No. S216878

IN THE
SUPREME COURT OF CALIFORNIA

People of the State of California,
Plaintiffs-Appellants,
vs.

Miami Nation Enterprises, et al.
Defendants-Respondents.

Court of Appeal, Second Appellate District, Div. 7, Case No. B242644
Los Angeles County Superior Court, Case No. BC373536
Hon. Yvette M. Palazuelos

BRIEF OF *AMICI CURIAE* CENTER FOR RESPONSIBLE LENDING, COMMUNITY LEGAL SERVICES IN EAST PALO ALTO, HOUSING AND ECONOMIC RIGHTS ADVOCATES, LAW FOUNDATION OF SILICON VALLEY, EAST BAY COMMUNITY LAW CENTER AND PUBLIC GOOD LAW CENTER, IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

At stake in this case are a cascade of competing interests, including the economic security of Native American tribes, the viability of businesses that abide by state law, and the ability of the People of California to protect the state's most financially vulnerable citizens. The standard for evaluating whether an entity is an arm of the tribe entitled to sovereign immunity must take account of each of these interests. It must also necessarily be informed by the recent history of the payday lending industry, and by a consideration of the potential consequences of its implementation. That is, in determining the arm-of-the-tribe standard for California, this Court must weigh – as the Court of Appeal did not – the landscape on which it acts and the practical impact of its decision.

The critical importance of respecting Native American sovereignty is undisputed. "Long before the formation of the United States, Tribes 'were self-governing sovereign political communities'" and they "have not given up their full sovereignty." (*Michigan v. Bay Mills Indian Cmty*. (2014) 134 S. Ct. 2024, 2040 [conc. opn. of Sotomayor, J.] [quoting *United States v. Wheeler* (1978) 435 U.S. 313, 322–323]; *see also NLRB v. Pueblo of San Juan* (10th Cir. 2002) 276 F.3d 1186, 1192 ["Indian tribes . . . are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate."].)

Also indisputably important is California's interest in enjoining "wrongful business conduct in whatever context such activity might occur." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal. 4th 163, 181.) It is crucial – both for law-abiding businesses and for consumers – that unscrupulous enterprises not be allowed to immunize otherwise illegal practices through merely nominal affiliations with Native American tribes.

In this case the Court of Appeal, by refusing to look past formal affiliation to allow any examination of the actual relationship between business entities and tribes, set out a legal standard – now urged by Defendants – that does not adequately take account of the interests of tribes, legitimate businesses, or the victims of illegal business practices.

The Payday Lenders[1] who are defendants in this case are not enterprises developed and staffed by members of the Miami Tribe and the Santee Sioux Nation. They are formerly (and still effectively) separate, non-tribal companies whose principals have long operated unlawful payday lending operations. (*See* Appellants' Opening Brief (AOB) at pp.14-15, 19-20; *see also* David Heath, CTR. FOR PUBLIC INTEGRITY, *Tribal Payday*

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[1] *Amici* will refer to Respondents as "the Payday Lenders" (consistent with the Attorney General's practice) or as "Defendants."

Lender Can't Sidestep Consumer Laws, Court Rules (Mar. 20, 2014)[2] [noting "[r]egulators in several states pursued [Scott] Tucker for years"]; Editorial, KANSAS CITY STAR (Sept. 23, 2013) [describing lawsuit claiming "a pattern of deception that enabled [Scott Tucker's] businesses to drain consumers' bank accounts with frequent withdrawals and exorbitant fees"].)[3] These predatory lenders have now morphed into purportedly tribal entities for the express purpose of evading the very laws designed to regulate the activities in which they take part. Nor are these lenders alone in seeking to affiliate with tribes for the explicit purpose of shielding themselves from the operation of State law. To the contrary, a cottage industry has emerged to link payday lenders seeking immunity with tribes willing to sell it, generally for 1-2% of the lender's profits. (Julia Harte and Joanna Zuckerman Bernstein, *The Sovereign Matchmaker: Meet Allen Parker, The Middleman Payday Lenders Need To Find Native American Tribes*, Al Jazeera America (June 19, 2014).)[4]

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[2] Available at <http://www.publicintegrity.org/2014/03/20/14442/tribal-payday-lender-cant-sidestep-consumer-laws-court-rules> (as of Dec. 3, 2014).
[3] Available at http://www.kansascity.com/news/local/article327923/Kansas-City-area-taking-the-lead-in-the-online-lending-industry.html#storylink=cpy (as of Dec. 3, 2014).
[4] Available at <http://projects.aljazeera.com/2014/payday-nation/matchmaker-payday.html> (as of Dec. 3, 2014).

The Payday Lenders have taken pains not to reveal to this Court the particulars of their financial arrangement with the tribes.[5] (*See, e.g.,* Respondents' Answer Brief (RAB) at p. 44 [stating that "profits" and "revenues" are used "for the benefit of the Tribe[s]", but neglecting to specify what percentage of overall profits and revenues these might entail].) It may be that they believe that disclosing the actual numbers would undermine their claim that the lending operations at issue here are under the control of the tribes. As one non-Native American, tribally affiliated payday executive aptly observed: If the tribes are the real owners of these businesses, "Why are we making 98 percent and they're making 2 percent?" (Harte and Zuckerman Bernstein, *supra*, *The Sovereign Matchmaker*.)

The attempt by certain payday lenders to evade State law is nothing new. Indeed, "the archetype for evading regulation through shape-shifting is high-priced small-dollar lending, such as payday lending." (Lauren E. Willis, *Performance-Based Consumer Law* (SSRN, Aug. 13, 2014) (forthcoming in U. Chi. L. Rev.) at p. 13.)[6] More than a decade ago, with states starting to address seriously the deep and lasting harm unregulated

[5] Documents cited in the Appellant's Opening Brief in the Court of Appeal (AOB-Ct. App.) put the number at 1% of gross revenues. (AOB-Ct. App., 2013 WL 3363410, at pp. *10-*11 [citing Clerk's Transcript (CT)].)
[6] Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2485667> (as of Dec. 3, 2014).

payday lending can do to low-income consumers, payday lenders tried to cloak themselves in the guise of national banks and to assert that, under the National Bank Act, state law did not apply to their operations. (*See* Pew Charitable Trusts (2014) *Fraud and Abuse Online: Harmful Practices in Internet Payday Lending*, at p. 22.)[7] Skeptical courts and federal regulators looked behind the façade and eventually shut down these "rent-a-bank" schemes. (*Ibid*.)

Meanwhile, other lenders had metamorphosed into "credit service organizations" (CSOs) – non-lending entities that offer to repair credit and broker loans for consumers – to shield themselves from laws regulating payday lenders. (*See* Diane Standaert & Sara Weed, CTR. FOR RESPONSIBLE LENDING (July 2010) *Payday Lenders Pose as Brokers to Evade Interest Rate Caps: The Next Chapter in Payday Lender Subterfuge*.)[8] This practice increased exponentially after federal regulators ended the rent-a-bank scheme. (*Ibid*.) The "brokerage fees" assessed by the CSOs for arranging the loans matched or exceeded the finance charges those same lenders had levied before the States stepped in – leading to an average APR over 500%. (*Ibid*.) Many (but not all) of the States that

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[7] Available at <http://www.pewtrusts.org/~/media/Assets/2014/10/Payday-Lending-Report/Fraud_and_Abuse_Online_Harmful_Practices_in_Internet_Payday_Lending.pdf> (as of Dec. 3, 2014).
[8] Available at <http://www.responsiblelending.org/payday-lending/policy-legislation/states/CRLCSO-Issue-Brief-FINAL.pdf> (as of Dec. 3, 2014).

permit CSOs to operate – including California – eventually passed laws effectively ending this scheme as well. (*Id*. at pp. 3-4.)

