TRIBAL LENDING AFTER *GINGRAS*

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ABSTRACT

Online payday lenders pose serious risks for consumers. Yet, for years, these lending companies have skirted state regulation by pleading tribal sovereign immunity. Under this doctrine, entities that are so affiliated with tribal nations that they are "an arm of the tribe" are immune from suit. Without comprehensive federal regulation, tribal sovereign immunity has served as a trump card at the pleading state for online payday lenders.

The Note argues that change may be on the horizon. In the recent decision Gingras v. Think Finance, the Second Circuit held that the Supreme Court's holding in Michigan v. Bay Mills Indian Community permitted injunctive suits against tribal affiliates, acting in their official capacity off reservation, based on state law. If other courts adopt the Second Circuit's reasoning, states and consumers will be far better equipped to tackle online payday lenders.

INTRODUCTION

Proudly displayed on the website of online payday lending company, Big Picture Loans,[1] is short history of Michigan's Chippewa Tribe.[2] The timeline labeled "Our History" begins in the 1600s, when the Chippewas "achiev[ed] sustainability through fishing, hunting, and gathering natural foods." Three panels later, the timeline explains that the Tribe now lives on a reservation in Watersmeet, Michigan, where it "strives to preserve the integrity of this land for future generations to enjoy."[3] Below the timeline, in a section titled "Our Business," the page says that the Chippewas formed Big Picture Loans to "enhance the Tribe's

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[1] *About Us*, BIG PICTURE LOANS, http://www.bigpictureloans.com/about-us (last visited Apr. 2, 2021).

[2] The Chippewa are members of the Michigan Anishinaabe tribes. "Anishinaabe" is the singular version of the name that the Chippewa (Ojibwe), Ottawa (Odawa), and Potawatomi (Bodewadomi) Nations of the Great Lakes use to refer to themselves. "Anishinaabe" means "original people." *See* Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 WYO. L. REV. 296, 297 n. 8 (2011). *See generally* MATTHEW L.M. FLETCHER, THE EAGLE RETURNS: THE LEGAL HISTORY OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS (2012).

[3] *Id.*

self-determination and further diversify the Tribe's economy."[4] The section further informs readers that the lending company "is an economic arm and instrumentality of the Tribe," and "is organized and licensed under Tribal law and is located on the Tribe's reservation."[5]

What the section does not explain is that "arm of the Tribe" is a legal term of art. Native American tribes enjoy tribal sovereign immunity unless Congress authorizes suit against them or the tribe waives its immunity.[6] Some federal circuit courts and state supreme courts have adopted "arm of the tribe" tests to determine whether tribal sovereign immunity protects commercial entities associated with Native American tribes.[7] Generally speaking, if a commercial entity is so closely affiliated with a Native American tribe that they are an "arm of the tribe," and granting the immunity will promote the tribe's economic development, the commercial entity will be immune from suit.[8] That means that Big Picture Loans is not simply describing its relationship with the Chippewa Tribe; it is asserting that the relationship shields it from legal culpability.

Big Picture Loans is not unique in this respect. Many online payday lender companies use tribal affiliations to benefit from tribal sovereign immunity.[9] This Note will describe these companies' problematic lending practices, discuss how they have partnered with Native American tribes, and detail the legal doctrines granting these companies immunity. This Note will also summarize state and federal attempts to regulate online payday lenders. Tribal immunity has stymied many state efforts,[10] and the federal government has not yet taken comprehensive measures in this area. However, a recent Second Circuit decision, *Gingras v. Think Finance*, *Inc.*,[11] may chart a new path forward. There, the Second Circuit held that the Supreme Court's decision in

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[4] *Id.*
[5] *Id.*
[6] Kiowa Tribe of Okla. v. Mfg. Techs., 523 U.S. 751, 754 (1998).
[7] *See, e.g.*, Breakthrough Mgmt. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1186 (10th Cir. 2010); Williams v. Big Picture Loans, LLC, 929 F.3d 170, 177 (4th Cir. 2019); White v. Univ. of Cal., 765 F.3d 1010, 1026 (9th Cir. 2014); People v. Miami Nation Enters., 386 P.3d 357, 365–66 (Cal. 2016); Cash Advance & Preferred Cash Loans v. Colo. ex rel. Suthers, 242 P.3d 1099, 1110 (Colo. 2010); Runyon v. Ass'n of Vill. Council Presidents, 84 P.3d 437, 439–40 (Alaska 2004).
[8] *See, e.g.*, *Breakthrough*, 629 F.3d at 1188.
[9] *See generally* Heather L. Petrovich, Commentary, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. REV. 326 (2012) (detailing sovereign immunity claims made by online payday lenders).
[10] *Id.* at 328.
[11] Gingras v. Think Fin., Inc., 922 F.3d 112 (2nd Cir. 2019).

Michigan v. Bay Mills Indian Community[12] permitted injunctive suits against tribal affiliates, acting in their official capacity off reservation, based on state law.[13] Should other courts adopt the Second Circuit's reasoning, states and consumers will be far better equipped to reign in online payday lenders.

