No. 17-184

In the Supreme Court of the United States

GREAT PLAINS LENDING, LLC, ET AL., PETITIONERS

v.

CONSUMER FINANCIAL PROTECTION BUREAU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Consumer Financial Protection Act of 2010, 12 U.S.C. 5481 *et seq.*, authorizes the Consumer Financial Protection Bureau (Bureau) to serve civil investigative demands (CIDs) upon "any person" that the Bureau "has reason to believe * * * may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation" of federal consumer financial laws. 12 U.S.C. 5562(c)(1). The Act defines "person" to mean "an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity." 12 U.S.C. 5481(19).

The question presented is whether the Bureau may issue a CID to a company that offers consumer loans in interstate commerce via the Internet where the company is owned by an Indian tribe and asserted to be an arm of the tribe.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Statutes—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 846 F.3d 1049. The opinion of the district court (Pet. App. 22a-68a) is not published in the Federal Supplement, but is available at 2014 WL 12685941.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 2017. A petition for rehearing was denied on April 5, 2017 (Pet. App. 69a-70a). On June 23, 2017, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including August 3, 2017, and the petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act to "protect consumers from abusive financial services practices." Pub.

L. No. 111-203, 124 Stat. 1376. Title X of that law, known as the Consumer Financial Protection Act of 2010 (CFPA or Act), 12 U.S.C. 5481 *et seq.*, created the Consumer Financial Protection Bureau (Bureau) and charged it with primary responsibility for "regulat[ing] the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. 5491(a). The Act authorizes the Bureau to "exercise its authorities under Federal consumer financial law for the purposes of ensuring" that "Federal consumer financial law is enforced consistently" and that "markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. 5511(a) and (b); see also S. Rep. No. 176, 111th Cong., 2d Sess. 11 (2010) (Senate Report) ("The new [Bureau] will establish a basic, minimum federal level playing field for * * * financial companies that sell consumer financial products and services to American families.").

The "Federal consumer financial laws" administered by the Bureau include the CFPA and 18 pre-existing "enumerated consumer laws" that regulate consumer financial products and services, including the Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, the Electronic Fund Transfer Act (EFTA), 15 U.S.C. 1693 *et seq.*, and specified provisions of the Gramm-Leach-Bliley Act (GLBA), 15 U.S.C. 6802 *et seq.* See 12 U.S.C. 5481(12) and (14). The CFPA prohibits "offer[ing] or provid[ing] to a consumer any financial product or service not in conformity with" those laws. 12 U.S.C. 5536(a)(1)(A). In addition, the CFPA makes it unlawful for covered persons to "engage in any unfair, deceptive, or abusive act or practice," 12 U.S.C. 5536(a)(1)(B), and empowers the Bureau to "prescribe rules" determining

particular acts or practices to be "unfair, deceptive, or abusive," 12 U.S.C. 5531(b).

The "consumer financial product[s] or service[s]" covered by the Act include, *inter alia*, "extending credit and servicing loans" when "offered or provided for use by consumers primarily for personal, family, or household purposes." 12 U.S.C. 5481(5) and (15)(A)(i). Among these covered products and services are payday loans, which are "small, short-term cash advances made at extremely high interest rates [and] secured by the borrower's personal check or some form of electronic access to the borrower's bank account." Senate Report 20.

The Act vests the Bureau with broad authority to "enforce * * * the provisions of Federal consumer financial law," 12 U.S.C. 5512(a), including by conducting investigations and adjudications and bringing civil litigation, see 12 U.S.C. 5562, 5563, 5564. To assist in these efforts, Congress has authorized the Bureau to issue "civil investigative demand[s]" (CIDs), a form of administrative subpoena, "[w]henever the Bureau has reason to believe that *any person* may be in possession, custody, or control of any documentary material or other tangible things, or may have any information, relevant to a violation" of any such law. 12 U.S.C. 5562(c)(1) (emphasis added). The Act defines "person" to mean "an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity." 12 U.S.C. 5481(19).

A person that receives a CID "may file with the Bureau a petition for an order by the Bureau modifying or setting aside the demand." 12 U.S.C. 5562(f)(1). If a person "fails to comply with any" CID, the Act authorizes the Bureau to file in an appropriate federal district

court "a petition for an order of such court for the enforcement" of the CID. 12 U.S.C. 5562(e)(1).

The Act also provides that "State[s]"—a term defined to include the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, Guam, American Samoa, and the U.S. Virgin Islands, as well as "any federally recognized Indian tribe," 12 U.S.C. 5481(27) (Supp. IV 2016)—may enforce the CFPA and related regulations within their respective jurisdictions. 12 U.S.C. 5552. In addition, the Act specifies that it generally does not preempt laws "in effect in any State" that are not inconsistent with the Act and that afford greater protections to consumers. 12 U.S.C. 5551(a). The Act also directs the Bureau to coordinate with "State" regulators on specified topics, as appropriate, to promote consistent and efficient regulation. See, *e.g.*, 12 U.S.C. 5493(c)(2)(B), 5495; see also 12 U.S.C. 5514(b)(3) (Supp. IV 2016). This office has been informed that, in accordance with those provisions, and consistent with the Bureau's *Policy for Consultation with Tribal Governments*,[1] the Bureau regularly consults with representatives of federally recognized Indian tribes concerning relevant regulatory initiatives and other matters of shared concern.