The past several years have witnessed the next incarnation, with payday lenders now playing a new role as "tribal" organizations – but with the same old actors underneath.

The Payday Lenders here, which operate online rather than in storefronts, present a particular threat to consumers. The great majority of consumer complaints filed against payday lenders are directed at online operations (*see* Pew Charitable Trusts, *Fraud and Abuse Online*, *supra*, at p. 18 [noting that despite accounting for only one-third of the industry, online lenders are responsible for 89 percent of all payday lending complaints received by the Better Business Bureau].) For online loans, oversight is more difficult, the rules less likely to be followed, and the fees charged low-income consumers all the more outrageous. (*Ibid*.) To remove state regulators – the primary watchdogs – from oversight of payday lending, as Defendants seek, would make it even more difficult to bring light to this shadiest corner of the industry.

Indeed, were a formalistic relationship with a tribe all that was required to obtain a shield from State regulation, a whole panoply of players in regulated industries – seeking competitive advantage over their law-abiding colleagues – would presumably flock to the banner of tribal immunity. A race to the regulatory bottom would ensue.

That is not and cannot be a scenario which this Court would seek to foster.

Instead, the inquiry for determining whether an entity claiming tribal immunity is in fact an arm of the tribe must be substantive, adaptable and practical. It needs to take account of both the importance of preserving tribal sovereignty and the urgency of protecting low-income consumers and law-abiding businesses in the marketplace. It needs to inquire into the tribe's actual involvement with the enterprise, encompassing both finances and control. It needs to place on the party asserting immunity the burden of establishing that claim, and to permit focused discovery on the issue. And it needs, "given the creative nature of the scheming mind" (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 112) and the fact that "unfair or fraudulent business practices may run the gamut of human ingenuity and chicanery" (*People ex rel. Mosk v. National Research Co. of Cal.* (1962) 201 Cal.App.2d 765, 772), to be as pragmatic and flexible as the payday lenders themselves.

ARGUMENT

I. EFFECTIVE REGULATION OF PAYDAY LENDERS IS NECESSARY TO PROTECT VULNERABLE BORROWERS FROM SERIOUS FINANCIAL HARM.

Proper and effective oversight of payday lending is a matter of urgency to low-income borrowers throughout California. The state's most financially vulnerable consumers face significant risk from loans that, even

when offered in accordance with California law (*see* Fin. Code, §§ 23035, 23036)[9] and repaid as advertised, carry annual interest rates of more than 400%. (*See* Cal. Dept. of Business Oversight (Oct. 31, 2013) *2012 Annual Report: Operation of Deferred Deposit Originators Licensed Under the California Deferred Deposit Transaction Law,* at p. 6).[10] When payday lenders – like Defendants here – do *not* follow California law, the resulting finance charges and APR may be many multiples of that figure. And the debt trap into which borrowers may fall – repaying one payday loan by taking out another – is that much deeper, and that much more difficult to escape.

A. The Payday Lending Industry Has Serious, Deleterious Impacts On Low-Income Californians.

There is urgent need for effective oversight of an industry that, particularly in its online incarnation as here, has employed unfair and deceptive practices to draw millions of California's most vulnerable residents ever deeper into debts they cannot afford. Deferred deposit loans – commonly known as payday loans – are small, short-term loans, typically between $250 and $500, that are repayable in full upon receipt of the borrower's next paycheck or public benefits payment, typically in two weeks. (*See* Consumer Financial Protection Bureau (Apr. 24, 2013)

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[9] All statutory references are to the California Codes unless otherwise specified.
[10] Available at <http://www.dbo.ca.gov/Licensees/Payday_Lenders/pdfs/CDDTL_Annual_Report_2012.pdf> (as of Dec. 3, 2014).

Payday Loans and Deposit Advance Products: A White Paper of Initial Data Findings, p. 15.)[11] Payday lenders charge a set fee based on the amount borrowed that does not vary with loan duration. (*Id.* at p. 6.) A 2013 study by the Consumer Financial Protection Bureau, reviewing 15 million payday loan transactions in 33 states – the most comprehensive data set on payday lending ever compiled and analyzed – found a median fee of $15 per $100 borrowed, with some lenders charging more than $20 per $100 borrowed. (*Id.* at pp. 15-16.) The mean annual percentage rate (APR) paid for a payday loan was found to be 339% (*id.* at p. 17), making them "one of the most expensive forms of credit in the world." (Paige Skiba & Jeremy Tobacman, *Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default* (Aug. 21, 2008) Vand. Law and Econ. Res. Paper No. 08-33, at p. 2.) Rather than assessing a borrower's ability to repay, payday lenders generally require access to a borrower's bank account as a condition of the loan, enabling them to seize the borrower's incoming funds on the due date. (*Id.* at p. 8.)

California law offers borrowers certain protections. The amount of the loan is generally capped at $300, and the amount of the fee at $45 (Fin. Code, §§ 23035, 23036). Proceeds from one loan cannot be used to pay off

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[11] Available at <http://files.consumerfinance.gov/f/ 201304_cfpb_payday-dap-whitepaper.pdf> (as of Dec. 3, 2014). The maximum legal payday loan amount in California is $255, for a check with a face value of $300. (Fin. Code, § 23035.)

a previous loan. (Fin. Code, § 23037.) But operators like Defendants, who claim immunity from California law, charge far higher rates and impose much more onerous terms. For example, in a case brought by the Federal Trade Commission against many of the defendants in this case, the court described a deceptive and unfair scheme with terms that starkly victimized borrowers:

> [Under Defendants'] renewal plan, the terms of which are scattered throughout the dense text below the TILA Box in the Loan Note and Disclosure document, a new finance charge accrues each pay-period and the borrower's principal balance only begins to decrease by $50.00 per pay-period following the fourth payday. … As a result, if the borrower of a $300.00 loan from the Lending Defendants fails to successfully opt out of the renewal plan, his or her total payments would actually total $975.00 rather than the $390.00 shown in the TILA Box.

(*Federal Trade Commission v. AMG Svces., Inc*. (D. Nev., May 28, 2014) No. 2:12-cv-00536-GMN-VCF, Doc. No. 584 [Order Adopting Report and Recommendation of Magistrate Judge][12][describing Defendants' lending scheme in detail].) That is $675 in finance charges on a $300 loan, an amount in overt violation of California law.

The extent of the potential damage to Californians is immense. More than 1.7 million Californians obtained deferred deposit loans in 2012, the most recent year for which records are available, borrowing a

[12] Available at <http://www.ftc.gov/system/files/documents/cases/140604amgorder.pdf> (as of Dec. 3, 2014).

cumulative total of more than three billion dollars in over 12 million transactions. (Cal. Dept. of Business Oversight, *supra*, at p.6.[13]) The average loan amount was $263; the average loan duration was 17 days; the average APR was 437%. (*Ibid.*) Payday lenders operating in violation of California law – that is, beyond the limit of $15 per $100 borrowed (Fin. Code, § 23036) – have a particularly grave impact on consumers. For the loans at issue in this case, Defendants charged $120 for every $100 borrowed (Complaint, at ¶ 22), equating to an APR as high as 3,000 percent.

