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18 UNITED STATES DISTRICT COURT  
19 CENTRAL DISTRICT OF CALIFORNIA

20 CONSUMER FINANCIAL )  
21 PROTECTION BUREAU, )  
22 )  
23 Petitioner, )  
24 )  
25 v. )  
26 GREAT PLAINS LENDING, LLC, )  
27 MOBILOANS, LLC & )  
28 PLAIN GREEN, LLC, )  
Respondents. )

No. 2:14-cv-02090-MWF-PLA  
The Hon. Michael W. Fitzgerald  
**RESPONDENTS' JOINT  
MEMORANDUM OF LAW IN  
OPPOSITION TO THE  
PETITION TO ENFORCE  
CIVIL INVESTIGATIVE  
DEMANDS**  
Date: Mon., April 28, 2014  
Time: 11:30 A.M.  
Room: 1600

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
BACKGROUND .....	2
A. The Tribes And Their Lending Entities .....	2
B. The Tribes’ Sovereign Authority And The Dodd-Frank Act .....	4
C. The Bureau’s Civil Investigative Demands .....	6
ARGUMENT .....	7
I. RESPONDENTS ARE SOVEREIGN ARMS OF THEIR RESPECTIVE TRIBES AND ARE NOT “PERSONS” WITHIN THE MEANING OF THE CFPA .....	8
A. Tribes And Arms Of Tribes Are Presumptively Not “Persons” Under The CFPA .....	8
B. Respondents Are Arms Of Their Respective Tribes .....	11
C. The Bureau Cannot Overcome The <i>Stevens</i> Presumption Because the CFPA Demonstrates A Clear Intention Not To Treat Tribes As “Persons” .....	13
D. The Bureau’s Contrary Arguments Are Misplaced .....	16
1. <i>Tuscarora</i> And <i>Coeur d’Alene</i> Do Not Help The Bureau .....	17
2. The CFPA’s Other Arguments Fare No Better .....	20
E. Any Ambiguity About The Word “Person” Must Be Construed In Favor Of The Tribe .....	21
II. THE CIDs ARE BARRED BY RESPONDENTS’ SOVEREIGN IMMUNITY .....	21
III. THE CIDs DO NOT PROVIDE ADEQUATE NOTICE AND ARE INDEFINITE AND OVERBROAD .....	23
CONCLUSION .....	25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**

Page

**CASES:**

*Alden v. Maine*,  
527 U.S. 706 (1999) ..... 22

*Allen v. Gold Country Casino*,  
464 F.3d 1044 (9th Cir. 2006)..... 11, 12, 20

*Blatchford v. Native Vill. of Noatak*,  
501 U.S. 775 (1991) ..... 22, 23

*Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*,  
629 F.3d 1173 (10th Cir. 2010)..... 12

*Breard v. Greene*,  
523 U.S. 371 (1998) ..... 9

*C&L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*,  
532 U.S. 411 (2001) ..... 22

*Catskill Dev., L.L.C. v. Park Place Entm’t Corp.*,  
206 F.R.D. 78 (S.D.N.Y. 2002)..... 22

*Cherokee Nation v. Georgia*,  
30 U.S. 1 (1831) ..... 5, 9

*Cook v. AVI Casino Enters., Inc.*,  
548 F.3d 718 (9th Cir. 2008)..... 11, 20

*County of Yakima v. Confederated Tribes & Bands of the  
Yakima Indian Nation*,  
502 U.S. 251 (1992) ..... 21

*Dobbs v. Anthem Blue Cross & Blue Shield*,  
600 F.3d 1275 (10th Cir. 2010)..... 17, 19

*Donovan v. Coeur d’Alene Tribal Farm*,  
751 F.2d 1113 (9th Cir. 1985)..... 17, 18, 19

*EEOC v. Cherokee Nation*,  
871 F.2d 937 (10th Cir. 1989)..... 19

1 *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*,  
 2 986 F.2d 246 (8th Cir. 1993)..... 19  
 3 *EEOC v. Karuk Tribe Housing Auth.*,  
 4 260 F.3d 1071 (9th Cir. 2001)..... 17, 18, 21, 23  
 5 *EEOC v. Peabody W. Coal Co.*,  
 6 400 F.3d 774 (9th Cir. 2005)..... 23  
 7 *FDIC v. Garner*,  
 8 126 F.3d 1138 (9th Cir. 1997)..... 7, 24  
 9 *FPC v. Tuscarora Indian Nation*,  
 10 362 U.S. 99 (1960) ..... *passim*  
 11 *General Ins. Co. v. EEOC*,  
 12 491 F.2d 133 (9th Cir. 1974)..... 24, 25  
 13 *Hester v. Redwood Cnty.*,  
 14 885 F. Supp. 2d 934 (D. Minn. 2012) ..... 9  
 15 *In re Sealed Case*,  
 16 42 F.3d 1412 (D.C. Cir. 1994) ..... 24, 25  
 17 *Inyo Cnty. v. Paiute-Shoshone Indians*,  
 18 538 U.S. 701 (2003) ..... *passim*  
 19 *Iowa Mut. Ins. Co. v. LaPlante*,  
 20 480 U.S. 9 (1987) ..... 5  
 21 *Kiowa Tribe of Okla. v. Mfg. Techs, Inc.*,  
 22 523 U.S. 751 (1998) ..... 20, 22, 23  
 23 *Louisiana Pub. Serv. Comm’n v. FCC*,  
 24 476 U.S. 355 (1986) ..... 8  
 25 *Miller v. Gammie*,  
 26 335 F.3d 889 (9th Cir. 2003)..... 23  
 27 *Miller v. Wright*,  
 28 705 F.3d 919 (9th Cir. 2012)..... 19  
*Montana v. Blackfeet Tribe*,  
 471 U.S. 759 (1985) ..... 21

1 *Nance v. EPA*,  
 2 645 F.2d 701 (9th Cir. 1981)..... 5

3 *Ngiraingas v. Sanchez*,  
 4 495 U.S. 182 (1990) ..... 9

5 *NLRB v. Bakersfield Californian*,  
 6 128 F.3d 1339 (9th Cir. 1997)..... 8

7 *NLRB v. Chapa De Indian Health Program, Inc.*,  
 8 316 F.3d 995 (9th Cir. 2003)..... 18

9 *NLRB v. Pueblo of San Juan*,  
 10 276 F.3d 1186 (10th Cir. 2002) (en banc)..... 19

11 *Peters v. United States*,  
 12 853 F.2d 692 (9th Cir. 1988)..... 24, 25

13 *Quileute Indian Tribe v. Babbitt*,  
 14 18 F.3d 1456 (9th Cir. 1994)..... 23

15 *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*,  
 16 132 S.Ct. 2065 (2012) ..... 18

17 *Reich v. Mont. Sulphur & Chem. Co.*,  
 18 32 F.3d 440 (9th Cir. 1994)..... 24

19 *San Manuel Indian Bingo & Casino v. NLRB*,  
 20 475 F.3d 1306 (D.C. Cir. 2007) ..... 17

21 *Santa Clara Pueblo v. Martinez*,  
 22 436 U.S. 49 (1978) ..... 5, 19, 22

23 *Stoner v. Santa Clara Cnty. Office of Educ.*,  
 24 502 F.3d 1116 (9th Cir. 2007)..... 1, 10

25 *Talton v. Mayes*,  
 26 163 U.S. 376 (1896) ..... 4

27 *United States v. Bly*,  
 28 510 F.3d 453 (4th Cir. 2007)..... 10

*United States v. Dion*,  
 476 U.S. 734 (1986) ..... 19

1 *United States v. Errol D., Jr.*,  
 2 292 F.3d 1159 (9th Cir. 2002)..... 10

3 *United States v. Golden Valley Elec. Ass’n*,  
 4 689 F.3d 1108 (9th Cir. 2012)..... 24, 25

5 *United States v. James*,  
 6 980 F.2d 1314 (9th Cir. 1992)..... 22

7 *United States v. LeCoe*,  
 8 936 F.2d 398 (9th Cir. 1991)..... 15

9 *United States v. Menominee Tribal Enters.*,  
 10 601 F. Supp. 1061 (E.D. Wis. 2009) ..... 9