2. Petitioners are two limited-liability companies in the business of offering "small-dollar loan products, including payday loans, installment loans, and lines of credit, to nationwide consumers." Pet. App. 24a. Each petitioner is owned by a federally recognized Indian tribe. *Id.* at 24a-25a.[2] Petitioners offer their loans "over

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[1] The Bureau's Policy is available at http://files.consumerfinance.gov/f/201304_cfpb_consultations.pdf.

[2] A third tribally owned company, which was an appellant below, has not joined in seeking review in this Court. See Pet. 7 n.*.

the Internet," thereby "reaching customers who are not members of the Tribes" and who "have [no] relation to the Tribes other than as debtors" to the petitioner companies. *Id.* at 14a.

The Bureau commenced an investigation of online lenders that offer small-dollar loan products, including payday loans, to nationwide consumers. As part of that investigation, the Bureau served civil investigative demands on each of the petitioner companies pursuant to 12 U.S.C. 5562(c). Pet. App. 4a-5a. The CIDs sought information and documents relevant to possible "unlawful acts or practices relating to the advertising, marketing, provision, or collection of small-dollar loan products, in violation of" specified laws, including the CFPA, TILA, EFTA, and GLBA. *Ibid.*

The Indian tribes that own the petitioner companies "directed [them] not to respond to the investigative demands." Pet. App. 5a. Petitioners then jointly petitioned the Bureau to set aside the CIDs on several grounds, including (as relevant here) that the Bureau "lacked statutory authority" to issue the CIDs because petitioners were owned by Indian tribes. *Id.* at 25a.

The Bureau denied the petition. C.A. E.R. 324-333. The Bureau's order explained that the CFPA "broadly authorizes the Bureau to issue a CID to 'any person' the Bureau has reason to believe may have information relevant to a violation." *Id.* at 325. The order noted that the Act defines the term "person" to include "compan[ies]" and "other entit[ies]," *ibid.* (emphases omitted) (quoting 12 U.S.C. 5481(19)), and observed that petitioners "admit[ted] they are limited liability 'companies,'" *ibid.* (citation omitted).

The Bureau rejected petitioners' argument that the CFPA must be read to exclude companies that are "affiliated with, and 'arms' of, Indian tribes." C.A. E.R. 325 (citation omitted); see *id.* at 326. The Bureau considered factors described in the Ninth Circuit's decision in *Donovan* v. *Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (1985) (*Coeur d'Alene*), which the order noted was the "most common framework" for determining whether a generally applicable federal statute applies to Indian tribes. C.A. E.R. 326. Under that approach, which is based upon this Court's statement in *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960) (*Tuscarora*), "a general statute in terms applying to all persons" is presumed to "include[] Indians and their property interests." *Coeur d'Alene*, 751 F.2d at 1115 (quoting *Tuscarora*, 362 U.S. at 116). *Coeur d'Alene* nonetheless contemplates that a generally applicable statute does *not* apply to tribes if "(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 * * * that Congress intended the law not to apply to Indians on their reservations." *Id.* at 1116 (brackets, citation, and internal quotation marks omitted).

Applying those principles, the Bureau concluded that the CIDs should be enforced. The Bureau explained that issuance of the CIDs to the petitioner companies did not touch upon the "'exclusive rights of self-governance'" of the associated Tribes—such as matters of "'tribal membership, inheritance rules, and domestic relations'"—but rather implicated only "commercial dealings on the open market" between "a tribally-affiliated entity and non-Indians." C.A. E.R. 327, 329

(citation omitted). The order also noted the lack of any suggestion that compliance with the CIDs would "abrogate any rights guaranteed by Indian treaties," *id.* at 328, and the absence of any indication of "congressional intent" within the CFPA "to exclude tribally-affiliated entities from the Bureau's jurisdiction," *ibid.*

3. After petitioners refused to comply, the Bureau filed a petition to enforce the CIDs in the United States District Court for the Central District of California. Pet. App. 5a. The district court granted the Bureau's petition. *Id.* at 22a-68a.

The district court explained that "[t]he CIDs must be enforced unless jurisdiction is 'plainly lacking.'" Pet. App. 26a (quoting *EEOC* v. *Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001)). The court noted its understanding, founded on this Court's statement in *Tuscarora* and the Ninth Circuit's discussion in *Coeur d'Alene*, that "federal laws of general applicability are presumed to apply with equal force to Indian tribes," absent contrary congressional intent or some other exception. *Ibid.* The court rejected petitioners' contention that the case was controlled by *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), which applied the interpretive principle that the term "person" ordinarily does not include the sovereign. Pet. App. 28a-37a. The court explained that *Stevens* addressed the question whether a State is a "person" that may be sued by private *qui tam* relators under the False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, and did not involve circumstances, like those here, in which "a suit is brought by the federal government or a federal agency against the sovereign," Pet.

App. 38a; see *id.* at 41a (noting that the CFPA "authorizes *only* federal agencies to bring suit to enforce CIDs").