I. ONLINE PAYDAY LENDERS AND TRIBES

Payday loans harm consumers by ensnaring them in "debt traps," wherein they are forced to take out multiple loans they cannot pay back in order to cover existing obligations. These debt traps are the key source of profit for payday lenders. This Part explains what payday loans are, why they are profitable, and how they harm consumers. Additionally, this section will describe how Internet payday lending companies partner with Native American tribes to circumvent regulation. These "rent-a-tribe" schemes grant companies sufficient connection with a Native American tribe for them to benefit from the tribe's sovereign immunity. In the best version of the model, the affiliated tribe will receive investment capital, jobs for tribe members, and a share of the profits from the business in return. How often this truly happens, though, is questionable.

A. What are Payday Loans?

Payday loans are high-cost, short-term credit arrangements, typically offered on 14-day repayment terms.[14] Internet lender companies distribute these loans through their websites, often advertising the speed and simplicity of their application processes.[15] Borrowers fill out application forms on lenders' websites, disclosing their names, addresses, phone numbers, Social Security information, employment information and income, and checking account information.[16] Borrowers are also required to write postdated checks for the amount they owe plus interest.[17] The lender will hold the check until the borrower's next payday, hence the name "Payday Loan."[18] When the loan is due, the borrower can redeem

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[12] Michigan v. Bay Mills Indian Cmty., 572 U.S. 782 (2014).
[13] *Gingras*, 922 F.3d at 121.
[14] Lauren K. Saunders et al., *Stopping the Payday Loan Trap*, NAT'L CONSUMER L. CTR 4 (2010), https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/report-stopping-payday-trap.pdf.
[15] *See, e.g.*, CHECK CITY, https://www.checkcity.com/services/payday-loans/ (last visited Mar. 12, 2020) ("[W]ith a fast, convenient payday loan from Check City you won't have to worry. A payday loan is has [sic] a quick application process, is surprisingly easy to qualify for, and it's incredibly affordable.").
[16] *See, e.g.*, PAYDAY CHAMPION, https://www.paydaychampion.com/online-application/ (last visited Apr. 8, 2020).
[17] Saunders et al., *supra* note 14.
[18] *Id.*

the check, allow it to be deposited, or pay a finance charge and roll the loan over to the new pay period at a new fee.[19] Many consumers with bad credit scores find these services attractive because they can procure the loan quickly and easily ,[20] even though pay day loans' Annual Percentage Rates (APRs) range from 391% to 789%.[21]

Hardly anything else is attractive about these loan services, however. While traditional lenders check that borrowers will be able to pay their loans back before disbursing funds,[22] payday lenders do not.[23] Instead, payday lenders solicit consumers who likely cannot pay back their loans and will thus opt to roll their loans over to a new pay period with even higher fees. Even though many online payday lenders advertise their loans as short-term commitments, people who use payday lenders end up taking out an average of eight to nine loans annually.[24] Lenders' business model, in fact, *depends* on these customers returning for new loans. Borrowers who take out five or more loans a year generate ninety percent of the industry's business; borrowers who take out twelve or more loans a year generate sixty percent of their business.[25] To be sure, a study by the Center for Responsible Lending found that seventy-six percent of payday loans are taken out to pay back prior payday loans.[26] This loan churning results in an extra $3.5 billion in fees annually.[27] As borrowers take out

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[19] *Id.*

[20] *See An Update on Emerging Issues in Banking* (Jan. 29, 2003), https://www.fdic.gov/bank/analytical/fyi/012903fyi.pdf; *see also* PAY DAY ME, https://www.paydayme.com/how-it-works/ (last visited Mar. 13, 2020).

[21] Saunders et al., *supra* note 14, at 4.

[22] Petrovich, *supra* note 9, at 326.

[23] Saunders et al., *supra* note 14, at 4.

[24] Uriah King & Leslie Parish, *Springing the Debt Trap: Rate Caps are Only Proven Payday Lending Reform*, CTR. FOR RESPONSIBLE LENDING 8 (Dec. 13, 2007), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/springing-the-debt-trap.pdf.

[25] *Id.* at 9.

[26] Uriah King & Leslie Parish, *Phantom Demand: Short-Term Due Date Generates Need for Repeat Payday Loans, Accounting for 76% of Total Volume*, CTR. FOR RESPONSIBLE LENDING 11 (July 9, 2009), https://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf.

[27] Susanne Montezemolo, *The State of Lending in America & Its Impact on U.S. Households*, CTR. FOR RESPONSIBLE LENDING 3 (Sept. 2013), https://www.responsiblelending.org/state-of-lending/reports/10-Payday-Loans.pdf.

more and more money, the attending fees also increase, leaving borrowers stuck in "debt traps."[28]

Debt traps pose serious consequences for borrowers. Studies have found that people who take out payday loans are more likely to file for bankruptcy[29] and become delinquent on their credit card payments.[30] Borrowers are more likely to pay other bills late, delay their medical care and prescription drug purchases,[31] and lose their bank accounts because of excessive overdrafts.[32] Another study found that over half of borrowers default on their payday loans within one year.[33] Most payday loan borrowers are teetering on the edge of the middle-class,[34] meaning that debt traps can easily send them into poverty.

