**No. 14-55900**

IN THE

# United States Court of Appeals for the Ninth Circuit

CONSUMER FINANCIAL PROTECTION BUREAU,

Petitioner-Appellee,

v.

GREAT PLAINS LENDING, LLC,
MOBILOANS, LLC, and
PLAIN GREEN, LLC,

Respondents-Appellants.

On Appeal from the
United States District Court for the Central District of California
Hon. Michael W. Fitzgerald
Case No. 2:14-cv-2090

## BRIEF FOR RESPONDENTS-APPELLANTS GREAT PLAINS LENDING, LLC, ET AL.

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December 10, 2014

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Respondents-Appellants make the following disclosure statements:

Great Plains Lending, LLC, is wholly owned by the Otoe-Missouria Tribe of Indians. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

MobiLoans, LLC, is wholly owned by the Tunica-Biloxi Tribe of Louisiana. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Plain Green, LLC (formerly First American Asset Recovery, LLC) is wholly owned by the Chippewa Cree Tribe of the Rocky Boy's Reservation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

/s/ Neal Kumar Katyal
Neal Kumar Katyal

December 10, 2014 *Counsel for Respondents-Appellants*

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## STATEMENT OF JURISDICTION

The District Court asserted jurisdiction under 12 U.S.C. § 5562(e). The District Court's order granting the Consumer Financial Protection Bureau's petition for enforcement was a final decision on the merits, and the issue presented is ripe for review. *See EEOC v. Karuk Tribe Housing Auth.*, 260 F.3d 1071, 1075-78 (9th Cir. 2001). This Court therefore has jurisdiction under 28 U.S.C. § 1291. The District Court issued its order on May 27, 2014. Respondents filed a timely notice of appeal on June 3, 2014. ER 39-40; *see* Fed. R. App. P. 4(a).

## STATEMENT OF THE ISSUE

The Consumer Financial Protection Bureau may issue civil investigative demands to those "person[s]" who the Bureau has reason to believe may possess information relevant to a violation of federal consumer finance law. 12 U.S.C. § 5562(c)(1). The term "person" is further defined by statute in detail to include a variety of entities, but that definition does not mention Indian Tribes or other sovereigns whatsoever. *Id.* § 5481(19). Tribes are, however, expressly included in the statute's definition of "State," *id.* § 5481(27), and the statute requires that the Bureau coordinate with "State regulators," *id.* § 5495. The issue presented is:

> Whether Indian Tribes and their sovereign instrumentalities are "persons" subject to the Bureau's investigative authority.

## PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the addendum to this brief.

## STATEMENT OF THE CASE

### A. The Consumer Financial Protection Act

The Consumer Financial Protection Act of 2010, which appears as Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, created the Consumer Financial Protection Bureau to implement and enforce federal consumer finance law. *See* 12 U.S.C. § 5481 *et seq.* The CFPA forbids the Bureau to complete that task alone. Rather, it instructs that the Bureau "shall coordinate" its regulation efforts with "State regulators." *Id.* § 5495. And because the Act defines "State" to include "any federally recognized Indian tribe," *id.* § 5481(27), it equally mandates that the Bureau coordinate its regulation efforts with Tribes. Various other statutory provisions spell out the details of the cooperative relationship that Congress envisioned between federal regulators and States (or Tribes). *See, e.g.*, *id.* §§ 5493(b)(3), 5493(c)(2), 5493(e)(1), 5493(g)(3), 5512(c)(6)-(7), 5514(b), 5515(b)(2), 5515(e)(2), 5551(a), 5551(b), 5552(a).

The Act gives the Bureau the authority to supervise "covered persons"—certain persons who provide consumer financial products or services—for compliance with federal law, and the authority to bring enforcement actions if needed. *Id.* § 5511(c)(4); *see also id.* § 5481(6), (15). The Bureau may also issue

civil investigative demands (CIDs) to "any person" who it has reason to believe may have material or information relevant to a violation of federal consumer finance law. *Id.* § 5562(c)(1). The term "person," which marks the outer boundary of the Bureau's power, is further defined in the Act to include various individual and corporate entities. *Id.* § 5481(19) ("The term 'person' means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity."). The definition says nothing about sovereign States or Tribes.

### B. The Bureau's Civil Investigative Demands

This case involves three federally recognized Indian Tribes: the Otoe-Missouria Tribe of Indians, the Tunica-Biloxi Tribe of Louisiana, and the Chippewa Cree Tribe of the Rocky Boy's Reservation. Like all Indian Tribes, these three Tribes cannot take advantage of the traditional mechanisms of raising government revenue through property and income taxes—either as a legal matter (because their land is held in trust by the federal government), or as a practical one (because most Tribe members do not make enough income). To make matters worse, as a result of forced relocation by the federal government, the Tribes are geographically isolated from major population centers and cannot achieve self-sufficiency through land-based businesses.

Consequently, the Tribes sought out Internet-based business opportunities. Each Tribe established an online lending entity for the purpose of raising government funds for social, educational, and economic initiatives. *See* ER 135, 176 (Great Plains); ER 114-15, 123 (MobiLoans); ER 44-45, 49 (Plain Green). Those entities are Respondents here. They are wholly owned and operated by their respective Tribes, and the Tribes have vested them with all of the privileges and immunities that a sovereign Tribe enjoys, including immunity from suit, from taxation, and from regulation. *See* ER 176 (Great Plains); ER 127 (MobiLoans); ER 51 (Plain Green). The Tribes themselves regulate the lending entities within their jurisdictions and require them to comply with both tribal and federal law. *See* ER 134-35, 179-88 (Great Plains); ER 117 (MobiLoans); ER 46, 101-12 (Plain Green).

At some point, the Bureau became interested in Respondents' lending activities. The Bureau could have implemented the co-regulatory approach that the CFPA prescribes by communicating with the Tribes about their tribal businesses. Instead, in June 2012, the Bureau issued CIDs to Respondents, purportedly under its § 5562(c)(1) authority to investigate "persons."

The CIDs were extensive, requiring Respondents to answer detailed interrogatories and produce a wide range of documents. The requested documents included all contracts and agreements; all marketing or solicitation materials; all

corporate filings; and all policies and procedures for handling consumer inquiries, consumer complaints, refunds, debt collection, consumer payments, and the like. *See, e.g.*, ER 221-22 (Great Plains CID). The Bureau demanded this information for the expansive purpose of determining "whether small-dollar online lenders or other unnamed persons have engaged or are engaging in unlawful acts or practices relating to the advertising, marketing, provision, or collection of small-dollar loan products," in violation of the CFPA, "the Truth in Lending Act, the Electronic Funds Transfer Act, the Gramm-Leach-Bliley Act, or any other Federal consumer financial law." ER 212 (citations omitted).

In July 2012, Respondents petitioned the Bureau to set aside the CIDs. *See* 12 C.F.R. § 1080.6(e). They argued that the CIDs were unenforceable because, among other reasons, Respondents are arms of sovereign Indian Tribes, which the CFPA regards as "States" rather than "persons" subject to the Bureau's investigative and regulatory authority. ER 264-71. Over a year later, the Bureau denied the petition by written decision and directed Respondents to comply with the CIDs. ER 324-33.

Each Tribe in this case has made consistent good-faith efforts to establish a cooperative regulatory relationship with the Bureau. The Otoe-Missouria Tribe, for example, initiated a series of meetings with the Bureau designed to provide the information requested in its CID in the context of a co-regulatory relationship.

ER 136-39. In a letter to the Director of the Bureau, the Tribe reiterated its intent to provide all of the information requested through direct consultation and coordination with the Bureau. ER 138, 199-201. The Tribe also provided the Bureau with a draft Model Lending Code and a draft Memorandum of Understanding between the Bureau and the Tribe. ER 138, 203-06. Notwithstanding these efforts, the Bureau halted communications with the Tribe, and failed to follow through with promises of sending a Bureau official to visit the Otoe-Missouria reservation. ER 137-38.

The Chippewa Cree Tribe made similar efforts to reach out to the Bureau. The Tribe met with Bureau officials on a number of recent occasions to discuss its willingness to cooperate with the Bureau in regulating consumer finance. ER 45. And the Tribe has endeavored to provide the information the Bureau seeks in the context of a government-to-government relationship. ER 45-46. The same goes for the Tunica-Biloxi Tribe, which has attempted both to establish a regulatory relationship with the Bureau and to provide the information requested in its CID. ER 116.

Despite the Tribes' efforts to communicate with the Bureau regarding the requested information, the Bureau made a federal case out of it. The Bureau filed a petition to enforce the CIDs in federal district court in March 2014—nearly two years after it had issued the CIDs in the first place. *See* 12 U.S.C. § 5562(e); Mem.

in Supp. of Pet. To Enforce Civil Investigative Demands, ECF No. 2. Respondents again maintained that because they are arms of sovereign Tribes, the Bureau's investigative authority does not extend to them. *See* Resp'ts' Joint Mem. of Law in Opp'n to the Pet. To Enforce Civil Investigative Demands 7-21, ECF No. 14.

### C. The District Court's Decision

The District Court granted the Bureau's petition. *See* ER 3-36. For much of its opinion, the court attempted to reconcile Ninth Circuit and Supreme Court decisions analyzing broadly worded statutes. Under Ninth Circuit precedent, the court reasoned, the CFPA is a generally applicable statute that presumptively applies to Indian Tribes, *see* ER 5-13; under Supreme Court precedent, by contrast, the term "person" presumptively excludes the sovereign, *see* ER 14. "[T]aken together," the court explained, these "rules . . . appear to mean" that the CFPA both "presumptively includes and presumptively excludes Indian tribes." ER 14. To resolve this tension, the court looked to the Act's "legislative environment," which it believed "indicates that Congress likely intended for tribally owned businesses like Respondents to be subject to the Bureau's investigatory authority." ER 27. The District Court did not dispute, however, that if Tribes were excluded from the CFPA's ambit, then Respondents would be as well. Although the court did not discuss the issue at length, it commented that the Bureau's attempt to distinguish Respondents from their respective Tribes was "weak." ER 34.