Noting this Court's instruction that interpretive principles concerning the word "person" must be applied in light of "the 'legislative environment' in which the word appears," Pet. App. 41a (quoting *Inyo County* v. *Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony*, 538 U.S. 701, 711 (2003)), the district court ultimately rested its decision on an analysis of the statutory provisions at issue. The court observed that, "[i]n the CFPA, Congress used broadly applicable, 'all-embracing language' to describe the parties subject to the Bureau's investigative authority." *Id.* at 46a. It further identified a "strong statutory basis to believe that consistency in both the application of consumer financial laws and the treatment of participants in consumer financial products markets is a key purpose of the CFPA." *Id.* at 52a-53a. The court reasoned that Congress's goals of marketwide consistency and fair competition "would be undermined by a holding that certain financial institutions providing identical products and serving an identical customer base are treated differently under the CFPA solely by virtue of their tribal, rather than private, ownership." *Id.* at 54a. The court therefore determined that, "whether or not the *Coeur d'Alene* framework applies," the correct conclusion was that "Congress likely intended for tribally owned businesses like [petitioners] to be subject to the Bureau's investigatory authority." *Id.* at 56a. The court did not reach the Bureau's alternative argument that the CIDs were enforceable in any event because petitioners were "private businesses instead of 'tribes'" for purposes of the Act. *Id.* at 64a.

4. The court of appeals affirmed. Pet. App. 1a-21a. The court explained that, "[a]t this stage of the proceedings," a court's inquiry is limited to "whether the Bureau plainly lacked jurisdiction to issue the investigative demands" on petitioners. *Id.* at 7a, 20a. Considering factors identified as relevant under the *Coeur d'Alene* framework, the court concluded that Congress likely had not intended to exclude tribally owned financial-services companies from the statute's coverage. The court noted that the CFPA "by its terms applies broadly and without exception" and authorizes issuance of CIDs to any "'person,'" including companies, corporations, and other entities. *Id.* at 9a-10a (citation omitted). The court observed that petitioners are "[l]ending [e]ntities * * * engaged in the business activity of small-dollar lending over the Internet, reaching consumers who are not members of the Tribes" and who "have [no] relation to the Tribes other than as debtors." *Id.* at 14a. The court thus distinguished its prior decision declining to enforce an administrative subpoena against a tribal entity under the Age Discrimination in Employment Act, where the dispute was one between "a member of the Karuk Tribe[] and the tribe itself" concerning his employment by an arm of tribal government: a tribal housing authority providing a governmental service by ensuring adequate housing for members of the Tribe. *Id.* at 14a-15a & n.4 (citing *Karuk Tribe Hous. Auth.*, 260 F.3d at 1081). The court further noted that enforcement of the CIDs would not implicate any treaty rights of the Tribes that own the petitioner companies, and was not inconsistent with the Act's structure or legislative history. *Id.* at 15a.

The court of appeals, like the district court, also rejected the argument that this Court's decision in *Stevens* compelled it to interpret "person" in the CFPA to exclude tribally owned companies. Pet. App. 12a. The court of appeals noted *Stevens*'s guidance that the interpretive presumption against application of generally applicable laws to the sovereign was "not a hard and fast rule of exclusion," *ibid.* (quoting *Stevens*, 529 U.S. at 781), and observed that *Stevens*'s holding rested in part on the nature of the plaintiff (who was "a private individual" suing on behalf of the United States) coupled with factors particular to the FCA context, *id.* at 12a-13a (citation omitted).

The court of appeals also rejected petitioners' assertion that the CFPA's provisions recognizing "State[s]"—a term defined to include "tribe[s]," see 12 U.S.C. 5481(27) (Supp. IV 2016)—as "potential co-regulator[s]" somehow "restrict[ed] the Bureau's jurisdiction to investigate covered entities," Pet. App. 17a. Noting the "great specificity" with which Congress had exempted particular classes of persons from the CFPA's coverage, see 12 U.S.C. 5517 (2012 & Supp. IV 2016), the court reasoned that "when Congress intended to limit the Bureau's authority" with respect to certain persons, "it did so explicitly." Pet. App. 18a. The court therefore was "not persuaded at this stage of the litigation that [it] should intervene to nullify the Bureau's issuance of investigative demands specifically provided for in the Act." *Id.* at 13a-14a; see also *id.* at 20a (reaffirming "[a]t this stage" that "the Bureau does not plainly lack jurisdiction").[3]

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[3] The court of appeals briefly acknowledged the Bureau's alternative argument that petitioners were not "arms of the tribe," but concluded "at this preliminary stage" that "the Tribes have an interest

5. The court of appeals denied rehearing en banc, without any judge requesting a vote. Pet. App. 69a-70a.

ARGUMENT

The court of appeals correctly concluded that the Consumer Financial Protection Bureau did not plainly lack jurisdiction to serve the civil investigative demands on the petitioner companies. The CFPA authorizes the Bureau to issue CIDs to "any person," and expressly defines "person" to include "compan[ies]" and "other entit[ies]." 12 U.S.C. 5481(19), 5562(c)(1). That language encompasses petitioners, which are limited liability companies that offer payday loans and other financial products to consumers nationwide via the Internet. The court properly determined that Congress intended to cover all such lenders without regard to tribal ownership. That holding—the first appellate interpretation of the term "person" within the CFPA—does not conflict with any decision of this Court or of any other court of appeals. And this subpoena-enforcement case would be a poor vehicle for considering interpretive approaches to be applied in the context of other, unrelated "generally applicable federal statute[s]" identified by petitioners (Pet. i, 20). Further review is unwarranted.