B. "Rent-a-Tribe" Schemes

Native American communities are struggling economically. The U.S. Census Bureau found that 27% of Native Americans lived in poverty, the highest poverty rate of any racial group.[35] In 2000, Native Americans' median wealth was equal to only 8.7 percent of the median wealth among all Americans.[36] This may be partially attributable to Native Americans' low home ownership rate and home values, both of which are dwarfed by

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[28] *See* Saunders et al., *supra* note 14; *see also* King & Parish, *supra* note 26. The "debt trap" describes when a consumer takes out a loan that she cannot pay back with her income and is, as a result, forced to take out more loans to pay the old ones. These new loans create new debt obligations she cannot repay, which then forces her to take out even more loans. This cycle continues until the consumer is "trapped" in debt.

[29] Paige Marta Skiba & Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy?*, 62 J. L. & ECON. 485, 485 (2019).

[30] Sumit Argawal et al., *Payday Loans and Credit Cards: New Liquidity and Credit Scoring Puzzles?*, 99 AM. ECON. REV. 412, 412 (2009).

[31] Brian T. Melzer, *The Real Costs of Credit Access: Evidence from the Payday Lending Market*, 126 Q. J. ECON. 517, 550 (2011).

[32] Dennis Campbell et al., *Bouncing out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures*, 36 J. BANKING & FIN. 1224, 1225 (2012).

[33] Paige Martin Skiba & Jeremy Tobacaman, *Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default*, at 1 (Vand. Sch. of L., L. & Econ. Res. Paper Series, Ser. No. 08-33, 2008).

[34] King & Parish, *supra* note 26, at 16.

[35] Suzanne Macartney et al., *Poverty Rates for Selected Detailed Race and Hispanic Groups by State and Place: 2007-2011*, U.S. CENSUS BUREAU 2 (Feb. 2013), https://www2.census.gov/library/publications/2013/acs/acsbr11-17.pdf.

[36] Algernon Austin, *Native Americans and Jobs: The Challenge and the Promise*, ECON. POL'Y INST. 3 (Dec. 17, 2013), https://www.epi.org/files/2013/NATIVE-AMERICANS-AND-JOBS-The-Challenge-and-the-Promise.pdf.

those of white Americans.[37] Even when controlling for factors like age, sex, education level, and state of residence, Native Americans are 31% less likely to be employed than white people.[38] The figures are even worse for Native Americans living on reservations. In 2005, the average unemployment rate for Native Americans on or near reservations was 49%.[39] Facing serious economic hardship, remotely located tribes have increasingly turned to e-commerce as a source of revenue.[40]

This is where payday lending companies come in, providing tribes the investment capital to start online payday businesses. In exchange, these businesses receive tribal sovereign immunity from their association with the tribe,[41] which they can use to sidestep state regulation for a greater profit.[42] Some commentators call these arrangements "rent-a-tribe" schemes,[43] which have become so popular that one can find several online consulting companies claiming to be expert in the process.[44] In its best iteration, a tribal lending entity ("TLE") will maintain offices on tribal lands, operate its computer servers there, and employ tribal personnel.[45] Generally, though, TLEs use many non-tribal subcontractors;[46] and because outside companies finance the entire enterprise, nearly all of the revenues from the entities flow to them and not the tribe.[47] To give one example, Adrian Rubin, an owner of multiple payday companies, agreed to send a relatively small monthly commission to an unnamed tribe in California on the condition that it pretend to own and operate the lending

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[37] *Id.*
[38] *Id.*
[39] Jenadee Nanini, Note, *Tribal Sovereignty and Fintech Regulations: The Future of Co-Regulating in Indian Country*, 1 GEO. LAW. TECH. REV. 503, 504 n.6 (*citing* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 21.04 (Nell Jessup Newton ed., 2015)).
[40] *Id.* at 504.
[41] *See* Heather L. Petrovich, *supra* note 9, at 341–45; Hilary Miller, *The Future of Tribal Lending Under the Consumer Financial Protection Bureau*, BUS. L. TODAY (2013), https://perma.cc/XF2Z-ES3C (detailing the legal risks and benefits of tribal lending models).
[42] *See* Paul Walsh and Neal St. Anthony, *State bars internet lender, wins $11.7M settlement over 'rent a tribe' loans*, STAR TRIB. (Aug. 18, 2016), https://perma.cc/53GT-P97J.
[43] *See* Petrovich, *supra* note 9, at 341–45; *see also* Ben McLannahan, *US authorities in crackdown on "rent-a-tribe" payday lenders*, FIN. TIMES (June 28, 2015), https://www.ft.com/content/82ca6198-1dc3-11e5-aa5a-398b2169cf79.
[44] *See, e.g.,* LEANING ROCK FIN., https://www.consultants4tribes.com/leaning-rock-finance/
(last visited Apr. 5, 2020).
[45] Miller, *supra* note 41.
[46] *Id.*
[47] *Id.*; Petrovich, *supra* note 9, at 342–43.

companies and claim tribal immunity if anyone alleged state law violations.[48] The Justice Department eventually tried and convicted Rubin on RICO,[49] conspiracy, and mail fraud charges.[50] No one knows how many other online payday lenders are engaging in bad faith "rent-a-tribe" schemes akin to Rubin's because tribal sovereign immunity can bar state suits before robust discovery takes place, and the lessened disclosure requirements for corporations chartered under tribal law limit what discovery can ultimately reveal.[51] A recent surge of RICO complaints alleging that many online lenders are "renting" tribes may indicate that the practice is common.[52]

