13-3769

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE OTOE-MISSOURIA TRIBE OF INDIANS, a federally-recognized Indian Tribe, GREAT PLAINS LENDING, LLC, a wholly-owned tribal limited liability company, AMERICAN WEB LOAN, INC., a wholly-owned tribal corporation, OTOE-MISSOURIA CONSUMER FINANCE SERVICES REGULATORY COMMISSION, a tribal regulatory agency, LAC VIEUX DESERT BAND OF LAKE SUPERIOR CHIPPEWA INDIANS, a federally-recognized Indian Tribe, RED ROCK TRIBAL LENDING, LLC, a wholly-owned tribal limited liability company, LAC VIEUX DESERT TRIBAL FINANCIAL SERVICES REGULATORY AUTHORITY, a tribal regulatory agency,

Plaintiffs-Appellants,

v.

NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, BENJAMIN M. LAWSKY, in his official capacity as Superintendent of the New York State Department of Financial Services,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE CONSUMER FINANCIAL PROTECTION BUREAU AS *AMICUS CURIAE* SUPPORTING DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Rules

Other Authorities

INTEREST OF AMICUS CURIAE

After the recent financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010), a comprehensive reform of the American financial system designed to alleviate the crisis and prevent its recurrence. Title X of that law, entitled the "Consumer Financial Protection Act of 2010" (CFPA or the Act), established the Consumer Financial Protection Bureau, a new independent agency focused on protecting consumers in the financial marketplace.

In this appeal, Indian tribes and payday lenders apparently affiliated with them contend that the creation of the Bureau and the law establishing it demonstrate various federal interests that weigh against allowing a state to apply its consumer-protection laws to tribally affiliated payday lenders. As a federal agency tasked with enforcing federal consumer law, the Bureau will not speak in this brief to decisions that the State of New York must appropriately make about whether and how to apply its laws. Nor does the Bureau take a position about the proper analysis that the Court should engage in to determine how to interpret and apply state law. But the Bureau has a direct and substantial interest in rebutting the contention that its creation or existence should affect the Court's analysis. We accordingly submit this brief as *amicus curiae* pursuant to Federal Rule of Appellate Procedure 29(a).

BACKGROUND

A. The Bureau's Creation and Authorities

In 2010, Congress created the Bureau as part of a "direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008." S. Rep. No. 111-176, at 2 (2010). The Consumer Financial Protection Act charged the Bureau with "ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. § 5511(a).

The Bureau's creation was part of Congress's solution to the problems of the earlier system of federal consumer protection, which was "too fragmented to be effective." S. Rep. 111-176, at 10. Under that earlier system, "seven different federal regulators" administered consumer financial protection laws, resulting in a dispersion of responsibility that kept those regulators from "adequately protect[ing] consumers and ensur[ing] financial stability." *Id.*; *accord* H.R. Rep. No. 111-367, pt. 1, at 91 (2009) ("Consumer protection in the financial arena is governed by various agencies with different jurisdictions and regulatory approaches. This disparate regulatory system has been blamed in part for the lack of aggressive enforcement against abusive and predatory loan products that contributed to the financial crisis . . . ."). The CFPA substantially consolidated the consumer financial protection responsibilities of those seven federal regulators in the Bureau.

Congress tasked the Bureau with using this consolidated responsibility to "establish a basic, minimum federal level playing field," as well as to enforce rules consistently, without regard to whether the institution selling a consumer financial product or service is a bank, a credit union, a mortgage broker, or any other type of nondepository financial institution. S. Rep. No. 111-176, at 11.

The Bureau is now the principal federal agency charged with "regulat[ing] the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a). The "consumer financial products or services" that the Bureau regulates include, for example, consumer deposit-taking activities, real estate settlement services, debt collection, and all manner of credit extension. *Id.* § 5481(5), (15). And the "Federal consumer financial laws" that the Bureau administers include eighteen pre-existing consumer-protection statutes, *id.* § 5481(12), (14), as well as the CFPA itself, which among other things bars providers of consumer financial products and services from engaging in any "unfair, deceptive, or abusive act or practice" in violation of the Act. *Id.* §§ 5531(a), 5536(a)(1); *see also id.* § 5481(6) (defining "covered person"). To carry out its responsibilities under these laws, the Bureau may promulgate rules, bring enforcement actions, and supervise certain types of financial institutions. 12 U.S.C. § 5512(b)(1) (rulewriting authority); *id.* §§ 5561-5565 (enforcement authority); *id.* §§ 5514, 5515 (supervision authority).