1. As the court of appeals explained, an agency's decision to issue an administrative subpoena (such as the CIDs here) is reviewed with deference, and challenges to their enforcement must be rejected unless the agency "plainly lack[s] jurisdiction." Pet. App. 7a. Under that standard, a court enforces a CID "[a]s long as the evidence is relevant, material and there is some plausible ground for jurisdiction." *Id.* at 7a n.2 (quoting *EEOC* v.

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in challenging the investigative demands based on their creation and operation of the [petitioner companies]." Pet. App. 14a n.3.

Federal Express Corp., 558 F.3d 842, 848 (9th Cir.), cert. denied, 558 U.S. 1011 (2009)); see, *e.g.*, *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943) (ordering district court to enforce subpoena where "[t]he evidence sought * * * was not plainly incompetent or irrelevant to any lawful purpose" of the agency).

a. The court of appeals correctly held that the Bureau did not plainly lack jurisdiction to issue the CIDs to petitioners. The text, structure, and purpose of the Act make clear that the Bureau may lawfully serve investigative demands upon tribally owned limited-liability companies that are engaged in interstate commerce and lend to consumers nationwide.

The CFPA authorizes the Bureau to serve a CID upon "any person" that may have information or materials relevant to a violation of federal consumer financial law. 12 U.S.C. 5562(c)(1). The Act defines "person" broadly to include a "company * * * or other entity." 12 U.S.C. 5481(19). Petitioners do not dispute that, as limited liability companies, the text of the Act as written would treat them as "persons" amenable to the Bureau's CID authority.

The Act's surrounding provisions underscore that the term "person" should be given the breadth that its statutory definition suggests. As the court of appeals observed, the Act delineates "[w]ith great specificity" certain persons that are exempted from the Bureau's enforcement authority, including persons regulated by state insurance and securities commissions; merchants and retailers of nonfinancial services; real estate brokers; tax preparers and accountants; and other enumerated persons. Pet. App. 18a; see 12 U.S.C. 5517(a)-(k) (2012 & Supp. IV 2016). "Notably absent from these ex-

tensive exclusions is any mention of tribal corporate entities." Pet. App. 18a. If, as petitioners contend, Congress intended to exempt financial-services companies that are owned by Indian tribes from the Act's coverage, it likely "would have done so explicitly as it did with other entities." *Ibid.*; cf. *Director of Revenue* v. *CoBank ACB*, 531 U.S. 316, 325 (2001) ("Had Congress intended to confer upon banks for cooperatives the more comprehensive exemption from taxation that it had provided to farm credit banks and federal land bank associations, it would have done so expressly as it had done elsewhere in the Farm Credit Act.").

Moreover, Congress vested the Bureau with the authority to enforce various consumer financial protection laws that indisputably apply to governments and government-owned entities, among them TILA; the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*; and the Equal Credit Opportunity Act (ECOA), 15 U.S.C. 1691 *et seq*. See 15 U.S.C. 1602(d) and (e) (defining "person" for purposes of TILA to include "corporation[s]" and "government or governmental subdivision[s] or agenc[ies]"); 15 U.S.C. 1681a(b) (FCRA) (same); 15 U.S.C. 1691a(f) (ECOA) (same). If, as the petitioner companies suggest, the term "person" in the CFPA were interpreted to exclude tribally owned companies (on the theory that such companies are arms of tribes and therefore "sovereign"), the Bureau would then lack the authority to investigate such companies' compliance with TILA, FCRA, and ECOA, even though those statutes apply to sovereigns and non-sovereigns alike. Such a

result would contradict Congress's express grant of authority to the Bureau in the CFPA to enforce those enumerated statutes. See 12 U.S.C. 5481(12).[4]

As the courts below recognized, the conclusion that tribally owned "compan[ies]" are "person[s]" under the Act, 12 U.S.C. 5481(19), directly furthers Congress's expressly stated purposes in enacting the CFPA, see Pet. App. 8a-9a, 52a-53a. Congress created the Bureau to respond to "serious structural flaws" in the regulation of consumer financial protection, including "conflicting regulatory missions, fragmentation, and regulatory arbitrage." Senate Report 10. Congress was concerned with a "race to the bottom in which the institutions with the least effective consumer regulation and enforcement attracted more business, putting pressure on regulated institutions to lower standards to compete effectively, and on their regulators to let them." *Ibid.* (citation and internal quotation marks omitted); cf. *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2052 (2014) (Thomas, J., dissenting) (expressing concern that "payday lenders" may "arrange to share fees or profits with tribes so they can use tribal immunity as a shield

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[4] Petitioners asserted in the court below that even if the Bureau were not empowered to enforce those statutes against government-owned entities, the Federal Trade Commission (FTC) could still do so. Pets. C.A. Reply Br. 15-16. But Congress similarly vested the FTC with enforcement authority over "persons" without expressly including tribally owned companies within that definition. See 15 U.S.C. 53(b), 57b(a) (authorizing suits for injunctions and other civil actions as to a "person, partnership, or corporation"); 15 U.S.C. 57b-1 (authorizing service of civil investigative demands upon "person[s]" as defined by statute, but without expressly mentioning tribally owned companies). Thus, under petitioners' logic, no federal agency would be permitted to enforce the enumerated statutes against tribally owned companies at all.

for conduct of questionable legality"). Congress therefore charged the Bureau with "enforc[ing] Federal consumer financial law *consistently* for the purpose of ensuring that * * * markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. 5511(a) (emphasis added); see also 12 U.S.C. 5511(b)(4) (authorizing the Bureau to ensure that "Federal consumer financial law is enforced consistently * * * in order to promote fair competition."). Congress thereby sought to ensure "a basic, minimum federal level playing field for *all* banks and * * * nondepository financial companies that sell consumer financial products and services to American families." Senate Report 11 (emphasis added).