11 *United States v. Mitchell*,  
 12 502 F.3d 931 (9th Cir. 2007)..... 17

13 *United States v. Morton Salt Co.*,  
 14 338 U.S. 632 (1950) ..... 23, 24

15 *United States v. Wells*,  
 16 519 U.S. 482 (1997) ..... 15, 16

17 *United States v. Wheeler*,  
 18 435 U.S. 313 (1978) ..... 1

19 *United States v. Yakima Tribal Court*,  
 20 806 F.2d 853 (9th Cir. 1986)..... 22, 23

21 *United States ex rel. Adrian v. Regents of Univ. of Cal.*,  
 22 363 F.3d 398 (5th Cir. 2004)..... 10

23 *United States ex rel. Howard v. Shoshone Paiute Tribes*,  
 24 2012 WL 6725682 (D. Nev. Dec. 26, 2012)..... 9

25 *United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*,  
 26 739 F.3d 598 (11th Cir. 2014)..... 10

27 *United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*,  
 28 681 F.3d 575 (4th Cir. 2012)..... 10, 20

*United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*,  
 472 F.3d 702 (10th Cir. 2006)..... 10

1 *U.S. Dep’t of Labor v. Occupational Safety & Health Rev. Comm’n*,  
 2 935 F.2d 182 (9th Cir. 1991)..... 18

3 *Vermont Agency of Natural Res. v. United States ex rel. Stevens*,  
 4 529 U.S. 765 (2000) .....*passim*

5 *White Mountain Apache Tribe v. Bracker*,  
 6 448 U.S. 136 (1980) ..... 14, 21

7 *Will v. Mich. Dep’t of State Police*,  
 8 491 U.S. 58 (1989) ..... 8, 9, 10, 15

9 *Williams v. Lee*,  
 358 U.S. 217 (1959) ..... 4

10 **STATUTES:**

11 12 U.S.C. § 5481 *et seq.* ..... 5

12 12 U.S.C. § 5481(6)..... 13

13 12 U.S.C. § 5481(19)..... 8, 13, 20

14 12 U.S.C. § 5481(27)..... 2, 5, 13

15 12 U.S.C. § 5491..... 13

16 12 U.S.C. § 5493(b)..... 5

17 12 U.S.C. § 5493(b)(3)(B)..... 14

18 12 U.S.C. § 5493(b)(3)(D)..... 14

19 12 U.S.C. § 5493(c)..... 5

20 12 U.S.C. § 5493(c)(2)(B)..... 14

21 12 U.S.C. § 5495..... 5, 14

22 12 U.S.C. § 5511(c)(4) ..... 8, 13

23 12 U.S.C. § 5512(c) ..... 5

24 12 U.S.C. § 5551(a)..... 5

25 12 U.S.C. § 5551(b)..... 5

26

27

28

1 12 U.S.C. § 5552(a)(1) ..... 5, 14

2 12 U.S.C. § 5562(c) ..... 6

3 12 U.S.C. § 5562(c)(1) ..... 1, 6, 8

4 12 U.S.C. § 5562(c)(2) ..... 24

5 12 U.S.C. § 5562(e)(1) ..... 8

6 16 U.S.C. § 470bb(5)..... 16

7 18 U.S.C. § 5031..... 10

8 25 U.S.C. § 479a–1(a) ..... 13

9 25 U.S.C. § 4301(a)(6) ..... 5

10 31 U.S.C. § 3729..... 16

11 31 U.S.C. § 3729(a)..... 8, 15

12 31 U.S.C. § 3733(a)(1) ..... 15, 16

13 31 U.S.C. § 3733(l)(4)..... 16

14 42 U.S.C. § 300f(10)..... 16

15 42 U.S.C. § 300f(12)..... 16

16 42 U.S.C. § 1983..... 9

17 42 U.S.C. § 8802(17)..... 16

18

19

20

21 **REGULATIONS:**

22 12 C.F.R. § 1080.5..... 24

23 12 C.F.R. § 1080.6(e) ..... 6

24 Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000)..... 5

25 **CONSTITUTIONAL PROVISIONS:**

26 U.S. Const. art. I, § 8, cl. 3 ..... 4

27

28



1 **OTHER AUTHORITIES:**

2 Br. for United States, *Inyo Cnty. v. Paiute-Shoshone Indians*, 538 U.S. 701  
3 (2003) (No. 02-281), 2003 WL 252549 (Jan. 23, 2003) .....9, 11

4 F. Cohen, *Handbook of Federal Indian Law* (1945)..... 1

5 U.S. Treasury Dep’t, *The Dodd-Frank Wall Street Reform and Consumer*  
6 *Protection Act Benefits Native Americans* ..... 14

7  
8  
9  
10  
11  
12  
13  
14  
15  
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17  
18  
19  
20  
21  
22  
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## INTRODUCTION

1  
2 The Consumer Financial Protection Bureau’s petition barely mentions the  
3 key fact of this case: Each of the three Respondents is an arm of a sovereign  
4 Indian Tribe, vested with all of the attributes of tribal sovereignty. Yet that fact  
5 makes all the difference. That is so for a simple reason: The Bureau’s  
6 investigative authority does not extend to Tribes. And because each Respondent  
7 is, in the eyes of the law, the Tribe itself, the Bureau’s investigative authority does  
8 not extend to Respondents.

9 That conclusion flows from the text Congress enacted in the Dodd-Frank  
10 Act, on which the Bureau relies for its Civil Investigative Demand (“CID”)  
11 authority. The Act empowers the Bureau to issue CIDs to “any person.” 12  
12 U.S.C. § 5562(c)(1). And the law on that phrase is crystal clear: The statutory  
13 term “person” presumptively “*does not include the sovereign*” or an arm thereof,  
14 whether the sovereign is a State, a foreign nation, or an Indian Tribe. *Vermont*  
15 *Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000)  
16 (emphasis added); *see also Stoner v. Santa Clara Cnty. Office of Educ.*, 502 F.3d  
17 1116, 1122 (9th Cir. 2007). That means the Bureau lacks authority to issue CIDs  
18 to Respondents unless it can make an “affirmative showing” that something in the  
19 Dodd-Frank Act overcomes the presumption. *Stevens*, 529 U.S. at 781. Here it  
20 cannot. As we explain below, the Act treats Tribes as co-regulators akin to States,  
21 not as regulated entities subject to the Bureau’s enforcement authority.

22 The Bureau’s petition conspicuously ignores all of these points. Instead of  
23 making its case under the relevant law, the Bureau tries to avoid it in two ways.  
24 First, its petition proceeds as if Respondents were run-of-the-mill private  
25 corporations. But that will not do; Indian Tribes and their instrumentalities have a  
26 unique legal status because they possess the “‘inherent powers of a limited  
27 sovereignty which has never been extinguished,’” *United States v. Wheeler*, 435  
28 U.S. 313, 322 (1978) (quoting F. Cohen, *Handbook of Federal Indian Law* 122



1 instrumentalities and arms of the Tribe, and their officers and employees  
2 considered officers and employees of the Tribe, created for the purpose of carrying  
3 out authorities and responsibilities of the Tribe for economic development of the  
4 Tribe and advancement of its citizens.” *Id.*, Ex. A (Otoe-Missouria Tribe Limited  
5 Liability Company Act § 913). Great Plains was created as “an arm of the [Otoe-  
6 Missouri] Tribe” pursuant to that tribal statute. *Id.*, Ex. B (Resolution Creating  
7 Great Plains ). The Otoe-Missouria created Great Plains specifically “to advance  
8 tribal economic development to aid [in] addressing issues of public safety, health  
9 and welfare.” *Id.* To that end, the company’s Operating Agreement provides that  
10 “[a]ll [c]ash [f]low shall be distributed to the Tribe.” *Id.*, Ex. D (Operating  
11 Agreement § 5.2). And the revenues from Great Plains have provided badly  
12 needed funding for, among other things, new tribal housing; additional classrooms,  
13 books, and teachers for Head Start programs; and new after-school and summer  
14 programs for tribal youth. *Id.* at 4. The Tribe has full control over Great Plains’  
15 operations; the directors “may be removed at any time by the Tribal Council, with  
16 or without cause.” *Id.*, Ex. D (Operating Agreement § 3.5).