II. TRIBAL SOVEREIGN IMMUNITY AND REGULATION

This section will describe the legal doctrines granting Internet TLEs immunity, as well as state and federal regulation of payday lending. The Marshall Court recognized Native American tribes as quasi-sovereigns entitled to immunity in the early 19th century, and this recognition prompted the United States Supreme Court to begin to announce robust protections for Native American tribes in the middle of the 20th century. Lower federal and state courts have also developed legal standards for tribal sovereign immunity, most notably the arm of the tribe analysis. States—with limited success—have tried to regulate payday lending with usury laws, while the federal government has not enacted any comprehensive regulation.

A. The Supreme Court Doctrine

Sovereign immunity is a federal common law principle that precludes sovereign governments from being sued without their consent, except in very narrow circumstances.[53] Lacking a clear textual basis in the Constitution, sovereign immunity emanates from the inherent powers of

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[48] Press Release, Dep't of Justice, Co-Conspirator of Reputed "Godfather of Payday Lending" Sentenced to Prison and Ordered to Forfeit $9,621,800 (Aug. 7, 2018) [hereinafter DOJ Press Release].

[49] 18 U.S.C. §§ 1961–1968 (1970).

[50] DOJ Press Release, *supra* note 48.

[51] *See* Petrovich, *supra* note 9, at 343–44.

[52] *See, e.g.*, Hengle v. Curry, No. 3:18-cv-100, 2018 U.S. Dist. WL 3016289 (E. D. Va. June 15, 2018); Gibbs v. Stinson, 421 F. Supp. 3d 267 (E. D. Va. 2019); Brice v. Plain Green, LLC., 372 F. Supp. 3d 955 (N.D. Cal. 2019).

[53] Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 662 (2002).

sovereignty.[54] The Supreme Court first recognized the federal government's immunity from nonconsensual suits in 1821,[55] and since then the doctrine has become firmly established in the Court's jurisprudence.[56] In addition to the federal government, state governments[57] and foreign governments[58] enjoy sovereign immunity in American courts. Congress has waived federal[59] and foreign sovereign immunity in some instances,[60] while the Court has developed several exceptions to state sovereign immunity in its case law.[61]

As "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories," Native American tribes also enjoy sovereign immunity from suit.[62] The Marshall Court first recognized tribes as "independent nations" possessing "absolute sovereignty" in *Johnson v. M'Intosh*, but allowed the discovery doctrine to undermine tribes' property interests nevertheless.[63] Eight years later, in *Cherokee Nation v. Georgia*, the Court held that tribes were "domestic dependent nations," a status which deprived the Cherokee tribe of diversity jurisdiction afforded to "foreign state[s]" under the Constitution.[64] The Court continued to refine its jurisprudence in *Worcester v. Georgia*, in which it ruled that members of the Cherokee Nation could not be prosecuted under a Georgia statute.[65] It explained that the Cherokee Nation's sovereign status meant that "the laws of Georgia [could] have no force" in Cherokee territory, and that only Congress could regulate "the

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[54] *See, e.g.*, Hans v. Louisiana, 134 U.S. 1, 13 (1890) (citing THE FEDERALIST NO 81. (Alexander Hamilton)).
[55] Cohens v. Virginia, 19 U.S. 264, 411–12 (1821).
[56] *See generally* Seisltad, *supra* note 53 (detailing the doctrinal history of tribal immunity in the Supreme Court).
[57] Alden v. Maine, 527 U.S. 706, 712–13 (1999).
[58] Samantar v. Yousuf, 560 U.S. 305, 311–13 (2010).
[59] *See, e.g.*, Federal Torts Claim Act, 28 U.S.C. § 1346 (1946).
[60] *See* The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1330 (1976).
[61] For example, under *Ex parte Young*, 209 U.S. 123 (1908), and Scheuer v. Rhodes, 416 U.S. 232 (1974), plaintiffs can sue state officials in limited circumstances.
[62] Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991) (citing Cherokee Nation v. Georgia, 30 U.S. 1, 2 (1831)).
[63] 21 U.S. 543, 574 (1823).
[64] 30 U.S. 1, 26–27 (1831).
[65] 31 U.S. 515, 556–57, 559 (1832). The Court later abrogated *Worcester* in Nevada v. Hicks, 533 U.S. 353, 364 (2001), where it held that generally applicable state laws could apply to off-reservation conduct by tribal officials.

intercourse between the United States and this nation."[66] It took until 1850 for the Court to extend sovereign immunity to tribal officials.[67]

While the above cases laid the foundation for the tribal sovereign immunity doctrine, the Court officially recognized tribal sovereign immunity as a federal common law mainstay in 1940 in *United States v. United States Fidelity & Guaranty Co.* (*USF&G*).[68] The case arose after the United States leased lands to a coal company as a trustee for the Chickasaw and Choctaw Nations.[69] When the lessee went into receivership, the United States sought to recover royalties on behalf of the tribes in a bankruptcy proceeding.[70] The coal company responded with a cross-claim against the tribes.[71]