This Court's past decisions in other statutory contexts involving the regulation of commercial activities are instructive. This Court has frequently concluded that when Congress uses the term "person" in regulating commerce, the term encompasses both private and publicly owned enterprises. In *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150 (1983), for example, this Court held that the regulation of "persons" and "purchasers" under the Robinson-Patman Price Discrimination Act was "sufficiently broad to cover governmental bodies" where a state-owned entity "compet[es] against private enterprises," *id.* at 154-155 (citation and internal quotation marks omitted). Similarly, in *California* v. *Taylor*, 353 U.S. 553 (1957), the Court held that the Railway Labor Act applies to both private- and state-run railroads, concluding that, although a State's decision to operate a railroad is an exercise of sovereignty, the State acts "in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government."

Id. at 568 (citation omitted); see also *California* v. *United States*, 320 U.S. 577, 580, 585-586 (1944) (holding that a state-owned waterfront terminal operator that competed with private terminals was a person subject to the authority of the United States Maritime Commission); *United States* v. *California*, 297 U.S. 175, 186 (1936) (recognizing that "an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action," generally will be found to apply to state-owned companies even if such application is "not explicitly stated"), abrogated on other grounds by *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Ohio* v. *Helvering*, 292 U.S. 360, 371 (1934) (holding that a State, "when it becomes a dealer in intoxicating liquors," is subject to tax "as a 'person' under the statutory extension of that word to include a corporation, or as a 'person' without regard to such extension"), abrogated on other grounds by *Garcia*, *supra*.

b. In addressing the question whether the Bureau had authority to issue CIDs to petitioners, the court of appeals applied the interpretive framework it had previously articulated in *Donovan* v. *Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) (*Coeur d'Alene*). That framework presumes that a generally applicable federal statute extends to tribes and tribally owned entities, except where "(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 * * * that Congress intended the law not to apply to Indians on their reservations." *Id.* at 1116 (brackets, citation, and internal quotation marks omitted). As petitioners note (Pet. 11, 12-14), that framework has also

been applied by several other courts of appeals as an interpretive guide in deciding whether and how other federal statutes may apply to Indian tribes or to the commercial enterprises that tribes operate.

Contrary to petitioners' suggestion (Pet. 11-12), however, there is no need in this case to determine whether the *Coeur d'Alene* framework is properly used to evaluate the applicability to Indian tribes of all federal statutes, or even of all such statutes regulating commerce and affecting tribal commercial enterprises. As explained, the court of appeals' analysis was correct in its fundamental points: the text of the CFPA does not exempt financial-services companies owned by a tribe from the statutory definition of "person," see Pet. App. 9a-10a (citing 12 U.S.C. 5481(6) and (19)); it is appropriate to distinguish between regulation of a tribe's governmental functions and regulation of a tribally owned company engaged in nationwide commercial activity, *id.* at 14a; and applying the CFPA to tribally owned lenders is necessary to achieve Congress's expressly stated goals in enacting the statute, *id.* at 8a-9a. Indeed, as the district court recognized, "whether or not the *Coeur d'Alene* framework applies," the CFPA is properly interpreted to allow the Bureau to serve CIDs on tribally owned companies engaged in nationwide commerce. *Id.* at 56a.

2. This case does not present any conflict warranting this Court's review.

a. Petitioners contend (Pet. 16-20) that the court of appeals' judgment conflicts with this Court's prior decisions in two respects. Neither contention has merit.

First, petitioners mistakenly assert that the decision below is inconsistent with the principles that "[s]tatutes are to be construed liberally in favor of the Indians, with

ambiguous provisions interpreted to their benefit," Pet. 18 (brackets in original) (quoting *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992)), and that "'clear indications of legislative intent' [are required] before a statute will be construed in a manner that impairs 'tribal sovereignty,'" *ibid.* (quoting *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 60 (1978)). Those arguments are misplaced.

The canon that textual ambiguities are to be construed in favor of Indian tribes most typically is applied to statutes that expressly deal with Indian affairs. See, *e.g.*, *County of Yakima*, 502 U.S. at 259 (construing Indian General Allotment Act of 1887, as subsequently amended by Burke Act of 1906); *Ramah Navajo Sch. Bd., Inc.* v. *Bureau of Revenue*, 458 U.S. 832, 846 (1982) ("We have consistently admonished that federal statutes and regulations *relating to tribes and tribal activities* must be construed generously in order to comport with . . . traditional notions of [Indian] sovereignty.") (emphasis added; citation and internal quotation marks omitted); *Bryan* v. *Itasca Cnty.*, 426 U.S. 373, 392 (1976) ("[S]tatutes *passed for the benefit of dependent Indian tribes* . . . are to be liberally construed.") (emphasis added; citation omitted). Petitioners do not identify any decision of this Court applying that canon of construction to a "generally applicable federal statute" (Pet. i) in order to exempt from regulation tribally owned companies engaged in interstate commerce. Cf. *San Manuel Indian Bingo & Casino* v. *NLRB*, 475 F.3d 1306, 1312 (D.C. Cir. 2007) ("We have found no case in which the Supreme Court applied th[e] principle of pro-Indian construction when resolving an ambiguity in a statute of general application."). Moreover, the principle of

pro-Indian construction applies only "[w]hen [the Court is] faced with * * * two possible constructions" and must make a "choice between them." *County of Yakima*, 502 U.S. at 269. Petitioners offer no reasonable construction of the term "company" in the CFPA's definition of "person" that would exclude companies that are owned by tribes or tribal entities.