17       The Tunica-Biloxi Tribe and MobiLoans. MobiLoans is wholly owned and  
18 operated by the federally recognized Tunica-Biloxi Tribe of Louisiana. Pierite  
19 Decl. 2-3. MobiLoans is a tribal lending entity that the Tunica-Biloxi created as an  
20 economic arm of the Tribe and “organized and chartered under the laws and  
21 inherent sovereign authority of the Tunica-Biloxi Tribe of Louisiana.” *Id.* at 3.  
22 MobiLoans’ revenue stream exists for the Tunica-Biloxi’s benefit; its “primary  
23 purpose” is to “engage in lending and related activities that will generate additional  
24 revenues for the Tribe.” *Id.* These revenues have been used to fund educational  
25 and social services, including Teach for America positions to serve tribal members.  
26 *Id.* And the Tribe, as the sole owner, exercises plenary control over MobiLoans.  
27 *Id.* at 3-4. All members of the Board of Managers must be enrolled members of  
28 the Tribe. *Id.* MobiLoans must obtain the Tunica-Biloxi Tribal Council’s

1 approval to adopt a budget or business plan; appoint an executive director; sell or  
2 transfer any asset; waive its immunity; commit or burden any tribal resource;  
3 amend its Charter or Operating Agreement; and participate in any business. *Id.*

4       The Chippewa Cree and Plain Green. Plain Green is wholly owned and  
5 operated by the federally recognized Chippewa Cree Tribe of Rocky Boy's  
6 Reservation, Montana. Morsette Decl. 2. The Chippewa Cree Tribe chartered  
7 Plain Green under its Limited Liability Company Act and gave it the authority to  
8 make installment consumer loans. *Id.*, Ex. A (Plain Green Articles of Organization  
9 1); Ex. B (Chippewa Cree Tribe Limited Liability Company Act). Plain Green  
10 exists to fulfill four purposes: (1) "To serve the social, economic, education and  
11 health needs of the Tribe"; (2) "To increase tribal revenues"; (3) "To enhance the  
12 Tribe's economic self-sufficiency and self-determination"; and (4) "To provide  
13 positive, long-term social, environmental and economic benefits to tribal members  
14 by enhancing the Tribe's business undertakings and prospects." *Id.*, Ex. A  
15 (Articles of Organization § 3.1). Revenue from Plain Green has funded  
16 educational and social services for the Tribe, as well as general governmental  
17 expenses. *Id.* at 3. Plain Green's Articles of Organization require that the "Tribe  
18 shall have the sole proprietary interest in, and shall have sole responsibility for the  
19 conduct of the activities of, the Company." *Id.*

## 20       **B. The Tribes' Sovereign Authority And The Dodd-Frank Act**

21       The three Tribes at issue here, like all Indian Tribes, possess the sovereign  
22 right to "make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S.  
23 217, 221-22 (1959). Their governing authority does not derive from the  
24 Constitution; it is inherent. *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896). That  
25 inherent tribal sovereignty is the bedrock of Indian law. The Framers understood  
26 Tribes to be sovereign. *See* U.S. Const. art. I, § 8, cl. 3. And the Supreme Court  
27 has consistently recognized that Tribes "remain a separate people, with the power  
28 of regulating their internal and social relations." *Santa Clara Pueblo v. Martinez*,

1 436 U.S. 49, 55 (1978) (citation omitted). Accordingly, the federal government  
2 has a “longstanding policy of encouraging tribal self-government.” *Iowa Mut. Ins.*  
3 *Co. v. LaPlante*, 480 U.S. 9, 14 (1987).

4 Indeed, the federal government has a fiduciary *obligation* to foster tribal  
5 sovereignty and self-government given its role as a tribal guardian. *See Cherokee*  
6 *Nation v. Georgia*, 30 U.S. 1, 17 (1831); 25 U.S.C. § 4301(a)(6) (“[T]he United  
7 States has an obligation to guard and preserve the sovereignty of Indian tribes in  
8 order to foster strong tribal governments, Indian self-determination, and economic  
9 self-sufficiency among Indian tribes.”); *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir.  
10 1981) (“[A]ny Federal government action is subject to the United States’ fiduciary  
11 responsibilities toward the Indian tribes.”). In fulfillment of this obligation, the  
12 Executive Branch has committed to interacting with Tribes on a “government-to-  
13 government basis,” “support[ing] tribal sovereignty and self-determination” by  
14 mandating “regular and meaningful consultation and collaboration with tribal  
15 officials in the development of Federal policies that have tribal implications.”  
16 Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,249 (Nov. 6, 2000).

17 Title X of the Dodd-Frank Act, entitled the Consumer Financial Protection  
18 Act of 2010 (“CFPA”), continued this policy of consultation and collaboration  
19 with Tribes. The CFPA created the Bureau to work cooperatively with States and  
20 Tribes to enforce consumer protection laws. *See* 12 U.S.C. § 5481 *et seq.* The  
21 CFPA mandates that the Bureau “shall coordinate” regulation efforts with “state”  
22 governments. *Id.* § 5495; *see id.* §§ 5493(b),(c), 5512(c), 5551(a),(b), 5552(a)(1).  
23 And because the CFPA defines “State” to include “any federally recognized Indian  
24 tribe,” *id.* § 5481(27), the CFPA consequently requires the Bureau to coordinate  
25 regulation and enforcement efforts with Tribes as well. *See infra* at 13-16.

26 Each Tribe in this matter has made consistent, good-faith efforts to establish  
27 a cooperative regulatory relationship with the Bureau. For example, the Otoe-  
28 Missouri Tribe has met with the Bureau numerous times to develop such a

1 relationship, submitted to the Bureau a draft Model Lending Code, and proposed a  
2 draft Memorandum of Understanding which would promote transparency and  
3 effective communication between the Tribe and the Bureau. Shotton Decl. at 5-8.  
4 Both the Tunica-Biloxi Tribe and the Chippewa Cree Tribe have similarly met  
5 with the Bureau and communicated a willingness to share the information  
6 requested pursuant to cooperative relationships that respect the Tribes' sovereignty  
7 and right to self-government. *See* Pierite Decl. 4-5; Morsette Decl. 3-4.

### 8 **C. The Bureau's Civil Investigative Demands**

9 Instead of treating the Tribes as co-regulators, as the CFPA envisions, the  
10 Bureau bypassed the Tribes altogether. About two years ago, on June 12, 2012,  
11 the Bureau issued CIDs to Respondents requiring them to answer numerous,  
12 detailed interrogatories and to produce a wide variety of documents. *See, e.g.,*  
13 Osborn Decl., Ex. A (Great Plains CID 6-10). The Bureau purported to issue the  
14 CIDs pursuant to its authority under Section 1052 of the CFPA, 12 U.S.C.  
15 § 5562(c). That Section provides that “[w]henever the Bureau has reason to  
16 believe that any person” may have information or documents relevant to a  
17 violation, the Bureau may “issue in writing, and cause to be served upon such  
18 person, a civil investigative demand[.]” *Id.* § 5562(c)(1).

19 On July 17, 2012, Respondents petitioned the Bureau pursuant to 12 C.F.R.  
20 § 1080.6(e), to set aside the CIDs for three reasons: (1) Respondents are not  
21 “persons” under the CFPA and the Bureau thus lacks authority to issue the CIDs;  
22 (2) the CIDs are barred by Respondents' tribal sovereign immunity; and (3) the  
23 CIDs fail to provide notice and are overly broad and unduly burdensome. Osborn  
24 Decl., Ex. B (Joint Petition to Set Aside CIDs).

25 Respondents waited over a year for a response. On September 26, 2013, the  
26 Bureau denied the Tribes' petition in a written decision by Director Richard  
27 Cordray. Osborn Decl., Ex. C (Bureau Dec.). The decision directed Respondents  
28 to comply with the CIDs. Bureau Dec. 10. The Tribes have since made repeated



1 attempts to share the requested information and documents pursuant to a  
2 government-to-government cooperative relationship. Shotton Decl. at 5-8; Pierite  
3 Decl. 4-5; Morsette Decl. 3-4. Instead of participating in such a relationship, or  
4 otherwise coordinating with the Tribes to obtain the information it seeks, the  
5 Bureau filed this petition after another lengthy delay.

## 6 **ARGUMENT**

7 This Court should deny the Bureau's petition to enforce the CIDs. When an  
8 agency petitions for enforcement of a CID or administrative subpoena, a "court  
9 must ask (1) whether Congress has granted the authority to investigate; (2) whether  
10 procedural requirements have been followed; and (3) whether the evidence is  
11 relevant and material to the investigation." *FDIC v. Garner*, 126 F.3d 1138, 1142  
12 (9th Cir. 1997) (internal quotation marks omitted). The agency must "establish[]  
13 these factors," after which "the subpoena should be enforced unless the party being  
14 investigated proves the inquiry is unreasonable because it is overbroad or unduly  
15 burdensome." *Id.* (internal quotation marks omitted).

