No. 20-1063

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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SCOTT ASNER, *et al.*,

Defendants-Appellants,

v.

GEORGE HENGLE, *et al.*,
on behalf of themselves and all individuals similarly situated

Plaintiff–Appellees.

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On Appeal from the United States District Court
for the Eastern District of Virginia, Richmond Division
Case No. 3:19-CV-00250-DJN
The Honorable District Judge David J. Novak

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# BRIEF OF AMICI CURIAE OF THE NATIVE AMERICAN FINANCE OFFICERS ASSOCIATION, NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL CENTER FOR AMERICAN INDIAN ECONOMIC DEVELOPMENT, NATIONAL INDIAN GAMING ASSOCIATION, AND ASSOCIATION ON AMERICAN INDIAN AFFAIRS IN SUPPORT OF DEFENDANTS-APPELLANTS

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## CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The Native American Finance Officers Association and additional Tribal *Amici Curiae*[1] are not-for-profit corporations. None of the *Amici Curiae* issue stock.

The law firm of Quarles & Brady LLP, whose office for the purposes of this brief is located at 1701 Pennsylvania Ave. NW, Ste. 700, Washington, DC, 20006, appears on behalf of amici in this case.

[1] The additional Tribal *Amici Curiae* include the National Congress of American Indians, the National Center for American Indian Economic Development, the National Indian Gaming Association, and the Association on American Indian Affairs (collectively, hereinafter referred to as "Tribal *Amici*").

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## INTEREST OF THE AMICI CURIAE

The Tribal *Amici* represent a cross-section of the largest and most prominent national non-profit organizations working to advance the interests of tribal nations and their citizens. The Native American Finance Officers Association ("NAFOA") is a non-profit tribal organization founded in 1982 that represents 120 tribal governments. NAFOA is committed to growing tribal economies and strengthening financial management across Indian Country. In furtherance of these efforts, NAFOA advocates sound economic and fiscal policy, develops innovative training programs in financial management, builds the financial and economic skills of the next generation, and convenes tribal leadership, experienced professionals, and economic partners to meet the challenges of economic growth and change.

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

The National Center for American Indian Economic Development ("NCAIED"), non-profit organization with over 50 years of experience in assisting

American Indian/Alaska Native-owned businesses, American Indian tribes and their enterprises with business and economic development. NCAIED actively assists American Indian and Alaska Native communities to develop economic self-sufficiency through business ownership, increased workforce participation, viable businesses, and positive impacts on reservation communities.

The National Indian Gaming Association ("NIGA"), established in 1985, is a non-profit organization comprised of 184 federally-recognized member Indian nations, as well as other non-voting associate members representing organizations, tribes, and businesses engaged in tribal gaming enterprises located throughout Indian Country.

The Association on American Indian Affairs (the "Association"), established in 1922, is the oldest non-profit organization serving Indian Country. Throughout its 97-year history, the Association has provided national advocacy on watershed issues including Tribal self-governance, land and usufructuary rights, religious freedom, protection of culture, economic self-sufficiency, and other functions tied to Tribal sovereignty.

As preeminent national organizations committed to advancing the Federal Government's economic development policies and programs in Indian Country, Tribal *Amici* have a unique perspective on how the district court's decision undermines tribal self-determination and economic development across the board.

Tribal *Amici* write to express their concern that if the district court's decision stands, the ability of tribal nations to participate in economic development and pursue greater self-sufficiency will be severely undermined, and the health, safety, and welfare of tribal citizens will be jeopardized.

While the *Amici* do not endorse every possible industry that a tribal nation may choose to develop, they do universally support the sovereign right of tribes—a right guaranteed by treaties, congressional legislation, and the U.S. Constitution—to operate and regulate their own enterprises in accordance with tribal law. State law should not obstruct this ability, regardless of the business practice.

## INTRODUCTION

The district court's holding constitutes a dramatic departure from well-established Supreme Court precedent—a departure that will seriously undermine tribal self-government, self-determination, and economic development beyond the lending industry. The Court has repeatedly recognized that tribal sovereign immunity serves as "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g,*, 476 U.S. 877, 890 (1986). What is more, "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (citation omitted). Subjecting tribal officials to *state* law by sidestepping sovereign immunity, as the

district court did here, not only conflicts with this longstanding precedent but thwarts the historic duty of Congress to carry out its trust obligations to tribal nations.

The Court's tribal sovereign immunity jurisprudence, which has endured repeated challenges over the years, is grounded in Congress' exclusive duty "to foster strong tribal governments, Indian self-determination, and economic self-sufficiency." *See, e.g.,* Native American Business Development, Trade Promotion, and Tourism Act, 25 U.S.C. §§ 4301(a)(4)-(7) (2000); *see also United States v. Jicarilla Apache Nation*, 564 U.S. 162, 175 (2011) ("Throughout the history of the Indian trust relationship, we have recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress.").

Until now, the limits of tribal sovereign immunity have been developed exclusively by Congress. Congress' Indian affairs authority is broad and exclusive, *see Jicarilla Apache Nation*, 564 U.S. at 175, and provides an open forum for addressing the competing interests of tribes and states. For instance, after the Supreme Court determined that states have no authority to regulate tribal gaming enterprises in *Cabazon*, Congress addressed the policy concerns raised by state governments and passed the Indian Gaming Regulatory Act ("IGRA"), a law affirming the inherent sovereignty of tribal nations to game while also affording

states a role in regulating certain aspects of tribal gaming. *See Cabazon Band of Mission Indians*, 480 U.S. at 207 (1987); 25 U.S.C. § 2701 (1988). Respectfully, the district court's decision, if affirmed, would favor a decision-making process driven by private plaintiffs in an area historically left to Congress—the body made up of representatives from each state and also exclusively tasked with protecting tribal self-governance. *See Jicarilla Apache Nation*, 564 U.S. at 175.

There are 574 federally-recognized tribes in the United States. The economic opportunities available to these tribes vary widely across jurisdictions and geographic landscapes. Economic development in Indian country is not one-size-fits-all. Innovation and creative entrepreneurship remain critical to tribes. To date, Congress has not created a regulatory framework for tribal financial services that allows for *any* state regulation. Instead, it has affirmed that tribes are the appropriate regulatory bodies for such commercial activities. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301-5641 (2010) (as amended). E-commerce and online tribal financial services bring willing consumers to remote, isolated tribes like the Habematolel Pomo of Upper Lake ("Upper Lake"), enabling such tribes to better support critical social service programs, including education, healthcare, housing, public safety, and infrastructure development. Tribal lending is but one of many diverse examples of economic activity tribal nations engage in to pursue self-sufficiency. By way of

example, tribal nations are actively engaged in the operation of healthcare services, tourism, energy development and distribution, construction, technology management, gaming, and agriculture.