Similarly, petitioners have identified no decision of this Court endorsing the proposition that a clear and particularized statement of congressional intent is required before a federal statute may be applied to the interstate commercial activities of tribally owned companies. The cases cited by petitioners (Pet. 18) involved different circumstances. *Santa Clara Pueblo* concerned whether the Indian Civil Rights Act of 1968, 25 U.S.C. 1301 *et seq.*, created an implied right of action authorizing a federal court to adjudicate "intratribal disputes" over tribal membership. 436 U.S. at 60. By contrast, the "small-dollar lending activities in this case do not touch upon" similar matters of tribal "self-governance." Pet. App. 14a. *United States* v. *Dion*, 476 U.S. 734 (1986), concerned whether Congress "abrogate[d] Indian treaty rights," *id.* at 738, a principle that is also inapplicable in this case.[5] See Pet. App. 15a. *Michigan* v. *Bay Mills Indian Community* considered whether Congress had abrogated tribal sovereign immunity from suit, 134 S. Ct. at 2031-2032, which is distinct from the question whether a federal statute regulating commerce applies to tribally owned enterprises.

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[5] In *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985), the Court similarly observed that a "plain and unambiguous" statement would be required within an Indian treaty in order to extinguish rights to tribal land, *id.* at 247-248 (citation omitted). This case does not involve Indian treaties or rights to tribal lands.

See *id.* at 2034-2035 & n.6; cf. *Kiowa Tribe of Okla.* v. *Manufacturing Techs., Inc.*, 523 U.S. 751, 755 (1998) ("There is a difference between the right to demand compliance with state laws and the means available to enforce them."). Other cases cited by petitioners do not implicate the scope of federal regulation at all, but rather addressed whether Congress had curtailed tribal immunity from taxation by the States, see *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985); see also *County of Yakima*, 502 U.S. at 268-269 (taxation by county), or a tribe's inherent authority to tax activities conducted on reservation lands, *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982).

Second, petitioners mistakenly assert (Pet. 19) that the court of appeals' decision conflicts with the "interpretive presumption that 'person' does not include the sovereign." *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 780 (2000). It remains unresolved in this litigation whether the petitioner companies are properly considered to be "sovereign." See pp. 27-28, *infra*. But even assuming petitioners were understood to be "sovereign" entities, the presumption applied in *Stevens* would not control the analysis here.

Stevens addressed the question whether a State could be a defendant in an action brought by a private *qui tam* relator under the False Claims Act, which extends liability to "[a]ny person" that submits a false claim to the government. 529 U.S. at 780 (brackets in original) (citing 31 U.S.C. 3729(a) (2000)). In construing the term "person" in that statute, which was undefined, the Court considered, among other factors, the traditional presumption that sovereigns are not "persons." *Id.* at 782. In the CFPA, however, the term "person" is

expressly defined to include a "company," 12 U.S.C. 5481(19), and there is no longstanding presumption that the term "company" is to be interpreted to exclude commercial enterprises that are owned by a sovereign. Cf. *Stevens*, 529 U.S. at 780 n.9 (highlighting that the Safety Appliance Act, which this Court found applicable to state-owned railroads in *United States* v. *California*, *supra*, "used not the word 'person,' but rather the phrase 'common carrier'").

Moreover, *Stevens* noted that the presumption against inclusion of the sovereign was animated by a concern that, when Congress authorizes private litigation against States, such action "'alter[s] the usual constitutional balance between States and the Federal government'" and potentially raises "difficult constitutional questions" of sovereign immunity. *Stevens*, 529 U.S. at 787 (citation omitted). Those concerns have considerably less, if any, force in circumstances where the United States itself brings suit, inasmuch as tribes do not "enjoy sovereign immunity from suits brought by the federal government." *EEOC* v. *Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1075 (9th Cir. 2001). Indeed, under the CFPA, the power to serve investigative demands upon "persons" is limited exclusively to a federal agency (the Bureau), and the Act provides no other means of private enforcement, as the courts below noted.[6] See Pet. App. 17a, 52a. *Stevens* distinguished

[6] The CFPA does authorize "State" regulators to enforce certain substantive provisions of the CFPA. See 12 U.S.C. 5552. The Act, however, does not contain the sort of "unequivocal[]" statement authorizing suits against Indian tribes that would be necessary to abrogate the sovereign immunity from suit that tribes (and arms of tribes) presumptively retain. *Bay Mills Indian Cmty.*, 134 S. Ct. at 2031 (citations omitted).

several of this Court's prior decisions precisely on the basis that they involved action by the federal government rather than a "private suit." See 529 U.S. at 780-781 n.9 (noting that "[n]one of the[]" cases cited by the dissent "involved a statutory provision authorizing *private* suit against a State," and reasoning that "comity and respect for our federal system demand that something more than mere use of the word 'person' demonstrate the federal intent to authorize unconsented *private* suit against them") (emphases added); accord *id.* at 789 (Ginsburg, J., concurring in the judgment) ("[T]he clear statement rule applied to private suits against a State has not been applied when the United States is the plaintiff.").[7]

