No. 17-

IN THE

Supreme Court of the United States

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

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a generally applicable federal statute, which is silent as to its applicability to Indian Tribes, should nevertheless be presumed to apply to Tribes.

PARTIES TO THE PROCEEDING

Great Plains Lending, LLC, and Plain Green, LLC, petitioners here, were appellants in the Court of Appeals.

The Consumer Financial Protection Bureau, respondent here, was the appellee in the Court of Appeals.

MobiLoans, LLC, was an appellant in the Court of Appeals. Petitioners believe that MobiLoans has no interest in the outcome of this petition for a writ of certiorari. *See infra* p. 7 n.*. Pursuant to this Court's Rule 12.6, petitioners have so notified the Clerk in a letter filed contemporaneously with this petition and served on all parties to the proceeding below.

RULE 29.6 DISCLOSURE STATEMENT

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

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

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Great Plains Lending, LLC, and Plain Green, LLC, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 846 F.3d 1049. Pet. App. 1a-21a. The District Court's order is not published in the *Federal Supplement* but is available at 2014 WL 12685941. Pet. App. 22a-68a.

JURISDICTION

The Ninth Circuit entered judgment on January 20, 2017, Pet. App. 1a, and denied a timely petition for rehearing en banc on April 5, 2017, *id.* at 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. *See* No. 16A1254. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Consumer Financial Protection Act (CFPA) provides in pertinent part:

> 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(19).

> 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 5131(a) of Title 25.

Id. § 5481(27).

> 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.

Id. § 5562(c)(1).

INTRODUCTION

Countless federal statutes speak in general terms, without specifying whether they apply to Indian Tribes. The question presented in this case concerns how those statutes should be construed: Should they be presumed to apply to Tribes, despite Congress's silence?

The circuits are divided on this question. Five circuits say yes; they hold that generally applicable laws should be presumed to apply to sovereign Tribes. Two circuits disagree; they reject such a presumption. Courts have acknowledged this split, which shows no signs of resolving itself. Only this Court's review can bring uniformity to this fundamental question of law.

This Court's review is warranted for another reason: The Ninth Circuit in this case reached the wrong answer. It held that generally applicable statutes should be presumed to cover Tribes, and then—applying that presumption—concluded that

the Consumer Financial Protection Act covers Tribes. That presumption, however, cannot be reconciled with this Court's holdings. This Court has long held that statutes should be construed liberally *in favor of* Indians, and yet the Ninth Circuit did the opposite, construing the CFPA's silence *against* Indians. Further, this Court has long held that the generally applicable term "person" should be presumed *not* to include sovereigns, and yet the Ninth Circuit presumed the opposite in construing the CFPA.

Finally, this Court should grant review because the question presented is exceptionally important. Because Tribes are sovereigns in their own right, whether they are presumptively subject to general laws has far-reaching implications—not just for tribal sovereignty, but also for tribal self-determination and self-sufficiency. Those implications are particularly significant in the context of the CFPA, which is unique among federal statutes in the expansive powers it grants to the Consumer Financial Protection Bureau. And the ramifications of the Ninth Circuit's decision extend even beyond Tribes: If the Ninth Circuit is correct that the CFPA should be presumed to cover Tribes, then it follows that the CFPA should be presumed to cover States, too. After all, States are sovereigns as well, and the CFPA treats States and Tribes equivalently. This petition thus presents a question of exceeding importance for all sovereigns, tribal and state alike.

For these reasons, certiorari should be granted.

STATEMENT

A. Statutory Background

In 2010, Congress enacted the Consumer Financial Protection Act, 12 U.S.C. § 5481 *et seq.* The CFPA establishes an independent agency called the Consumer Financial Protection Bureau for the purpose of "ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." *Id.* § 5511(a).

The CFPA, however, forbids the Bureau to promote that purpose alone. Rather, it instructs that the Bureau "shall coordinate" its efforts with "State regulators." *Id.* § 5495. And because the CFPA defines "State" to include "any federally recognized Indian tribe," *id.* § 5481(27), it equally mandates that the Bureau coordinate its efforts with Tribes. Various other statutory provisions spell out the cooperative relationship that Congress envisioned between federal regulators and "State[s]" (including Tribes). *Id.* § 5493(b)(3); *see, e.g.*, *id.* §§ 5493(c)(2), 5493(e)(1), 5493(g)(3), 5512(c)(6)-(7), 5514(b), 5515(b)(2), 5515(e)(2), 5551(a)-(b), 5552(a).

As for the Bureau itself, the CFPA grants it the authority to "supervis[e]" "any person that engages in offering or providing a consumer financial product or service," *id.* §§ 5511(c)(4), 5481(6), and to enforce 19 different federal consumer financial laws against "any person" who violates them, *id.* §§ 5564(a), 5481(12), 5481(14). The CFPA also empowers the Bureau to issue civil investigative demands (CIDs) to "any person" who it has reason to believe may have material or information relevant to a violation of a

federal consumer financial law. *Id.* § 5562(c)(1). The statute defines the term "person" to include various entities—"an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity"—but the definition does not mention States or Tribes. *Id.* § 5481(19).

B. Factual And Procedural Background

1. The Otoe-Missouria Tribe of Indians and the Chippewa Cree Tribe of the Rocky Boy's Reservation are federally recognized Indian Tribes. Both of them are unable to 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. To raise government funds for social, educational, and economic initiatives, each Tribe established an online lending entity: The Otoe-Missouria Tribe established petitioner Great Plains Lending, LLC, and the Chippewa Cree Tribe established petitioner Plain Green, LLC. *See* Pet. App. 24a-25a. Petitioners are arms of their respective Tribes, which means that they share in the Tribes' sovereign status. *Id.* at 14a n.3.

2. At some point, the Bureau became interested in petitioners' lending activities. The Bureau could

have implemented the co-regulatory approach that the CFPA prescribes by communicating with the Tribes about their tribal arms. Instead, in June 2012, the Bureau issued CIDs to petitioners, purportedly under its authority to investigate "person[s]." 12 U.S.C. § 5562(c)(1); *see* Pet. App. 5a; C.A. E.R. 212-244.*

The CIDs were extensive, requiring petitioners to answer detailed interrogatories and produce a wide range of documents. The requested documents included all contracts and agreements with partner companies; 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.*, C.A. E.R. 221-222. 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." *Id.* at 212 (citations omitted).

In July 2012, petitioners petitioned the Bureau to set aside the CIDs. *See* 12 U.S.C. § 5562(f); C.A. E.R.

* The Bureau also issued a CID to MobiLoans, LLC, an arm of the Tunica-Biloxi Tribe of Louisiana. Although MobiLoans initially challenged the CID, it eventually complied with a revised version of the CID following the Ninth Circuit's decision in this case. MobiLoans thus has no interest in the outcome of this petition for certiorari.

246-278. Petitioners argued that, as arms of sovereign Tribes, they are not "persons" subject to the Bureau's investigative and regulatory authority under the CFPA; rather, the statute expressly regards Tribes as co-regulating "States." *See* C.A. E.R. 264-271. Over a year later, the Bureau denied the petition and directed petitioners to comply with the CIDs. *Id.* at 324-333.