These activities regularly involve contracts with customers, vendors, and finance entities who routinely and voluntarily agree to arbitration and choice-of-law provisions within the tribal domain. Such provisions protect tribal governments, businesses, and elected officials, from the major financial burden of being hauled into courts in far-off locations across the country, while providing customers a fair process to assert any grievances or otherwise resolve disputes.

If the district court's decision remains intact, it would chill tribal participation in all tribal economic activity carried out in the Fourth Circuit and beyond, negatively affecting tribal self-governance on a grand scale. Without a tax base like the ones that the federal, state, and local governments enjoy, tribes rely heavily on the revenues generated from their tribal economic development to fund essential government operations.

Furthermore, the district court's decision cannot be squared with this Court's recent opinion in *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 181 (4th Cir. 2019). In *Big Picture Loans*, this Court concluded that courts cannot second guess the tribal economic development means chosen by a particular tribe, as tribal economic development constitutes a foundational federal policy goal to be

respected, protected and advanced by the courts. *See id.* That is, courts cannot pick and choose which tribal industries they like and which they dislike, and recognize tribal sovereignty and sovereign immunity in some cases but not others. To be clear, *Amici* do not favor one industry over another, rather, they seek to preserve the right to engage in economic development—a right preserved by decades of congressional policy—which "counsel[s] against second-guessing a financial decision of the Tribe where, as here, the evidence indicates that the Tribe's general fund has in fact benefited significantly from the revenue generated by an entity." *Id.*

The district court's decision subjects tribal officials to lawsuits in venues around the country, and in so doing, threatens a sea-change to the tribal economic development landscape. If left in place, the decision will impede economic development for tribes all across the nation. The Court should preserve the Supreme Court's longstanding doctrine of tribal sovereign immunity and reverse the district court's decision.

## ARGUMENT

### I. Sovereign Immunity Is A Cornerstone Of The Supreme Court's Federal Indian Law Jurisprudence.

Indian tribes possess sovereign immunity from unconsented suit. In the seminal case *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), the Court held that Indian tribes are "domestic dependent nations," with inherent sovereign

authority over their members and their territory. Furthermore, in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978), the Supreme Court held that suits against Indian tribes are barred by tribal sovereign immunity.

The Court has repeatedly affirmed the sovereign immunity of Indian tribes. *See, e.g., Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2030-2031 (2014) ("[W]e have time and again treated the 'doctrine of tribal immunity as settled law' and dismissed any suit against a tribe absent congressional authorization (or a waiver).") (quoting *Kiowa Tribe v. Mfg. Technologies, Inc*., 523 U.S. 751, 756 (1998)). Tribal sovereign immunity extends as well to the governmental and commercial activities of Indian tribes, *Kiowa Tribe*, 523 U.S. at 760, and it applies to suits for monetary damages, as well as suits for declaratory and injunctive relief. *See Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

Sovereign immunity provides no less protection for Indian tribes than it does to federal and state governments. *See, e.g., U. S. v. U. S. Fidelity & Guar. Co*., 309 U.S. 506, 512-13 (1940) (analogizing sovereign immunity of federal government to immunity of Indian tribes); *Santa Clara Pueblo,* 436 U.S. at 58 ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers"); *Lewis v. Clarke*, 137 S. Ct. 1285, 1291 (2017) ("There is no reason to depart from these general rules [of federal and

state sovereign immunity] in the context of tribal sovereign immunity"). However, the limitations federal courts apply to state sovereign immunity do not apply to tribal sovereign immunity. *See, e.g., Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756 (1998) ("we distinguished state sovereign immunity from tribal sovereign immunity, as tribes were not at the Constitutional Convention. They were thus not parties to the mutuality of … concession that makes the States' surrender of immunity from suit by sister States plausible.") (internal citations and quotation marks omitted); *see also Kiowa Tribe*, 523 U.S. at 759 ("Like foreign sovereign immunity, tribal immunity is a matter of federal law."). Accordingly, tribal sovereign immunity constitutes "a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation, P.C.*, 476 U.S. at 890; *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).

Moreover, tribal sovereign immunity is not limited simply to on-reservation, non-commercial activities. *See Kiowa Tribe of Oklahoma*, 523 U.S. at 758 (noting that parties had asked that the Court "confine [tribal sovereign immunity] to reservations or to noncommercial activities[,]" and the Court "decline[d] to draw this distinction" and instead "defer[red] to the role Congress may wish to exercise

in this important judgment."). In fact, instead of diminishing tribal sovereign immunity, Congress has continued to place the goals of furthering tribal self-government and tribal economic development at the forefront. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334-35 (1983) (noting that "Congress' objective of furthering tribal self-government . . . includes Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'"). Time and again, Congress has "reaffirm[ed] that the responsibility of the United States to Indian tribes includes a duty to promote tribal self-determination regarding governmental authority and economic development." Reaffirmation of Policy, 25 U.S.C. § 5602 (2016).

Consistently, Congress has demonstrated a commitment to its exclusive duty to protect the sovereignty of Indian tribes "in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency." *See, e.g.*, Native American Business Development, Trade Promotion, and Tourism Act, 25 U.S.C. §§ 4301(a)(4)-(7) (2000). Congress has repeatedly noted its important role in preserving tribal self-determination and promoting tribal economic development in current federal policy. *See, e.g.*, Indian Gaming Regulation Act, 25 U.S.C. § 2701(4) (1988) ("[A] principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government."); Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 5302(b),

5332 (1988) ("Nothing … shall be construed as … impairing the sovereign immunity from suit enjoyed by an Indian tribe" and "a major national goal of the United States" is to assist Indian communities); *see also* Financing Economic Development of Indians and Indian Organizations Act, 25 U.S.C. § 1451 (1974) (it is the policy of Congress to assist tribes to the "point where [they] will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities."); Indian Trust Asset Reform Act, 25 US.C. § 5602 (2016) (the United States has "a duty to promote tribal self-determination regarding governmental authority and economic development").