Even if the principle that "person" ordinarily excludes the sovereign were given weight in this context, it nonetheless would not alter the outcome. As *Stevens* explained, that presumption is "not a 'hard and fast rule of exclusion,'" 529 U.S. at 781 (citation omitted), and this Court has stated in an analogous context that whether a "person" includes a sovereign "depends not upon a bare analysis of the word 'person,' but on the legislative environment in which the word appears." *Inyo Cnty.* v. *Paiute-Shoshone Indians of Bishop Cnty. of Bishop Colony*, 538 U.S. 701, 711 (2003) (citations and internal quotation marks omitted). As previously explained, the text, structure, and purpose of the Act at issue here demonstrate that Congress intended that

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[7] In *United States ex rel. Cain* v. *Salish Kootenai Coll., Inc.*, 862 F.3d 939, 942-943 (2017), the Ninth Circuit, applying *Stevens*, held that an "arm of the Tribe" was not subject to suit in a qui tam action pursued by a private relator under the FCA. The court specifically distinguished its decision in this case and its application of *Coeur d'Alene*. See *id.* at 943.

federal consumer financial laws be "enforced consistently" in order "to promote fair competition," 12 U.S.C. 5511(b)(4), thereby establishing a "level playing field for all * * * financial companies that sell consumer financial products and services to American families," Senate Report 11. Cf. *United States* v. *Cooper Corp.*, 312 U.S. 600, 605 (1941) ("The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term ["person"], to bring state or nation within the scope of the law.").

b. Petitioners similarly err in suggesting (Pet. 11-16) that the decision below conflicts with that of two other courts of appeals. To the contrary, no other court has yet considered the question whether the term "person" in the CFPA must be read to exclude tribally owned companies.[8] Petitioners assert (Pet. 11) that two circuits, addressing a different statute, have rejected "the *Coeur d'Alene* framework," but the cited decisions offer no basis to conclude that either court, if faced with this case, would hold the Bureau to plainly lack authority to issue CIDs to petitioners.

In *San Manuel Indian Bingo & Casino* v. *NLRB*, *supra*, the D.C. Circuit upheld a decision by the National Labor Relations Board (NLRB) applying the National Labor Relations Act (NLRA), 29 U.S.C. 151

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[8] A pending action in the District of Kansas implicates the question whether tribally owned companies are "persons" within the meaning of the CFPA. See *Consumer Fin. Prot. Bureau* v. *Golden Valley Lending, Inc.*, 17-cv-2521, Docket entry No. 62 (Oct. 10, 2017) (moving to dismiss Bureau's civil enforcement action on the asserted basis that tribally owned companies are not "persons" within the meaning of the CFPA).

et seq., to a casino operated by a tribe "on its reservation." 475 F.3d at 1308. The court explained that "when a tribal government goes beyond matters of internal self-governance and enters into off-reservation business transaction[s] with non-Indians, its claim of sovereignty is at its weakest." *Id.* at 1312-1313. The court read this Court's decisions as "reflect[ing] an earnest concern for maintaining tribal sovereignty," while also "recogniz[ing] that tribal governments engage in a varied range of activities many of which are not activities we normally associate with governance." *Id.* at 1314. The court ultimately declined to decide whether "laws of general applicability apply also to Indian tribes" or whether, instead, "courts may not construe laws in a way that impinges upon tribal sovereignty absent a clear indication of Congressional intent," because the court found that the NLRB's decision should be upheld under either standard. *Id.* at 1315. Although the court declined to apply the *Coeur d'Alene* framework, it explained that its analysis only "differed slightly from that of the [NLRB]," which had applied that framework, *id.* at 1318. And the court noted that its conclusion was "consistent with the conclusion of several other circuits" that had used *Coeur d'Alene* to evaluate the "application of federal employment law to certain commercial activities of certain tribes." *Id.* at 1315. Accordingly, nothing in the D.C. Circuit's decision in *San Manuel Indian Bingo & Casino* suggests that, if confronted with this case, it would regard petitioners' "commercial activities" and "off-reservation business transaction[s] with non-Indians" to be beyond the Bureau's enforcement powers. *Id.* at 1312-1313, 1315.

The Tenth Circuit's en banc decision in *NLRB* v. *Pueblo of San Juan*, 276 F.3d 1186 (2002), similarly presents no conflict. There, the court held that the NLRA did not preempt a tribal government's enactment of a "right-to-work" ordinance regulating employment on tribal lands. *Id.* at 1189, 1200. The court reasoned that, although "silence [in a federal statute] does not work a divestiture of tribal power" when a tribe's sovereign "authority to enact and enforce laws" is at stake, *id.* at 1196-1197, a federal law that affects a tribe's "proprietary interests"—such as its interest as "employer or landowner"—may apply to tribes "even when Indians are not specifically mentioned" in the statute, *id.* at 1199-1200. The court specifically reaffirmed its past decision holding that "tribal ownership did not prevent a generally applicable federal statute from regulating activity to ensure the safety of ground water under tribally-owned land." *Id.* at 1199 (citing *Phillips Petroleum Co.* v. *United States EPA*, 803 F.2d 545 (10th Cir. 1986)); see also *Dobbs* v. *Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283 n.8 (10th Cir. 2010) (reaffirming *Pueblo of San Juan*'s distinction between a tribe's exercise of proprietary rights, as in *Phillips Petroleum*, and its "'authority as a sovereign'"). There is therefore no basis to conclude that the Tenth Circuit would hold that the Bureau lacks authority to investigate tribally owned lenders engaged in interstate commerce with non-tribal customers located throughout the United States. Cf. Pet. App. 57a-58a (citing *Pueblo of San Juan* and explaining that the tribes that own petitioners have "act[ed] in a proprietary capacity * * * to provide consumer financial products to the public").