Payday borrowers tend to be among the most vulnerable members of society. Nearly one in four payday borrowers identifies public assistance or "retirement funds" as her primary income source. (CFPB, *Payday Loans*, *supra*, at p. 18.) The median payday borrower in the United States earns $22,476 annually. (*Ibid.*)

Unsurprisingly, borrowing at these unsustainable interest rates has a devastating impact on financially struggling borrowers and their families. People who are approved for payday loans file for Chapter 13 bankruptcy almost twice as often as people who are rejected for payday loans. (Paige

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[13] Available at <http://www.dbo.ca.gov/Licensees/Payday_Lenders/pdfs/CDDTL_Annual_Report_2012.pdf> (as of Dec. 3, 2014).

Skiba & Jeremy Tobacman (2010) *Do Payday Loans Cause Bankruptcy?*[14]; Paige Marta Skiba, CREDIT SLIPS (Mar. 17, 2008).[15])). Households with easy access to payday loan stores are more likely to pay bills late (Brian Melzer, *The Real Costs of Credit Access: Evidence from the Payday Lending Market* (2011) 126 Q. J. Econ. 517),[16] delay medical care (*ibid.*), and be delinquent on child support payments (Brian Melzer, *Spillovers from Costly Credit* [Preliminary Draft, May 2012])[17] than similar low-to-moderate income households without such access. Payday borrowers have higher rates of delinquency on credit card debt than do similarly situated people who do not use payday loans. (Sumit Agarwal et al., *Payday Loans and Credit Cards: New Liquidity and Credit Scoring Puzzles?* [Working Paper, Nat'l Bureau of Econ. Research].)[18] Payday borrowers also incur more overdraft fees, ultimately causing many of them to lose their bank accounts. (*See* Dennis Campbell *et al.* (2008) *Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures*

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[14] Available at <http://www.law.yale.edu/documents/pdf/LEO/J.Tobacman.pdf> (as of Dec. 3, 2014).
[15] Available at < http://www.creditslips.org/creditslips/2008/03/do-payday-loa-1.html> (as of Dec. 3, 2014)
[16] Available at <http://qje.oxfordjournals.org/content/126/1/517.full.pdf> (as of Dec. 3, 2014).
[17] Available at <http://www.kellogg.northwestern.edu/faculty/melzer/Papers/Spillovers_from_Costly_Credit_11_28_12. pdf> (as of Dec. 3, 2014).
[18] Available at <http://www.nber.org/papers/w14659.pdf> (as of Dec. 3, 2014).

[Working Paper].)[19]

While payday loans are "marketed as short-term solutions to an emergency need," in reality they are too often "debt traps – products that trigger a cycle of debt whose substantial costs over time can disrupt the precarious balance of people's financial lives." (Richard Cordray, Director, CONSUMER FINANCIAL PROTECTION BUREAU, Remarks at CFPB Consumer Advisory Meeting (Feb. 20, 2013).)[20] The high price of a payday loan and the fact that it must be paid off in a lump sum after a short period make it unlikely that cash-strapped families living paycheck to paycheck will be able to pay off their loan with their next paycheck and also meet basic expenses. (*See* Uriah King & Leslie Parrish, Center For Responsible Lending, *Springing the Debt Trap: Rate Caps are Only Proven Payday Lending Reform* (2007).)[21] Consequently, a large proportion of payday loan users take out another short-term, high-APR loan to repay the previous one, leading to a cycle of debt that profits no one except the lender. In fact, an extensive 2009 study by the Center for Responsible Lending found that 82% of all payday loans are taken out within a month of repaying a

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[19] Available at <http://www.bostonfed.org/economic/cprc/conferences/2008/payment-choice/papers/campbell_jerez_tufano.pdf> (as of Dec. 3, 2014).
[20] Available at <http://www.consumerfinance.gov/newsroom/prepared-remarks-by-richard-cordray-at-a-consumer-advisory-board-meeting> (as of Dec. 3, 2014).
[21] Available at <http://www.responsiblelending.org/payday-lending/research-analysis/springing-the-debt-trap.pdf> (as of Dec. 3, 2014).

previous payday loan. (Leslie Parrish & Uriah King (Center for Responsible Lending) (July 9, 2009) *Phantom Demand*, p. 13)[22] The CFPB's 2013 study of data from 33 states found that the average payday loan user took out 10.7 loans in a twelve-month period (CFPB, *Payday Loans*, *supra*, at p. 6),[23] paying $574 in total fees (not counting repayment of principal) (*id.* at Table 3, p. 23) on an average debt of $392. (*Id.* at p. 15.) Similar borrowing patterns exist in California: on a conservative analysis of 2012 data, 81% of all payday loans issued in California in 2012 went to borrowers who took out at least 6 payday loans that year; 61% went to borrowers who took out at least 10. (Cal. Dept. of Business Oversight (Nov. 2013) *2013 Summary Report: California Deferred Deposit Transaction Law – Industry Survey*, p. 6.)[24]

Most users of payday loans eventually default, but only after having paid on average $90 in fees for every $100 borrowed. (*See* Skiba & Tobacman, *supra*, at p. 1 [over half of payday borrowers default within one year of their initial loan; the average defaulting borrower has already serviced 5 payday loans and has paid interest fees of 90% of the principal

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[22] Available at <http://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf> (as of Dec. 3, 2014).
[23] This figure likely *understates* the actual number of loans taken out by the average borrower, as it counts only loans issued by a single lender; the findings undercount the number of loans taken out by borrowers who borrow from more than one lender.
[24] Available at <http://dbo.ca.gov/Licensees/Payday_Lenders/pdfs/2013_CDDTL_Industry_Survey_Summary_Report_Letter.pdf> (as of Dec. 3, 2014).

of her original loan].) Defaulters experience further financial hardship, including bounced check fees as well as diminished access to credit. (*Ibid.*) They may also face legal ramifications such as garnishment or bank account levies, along with illegal harassment by debt collection agencies. (*Ibid*.)

B. Payday Lending Negatively Impacts Native Americans Individuals and Communities.

Numerous Native American-run organizations have identified payday loans as a serious problem for their communities. "In Native communities . . . predatory lending has been a major concern for years, since abusive lending practices have tended to proliferate more in minority and low-income communities than elsewhere." (First Nations Development Inst. *Borrowing Trouble: Predatory Lending in Native American Communities* (2008), p. 1 [noting survey in which 67% of tribal respondents considered payday loans either a "big problem" or "[s]omewhat of a problem" in their communities].)[25] A coalition of Native

[25] Available at <http://www.firstnations.org/system/files/2008_Borrowing_Trouble.pdf> (as of Dec. 3, 2014), at Table 1, p. 2. The report concludes with a recommendation that might have been written for this case: "It is an opportune time for Native nations to collaborate with state governments to establish a policy agenda to combat all types of predatory lending…. Native nations are in a position to influence and lend force to state anti-predatory lending efforts and vice versa. If states and tribes have similar rules and recognize each others' authority and judgments, usurious lending practices cannot continue in either jurisdiction." (*Id.* at pp. 32-33.)