Sovereign immunity plays a vital role in promoting tribal economic development and self-governance. In fact, it is essential to many of the industries within which tribal nations have engaged, including tribal lending. *See Williams v. Big Picture Loans, LLC,* 929 F.3d 170, 181 (4th Cir. 2019) (concluding that sovereign immunity allows tribal lending enterprises to support federal "policy considerations of tribal self-governance and self-determination."). This Court has recognized the significant support that tribal lending can provide to tribal governance, having recently recognized the many impacts that the Lac Vieux

Desert Band of Lake Superior Chippewa Indians' lending operations have had on the Tribe's revenues, programs, and services.[2]

Because the courts have limited the ability of tribal nations to exercise tax authority to fund governance in the same manner as states, Congress has repeatedly relied on—and promoted—tribal economic development as a means to fund, and support, strong tribal governments.[3] Those efforts, however, would be frustrated if private plaintiffs were permitted to impose limitations on tribal sovereign immunity, since without this immunity, there can be no tribal government or tribal economic development. That is why "[t]his aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress." *Santa Clara Pueblo*, 436 U.S. at 58.

Tribal sovereign immunity is not an abstract concept. It is a fundamental pillar of the Supreme Court's Indian law jurisprudence, and without it, Indian

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[2] *See Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 180-181 (4th Cir. 2019); *see also id.* (reviewing Lac Vieux's tribal lending enterprises and concluding that "the evidence indicates that the Tribe's general fund has in fact benefited significantly from the revenue generated by an entity" and has funded governmental items such as the "$14.1 million in financing for the Tribe's new health clinic," "new vehicles for the Tribe's Police Department," "an Ojibwe language program and other cultural programs," renovations on "a new space for the Tribe's Court and bring in telecom services for remote court proceedings," "tribal elder nutrition programs and tribal elder home care and transport services," and much more.).

[3] In 2013, NCAI passed Resolution #TUL-13-056, attached herein as Exhibit A ("2013 Resolution"). In its 2013 Resolution, NCAI "recognizes that engaging in the responsible conduct of these ecommerce economic development opportunities … improve the lives their tribal citizens." *Id.* at 2.

tribes would be hamstrung in developing strong tribal governments and economies. Congress understands this, too. If "Congress ha[s] failed to abrogate [tribal sovereign immunity, it did so] in order to promote economic development and tribal self-sufficiency." *Kiowa Tribe of Okla.*, 523 U.S. at 757.

It is similarly unfair to assume that tribal sovereign immunity promotes a system in which consumers are treated worse than they would be under federal or state law. For example, in this case, Upper Lake enacted laws that incorporate federal consumer protection laws and formed a tribal regulatory commission with individuals experienced in consumer protection matters; all steps designed to ensure ethical business practices and a fair treatment of consumers. Further, in certain cases, like any sovereign, tribes may waive their immunity relating to economic activities. *See Kiowa Tribe of Oklahoma*, 523 U.S. at 754 ("[A]n Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."). There is no reason for a presumption that tribal immunity will breed such an inferior treatment of consumers' rights that the laws of Virginia must be imposed on another sovereign.

Finally, though the district court's decision should be reversed based solely on the principles of tribal immunity, the plaintiffs' suit here against tribal officials arising from a tribe's legislative enactment also creates tension with the principles of legislative immunity. As Justice Sotomayor noted in her concurring opinion in

*Michigan v. Bay Mills Indian Cmty.* 572 U.S. 782, 806 (2014), tribal sovereign immunity is also bound up with the principles of comity—that is, "respectful, harmonious relations between governments." (internal quotation omitted). For that reason, the same legislative immunity that protects state legislators from legal actions involving their legislative acts or deliberations applies with equal force to similar acts by tribal officials. *See Tohono O'odham Nation v. Ducey*, 2016 WL 3402391, at *3 (D. Ariz. Jun. 21, 2016) (holding legislative immunity applies to tribal bodies). Legislative immunity is a common law doctrine, and it "attaches to all actions taken 'in the sphere of legitimate legislative activity.'" *Bogan v. Scott*, 523 U.S. 44, 54 (1998) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). To the extent a suit against tribal officials may impinge on that legislative immunity, it creates needless friction with those underlying principles of comity.

## II. The History of Indian Gaming Demonstrates the Benefits of Adhering to Congress' Exclusive Authority over Indian Affairs.

The district court's reliance on Virginia's usury and consumer protection laws to eclipse tribal law conflicts with well-established Supreme Court precedent that states cannot regulate tribal operations absent congressional authorization, and that tribal sovereign immunity cannot be abrogated by implication**.** The Supreme Court's decisions regarding Indian gaming are illustrative of these foundational principles.

In *California v. Cabazon Band of Mission Indians*, the watershed case

involving Indian gaming regulation, the Supreme Court had the opportunity to uphold state regulation of tribal gaming operations. But it rejected that course specifically because Congress, as is the case in the present matter, had not authorized such an encroachment into tribal sovereign authority. 480 U.S. at 222. In *Cabazon*, the Cabazon and Morongo Bands of Mission Indians conducted bingo games and a card club on its reservation, which were predominantly played by non-Indians. *Id.* at 205. This gaming formed the Tribe's sole source of income. The State of California sought to apply its criminal code to the Tribe's gaming operations, which did not entirely prohibit gaming but placed significant restrictions on it. *Id.* at 205-06. The Tribe subsequently brought suit against California seeking to enjoin it from regulating its on-reservation activity. *Id.* at 206. California argued that it had an interest in regulating tribal bingo to prevent its infiltration by organized crime, which allegedly was permitted by Congress under Public Law 280 and in the Organized Crime Control Act.

The Supreme Court disagreed and held that, although Congress had given states the authority to apply its *criminal* laws on Indian reservations, California lacked *civil regulatory* authority over gaming operations owned and operated by Tribes in California. *Id.* at 222. In doing so, the Court reasoned that, because California had not prohibited all forms of gaming and sought only to regulate it (similar to Va. Code Ann. § 6.2-1800 *et seq.*, which seeks to regulate but does not

ban payday loans), the Tribe did not violate the state's public policy[4] and, thus, it had no legitimate interest in regulating on-reservation activity. *Id.* at 211.

On the other hand, the Tribe had a substantial interest in regulating its gaming because that was its sole source of revenue:

> [t]he Cabazon and Morongo Reservations contain no natural resources which can be exploited. The tribal games at present provide the *sole source of revenues* for the operation of the tribal governments and the provision of tribal services. They are also the major sources of employment on the reservations. Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members. The Tribes' interests obviously parallel the federal interests.