Both Tribes have made consistent good-faith efforts to establish a cooperative regulatory relationship with the Bureau. The Otoe-Missouria Tribe 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. *Id.* at 136-139. In a letter to the Bureau's Director, the Tribe reiterated its intent to provide all of the information requested through direct consultation and coordination with the Bureau. *Id.* at 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. *Id.* at 138, 203-206. 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. *Id.* at 137-138.

The Chippewa Cree Tribe has made similar efforts to reach out to the Bureau. The Tribe met with Bureau officials on a number of occasions to discuss its willingness to cooperate with the Bureau in regulating consumer finance. *Id.* at 45. And the Tribe has endeavored to provide the information the Bureau seeks in the context of a government-to-government relationship. *Id.* at 45-46.

3. Despite the Tribes' efforts to communicate with the Bureau regarding the requested information, 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); C.A. E.R. 334. Petitioners again maintained that because they are arms of sovereign Tribes, the Bureau's investigative authority does not extend to them. *See* Pet. App. 24a.

The District Court disagreed and granted the Bureau's petition. *Id.* at 67a. For much of its opinion, the court attempted to reconcile decisions of the Ninth Circuit and this Court analyzing generally applicable statutes. *See id.* at 26a-47a. Under *Donovan* v. *Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), the court reasoned, the CFPA is a generally applicable statute that presumptively applies to Indian Tribes, *see* Pet. App. 26a-28a; under *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), by contrast, the term "person" presumptively excludes sovereigns, *see* Pet. App. 28a-29a. "[T]aken together," the court explained, these "rules * * * appear to mean" that the CFPA both "presumptively includes and presumptively excludes Indian tribes." *Id.* at 37a-38a. To resolve this tension, the court looked to the CFPA's "legislative environment," which it believed "indicates that Congress likely intended for tribally owned businesses like [petitioners] to be subject to the Bureau's investigatory authority." *Id.* at 56a. Noting that the statutory question "is something over which judges and lawyers could reasonably disagree," the District Court stayed its ruling pending appeal to the Ninth Circuit. *Id.* at 67a.

4. A three-judge panel of the Ninth Circuit affirmed. *Id.* at 21a. The Ninth Circuit observed that "the Tribal Lending Entities make some appealing arguments," *id.* at 20a, but explained that it was nevertheless bound by *Coeur d'Alene* to conclude that "laws of general applicability govern tribal entities unless Congress has explicitly provided otherwise." *Id.* at 10a. "In keeping with [that] precedent," the Ninth Circuit concluded that the CFPA "applies to tribal businesses like the Tribal Lending Entities," even though they function as "arms of the tribe." *Id.* at 12a, 14a n.3.

In reaching that conclusion, the Ninth Circuit acknowledged this Court's holding in *Stevens* that the term "person" should be presumed to *exclude* sovereigns. *Id.* at 12a-13a. But the Ninth Circuit did not explain why that presumption did not apply. *See id.* The Ninth Circuit also acknowledged a second principle found in this Court's precedent: that "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.* at 20a (quoting *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992)). But the Ninth Circuit "repudiated this presumption" in light of its own case law; "to apply the presumption to laws of general applicability," the court explained, "would be effectively to overrule[] *Coeur d'Alene*." *Id.* (internal quotation marks and brackets omitted).

The Ninth Circuit denied rehearing en banc. *Id.* at 70a. This petition followed.

REASONS FOR GRANTING THE PETITION

I. THERE IS AN ACKNOWLEDGED AND SQUARE SPLIT ON THE QUESTION PRESENTED

Under the framework set forth by the Ninth Circuit in *Coeur d'Alene*, a "federal statute of general applicability that is silent on the issue of applicability to Indian Tribes" should be presumed to apply to them. 751 F.2d at 1116. That presumption may be overcome in only three narrow circumstances: (1) if "the law touches exclusive rights of self-governance in purely intramural matters"; (2) if "the application of the law to the tribe would abrogate rights guaranteed by Indian treaties"; or (3) if "there is proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations." *Id.* (internal quotation marks and brackets omitted).

Federal courts of appeals are divided over whether the *Coeur d'Alene* framework is correct. The Ninth Circuit in this case adhered to that framework in holding that the CFPA applies to Tribes. Pet. App. 10a-11a. Four other circuits—the Second, the Sixth, the Seventh, and the Eleventh—have embraced the *Coeur d'Alene* framework, too. Two circuits, by contrast, have rejected it. Unlike their sister circuits, the Tenth and the D.C. Circuits do *not* presume that every generally applicable statute, which is silent as to its applicability to Tribes, nonetheless applies to them.

The circuits have acknowledged their disagreement. *See, e.g.*, *Soaring Eagle Casino & Resort* v. *NLRB*, 791 F.3d 648, 673 (6th Cir. 2015) (describing the split); *San Manuel Indian Bingo & Casino* v.

NLRB, 475 F.3d 1306, 1311 (D.C. Cir. 2007) ("[O]ut-of-circuit precedent is inconsistent as to the applicability of general federal laws to Indian tribes."). And there is no indication that the split will go away on its own. This Court's intervention is therefore necessary to bring uniformity to this recurring question of statutory interpretation.

1. On one side of the split are five circuits that have adopted the *Coeur d'Alene* framework. These circuits presume that statutes of general applicability apply to Tribes.

In the decision below, for example, the Ninth Circuit explained that it has "consistently held that * * * laws of general applicability govern tribal entities unless Congress has explicitly provided otherwise," citing *Coeur d'Alene*. Pet. App. 10a. It then characterized the CFPA as "a law of general applicability," *id.*, and concluded that "none of the three *Coeur d'Alene* exceptions to the enforcement of generally applicable laws against Indian tribes apply in this case," *id.* at 14a.

The Seventh Circuit followed the same approach in *Smart* v. *State Farm Insurance Co.*, 868 F.2d 929 (7th Cir. 1989). The question in that case was whether the Employee Retirement Income Security Act (ERISA) applies to employment benefit plans established by Tribes. *Id.* at 932. "ERISA," the Seventh Circuit explained, "is clearly a statute of general application." *Id.* at 933. And "when Congress enacts a statute of general applicability," the court reasoned, "the statute reaches everyone within federal jurisdiction not specifically excluded, including Indians and Tribes." *Id.* at 932. After finding none of *Coeur d'Alene*'s exceptions to that "general

rule" satisfied, the Seventh Circuit upheld the application of ERISA to Indian Tribes. *Id.* at 932-936; *see also Menominee Tribal Enters.* v. *Solis*, 601 F.3d 669, 673-674 (7th Cir. 2010).