American community financial development institutions (CDFIs) recently met with the Consumer Financial Protection Bureau to express concerns about the negative effects of payday lending in Native American communities, noting "We deal with the devastating effects of payday loans on a daily basis." (Native CDFI Network, Press Release (May 15, 2012) *Native American Financial Institutions Meet with Consumer Financial Protection Bureau to Express Concerns About Payday Lending Products*.)[26]

Some Native American tribes specifically restrict payday lending. For example, the Blackfeet Nation's Consumer Protection Code caps interest rates on consumer loans at 24% per year and declares invalid any agreement to apply the law of another jurisdiction. (Blackfeet Tribal Law and Order Code, Consumer Protection, §§ 1.3 – 1.4)[27] The Cherokee Code of the Eastern Band of the Cherokee Nation also regulates "deferred deposit loans" (i.e., payday loans), capping loan size at $300 and interest rates at 36% per year. (Cherokee Code, ch. 53, § 13).[28] And at least one Navajo court has held that interest rates of 89.62% to 233.76% per year are unconscionable as a matter of law, and therefore unenforceable. (*Capital*

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[26] Available at <http://nativecdfi.net/documents/Native%20CDFIs%20Meet%20CFPB_v1_05.15.12.pdf.>

[27] Available at <blackfeetcode/blkftcp1credit.htm> (as of Dec. 3, 2014).

[28] Available at <http://www.angelfire.com/rings/trueonrez/The_Cherokee_Code.pdf> (as of Dec. 3, 2014).

Loan Corp. v. Platero, (Navajo D. Ct., Jan. 25, 2000) No. 2000 CP-CV-001.)[29]

C. The Cycle of Debt That Traps So Many Borrowers Is An Integral Part Of The Payday Lending Paradigm.

The "debt trap" that catches so many families through revolving high-interest loans, often culminating in bankruptcy, is not an incidental by-product but rather an integral aspect of a predatory business model. The CEO of a national payday lender explained to a financial services conference in 2007 that "the theory in the business is [that] you've got to get that customer in, work to turn him into a repetitive customer, long-term customer, because that's really where the profitability is." (Dan Feehan, CEO, Cash America, Remarks at Jeffries Financial Services Conference (June 20, 2007), *quoted in* King & Parrish, *supra*, at p. 1.) The former manager of a payday lending store expressed the same perspective: "This industry could not survive if the goal was for the customer to be 'one and done.' Their survival is based on the ability to create the need to return, and the only way to do that is to take the choice of leaving away. That is what I did." (Stephen Winslow, *quoted in* King & Parrish, *supra*, at p. 12.) A similar analysis is offered by investors: "A note about rollovers. We are convinced the business just doesn't work without them." (Roth Capital

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[29] Available at <http://www.tribal-institute.org/cases/navajo/capital.htm> (as of Dec. 3, 2014).

Partners, First Cash Financial Services, Inc. Company Update (July 16, 2007), *quoted in* King & Parrish, *supra*, at p. 11]). Academics, too, agree: "[N]otwithstanding industry denials, the financial performance of the payday loan industry . . . is significantly enhanced by the successful conversion of more and more occasional users into chronic borrowers." (Michael Stegman & Robert Faris, *Payday Lending: A Business Model that Encourages Chronic Borrowing* (2007) 17 (No.1) Economic Development Quarterly, at p. 8).

In sum, while *amici* believe that stronger and more effective regulations are needed to protect millions of California's most vulnerable citizens from abuse by the payday lending industry, at a minimum California has a strong interest in enforcement of existing regulations to the greatest extent permitted by law.

II. BECAUSE PREDATORY LENDERS OFTEN LOOK FOR UNLAWFUL WAYS TO SHIELD THEMSELVES FROM LIABILITY, IT IS ESSENTIAL THAT THIS COURT SET FORTH A STANDARD THAT DISTINGUISHES BETWEEN GENUINE TRIBAL ENTERPRISES AND ENTERPRISES WITH ONLY NOMINAL TRIBAL AFFILIATION.

Given the history of payday lenders' use and abuse of affiliation with different entities in a search for immunity from state law, the inquiry into a business's relationship with a tribe must be one of substance rather than merely form. By setting forth a standard that disregards the actual nature of the relationship between the business entities and the tribes, and

by disallowing discovery as to the nature of that relationship, the Court of Appeal here devised a test – now urged by Defendants – which is incapable of distinguishing between genuine arms of the tribe and sham affiliations. Indeed, the Court of Appeal's standard is one that any unscrupulous lender could meet simply by enlisting the nominal cooperation of the leadership of some tribe in some state. Even a brief account of the history and prevalence of nominal tribal affiliation by predatory lenders makes clear the inadequacy of that – or any other formalistic – standard.

A. Courts And Regulators Rejected Payday Lenders' Attempts To Affiliate With National Banks In Order To Evade State Law.

The trend of seeking to affiliate with tribes is only the latest wrinkle in a longer history of subterfuge in which payday lenders seek to evade regulation by cloaking themselves in other identities. For example, when states acted to limit the effective interest rates that could be charged on payday loans, lenders affiliated with out-of-state banks on the theory that they could then, under federal law, charge any interest rate allowed by the banks' "home" state. (*See, e.g., BankWest, Inc. v. Baker* (11th Cir. 2005) 411 F.3d 1289, 1293, *vacated as moot* (11th Cir. 2006) 446 F.3d 1358.) Through this stratagem, payday lenders could, they believed, import high or nonexistent usury caps into states with restrictive lending laws. (Creola Johnson, *Payday Loans: Shrewd Business Or Predatory Lending?* (2002) 87 Minn. L. Rev. 1, 105-06.) And although some amount of the proceeds

from the loans was shared with the bank, the payday lender would often purchase the entirety of the loan back from the bank – a practice that raised doubts about whether the bank was at all involved in underwriting or financing the loans. (*Id*. at p. 106.)

This ploy did not escape judicial scrutiny. When determining whether payday lenders who claimed to be acting as agents of banks were subject to state law, courts did not simply look to the paperwork of the agreement; instead, they looked to the substance of the relationship. The Eleventh Circuit, for example, held that a payday lender was subject to Georgia's usury cap despite the fact that the lender was technically operating as an agent of an out-of-state bank. (*See BankWest, Inc., supra,* 411 F.3d 1289 [noting that the payday stores "retain the predominate economic interest in the loans" and the "out-of-state banks have no physical locations" in state].) A similar skepticism about the too-convenient nature of the relationship between bank and payday lender caused other courts to reject attempts by payday lenders to operate in states where their interest rates and other terms violated state law. (*See, e.g.*, *West Virginia v. CashCall, Inc.* (S.D. W. Va. 2009) 605 F.Supp.2d 781, 787 [holding that although the *bank* certainly had the right to lend in West Virginia at South Dakota interest rates, the *payday lender* did not if it was "found to be a de facto lender"]); *Flowers v. EZ Pawn* (N.D. Okla. 2004) 307 F.Supp.2d 1191, 1205 [finding that a class action brought against a payday lender did

not improperly infringe upon the affiliated bank's right to lend at out-of-state rates because it was in fact the payday lender who "exerts ownership and control over these loans[,] . . . carries out all interactions with the borrowers, accepts the ultimate credit risk, collects and pockets virtually all of the finance charges and fees, and owns and controls the branding of the loans"]; *Goleta Nat'l Bank v. Lingerfelt* (E.D.N.C. 2002) 211 F.Supp.2d 711, 718-19 [finding that although the bank had a right to make loans at an out-of-state rate, its payday lender agent did not]; *Salazar v. ACE Cash Express, Inc.* (D. Colo. 2002) 188 F.Supp.2d 1282, 1285 [concluding that a state enforcement action against a payday lender was not preempted, because the payday lender "and the national bank are separate entities"].)

