federal regulatory scheme invoked by the CFPB must yield to the inherent and fundamental political independence of tribes. The Bureau's position runs in direct contravention of Supreme Court and Circuit precedent regarding the sovereign authority of tribal entities. The Bureau's position also impermissibly constrains tribes' freedom of contract and sovereign right to trade freely. Therefore, NCAI respectfully urges this Court to grant Defendants' Motion to Dismiss and dismiss the claims of the CFPB as to these sovereign entities with prejudice.

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CERTIFICATE OF SERVICE

I hereby certify that on November 27, 2017, the BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS was electronically filed with the Clerk of Court using

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