Similarly, the Second Circuit in *Reich* v. *Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996), "adopt[ed] the Ninth Circuit's method of analysis in *Coeur d'Alene* as the appropriate test to determine whether a statute, silent as to Indians, applies to tribes." *Id.* at 182. Applying that test to the Occupational Safety and Health Act (OSHA), the Second Circuit concluded that OSHA is a law of general applicability, *see id.* at 177-179, that "does not fall within one of the *Coeur d'Alene* exceptions," *id.* at 182. Accordingly, the Second Circuit held that Tribes are subject to OSHA. *Id.*

Coeur d'Alene is also the law in the Eleventh Circuit. In *Florida Paraplegic Association* v. *Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126 (11th Cir. 1999), the Eleventh Circuit held that "[a] general statute presumptively governs Indian tribes and will apply to them absent some superseding indication that Congress did not intend tribes to be subject to that legislation." *Id.* at 1129. Citing *Coeur d'Alene*, the Eleventh Circuit then concluded that the Americans with Disabilities Act (ADA) "is a generally applicable law," and that "no exception to the presumption that [it] appl[ies] to Indian tribes" had been established. *Id.* at 1129-1130.

The Sixth Circuit is the most recent court of appeals to join this side of the split—though not without controversy. In *NLRB* v. *Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537 (6th Cir. 2015), the majority "adopt[ed] the *Coeur*

d'Alene framework," *id.* at 551, and concluded that the National Labor Relations Act (NLRA) is a "generally applicable" statute, *id.*, that "does not fall within the exceptions to the presumptive applicability of a general statute outlined in *Coeur d'Alene*," *id.* at 555. Accordingly, the majority held that the NLRA applies to Tribes. *Id.* at 539.

Judge McKeague dissented, criticizing the majority for embracing a doctrine that "ignores Supreme Court precedent, creates a needless circuit split and, not least of all, impermissibly intrudes on tribal sovereignty." *Id.* at 565 (McKeague, J., dissenting). Less than a month later, a unanimous Sixth Circuit panel agreed. *See Soaring Eagle*, 791 F.3d 648. Although it felt bound to apply the *Little River* holding, the panel took the remarkable step of disavowing "the *Little River* majority's adoption of the *Coeur d'Alene* framework." *Id.* at 662. For many of the same reasons that Judge McKeague had articulated, the panel explained that "[t]he *Coeur d'Alene* framework unduly shifts the analysis away from a broad respect for tribal sovereignty, and the need for a clear statement of congressional intent to abrogate that sovereignty." *Id.* at 674; *see also id.* at 675 (White, J., concurring in part and dissenting in part) (agreeing that "*Coeur d'Alene* *** is inconsistent with Supreme Court precedent"). The panel thus lamented the fact that it was bound to follow *Coeur d'Alene* because the Sixth Circuit in *Little River* had joined the wrong side of the circuit split. *See id.* at 673-674 (majority opinion).

2. Opposite the Second, Sixth, Seventh, Ninth and Eleventh Circuits are the Tenth and D.C. Circuits, which do not follow the *Coeur d'Alene* framework and

which do not presume that a generally applicable federal statute applies to Tribes.

In *NLRB* v. *Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (en banc), for instance, the Tenth Circuit "rejected the *Coeur d'Alene* framework." *Soaring Eagle*, 791 F.3d at 672. Confronted with the question whether the NLRA applies to Tribes, the en banc Tenth Circuit answered no: There is no presumption of applicability "where an Indian tribe has exercised its authority as a sovereign." *Pueblo of San Juan*, 276 F.3d at 1199. The Tenth Circuit reaffirmed that view in *Dobbs* v. *Anthem Blue Cross & Blue Shield*, 600 F.3d 1275 (10th Cir. 2010). "In this circuit," the court reiterated, "respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization." *Id.* at 1283.

The D.C. Circuit also employs a framework "different from" *Coeur d'Alene*. *San Manuel*, 475 F.3d at 1315. Rather than presume that every generally applicable statute covers Tribes, the D.C. Circuit engages in a case-by-case analysis of "the extent to which application of the general law will constrain the tribe with respect to its governmental functions." *Id.* at 1313. Applying that analysis in *San Manuel*, the D.C. Circuit upheld the application of the NLRA to a particular Tribe. *Id.* at 1308.

3. In sum, seven circuits have addressed the question presented and come to different conclusions. Five circuits have held that a generally applicable federal statute, which is silent as to Tribes, should nevertheless be presumed to apply to them, while two circuits have declined to adopt such a presump-

tion. Whether sovereign Indian Tribes are presumptively subject to general laws should not depend on geography. Because this lack of uniformity is untenable, the Court should agree to resolve the question presented.

II. THE NINTH CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S PRECEDENT

Review is warranted for another reason: The Ninth Circuit's decision in this case is wrong. The *Coeur d'Alene* framework has no basis in this Court's holdings; in fact, it contradicts two separate lines of this Court's precedent.

1. The Ninth Circuit and other courts that have adopted the *Coeur d'Alene* framework insist that their approach is justified because of a single sentence from this Court's decision 57 years ago in *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960), stating that "a general statute in terms applying to all persons includes Indians and their property interests." *Id.* at 116.

That one line cannot bear the weight placed on it. As even courts that follow *Coeur d'Alene* have acknowledged, the sentence was merely dictum. *See Coeur d'Alene*, 751 F.2d at 1115 ("[I]t is dictum that has guided many of our decisions."); *Reich*, 95 F.3d at 177 (describing *Coeur d'Alene* as a "presumption" "borrowed" from "a dictum"). The issue in *Tuscarora* was whether the Federal Power Act applied to non-reservation lands that an Indian Tribe owned in fee simple. 362 U.S. at 115. The Act, however, was not silent as to Tribes at all; "[i]nstead," the Court explained, "the Act specifically define[d] and treat[ed] with lands occupied by Indians." *Id.* at 118. Thus,

according to the Court, "the Act g[ave] every indication that" it applied to such lands. *Id.* So the line in the Court's opinion about a "general statute" was only dictum, with no bearing on the Court's holding. It should come as no surprise, then, that in the decades since *Tuscarora*, this Court has *never* cited that sentence.

When read in context, moreover, the sentence actually says nothing about the applicability of laws to Tribes *as sovereigns* at all. Rather, the Court appeared to indicate only that individual Indians (and other ordinary property-holders of non-reservation land) are subject to general federal statutes about property rights, taxes, criminal laws, and so forth. *See id.* at 116-117 (citing various tax cases and one criminal case). So, for example, a federal statute criminalizing mail fraud applies to Indians and non-Indians alike. Or a federal agency exercising eminent domain may take private, non-reservation land owned by an Indian, just as it may take the land of any other private citizen.

For 25 years after *Tuscarora*, the Ninth Circuit applied that relatively uncontroversial reading of *Tuscarora*'s dictum. *See, e.g.*, *Kirschling* v. *United States*, 746 F.2d 512, 514 (9th Cir. 1984) (federal gift tax); *United States* v. *Burns*, 529 F.2d 114, 117 (9th Cir. 1975) (federal criminal law); *Comm'r* v. *Walker*, 326 F.2d 261, 263 (9th Cir. 1964) (federal income tax). Then, in *Coeur d'Alene*, things changed. *Coeur d'Alene* held that generally applicable regulatory regimes apply to Tribes *as sovereigns*, unless Congress explicitly exempts them. *See* 751 F.2d at 1115-1116. But this Court did not bless such a sweeping rule in *Tuscarora* or in any case since.