The Court held that the coal company could not file its cross-claim. In keeping with its other holdings, the Court reiterated that Native American tribes are immune from suit absent Congressional authorization or their own waiver.[72] The Chickasaw and Choctaw Nations did not waive their immunity from suit when they filed for bankruptcy in a federal tribunal, either, because their sovereign immunity could not depend on the jurisdiction in which their debtors resided.[73] Tribes' "unusual governmental organization and peculiar problems" made this reasoning "particularly applicable" to their circumstances.[74] Harkening back to tribal sovereign immunity's foundations, the Court cited *Cherokee Nation v. Georgia* for the "public policy" goal that dependent sovereigns like tribal nations are exempt from suit.[75] Effective protection of *Cherokee Nation v. Georgia*'s "public policy" required cross-claims to be as ineffective as direct suits.[76]

In the decades following *USF&G*, the Court consistently reaffirmed that Native American tribes possess robust sovereign immunity protections. It has held that corporations can be entitled to a tribe's

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[66] *Worcester*, 31 U.S. at 561.
[67] *See* Parks v. Ross, 52 U.S. 362, 374–75 (1850).
[68] 309 U.S. 506, 512–13 (1940).
[69] *Id.* at 510–11.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 512 ("It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did.").
[73] *Id.* at 513 ("The sovereignty possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts, not of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent.").
[74] *Id.*
[75] *Id.* at 512–13.
[76] *Id.*

sovereign immunity.[77] It prevented enforcement of state fishing laws[78] and the Indian Civil Rights Act against tribes.[79] It has barred states from enforcing lawful tax provisions for on-reservation transactions.[80] Most relevant to online payday lenders, the Court held in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies* that sovereign immunity protected tribes governmental and commercial activities, on- and off-reservation.[81] Now, 80 years after *UFS&G*, the broad rule is that Native American tribes will enjoy sovereign immunity unless the tribe explicitly waives its immunity or Congress abrogates it.[82]

B. Arm of the Tribe Tests

Although the Supreme Court has provided plenty of case law on when sovereign immunity protects Native Americans tribes, it has not spoken on how to determine when this immunity applies to tribes' business entities.[83] This question is especially relevant for tribally-affiliated online lenders; its answer determines whether they will face legal culpability in many instances. Some state and federal appellate courts developed "arm of the tribe" tests to fill the vacuum the Supreme Court has left. These tests, broadly speaking, ask whether the business entity in question is truly a functionary of the tribe and not merely a third-party company employing something like a "rent-a-tribe" scheme.

For example, the Colorado Supreme Court in 2010 came out with a three-factor arm of the tribe test, in which it evaluated "(1) whether the tribes created the entities pursuant to tribal law; (2) whether the tribes own and operate the entities; and (3) whether the entities' immunity protects the tribes' sovereignty."[84] In 2016, the California Supreme Court announced a five-factor test which considers "(1) the entity's method of creation, 2) whether the tribe intended the entity to share in its immunity, (3) the entity's purpose, (4) the tribe's control over the entity; and (5) the financial relationship between the tribe and the entity."[85] California's test originated in the Tenth Circuit in *Breakthrough Management Group, Inc.*

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[77] 538 U.S. at 705 n.1 (2003).
[78] Puyallup Tribe, Inc., v. Dep't of Game, 433 U.S. 165, 173 (1977).
[79] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978).
[80] Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Okla., 498 U.S. 505, 514, (1991).
[81] 523 U.S. 751, 760 (1998).
[82] *Id.* at 759–60.
[83] Petrovich, *supra* note 9, at 335.
[84] Cash Advance & Preferred Cash Loans v. Colorado ex rel. Suthers, 242 P.3d 1099, 1102 (Colo. 2010).
[85] People v. Miami Nation Enters., 2 Cal. 5th 222, 244 (Cal. 2016).

v. Chukchansi Gold Casino & Resort.[86] Other circuits have found *Breakthrough*'s analysis convincing and adopted its factors, too.[87] The California Supreme Court left out *Breakthrough*'s sixth factor—whether "the policies underlying tribal sovereign immunity and its connection to tribal economic development . . . are served by granting immunity to the economic entities"[88]—because it believed that the first five factors "properly account[ed] for" these considerations.[89]

The two state tests differ in that California considers the entity's purpose and the financial link between the tribe and lender[90] whereas Colorado does not.[91] The discrepancies in different states' tests means that tribal lending entities will be entitled to sovereign immunity in some states but not others.[92] The California and Colorado cases above reflect this phenomenon: lending entities associated with the Miami Tribe of Oklahoma and the Santee Sioux Nation were being sued in both decisions, yet only in Colorado were they afforded tribal sovereign immunity.[93] The possibility of variation like this has prompted some to call for comprehensive action from Congress.[94]

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[86] 629 F.3d 1173, 1191 (10th Cir. 2010). Just this year, the Arizona Supreme Court adopted all six of the *Breakthrough* factors in Hwal'Bay Ba: J Enters., Inc. v. Jantzen, No. CV-19-0123-PR, 2020 Ariz. LEXIS 64 at *15 (Feb. 24, 2020).