16 The Bureau fails this standard for three independent reasons. *First*, the  
17 Bureau lacks the authority to issue or enforce its CIDs because the CFPA allows  
18 the Bureau to regulate only "persons" and Respondents are not "persons" under the  
19 CFPA. They are "States," sovereign co-regulators. *Second*, the Bureau lacks  
20 authority to issue or enforce its CIDs because Respondents are protected from  
21 CIDs and civil enforcement by their tribal sovereign immunity. *Third*, the CIDs  
22 are improper and unenforceable because they do not provide notice and assert  
23 vague, overbroad, and unduly burdensome demands.

### 24 **I. RESPONDENTS ARE SOVEREIGN ARMS OF THEIR 25 RESPECTIVE TRIBES AND ARE NOT "PERSONS" WITHIN THE 26 MEANING OF THE CFPA.**

27 In order to issue and enforce its CIDs, the Bureau must demonstrate that  
28 "Congress has granted [it] the authority to investigate." *NLRB v. Bakersfield  
Californian*, 128 F.3d 1339, 1341 (9th Cir. 1997); *see also Louisiana Pub. Serv.*



1 *Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to  
2 act . . . unless and until Congress confers power upon it.”). The Bureau cannot do  
3 so here because its authority to issue and enforce CIDs extends only to “persons,”  
4 and Respondents do not fall within that statutory term.

5 **A. Tribes And Arms Of Tribes Are Presumptively Not “Persons”**  
6 **Under The CFPA.**

7 1. The CFPA charges the Bureau with “supervising covered persons for  
8 compliance with Federal consumer financial law.” 12 U.S.C. § 5511(c)(4). To  
9 carry out this duty, the Act grants the Bureau authority to issue CIDs to “any  
10 person” and power to petition to enforce a CID when “any person” fails to comply.  
11 *Id.* § 5562(c)(1), (e)(1). The statute defines “person” as “an individual,  
12 partnership, company, corporation, association (incorporated or unincorporated),  
13 trust, estate, cooperative organization, or other entity.” *Id.* § 5481(19).

14 Congress’s decision to extend the Bureau’s authority only to “persons” is  
15 critical because that term carries with it a “longstanding interpretive presumption”:  
16 the term “ ‘person’ does not include the sovereign,” *Stevens*, 529 U.S. at 780, and  
17 therefore “statutes employing the word are ordinarily construed to exclude it,” *Will*  
18 *v. Mich. Dep’t of State Police*, 491 U.S. 58, 72-73 (1989) (internal alterations and  
19 quotation marks omitted). The Supreme Court and other courts have applied that  
20 presumption time and again. They have held, for example, that the term “any  
21 person” in the False Claims Act (FCA), 31 U.S.C. § 3729(a), does not include  
22 States. *Stevens*, 529 U.S. at 780-82. They have held that “persons” as used in 42  
23 U.S.C. § 1983 does not include States, foreign nations, or territories. *See Will*, 491  
24 U.S. at 69-70, 74 (States); *Breard v. Greene*, 523 U.S. 371, 378 (1998) (per  
25 curiam) (foreign nations); *Ngiraingas v. Sanchez*, 495 U.S. 182 (1990) (territories).  
26 And, most important for present purposes, they have held that Tribes, as  
27 sovereigns, are presumptively not “persons.” *See Inyo Cnty. v. Paiute-Shoshone*  
28 *Indians*, 538 U.S. 701, 709 (2003) (adopting the United States’ position that Tribes

1 are not “persons” under Section 1983); *see also United States ex rel. Howard v.*  
2 *Shoshone Paiute Tribes*, 2012 WL 6725682, at \*2 (D. Nev. Dec. 26, 2012)  
3 (holding that Tribes are not “persons” under the FCA because “Indian tribes, like  
4 states, are separate sovereigns” and “entitled to the application” of the *Stevens*  
5 presumption); *United States v. Menominee Tribal Enters.*, 601 F. Supp. 2d 1061,  
6 1068 (E.D. Wis. 2009) (same); *Hester v. Redwood Cnty.*, 885 F. Supp. 2d 934, 948  
7 (D. Minn. 2012) (holding “Indian tribes are not ‘persons’” within the meaning of  
8 Section 1983 “under the plain and ordinary usage of that word”).

9 That makes sense. After all, the Supreme Court has recognized for nearly  
10 two centuries that Indian Tribes are “distinct political societ[ies] separated from  
11 others, capable of managing [their] own affairs and governing [themselves].”  
12 *Cherokee Nation*, 30 U.S. at 16. The United States has consistently agreed. It has  
13 explained to the Supreme Court that “Indian Tribes, like States (and unlike, for  
14 example, municipal governments), are also sovereigns under the constitutional  
15 structure” and thus “the ‘interpretative presumption that ‘person’ does not include  
16 the sovereign’ properly applies to Tribes as well as to States.” Br. for United  
17 States at 8, *Inyo Cnty.*, 538 U.S. 701 (No. 02-281), 2003 WL 252549 (Jan. 23,  
18 2003) (quoting *Stevens*, 529 U.S. at 780) (internal citations omitted).

19 2. All sovereigns, including Tribes, act by delegating their power. It is  
20 therefore unsurprising that courts (including the Ninth Circuit) have unanimously  
21 concluded that the *Stevens* presumption extends not just to the sovereign, but also  
22 to closely intertwined entities that constitute an “arm” of that sovereign.

23 In *Stevens* itself, the Court held that “person” does not include “a State (*or a*  
24 *state agency*).” 529 U.S. at 788 (emphasis added). In *Will*, the Court held that  
25 “person” excludes not only a state but also “governmental entities that are  
26 considered ‘arms of the state.’” 491 U.S. at 70 (citation omitted). And in *Inyo*  
27 *County*, “when a sovereign Indian Tribe and a corporation that was an ‘arm of the  
28 Tribe’ sought to be recognized as ‘person[s]’ under a federal statute, the Supreme

1 Court denied this status as to both the Tribe and the corporation, without  
2 distinguishing between the two, because both were sovereign entities.” *United*  
3 *States v. Bly*, 510 F.3d 453, 465 (4th Cir. 2007) (Motz, J., concurring).

4 Applying this precedent, the Ninth Circuit has explained that the term  
5 “person” presumptively excludes both a sovereign and its arms: “To effectuate  
6 Congress’s presumed intent, we must interpret the term ‘person’ . . . in a way that  
7 avoids suits against ‘state instrumentalities’ that are effectively arms of the state[.]”  
8 *Stoner*, 502 F.3d at 1122; *see also United States v. Errol D., Jr.*, 292 F.3d 1159,  
9 1162-63 (9th Cir. 2002) (applying *Stevens* to hold that 18 U.S.C. § 5031, which  
10 makes it a crime to commit an offense against “the person or property of another  
11 Indian or other *person*,” did not include crimes against government agencies).  
12 Many other courts have followed the Ninth Circuit and recognized that if an entity  
13 is an “arm” of a sovereign, then it must be treated like the sovereign itself and  
14 given the benefit of the legal presumption that a sovereign is not a “person.” *See*  
15 *United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, 602 (11th  
16 Cir. 2014) (utilizing arm-of-the-state analysis to determine whether a state  
17 instrumentality was a “person” under the FCA); *United States ex rel. Oberg v. Ky.*  
18 *Higher Educ. Student Loan Corp.*, 681 F.3d 575, 579-80 (4th Cir. 2012) (same);  
19 *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d  
20 702, 718 (10th Cir. 2006) (same); *United States ex rel. Adrian v. Regents of Univ.*  
21 *of Cal.*, 363 F.3d 398, 401-02 (5th Cir. 2004) (same).

22 Indeed, the United States itself has taken the same position before the  
23 Supreme Court: It argued in *Inyo County* that “because the term ‘person’ excludes  
24 a Tribe, *it also excludes arms of the Tribe*, including a tribal gaming corporation.”  
25 Br. for United States at 11, *Inyo Cnty.*, 538 U.S. 701 (No. 02-281), 2003 WL  
26 252549 (emphasis added). That is exactly right. When “[a] tribe establishes an  
27 entity to conduct certain activities,” the entity shares in the Tribe’s immunity and  
28 other sovereign rights “if it functions as an arm of the tribe.” *Allen v. Gold*

1 *Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). Arms of a Tribe thus *are*  
2 the Tribe, legally speaking; when an entity “acts as an arm of the tribe,” “its  
3 activities are properly deemed to be those of the tribe.” *Id.* An arm of the Tribe  
4 can thus be a “person” under federal law only if the Tribe itself is a “person.”