2. To the contrary, two separate lines of this Court's precedent foreclose any presumption that Tribes are subject to generally applicable federal statutes.

First, this Court has repeatedly applied the "deeply rooted" principle that "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima*, 502 U.S. at 269 (internal quotation marks omitted). That principle is reinforced by a companion rule, which requires "clear indications of legislative intent" before a statute will be construed in a manner that impairs "tribal sovereignty." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 60 (1978); *see also, e.g.*, *Michigan* v. *Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031-2032 (2014) ("[C]ourts will not lightly assume that Congress in fact intends to undermine Indian self-government."); *United States* v. *Dion*, 476 U.S. 734, 738 (1986) ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain."); *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law."); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982) ("[A]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." (internal quotation marks omitted)); *Soaring Eagle*, 791 F.3d at 666 ("[A]bsent a clear statement by Congress, to determine whether a tribe has the inherent sovereign authority necessary to prevent application of a federal statute to tribal activity, we apply the analysis set forth in *Montana* [v. *United*

States, 450 U.S. 544 (1981)]."). In fact, the Court has described *Tuscarora* itself as "implicitly" reaffirming these Indian law canons. *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 248 n.21 (1985).

The Ninth Circuit nevertheless "repudiated" these canons in this case, on the view that applying them "would be effectively to overrule[] *Coeur d'Alene*." Pet. App. 20a (internal quotation marks and brackets omitted). Recognizing that *Coeur d'Alene* stands contrary to this Court's precedent, the Ninth Circuit followed *Coeur d'Alene* anyway. That is precisely backwards: This Court's precedent should trump *Coeur d'Alene*—not the other way around.

Second, this Court has repeatedly held that the term "person" "does not include the sovereign" unless there is an "affirmative showing of statutory intent to the contrary." *Stevens*, 529 U.S. at 780-781. Applying that "longstanding interpretive presumption," the Court in *Stevens* held that sovereign States are not subject to suit under the False Claims Act. *Id.* at 780; *see also, e.g.*, *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) (applying the same presumption to conclude that a State is not a "person" under 42 U.S.C. § 1983); *Inyo Cty.* v. *Paiute-Shoshone Indians of Bishop Cmty. of Bishop Colony*, 538 U.S. 701, 709 (2003) (assuming that Tribes, "like States," are not "persons" subject to suit under § 1983); *United States* v. *Cooper Corp.*, 312 U.S. 600, 604 (1941) (noting that, "in common usage, the term 'person' does not include the sovereign"), *superseded by statute*, 15 U.S.C. § 15a; Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 273 (2012) (explaining the canon that "the word *person* traditionally excludes the sovereign").

Coeur d'Alene led the Ninth Circuit in this case to apply the opposite rule. Instead of presuming that the term "person" in the CFPA *excludes* sovereign Tribes, the Ninth Circuit presumed that it *includes* them because the CFPA is "a law of general applicability." Pet. App. 10a. And according to the Ninth Circuit, petitioners could not overcome that presumption because the CFPA does not "explicitly provide[]" that Tribes are not subject to the Bureau's authority. *Id.*; *see id.* at 15a-19a. Under *Stevens*, however, the roles should have been reversed: It should have been the *Bureau's* burden to point to "some affirmative showing of statutory intent" that Congress intended to *include* Tribes in the definition of "person." *Stevens*, 529 U.S. at 781. Once again, the Ninth Circuit offered no explanation why *Coeur d'Alene* should trump this Court's precedent.

In short, the Ninth Circuit's opinion in this case cannot be squared with this Court's decisions, and it should have held that the CFPA does *not* apply to Tribes. For that reason, too, certiorari should be granted.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT

Finally, certiorari should be granted because of the exceptional significance of the question presented. Countless federal statutes are laws of general applicability, which are silent as to their applicability to Indian Tribes. The CFPA is only one such statute; there are many others, including ERISA, OSHA, the ADA, and the NLRA. *See supra* pp. 12-15. So the issue frequently arises: Do these statutes presumptively apply to Tribes or not?

The importance of getting the answer right could not be greater. After all, Tribes are not just anyone. They are "separate sovereigns pre-existing the Constitution." *Bay Mills*, 134 S. Ct. at 2030 (internal quotation marks omitted). The "United States has an obligation to guard and preserve the sovereignty of Indian tribes," 25 U.S.C. § 4301(a)(6), and the Executive Branch has committed to working with Indian Tribes "on a government-to-government basis," Exec. Order No. 13,175, 65 Fed. Reg. 67,249, 67,249 (Nov. 6, 2000). The question presented is thus no ordinary issue of statutory interpretation. Whether Tribes are presumptively subject to generally applicable statutes has enormous implications for the sovereignty, self-determination, and economic self-sufficiency of "distinct, independent political communities." *Santa Clara Pueblo*, 436 U.S. at 55 (internal quotation marks omitted).

The stakes are especially high in this case. The term "person" stands at the center of the CFPA. 12 U.S.C. § 5481(19). If that generally applicable term includes Tribes, then Tribes would be subject not just to the Bureau's expansive authority to issue CIDs, *id.* § 5562(c)(1), but also to its sweeping powers of supervision, regulation, and enforcement, *e.g.*, *id.* §§ 5514, 5518, 5531, 5532, 5564(a). What is more, Tribes would be subject to civil penalties of as much as $1,000,000 per violation, per day—penalties that are essentially punitive in nature. *Id.* § 5565(c)(2). The consequences of presuming—and concluding—that the CFPA applies to sovereign Tribes are therefore profound.

And as the Bureau acknowledges, if the CFPA applies to sovereign *Tribes*, it applies to sovereign *States* as well. *See* Bureau C.A. Br. 30 ("[S]tates and

state-owned companies are neither exempt from regulation under the CFPA, nor exempt from complying with the Bureau's CIDs."). *Contra* Pet. App. 17a n.5 (purporting not to address the application of the CFPA to States). Under the CFPA, there is no distinguishing the two; the statute treats them equivalently. *See* 12 U.S.C. § 5481(27) (defining the term "State" to include "any State" as well as "any federally recognized Indian tribe"); *Stevens*, 529 U.S. at 780-781 (presuming that the term "person" does not include States). And States engage in countless consumer-facing lending activities each year via state student loan programs, state lending programs for employees and veterans, and state housing finance agencies. *See* Great Plains C.A. Br. 23-24 & n.1. The implications of the Ninth Circuit's decision thus extend to all sovereigns, tribal and state alike—making this Court's review all the more necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 2017

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-55900

D.C. No.
2:14-cv-02090-MWF-PLA

CONSUMER FINANCIAL PROTECTION BUREAU,
Petitioner-Appellee,
v.

GREAT PLAINS LENDING, LLC;
MOBILOANS, LLC;
PLAIN GREEN, LLC,
Respondents-Appellants.

Appeal from the United States District Court
for the Central District of California
Michael W. Fitzgerald, District Judge, Presiding

Argued and Submitted June 6, 2016
Pasadena, California

Filed January 20, 2017

Before: Ferdinand F. Fernandez, Johnnie B. Rawlinson, and Carlos T. Bea, Circuit Judges.