[87] White v. Univ. of California, 765 F.3d 1010, 1025 (9th Cir. 2014); Williams v. Big Picture Loans, LLC, 929 F.3d 170, 177 (4th Cir. 2019).

[88] *Breakthrough*, 629 F.3d at 1191.

[89] *Miami Nation Enters.*, 2 Cal. 5th at 244. This discussion should contextualize the "Our Business" section on Big Picture Loans' website. The page says that the company's purpose is to "enhance the Tribe's self-determination and further diversify the Tribe's economy"; that it was formed under tribal law; and that it is located on reservation. These statements are best read as attempts to fulfill *Breakthrough* factors (6), (1), and possibly (4), respectively. *About Us*, BIG PICTURE LOANS, http://www.bigpictureloans.com/about-us (last visited Apr. 7, 2020).

[90] *Miami Nation Enters.*, 2 Cal. 5th at 244.

[91] Cash Advance & Preferred Cash Loans v. Colorado ex rel. Suthers, 242 P.3d 1099, 1102 (Colo. 2010).

[92] Adam Crepelle, *Tribal Lending and Tribal Sovereignty*, 66 DRAKE L. REV. 1, 24 (2018).

[93] On remand, the Colorado district court dismissed the suit against the TLEs. State v. Cash Advance, No. 05CV1143, 2012 Colo. Dist. Court LEXIS 3032 at 40 (Feb. 13, 2012).

[94] *See e.g.,* Crepelle, *supra* note 92, at 34.

C. State Regulation

States generally attempt to regulate payday lenders with usury laws.[95] These laws cap the amount of money lenders can give out, set limits on their interest rates, and limit the length of loans' terms.[96] Some regulations even specify the number of loans someone can have outstanding and the number of times loans may be rolled over.[97] Loan caps range from $300 to $50,000, while loan term limits span from less than two weeks to 60 days.[98] Interest rate caps vary substantially.[99] Instead of regulating payday lenders' practices, Arizona, Arkansas, Georgia, Maryland, Massachusetts, New Jersey, New York, New Mexico, North Carolina, Vermont, and West Virginia have chosen to ban them entirely.[100]

Although these laws appear robust and straightforward, payday lenders find many ways to avoid them, and not just by claiming tribal immunity. Indeed, a 2016 report by the Democrats on the House Financial Services Committee found that payday lenders disguise themselves as different financial services providers, give out loans under mortgage lending statutes, abuse loopholes, and ignore laws entirely when distributing loans online.[101] Lenders also form shell companies to hide their businesses from regulators.[102] Tribal immunity presents its own set of problems, too. Because payday lenders make tribal immunity claims at the pleading stage, courts can dismiss state regulatory enforcement cases before they go to discovery.[103] And because states bear the burden of proving that lenders are not entitled to immunity, states must argue that lenders are not arms of the tribe without the useful information full discovery can provide.[104] Courts do allow a limited amount of discovery before these motions, but how helpful that is to state regulators is questionable.[105] These problems have lead some state regulators to give up

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[95] Heather Morton, NAT'L CONF. OF STATE LEGISLATURES, *Payday Lending Statutes* (Mar. 10, 2020), https://www.ncsl.org/research/financial-services-and-commerce/payday-lending-state-statutes.aspx.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] Grace Austin, *What Happens When Payday Loans Are Outlawed?* (Dec. 11, 2018), https://www.opploans.com/payday-news/what-happens-when-payday-loans-are-outlawed/ (last visited Oct. 30, 2020).
[101] STAFF OF H. COMM. ON FIN. SERVS., 114TH CONG., SKIRTING THE LAW: FIVE TACTICS PAYDAY LENDERS USE TO EVADE STATE CONSUMER PROTECTION LAWS 5–6 (Comm. Print 2016).
[102] Petrovich, *supra* note 9, at 345.
[103] *Id.* at 343–44.
[104] *Id.*
[105] *Id.*

enforcing state laws against tribal lending entities entirely,[106] and the small number of state cases on the matter may reflect state regulators' hesitance to bring enforcement actions.[107] In 2016, the California Supreme Court granted relief after the state successfully brought suit against tribally affiliated lenders,[108] but remains the only state supreme court to allow regulatory action to proceed against tribally-affiliated lenders pleading tribal sovereign immunity for on-reservation activity.

D. Federal Regulation

Congress has not passed a comprehensive statute regulating online payday lenders.[109] A Senate bill that would cap interest rates at 36% remains stuck in committee.[110] The Supreme Court has made clear that Congress *can* waive tribal sovereign immunity.[111] Whether it will, though, is a different question. The payday lobby is reportedly quite influential in Congress,[112] as are some Native American industry lobbies.[113] With the Consumer Financial and Protection Bureau set to withdraw proposed rules regulating payday lenders,[114] sweeping federal regulation appears unlikely.