5 **B. Respondents Are Arms Of Their Respective Tribes.**

6 In short, Tribes and arms of Tribes are presumed not to be “persons” under  
7 federal statutes. That principle decides this case because Respondents are clearly  
8 arms of their respective Tribes. Indeed, the Bureau does not even dispute the  
9 point. *See* Mem. 5 (assuming *arguendo* that Respondents are arms of their Tribes).

10 To determine whether an entity is an arm of a Tribe, the Ninth Circuit  
11 examines “the purposes for which the Tribe founded [the entity]” and “the Tribe’s  
12 ownership and control of [the entity’s] operations.” *Allen*, 464 F.3d at 1046-47;  
13 *see also Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 726 (9th Cir. 2008)  
14 (casino and corporation that operated it were arms of the Tribe because (1) they  
15 were created to benefit the Tribe, (2) the “tribal corporation [wa]s wholly owned  
16 and managed by the Tribe,” (3) “the economic benefits produced by the casino  
17 inure[d] to the Tribe’s benefit,” and (4) the composition and control of the  
18 governing board indicated its entwinement with the Tribe).

19 Respondents are arms of their respective Tribes under this test. First, each  
20 Respondent was created by a tribal government and incorporated under tribal law,  
21 and each was designed to support tribal governmental purposes, including  
22 “advanc[ing] tribal economic development to aid addressing issues of public  
23 safety, health and welfare,” Shotton Decl., Ex. B (Resolution Creating Great Plains  
24 1), and “serv[ing] the social, economic, educational, and health needs of the  
25 Tribe,” Morsette Decl., Ex. A. (Plain Green Articles of Organization § 3.1). *See*  
26 *supra* at 2-4. Second, each Respondent is wholly owned and controlled by the  
27 Tribe, and the Tribe retains control over all company activities. *See id.* Third, the  
28 economic benefits produced by each Respondent inure to the benefit of their

1 respective Tribe as the sole member in the company. *See id.* And finally, the  
2 governing board of each Respondent is controlled by the Tribe through provisions  
3 that, for example, restrict participation to tribal members and give the Tribe power  
4 to appoint and remove officials. *See id.*; *see also* Shotton Decl., Ex. B (Resolution  
5 Creating Great Plains 1); *id.*, Ex. D (Great Plains Operating Agreement § 3.5);  
6 Pierite Decl. 3-4; Morsette Decl., Ex. A (Plain Green Articles of Organization  
7 §§ 7.1, 7.2).

8 “In light of the purposes for which the Tribe[s] founded [Respondents] and  
9 the Tribe[s]’ ownership and control of [their] operations, there can be little doubt  
10 that [Respondents] function[] as . . . arm[s] of the Tribe.” *Allen*, 464 F.3d at 1047.  
11 Indeed, the resolutions and governing charters that formed these companies  
12 demonstrate that that is precisely what the Tribes intended. The Tribes conferred  
13 on them all the powers and attributes associated with the Tribes, including  
14 sovereign immunity. *See supra* at 2-4. And that intent confirms Respondents’  
15 status as arms of their Tribes. *See Breakthrough Mgmt. Grp., Inc. v. Chukchansi*  
16 *Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010) (recognizing that  
17 courts have considered a Tribe’s intent in the arm-of-the-tribe analysis).

1           **C.     The Bureau Cannot Overcome the *Stevens* Presumption Because**  
 2           **The CFPA Demonstrates A Clear Intention Not To Treat Tribes**  
 3           **As “Persons.”**

4           In sum, Respondents, as arms of sovereign Tribes, presumptively are not  
 5 “persons” within the meaning of the CFPA. The only remaining question, then, is  
 6 whether that presumption can be overcome by an “affirmative showing of statutory  
 7 intent to the contrary.” *Stevens*, 529 U.S. at 781. It cannot. Nothing in the CFPA  
 8 demonstrates a congressional intent to regulate Tribes. Quite the contrary, in fact:  
 9 The CFPA displays the opposite intent by treating Tribes as the equivalent of  
 10 States, and treating *both* Tribes *and* States as co-regulators with whom the Bureau  
 11 must consult and cooperate in carrying out its statutory mandates.

12           1. Congress specifically references Tribes in the CFPA. That reference  
 13 occurs in the definition of “State”:

14           The term “State” means any State, territory, or possession of the United  
 15 States, the District of Columbia, the Commonwealth of Puerto Rico, the  
 16 Commonwealth of the Northern Mariana Islands, Guam, American Samoa,  
 17 or the United States Virgin Islands or *any federally recognized Indian tribe*,  
 18 as defined by the Secretary of the Interior under [25 U.S.C. § 479a–1(a)].

19 12 U.S.C. § 5481(27) (emphasis added). Congress, in other words, chose to treat  
 20 Tribes such as the Otoe-Missouria, Tunica-Biloxi, and Chippewa Cree in the exact  
 21 same way it treated States such as Oklahoma, Louisiana, and Montana. Congress’s  
 22 definition of “person,” by contrast, makes no mention of Tribes, States, or their  
 23 instrumentalities. *See id.* § 5481(19). The CFPA thus erects a clear demarcation  
 24 between regulated entities—“covered persons,” *id.* §§ 5481(6),(19), 5511(c)(4)—  
 25 and sovereign entities who are to be co-regulators, *id.* §§ 5481(27), 5491.

26           Provision after provision of the CFPA confirms that Congress expected  
 27 “States,” which include Tribes, to be among the regulators, not the regulated. The  
 28 CFPA provides that “[t]he Bureau *shall* coordinate with . . . State [and Tribal]  
 regulators, as appropriate, to promote consistent regulatory treatment of consumer



1 financial and investment products and services.” *Id.* § 5495. Likewise, it requires  
2 the Bureau to coordinate its “fair lending efforts . . . with other Federal agencies  
3 and State [and Tribal] regulators, as appropriate, to promote consistent, efficient,  
4 and effective enforcement of Federal fair lending laws.” *Id.* § 5493(c)(2)(B). It  
5 gives “States” a significant role in collecting and tracking consumer complaints, *id.*  
6 § 5493(b)(3)(B), and mandates that the Bureau share the data it collects with  
7 “State” agencies, *id.* § 5493(b)(3)(D). And it provides that “the attorney general  
8 (or the equivalent thereof) of any State [or Tribe] may bring a civil action in the  
9 name of such State [or Tribe]” in federal or state court to enforce the Act and  
10 associated regulations. *Id.* § 5552(a)(1).

11 Congress accordingly intended “States,” and thus Tribes, to be the Bureau’s  
12 *partners* in regulation and enforcement, not to be regulated entities themselves.  
13 Indeed, the Department of the Treasury itself has said as much. In a public  
14 statement regarding how the Bureau will interact with Tribes, it explained that the  
15 CFPA “[e]mpower[s] tribal government[s] . . . to enforce the [Bureau]’s rules in  
16 areas under their jurisdiction, the same way that states will be permitted to enforce  
17 those rules.” U.S. Treasury Dep’t, *The Dodd-Frank Wall Street Reform and*  
18 *Consumer Protection Act Benefits Native Americans*.<sup>1</sup>

19 It makes perfect sense that Congress would have chosen that approach,  
20 given the longstanding federal policy of promoting tribal sovereignty and self-  
21 government. Congress and the Executive Branch have long embraced a “general  
22 federal policy of encouraging tribes ‘to revitalize their self-government’ and to  
23 assume control over their ‘business and economic affairs.’” *White Mountain*  
24 *Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980). Recognizing that that was  
25 what Congress intended, the Tribes have acted to regulate consumer finance  
26 alongside the Bureau and offered to work with the Bureau to provide the  
27

28 <sup>1</sup> Available at <http://www.treasury.gov/initiatives/wsr/Documents/Fact%20Sheet-%20%20Benefits%20Native%20Americans,%20Oct%202010%20FINAL.pdf>

1 documents and information requested as part of a cooperative agreement. *See*  
2 *supra* 4-6; Shotton Decl. at 5-8; Pierite Decl. 4-5; Morsette Decl. 3-4.