As a New York state appellate court observed in a case brought by the New York Attorney General against a payday lender with an analogous agreement with a state-chartered bank,[30]

> It strikes us that we must look to the reality of the arrangement and not the written characterization that the parties seek to give it, much like Frank Lloyd Wright's aphorism that "form follows function." Thus, an examination of the totality of the circumstances surrounding this type of business association must be used to determine who is the "true lender," with the key factor being "who had the predominant economic interest" in the transactions.

(*Matter of People v. County Bank of Rehoboth Beach, Del.* (N.Y. App. Div. 2007) 45 A.D.3d 1136, 1138, 846 N.Y.S.2d 436.)

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[30] The Federal Deposit Insurance Act enabled payday lenders to strike the same type of deals with state-chartered banks. (12 U.S.C., § 1831(a).)

The FDIC dealt the sham-affiliation model a final blow in 2005, when – following similar action by other regulators – the agency issued new guidelines prohibiting banks from issuing more than six two-week payday loans per borrower per year. (Susanna Montezemolo, CENTER FOR RESPONSIBLE LENDING, *Payday Lending Abuses and Predatory Practices* (2013), pp. 11, 18.)[31] Stripped of the ability to perpetuate a lucrative debt cycle, banks chose to get out of the payday lending business altogether, thereby putting a functional end to the agreements.

The parallels between this failed scheme and payday lenders' present arrangements with tribes are telling. If a payday lender could not successfully claim then that a formal affiliation with a national bank entitled it to share in the banks' immunity from state law, it is difficult to see why a similarly nominal relationship with tribes should confer sovereign immunity.

B. The California Legislature Rejected Payday Lenders' Efforts To Disguise Themselves As Credit Service Organizations.

With courts unreceptive to payday lenders' attempts to partner with out-of-state banks in order to skirt state usury laws, payday lenders "turned to an alternative model: the credit services organization." (Erick Bergquist, AMERICAN BANKER (Oct. 24, 2005) *A Surprising Contrarian in Payday*

[31] Available at <http://www.responsiblelending.org/state-of-lending/reports/10-Payday-Loans.pdf> (as of Dec. 3, 2014).

Trend.)[32] Under this model, payday lenders – faced with a legislatively imposed interest-rate cap – styled themselves as "credit services organizations" offering credit repair services and brokering loans from other lenders. The new "CSOs" then assessed "brokerage fees" on top of the maximum interest rate allowed under state law; borrowers thereby paid at least the same total amount (and APR) that they were paying before. (Standaert & Weed, *supra*, *Payday Lenders Pose as Brokers to Evade Interest Rate Caps: The Next Chapter in Payday Lender Subterfuge*, p. 1.)[33] The enterprise as a whole was thus able to effectively evade state usury law. (*See Lovick v. Ritemoney Ltd.* (5th Cir. 2004) 378 F.3d 433, 436-37.)

Regulators recognized this stratagem as simply a means of avoiding state restrictions on payday lending. North Carolina's Attorney General observed that the CSO model seemed to be "another situation of a payday lender trying to evade state lending laws" (Bergquist, AMERICAN BANKER, *supra.*)[34] Even payday lending executives acknowledged that avoiding state interest rate caps is the purpose behind the creation of CSOs. (*See* Standaert & Weed, CTR. FOR RESPONSIBLE LENDING, *supra*, at p.2 [quoting deposition of executive: "'There's multiple models for different states.

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[32] Available at <http://www.americanbanker.com/issues/170_205/-261578-1.html> (as of Dec. 3, 2014).
[33] Available at <http://www.responsiblelending.org/payday-lending/policy-legislation/states/CRLCSO-Issue-Brief-FINAL.pdf> (as of Dec. 3, 2014).
[34] Available at <http://www.americanbanker.com/issues/170_205/-261578-1.html> (as of Dec. 3, 2014).

Every state has its laws, and currently, in the state of Texas they're using what's called a CSO model . . . .' Q: 'And the different models are used from the lender's perspective in order to avoid what could be problems with usury laws, right?' A: 'Yes.'"])[35]; PayDay Loan Capital LLC, *A History of Texas Credit Service Organization Model* (2011) [calling the CSO model a "work-around" devised after the FDIC "significantly restricted" the national bank-affiliation regime)].[36])

California recognized the subterfuge for what it was. In 2007, the Legislature explicitly prohibited CSOs – who were already barred from making loans themselves (Civ. Code, § 1789.12, subd. (b)) – from "[c]harg[ing] or receiv[ing] any money or other valuable consideration for referral of the buyer to a retail seller or other credit grantor who will or may extend credit to the buyer" (Civ. Code, § 1789.13, subd. (c).), thereby putting a stop to the thinly disguised payday lending operations. To ensure compliance – and in recognition of the Protean nature of payday lending operations – California also prohibited CSOs from "[u]s[ing] a scheme, device, or contrivance to evade the prohibitions contained in this section." (Civ. Code, § 1789.13, subd. (r).)

Many other states with CSO regimes responded with similar

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[35] Available at <http://www.responsiblelending.org/payday-lending/policy-legislation/states/CRLCSO-Issue-Brief-FINAL.pdf> (as of Dec. 3, 2014).
[36] Available at <http://www.pdlcapital.com/cso.html> (as of Dec. 3, 2014).

measures.[37] But others did not. And in those states the severe financial consequences of permitting formalistic affiliations to evade critical state consumer protection law have become clear. In Texas, for example, unregulated CSO payday lending exploded after the Fifth Circuit turned back a challenge to payday lenders' CSO scheme. (Ann Baddour, Texas Appleseed, DallasFed e-Perspectives, *Why Texas' Small-Dollar Lending Market Matters* (2012) [noting more than 1,300% increase in number of CSOs in Texas between 2004 and 2011]; *Lovick v. Ritemoney Ltd.*, *supra*, 378 F.3d 433.)[38] As a result, low-income consumers pay about $1 billion a year to storefront lenders in loan charges above the maximum otherwise permitted under Texas lending law. (Texas Appleseed, *Reshaping The Future Of Small-Dollar Lending in Texas* (2012), p. 8[39]; Tex. Fin. Code, § 342.201.)

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[37] As of 2010, in addition to California, the states of Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Louisiana, Maryland, Michigan, New York, North Carolina, Ohio, Oklahoma, Tennessee, Utah, and Virginia had placed restrictions on their CSO regime in order to prevent CSO payday lending. (Ctr. For Responsible Lending, *supra*, *Payday Lenders Pose As Brokers To Evade Interest Rate Caps*, at pp. 6-7.)

[38] *See* John Oliver, Last Week Tonight (Aug. 10, 2014) at 7:50, available at <https://www.youtube.com/watch?v=PDylgzybWAw> (as of Dec. 3, 2014).

[39] Available at <http://www.texasappleseed.net/index.php?option=com_docman&task=doc_download&gid=698&Itemid=> (as of Dec. 3, 2014).

C. This Court Should Reject Payday Lenders' Latest Attempt To Defeat State Law By Nominally Affiliating With Tribes And Claiming Once Again To Be What They Are Not.

The affiliation between payday lenders and Native American tribes at issue in this case bears striking similarities to earlier attempts by lenders to cloak themselves in new identities and exemptions from state law. This latest subterfuge is no more about tribal sovereignty than nominal affiliations with banks were about the need to encourage a uniform national banking system or affiliations with CSOs were about promoting the repair of borrowers' credit. To the contrary, nominal affiliation with tribes is merely the latest attempt by certain payday lenders to continue operating as they have always operated – in violation of state law.