That is not to say there has been no federal action, however. Notably, the Federal Trade Commission (FTC) has brought suit against online lenders[115] seeking to enforce § 5 of the Federal Trade Commission Act (FTCA).[116] Section 5 prohibits "unfair or deceptive" practices in or affecting interstate commerce.[117] For example, in a 2016 case, the FTC secured a $25.5 million settlement against several lenders who violated §

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[106] *Id.* at 339.
[107] *Id.* at 338–40.
[108] People v. Miami Nation Enters., 386 P.3d 357, 370–71 (Cal. 2016).
[109] It did pass the Military Lending Act in 2006, 10 U.S.C. § 987, which caps interest rates on small dollar loans to members of the military at 36 percent.
[110] S. 2833, 116th Cong. § 140(b) (2019) (extending the military rate cap of 36% to all consumers).
[111] *See, e.g.*, Kiowa Tribe v. Mfg. Techs., 523 U.S. 751, 759 (1998).
[112] CITIZENS FOR RESP. AND ETHICS IN WASH., *Crew Finds Payday Lending Industry Still Paying Up* (Apr. 18, 2012), https://www.citizensforethics.org/payday-lenders-2012-update/.
[113] Petrovich, *supra* note 9, at 350.
[114] Daniella Cheslow, *Consumer Protection Bureau Aims to Roll Back Rule For Payday Lending* (Feb. 6, 2019), https://www.npr.org/2019/02/06/691944789/consumer-protection-bureau-aims-to-roll-back-rules-for-payday-lending (last visited Oct. 30, 2020).
[115] *See, e.g.*, FTC v. PayDay Fin. LLC, 989 F. Supp. 2d 799 (D.S.D. 2013); *see also* FTC v. AMG Servs., No. 2:12-cv-00536-GM-VCF, 2016 U.S. Dist. LEXIS 135765 (D. Nev. 2016).
[116] 15 § U.S.C. 45(a)(1).
[117] *Id*.

5 by charging borrowers undisclosed and inflated fees.[118] As a generally applicable federal law, the FTCA presumptively applies to tribally-affiliated lenders,[119] so the FTC can bring § 5 actions without having to clear the tribal immunity bar. Having said that, the FTC still must operate within its statutory mandates; it cannot enforce state laws nor can it bring actions that Congress has not authorized.[120] This makes FTC enforcement a powerful, but circumscribed tool for regulating tribal lenders.

III. GINGRAS: A NEW WAY FORWARD?

Much of this Note has detailed the problems state regulators and consumers who want to take action against TLEs face. Indeed, tribal immunity is a robust protection and difficult to nullify at the pleading stage, making state regulatory efforts useless against many TLEs. *Gingras v. Think Finance, Inc.*[121] may signal that this dynamic is over. There, the Second Circuit allowed an injunctive suit, based on state law, to proceed beyond the pleading stage against employees of a TLE.[122] In so holding, it joined the Eleventh Circuit[123] in concluding that tribal sovereign immunity does not bar state law injunctive suits against tribal officials or employees.[124] This decision could prove a winning countermeasure for plaintiffs seeking to vindicate state law claims against TLEs claiming tribal sovereign immunity.

The *Gingras* plaintiffs borrowed money from Plain Green, an online payday lender owned by the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation in Montana.[125] Plaintiffs, residents of Vermont, sought an injunction against some of Plain Green's officers for violating state and federal law after the Plaintiffs failed to pay back some of their

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[118] Press Release, Fed. Trade Comm'n, FTC Secures $4.4 Million From Online Payday Lenders to Settle Deception Charges (Jan. 5, 2016), https://www.ftc.gov/news-events/press-releases/2016/01/ftc-secures-44-million-online-payday-lenders-settle-deception.

[119] *See* Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1960).

[120] A BRIEF OVERVIEW OF THE FEDERAL TRADE COMMISSION'S INVESTIGATIVE, LAW ENFORCEMENT, AND RULEMAKING AUTHORITY, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority (last visited Apr. 7, 2020).

[121] 922 F.3d 112 (2nd Cir. 2019).

[122] *Id.* at 121.

[123] *See* Alabama v. PCI Gaming Auth., 801 F.3d 1278, 1290 (11th Cir. 2015) ("[T]ribal officials may be subject to suit in federal court of state law under the fiction of *Ex parte Young* when their conduct occurs outside of Indian lands."). The subject of the suit in that case was a group of casinos owned by Native American tribes. *Id.* at 1282. *Gingras* is the first to allow such a suit to proceed against an online TLE.

[124] *Gingras*, 922 F.3d at 121.

[125] *Id.* at 117.

loans.[126] Their complaint alleged that Plain Green's interest rates exceeded the caps imposed by Vermont law.[127] The complaint also alleged that Think Finance, which Plain Green employed to service their loan, orchestrated a rent-a-tribe scheme with the Chippewa Tribe designed to circumvent state and federal lending laws.[128] The defendants moved to dismiss plaintiffs' suit, arguing that their status as an "arm of the tribe" entitled them to tribal sovereign immunity.[129] The district court denied the motion, which the defendants appealed to the Second Circuit.[130]