3 The bottom line: Nothing in the CFPA remotely suggests that Congress  
4 intended to authorize the Bureau to issue CIDs to Tribes, and the CFPA's explicit  
5 treatment of Tribes as "States" suggests exactly the opposite. The Bureau thus  
6 cannot make any "affirmative showing of statutory intent" that would overcome  
7 the *Stevens* presumption and demonstrate that Congress intended to include  
8 sovereign entities within the definition of "person." 529 U.S. at 781.

9 2. The Bureau also cannot overcome the *Stevens* presumption for a second  
10 reason: Congress understood what the result would be when it included Tribes  
11 within the definition of "State" but not within the definition of "persons" in the  
12 CFPA—and yet it did so anyway.

13 The Supreme Court has explained that courts "presume that Congress  
14 expects its statutes to be read in conformity with th[e] Court's precedents." *United*  
15 *States v. Wells*, 519 U.S. 482, 495 (1997); *accord United States v. LeCoe*, 936 F.2d  
16 398, 403 (9th Cir. 1991) ("Congress is, of course, presumed to know existing law  
17 pertinent to any new legislation it enacts."). And when Congress drafted the  
18 CFPA, the Court's precedents had long held that the word "person" is presumed  
19 not to reach the sovereign, including Tribes. *See Will*, 491 U.S. at 72-73; *Stevens*,  
20 529 U.S. at 780-82, *Inyo Cnty.*, 538 U.S. at 709.

21 Indeed, *Stevens* could not have been more explicit in teaching Congress how  
22 to make an agency's CID authority reach sovereigns. The *Stevens* Court contrasted  
23 the undefined word "person" in 31 U.S.C. § 3729(a) with the use of the word  
24 "person" in another provision of the FCA. The latter provision allowed the  
25 Attorney General to issue CIDs to "any person . . . possessing information relevant  
26 to a false claims law investigation," 31 U.S.C. § 3733(a)(1)—language very similar  
27 to that at issue here. *Stevens*, 529 U.S. at 783-84. But in that latter provision,  
28 Congress defined "person" to include "*any State or political subdivision of a*



1 *State.*” 31 U.S.C. § 3733(l)(4) (emphasis added). That made all the difference:  
2 *Stevens* held that § 3733(a)(1) subjected States to CIDs, while § 3729, which did  
3 *not* define “person” to include States and their political subdivisions, did not  
4 encompass those sovereigns. 529 U.S. at 784 & n.13.

5 A clearer blueprint for how to vest the Bureau with authority over Tribes  
6 could hardly be imagined. But Congress did not take that route; instead, it chose  
7 not to mention States, Tribes, or any other sovereign in the CFPA’s definition of  
8 “person.” Congress made that choice even though it knows how to include  
9 sovereign entities, including Tribes and their instrumentalities, in the definition of  
10 a “person” when it so chooses. *See, e.g.*, 16 U.S.C. § 470bb(5) (defining “person”  
11 to include, *inter alia*, “any . . . instrumentality of the United States, of any Indian  
12 tribe, or of any State or political subdivision thereof”); 42 U.S.C. § 8802(17)  
13 (defining “person” to include, *inter alia*, “any State or local government . . . or any  
14 agency or instrumentality thereof, or any Indian tribe or tribal organization”); 42  
15 U.S.C. § 300f(10),(12) (defining “person” to include a “municipality” and defining  
16 “municipality” to include “an Indian tribe”). That choice must be understood as  
17 intentional. *See Wells*, 519 U.S. at 495. And it further dooms any attempt to make  
18 an “affirmative showing of statutory intent” to overcome the *Stevens* presumption.  
19 529 U.S. at 781. Respondents are not “persons” subject to the Bureau’s authority.

20 **D. The Bureau’s Contrary Arguments Are Misplaced.**

21 Notably, the Bureau never even mentions the *Stevens* presumption, despite  
22 Respondents’ prior submission to the Bureau on that point. *See* Joint Petition To  
23 Set Aside CIDs 14-15. Instead, the Bureau relies on the Ninth Circuit’s application  
24 of *FPC v. Tuscarora Indian Nation*, 362 U.S. 99 (1960), to argue that the CFPA  
25 must apply to Respondents because the CFPA is a law of “general applicability.”  
26 Mem. 6. The Bureau also argues that Respondents must be subject to its authority  
27 because the word “persons” itself is defined in the statute to include “companies”  
28 and “other entities.” *Id.* at 5. Both arguments are misplaced.

1           1.       *Tuscarora* and *Coeur d'Alene* Do Not Help The Bureau.

2           More than a half-century ago, the Supreme Court observed in *Tuscarora* that  
3 “a general statute in terms applying to all persons includes Indians and their  
4 property interests.” 362 U.S. at 116. The Ninth Circuit has held that *Tuscarora*  
5 stands for the proposition that a “federal statute of general applicability that is  
6 silent on the issue of applicability to Indian tribes” includes Indians and their  
7 Tribes, subject to three exceptions. *Donovan v. Coeur d'Alene Tribal Farm*, 751  
8 F.2d 1113, 1116 (9th Cir. 1985); *see also EEOC v. Karuk Tribe Housing Auth.*,  
9 260 F.3d 1071, 1078 (9th Cir. 2001).<sup>2</sup> The Bureau seeks to make that statement  
10 bear the weight of its entire case. That maneuver fails for several reasons.

11           *First*, as *Coeur d'Alene* itself noted, the *Tuscarora* presumption applies only  
12 when a statute is “*silent* on the issue of applicability to Indian tribes.” 751 F.2d at  
13 1116 (emphasis added); *accord, e.g., Karuk Tribe*, 260 F.3d at 1078 (discussing  
14 *Tuscarora* only because statute at issue said nothing about Tribes); *United States v.*  
15 *Mitchell*, 502 F.3d 931, 947-48 (9th Cir. 2007) (same). And the CFPA is *not* silent  
16 about how it applies to Tribes. On the contrary, it expressly places Tribes within  
17 the definition of “State,” thus making them co-regulators, and excludes them from  
18 the definition of “person.” *Coeur d'Alene* and *Tuscarora* are thus inapplicable.

19  
20  
21 <sup>2</sup> Courts have observed that “*Tuscarora*’s statement is of uncertain significance,  
22 and possibly dictum, given the particulars of that case,” and that it is “in tension  
23 with the longstanding principles that (1) ambiguities in a federal statute must be  
24 resolved in favor of Indians and (2) a clear expression of Congressional intent is  
25 necessary before a court may construe a federal statute so as to impair tribal  
26 sovereignty.” *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1311  
27 (D.C. Cir. 2007). Accordingly, Respondents maintain that the *Tuscarora* principle  
28 cannot *ever* apply to Tribes or their sovereign arms because courts should never  
presume that Congress intends to subject sovereign entities to generally applicable  
provisions without an expressed intention to do so. *See Dobbs v. Anthem Blue*  
*Cross & Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010). Respondents  
recognize, however, that the Ninth Circuit has applied the *Tuscarora* dictum to  
tribal entities, and that this Court is bound by that precedent. *See Karuk*, 260 F.3d  
at 1078-79.

1           *Second*, *Tuscarora*'s general principle cannot trump the Supreme Court's  
2 specific guidance about how courts should interpret the word "person." In *Stevens*  
3 and like cases, the Supreme Court has explicitly held that "person" presumptively  
4 "does not include the sovereign," including Tribes. 529 U.S. at 780; *Inyo Cnty.*,  
5 538 U.S. at 712. *Tuscarora* cannot apply in such cases, because if it did it would  
6 swallow more recent, and more specific, Supreme Court decisions: Statutes  
7 including the word "person" *would* reach sovereign Tribes, despite the Supreme  
8 Court's express holding that they presumptively do not. This Court is not at liberty  
9 to jettison binding precedent in that way. *Cf. RadLAX Gateway Hotel, LLC v.*  
10 *Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (recognizing that a specific rule  
11 must trump a general rule so as not to be "swallowed by the general one"). Nor  
12 does any precedent even purport to require that it do so: None of the Bureau's  
13 cited cases involves the word "person." *See Tuscarora*, 362 U.S. at 115  
14 (interpreting "lands or property of others"); *Coeur d'Alene*, 751 F.2d at 1115  
15 (interpreting "employer"); *Karuk*, 260 F.3d 1078 (same); *U.S. Dep't of Labor v.*  
16 *Occupational Safety & Health Rev. Comm'n*, 935 F.2d 182, 183-84 (9th Cir. 1991)  
17 (same). Thus, although the Ninth Circuit has applied the *Tuscarora* dictum, it has  
18 never done so in conflict with the *Stevens* presumption.<sup>3</sup> Nor has any court, to our  
19 knowledge. This Court should not be the first.