Affiliation with tribes is also part of a nationwide trend. Crucially, that trend is not one in which tribes start payday lending businesses; rather, it is one in which existing payday lending businesses approach tribes in order to evade regulation, as even industry sources acknowledge. A 2012 Internet advertisement by an online payday lender openly advocated the practice:

> Due to the strict regulations that are hitting the payday loan industry hard, many lenders are now turning to Indian Tribes to help them out…. There are 12 states which have banned payday lending but as long as their [*sic*] is an Indian tribe who runs the operation on this sovereign land, the lenders can continue their business even where payday loans have already been banned…. It is no surprise that many lending companies are

> currently seeking out American Indian Tribes in an effort to save their businesses by escaping US lending laws. Tribal leaders are paid a few thousand dollars a month for allowing a payday lender to incorporate on tribal land. The more lenders that tribes allow to move onto their reservation, the larger the profit that they make.

(Advertisement for Online Cash Advance, *quoted in* Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?* (2012) 69 Wash. & Lee L. Rev. 751, 766-67 [noting that the ad assures the target audience of non-tribal lenders that, under this model, outsiders can make "huge profits" while the tribes get "crumbs"].) After the first Court of Appeal decision in this case (*Ameriloan v. Superior Court* (2008) 169 Cal.App.4th 81) was published, a payday industry consultant blog boasted, "This is a fantastic development as we have facilitated the organization and implementation of the Sovereign Nation Payday Loan Model."[40] That consultant "to the best minds, suppliers, vendors, legal and compliance counsel, and related resources in the micro-lending industry"[41] took the

[40] PaydayLoanIndustryBlog (undated), *Tribe PDL*, available at <http://paydayloanindustryblog.com/payday-loans-indian-reservations-sovereign-nations> (as of Dec. 3, 2014).
[41] PaydayLoanIndustryBlog (undated), *Us*, available at <http://paydayloanindustryblog.com/about> (as of Dec. 3, 2014).

opportunity to advertise and urge that lenders call him "[f]or the latest developments regarding the tribal payday loan model."[42]

The touted affiliation is neither intended nor designed as a serious business partnership. Instead, the tribe is provided formal but not effective control and a nominal income stream from the operation. (*See* Zeke Faux, *Behind 700% Loans, Profits Flow From Red Rock to Wall Street*, BUS. WEEK (Nov. 24, 2014)[43] [quoting tribal official who noted tribe received only 1% of profits and "We were just a pawn."]; Harte and Zuckerman Bernstein, *The Sovereign Matchmaker, supra* [If the tribes are the real owners, "Why are we making 98 percent and they're making 2 percent?")

The design and reality of these agreements run counter to any genuine business partnership. They are clearly crafted for the primary purpose of shielding the payday lender's operations from state law. No law of economics or of business associations requires that tribes receive only 1-2% of earnings and exercise no effective control over the enterprise. Nor is there any lack of examples of agreements in which tribes really do have a full and active stake. Compare these figures with the explicit statement of purpose in the Indian Regulatory Gaming Act "that the Indian tribe is the

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[42] *Tribe PDL*, *supra*, available at <http://paydayloanindustryblog.com/payday-loans-indian-reservations-sovereign-nations> (as of Dec. 3, 2014).

[43] Available at <http://www.businessweek.com/news/2014-11-24/payday-loan-fortune-backed-by-medley-found-behind-indian-casino> (as of Dec. 3, 2014).

primary beneficiary of the gaming operation" (25 U.S.C., § 2702(2)) and the express requirement under that act that management fees (i.e., payments to non-tribal entities) generally not exceed 30% of net revenues. (25 U.S.C., § 2711(c); 25 C.F.R., § 531.1(i).) In short, there are plainly instances in which tribes and non-tribal entities enter into balanced, mutually beneficial arrangements in which the tribes retain control or are true partners. Tribal payday arrangements are not among them.

D. The Affiliation Of The Payday Lenders And Tribes Here Exemplifies The Type Of Dubious Relationship Which History – And Common Sense – Require Be Closely Examined.

The tribal affiliation scheme at issue in the instant case appears to fit the historical pattern: a scrim of tribal authority and benefit masking a functionally non-tribal operation. As the People have alleged: The trade names used in the challenged conduct were registered by Scott Tucker in 2002. (AOB-Ct. App., 2013 WL 3363410, at pp. **6-7 [summarizing cited portions of Clerk's Transcript (CT)].)[44] In late 2003, after Kansas began investigating violations of state law by his payday lending businesses, Tucker approached the Miami Tribe of Oklahoma and the Santee Sioux Nation, seeking their participation in those businesses. (*Id.* at p. *7 [summarizing cited portions of CT].) Eventually, a corporate entity was set

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[44] Also available at <https://turtletalk.files.wordpress.com/2014/01/california-opening-brief.pdf> (as of Dec. 3, 2014).

up under the auspices of each tribe for the purpose of engaging in payday lending, using the names that Tucker had previously registered. (*Id.* at pp. *7-*9 [summarizing cited portions of CT]; *id.* at p. *21.) The articles of incorporation stated that the tribes intended that tribal sovereign immunity extend to the corporations. (Ct. of App., slip op., at p. 9.) The two entities entered into nearly identical management agreements with a corporation controlled by Tucker, under which the business was managed by Tucker's corporation and the tribal corporate entity received 1% of the gross revenues. (AOB-Ct. App., at pp. *10-*11 [citing CT].)[45] Tucker and his brother signed most or all of the checks issued by the two corporations in connection with the payday loan business. (*Id.* at p. *12 [citing CT].) Funds from the two corporations' payday lending activities were repeatedly commingled with funds of other corporations affiliated with or controlled by Tucker, and were used by Tucker for his personal and business expenses, including purchase of an $8 million family home, tens of millions of dollars paid for his automobile racing team, and maintenance of his private jet. (*Ibid.* [citing CT].)

The foregoing account illustrates that the Court of Appeal's conclusion that "[a] tribal entity engaged in a commercial enterprise . . .

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[45] *See also* Laura Strickler, *Federal Trade Commission Investigating Online Payday Lender Profiled by CBS News* (Dec. 22, 2011), available at <http://www.cbsnews.com/news/federal-trade-commission-investigating-online-payday-lender-profiled-by-cbs-news/> (citing financial documents obtained by Colorado Attorney general confirming 1% figure).

does not lose [tribal] immunity simply by contracting with non-tribal members to operate the business" (Ct. App., slip op., at p. 23) describes the very inverse of the actual facts of this case. This is not a situation in which a tribal business contracted with non-tribal managers. To the contrary, a non-tribal member who was engaged in commercial enterprises solicited and contracted with tribal entities, exchanging minimal royalties for a declaration that the enterprises were covered by tribal immunity. There is no indication that the conduct of the payday lending business has been in any way affected by the fact that the contractual "agreements expressly provide that the tribal entities have 'the sole proprietary interest in and responsibility for the conduct of the business' and that [Tucker's company's] day-to-day management of the operations is 'subject to the oversight and control of'" the tribal entities. (Ct. App., slip op., at p. 22.) Indeed, there is no indication in the record that the payday lending businesses in question operate meaningfully differently than they did before nominally affiliating with the tribes.

III. IF PAYDAY LENDERS ARE ABLE TO OBTAIN IMMUNITY THROUGH FORMALISTIC AFFILIATION, OTHER UNSCRUPULOUS, NON-TRIBAL BUSINESSES WILL ALSO SEEK TO EVADE CALIFORNIA LAW BY AFFILIATING WITH TRIBES.