*Id.* at 281-219 (emphasis added). Stated differently, the Court held that California sought to prevent precisely what current federal policy seeks to promote, namely, tribal commerce to support self-sustainability.

Moreover, the fundamental principles the Court applied in *Cabazon* continue to guide its approach to tribal sovereign immunity. As the Court in *Bay Mills* concluded, "it is fundamentally Congress' job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain – both its nature and its extent – rests in the hands of Congress." *Bay Mills Indian*

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[4] The district court also invoked public policy as a basis for abrogating sovereign immunity; however, it failed to consider that the public policy contemplated by *Cabazon* and its progeny is whether the state has banned the conduct entirely through its criminal code and not whether it generally violates notions of fairness to its consumers. Here, Virginia clearly seeks to regulate—not criminally ban—all payday lending under Va. Code § 6.2-1800 *et seq.*

*Comty.*, 572 U.S. at 800. Only three years after *Bay Mills*, in *Lewis v. Clarke*, the Court once again examined tribal sovereign immunity and held that "[t]here is no reason to depart from these general rules in the context of tribal sovereign immunity." In doing so, it reiterated that tribal immunity applies when, "[i]n an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." *Lewis*, 137 S. Ct. at 1291. Notably, the district court in this matter reached its conclusion without any mention of the Court's most recent decision in *Lewis.*

Instead, the district court relied solely on the Supreme Court's dicta in *Bay Mills* that "'Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license' in violation of state law." Dkt. 109, p. 62 (quoting *Bay Mills Indian Comty.*, 572 U.S. at 796). That dicta, however, certainly cannot extend to non-injunctive relief and does not apply to tribal lending entities owned and controlled by a tribal nation with significant operations on that tribe's lands.[5] The district court, however,

[5] Upper Lake's critical brick and mortar facilities, including its headquarters for its operational support entity, are located on *tribal* (not state) lands. *See* Docs. 33, ¶¶ 124 and 125; *see also* Docs, 35, ¶ 130. Furthermore, all entities at issue were incorporated under tribal law and wholly owned by the Tribe at all times; no one other than the Tribe is permitted to own any portion of these entities; each entity's incorporation documents make clear that the entity constitutes a "governmental instrumentality of the Tribe"; all entities at issue in this suit are governed by the same tribal Board of Directors; and even Upper Lake's Processing Services, Inc. that

overlooked these facts in concluding "that *Bay Mills* permits *Ex parte Young*-style claims against tribal officials for violations of state law that occur *on non-Indian lands*." Dkt. 109, p. 65.[6]

Again, history supports the judiciary staying its hand in the area of Indian affairs better suited for Congress to address. One year after *Cabazon* declared that California's civil gaming regulatory law could not regulate tribal gaming enterprises, Congress enacted IGRA, which created a uniform and predictable regulatory framework for tribal gaming. 25 U.S.C. § 2701. Born directly out of *Cabazon*, IGRA provided states with limited authority over Class III gaming. But for the allowances Congress provided for in IGRA, states would have *no* role in the operation and regulation of Indian gaming.

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has provided operational support for the entities at issue in this case since 2013 is wholly owned by the Tribe and headquartered there. Docs. 44, ¶¶ 124-125, 130, 193-95, 198; Doc. 54, at Ex. A, ¶¶ 124-125, 130, ¶¶ 193-95, 198 (First Am. Compl.). .

[6] Because the district court was considering a challenge to its own jurisdiction, the court erred when it refused to consider the facts presented by defendants-appellants. *See Sizova v. Nat. Inst. of Standards & Tech*., 282 F.3d 1320, 1326 (10th Cir. 2002) ("When a defendant moves to dismiss for lack of jurisdiction, either party should be allowed discovery on the factual issues raised by that motion."); *see also Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1849 (2019) ("Unlike most arguments, challenges to subject-matter jurisdiction may be raised by the defendant 'at any point in the litigation,' and courts *must* consider them *sua sponte*" to avoid harsh consequences"). Appellate courts routinely conclude that the jurisdiction "question was decided prematurely" where there are "contested facts relevant to the" jurisdictional inquiry and a "need for further factual development of those issues." *Id.* at 1328.

Thirty-plus years after the passage of IGRA, it is clear that IGRA has been a success. Indian gaming provides billions of dollars in revenue to tribes and states, which funds education, health care, cultural preservation, and many other public service, health, and welfare benefits to Indian and non-Indian communities alike.[7] This success, however, would not have been possible had the Supreme Court failed to adhere to Congress' exclusive authority over Indian affairs in deciding *Cabazon*. In crafting IGRA, Congress was able to maintain a critical balance: on one hand, IGRA grants states a regulatory role in Indian gaming they otherwise would never have had; on the other hand, IGRA preserves and protects tribal sovereignty, tribal self-determination, and tribal economic development and self-sufficiency. IGRA, and the Supreme Court's decision in *Cabazon*, counsel against any judicial interference to grant states authority that Congress exclusively holds.[8]

By enacting IGRA, Congress effectively limited tribal sovereign immunity by granting states a role in regulating Class III gaming only. To be clear, the *Amici*

[7] For instance, in 2018, the gaming industry alone generated 308,712 jobs, of which 75% were held by non-tribal citizens. *See* Shawn Johns, *FY2018: The Nationwide Economic Impact of Indian Gaming*, p. 3 (Mar. 17, 2019), attached hereto as Exhibit B. The ancillary businesses related to tribal gaming operations and its capital spending projects resulted in an additional 178,510 and 29,052 jobs, respectively. *Id.* at 9. In total, tribal gaming created over 766,900 jobs throughout the United States in 2018 alone. *Id.* at 3, 9-10.

[8] Though tribal lending and gaming have inherent differences, the underlying principle that a state cannot and should not regulate tribal commerce applies with equal force.

are not advocating for Congress to enact any such regulatory restriction here; rather, IGRA is merely an example of Congress' exclusive authority to limit tribal sovereign immunity under the *Cabazon* model, which should equally apply here.