Noting that the statutory question in this case "is something over which judges and lawyers could reasonably disagree," the District Court stayed its ruling pending appeal. ER 36. Respondents timely appealed. ER 39-40.

## STANDARD OF REVIEW

This Court reviews de novo a district court's decision to enforce an agency subpoena. *FDIC v. Garner*, 126 F.3d 1138, 1142 (9th Cir. 1997). A threshold question a reviewing court must ask is "whether Congress has granted the authority to investigate." *Id.* (quoting *EEOC v. Children's Hosp. Med. Ctr. of N. Cal.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc)). Whether Congress has done so "is a pure question of law"—and a "particularly sensitive" one when sovereign Indian Tribes are the targets of the agency's investigation. *Karuk*, 260 F.3d at 1078.

## SUMMARY OF THE ARGUMENT

1. The Bureau does not have the authority to issue CIDs to Respondents, each of which is an arm of a sovereign Indian Tribe. Under the CFPA, the Bureau's investigative authority extends to "any person." 12 U.S.C. § 5562(c)(1). The Supreme Court has given clear guidance on the appropriate construction of statutes like this one: Courts must presume that the term "person" does not include a sovereign entity unless there is an affirmative showing of congressional intent to the contrary. *See Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000).

No such showing has been made here. The CFPA defines "person" to include individuals and various businesses, without any mention of Tribes. 12 U.S.C. § 5481(19). It accounts for Tribes a few provisions later, though, by defining "State" to include "any federally recognized Indian tribe." *Id.* § 5481(27). That equivalence provision is critical because the CFPA gives every indication that States are to be treated as co-*regulators* with the Bureau, not as *regulated* entities. At various points when discussing States and "persons," the Act treats the two categories as mutually exclusive. And when discussing States and the Bureau, the Act repeatedly characterizes the two regulators as partners in the enforcement of federal consumer finance law. Nowhere does the Act suggest that a federal agency has the far-reaching jurisdiction to regulate the consumer lending activities of all fifty States—and, as a necessary consequence, of all Indian Tribes.

In some tension with the *Stevens* presumption, the Ninth Circuit has stated that "a statute of general applicability that is silent on the issue of applicability to Indian tribes" extends to Tribes. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985). The *Coeur d'Alene* line of precedent, however, poses no barrier to the best reading of the CFPA. That is because the CFPA is not silent about its applicability to Tribes. In fact, it explicitly defines how Tribes are to be treated under the Act: as States. Every other Ninth Circuit case applying *Coeur d'Alene* involved a federal regulatory scheme that said not one word about Tribes.

Moreover, in each case in which Tribes were subjected to federal regulation, the statute's silence as to Tribes was especially meaningful in light of express exemptions for other sovereigns. In this case, by contrast, the CFPA specifies that States and Tribes are to be treated as equals. The Court can reconcile *Coeur d'Alene* with *Stevens* only by declining to extend *Coeur d'Alene* to this distinct statutory context.

2. Just as Tribes are not subject to the Bureau's regulatory authority under the CFPA, neither are tribal entities that function as arms of the Tribe. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989). Respondents were founded by their respective Tribes in order to support critical social and economic development, and they remain wholly owned and operated by each Tribe. They are arms of the Tribe bearing the same sovereign status as the Tribe itself. Here, that means that the Bureau lacks statutory authority to issue CIDs to Respondents. The District Court's contrary decision should be reversed.

## ARGUMENT

### I. THE CFPA DOES NOT GIVE THE BUREAU THE AUTHORITY TO INVESTIGATE SOVEREIGN INDIAN TRIBES.

#### A. The Text, Structure, Purpose, And History Of The CFPA Make Clear That Sovereigns Are Not "Persons."

The Bureau may issue CIDs to Respondents only if Congress has vested the agency with the necessary authority. *See La. Pub. Serv. Comm'n v. FCC*, 476 U.S.

355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it."). In passing the CFPA, Congress did no such thing.

The CFPA charges the Bureau with "supervising covered persons for compliance with Federal consumer financial law, and taking appropriate enforcement action to address violations of Federal consumer financial law." 12 U.S.C. § 5511(c)(4). The Bureau accordingly has regulatory authority over certain "persons" who provide consumer financial products or services. *See id.* § 5481(6), (15). Of particular relevance here, the Bureau also has investigative authority over any "person," even if not a provider of consumer financial products or services. The Bureau may issue a CID whenever it "has reason to believe that any *person* may be in possession, custody, or control of any documentary material or tangible things, or may have any information relevant to a violation." *Id.* § 5562(c)(1) (emphasis added).

1. The term "person" is a critical check on the scope of the Bureau's investigative authority, as a matter of plain meaning and settled doctrine. "[I]n common usage, the term 'person' does not include the sovereign . . . ." *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941). It "applies to natural persons and also to artificial persons" but, as a general matter, "cannot be so extended" as to include sovereign governments. *United States v. Fox*, 94 U.S. 315, 321 (1876).

The Supreme Court reaffirmed this rule of statutory construction in *Stevens*. The qui tam plaintiff in *Stevens* brought a False Claims Act action against a state agency, under a provision barring "any person" from presenting a fraudulent claim for payment to the United States. 529 U.S. at 769-70; *see* 31 U.S.C. § 3729(a). The Supreme Court held that the term "person" in § 3729(a) does not cover States or state agencies. *See* 529 U.S. at 788. In doing so, it applied the "longstanding interpretive presumption that 'person' does not include the sovereign"—a presumption that § 3729(a), which left "person" undefined, did not rebut. *Id.* at 780; *see also Will*, 491 U.S. at 64 (applying same presumption to conclude that a State is not a "person" within the meaning of 42 U.S.C. § 1983); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 273-77 (2012) (explaining canon that "the word *person* traditionally excludes the sovereign," *id.* at 273).

The *Stevens* presumption applies not only to sovereign States but also to sovereign Indian Tribes. Tribes, after all, are "distinct political societ[ies], separated from others, capable of managing [their] own affairs and governing [themselves]." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). As such, they have retained the right "to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). "Although no longer possessed of the full attributes of sovereignty, they remain a separate people, with the power of

regulating their internal and social relations." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (internal quotation marks omitted).

Thus, a few years before the CFPA was enacted, the Solicitor General of the United States—speaking on behalf of the entire United States Government—argued in *Inyo County v. Paiute-Shoshone Indians*, 538 U.S. 701 (2003), that the term "person" presumptively excludes both Tribes and States. *Id.* at 709; *see also* Br. for United States at *8, *Inyo Cnty.*, 538 U.S. 701 (No. 02-281), 2003 WL 252549 (Jan. 23, 2003) (arguing that "the 'interpretative presumption that "person" does not include the sovereign,' *Stevens*, 529 U.S. at 780, properly applies to Tribes as well as States in this context"). And in light of the fact that Tribes are sovereign, the Supreme Court held that they are not "person[s]" who may sue under 42 U.S.C. § 1983. *Inyo Cnty.*, 538 U.S. at 708, 711-12. This Court has similarly acknowledged that the *Stevens* presumption extends to Tribes. *See Skokomish Indian Tribe v. United States*, 410 F.3d 506, 515 (9th Cir. 2005). All of that law was on the books when Congress passed the CFPA in 2010.

Here, the CFPA uses the term "person," so the *Stevens* presumption applies. Without "some affirmative showing of statutory intent to the contrary," *Stevens*, 529 U.S. at 781, the Bureau's authority over "persons" cannot encompass Indian Tribes.

2. There is no contrary showing of statutory intent in the CFPA. To begin, the Act defines "person" as "an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity." 12 U.S.C. § 5481(19). Absent from that definition is any mention of sovereign entities—including Tribes. Given that Congress defined the term "person" with apparent care, the omission is an especially meaningful one. *See Cooper*, 312 U.S. at 607 (observing that "the sweeping inclusion of various entities" in the Sherman Act's definition of "person" served to "emphasize[] the fact that if the United States was intended to be included Congress would have so provided"), *superseded by statute*, 15 U.S.C. § 15a.

*Stevens* itself illustrates the point. In *Stevens*, the Court contrasted the undefined term "person" in § 3729(a) with the use of the word in another False Claims Act provision. *See* 529 U.S. at 783-84. The latter provision authorized the Attorney General to issue CIDs to "any person" in possession of "information relevant to a false claims law investigation." 31 U.S.C. § 3733(a)(1). It went on to specify that, for purposes of the particular provision, "person" included "any State or political subdivision of a State." *Id.* § 3733(*l*)(4). That definition was critical. The Court explained that the undefined use of "person" in § 3729(a) did not include States, while the precise definition of "person" in § 3733 overcame the default presumption. *See Stevens*, 529 U.S. at 784; *see also, e.g.*, 15 U.S.C.

§ 375(10) (defining "person" to include "State government" or "Indian tribal government"); 42 U.S.C. § 300f(10), (12) (defining "person" to include "State" or, by reference, "Indian Tribe"); 42 U.S.C. § 8802(17) (defining "person" to include "State" or "Indian tribe"); 44 U.S.C. § 3502(10) (defining "person" to include "State" or "tribal . . . government").

There is nothing in the CFPA's definition of "person" to overcome the *Stevens* presumption here. As noted, the Act's definition makes no mention of any governmental entities, and so it only reinforces the presumption that Congress did not intend "person[s]" to include sovereigns.

3. The remainder of the CFPA confirms that "person" excludes Tribes. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."). Although absent from the definition of "person," Tribes are not absent from the CFPA altogether. Congress clearly thought about how to categorize Tribes. Indeed, just a few provisions after it defines "person," the Act defines "State" to include Tribes:

> The 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) (emphasis added). This equivalence provision makes clear that the Act treats Indian Tribes the same way it treats the fifty States. And it shows that when Congress meant to refer to any of these sovereigns, including Tribes, it did not use the term "person"; it used a different term altogether—"State."