The most important point, however, is not that the Court of Appeal reached the wrong conclusion about the parties to this case, but that it set forth a standard which does not distinguish non-tribal businesses with purely nominal affiliations to tribes – including affiliations that do not go beyond paying tribes for stating their intention to share their sovereign immunity – from actual tribal businesses. The standard articulated by the Court of Appeal and urged by Defendants – that "[a]bsent … extraordinary … circumstances …, a tribal entity functions as an arm of the tribe if it has been formed by tribal resolution and according to tribal law, for the stated purpose of tribal economic development and with the clearly expressed intent by the sovereign tribe to convey its immunity to that entity, and has a governing structure both appointed by and ultimately overseen by the tribe" (Ct. App., slip op., at p. 24) – is a standard that could be met by *any* rogue business that persuades or pays a tribe to create a corporate entity using the right words in its articles of incorporation and its contract with the business. These prescribed words will, of course, be readily supplied by the law-evading business. "Ultimate oversight" (at least in name) will always exist as long as the tribe retains the stated power to terminate the arrangement. The inadequacy of this standard is only exacerbated by the Court of

Appeal's refusal to allow discovery into the actual workings of the relations among the different entities involved. (*See* Ct. App., slip op., at p. 7, fn. 9.)

Furthermore, the consequences of the formalistic standard employed by the Court of Appeal would reach far beyond payday lending. Any business operating in violation of state law could seek to avoid that law by finding a tribe somewhere in the United States willing to agree to a nominal affiliation. The business could then evade enforcement actions brought by states, private actions brought by individual consumers under state law, and even state-law claims brought by competitors. In California, where the Legislature has acted to provide both consumers and law-abiding companies with substantial protection from unlawful, unfair and deceptive business practices (*see, e.g*., Bus. & Prof. Code, §§ 17200 et seq., 17500 et seq.), the consequences of such broad immunity would be devastating.

Other more specific laws would be no less vulnerable. As already noted, for example, if California's credit service organizations law – which prevents CSOs from acting as payday lenders – were unenforceable against any tribally-affiliated business, then payday lending abuses (as in Texas) would multiply. But even setting aside payday lenders, *any* CSO exercising tribal immunity could evade the state's prohibition on CSOs accepting up-front fees for credit-repair services (Civ. Code, § 1789.13, subd. (a)) – a restriction imposed because CSOs so often failed to provide the already-paid-for services. (*See* Assem. Com. on Banking and Finance,

Bill Analysis (Jan. 25, 1994), Assem. Bill No. 1922 (1993-1994 Reg. Sess.)).

A broad swath of industries could avoid state regulation in similar fashion. Bail bondsmen could avoid state licensing requirements. (Ins. Code, § 1800.) Immigration consultants could deny restitution to their defrauded customers by failing to file the required $50,000 bond when they register with the State. (Bus. & Prof. Code, § 22443.1.) Creditors collecting their own debts – a group currently covered by state, but not federal, fair debt collection law (*compare* Civ. Code, § 1788.2, *with* 15 U.S.C., § 1692a) – could engage in prohibited conduct such as making threats (Civ. Code, § 1788.10), harassing debtors via telephone (Civ. Code, § 1788.11), misrepresenting their identity (Civ. Code, § 1788.13), and publicly disclosing a debtor's identity (Civ. Code, § 1788.12). Property companies could abuse their tenants by entering units for purposes of harassment (Civ. Code, § 1954) or by retaliating against them for attempting to exercise their legal rights (Civ. Code, § 1942.5.)

The foregoing examples are far from exhaustive. Were tribal immunity available through simple formalities, what would prevent *any* business now overseen by the California Department of Consumer Affairs from declaring itself liberated from state regulation? And the consequences would extend far beyond consumer protection laws or even public enforcement actions. Employers could ignore state workplace safety and

wage-and-hour requirements. (*E.g*., Cal. Code Regs., tit. 8, ch. 4 [setting out safety mandates for everything from construction to sawmills to amusement rides]; Labor Code, § 204 [overtime rules].) Polluters could evade state sanctions for illegal emissions. (*E.g*., Health & Saf. Code, § 43018.5 [greenhouse gas emissions reductions for passenger vehicles].) Businesses could insulate themselves from causes of action brought by their competitors. (*E.g*., Bus. & Prof. Code, §§ 17000 et seq. [Unfair Practices Act], 16720 et seq. [Cartwright Act].) Countless other public protections would be undermined.

Commentators and tribal advocates have expressed legitimate concern that if courts expand the reach of tribal immunity to allow separate non-tribal entities to escape legal liability, that may incite public animosity towards tribes (Martin and Schwartz, *supra*, 69 Wash. & Lee L. Rev., at p. 768) and cause Congress to respond by limiting tribal immunity. (*Id.* at pp. 804-05; Alexander Skibine, *The Indian Gaming Regulatory Act at 25: Successes, Shortcomings, And Dilemmas*, (2013) 60 Fed. Law. 35, 40.) As the former executive director of the National Congress of American Indians has noted,

> [T]his type of business is fodder for those forces that still argue that tribes are not up to the standards of discipline and law for sovereignty and self-governance. Instead they are seen by many as havens of corruption and lawlessness, and fronts for sleazy businesses. These are the things that could feed a backlash; and . . . even if our sovereignty is secure, those

> forces could make it most difficult to exercise it for the good of our people.
>
> …
>
> In my keynote address to the National Congress of American Indians annual convention three years ago, . . . I noted "There is great dignity in sovereignty, and great discipline is needed for its preservation. The powers of sovereignty could bring arrogance and overconfidence on the part of our leaders, especially when they are promised great wealth by outside lawyers who want to use them. And sometimes, pursuant to greed, the envelope of sovereignty can be pushed to the limits of its destruction.

Charles Trimble, *Sovereignty For Rent With Payday Loan Businesses* (Mar. 14, 2011).[46]

IV. THE STANDARD FOR DETERMINING WHETHER AN ENTITY IS AN ARM OF THE TRIBE ENTITLED TO IMMUNITY FROM STATE LAW MUST ENTAIL A PRAGMATIC INQUIRY INTO THE SUBSTANCE, RATHER THAN JUST THE FORM, OF THE BUSINESS RELATIONSHIP.

From the history of payday lenders' attempts to evade state law and the potential consequences of the unbridled extension of tribal immunity to nontribal entities, there emerge several principles for the development of a test to determine whether a given entity should be treated as an arm of the tribe. All of them point to the signal need for pragmatism rather than formalism in conducting the inquiry.

[46] Available at <http://www.indianz.com/News/2011/000756.asp> (as of Dec. 3, 2014).

First, two fundamental interests – tribal sovereignty and the protection of vulnerable individuals – must be preserved and harmonized. The ability of tribes to self-govern, including their ability to raise funds to support self-government, is vital. (*Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, *Inc*. (1998) 523 U.S. 751, 758; *see also Michigan v. Bay Mills Indian Cmty.* (2014) 134 S. Ct. 2024, 2043 [conc. opn. of Sotomayor, J.] ["tribal 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"].) The high court has also observed, however, that there are inevitably negative externalities in such an arrangement and that "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." (*Kiowa*, 523 U.S., at p. 578.) Because tribal immunity provides powerful protection from state law, and imposes potentially devastating harms on victims, the test for a non-tribal entity to obtain tribal immunity must be robust. California has enacted a network of measures designed to protect its most vulnerable citizens – as well as its law-abiding businesses – from predatory operators (*see, e.g*., Fin. Code, § 23035), including unscrupulous payday lenders that would charge *more* than the approximately 459% APR permitted under state law. (Cal. Reinvestment Coalition, *Payday Lenders*

in California: How Predatory Lenders Trap Consumers (2014).)[47] To the extent that these protections can be reconciled with the proper regard for tribal sovereignty, they must be.