B. State Consumer Financial Protection

The CFPA and the Bureau's creation did not supplant the states' historic role in protecting consumers in the financial marketplace. Congress consolidated federal authority for consumer financial protection in the Bureau so that it could establish a "*minimum federal* level playing field." S. Rep. No. 111-176, at 11 (emphasis added). At the same time, it expressly preserved states' authority to enact and enforce laws that provide consumers greater protections, except in narrow circumstances not present here. *See* 12 U.S.C. § 5551(a).

Consistent with the CFPA's endorsement of the role of states in protecting consumers, the Bureau has worked cooperatively with states to carry out its responsibilities. The Bureau has, for example, entered into agreements with state financial regulators describing how the Bureau will coordinate with those regulators on examinations of financial institutions. In addition, the Bureau has repeatedly partnered with states to investigate wrongdoing and to bring enforcement actions to halt harmful conduct that violates both federal and state law. *See, e.g.*, *Consumer Financial Protection Bureau et al. v. Payday Loan Debt Solution, Inc.*, No. 1:12-cv-24410, Stipulated Final Judgment and Order, Docket No. 10 (S.D. Fla. 2012).

C. The Bureau's Relationship with Tribes

The Bureau has also fostered relationships with Indian tribes, which the CFPA includes in the definition of "State," 12 U.S.C. § 5481(27). In particular, the Bureau has engaged tribes across the country on financial education and has entered into an

information-sharing agreement with the Navajo Nation Department of Justice to help prevent harmful practices targeting Native American consumers.[1] It has also adopted a "Policy for Consultation with Tribal Governments," through which the Bureau engages in dialogue on proposed regulations, policies, and programs that are expressly directed to tribal governments or tribal members or that have direct implications for Indian tribes.[2]

At the same time, the Bureau has made clear that affiliation with an Indian tribe does not exempt a financial institution from complying with federal consumer financial law. For example, the Bureau recently denied a petition that several tribally affiliated payday lenders—including Appellant Great Plains Lending, LLC—filed seeking to set aside civil investigative demands that the Bureau issued to them as part of an investigation into possibly illegal practices.[3] In that petition, the lenders argued that the CFPA did not apply to them because of their tribal affiliation, and that the Bureau therefore lacked authority to issue civil investigative demands to them. *See*

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[1] Memorandum of Understanding Between the Consumer Financial Protection Bureau and Navajo Nation Department of Justice (Jan. 2013), *available at* http://files.consumerfinance.gov/f/201301_cfpb_memorandum-of-understanding_navajo-nation-dept-of-justice.pdf.

[2] Consumer Financial Protection Bureau Policy for Consultation with Tribal Governments, *available at* http://files.consumerfinance.gov/f/201304_cfpb_consultations.pdf.

[3] Decision and Order on Petition by Great Plains Lending, LLC; MobiLoans, LLC; and Plain Green, LLC To Set Aside Civil Investigative Demands, No. 2013-MISC-Great Plains Lending-0001 (2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_decision-on-petition_great-plains-lending-to-set-aside-civil-investigative-demands.pdf [hereinafter Great Plains Decision and Order].

Great Plains Decision and Order at 2. The Bureau rejected that argument. *Id.* at 3-6. In particular, the Bureau explained that investigating the lenders' commercial relations with non-Indians on the open market did not interfere with tribal self-government on purely intramural matters; nor did it affect any treaty-protected rights. *Id.* at 4-5. The Bureau further explained that nothing in the CFPA—including the provision that includes tribes in the definition of "State"—revealed any congressional intent to exempt tribally affiliated lenders from the CFPA's coverage. *Id.* at 5-6. Thus, under the well-established framework for analyzing whether a federal statute applies to a tribally affiliated entity, the CFPA applied to the tribally affiliated lenders. *Id.* at 3-6 (applying *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) and *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), among other precedents).

SUMMARY OF ARGUMENT

The Bureau takes no position in this brief on whether the Court must balance federal, state, and tribal interests to determine if a state may apply its laws to tribally affiliated lenders that make loans to the state's residents over the internet; nor does it take a position on the underlying question of the applicability of New York law here. But if the Court does apply an interest-balancing framework, it should find that neither the passage of the CFPA nor the creation of the Bureau demonstrates any federal interest that weighs against allowing states to apply their consumer-protection laws to tribally affiliated lenders. The CFPA does not reflect federal interests in

"uniform regulation" of the consumer financial marketplace nationwide, or in preventing state law from threatening "consumer access" to particular types of credit, of the sort that would prevent New York from applying its laws here. On the contrary, with only narrow exceptions not present here, the Act expressly preserves states' varying consumer-protection laws as applied here, including those that would outlaw loans with certain terms. *See* 12 U.S.C. § 5551(a). And although the CFPA recognizes that tribes, like states, have a role in regulating consumer financial products and services, and that the Bureau will coordinate with tribes and states in protecting consumers, that has no bearing on whether tribally affiliated lenders must comply with state laws.