Here, Congress has not created a role for states to play in the regulation of tribal financial services. To the contrary, when it has had the opportunity to do so, Congress has instead preserved the role of tribes as the appropriate regulatory bodies with respect to such commercial activities.[9]

The district court's decision, on the other hand, provides no compelling reason to depart from Supreme Court precedent holding that only Congress can curtail tribal sovereignty. Further, there is no shortage of statistics and policy supporting tribal commerce, which would include tribal lending:

> Across the United States, more American Indian families per capita live below the poverty line than any other racial or ethnic group. Economic conditions are even worse on the more than 300 Indian reservations where unemployment reaches 80-90%, inadequate housing and the absence of housing are at the highest rates anywhere in the United States, and health conditions and life expectancy rates are the worst in America. … In contrast, before contact with Europeans, most Indian nations and peoples were fairly prosperous and healthy, and had thriving societies that existed for hundreds and

[9] *See. e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301-5641 (2010) (as amended). In enacting the Dodd-Frank Act, Congress neither prohibited nor limited tribal online lending services, despite having the opportunity to do so. Further, by including federally-recognized tribes as "States," Congress specifically declined to provide states with any regulatory authority over tribal consumer protection violations. *See* 12 U.S.C.A. § 5481(27).

> thousands of years with well-established governmental and economic systems.

Robert J. Miller, *Sovereign Resilience: Reviving Private-Sector Economic Institutions in Indian Country*, 2018 BYU L. REV. 1331,1332 (2019) (citations omitted). Indeed, "expanding and creating new forms of economic development and activities in Indian Country is probably the most important political, social, community, and financial concern that Indian nations, tribal leaders, and Indian peoples face today." *See* Robert J. Miller, *Reservation "Capitalism": Economic Development in Indian Country*, p. 3 (2012).

And now, more than ever, commerce in any form serves as a lifeline—literally—to tribal governments in light of the coronavirus. In a front page article in the *New York Times* last month, Harvard scholar Joseph Kalt "likened the far-reaching devastation caused by shutdowns of tribal businesses around the country this year to the demise of the bison herds in the 19th century and the contentious attempt in the 1950s to disband tribes and relocate Native Americans to cities." Simon Romero and Jack Healy, *Tribal Nations Face Most Severe Crisis in Decades as the Coronavirus Closes Casinos*, THE NEW YORK TIMES (May 11, 2020).

Tribal lending, like gaming in *Cabazon*, provides a source of revenue for tribes whose reservations contain no natural resources and are geographically too remote to make other commercial enterprises viable. Moreover, tribal lending is a

substantial source of revenue for the operation of tribal governments, and a major source of employment for tribal members. If tribal sovereign immunity is shaped by the judiciary in private-party litigation, rather than by Congress, then self-determination and economic development will be out of the reach of many tribes. If there is a balance to be struck, Congress is in the best position to do it.

## III. The district court's decision cannot be squared with this Court's decision in *Big Picture*.

The district court's ruling is also at odds with this Court's decision in *Big Picture Loans.* In *Big Picture Loans,* the plaintiffs brought suit against the Lac Vieux, claiming the Tribe's lending enterprise charged interest rates that exceeded Virginia law. 929 F.3d at 174-75. Lac Vieux asserted its sovereign immunity but the district court allowed the case to proceed against the tribal nation. *See id.* at 175-76. This Court reversed. In doing so, it reaffirming the Supreme Court's conclusion that "tribal immunity extends to 'suits arising from a tribe's commercial activities, even when they take place off Indian lands.'" *Id.* at 178 (quoting *Bay Mills Indian Cmty.*, 572 U.S. at 789); *Big Picture Loans, LLC*, 929 F.3d at 177 ("[W]e hold that the Entities are entitled to sovereign immunity as arms of the Tribe and therefore reverse the district court's decision"). *Big Picture Loans, LLC*, 929 F.3d at 177.

In considering the "arm of the tribe" test, this Court made clear that "[t]he stated purpose" of the tribal lending entity "need not be purely governmental to

weigh in favor of immunity as long as it relates to broader goals of tribal self-governance." 929 F.3d at 178. This Court further reasoned that "[t]he fact that the Tribe created [the tribal lending entities] in part to reduce exposure to liability does not necessarily invalidate or even undercut the Tribe's stated purpose, *i.e.*, tribal economic development." *Id.* at 179. And as this Court concluded, "in order to reach its stated goal, the Tribe may have deemed it necessary to reduce its exposure to liability," and that "does not sway the tribal immunity analysis." *Id.at 185*

Further, this Court pointed out that any opinions about the "respectability of the business which a tribe has chosen to engage" have no place in a sovereign immunity analysis. *See id.* (holding that "an entity's entitlement to tribal immunity cannot and does not depend on a court's evaluation of the respectability of the business in which a tribe has chosen to engage."). What is more, the "lack of remedy for those alleged wrongs—does not sway the tribal immunity analysis." *Id.* at 185.

Thus, even where a federal court is "animated by the intent to protect … consumers," the "Tribe's ability to govern itself according to its own laws, become self-sufficient, and develop economic opportunities for its members" precludes "a

finding of no immunity." *Id.* at 185[10] In sum, Congress has not granted the Judicial Branch the authority to determine whether a tribe is engaged in economic development that is worthy or unworthy. That is a policy decision that has always been reserved to Congress.

## IV. Adequate remedies are available to Plaintiffs by honoring the terms of tribal business contracts.

The claims asserted in this action may be fairly resolved in arbitration and under tribal law, as the parties agreed in their contract. The lending agreements at issue in this case contain express provisions to arbitrate the parties' disputes. Such provisions are regularly enforced in the normal course of business, including in contracts drafted by attorneys for states, major American corporations, and numerous other entities. The district court failed to explain why such provisions may be enforced for such entities, but not for tribal governments. There is no

[10] Although the Tribal *Amici* agree that the Fourth Circuit reached the correct result with respect to tribal sovereign immunity in *Big Picture Loans*, Tribal *Amici* disagree that sovereign immunity is "akin to an affirmative defense," which places the burden of proof on the party seeking immunity. *Id.* at 176-77. Sovereign immunity is an issue of subject matter jurisdiction. *Bales v. Chickasaw Nation Industries*, 606 F. Supp. 2d 1299, 1301 (D.N.M. 2009). It is not a discretionary doctrine—if a defendant is protected by sovereign immunity, a court does not have subject matter jurisdiction over claims against that defendant. *Fletcher v. U.S.*, 116 F.3d 1315, 1323-26 (10th Cir. 1997). And traditionally, the plaintiff—not the defendant—is tasked with the burden of demonstrating a court's jurisdiction. *See Hardy v. Lewis Gale Med. Ctr., LLC*, 377 F. Supp. 3d 596, 604 (W.D. Va. 2019).

legitimate basis upon which such provisions in a tribal business contract should be less enforceable than any non-tribal contracts.