Second, any "arm of the tribe" standard needs to include a meaningful inquiry into the relationship between tribe and payday lender. A substantive, flexible and practical inquiry accepts both the necessity of respecting tribal sovereignty and the need to ensure that those purporting to exercise it are entitled to do so. To engage in a mere formalistic inquiry – as did the Court of Appeal – is an abrogation of responsibility to vulnerable consumers, legitimate businesses, and tribes seeking to play by the rules. If all an enterprising business need do is have its attorneys draw up corporate documents with the necessary references to tribal intent, control, and involvement – as proposed by the Court of Appeal and urged by the Payday Lenders – then tribal immunity will soon be available to a rogue's gallery of enterprises.

Third, requiring active – not merely titular – involvement of tribal members in a commercial enterprise not only ensures robust tribal oversight over activities with the potential for serious harm, but also limits the possibility of a race to the bottom in which one or more tribes, in a form of regulatory arbitrage, seek to attract great numbers of unscrupulous

[47] Available at <http://calreinvest.org/crc-issues/payday-lenders> (as of Dec. 3, 2014).

operators by offering terms that require neither substantial revenue to, nor meaningful participation by, members of the tribe. The siren song of the payday matchmaker serves as a useful caution: "The more lenders that tribes allow to move onto their reservation, the larger the profit that they make." (Advertisement for Online Cash Advance, *quoted in* Martin & Schwartz, *supra.*) With tribal members actively involved in an enterprise, oversight is enhanced and the potential for abuse reduced.

Fourth and finally, the burden of establishing immunity must rest with the entity claiming it. Immunity from the operation of state law is an extraordinary measure, with the capacity for denying redress to any victims of tortious, unfair or deceptive conduct. (*See Kiowa*, 523 U.S., at p. 578.) It is not to be conferred lightly. Further, sovereign immunity operates essentially as a party's possible *defense* to a cause of action. (*Weeks Const., Inc. v. Oglala Sioux Housing Auth.* (8th Cir. 1986) 797 F.2d 668, 671–72.) A non-tribal entity claiming tribal immunity must therefore carry the burden of establishing that immunity is something to which it is entitled. The party contesting immunity is correspondingly entitled to focused discovery relating to the question. (*Cf. Warburton/Buttner v. Superior Court*, 103 Cal.App.4th 1170, 1191 (2002) ["Facts that are normally within the knowledge of corporate, or in this case, tribal, officers, relating to jurisdictional issues, are ordinarily subject to discovery"][citing *The 1880 Corporation v. Superior Court* (1962) 57 Cal.2d 840, 843].)

The People's proposed standard incorporates these principles. It requires assessment of issues involving not only the function and purpose of the enterprise, but also the financial relationship between the tribe and the entity, and the actual control of the entity's operation.

The proposal also has the advantages of a developed body of law, and of symmetry. Just as tribes may not sue states in federal court (*Seminole Tribe of Fla. v. Florida* (1996) 517 U.S. 44), "including for commercial conduct that chiefly impacts Indian reservations" (*Bay Mills, supra,* 134 S. Ct., at p. 2041 [conc. opn. of Sotomayor, J.]), so are states barred from suing tribes. (*Ibid*.) Drawing on principles of state sovereign immunity to inform the scope of tribal sovereign immunity, as the Attorney General proposes, is one way of harmonizing the two exigent precepts. Because "tribal sovereign immunity maps state sovereign immunity in nearly every particular" (Katherine Florey, *Sovereign Immunity's Penumbras: Common Law, "Accident," and Policy in the Development of Sovereign Immunity Doctrine* (2008) 43 Wake Forest L. Rev. 765, 782-83), numerous courts have recognized and drawn upon similarities between the two. (*See, e.g., Seminole Tribe, supra,* 517 U.S. at p. 55 [finding that, as with state sovereign immunity, Congress must "unequivocally express its intent to abrogate [tribal] immunity"]; *Osage Tribal Council v. United States Department of Labor* (10th Cir. 1999) 187 F.3d 1174, 1181 ["courts

have often used similar language in defining the requirements for waiver of [state and tribal] immunities"].)

Most notably, the breadth of the two forms of sovereignty is essentially the same: "[T]ribal immunity is similar in scope to that enjoyed by the states." (*In re Mayes* (B.A.P. 10th Cir. 2003) 294 B.R. 145, 150; *see also TTEA v. Ysleta del Sur Pueblo* (5th Cir. 1999) 181 F.3d 676, 680 ["There is no reason that the federal common law doctrine of tribal sovereign immunity, a distinct but similar concept, should extend further than the now-constitutionalized doctrine of state sovereign immunity"]; *Tribal Smokeshop v. Alabama-Coushatta Tribes of Texas ex rel. Tribal Council* (E.D. Tex. 1999) 72 F. Supp. 2d 717, 720 ["tribal sovereign immunity should have the same limits as state sovereign immunity"].)

CONCLUSION

The history of evasion of state law by the payday lending industry provides an object lesson in the need for a substantive and pragmatic inquiry into whether an entity is in fact an arm of the tribe with which it claims to be affiliated. The setting of that standard will affect the viability of legitimate businesses serving Californians, the sustainability of businesses that are meaningfully affiliated with tribes, the economic interests of the tribes themselves, and the financial security of California's most vulnerable consumers. Because the Court of Appeal took none of

these factors into account, its decision affirming dismissal of the case should be reversed.

Dated: December 8, 2014 Respectfully submitted,

By: ______________________________

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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies, pursuant to rule California Rule of Court 8.204(c)(1), that the enclosed **BRIEF OF *AMICI CURIAE*** contains 9,358 words, including footnotes and headings but exclusive of tables and signature block, this certificate of compliance, and the declaration of service. Counsel derives this number from the word count provided by Microsoft Word word-processing software.

Dated: December 8, 2014 By: ____________________________

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CERTIFICATE OF SERVICE

I, the undersigned, declare:

I am employed in the County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 125 Cambon Drive, 5D, San Francisco, CA 94132.

On the date set forth below, I caused a copy of the following document to be served:

APPLICATION TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* CENTER FOR RESPONSIBLE LENDING, COMMUNITY LEGAL SERVICES IN EAST PALO ALTO, HOUSING AND ECONOMIC RIGHTS ADVOCATES, LAW FOUNDATION OF SILICON VALLEY, EAST BAY COMMUNITY LAW CENTER AND PUBLIC GOOD LAW CENTER, IN SUPPORT OF PLAINTIFFS-APPELLANTS

On the following interested parties in this action by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, for deposit with the United States Postal Service at San Francisco, California, addressed as set forth below:

Clerk of the Court
Court of Appeal, Second Appellate District, Div. 7 (Case No. B242644)
Ronald Reagan State Building
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Los Angeles, CA 90013

Clerk of the Court
Los Angeles Superior Court, Dept. 28 (Case No. BC373536)
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Dated: December 8, 2014 By: ___________________________
Vanessa Buffington