The CFPA elsewhere indicates that "States" fall outside the Bureau's authority to investigate and regulate "persons." The meaning of a word that appears "in one portion of an Act may often be clarified by reference to its use in others." *Cooper*, 312 U.S. at 606. At various points, the CFPA uses the terms "State" and "person" together in a way that makes more sense if they represent mutually exclusive categories. For example, "a State regulator . . . having jurisdiction over a covered person" must be given access to Bureau reports about that person. 12 U.S.C. § 5512(c)(6)(C)(i). It would be strange, to say the least, if a State were to have mandatory access to Bureau reports about itself. Similarly, a "State attorney general or State regulator" must provide notice to the Bureau before initiating an administrative or regulatory action to enforce the CFPA "against any covered person." *Id.* § 5552(b)(1)(A). If a State is the actor that brings suits against "persons" within its jurisdiction, the State would not naturally be classified as one such "person."

In addition, the Bureau possesses limited enforcement authority "with respect to a person regulated by a State insurance regulator," *id.* § 5517(f)(1), and "with respect to a person regulated by any securities commission (or any agency or office performing like functions) of any State," *id.* § 5517(h)(1). The Act also clarifies that it does not exempt "any person" from complying with statutes and regulations "in effect in any State." *Id.* § 5551(a)(1). Such provisions build even more separation between "States" and "persons" and underscore that Congress did not imagine the former as a subset of the latter. It is fair to infer, then, that Congress did not intend to include States—or, by extension, Tribes—when it gave the Bureau investigative power over "persons" in § 5562(c)(1). *See Cooper*, 312 U.S. at 607 (looking to the Sherman Act's other uses of the term "person" to determine that it did not include the United States when used in Section 7).

The CFPA's penalty provisions further demonstrate that the statute does not treat States (or Tribes) as "persons." In *Stevens*, the Supreme Court explained that the ordinary meaning of the term "person" was confirmed by the statute's imposition of punitive damages. *See* 529 U.S. at 784-86. To subject States to liability as "persons" under the False Claims Act "would be inconsistent with . . . the presumption against imposition of punitive damages on governmental entities." *Id.* at 784-85. So too here. Although the CFPA does not impose treble damages, which *Stevens* found punitive in nature, its penalty provisions are clearly punitive

rather than remedial. The CFPA authorizes civil penalties of between $5,000 and $1,000,000 per violation, per day. *See* 12 U.S.C. § 5565(c)(2). And the size of the penalty imposed need not reflect just a consumer's losses but may also account for the financial resources of the "person" charged, any history of violations, and "such other matters as justice may require." *Id.* § 5565(c)(3); *see Tull v. United States*, 481 U.S. 412, 422-23 (1987). The CFPA even authorizes the Bureau to refer some "persons" for criminal prosecution, a provision obviously inapplicable to States. 12 U.S.C. § 5566; *see Cooper*, 312 U.S. at 607.

4. *Stevens* also looked to the "historical context" of the False Claims Act—including its "principal goal of stopping the massive frauds perpetrated by large private contractors during the Civil War"—to confirm the presumption that "person" did not include States. 529 U.S. at 781 (internal quotation marks and alteration omitted). Along the same lines, *Inyo County* explained that a proper analysis of the term "person" should account for "the 'legislative environment' in which the word appears." 538 U.S. at 711. In this case, the CFPA's structure and objectives point to the same conclusion that the Bureau does not have regulatory authority over States.

The CFPA was enacted to combat consumer fraud perpetrated by the private sector. To achieve that goal, the Act enlists States (and Indian Tribes) as co-*regulators*, rather than designating them as *regulated* entities. The Act envisions

that States would play a cooperative role—not an adversarial one—in the enforcement of federal consumer finance law. To take a few examples:

- The Act commands that the "Bureau shall coordinate with . . . State regulators, as appropriate, to promote consistent regulatory treatment of consumer financial and investment products and services." 12 U.S.C. § 5495.
- The Act similarly requires the Bureau to coordinate its "fair lending efforts" with "State regulators, as appropriate, to promote consistent, efficient, and effective enforcement of Federal fair lending laws." *Id.* § 5493(c)(2)(B).
- The Act also requires that, with respect to developing registration requirements, "the Bureau shall consult with State agencies regarding requirements or systems (including coordinated or combined systems for registration), where appropriate." *Id.* § 5512(c)(7)(C).
- The Act instructs the Bureau to "minimize regulatory burden" by coordinating with "State bank regulatory authorities" about the regulation of nondepository institutions and evaluating "the extent to which such institutions are subject to oversight by State authorities for consumer protection." *Id.* § 5514(b)(3), (b)(2)(D).

- The Act gives States a significant role in collecting consumer complaints and allows for data sharing between the Bureau and state agencies. *Id.* § 5493(b)(3)(B), (D).
- The Act provides that "the attorney general (or the equivalent thereof) of any State may bring a civil action in the name of such State" to enforce the provisions of the CFPA or its associated regulations. *Id.* § 5552(a)(1).

As these provisions illustrate, the CFPA regards States as the Bureau's partners in the enforcement of federal consumer finance law; it does not treat States as regulated entities subject to the Bureau's investigative and enforcement authority. Consistent with their congressionally defined role as co-regulators, the Tribes have attempted to cooperate with the Bureau on a government-to-government basis. The Otoe-Missouria Tribe, for example, initiated a series of meetings with the Bureau to share information about the Tribe's regulatory system and submitted to the Bureau a draft Memorandum of Understanding to further facilitate transparency and communication. *See* ER 136-39; *supra* pp. 5-6. The Tunica-Biloxi Tribe and the Chippewa Cree Tribe have made similar efforts to communicate with the Bureau in their proper role as co-regulators under the Act. *See* ER 116 (Tunica-Biloxi Tribe); ER 46-47 (Chippewa Cree Tribe); *supra* p. 6.

The District Court worried that the CFPA's purpose of ensuring access to fair, competitive markets for consumer financial products would be undermined if tribal entities were "immunize[d]" from federal regulation. ER 24; *see* 12 U.S.C. § 5511(a). But that concern treats the Bureau as the only competent regulator. Although the CFPA created a new federal agency, it did not foreclose an ongoing role for existing regulators. Congress reasonably entrusted some regulatory and investigative authority to sovereigns familiar with the unique characteristics of their own jurisdictions.

Indian Tribes have proved capable of shouldering their shared regulatory responsibilities. The Tribes here have taken active roles to regulate consumer finance within their jurisdictions. For example, the Chippewa Cree Tribe has enacted a Tribal Consumer Financial Services Regulatory Code that requires compliance with both tribal and federal law. ER 46, 101-12. The Tribe has also established a Tribal Financial Services Regulatory Commission to enforce the Code and to oversee the activities of tribal lending businesses, including Plain Green. *Id.* The Otoe-Missouria Tribe has similarly adopted a Consumer Finance Services Regulatory Ordinance and has created the Otoe-Missouria Consumer Financial Services Regulatory Commission, which licenses all consumer finance business and monitors Great Plains' compliance with tribal and federal law. ER 134-35, 179-88. The Tunica-Biloxi Tribe, for its part, mandates that

MobiLoans follow tribal and federal law; to that end, it has required MobiLoans to undertake an independent third-party review of its business practices. ER 117. The Tribe's responsive actions are underway. *Id.*

The CFPA was not enacted in a vacuum. *See Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2044 (2012) ("No legislation pursues its purposes at all costs." (internal quotation marks and alteration omitted)). Even if the Bureau could achieve the greatest uniformity in the enforcement of federal consumer finance law, as the District Court assumed, Congress doubtless intended the CFPA to operate in a manner consistent with other important federal priorities. As far as priorities go, the federal commitment to Indian sovereignty is unequivocal. Congress has codified the federal government's "obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes." 25 U.S.C. § 4301(a)(6). The Executive Branch has committed to working with Indian Tribes "on a government-to-government basis" and to establishing "regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications." Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,249 (Nov. 6, 2000). And the Supreme Court has "repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987). When

properly construed, the CFPA allows Tribes to serve a complementary regulatory role that furthers the Act's specific objectives, while leaving the federal government's general goal of Indian sovereignty intact.

5. Finally, the legislative history of the CFPA, to the extent one needs to consider it at all, supports the exclusion of Tribes from the term "person." The CFPA was a significant, controversial piece of legislation. It is implausible that both friends and foes of the Act failed to mention the considerable power to regulate state and tribal entities that the Bureau now claims. *See Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991) (noting that if Congress had intended to make an important policy choice, "Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point"). If States and their instrumentalities were to be classified as "persons," then the Act would give the Bureau expansive regulatory power over the vast panoply of consumer-facing activities operated by state governments. Consider just a few examples of what would be swept in under the Bureau's reading of the law: state student loan programs, lending programs for state employees and veterans, state housing finance agencies, and other state agencies that engage in lending.[1] It would also permit the Bureau to demand information

[1] Many States have student loan authorities. *See, e.g.*, Arkansas Student Loan Authority, www.asla.info/home (last visited Dec. 10, 2014); Rhode Island Student Loan Authority, www.risla.com (last visited Dec. 10, 2014). Some also have

from the States themselves. Yet the legislative history reveals absolutely no justification for, or opposition to, this sweeping authority.

Perhaps more tellingly, the bill that ultimately became the CFPA was silent with respect to Indian Tribes at the time it was introduced. *See* H.R. 3126, 111th Cong. (introduced on July 8, 2009). It was later amended to account for Tribes, in precisely one way: Tribes were added to the definition of "State," but not to the definition of "person." *See* H.R. Rep. No. 111-370, at 36 (2009); 155 Cong. Rec. H14,729 (daily ed. Dec. 10, 2009). If there is any inference to be gleaned from this legislative history, it is that Congress's decision not to include Tribes in the definition of regulated "persons" was intentional. After all, less than a decade before the CFPA was introduced, the Supreme Court had stated that the term " 'person' does not include the sovereign" absent "some affirmative showing of statutory intent to the contrary." *Stevens*, 529 U.S. at 780-81. Courts must presume that Congress was aware of that clear precedent when it amended the

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lending programs for state employees, veterans, and other targeted populations. *See, e.g.*, CalVet Home Loans, www.calvet.ca.gov/HomeLoans (last visited Dec. 10, 2014); New Jersey Pension Loans, www.nj.gov/treasury/pensions/loans-home.shtml (last visited Dec. 10, 2014); North Dakota Veterans Aid Loan Program, www.nd.gov/veterans/benefits/loan-programs (last visited Dec. 10, 2014). And all fifty States plus the District of Columbia have housing finance agencies. *See, e.g.*, Alabama Housing Finance Authority, www.ahfa.com (last visited Dec. 10, 2014); Alaska Housing Finance Corporation, www.ahfc.us (last visited Dec. 10, 2014); Colorado Housing and Finance Authority, www.chfainfo.com (last visited Dec. 10, 2014); District of Columbia Housing Finance Agency, www.dchfa.org (last visited Dec. 10, 2014).

pertinent bill to account for Tribes in their sovereign capacity, but chose not to add Tribes to the definition of "person." *See United States v. Wells*, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with [the Supreme] Court's precedents . . . .").