ARGUMENT

The Consumer Financial Protection Act generally does not affect whether states may apply their consumer-protection laws to tribally affiliated lenders.

In their brief, Appellants argue that, to determine whether a state may apply its laws to tribally affiliated lenders that make loans to the state's residents over the internet, the Court must balance the federal, state, and tribal interests at stake. Appellants' Br. at 16-21. The Bureau takes no position in this brief on whether this is in fact the proper analytical framework for determining the applicability of state law in this case, nor on the question whether New York's laws in fact apply. But if the Court applies Appellants' framework, it should reject their contention (at 28-29) that the

CFPA demonstrates a federal interest in protecting tribally affiliated lenders from state regulation that would otherwise apply.

Courts have found that federal interests preclude states from applying their laws to tribally affiliated entities where, for example, "federal policy is to promote precisely what [the state] seeks to prevent." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 220 (1987) (concluding that state could not regulate tribal bingo enterprises where federal government approved and actively promoted those enterprises). But that is not the case here. The CFPA does not mention tribal lending operations, much less give them special protections or otherwise promote them.

And the CFPA reveals no other interests that weigh against allowing states to apply their laws to tribally affiliated lenders. Contrary to Appellants' assertion (at 28), the CFPA does not reflect general interests in "uniform regulation" or in "preserving consumer access" to particular types of loans of the sort that would preclude New York from applying its consumer-protection laws here. Nor does the fact that the CFPA includes tribes in the definition of "State," 12 U.S.C. § 5481(27), reveal any federal interest in giving tribally affiliated lenders special protection from state consumer-protection laws.

A. The CFPA reveals no interest in "uniform regulation" or in "preserving consumer access" to particular types of credit that would generally preclude states from applying their consumer-protection laws to tribally affiliated lenders.

In contending that the CFPA insulates tribally affiliated lenders from state consumer-protection laws, Appellants emphasize supposed federal interests in "uniform consumer protection regulation" nationwide and in "preserving consumer access" to short-term credit. Appellants' Br. at 28. But this argument—which would support exempting everyone, not merely tribally affiliated entities, from state consumer-protection laws—is foreclosed by the CFPA's plain terms.

In particular, the CFPA expressly provides that it does not displace or otherwise affect states' varying laws, except to the extent they are inconsistent with the CFPA, and except as applied to certain specific types of entities not involved here. Section 1041(a) of the CFPA (codified at 12 U.S.C. § 5551(a)(1)) provides that

> [The CFPA] may not be construed as annulling, altering, or affecting, or exempting any person subject to the provisions of this title from complying with, the statutes, regulations, orders, or interpretations in effect in any State, except to the extent that any such provision of law is inconsistent with the provisions of this title, and then only to the extent of the inconsistency.

This provision thus generally reaffirms that states may continue to apply their own laws post-CFPA, and demonstrates that Congress did not intend for "uniform" nationwide regulation that would displace all state law. Although this provision contains specific exceptions for certain entities—such as national banks—for which

federal law may more broadly preempt state laws,[4] those exceptions do not support the tribe's arguments in this case. Tribally affiliated lenders are not included among those excepted.

Section 1041 also refutes Appellants' proposition (at 28) that the CFPA demonstrates an interest in preserving "consumer access" to short-term credit on any terms. That provision specifies that state laws that are "inconsistent with" the CFPA are preempted, but clarifies that a state law will not be deemed "inconsistent with" the Act "if the protection that [state law] affords to consumers is greater than the protection provided under [the CFPA]." *Id.* § 5551(a)(2). Thus, a state generally remains free to regulate or ban products that it believes to be harmful to consumers, even if those regulations go beyond federal rules.