Opinion by Judge Rawlinson

SUMMARY*

Tribal Issues / Consumer Financial Protection Bureau

The panel affirmed the district court's decision compelling Tribal Lending Entities to comply with civil investigative demands issued by the Consumer Financial Protection Bureau.

The Tribal entities are for-profit lending companies created by the Chippewa Cree, Tunica Biloxi and Otoe Missouria Tribes (the "Tribes"). The Bureau initiated an investigation into the Tribal Lending Entities to determine whether small-dollar lenders violated federal consumer financial laws. The Tribes directed the Tribal Lending Entities not to respond to the investigative demands.

The panel held that the Consumer Financial Protection Act was a law of general applicability, and it applied to tribal businesses, like the Tribal Lending Entities involved in this appeal. The panel further held that Congress did not expressly exclude Tribes from the Bureau's enforcement authority. The panel also held that none of the three exceptions in *Donovan v. Coeur d'Alene Tribal Farms*, 751 F.2d 1113, 1115 (9th Cir. 1985), to the enforcement of generally applicable laws against Indian tribes applied to this case. The panel concluded that the district court properly held that the Bureau did not plainly lack

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

jurisdiction to issue investigative demands to the tribal corporate entities under the Act.

COUNSEL

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Kristin Bateman (argued) and Lawrence DeMille-Wagman, Attorneys; John R. Coleman, Assistant General Counsel; To-Quyen Truong, Deputy General Counsel; Meredith Fuchs, General Counsel; Consumer Financial Protection Bureau, Washington, D.C.; for Petitioner-Appellee.

OPINION

RAWLINSON, Circuit Judge:

Appellants Great Plains Lending, LLC, Mobiloans, LLC, and Plain Green, LLC (collectively, Tribal Lending Entities) appeal from the district court's decision compelling the Tribal Lending Entities to comply with civil investigative demands (investigative demands) issued by Appellee Consumer Financial Protection Bureau (Bureau). The Tribal Lending Entities maintain that they are not subject to the Bureau's jurisdiction because the entities were created and operated by several recognized tribes, and are thereby cloaked in tribal sovereign immunity. The Tribal Lending Entities assert that, because the

Consumer Financial Protection Act of 2010 (the Act)[1] defines the term "State" as including Native American tribes, the Tribal Lending Entities, as arms of sovereign tribes, are not required to comply with the investigative demands. We disagree with the argument made by the Tribal Lending Entities that the inclusion of tribes in the Act's definition of "State" impliedly excludes the Tribal Lending Entities from regulation under the Act, and therefore AFFIRM the decision of the district court enforcing the investigative demands.

I. BACKGROUND

This appeal stems from the creation of several Tribal Lending Entities as for-profit lending companies by the Chippewa Cree, Tunica Biloxi, and Otoe Missouria Tribes (collectively, Tribes). The Tribes established regulatory frameworks for consumer lending by these Tribal Lending Entities.

In addition to regulation by the Tribes, the Tribal Lending Entities came to the attention of the Bureau, which initiated an investigation into the Tribal Lending Entities by serving investigative demands. The Bureau explained that:

> The purpose of this investigation is to determine 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 Section 1036 of the Dodd-Frank Wall

[1] The Act is part of the Dodd-Frank Wall Street Reform and Consumer Protection Act. *See* Title X, Pub. L. No. 111-203, July 21, 2010, 124 Stat 1376.

> Street Reform and Consumer Protection Act, 12 U.S.C. § 5536, the Truth in Lending Act, 15 U.S.C. § 1601, the Electronic Funds Transfer Act, 15 U.S.C. § 1693, the Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6802-6809, or any other Federal consumer financial law. The purpose of this investigation is also to determine whether Bureau action to obtain legal or equitable relief would be in the public interest.

The Tribes directed the Tribal Lending Entities not to respond to the investigative demands, and informed the Bureau that it lacked jurisdiction to investigate lending entities created and operated by the Tribes. Rather, the Tribes offered to cooperate with the Bureau as co-regulators of consumer lending services.

When the offer of cooperative regulation was rejected by the Bureau, the Tribes petitioned the Bureau to set aside the investigative demands. The Bureau denied the Tribes' petition, and sought enforcement of the investigative demands in federal court. The district court then issued an order to show cause as to why the Tribal Lending Entities should not comply with the investigative demands.

Relying primarily on our ruling in *Donovan v. Coeur d'Alene Tribal Farms*, 751 F.2d 1113, 1115 (9th Cir. 1985), the district court concluded that the Act, as an act of general applicability, was enforceable against the Tribal Lending Entities. The district court rejected the Tribal Lending Entities' reliance on the holding in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000) that the statutory definition of the term "person" typically excludes "the sovereign." The dis-

trict court noted the unlikelihood that *Stevens* overruled subsequent Ninth Circuit authority restating the holding in *Coeur d'Alene*. Instead, the district court found it persuasive that "[t]he Stevens and *Coeur d'Alene* presumptions have . . . existed side by side for decades" without so much as a suggestion of "an inescapable conflict between them." The district court reasoned that the cases were indeed reconcilable because the Supreme Court had not definitively held that the holding in *Stevens* applied to actions brought by the federal government against "the sovereign."

The district court was also not swayed by the Tribes' argument that, because the Act treats the states and tribes as co-regulators, Congress did not intend to vest authority in the Bureau to regulate tribal entities in the absence of cooperation with tribal regulators. The district court emphasized that:

> textually, the [Act] is not silent with respect to Indian tribes. . . . The exclusion of statutes that are not silent with respect to Indian tribes is intended to avoid undermining the expressed intent of Congress. Congress does not express such intent by merely mentioning Indian tribes as sovereign regulators, while remaining silent on whether the unrelated provision at issue is also intended to regulate Indian tribes.
>
> Put simply, there is no provision of the [Act] that expressly or impliedly suggests that the defined terms "persons" and "States" are mutually exclusive. Accordingly, the provision

> creating the Bureau's authority to investigate "persons" is silent with respect to the tribes.

Finally, the district court referenced the lack of any convincing legislative history bearing on the issue.

Following the district court's denying the Tribal Lending Entities' petition to set aside the Bureau's investigative demands, the Tribal Lending Entities filed a timely notice of appeal.

II. STANDARD OF REVIEW

We review *de novo* whether the Bureau plainly lacked jurisdiction to issue the investigative demands. *See Nat'l Labor Relations Bd. v. Chapa De Indian Health Program Inc.*, 316 F.3d 995, 997-98 (9th Cir. 2003).[2]

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[2] Although the Tribal Lending Entities maintain that the "plainly lacking" jurisdictional standard is inapplicable, we have consistently applied this standard in assessing an agency's jurisdiction at the investigative stage. *See EEOC v. Fed. Express Corp.*, 558 F.3d 842, 848 (9th Cir. 2009), *as amended* ("Regarding whether Congress has granted the authority to investigate, we have emphasized the strictly limited role of the district court when an agency subpoena is attacked for lack of jurisdiction. As long as the evidence is relevant, material and there is some plausible ground for jurisdiction, or, to phrase it another way, *unless jurisdiction is plainly lacking, the court should enforce the subpoena.*") (citations and internal quotation marks omitted) (emphasis added); *see also Gen. Atomics v. U.S. Nuclear Regulatory Comm'n*, 75 F.3d 536, 541 (9th Cir. 1996); *Marshall v. Burlington N., Inc.*, 595 F.2d 511, 513 (9th Cir. 1979), *as amended*.