Moreover, there is no dispute that this matter may be fully adjudicated under tribal law. Many tribal laws, whether produced by tribal governments or judicial forums, have preexisted the creation of the states in which they reside.[11] The Supreme Court has noted that, as of 1976, there were 117 operating tribal courts, which handled approximately 70,000 cases. *Santa Clara Pueblo*, 436 U.S. at 66 n.21. That number has expanded to over 300 tribal justice forums as of 2004.[12]

Judgments under tribal law have often been properly regarded as entitled to full faith and credit in other courts. *Santa Clara Pueblo*, 436 U.S. at 65-66 n.21. Notably, as a canon of construction, treaties, statutes, and agreements pertaining to tribal nations are to be interpreted with deference to tribal interests and

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[11] *See, e.g., Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988) (As early as 1867, Muscogee (Creek) Nation had established a judicial system prior to Oklahoma statehood in 1907); Cherokee Nation Judicial Branch, History, available at: https://www.cherokeecourts.org/History (last visited on March 18, 2020) (the Cherokee Nation established its *second* constitution by 1839 containing a judiciary); Navajo Nation Museum, Library & Visitor Center, History of the Courts of the Navajo Nation, available at: http://www.navajocourts.org/history.htm (last visited March 18, 2020) (prior to the arrival of the Spanish in 1598, the Navajo Tribe had judges to resolve disputes); Pechanga Band of Luiseno Indians, History, available at: https://www.pechanga-nsn.gov/index.php/history (last visited March 18, 2020) (for thousands of years, the Pechanga Band has had "rules for proper behavior and the consequences for breaking those rules").

[12] Nat'l Center for State Courts: Library eCollection, Tribal Courts, available at: https://cdm16501.contentdm.oclc.org/digital/collection/spcts/id/159 (last visited March 18, 2020.

understandings. *See, e.g.*, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); *Ramah Navajo Chapter v. Salazar*, 644 F.3d 1054, 1062 (10th Cir. 2011) (noting that the canon of construction by which a statute must be construed in favor of a tribe "applies with equal force to interpretations of contracts"). If arbitration clauses and choice of law provisions are enforced as a matter of course, then they are equally enforceable in tribal business contracts. Tribal business entities are not weaker kin whose contract terms should be disregarded while the same terms in other agreements would be enforced.

Pragmatically, tribal business entities rely on the fundamental principle that the parties with whom they contract will honor the terms of those contracts. Ultimately, if tribal nations and their enterprises cannot enter into contracts with certainty as to their enforcement, the entire foundation of tribal economic development will be undone. The district court's disparate treatment of the ordinary, mundane choice-of-law and arbitration provisions in a *tribal* contract cannot withstand even a rational level of scrutiny, and given the Supreme Court and Congress' continued emphasis on the importance of tribal economic development and tribal self-governance, the district court's decision to discount

tribal contracts solely because they are signed by tribes, and not states or private corporations, must be overturned.

## CONCLUSION

The Supreme Court has long recognized that Congress, not private-party litigation, should shape policy and determine the metes and bounds of tribal sovereign immunity. Tribal immunity forms the foundation for tribal economic development and self-governance across Indian Country. To preserve Congress' historic and exclusive role, the district court's decision should be reversed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH RULE 29(A)(4)(E)

Pursuant to Fed. R. App. P. 29(a)(4)(E), Tribal *Amici* certify that no party's counsel authored this brief, in whole or in part. Nor did any party, the party's counsel or any other person other than the Tribal *Amici* contribute money that was intended to be used to fund the preparation or submittal of this amicus brief.

## CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) , I hereby certify that the foregoing brief was produced using the Times New Roman font and contains 6,386 words, excluding the parts of the brief exempted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

## CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of June, 2020, a true and correct copy of the foregoing Brief of Tribal Amici was filed with the Clerk of Court via the CM/ECF system, which sent a Notice of Electronic Filing to all counsel of record.

_____

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*Counsel for the Tribal Amici*

## INDEX TO APPENDIX

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# The National Congress of American Indians
# Resolution #TUL-13-056

**TITLE: Support for Tribes Providing Online Short Term Consumer Financial Services and Products Pursuant to Tribal Law and Ensuring Appropriate Regulation of these Services for the Protection and Fairness of Consumers**

**WHEREAS,** we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

**WHEREAS,** the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

**WHEREAS,** the United States' current policy toward Indian affairs is one of tribal self-determination and tribal autonomy, to strengthen tribal nations and encourage economic development so that tribal nations can effectively govern and provide resources for their peoples; and

**WHEREAS,** in July 2010, Congress enacted the Dodd–Frank Wall Street Reform and Consumer Protection Act, ("Dodd–Frank Act"), for the stated purpose of "promot[ing] the financial stability of the United States by improving accountability and transparency in the financial system . . . [and] protect[ing] consumers from abusive financial services practices;" and

**WHEREAS,** under Title X of the Dodd-Frank Act, tribal governments are included in the definition of States, recognizing the status of tribal nations as co-regulators of consumer financial services; and

**WHEREAS,** all references to States throughout Title X of the Dodd-Frank Act highlight the cooperation Congress envisioned between the federal government and tribes, further reinforcing that Congress intended States (and thus tribes) to make governance decisions regarding the legalization, regulation, and conduct of short term on-line consumer financial services and products within the confines of applicable tribal and federal consumer protection laws; and

**WHEREAS,** pursuant to the Dodd-Frank Act, Congress expressly recognized the authority of tribal governments to conduct and regulate short-term online consumer financial services; and

**WHEREAS,** pursuant to their inherent sovereign authority and as expressly recognized by Congress, Tribal governments have been engaged in providing online short term consumer financial services and products within the boundaries of their tribal lands in an effort to expand economic development opportunities; and

**WHEREAS,** NCAI supports member tribes offering online short term consumer financial products and services, which are authorized under tribal law, consistent with federal consumer protection laws as well as relevant Congressional directives; and

**WHEREAS,** NCAI is aware of certain entities providing online lending products and services that claim affiliation with Indian tribes but are neither wholly owned and operated by Tribal governments, nor are their lending activities authorized pursuant to tribal law, their proceeds earmarked specifically to fund essential tribal government services, their business conduct regulated by tribal regulators, nor are their customers provided with the consistent application of federal consumer protection laws; and

**WHEREAS,** NCAI's support on this issue does not extend to non-tribally owned and operated entities which do not operate in accordance with tribal law and applicable federal consumer protection laws; and