20           *Third*, even if the *Tuscarora* presumption applied—which it does not—this  
21 case falls within an exception. In *Coeur d'Alene*, the Ninth Circuit explained that  
22 the *Tuscarora* principle does not apply when "there is proof by legislative history  
23 or some other means that Congress intended [the law] not to apply to Indians on  
24

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25 <sup>3</sup> *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003), is  
26 not to the contrary. Although that case involved the enforcement of a subpoena  
27 and the statute used the word "person," the respondent was not an arm of the Tribe  
28 but "a non-profit California corporation that operate[d] outpatient health care  
facilities on non-Indian land" and its "funding c[ame] from MediCal and third-  
party insurers as well as from [Indian Health Services]." *Id.* at 1000. The *Stevens*  
presumption thus did not apply in that case, and no party argued that it did.

1 their reservations.” 751 F.2d at 1116 (quotation marks omitted). And the CFP  
2 contains just such proof, as we have discussed: It expressly includes Tribes within  
3 the statutory term “State”; it *excludes* all sovereigns from the statutory term  
4 “person”; and it creates a statutory scheme that, again and again, contemplates  
5 States and Tribes as co-regulators. *See supra* at 4-6, 13-16. That is ample proof  
6 that Congress did not intend the Bureau’s investigative authority to reach Tribes.  
7 Indeed, it is more compelling proof than the legislative history that the Ninth  
8 Circuit gave as an example in *Coeur d’Alene*. 751 F.2d at 1116; *see also Miller v.*  
9 *Wright*, 705 F.3d 919, 927 (9th Cir. 2012) (finding *Coeur d’Alene*’s requirement of  
10 “proof” satisfied by prior precedent that looked to the overall structure of the  
11 antitrust laws).<sup>4</sup>

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19 <sup>4</sup> The Bureau’s argument fails for yet another reason: The *Tuscarora* dictum does  
20 not apply when “the matter at stake is a fundamental attribute of sovereignty and a  
21 necessary instrument of self-government and territorial management . . . which  
22 derives from the tribe’s general authority, as sovereign, to control economic  
23 activity within its jurisdiction.” *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1200  
24 (10th Cir. 2002) (en banc) (quotation marks and alterations omitted); *accord*  
25 *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 250 (8th Cir.  
26 1993); *EEOC v. Cherokee Nation*, 871 F.2d 937, 938 (10th Cir. 1989). Here the  
27 three Tribes exercise powers of “self-government,” *Santa Clara*, 436 U.S. at 59-  
28 60, and inherent sovereign authority in regulating Respondents’ activities. *See*  
*supra* at 2-5. The Bureau seeks to interfere with that authority by subjecting the  
Tribes to its coercive investigatory power. The government must present “clear  
evidence that Congress actually considered the conflict between its intended action  
on the one hand and Indian . . . rights on the other, and chose to resolve that  
conflict by abrogating [the tribal rights].” *Fond du Lac*, 986 F.2d at 250 (quoting  
*United States v. Dion*, 476 U.S. 734, 740 (1986)); *see also see Dobbs*, 600 F.3d at  
1283-84. In the CFP, that evidence is conspicuously lacking. *See supra* 13-16.

1           2.     The CFPA’s Other Arguments Fare No Better.

2           The Bureau also argues that Respondents “squarely fall” within the CFPA’s  
3 definition of “person” because the statute defines “person” to include various types  
4 of entities, including “compan[ies]” and “other entit[ies].” Mem. 5 (citing 12  
5 U.S.C. § 5481(19)). That argument fares no better. *Stevens* recognized that  
6 corporations are “presumptively covered by the term ‘person,’” and yet it held that  
7 a statute’s use of the word “person” “does less than nothing to overcome the  
8 presumption that [sovereigns] are *not* covered.” 529 U.S. at 782 (emphases  
9 added). The Bureau would flip that holding on its head by “render[ing] every  
10 corporation, no matter how close its relationship to a state, a ‘person.’” *Oberg*,  
11 681 F.3d at 579. As courts have recognized, that approach is “inconsistent with  
12 *Stevens*’ express holding.” *Id.* Instead, “the critical inquiry” is whether a  
13 corporate entity “is truly subject to sufficient state control to render [it] a part of  
14 the state, and not a ‘person.’” *Id.*

15           Finally, though the Bureau does not make the argument here, it previously  
16 asserted that it could issue the CIDs because Respondents “are not themselves the  
17 sovereign” but are “companies that have commercial dealings on the open market  
18 and at most claim to have some sort of affiliation with a sovereign.” Bureau Dec.  
19 6. That is incorrect. Respondents have more than “some sort of affiliation with a  
20 sovereign”; they are arms of their Tribes. *See supra* at 11-12. And the fact that  
21 they “have commercial dealings on the open market” is immaterial. The Ninth  
22 Circuit in *Cook* roundly rejected this same argument, 548 F.3d at 725, and  
23 explained that whether a “tribal business entity” is an arm of the Tribe “depends  
24 not on ‘whether the activity may be characterized as a business . . . but whether the  
25 entity acts as an arm of the tribe so that its activities are properly deemed to be  
26 those of the tribe,’” *id.* (quoting *Allen*, 464 F.3d at 1046); *see Kiowa Tribe of Okla.*  
27 *v. Mfg. Techs, Inc.*, 523 U.S. 751, 759-60 (1998) (declining to adopt a commercial-  
28 activities exception to tribal sovereign immunity).

1           **E. Any Ambiguity About The Word “Person” Must Be Construed In**  
 2           **Favor Of The Tribe.**

3           Even if this Court were to determine that *Tuscarora* and *Stevens* are in  
 4 conflict, or that the CFPA’s scope is otherwise ambiguous, the Court must interpret  
 5 it in Respondents’ favor. When courts “are faced with . . . two possible  
 6 constructions” of a statute, their choice “must be dictated by a principle deeply  
 7 rooted in th[e] [Supreme] Court’s Indian jurisprudence: ‘[S]tatutes are to be  
 8 construed liberally in favor of the Indians, with ambiguous provisions interpreted  
 9 to their benefit.’” *County of Yakima v. Confederated Tribes & Bands of the*  
 10 *Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet*  
 11 *Tribe*, 471 U.S. 759, 766-67 (1985)). “Ambiguities in federal law have been  
 12 construed generously in order to comport with . . . traditional notions of [tribal]  
 13 sovereignty and with the federal policy of encouraging tribal independence.”  
 14 *Bracker*, 448 U.S. at 143-44.

15           The Ninth Circuit applied this rule in analogous circumstances in *Karuk*.  
 16 The EEOC there argued—as the Bureau argues here—that standard principles of  
 17 statutory construction indicated that Tribes were covered by a federal statute  
 18 (there, the ADEA). 260 F.3d at 1082. The Ninth Circuit rejected that view on the  
 19 ground that the Tribe had to be given the benefit of all ambiguities. *See id.*  
 20 (quoting ambiguity-canon language from *Bracker*). It wrote that the EEOC’s  
 21 analysis “d[id] not account for the rule that ‘the standard principles of statutory  
 22 construction do not have their usual force in cases involving Indian law.’” *Id.*  
 23 (quoting *Blackfeet Tribe*, 471 U.S. at 766). To the extent the reach of the CFPA’s  
 24 authority can be subject to differing interpretations, the same analysis applies here.

25           **II. THE CIDs ARE BARRED BY RESPONDENTS’ SOVEREIGN**  
 26           **IMMUNITY.**

27           Though this Court need go no further, the CIDs also are unenforceable for a  
 28 second reason: They are barred by tribal sovereign immunity.