III. DISCUSSION

A. The Bureau's Jurisdiction to Investigate the Tribal Lending Entities' Activities

Consistent with their argument before the district court, the Tribal Lending Entities contend on appeal that the Act does not confer authority upon the Bureau to investigate tribal entities. The Tribal Lending Entities repeat their assertion that the Act limits the Bureau's authority to "persons," which excludes sovereign entities. The Tribal Lending Entities add that Congress did not intend for the definition of "person" to encompass tribal entities because the Act explicitly includes tribes in the definition of "State" in 12 U.S.C. § 5481(27).

Before we address the merits of the Tribal Lending Entities' arguments, a delineation of the Act's statutory framework is in order. Pursuant to the expressed statutory purpose of the Act:

> The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.

12 U.S.C. § 5511(a). The "primary functions" of the Bureau include "collecting, investigating, and responding to consumer complaints," and, to accomplish its objectives, "[t]he Bureau is authorized to exercise its authorities under Federal consumer financial law" to ensure that "consumers are protected from unfair, deceptive, or abusive acts and practices

and from discrimination." 12 U.S.C. § 5511(b), (c)(2). In terms of its enforcement authority,

> 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(c) (emphasis added). 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).

The Act also addresses the role "States" may play in supporting the goals of the Act. The Act defines "State" to include "any State, territory, or possession of the United States" including "any federally recognized Indian tribe, as defined by the Secretary of the Interior . . . ," 12 U.S.C. § 5481(27), and compels the Board to "coordinate with . . . State regulators, as appropriate, to promote consistent regulatory treatment of consumer financial and investment products

and services." 12 U.S.C. § 5495. Under the Act, States are also authorized to "bring a civil action" to enforce provisions of the Act. The only entities excluded from the enforcement authority of the state are national banks and federal savings associations. 12 U.S.C. § 5552(a)(2)(A). No entities are expressly excluded from the enforcement authority of the Bureau. *See* 12 U.S.C. § 5481(6) (defining "covered person" without exception).

Because the Act by its terms applies broadly and without exception, it is properly characterized as a law of general applicability. *See Federal Power Commission v. Tuscarora Indian Nation*, 80 S.Ct. 543, 553 (1960). We have consistently held that similar laws of general applicability govern tribal entities unless Congress has explicitly provided otherwise. Most notably, in *Coeur d'Alene*, we considered whether the Occupational Safety and Health Act (OSHA) applied to tribal entities. *See* 751 F.2d at 1114-15. We observed that OSHA's definition of "employer" as an "organized group of persons engaged in a business affecting commerce who has employees" encompassed a tribal farm operating as a commercial enterprise. *Id.* at 1115 n.1 (alteration omitted). We recognized that "Congress expressly excluded only the United States or any State or any political subdivision of a State from the broad definition of employer in the Act." *Id.* (citation and internal quotation marks omitted). We explained that:

> No one doubts that the Tribe has the inherent sovereign right to regulate the health and safety of workers in tribal enterprises. But neither is there any doubt that Congress has the power to modify or extinguish that right. Unlike the states, Indian tribes possess only a

> limited sovereignty that is subject to complete defeasance. . . .

Id. at 1115 (citations omitted). We emphasized that "[m]any of our decisions have upheld the application of general federal laws to Indian tribes; not one has held that an otherwise applicable statute should be interpreted to exclude Indians. . . ." *Id.* (citations omitted). As a result, we eschewed "the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them. . . ." *Id.* at 1116. At the same time, we recognized the following three exceptions to enforcement of generally applicable laws against tribes:

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them 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 by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations.

Id. (citation, alterations, and internal quotation marks omitted). "In any of these three situations, Congress must *expressly* apply a statute to Indians before we will hold that it reaches them." *Id.* (emphasis in the original).

We have consistently applied *Coeur d'Alene* and its progeny to hold that generally applicable laws may be enforced against tribal enterprises. *See Solis v. Matheson*, 563 F.3d 425, 432 (9th Cir. 2009) (observing that "[o]ther cases have similarly affirmed the application of OSHA, the Employee Retirement In-

come Security Act (ERISA), and the Americans with Disabilities Act (ADA) to tribal businesses") (citations omitted). In keeping with our precedent, we similarly conclude that the Consumer Financial Protection Act, a law of general applicability, applies to tribal businesses like the Tribal Lending Entities involved in this appeal. *See Chapa De*, 316 F.3d at 1002.

Relying on *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Tribal Lending Entities contend that our precedent departs from the United States Supreme Court's holding that the statutory term "person" generally excludes sovereign entities, such as states and Native American tribes. In *Stevens*, the Supreme Court considered "whether a private individual may bring suit in federal court on behalf of the United States against a State (or state agency) under the False Claims Act." *Id.* at 768 (citation omitted). The Supreme Court reasoned that, in considering application of the False Claims Act to "any person," the Court was required to take into account its "longstanding interpretive presumption that 'person' does not include the sovereign." *Id.* at 780 (citations omitted). The Supreme Court added that "[t]he presumption is particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before." *Id.* at 780-81 (citations and internal quotation marks omitted). However, "[t]he presumption is, of course, not a hard and fast rule of exclusion, but . . . may be disregarded only upon some affirmative showing of statutory intent to the contrary." *Id.* at 781 (citations and internal quotation marks omitted). The Supreme Court observed that, in "another section of

the [False Claims Act] . . . which enables the Attorney General to issue civil investigative demands," the statute includes a provision "expressly defining 'person' for purposes of this section to include States . . ." *Id.* at 783-84 (citations and footnote reference omitted). Additionally, the False Claims Act imposes punitive damages "which would be inconsistent with state *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities. . . ." *Id.* at 784-85 (citation and footnote reference omitted); *see also Will v. Michigan Department of State Police*, 491 U.S. 58, 67-68 (1989) (holding that a state is not a "person" under 42 U.S.C. § 1983 because "[i]t is an established principle of jurisprudence that the sovereign cannot be sued in its own courts without its consent. . . .") (citation and internal quotation marks omitted).