3. Several additional considerations also counsel against further review.

First, although petitioners claim (Pet. 21) that review is warranted because "[t]he term 'person' stands at the center of the CFPA," this case does not squarely present the question whether petitioners are subject to the Bureau's regulatory authority. The question at this juncture is solely whether the Bureau may obtain information from petitioners pursuant to a CID. As explained (pp. 11-12, *supra*), a deferential standard of review applies to that question, under which the CID must be enforced "unless jurisdiction is plainly lacking." Pet. App. 7a n.2 (emphasis omitted) (quoting *Federal Express Corp.*, 558 F.3d at 848). The court of appeals expressly rested its judgment on application of that standard. See *id.* at 13a-14a ("We are not persuaded at this stage of the litigation that we should intervene to nullify the Bureau's issuance of investigative demands * * * on the basis that jurisdiction is 'plainly lacking.'") (citation omitted); *id.* at 20a ("At this stage of the proceedings, we conclude that the district court properly held that the Bureau does not plainly lack jurisdiction to issue investigative demands to the tribal corporate entities under the Act."); *id.* at 21a ("At this stage of the proceedings, we affirm the district court's order enforcing the investigative demands against the Tribal Lending Entities"). The highly deferential standard applicable to subpoena-enforcement proceedings distinguishes this case from other contexts in which a court would review final agency action involving a determination of the lawful scope of the agency's jurisdiction.[9]

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[9] Petitioners' assertion (Pet. 21) that "if the CFPA applies to sovereign *Tribes*, it applies to sovereign *States* as well," similarly affords no basis for this Court's review. The court of appeals counseled that nothing in its opinion "should be construed as a ruling addressing whatsoever any authority the Bureau may or may not

Second, this case reaches this Court with unresolved, antecedent factual and legal questions concerning petitioners' ability to benefit from the statutory interpretation that they advance. Petitioners are not themselves Indian tribes; rather, the tribes created petitioners as limited liability companies with legal rights and obligations separate and apart from those of the tribes themselves. Cf. *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474 (2003) ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities."). Petitioners nonetheless have asserted throughout this litigation (Pet. 6) that they "are arms of their respective Tribes, which means that they share in the Tribes' sovereign status." See Pets. C.A. Br. 35-39. The Bureau contested petitioners' status as arms of the Tribes in the proceedings below, but the lower courts did not resolve that dispute, finding it unnecessary to do so in light of their holding that the Bureau's issuance of CIDs to the petitioner companies was lawful in all events. See Pet. App. 14a n.3, 64a.[10] Accordingly, petitioners' ability to benefit from the legal principles that they seek to establish has never been factually resolved.

Moreover, this Court has not yet decided when a tribally owned company engaged in interstate commerce may qualify as an "arm of the tribe." In the context of evaluating whether State-owned entities are

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have to regulate or to direct subpoenas to the State or to State enterprises." Pet. App. 17a-18a n.5. The district court similarly declined to resolve the question "whether state agencies would be subject to CIDs" issued by the Bureau. *Id.* at 64a.

[10] The court of appeals did conclude that, "at this preliminary stage," "the Tribes have an interest in challenging the investigative demands." Pet. App. 14a n.3. The Tribes are not parties to this litigation, however, and the court of appeals did not address whether petitioners are properly regarded as arms of the respective Tribes.

"arms of the State" that may partake of a State's immunity from suit, this Court has engaged in a multifactor analysis that considers the political, legal, and financial treatment of the entities under state law. See, *e.g.*, *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429-430 (1997); *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44-51 (1994); *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 280 (1977). But this Court has not yet decided whether or how that framework applies in evaluating whether a tribally owned commercial entity is properly deemed an arm of an Indian tribe.[11]

Finally, as the Bureau explained in denying petitioners' set-aside petition, even if "arms of the Tribe" were excluded from the definition of "person" in the CFPA, enforcement of the CIDs would nonetheless remain proper in this case to the extent necessary to ascertain the facts demonstrating petitioners' status as arms of the respective Tribes. C.A. E.R. 330 n.2; cf. *Federal Power Comm'n* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972) (emphasizing "[t]he need to protect the primary authority of an agency to determine its own jurisdiction," which may include "proceedings to determine whether [a particular entity is] subject to its jurisdiction").

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[11] The United States has previously suggested that factors that this Court identified as relevant for "arm-of-the-State" analysis may also be employed in determining whether a tribally owned entity is an "arm of the Tribe." Gov't Amicus Br. at 11-14, *Inyo Cnty.*, *supra* (No. 02-281). This Court's opinion in *Inyo County* noted that the tribally owned entity's status as an "'arm' of the Tribe" was not contested, however, and thus did not address that question on the merits. 538 U.S. at 705 n.1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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