1           1. “Indian tribes have long been recognized as possessing the common-law  
2 immunity from suit traditionally enjoyed by sovereign powers.” *Santa Clara*, 436  
3 U.S. at 58 (collecting cases). Tribal immunity is broad, extending to off-  
4 reservation tribal activities, *see Kiowa Tribe*, 523 U.S. at 756, and even “to suits on  
5 off-reservation commercial contracts” entered into by Tribes, *C&L Enters., Inc. v.*  
6 *Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). And it extends  
7 to subpoenas and similar investigatory documents, such as CIDs. Subpoenas and  
8 similar documents are, in effect, judicial processes, and therefore can be enforced  
9 only through a formal court process. *See United States v. James*, 980 F.2d 1314,  
10 1319 (9th Cir. 1992); *Catskill Dev., L.L.C. v. Park Place Entm’t Corp.*, 206 F.R.D.  
11 78, 86 (S.D.N.Y. 2002). Tribal immunity is not absolute but “is subject to the  
12 superior and plenary control of Congress.” *Santa Clara*, 436 U.S. at 58. But “[t]o  
13 abrogate tribal immunity, Congress must unequivocally express that purpose.”  
14 *C&L Enters.*, 532 U.S. at 418 (quotation marks omitted). And only Congress  
15 possesses the authority to abrogate this immunity: “As a matter of federal law, an  
16 Indian tribe is subject to suit only where Congress has authorized the suit or the  
17 tribe has waived its immunity.” *Kiowa Tribe*, 523 U.S. at 754.

18           Applying this framework, the Bureau cannot issue or enforce the CIDs here.  
19 Nothing in the Dodd-Frank Act abrogates tribal sovereign immunity.

20           2. In *United States v. Yakima Tribal Court*, 806 F.2d 853 (9th Cir. 1986),  
21 the Ninth Circuit held that Tribes may not assert sovereign immunity in a suit  
22 brought by the United States. But *Yakima* is no longer good law in light of  
23 *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991).

24           As the Supreme Court has explained, States do not enjoy immunity against  
25 the United States because “[i]n ratifying the Constitution, the States consented to  
26 suits brought by . . . the Federal Government.” *Alden v. Maine*, 527 U.S. 706, 755  
27 (1999). The Ninth Circuit in *Yakima* held that “[b]y analogy [to States], the United  
28 States may sue Indian tribes and override tribal sovereign immunity.” 806 F.2d at

1 861. But five years later the Supreme Court explained that such an analogy is  
2 inapt: It held in *Blatchford* that whereas States surrendered their sovereign  
3 immunity against the federal government, “*it would be absurd to suggest that the*  
4 *tribes surrendered immunity in a convention to which they were not even parties.*”  
5 501 U.S. at 782 (emphasis added). *Blatchford* thus “distinguished state sovereign  
6 immunity from tribal sovereign immunity, as tribes were not at the Constitutional  
7 Convention.” *Kiowa Tribe*, 523 U.S. at 756.<sup>5</sup>

8 The Ninth Circuit has been clear that where “the relevant court of last  
9 resort”—here the Supreme Court—has “undercut the theory or reasoning  
10 underlying [a] prior circuit precedent in such a way that the cases are clearly  
11 irreconcilable,” then “district courts should consider themselves bound by the  
12 intervening higher authority and reject the prior opinion of [the Ninth Circuit] as  
13 having been effectively overruled.” *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir.  
14 2003) (en banc). The reasoning of *Blatchford* that Tribes did *not* surrender their  
15 immunity in the Convention as States did “undercut[s] the theory or reasoning”  
16 underlying *Yakima*, and this Court should “consider [itself] bound” by *Blatchford*  
17 and reject *Yakima* “as having been effectively overruled.” *Id.* Respondents are  
18 entitled to immunity from the Bureau’s attempt to enforce its CIDs.

19 **III. THE CIDS DO NOT PROVIDE ADEQUATE NOTICE AND ARE**  
20 **INDEFINITE AND OVERBROAD.**

21 Finally, the CIDs are improper because they are overbroad and do not  
22 comport with the statutory and regulatory provisions that restrict the Bureau’s  
23 investigatory powers. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652  
24 (1950) (administrative subpoena is enforceable only when the relevant  
25 investigation is within the agency’s authority, the demand is sufficiently definite,

26 <sup>5</sup> The Ninth Circuit has reaffirmed *Yakima*’s holding after *Blatchford* and *Kiowa*,  
27 but it has not addressed the tension between *Yakima* and these later cases. *See*  
28 *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 781 (9th Cir. 2005); *Karuk*, 260  
F.3d at 1075; *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1459–60 (9th Cir.  
1994). No party in those cases cited *Blatchford* or raised this issue.



1 and the information sought is reasonably relevant); *Garner*, 126 F.3d at 1142; *In re*  
2 *Sealed Case*, 42 F.3d 1412, 1415 (D.C. Cir. 1994). An administrative subpoena  
3 “will not be enforced if it is too indefinite or broad” and “may not be so broad as to  
4 be in the nature of a ‘fishing expedition.’” *Peters v. United States*, 853 F.2d 692,  
5 700 (9th Cir. 1988). This is because an administrative subpoena must “satisf[y] ‘a  
6 Fourth Amendment reasonableness inquiry.’” *United States v. Golden Valley*  
7 *Elec. Ass’n*, 689 F.3d 1108, 1113 (9th Cir. 2012) (quoting *Reich v. Mont. Sulphur*  
8 *& Chem. Co.*, 32 F.3d 440, 444 n.5 (9th Cir. 1994)). Although the “scope of  
9 judicial review” over whether a subpoena is unreasonably broad and burdensome is  
10 “quite narrow,” *id.* (internal quotation marks omitted), even that narrow review is  
11 fatal here. The CIDs issued by the Bureau here are manifestly “fishing  
12 expeditions” and unenforceable.

13 Most importantly, the CIDs as written do not provide adequate notice of the  
14 purpose and scope of the Bureau’s investigation. The CFPA explicitly states that  
15 “[e]ach civil investigative demand shall state the nature of the conduct constituting  
16 the alleged violation which is under investigation and the provision of law  
17 applicable to such violation.” 12 U.S.C. § 5562(c)(2); *see also* 12 C.F.R. § 1080.5  
18 (same). The CIDs fail to satisfy this notice requirement. They purport to seek  
19 information in furtherance of an undefined investigation of “small dollar online  
20 lenders” pursuant to any of four elaborate statutory schemes and “*any other*  
21 Federal consumer financial law.” Osborn Decl., Ex. A (Great Plains CID 1).  
22 These generalities amount to no notice whatsoever.

23 This lack of notice makes it impossible for a reviewing court “to determine  
24 whether the information demanded is ‘reasonably relevant’ and ‘not too  
25 indefinite.’” *In re Sealed Case*, 42 F.3d at 1418. In *Peters*, the Ninth Circuit  
26 quashed an administrative subpoena because “the INS ha[d] failed to demonstrate  
27 that the . . . subpoena [wa]s no broader than necessary to achieve its purposes.”  
28 853 F.2d at 700. And in *General Insurance Co. v. EEOC*, 491 F.2d 133 (9th Cir.

1 1974), the Ninth Circuit affirmed the district court’s refusal to enforce the EEOC’s  
2 demand because the demand “reached back in time nearly eight years” and  
3 “demanded evidence going to forms of discrimination not even charged or  
4 alleged.” *Id.* at 136. Here, the Bureau has not specified its purpose as it relates to  
5 Respondents, has included a laundry list of every consumer financial law, has  
6 asked Respondents to account for every loan, every consumer, and every profit  
7 calculation for every customer since their inception, Osborn Decl., Ex. A (Great  
8 Plains CID 6-8), and has demanded that Respondents produce every contract,  
9 accounting statement, internal complaint, policy or procedure, corporate filing,  
10 bank account, press release, training document, and on and on, *id.* at 9-10.

11 The Bureau cannot show that these CIDs are “no broader than necessary.”  
12 *Peters*, 853 F.2d at 700. And it has “demanded evidence” far beyond the scope of  
13 any possible violation, in part because it has not specified any violation. *Gen. Ins.*,  
14 491 F.2d at 136; *see also In re Sealed Case*, 42 F.3d at 1418-19 (an agency cannot  
15 employ “broad language . . . to describe [a subpoena’s] purpose” in order to  
16 exercise “unfettered authority to cast about for potential wrongdoing”). Unlike  
17 subpoenas that the Ninth Circuit has enforced in the past, the CIDs issued by the  
18 Bureau here are not “narrow and specific.” *Golden Valley*, 689 F.3d at 1115.  
19 They should not be enforced.

## 20 CONCLUSION

21 For the foregoing reasons, the Bureau’s petition to enforce its CIDs against  
22 Respondents should be denied.

23 Dated: April 11, 2014

Respectfully submitted,

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