**WHEREAS,** NCAI recognizes that engaging in the responsible conduct of these ecommerce economic development opportunities thereby advances the goals of many tribal governments to realize self-sufficiency and improve the lives their tribal citizens; and

**WHEREAS,** NCAI supports the authority of Tribal Nations to exercise self-determination by enacting short-term consumer financial service laws and establishing regulatory agencies for the oversight and enforcement of such tribal and federal laws in an effort to regulate the short-term consumer financial industry on tribal land; and

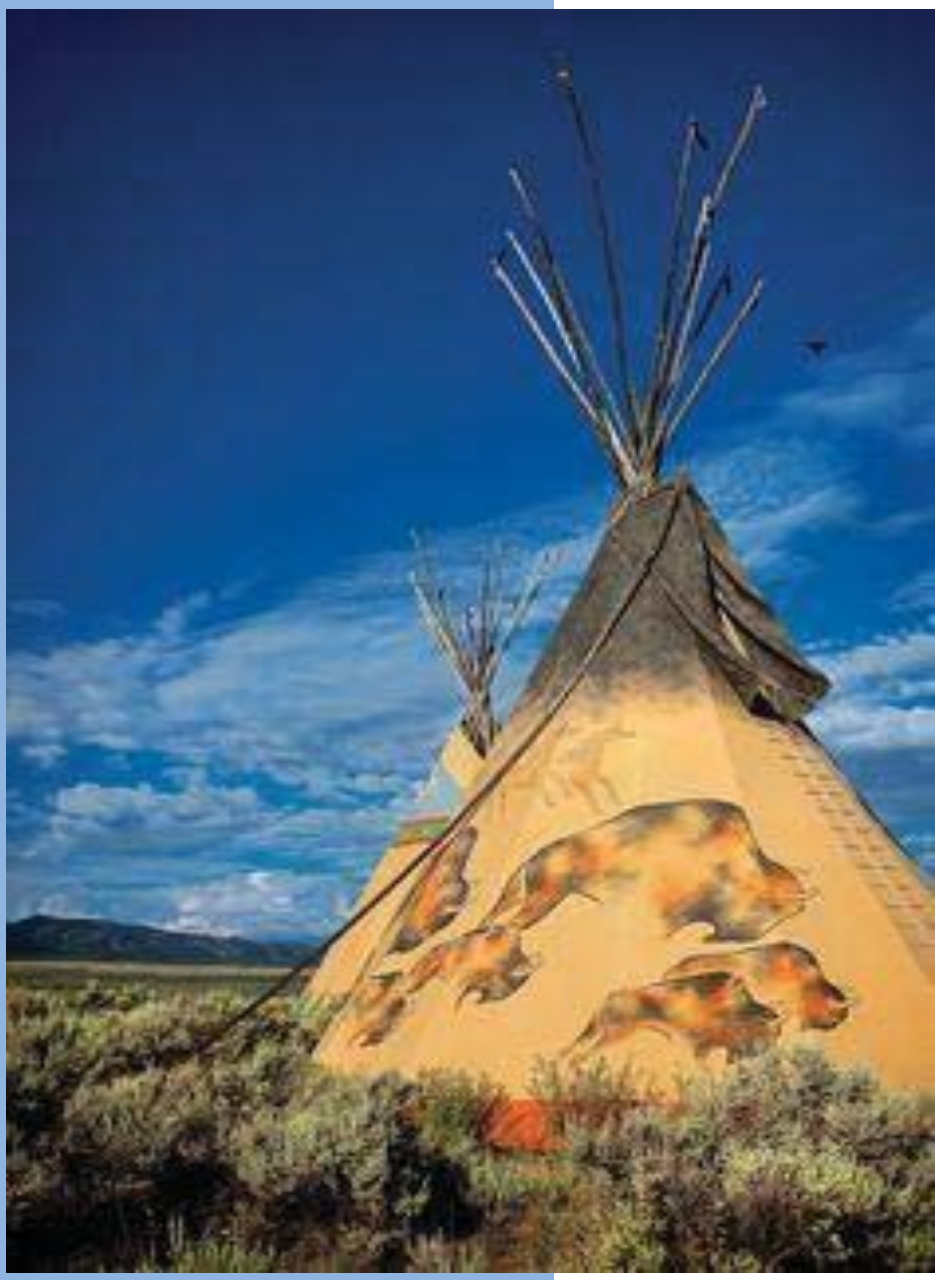
**WHEREAS,** this resolution is consistent with NCAI's previous efforts and policy to protect consumers from predatory financial practices.

**NOW THEREFORE BE IT RESOLVED,** that NCAI supports the efforts of Tribal Nations to offer online short term consumer financial services and products where appropriately authorized and to regulate these services, pursuant to Tribal law and in accordance with federal law and policy, in the exercise of their self-determination and self-governance; and

**BE IT FURTHER RESOLVED,** that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution.

# FY 2018

# The Nationwide Economic Impact of Indian Gaming




## National Indian Gaming Association

*Shawn Johns, Dupris Consulting Group, LLC.*


*March 17, 2019*

**EXHIBIT B**

Amici-SOR-003

## *Economic Impact Summary*

The following section presents a summary of the findings and conclusions from the study entitled, *"The Nationwide Impacts of Indian Gaming,"* An Economic Analysis Study for 2018, conducted and authored by Dupris Consulting Group, LLC. on behalf of the National Indian Gaming Association (NIGA).

### DIRECT AND MULTIPLIER IMPACT

- In 2018, the Indian Gaming Industry has generated significant economic activity which had an overall economic output of $87,023,847,012. This represents an economic output of $23,315,756,853 on the reservation, where all Tribal casinos are located and an economic output of $63,708,090,159 off the reservation.

- The Indian Gaming Industry, in 2018 directly transferred $13,831,363,429 to their Tribal owners for governmental program spending and investments, helping to meet gaps in federal funding for Indian programs. Since government spending is largely wages and employee benefits, the majority of that spending stays in the region.

- Tribal Gaming Operations and Ancillary Facilities supported 308,712 ongoing jobs in 2018 of which 75% or held my non-tribal citizens.

- Total employment gains from the Indian Gaming Industry's economic impact activities totaled 766,944 jobs. Of this total, 40.3% or 308,712 were direct jobs, and 59.7% or 458,232 representing indirect jobs.