### B. Any Remaining Statutory Ambiguity Should Be Resolved In Favor Of The Tribes.

The CFPA makes clear that Indian Tribes are "States" and thus regulating entities, not regulated "persons." But to the extent any ambiguity can be wrung out of this clear statute, the Act must be construed in the Tribes' favor. When faced with two possible constructions of a statute, the "choice between them must be dictated by a principle deeply rooted in [the Supreme] Court's Indian jurisprudence: 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' " *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 767-68 (1985)). That rule of construction is reinforced by a companion canon, which requires "clear indications of legislative intent" before a court will construe a statute in a manner that impairs Indian sovereignty. *Santa Clara Pueblo*, 436 U.S. at 60.

The twin Indian law canons are "rooted in the unique trust relationship between the United States and the Indians." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). And they reflect what the Supreme Court has

called "an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031-32 (2014). In light of those broad justifications, and contrary to the Bureau's position below, the canons apply regardless of whether the statute at issue was enacted specifically for the regulation of Indian affairs. *See, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999) (requiring "clear evidence of congressional intent" in Minnesota's enabling Act to abrogate Indian treaty rights); *LaPlante*, 480 U.S. at 18 (requiring " 'clear indications of legislative intent' " in general diversity statute to limit tribal jurisdiction); *United States v. Dion*, 476 U.S. 734, 738-40 (1986) (requiring "clear evidence" of legislative intent in Eagle Protection Act to abrogate Indian treaty rights); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149-52 (1982) (requiring " 'clear indications of legislative intent' " in federal energy statutes to limit tribal taxing authority); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1191-92 (10th Cir. 2002) (en banc) ("The canon applies to other statutes, even where they do not mention Indians at all.").

### C. Ninth Circuit Precedent Does Not Foreclose The Best Reading Of The CFPA.

The statutory analysis is straightforward enough, and the Supreme Court's decision in *Stevens* should control this case. But a distinct line of Ninth Circuit

precedent ensnared the District Court, erroneously if understandably. That line of precedent should not detain this Court for long.

The confusion stems from a single sentence—likely dictum—in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960). In analyzing a statute that "neither overlook[ed] nor exclude[d] Indians or lands owned or occupied by them" and gave "every indication" that Congress intended to cover such lands, *id.* at 118, the Supreme Court stated that "a general statute in terms applying to all persons includes Indians and their property interests." *Id.* at 116; *see San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1311 (D.C. Cir. 2007) ("*Tuscarora*'s statement is of uncertain significance, and possibly dictum, given the particulars of that case."). In the 54 years since, the Supreme Court has never cited *Tuscarora* for the proposition that generally applicable statutes apply to Indian Tribes. Quite the opposite. It has described *Tuscarora* as "implicitly" reaffirming the rule of construction *in favor* of Tribes. *County of Oneida*, 470 U.S. at 248 n.21.

Despite *Tuscarora*'s tenuous status, the Ninth Circuit has adopted the broad proposition that a "federal statute of general applicability that is silent on the issue of applicability to Indian tribes" in fact applies to Tribes. *Coeur d'Alene*, 751 F.2d at 1116. Even when a statute is "silent on the issue of applicability to Indian tribes," however, there are three exceptions to this presumption: "(1) the law

touches 'exclusive rights of self-governance in purely intramural matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.' " *Id.* (quoting *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980)). In those three situations, "Congress must *expressly* apply a statute to Indians" if it is to cover them. *Coeur d'Alene*, 751 F.2d at 1116.[2]

The Ninth Circuit has applied the *Coeur d'Alene* framework to several federal regulatory schemes and found that the statutes permit regulation of Indian Tribes. *See NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (9th

[2] There is an alternative reading of *Tuscarora* under which *Stevens* and *Tuscarora* exist comfortably side-by-side: *Stevens* presumes that a generally applicable statute does not apply to a *sovereign Indian Tribe*, while *Tuscarora* presumes that a generally applicable statute applies to *individual Indians* and other tribal entities that are not acting as sovereign instrumentalities of the Tribe. Under this reading of the cases, a statute that says an agency may investigate any "person" for regulatory compliance does not mean that the agency may subpoena a Tribe. But a statute that says any "person" may be stopped for exceeding the speed limit of course means that a member of an Indian Tribe may be stopped for speeding. This is the best reading of *Tuscarora*, and the only reading consistent with the Supreme Court's repeated admonishment that Congress must clearly indicate its intent to restrict tribal sovereignty. *See Dobbs v. Anthem Blue Cross & Shield*, 600 F.3d 1275, 1283 & n.8 (10th Cir. 2010); *supra* pp. 25-26. The Ninth Circuit's initial treatment of *Tuscarora* aligned with this reading. *See Farris*, 624 F.2d 890 (holding that a generally applicable criminal law applied to individual Indians). But Respondents recognize that a panel of this Court is bound by subsequent Ninth Circuit cases that have extended the *Tuscarora* rule to sovereign Tribes under certain circumstances. At a minimum, though, the dubious foundation for those cases counsels against their further expansion to statutes like the CFPA.

Cir. 2003) (National Labor Relations Act); *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (9th Cir. 1991) (Employee Retirement Income Security Act); *Coeur d'Alene*, 751 F.2d 1113 (Occupational Safety and Health Act). It has applied the same framework to two regulatory schemes but found that Tribes were exempt from regulation under the first *Coeur d'Alene* exception. *See Snyder v. Navajo Nation*, 382 F.3d 892 (9th Cir. 2004) (Fair Labor Standards Act); *Karuk*, 260 F.3d 1071 (Age Discrimination in Employment Act). Yet not a single one of those decisions assessed a statute like the CFPA or required this Court to grapple with *Stevens*. Given the CFPA's unique text, the *Coeur d'Alene* presumption of inclusion does not govern; instead, the *Stevens* presumption of exclusion should apply.

*1. The* Coeur d'Alene *presumption does not apply because the CFPA is not silent on its applicability to Indian Tribes.*

For the *Coeur d'Alene* presumption to apply at all, the statute must be silent on the issue of applicability to Indian Tribes. *See Coeur d'Alene*, 751 F.2d at 1116. The presumption is inapplicable here because the CFPA does not meet this prerequisite. Unlike every other federal regulatory scheme to which the Ninth Circuit has applied *Coeur d'Alene*, the CFPA both accounts for Indian Tribes and equates Tribes with other sovereigns.

As an initial matter, the CFPA is not silent about Tribes. To the contrary, the Act specifies exactly how Tribes are to be treated: as "States." *See* 12 U.S.C.

§ 5481(27). And as explained above, the Act assigns "States" a role as regulators, a role that is inconsistent with the Bureau's argument that they should be treated instead as regulated entities. In addition, the specific reference to Tribes in the definition of "State" implies that Tribes do not fall within the meaning of "person," a term whose definition makes no mention of Tribes or other sovereigns. The Supreme Court explained in analogous circumstances that "the conspicuous mention of the United States" in one statutory provision indicated that Congress did not elsewhere intend to include the United States by using "muffled words" only—that is, by using the term "person." *Davis v. Pringle*, 268 U.S. 315, 318 (1925). Indeed, it found the argument that Congress could have intended such a result "incredible." *Id.*

The CFPA's "conspicuous mention" of Indian Tribes distinguishes this statute from other federal schemes held to be silent on their applicability to Tribes. Not one of the Ninth Circuit's cases applying *Coeur d'Alene* involved a statute that referred to Tribes, let alone indicated that Tribes should be treated as sovereigns. The NLRA, ERISA, OSHA, FLSA, and ADEA were all silent on the question.

Moreover, the CFPA does not simply address Tribes; its equivalence provision, *see* 12 U.S.C. § 5481(27), demonstrates that Congress intended to treat Tribes *the same as* other sovereigns. In prior Ninth Circuit cases, by contrast, each statute's silence as to Tribes was especially meaningful because Congress took

care to exclude other sovereigns from regulation. Where Congress expressly exempts other sovereigns but says nothing about Tribes, there may be a negative implication that Congress intended to treat Tribes *differently* and thus meant to *regulate* them. *See TVA v. Hill*, 437 U.S. 153, 188 (1978) (articulating *expressio unius* canon).

Accordingly, this Court observed in *Coeur d'Alene* that OSHA applies to Tribes in part because "Congress expressly excluded only 'the United States or any State or political subdivision of a State' from the broad definition of 'employer.' " 751 F.2d at 1115 & n.1 (citing 29 U.S.C. § 652 (1982)); *accord Menominee Tribal Enters. v. Solis*, 601 F.3d 669, 670 (7th Cir. 2010) (pointing out same statutory omission). *Chapa De* likewise recognized that the NLRA exempts the United States, States, and political subdivisions, but does not expressly exempt Tribes. *See* 316 F.3d at 1001 & n.3 (citing 29 U.S.C. § 152(2)); *accord San Manuel*, 475 F.3d at 1316 (drawing same negative inference). The version of ERISA at issue in *Lumber Industry* included a similar exemption for various governmental plans, without mention of Tribes. *See* 29 U.S.C. §§ 1003(b)(1), 1002(32) (1988).[3]

[3] The Eleventh Circuit has applied *Coeur d'Alene* to Title III of the Americans with Disabilities Act, which exhibits the same key pair of statutory features. *See Fla. Paraplegic, Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126 (11th Cir. 1999). Like the other statutes discussed, Title III makes "no specific reference to Indians or Indian tribes." *Id.* at 1131. In addition, it bars discrimination by a "place of public accommodation," 42 U.S.C. § 12182(a), a term defined to exempt

Thus, in every case in which this Court has held that a "silent" federal regulatory scheme included Tribes, that conclusion was buttressed by the express exclusion of other sovereigns. In this case, however, the statute contains an equivalence provision that cuts in the opposite direction. Because that provision expressly defines "State" to include Tribes, there is no silence as to Tribes and no implication that Tribes and States should be treated differently.