Appellants fail to acknowledge section 1041, and do not suggest that New York law is "inconsistent with" the CFPA for purposes of that provision. Instead, in the hope of nonetheless obtaining broad preemption, Appellants ask this Court to discern a federal interest in "uniform regulation" from a provision that directs the Bureau to

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[4] Section 1041(a) provides that the Act, "other than sections 1044 through 1048" does not preempt state law. Sections 1044 through 1047 of the Act address preemption standards for certain types of institutions, such as national banks. *See* CFPA § 1044 (codified at 12 U.S.C. § 25b(a)-(g)) (national banks and subsidiaries); CFPA § 1045 (codified at 12 U.S.C. § 25b(h)) (nondepository institution subsidiaries and affiliates of national banks); CFPA § 1046 (codified at 12 U.S.C. § 1465(a)-(b)) (federal savings associations and subsidiaries); CFPA § 1047 (codified at 12 U.S.C. § 25b(i)-(j), § 1465(c)-(d)) (national banks and savings associations). And section 1048 sets the effective date for the subtitle. CFPA § 1048 (codified at 12 U.S.C. § 5551 note).

coordinate with federal and state regulators "to promote consistent regulatory treatment of consumer financial and investment products and services," 12 U.S.C. § 5495 (directing the Bureau to "coordinate with the [Securities and Exchange] Commission, the Commodity Futures Trading Commission, the Federal Trade Commission, and other Federal agencies and State regulators, as appropriate"). Appellants' Br. at 28. They similarly contend that a House Report issued three years after the CFPA's enactment reveals a federal interest in preserving consumers' "access to credit." Appellants' Br. at 28 (citing H.R. Rep. No. 113-23 (2013)). But neither the CFPA's mention of "consistent regulatory treatment" nor a House Report's reference to "access to credit" trumps section 1041's clear statement about when the CFPA preempts state law.

B. The CFPA's inclusion of tribes in the definition of "State" does not reveal a federal interest in protecting tribally affiliated lenders from state consumer-protection laws.

Appellants apparently base their assertion of a federal interest in preventing states from applying their laws to tribally affiliated entities in significant part on the provision of the CFPA that defines "State" to include not just the fifty states but also "federally recognized Indian tribe[s]," 12 U.S.C. § 5481(27).[5] Appellants' Br. at 28.

[5] The provision provides in full that "[t]he term 'State' means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands or any federally recognized Indian tribe, as defined by the Secretary of the Interior under section 479a-1(a) of Title 25." 12 U.S.C. § 5481(27).

According to Appellants, this provision "made clear that the Tribes are co-equal with the States for purposes of regulatory enforcement of consumer protection laws" and "contemplates coordination between the Tribes and the States, led by the CFPB, to promote consistent regulatory treatment of short-term loans." *Id.* But neither the CFPA's recognition of the role of tribes in "regulatory enforcement" nor the Bureau's (or the states') coordination with tribes demonstrates a federal interest in exempting tribes or entities affiliated with them from state laws that otherwise would apply to them.

First, although the CFPA recognizes a role for tribes in "regulatory enforcement of consumer protection laws" by defining "State" to include tribes, there is no reason to believe that this recognition has any effect on whether or not tribally affiliated lenders are subject to state regulation. By recognizing tribes' (and states') authority to regulate entities within their jurisdictions, the CFPA does not grant tribes (or states) exclusive authority over those entities—whether tribally affiliated or not—when those entities also transact business in another regulator's territory. Additionally, the fact that tribes are recognized as regulators has no bearing on whether or not tribes or their affiliated entities are subject to regulation by other sovereigns when they themselves transact business in another regulator's territory.

Second, Appellants are wrong to suggest that the CFPA "contemplates coordination between the Tribes and the States," or that this somehow indicates that tribally affiliated lenders need not comply with state regulation. Appellants' Br. at 28.

As an initial matter, the CFPA does not speak to coordination between tribes and states, but rather speaks only to *the Bureau's* coordination with other regulators. *See, e.g.*, 12 U.S.C. § 5495. And, in any event, Appellants fail to explain how allowing states to apply their laws to tribally affiliated lenders would interfere with the "coordination" contemplated by the CFPA. Coordination does not require consensus, and nothing in the CFPA suggests that a regulator must obtain other affected regulators' approval before it can enforce its own consumer-protection laws.

CONCLUSION

The Bureau takes no position in this brief on whether resolution of this case requires the Court to balance state, federal, and tribal interests, or on any specific question about the interpretation or applicability of New York law. But to the extent it is relevant, the Bureau respectfully requests that the Court find that neither the passage of the CFPA nor the creation of the Bureau demonstrates a federal interest that would preclude states from applying their otherwise-applicable consumer-protection laws to tribally affiliated lenders.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3078 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word 2010.

/s/ David M. Gossett
David M. Gossett

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2013, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I further certify that I will cause 6 paper copies of this brief to be filed with the Court within three business days.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ David M. Gossett
David M. Gossett