At first blush, the Tribal Lending Entities' reliance on *Stevens*, a decision predating our precedent focusing on the general applicability of the law in question, has surface appeal. However, the "equivalence" provision in the Consumer Financial Protection Act only provides definitional guidance for later references in the statute only to the term "State." This "equivalence" provision simply clarifies that the term "State" includes "any federally recognized Indian tribe, as defined by the Secretary of the Interior . . ." 12 U.S.C. § 5481(27). It does not expressly provide that tribes are excluded from the definition of "person" or from the Bureau's enforcement authority under the Act. In sum, the Tribal Lending Entities' interpretation of the equivalence provision reads far too much into a simple definition. We are not persuaded at this stage of the litigation that we should intervene to nullify the Bureau's issuance of investi-

gative demands specifically provided for in the Act on the basis that jurisdiction is "plainly lacking." *Chapa De*, 316 F.3d at 1002.[3]

Furthermore, none of the three *Coeur d'Alene* exceptions to the enforcement of generally applicable laws against Indian tribes apply in this case. *See* 751 F.2d at 1116. It is undisputed that the Tribal Lending Entities are engaged in the business activity of small-dollar lending over the Internet, reaching customers who are not members of the Tribes, or indeed, have any relation to the Tribes other than as debtors to the Tribal Lending Entities. Thus, the first *Coeur d'Alene* exception—whether "the law touches exclusive rights of self-governance in purely intramural matters—does not apply. *Coeur d'Alene*, 751 F.2d at 1116 (internal quotation marks omitted). Unlike the activities of the Housing Authority at issue in *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (9th Cir. 2001), the small-dollar lending activities in this case do not touch upon purely intramural matters involving self-governance.[4] The

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[3] The Bureau maintains in the alternative that the investigative demands are enforceable because it is unclear if the Tribal Lending Entities are actually arms of the tribe. We conclude that, at this preliminary stage, the record is sufficient to demonstrate that the Tribes have an interest in challenging the investigative demands based on their creation and operation of the Tribal Lending Entities. *See Cook v. AVI Casino, Enter. Inc.*, 548 F.3d 718, 726 (9th Cir. 2008) (concluding that a business was an arm of the tribe because it was created "pursuant to a tribal ordinance . . . and the tribal corporation is wholly owned and managed by the Tribe").

[4] In *Karuk Tribe Housing Authority*, 260 F.3d at 1073-74, we applied the *Coeur d'Alene* framework to the Karuk Tribe Housing Authority, a governmental arm of the Karuk Tribe. A member of the Karuk Tribe filed a complaint with the EEOC,

Tribal Lending Entities do not argue that the second exception—covering situations in which the application of a statute would abrogate Indian treaty rights—applies in this case, so we do not address it here.

With respect to the third exception, the Tribal Lending Entities' assertion that the Act's legislative history supports a finding of lack of jurisdiction is unpersuasive. In considering the *Coeur d'Alene* exception concerning legislative history, we have explained that for the exception to apply, "there must be proof that Congress intended the statute not to apply to Indians on their reservations." *Chapa De*, 316 F.3d at 1000-01 (citation, alteration, and inter-

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asserting that his employment with the Housing Authority was terminated in violation of the Age Discrimination in Employment Act. *See id.* at 1074. The EEOC opened an investigation and issued an administrative subpoena seeking employment records from the Karuk Tribe. The Tribe refused to comply, disputing the EEOC's jurisdiction over Indian tribes. *See id.* at 1074-76. The EEOC petitioned for enforcement of the subpoena, and the district court granted the petition. *See id.* at 1075. On appeal, we applied the *Coeur d'Alene* framework, focusing on the first exception in *Coeur d'Alene*—whether "the law touches exclusive rights of self-governance in purely intramural matters." *Id.* at 1079 (citation omitted). We noted that the Housing Authority functioned as an arm of the Karuk Tribe and provided a governmental service—ensuring adequate housing for members of the Karuk Tribe. *See id.* at 1080. Moreover, the dispute at issue was "purely intramural," because it was between a member of the Karuk Tribe, and the tribe itself. *Id.* at 1081. We therefore reversed the district court's decision enforcing the subpoena. *See id.* at 1083. We considered it relevant that the Housing Authority "is not simply a business entity that happens to be run by a tribe or its members" and that the dispute "d[id] not concern non-Karuks or non-Indians as employers, employees, customers, or anything else." *Id.* at 1080-81.

nal quotation marks omitted). We rejected the tribe's reliance on the legislative history of the National Labor Relations Act (NLRA) because that history failed to reflect that "Congress intended the NLRA not to apply to Indian tribes" or to the particular activities of the tribal entity at issue. *Id.* at 1001. Ultimately, we determined that despite the existence of one out-of-circuit case offering some support for the tribe's position, the tribe nevertheless failed to demonstrate that jurisdiction was "*plainly lacking*." *Id.* at 1002 (emphasis in the original).

Here, the Tribal Lending Entities maintain that Congress' decision to include tribes within the definition of "State" and not the definition of "person" reflects an intent to exclude tribes from the Bureau's enforcement purview. *See* H.R. Rep. No. 111-370, 2009 WL 4724255. However, these attenuated references do not demonstrate that jurisdiction is "plainly lacking" or that "Congress intended the [Act] not to apply to Indian tribes, or to [the tribes'] activities." *Chapa De*, 316 F.3d at 1001-02. At best, the referenced report reflects only the addition of tribes to the definition of "State," without any expressed intent to cloak the tribes with immunity from enforcement of the Act as a generally applicable congressional enactment. *See* H.R. Rep. No. 111-370, 2009 WL 4724255, at *36. In addition, the lack of immunity is particularly evident in this case because "Indian tribes do not . . . enjoy sovereign immunity from suits brought by the federal government." *Karuk Tribe*, 260 F.3d at 1075 (citation omitted).

The Tribal Lending Entities also failed to persuasively establish that Congress intended to exclude tribes from enforcement of the Act by virtue of the promotion of cooperation between the States and the

federal government. The statutes relied upon by the Tribal Lending Entities do not reflect mutual exclusivity of the Bureau's investigative authority and the States' potential co-regulator status. For example, 12 U.S.C. § 5495 instructs the Bureau to coordinate with "State regulators, *as appropriate* . . ." (emphasis added). Similarly, in support of the Act's promotion of "consistent regulatory treatment," *id.*, 12 U.S.C. § 5512(c)(6)(C)(i) provides that "a State regulator . . . having jurisdiction over a covered person . . . shall have access to any report of examination made by the Bureau with respect to such person . . ." These coordination provisions of the Act in no way restrict the Bureau's jurisdiction to investigate covered entities simply because the States have a measure of co-regulatory status. Indeed, the Act limits the extent of the States' co-regulatory authority. By way of example, 12 U.S.C. § 5552(b)(1)(A) forbids a State from initiating independent court proceedings against a covered entity. Instead, the State must consult with the Bureau and "timely provide a copy of the complete complaint to be filed and written notice describing such action or proceeding to the Bureau . . ." Upon receiving the requisite notice, the Bureau may "intervene in the action as a party," "remove the action to the appropriate United States district court," and "be heard on all matters arising in the action . . ." 12 U.S.C. § 5552(b)(2)(B). Moreover, with absolutely no mention of States or tribes, the Act limits investigative powers, such as issuance of investigative demands and subpoenas, to the Bureau. *See* 12 U.S.C. § 5562(b)-(c).[5]

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[5] Nothing we say in this opinion should be construed as a ruling addressing whatsoever any authority the Bureau may or