- Wages paid to employees of the Indian Gaming Industry amounted to $9,484,393,424 and employment resulting from Indian Gaming workers spending their disposable incomes, operations purchasing activities and capital expansion projects generated another $24,662,973,771 in wages. In summary, Indian Gaming was responsible for generating $34,147,367,195 in direct and indirect wages throughout Indian Country, the States their casinos are in, and the United States.

- The fiscal impacts to State and Federal Governments have been very strong. When including taxes paid and payments reduced, the Indian Gaming Industry has had a positive impact on governments in the amount of $17,243,917,654.

## Areas of Employment Gains

The Indian Gaming Industry employs 308,712 full-time workers. Wages paid to these employees amounted to $9,484,393,424 in 2018, and employment resulting from casino and ancillary business employees spending their disposable incomes generated another 87,093 jobs in the local, regional and national economy, bringing job creation for the first and second levels to 395,805.

In 2018, Indian gaming facilities, and their ancillary businesses spent $13,676,513,146 on goods and services. This spending created another 178,510 jobs.

The Indian Gaming Industry also undertook $3,622,627,223 in capital spending projects which created another 29,052 jobs.

Indian casinos transferred $13,690,953,135 to Tribal Governments, for programs spending and investments, which created 163,577 jobs.

As a job generator in the United States economy, Indian gaming successfully contributes 766,944 direct and indirect jobs. Although Tribal gaming has matured since the passage of the Indian Gaming Regulatory Act in 1988, it continues to add growth and maintains stable employment at all the facilities throughout the United States.

| INDIAN GAMING DIRECT AND INDIRECT JOBS | |
|---|---|
| Direct Jobs in Gaming | 229,253 |
| Direct Jobs from Ancillary (Hotels, Food & Beverage, etc..) | 75,423 |
| Direct Jobs from Regulatory Oversight at Federal, State & Tribal Levels | 4,036 |
| | 308,712 |
| | |
| Indirect Jobs from Wages created by Indian Gaming | 87,093 |
| Indirect Jobs created by tribal casinos purchasing activities of Goods & Services | 178,510 |
| Indirect Capital Expansion and Replacement Related Jobs | 29,052 |
| | 294,655 |
| | |
| Indirect Jobs created by tribal governments purchasing activities of Goods & Services | 132,082 |
| Indirect Jobs created by Tribal Revenue Sharing Payments to State Governments | 19,980 |
| Indirect Jobs created from Regulatory Spending at Federal, State & Tribal Levels | 11,515 |
| | 163,577 |
| | |
| **Indian Gaming Stimulated Jobs Nationwide** | **766,944** |

*Source: Dupris Consulting Group, LLC*

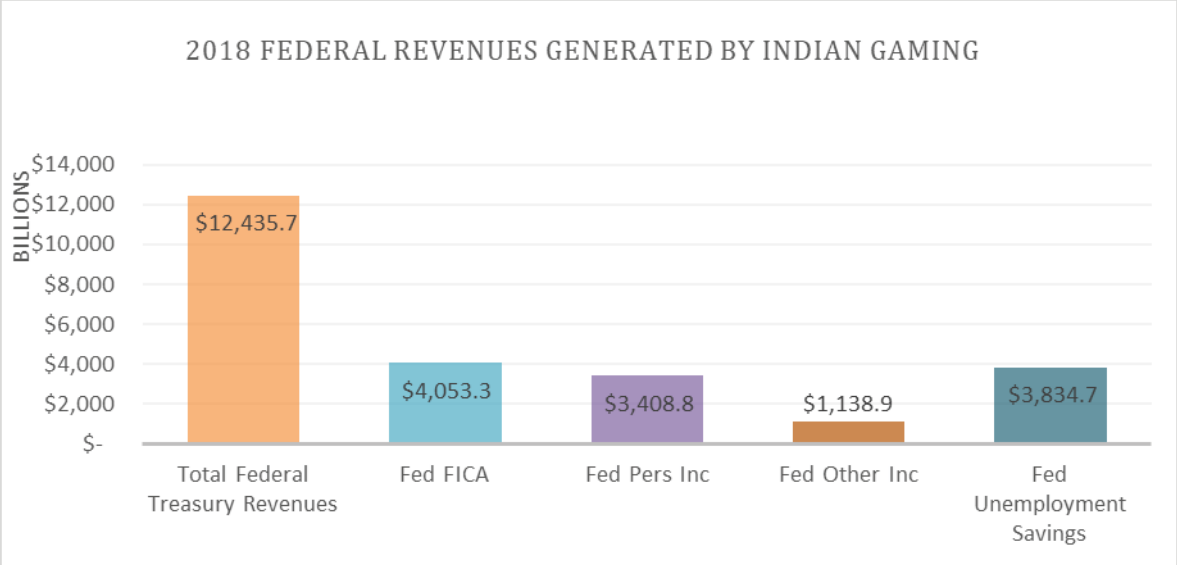
## Payroll and Related Taxes

Federal, State, and local taxes claim roughly a third of income generated in the United States. Increases in economic activity expand the tax base and increase government revenues. Indian Gaming created 766,944 jobs throughout the United States. The wages associated with these jobs generated federal, state, and local payroll, income, and other taxes and helped reduce welfare payments and unemployment benefits, freeing up more government revenue for other purposes.

Wages paid to employees of Indian Gaming amounted to $9,484,393,424 and employment resulting from Indian Gaming employees spending their disposable incomes, gaming enterprise purchases, capital spending and transfer payments to Tribal Governments, generated another $24,662,973,771 in wages. Together in 2018, the employment, purchasing and other economic activities of Indian Gaming was responsible for paying $3,408,764,541 in *Federal Income Taxes*.

As we all know, *Social Security/Medicare Taxes* are above and beyond *Federal Income Taxes*. In 2018, Indian Gaming's economic activities was also responsible for the payment of $4,053,284,425 of *Social Security/Medicare Taxes*. When you add: *Federal proprietor Income Taxes, Federal Indirect Business (Excise, Duty) Taxes, Federal Households (Property, Fees) Taxes and Federal Corporate Income Taxes* together, Indian Gaming was responsible for generating an additional $1,138,908,090 in "Other Types of Federal Taxes."

Besides adding $8,600,957,056 to its revenues, the Federal Government saved $3,834,719,616 through lower payouts of welfare and unemployment benefits. As a result, when consolidating the total contribution to the treasury of the governments bottom line, Indian Gaming contributed $12,435,676,672.




*Source: Dupris Consulting Group, LLC*