The equivalence provision also brings to the fore the potential clash between this Court's *Coeur d'Alene* decision and the Supreme Court's *Stevens* decision. Consider a simple hypothetical: This Court determines (incorrectly) that, under *Coeur d'Alene*, the Bureau may regulate Indian Tribes. The Bureau next issues a CID to a State, and seeks to enforce it in court. *Stevens* could hardly be clearer that the State would not be subject to regulation under the CFPA. But it would make little sense if Tribes were to be regulated and States were not, when the statute explicitly commands that Tribes be treated as States.

If that result sounds like a mess, it would be. Fortunately, the distinct features of the CFPA provide a clean way to harmonize *Coeur d'Alene* and its progeny with *Stevens*. A generally applicable federal statute that (1) addresses Tribes, and (2) makes clear that Tribes are to be treated on par with other sovereigns, should *not* meet *Coeur d'Alene*'s requirement that the statute be

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State and local governments and their agencies or instrumentalities, but not Tribes, *id.* §§ 12131(1), 12181(6), (7).

"silent" on its applicability to Indian Tribes. Such a rule would cohere with Ninth Circuit precedent while giving due respect to Supreme Court precedent.

The District Court was hesitant to adopt this rule because the Ninth Circuit had previously described *Coeur d'Alene* in broad terms, even if applying its presumption in a narrower subset of cases. *See* ER 13. This Court should not be similarly deterred by the fact that its prior decisions have not explored the boundaries of the *Coeur d'Alene* framework. This case is the first in which the statute at issue addresses Tribes and includes an equivalence provision. It is also the first in which the Ninth Circuit has been asked to resolve the potential conflict between *Coeur d'Alene* and *Stevens*. There was no pressing need in prior Ninth Circuit cases to address the question facing this Court here. *See United States v. Vroman*, 975 F.2d 669, 672 (9th Cir. 1992) (noting that circuit precedent is not controlling where an earlier panel does not consider an argument a later panel finds persuasive); *see also* ER 11 (District Court commenting that "it would likely be proper" for this Court to modify *Coeur d'Alene* in light of *Stevens*).

*2. Even assuming that the* Coeur d'Alene *framework applies, the CFPA falls within an exception.*

Because the CFPA is not silent about its applicability to Tribes, the *Coeur d'Alene* framework is inapposite. But if this Court nevertheless extends *Coeur d'Alene* to the CFPA, it should conclude that the Act falls within the third exception. That exception requires "proof by legislative history or some other

means that Congress intended the law not to apply to Indians on their reservations." *Coeur d'Alene*, 751 F.2d at 1116 (internal quotation marks and alteration omitted).

Most of the cases adopting the *Coeur d'Alene* framework have not addressed the third exception at any length. Some basic principles, however, can be drawn from the few cases that have. On the one hand, this Court has declined to apply the third exception where the offer of proof consisted of general statements about statutory purpose and an ambiguous footnote in a conference report. *See United States v. Baker*, 63 F.3d 1478, 1485-86 (9th Cir. 1995); *see also Smart v. State Farm Ins. Co.*, 868 F.2d 929, 936 (7th Cir. 1989) (declining to apply the third exception where the statute expressly exempted States, but not Tribes). On the other, this Court has applied the third exception where Supreme Court precedent made clear that sovereigns were exempt from the federal antitrust laws at issue. *See Miller v. Wright*, 705 F.3d 919, 926-27 (9th Cir. 2013).

Even if this Court determines that the *Coeur d'Alene* framework applies here, the CFPA's unique equivalence provision, its distinct use of the terms "State" and "person," and its consistent treatment of States as co-regulators should constitute sufficient proof that Congress did not intend the Bureau to regulate Tribes. Such statutory signals are significantly stronger than the ambiguous evidence proffered in *Baker*. Moreover, because *Stevens* indicates that sovereigns

are presumed not to be "persons," there is relevant Supreme Court precedent like that in *Miller*. Either alone or in tandem, these two types of evidence—statutory indicators and on-point Supreme Court precedent—demonstrate that Congress did not intend the Bureau to exercise regulatory authority over Tribes.

## II. AS ARMS OF THEIR RESPECTIVE TRIBES, RESPONDENTS SHARE IN THE TRIBES' SOVEREIGN STATUS.

### A. Just As The Bureau's Authority Does Not Extend To Tribes, It Does Not Extend To Arms Of Tribes.

All sovereigns act by delegating their power. Given that reality, decisions about statutory coverage apply both to the sovereign itself and to entities properly considered arms of the sovereign.

The equal treatment of sovereigns and their arms is firmly ingrained in Supreme Court precedent. In *Will*, for example, the Court concluded that neither a State nor "governmental entities that are considered 'arms of the State' " are "persons" under § 1983. 491 U.S. at 70. *Stevens* similarly held that the word "person" in the False Claims Act does not subject "a State (or state agency) to liability." 529 U.S. at 788. Indeed, the principle is so well established that it barely merited mention in *Inyo County*. The Court dropped a footnote stating that an Indian gaming corporation was "an 'arm' of the Tribe." 538 U.S. at 705 n.1. It then went on to determine that neither the Tribe nor the corporation was a "person"

for purposes of bringing suit under § 1983, without distinguishing between the two kinds of entities. *See id.* at 706, 712.

This Court likewise has recognized that if an entity is an arm of the sovereign, it is subject to the same legal treatment as the sovereign. After *Stevens*, this Court stated that "[t]o effectuate Congress's presumed intent, we must interpret the term 'person' under [the False Claims Act] in a way that avoids suits against 'state instrumentalities' that are effectively arms of the state immune from suit under the Eleventh Amendment." *Stoner v. Santa Clara Cnty. Office of Educ.*, 502 F.3d 1116, 1122 (9th Cir. 2007). As usual, the same rule applies to Indian Tribes. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) ("When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe.").

### B. Respondents Are Arms Of Their Respective Tribes.

To determine whether an entity is an arm of the sovereign, courts consult sovereign immunity principles as a guide. *See Stoner*, 502 F.3d at 1121-22. Because States enjoy Eleventh Amendment immunity and Tribes enjoy tribal immunity, the "arm" tests diverge in order to track the relevant immunity principles. In this Court, the arm-of-the-Tribe analysis examines (1) the purposes for which the Tribe founded the entity, and (2) the Tribe's ownership or control of the entity's operations. *Allen*, 464 F.3d at 1047. This Court has also considered

the related factors of (3) whether the economic benefits produced inure to the Tribe's benefit, and (4) whether the composition and control of the governing board indicate entwinement with the Tribe. *Cook v. AVI Casino Enters.*, 548 F.3d 718, 726 (9th Cir. 2008).

Respondents are arms of their Tribes under all four factors of this test. *First*, each Respondent was created by a Tribe, chartered under tribal law, and authorized to promote tribal economic development and social welfare. *See* ER 134-35, 176 (Resolution Creating Great Plains); ER 114-15, 123-24 (Second Amended and Restated Operating Agreement of MobiLoans § 2.1); ER 44-45, 49 (Articles of Organization of First American Asset Recovery [Plain Green] § 3.1). Respondents do not serve a "mere revenue-producing" function, but constitute an important means of obtaining the economic self-sufficiency that Congress has codified as federal policy. *Allen*, 464 F.3d at 1046 (citing 25 U.S.C. § 2702(1)); *see also Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J., concurring) (explaining that "tribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases may be the only means by which a tribe can raise revenues" (internal quotation marks omitted)).

*Second*, each Respondent is wholly owned and controlled by the Tribe. *See* ER 133-34, 176 (Great Plains); ER 114-15, 124 (§ 3.1) (MobiLoans); ER 44-45, 49 (§ 3.1) (Plain Green).

*Third*, because the Tribe is the sole member of each business, the economic success of Respondents inures to the benefit of their respective Tribes. *See Cook*, 548 F.3d at 726; *see also Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 107 (2d Cir. 2014) (describing lending business as Tribe's attempt "to combat poverty within [its] borders"). Thus far, Respondents' success has benefitted their Tribes in significant ways. The Otoe-Missouria Tribe uses Great Plains' revenues to fund various educational needs, including books, additional classrooms, teachers for Head Start programs, and after-school and summer programs for tribal youth. ER 135. Revenues also fund essential social programs, such as child care services, employment training, child protection services, and family violence protection services. *Id.* The Tunica-Biloxi Tribe uses MobiLoans' revenues to fund important educational and social initiatives, including Teach for America positions and health care services for Tribe members. ER 115. And the Chippewa Cree Tribe uses Plain Green's revenues to fund educational and social services, as well as general governmental expenses. ER 44-45.

*Fourth*, each Respondent's corporate structure reflects total control by the Tribe. In *Cook*, Tribe members constituted a majority of the governing board, and the Tribal Council performed corporate shareholder functions. *See* 548 F.3d at 726. Here, the Tribes maintain a similar, if not more substantial, presence in

Respondents' corporate structures. *See, e.g.*, ER 193 (§ 3.5) (granting Tribal Council the authority to appoint directors and remove them without cause); ER 115-16, 124 (§ 3.2) (requiring all members of the board to be Tribe members); ER 125-26 (§ 3.2.2, 3.5) (requiring monthly reports to Tribal Council and Tribal Council approval of any major action); ER 45, 53 (§ 7.2, 7.5) (requiring all directors to be Tribe members and giving Tribal Business Council the authority to remove them).