The Second Circuit affirmed the district court's denial.[131] The court decided that it did not have to determine whether the defendants were arms of the Chippewa Tribe, because the Supreme Court case *Michigan v. Bay Mills Indian Community*[132] condoned injunctive suits, based on state law, against tribal officials or employees.[133] Therefore, the plaintiffs' suit would be valid regardless of the defendants' entitlement to tribal sovereign immunity. Similarly, in *Bay Mills*, the Supreme Court held that the Indian Gaming Regulatory Act[134] did not abrogate tribal sovereign immunity from a state's suit to enjoin off-reservation gaming, and thus Michigan could not bring suit against the Bay Mills Indian Community for opening up a casino off tribal lands.[135] The Court suggested, however, that "Michigan could bring suit against tribal officials or employees (rather than the tribe itself) for, say, gambling without a license."[136] Under an analogy to *Ex parte Young*,[137] explained the Court, "tribal immunity does not bar such suit[s] for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct."[138] This "panoply of tools"

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[126] *Id.* at 118.
[127] *See id.* at 117–19.
[128] *Id.* at 119.
[129] *Id.* at 119–20.
[130] *Id.* at 119.
[131] *Id.* at 128.
[132] 572 U.S. 782 (2014).
[133] *Gingras*, 922 F.3d at 121–22.
[134] 25 U.S.C. §§ 2701–2721 (1988).
[135] *Bay Mills*, 572 U.S. at 785.
[136] *Id.* at 796.
[137] 209 U.S. 123 (1908). *Ex parte Young*'s holding rests on the legal fiction that state officers who violate federal law no longer represent their respective states. *See id.* at 159–60 ("If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer . . . is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."). Extending this analogy to tribal officials or employees means that, when they violate state or federal law, they lose their "representative character" of the tribe and no longer benefit from its sovereign immunity.
[138] *Bay Mills*, 572 U.S. at 796 (emphasis in original).

meant that the Court's holding on the Indian Gaming Regulatory Act did not leave Michigan and other states without recourse to enforce their laws against tribal entities.[139]

The Second Circuit concluded that the Court's language endorsed plaintiffs' state law claims and rejected the defendants' arguments to the contrary.[140] The defendants first tried arguing that *Bay Mills*' key language was only dicta and accidentally overturned the Court's holding in *Pennhurst State School & Hospital v. Halderman*.[141] There, the Court declined to extend the *Ex parte Young* doctrine to suits against state officials violating state law, because those suits did not vindicate the supremacy of federal law and invaded state sovereignty.[142] In the Second Circuit's mind, however, the suit at bar did not implicate the concerns about sovereignty animating *Pennhurst*.[143] Principles of sovereignty prevent federal courts from instructing a state official how to follow state law or a tribal official how to follow tribal law; those principles do not apply to compelling a tribal official to follow state or federal law.[144] The defendants also tried arguing that *Bay Mills* applied to only individual capacity, as opposed to official capacity, suits against tribal officials or employees violating state law.[145] The court declined to accept "such a cramped reading," instead interpreting *Bay Mills* as distinguishing only between tribal officials, employees, and the tribe itself.[146] Last, the defendants contended that *Bay Mills* authorized only *Ex parte Young*-like suits against tribal official or employees by states themselves, but the Second Circuit found nothing in the case law foreclosing those suits based on the identity of the plaintiff.[147]

Gingras could be a sign of things to come for TLEs violating state law. Especially significant is that the Second Circuit did not even address the arm of the tribe question,[148] which, as this Note has discussed, frustrated past state regulatory efforts. Under *Gingras*, state and consumer plaintiffs would no longer be forced to argue against motions to dismiss with one hand tied behind their back; instead, plaintiffs can avoid the question of sovereign immunity and proceed directly to the merits. And without the benefit of presumptive tribal sovereign immunity, online

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[139] *Id.*
[140] *Gingras*, 922 F.3d at 121–22.
[141] *Id.* at 122; 465 U.S. 89 (1984).
[142] *Pennhurst*, 465 U.S. at 106.
[143] *Gingras*, 922 F.3d at 122.
[144] *Id.* at 122–23.
[145] *Id.* at 123.
[146] *Id.*
[147] *See id.* at 123–24.
[148] *Id.* at 120–21.

payday lenders will not be able to violate state law with impunity. The Second Circuit appeared to be aware that tribal sovereign immunity had been abused by payday lenders in the past, and that their decision could help put an end to it, observing, "[a]bsent this mechanism for a state to enforce its laws against out-of-state tribal officials, the state and its citizens would seemingly be without recourse."[149] Indeed, *Gingras* and its reasoning provide state and individual plaintiffs the opportunity to hold online payday lenders accountable for violating state law and ensnaring unwitting borrowers in the "debt trap." Hopefully, the "recourse" the Second Circuit furnished will help minimize the significant financial risks online payday lenders pose to borrowers.

CONCLUSION

Without comprehensive federal regulation, states and consumers have struggled to pursue legal remedies against Internet TLEs. For a while it appeared that tribal sovereign immunity could overcome almost any state regulatory effort, leaving plaintiffs "without recourse" to vindicate state law claims. *Gingras* could portend better things for plaintiffs. Under *Gingras*, states and consumers may finally be able to seek "recourse" in the federal courts. The availability of federal forums should mean that Internet TLEs and their employees will feel more compelled to respect state law, or else face injunctive suit in federal court. Indeed, if other circuits adopt the Second Circuit's reading of *Bay Mills*, it will be that rent-a-tribe schemes who are violating state law without effective answers, for a change.

[149] *Id.* at 124.