Finally, other courts have asked the additional question whether the Tribe intended to share its sovereign immunity with a particular entity. *See Breakthrough Mgmt. Grp. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010). To the extent such a consideration is relevant in this circuit, it reinforces the conclusion that Respondents are arms of their respective Tribes. The Tribes have expressly conferred on Respondents all their powers and attributes of sovereignty. *See* ER 176 (Great Plains); ER 127 (MobiLoans); ER 51 (Plain Green).[4]

[4] The United States previously endorsed an arm-of-the-Tribe analysis that closely mirrors the Ninth Circuit's. *See* Br. for United States at *11-*14, *Inyo Cnty.*, 538 U.S. 701 (No. 02-281), 2003 WL 252549 (Jan. 23, 2003). Respondents would also qualify as arms of their Tribes under the United States' preferred analysis. The proposed test would consider (1) "the nature of the entity created by the sovereign's law," (2) "the extent to which the entity functions autonomously from the sovereign," and (3) "whether the sovereign would be liable for a money judgment against the entity." *Id.* at *11 (internal quotation marks and alteration omitted). The first and second factors cover much of the same ground as the Ninth

### C. Respondents Cannot Be Both Arms Of Their Tribes And Regulated "Persons."

As explained, the CFPA does not regulate Tribes, and Respondents are arms of their Tribes. That should be the end of the matter. Throughout its briefing in the District Court, though, the Bureau argued that Respondents are limited liability companies and therefore fall within the CFPA's definition of "person," because the definition includes "compan[ies]." 12 U.S.C. § 5481(19). If the Bureau means to assert that a single entity can be both an independent sovereign and a regulated "person," such a position is untenable. In fact, the District Court went out of its way to observe that the Bureau's argument on this point is "weak." ER 34.

Calling Respondents "companies"—notwithstanding their status as arms of their Tribes—is a semantic maneuver that would gut the arm-of-the-sovereign doctrine entirely. The plaintiff in *Will* made a comparable argument that States might not be "persons" under § 1983, but that individual state officials were certainly "persons." *See* 491 U.S. at 70. The Supreme Court dismissed the argument because it missed the point: "Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity . . . is no different from a suit against the State itself." *Id.* at 71. The same is true here.

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Circuit's test. The third factor appears different on its face; in substance, however, it collapses into the Ninth Circuit's requirement that the success of the entity inure to the Tribe's benefit. That is because, as the United States argued in *Inyo County*, any money judgment against an entity that provides revenue solely to the Tribe "would necessarily deplete what would otherwise be tribal funds." *Id.* at *13.

Legally speaking, an arm of the sovereign is the sovereign. The Bureau may regulate an arm of a Tribe only to the extent it may regulate the Tribe itself. Any other rule, "rendering every corporation, no matter how close its relationship to a state, a 'person,' " would be inconsistent with *Stevens* and with the arm-of-the-sovereign doctrine. *United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 579 (4th Cir. 2012).

The Bureau's argument to the contrary relies at least implicitly on a distinction between sovereignty and commercial activity. The Supreme Court, however, has repeatedly rebuffed efforts to graft such a distinction onto sovereign immunity law. As recently as last Term, it reiterated that a Tribe operating in interstate commerce remains a sovereign entity, entitled to all the attributes of sovereignty. *See Bay Mills*, 134 S. Ct. at 2031. The only question, then, "is not whether the activity may be characterized as a business, which is irrelevant under *Kiowa [Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998)], but whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe." *Allen*, 464 F.3d at 1046. The answer is that Respondents act as arms of their Tribes, and that the Bureau therefore may not enforce its CIDs.

## CONCLUSION

For all of the foregoing reasons, the District Court's order granting the petition to enforce the Bureau's civil investigative demands should be reversed.

Respectfully submitted,

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**12 U.S.C. § 5481(6). Definitions—Covered person.**

The term "covered person" means—
(A) any person that engages in offering or providing a consumer financial product or service; and
(B) any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person.

**12 U.S.C. § 5481(15). Definitions—Financial product or service.**

(A) In general
The term "financial product or service" means—

(i) extending credit and servicing loans, including acquiring, purchasing, selling, brokering, or other extensions of credit (other than solely extending commercial credit to a person who originates consumer credit transactions);
(ii) extending or brokering leases of personal or real property that are the functional equivalent of purchase finance arrangements, if—

(I) the lease is on a non-operating basis;
(II) the initial term of the lease is at least 90 days; and
(III) in the case of a lease involving real property, at the inception of the initial lease, the transaction is intended to result in ownership of the leased property to be transferred to the lessee, subject to standards prescribed by the Bureau;

(iii) providing real estate settlement services, except such services excluded under subparagraph (C), or performing appraisals of real estate or personal property;
(iv) engaging in deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer;
(v) selling, providing, or issuing stored value or payment instruments, except that, in the case of a sale of, or transaction to reload, stored value, only if the seller exercises substantial control over the terms or conditions of the stored value provided to the consumer where, for purposes of this clause—

(I) a seller shall not be found to exercise substantial control over the terms or conditions of the stored value if the seller is not a party to the contract with the consumer for the stored value product, and another person is principally responsible for establishing the terms or conditions of the stored value; and

(II) advertising the nonfinancial goods or services of the seller on the stored value card or device is not in itself an exercise of substantial control over the terms or conditions;

(vi) providing check cashing, check collection, or check guaranty services;

(vii) providing payments or other financial data processing products or services to a consumer by any technological means, including processing or storing financial or banking data for any payment instrument, or through any payments systems or network used for processing payments data, including payments made through an online banking system or mobile telecommunications network, except that a person shall not be deemed to be a covered person with respect to financial data processing solely because the person—

(I) is a merchant, retailer, or seller of any nonfinancial good or service who engages in financial data processing by transmitting or storing payments data about a consumer exclusively for purpose of initiating payments instructions by the consumer to pay such person for the purchase of, or to complete a commercial transaction for, such nonfinancial good or service sold directly by such person to the consumer; or

(II) provides access to a host server to a person for purposes of enabling that person to establish and maintain a website;

(viii) providing financial advisory services (other than services relating to securities provided by a person regulated by the Commission or a person regulated by a State securities Commission, but only to the extent that such person acts in a regulated capacity) to consumers on individual financial matters or relating to proprietary financial products or services (other than by publishing any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation, including publishing market data, news, or data analytics or investment information or recommendations that are not tailored to the individual needs of a particular consumer), including—

(I) providing credit counseling to any consumer; and

(II) providing services to assist a consumer with debt management or debt settlement, modifying the terms of any extension of credit, or avoiding foreclosure;

(ix) collecting, analyzing, maintaining, or providing consumer report information or other account information, including information relating to the credit history of consumers, used or expected to be used in connection with any decision regarding the offering or provision of a consumer financial product or service, except to the extent that—

(I) a person—

(aa) collects, analyzes, or maintains information that relates solely to the transactions between a consumer and such person;
(bb) provides the information described in item (aa) to an affiliate of such person; or
(cc) provides information that is used or expected to be used solely in any decision regarding the offering or provision of a product or service that is not a consumer financial product or service, including a decision for employment, government licensing, or a residential lease or tenancy involving a consumer; and

(II) the information described in subclause (I)(aa) is not used by such person or affiliate in connection with any decision regarding the offering or provision of a consumer financial product or service to the consumer, other than credit described in section 5517(a)(2)(A) of this title;

(x) collecting debt related to any consumer financial product or service; and
(xi) such other financial product or service as may be defined by the Bureau, by regulation, for purposes of this title, if the Bureau finds that such financial product or service is—

(I) entered into or conducted as a subterfuge or with a purpose to evade any Federal consumer financial law; or
(II) permissible for a bank or for a financial holding company to offer or to provide under any provision of a Federal law or regulation applicable to a bank or a financial holding company, and has, or likely will have, a material impact on consumers.

(B) Rule of construction

(i) In general

For purposes of subparagraph (A)(xi)(II), and subject to clause (ii) of this subparagraph, the following activities provided to a covered person shall not, for purposes of this title, be considered incidental or complementary to a financial activity permissible for a financial holding company to engage in under any provision of a Federal law or regulation applicable to a financial holding company:

(I) Providing information products or services to a covered person for identity authentication.
(II) Providing information products or services for fraud or identify theft detection, prevention, or investigation.
(III) Providing document retrieval or delivery services.
(IV) Providing public records information retrieval.

(V) Providing information products or services for anti-money laundering activities.

(ii) Limitation

Nothing in clause (i) may be construed as modifying or limiting the authority of the Bureau to exercise any—

(I) examination or enforcement powers authority under this title with respect to a covered person or service provider engaging in an activity described in subparagraph (A)(ix); or

(II) powers authorized by this title to prescribe rules, issue orders, or take other actions under any enumerated consumer law or law for which the authorities are transferred under subtitle F or H.

(C) Exclusions

The term "financial product or service" does not include—

(i) the business of insurance; or

(ii) electronic conduit services.

**12 U.S.C. § 5481(19). Definitions—Person.**

The term "person" means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.

**12 U.S.C. § 5481(27). Definitions—State.**

The 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. § 5493(b)(3). Administration—Specific functional units.**

(3) Collecting and tracking complaints

(A) In general

The Director shall establish a unit whose functions shall include establishing a single, toll-free telephone number, a website, and a database or utilizing an existing database to facilitate the centralized collection of, monitoring of, and response to consumer complaints regarding consumer financial products or services. The Director shall coordinate with the Federal Trade

Commission or other Federal agencies to route complaints to such agencies, where appropriate.

(B) Routing calls to States

To the extent practicable, State agencies may receive appropriate complaints from the systems established under subparagraph (A), if—

(i) the State agency system has the functional capacity to receive calls or electronic reports routed by the Bureau systems;

(ii) the State agency has satisfied any conditions of participation in the system that the Bureau may establish, including treatment of personally identifiable information and sharing of information on complaint resolution or related compliance procedures and resources; and

(iii) participation by the State agency includes measures necessary to provide for protection of personally identifiable information that conform to the standards for protection of the confidentiality of personally identifiable information and for data integrity and security that apply to the Federal agencies described in subparagraph (D).

(C) Reports to the Congress

The Director shall present an annual report to Congress not later than March 31 of each year on the complaints received by the Bureau in the prior year regarding consumer financial products and services. Such report shall include information and analysis about complaint numbers, complaint types, and, where applicable, information about resolution of complaints.

(D) Data sharing required

To facilitate preparation of the reports required under subparagraph (C), supervision and enforcement activities, and monitoring of the market for consumer financial products and services, the Bureau shall share consumer complaint information with prudential regulators, the Federal Trade Commission, other Federal agencies, and State agencies, subject to the standards applicable to Federal agencies for protection of the confidentiality of personally identifiable information and for data security and integrity. The prudential regulators, the Federal Trade Commission, and other Federal agencies shall share data relating to consumer complaints regarding consumer financial products and services with the Bureau, subject to the standards applicable to Federal agencies for protection of confidentiality of personally identifiable information and for data security and integrity.

**12 U.S.C. § 5493(c)(2). Administration—Office of Fair Lending and Equal Opportunity.**

(2) Functions
The Office of Fair Lending and Equal Opportunity shall have such powers and duties as the Director may delegate to the Office, including—

(A) providing oversight and enforcement of Federal laws intended to ensure the fair, equitable, and nondiscriminatory access to credit for both individuals and communities that are enforced by the Bureau, including the Equal Credit Opportunity Act [15 U.S.C. 1691 et seq.] and the Home Mortgage Disclosure Act [12 U.S.C. 2801 et seq.];
(B) coordinating fair lending efforts of the Bureau with other Federal agencies and State regulators, as appropriate, to promote consistent, efficient, and effective enforcement of Federal fair lending laws;
(C) working with private industry, fair lending, civil rights, consumer and community advocates on the promotion of fair lending compliance and education; and
(D) providing annual reports to Congress on the efforts of the Bureau to fulfill its fair lending mandate.

**12 U.S.C. § 5493(e)(1). Administration—Office of Service Member Affairs.**

(1) In general
The Director shall establish an Office of Service Member Affairs, which shall be responsible for developing and implementing initiatives for service members and their families intended to—

(A) educate and empower service members and their families to make better informed decisions regarding consumer financial products and services;
(B) coordinate with the unit of the Bureau established under subsection (b)(3), in order to monitor complaints by service members and their families and responses to those complaints by the Bureau or other appropriate Federal or State agency; and
(C) coordinate efforts among Federal and State agencies, as appropriate, regarding consumer protection measures relating to consumer financial products and services offered to, or used by, service members and their families.

**12 U.S.C. § 5493(g)(3). Administration—Office of Financial Protection for Older Americans.**

(3) Duties
The Office shall—

(A) develop goals for programs that provide seniors financial literacy and counseling, including programs that—

(i) help seniors recognize warning signs of unfair, deceptive, or abusive practices, protect themselves from such practices;

(ii) provide one-on-one financial counseling on issues including long-term savings and later-life economic security; and

(iii) provide personal consumer credit advocacy to respond to consumer problems caused by unfair, deceptive, or abusive practices;

(B) monitor certifications or designations of financial advisors who advise seniors and alert the Commission and State regulators of certifications or designations that are identified as unfair, deceptive, or abusive;

(C) not later than 18 months after the date of the establishment of the Office, submit to Congress and the Commission any legislative and regulatory recommendations on the best practices for—

(i) disseminating information regarding the legitimacy of certifications of financial advisers who advise seniors;

(ii) methods in which a senior can identify the financial advisor most appropriate for the senior's needs; and

(iii) methods in which a senior can verify a financial advisor's credentials;

(D) conduct research to identify best practices and effective methods, tools, technology and strategies to educate and counsel seniors about personal finance management with a focus on—

(i) protecting themselves from unfair, deceptive, and abusive practices;

(ii) long-term savings; and

(iii) planning for retirement and longterm care;

(E) coordinate consumer protection efforts of seniors with other Federal agencies and State regulators, as appropriate, to promote consistent, effective, and efficient enforcement; and

(F) work with community organizations, non-profit organizations, and other entities that are involved with educating or assisting seniors (including the National Education and Resource Center on Women and Retirement Planning).

**12 U.S.C. § 5495. Coordination.**

The Bureau shall coordinate with the Commission, the Commodity Futures Trading Commission, the Federal Trade Commission, and other Federal agencies and State regulators, as appropriate, to promote consistent regulatory treatment of consumer financial and investment products and services.

**12 U.S.C. § 5511(c). Purpose, objectives, and functions—Functions.**

The primary functions of the Bureau are—

(1) conducting financial education programs;

(2) collecting, investigating, and responding to consumer complaints;

(3) collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets;

(4) subject to sections 5514 through 5516 of this title, supervising covered persons for compliance with Federal consumer financial law, and taking appropriate enforcement action to address violations of Federal consumer financial law;

(5) issuing rules, orders, and guidance implementing Federal consumer financial law; and

(6) performing such support activities as may be necessary or useful to facilitate the other functions of the Bureau.

**12 U.S.C. § 5512(c)(6)-(7). Rulemaking authority—Monitoring.**

(6) Confidentiality rules

(A) Rulemaking

The Bureau shall prescribe rules regarding the confidential treatment of information obtained from persons in connection with the exercise of its authorities under Federal consumer financial law.

(B) Access by the Bureau to reports of other regulators

(i) Examination and financial condition reports

Upon providing reasonable assurances of confidentiality, the Bureau shall have access to any report of examination or financial condition made by a prudential regulator or other Federal agency having jurisdiction over a covered person or service provider, and to all revisions made to any such report.

(ii) Provision of other reports to the Bureau

In addition to the reports described in clause (i), a prudential regulator or other Federal agency having jurisdiction over a covered person or service provider may, in its discretion, furnish to the Bureau any other report or other confidential supervisory information concerning any insured depository institution, credit union, or other entity examined by such agency under authority of any provision of Federal law.

(C) Access by other regulators to reports of the Bureau

(i) Examination reports

Upon providing reasonable assurances of confidentiality, a prudential regulator, a State regulator, or any other Federal agency having jurisdiction over a covered person or service provider shall have access to any report of examination made by the Bureau with respect to such person, and to all revisions made to any such report.

(ii) Provision of other reports to other regulators

In addition to the reports described in clause (i), the Bureau may, in its discretion, furnish to a prudential regulator or other agency having jurisdiction over a covered person or service provider any other report or other confidential supervisory information concerning such person examined by the Bureau under the authority of any other provision of Federal law.

(7) Registration

(A) In general

The Bureau may prescribe rules regarding registration requirements applicable to a covered person, other than an insured depository institution, insured credit union, or related person.

(B) Registration information

Subject to rules prescribed by the Bureau, the Bureau may publicly disclose registration information to facilitate the ability of consumers to identify covered persons that are registered with the Bureau.

(C) Consultation with State agencies

In developing and implementing registration requirements under this paragraph, the Bureau shall consult with State agencies regarding requirements or systems (including coordinated or combined systems for registration), where appropriate.

**12 U.S.C. § 5514(b). Supervision of nondepository covered persons—Supervision.**

(1) In general

The Bureau shall require reports and conduct examinations on a periodic basis of persons described in subsection (a)(1) for purposes of—

(A) assessing compliance with the requirements of Federal consumer financial law;

(B) obtaining information about the activities and compliance systems or procedures of such person; and

(C) detecting and assessing risks to consumers and to markets for consumer financial products and services.

(2) Risk-based supervision program

The Bureau shall exercise its authority under paragraph (1) in a manner designed to ensure that such exercise, with respect to persons described in subsection (a)(1), is based on the assessment by the Bureau of the risks posed to consumers in the relevant product markets and geographic markets, and taking into consideration, as applicable—

(A) the asset size of the covered person;

(B) the volume of transactions involving consumer financial products or services in which the covered person engages;

(C) the risks to consumers created by the provision of such consumer financial products or services;

(D) the extent to which such institutions are subject to oversight by State authorities for consumer protection; and

(E) any other factors that the Bureau determines to be relevant to a class of covered persons.

(3) Coordination

To minimize regulatory burden, the Bureau shall coordinate its supervisory activities with the supervisory activities conducted by prudential regulators and the State bank regulatory authorities, including establishing their respective schedules for examining persons described in subsection (a)(1) and requirements regarding reports to be submitted by such persons.

(4) Use of existing reports

The Bureau shall, to the fullest extent possible, use—

(A) reports pertaining to persons described in subsection (a)(1) that have been provided or required to have been provided to a Federal or State agency; and

(B) information that has been reported publicly.

(5) Preservation of authority
Nothing in this title may be construed as limiting the authority of the Director to require reports from persons described in subsection (a)(1), as permitted under paragraph (1), regarding information owned or under the control of such person, regardless of whether such information is maintained, stored, or processed by another person.
(6) Reports of tax law noncompliance
The Bureau shall provide the Commissioner of Internal Revenue with any report of examination or related information identifying possible tax law noncompliance.
(7) Registration, recordkeeping and other requirements for certain persons
(A) In general
The Bureau shall prescribe rules to facilitate supervision of persons described in subsection (a)(1) and assessment and detection of risks to consumers.
(B) Recordkeeping
The Bureau may require a person described in subsection (a)(1), to generate, provide, or retain records for the purposes of facilitating supervision of such persons and assessing and detecting risks to consumers.
(C) Requirements concerning obligations
The Bureau may prescribe rules regarding a person described in subsection (a)(1), to ensure that such persons are legitimate entities and are able to perform their obligations to consumers. Such requirements may include background checks for principals, officers, directors, or key personnel and bonding or other appropriate financial requirements.
(D) Consultation with State agencies
In developing and implementing requirements under this paragraph, the Bureau shall consult with State agencies regarding requirements or systems (including coordinated or combined systems for registration), where appropriate.

**12 U.S.C. § 5515(b)(2). Supervision of very large banks, savings associations, and credit unions—Supervision.**

(2) Coordination
To minimize regulatory burden, the Bureau shall coordinate its supervisory activities with the supervisory activities conducted by prudential regulators and the State bank regulatory authorities, including consultation regarding their respective schedules for examining such persons described in subsection (a) and requirements regarding reports to be submitted by such persons.

**12 U.S.C. § 5515(e)(2). Supervision of very large banks, savings associations, and credit unions—Simultaneous and coordinated supervisory action.**

(2) Coordination with State bank supervisors
The Bureau shall pursue arrangements and agreements with State bank supervisors to coordinate examinations, consistent with paragraph (1).

**12 U.S.C. § 5517(f)(1). Limitations on authorities of the Bureau; preservation of authorities—Exclusion for persons regulated by a State insurance regulator.**

(1) In general
No provision of this title shall be construed as altering, amending, or affecting the authority of any State insurance regulator to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by a State insurance regulator. Except as provided in paragraph (2), the Bureau shall have no authority to exercise any power to enforce this title with respect to a person regulated by a State insurance regulator.

**12 U.S.C. § 5517(h)(1). Limitations on authorities of the Bureau; preservation of authorities—Persons regulated by a State securities commission.**

(1) In general
No provision of this title shall be construed as altering, amending, or affecting the authority of any securities commission (or any agency or office performing like functions) of any State to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by any securities commission (or any agency or office performing like functions) of any State. Except as permitted in paragraph (2) and subsection (f), the Bureau shall have no authority to exercise any power to enforce this title with respect to a person regulated by any securities commission (or any agency or office performing like functions) of any State, but only to the extent that the person acts in such regulated capacity.

**12 U.S.C. § 5551(a). Relation to State law—In general.**

(1) Rule of construction
This title, other than sections 1044 through 1048, 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.
(2) Greater protection under State law
For purposes of this subsection, a statute, regulation, order, or interpretation in effect in any State is not inconsistent with the provisions of this title if the protection that such statute, regulation, order, or interpretation affords to consumers is greater than the protection provided under this title. A determination regarding whether a statute, regulation, order, or interpretation in effect in any State is inconsistent with the provisions of this title may be made by the Bureau on its own motion or in response to a nonfrivolous petition initiated by any interested person.

**12 U.S.C. § 5551(b). Relation to State law—Relation to other provisions of enumerated consumer laws that relate to State law.**

No provision of this title, except as provided in section 1083, shall be construed as modifying, limiting, or superseding the operation of any provision of an enumerated consumer law that relates to the application of a law in effect in any State with respect to such Federal law.

**12 U.S.C. § 5552(a). Preservation of enforcement powers of States—In general.**

(1) Action by State
Except as provided in paragraph (2), the attorney general (or the equivalent thereof) of any State may bring a civil action in the name of such State in any district court of the United States in that State or in State court that is located in that State and that has jurisdiction over the defendant, to enforce provisions of this title or regulations issued under this title, and to secure remedies under provisions of this title or remedies otherwise provided under other law. A State regulator may bring a civil action or other appropriate proceeding to enforce the provisions of this title or regulations issued under this title with respect to any entity that is State-chartered, incorporated, licensed, or otherwise authorized to do business under State law (except as provided in paragraph (2)), and to secure remedies under provisions of this title or remedies otherwise provided under other provisions of law with respect to such an entity.

(2) Action by State against national bank or Federal savings association to enforce rules

(A) In general

Except as permitted under subparagraph (B), the attorney general (or equivalent thereof) of any State may not bring a civil action in the name of such State against a national bank or Federal savings association to enforce a provision of this title.

(B) Enforcement of rules permitted

The attorney general (or the equivalent thereof) of any State may bring a civil action in the name of such State against a national bank or Federal savings association in any district court of the United States in the State or in State court that is located in that State and that has jurisdiction over the defendant to enforce a regulation prescribed by the Bureau under a provision of this title and to secure remedies under provisions of this title or remedies otherwise provided under other law.

(3) Rule of construction

No provision of this title shall be construed as modifying, limiting, or superseding the operation of any provision of an enumerated consumer law that relates to the authority of a State attorney general or State regulator to enforce such Federal law.

**12 U.S.C. § 5552(b)(1). Preservation of enforcement powers of States—Consultation required.**

(1) Notice

(A) In general

Before initiating any action in a court or other administrative or regulatory proceeding against any covered person as authorized by subsection (a) to enforce any provision of this title, including any regulation prescribed by the Bureau under this title, a State attorney general or State regulator shall timely provide a copy of the complete complaint to be filed and written notice describing such action or proceeding to the Bureau and the prudential regulator, if any, or the designee thereof.

(B) Emergency action

If prior notice is not practicable, the State attorney general or State regulator shall provide a copy of the complete complaint and the notice to the Bureau and the prudential regulator, if any, immediately upon instituting the action or proceeding.

(C) Contents of notice
The notification required under this paragraph shall, at a minimum, describe—

(i) the identity of the parties;
(ii) the alleged facts underlying the proceeding; and
(iii) whether there may be a need to coordinate the prosecution of the proceeding so as not to interfere with any action, including any rulemaking, undertaken by the Bureau, a prudential regulator, or another Federal agency.

**12 U.S.C. § 5562(c)(1). Investigations and administrative discovery—Demands.**

(1) In general
Whenever the Bureau has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation, the Bureau may, before the institution of any proceedings under the Federal consumer financial law, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to—

(A) produce such documentary material for inspection and copying or reproduction in the form or medium requested by the Bureau;
(B) submit such tangible things;
(C) file written reports or answers to questions;
(D) give oral testimony concerning documentary material, tangible things, or other information; or
(E) furnish any combination of such material, answers, or testimony.

**12 U.S.C. § 5562(e). Investigations and administrative discovery—Petition for enforcement.**

(1) In general
Whenever any person fails to comply with any civil investigative demand duly served upon him under this section, or whenever satisfactory copying or reproduction of material requested pursuant to the demand cannot be accomplished and such person refuses to surrender such material, the Bureau, through such officers or attorneys as it may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts

business, and serve upon such person, a petition for an order of such court for the enforcement of this section.

(2) Service of process

All process of any court to which application may be made as provided in this subsection may be served in any judicial district.

**12 U.S.C. § 5565(c). Relief available—Civil money penalty in court and administrative actions.**

(1) In general

Any person that violates, through any act or omission, any provision of Federal consumer financial law shall forfeit and pay a civil penalty pursuant to this subsection.

(2) Penalty amounts

(A) First tier

For any violation of a law, rule, or final order or condition imposed in writing by the Bureau, a civil penalty may not exceed $5,000 for each day during which such violation or failure to pay continues.

(B) Second tier

Notwithstanding paragraph (A), for any person that recklessly engages in a violation of a Federal consumer financial law, a civil penalty may not exceed $25,000 for each day during which such violation continues.

(C) Third tier

Notwithstanding subparagraphs (A) and (B), for any person that knowingly violates a Federal consumer financial law, a civil penalty may not exceed $1,000,000 for each day during which such violation continues.

(3) Mitigating factors

In determining the amount of any penalty assessed under paragraph (2), the Bureau or the court shall take into account the appropriateness of the penalty with respect to—

(A) the size of financial resources and good faith of the person charged;

(B) the gravity of the violation or failure to pay;

(C) the severity of the risks to or losses of the consumer, which may take into account the number of products or services sold or provided;

(D) the history of previous violations; and

(E) such other matters as justice may require.

(4) Authority to modify or remit penalty

The Bureau may compromise, modify, or remit any penalty which may be assessed or had already been assessed under paragraph (2). The amount of such penalty,

when finally determined, shall be exclusive of any sums owed by the person to the United States in connection with the costs of the proceeding, and may be deducted from any sums owing by the United States to the person charged.

(5) Notice and hearing

No civil penalty may be assessed under this subsection with respect to a violation of any Federal consumer financial law, unless—

(A) the Bureau gives notice and an opportunity for a hearing to the person accused of the violation; or

(B) the appropriate court has ordered such assessment and entered judgment in favor of the Bureau.

**12 U.S.C. § 5566. Referrals for criminal proceedings.**

If the Bureau obtains evidence that any person, domestic or foreign, has engaged in conduct that may constitute a violation of Federal criminal law, the Bureau shall transmit such evidence to the Attorney General of the United States, who may institute criminal proceedings under appropriate law. Nothing in this section affects any other authority of the Bureau to disclose information.

**12 C.F.R. § 1080.6(e). Civil investigative demands—Petition for order modifying or setting aside demand—in general.**

Any petition for an order modifying or setting aside a civil investigative demand shall be filed with the Executive Secretary of the Bureau with a copy to the Assistant Director of the Office of Enforcement within 20 calendar days after service of the civil investigative demand, or, if the return date is less than 20 calendar days after service, prior to the return date. Such petition shall set forth all factual and legal objections to the civil investigative demand, including all appropriate arguments, affidavits, and other supporting documentation. The attorney who objects to a demand must sign any objections.

(1) Statement.

Each petition shall be accompanied by a signed statement representing that counsel for the petitioner has conferred with counsel for the Bureau pursuant to section 1080.6(c) in a good-faith effort to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved. The statement shall recite the date, time, and place of each such

meeting between counsel, and the names of all parties participating in each such meeting.

(2) Extensions of time.

The Assistant Director of the Office of Enforcement and the Deputy Assistant Directors of the Office of Enforcement are authorized to rule upon requests for extensions of time within which to file such petitions. Requests for extensions of time are disfavored.

(3) Bureau investigator response.

Bureau investigators may, without serving the petitioner, provide the Director with a statement setting forth any factual and legal response to a petition for an order modifying or setting aside the demand.

(4) Disposition.

The Director has the authority to rule upon a petition for an order modifying or setting aside a civil investigative demand. The order may be served on the petitioner via email, facsimile, or any other method reasonably calculated to provide notice of the order to the petitioner.

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 9,913 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman 14-point font.

/s/ Neal Kumar Katyal
Neal Kumar Katyal

December 10, 2014

*Counsel for Respondents-Appellants*

## STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Counsel for Respondents-Appellants states that there are no known related cases pending in this Court.

/s/ Neal Kumar Katyal
Neal Kumar Katyal

December 10, 2014

*Counsel for Respondents-Appellants*

## CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 10, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Neal Kumar Katyal
Neal Kumar Katyal

December 10, 2014

*Counsel for Respondents-Appellants*