The Tribal Lending Entities also argue that limitations upon the Bureau's enforcement authority vis-à-vis the States under 12 U.S.C. § 5517 demonstrate that Congress did not intend to include States or tribal entities within the definition of "person." However, § 5517 does not bolster the Tribal Lending Entities' argument, as it merely reflects that when Congress intended to limit the Bureau's authority, it did so explicitly. With great specificity, 12 U.S.C. § 5517 delineates that the Bureau lacks authority over merchants and retailers of nonfinancial services and goods, *see id.*, § 5517(a); real estate brokerage activities, *see id.*, § 5517(b); modular home retailers and manufactured home retailers, *see id.*, § 5517(c); tax preparers and accountants, *see id.*, § 5517(d); the practice of law, *see id.*, § 5517(e); and persons regulated by state insurance and securities commissions. *See id.*, § 5517(f), (h). Section 5517 also excludes persons regulated by the Commodities Futures Trading Commission and the Farm Credit Administration. *See id.*, § 5517(j)-(k). Notably absent from these extensive exclusions is any mention of tribal corporate entities. We are persuaded by these provisions that, had Congress intended to exclude tribal entities from the Bureau's enforcement purview, it would have done so explicitly as it did with other entities.

Davis v. Pringle, 268 U.S. 315 (1925) does not compel a contrary conclusion. In that case, the Supreme Court rejected the United States' priority claim under the Bankruptcy Act then in effect. *See id.* at 318-19. The Supreme Court stated that the United

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may not have to regulate or to direct subpoenas to the State or to State enterprises. That issue is not before us.

States was not entitled to priority for its bankruptcy claim because Congress could not have "intended to smuggle in a general preference by muffled words at the end" of a statutory provision. *Id.* at 318. The Supreme Court noted the "conspicuous mention of the United States . . . at the beginning of the section and the grant of a limited priority[.]" *Id.* The Supreme Court also observed that "[e]lsewhere in cases of possible doubt when the Act means the United States it says the United States. . . ." *Id.* The Supreme Court did not confront or address the exclusion by implication argument raised by the Tribal Lending Entities in this appeal. Rather, in *Davis*, the Supreme Court construed a statute that specifically mentioned the United States relative to the substantive provisions of the bankruptcy priority framework. *See id.* That circumstance is vastly different from relying on the Act's definitional provisions to cloak tribal corporate entities with sovereign immunity merely because tribes are mentioned in the Act's definition of "States." In any event, the general statutory interpretation approach expounded in *Davis* does not in any way undermine our binding precedent that laws of general applicability may be enforced against the tribes unless Congress expressly provides otherwise. *See Coeur d'Alene*, 751 F.2d at 1115-16.

Finally, relying on *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) and *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767-68 (1985), the Tribal Lending Entities assert that any ambiguity in the Act must be resolved in their favor. The Supreme Court has recognized that, when confronted with two plausible statutory constructions, "our choice be-

tween them must be dictated by a principle deeply rooted in this 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*, 502 U.S. at 269 (citation and alteration omitted). Nevertheless, we have repudiated this presumption in the face of our governing precedent concluding that to apply the presumption to laws of general applicability "would be effectively to overrule, [*Coeur d'Alene*], which, of course, this panel cannot do." *Chapa De*, 316 F.3d at 999 (citation omitted).

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. *See id.* at 1002. Although the Tribal Lending Entities make some appealing arguments, none of the arguments suffices to breach or evade the barrier to their success provided by the *Coeur d'Alene* revetment.

IV. CONCLUSION

We have consistently held in our post-*Stevens* precedent that generally applicable laws apply to Native American tribes unless Congress expressly provides otherwise. In the Consumer Financial Protection Act, a generally applicable law, Congress did not expressly exclude tribes from the Bureau's enforcement authority. Although the Act defines "State" to include Native American tribes, with States occupying limited co-regulatory roles, this wording falls far short of demonstrating that the Bureau plainly lacks jurisdiction to issue the investigative demands challenged in this case, or that Congress intended to ex-

clude Native American tribes from the Act's enforcement provisions. Neither have the Tribes offered any legislative history compelling a contrary conclusion regarding congressional intent. At this stage of the proceedings, we affirm the district court's order enforcing the investigative demands against the Tribal Lending Entities.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.
CV-14-2090-MWF-(PLAx)

Consumer Financial Protection Bureau,

v.

Great Plains Lending, LLC, et al.

Date: May 27, 2014

CIVIL MINUTES – GENERAL

Present:

The Honorable MICHAEL W. FITZGERALD,
U.S. District Judge

Deputy Clerk: Rita Sanchez

Court Reporter: Not Reported

Attorneys Present for Plaintiff: None Present

Attorneys Present for Defendant: None Present

Proceedings (In Chambers):
ORDER DISCHARGING ORDER TO SHOW CAUSE [6] AND GRANTING PETITION TO ENFORCE CIVIL INVESTIGATIVE DEMANDS [1]

Before the Court are the Order to Show Cause Why Respondents Should Not Fully Comply with Petitioner's Civil Investigative Demands, issued by the Court on March 20, 2014 (Docket No. 6), and the Petition to Enforce Civil Investigative Demands (the "Petition") filed by Petitioner Consumer Financial Protection Bureau (the "Bureau") on March 19, 2014. (Docket No. 1). Respondents Great Plains Lending, LLC, MobiLoans, LLC, and Plain Green, LLC, filed an Opposition to the Petition on April 11, 2014. (Docket No. 14). The Bureau filed a Reply on April 25, 2014. (Docket No. 22). With the Court's permission, Respondents filed a Surreply on May 6, 2014. (Docket No. 25).

The Court has read and considered the papers, and a hearing was held on May 12, 2014. For the reasons set forth below, the Petition is **GRANTED**.

This Petition involves interpretation of the word "person" in the Consumer Financial Protection Act (the "CFPA"), Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, codified at 12 U.S.C. §§ 5481-5603. The Court is honored to have these Tribes, as sovereigns, appear in this case, as it would be honored to have the State of Wisconsin or the Federal Republic of Germany or the Holy See. The issue raised by the Petition is difficult. It involves the need to respect both Supreme Court and Ninth Circuit precedent. Ultimately, it seems to the Court that the tribal owners of Respondents are insulted that, exercising his discretion, the Director has inappropriately declined to resolve issues in the underlying investigation on a government-to-government basis. Given that the CFPA contemplates a certain amount of cooperation between the

Bureau, the states, and the tribes, that attitude is understandable, but it falls within the ambit of administrative discretion, not statutory mandate. If the Court has erred in its statutory interpretation, then the Ninth Circuit or the Supreme Court can correct the error.

I. BACKGROUND

The Bureau issued civil investigative demands ("CIDs") to Respondents and other online lenders offering small-dollar loan products, including payday loans, installment loans, and lines of credit, to nationwide consumers. The CIDs sought information and documents as part of its inquiry into whether these online lenders have engaged in unlawful acts or practices related to their loan products. (CIDs, Declaration of Meredith B. Osborn ("Osborn Decl.") Ex. A (Docket No. 3)). Respondents refused to respond to the CIDs, prompting the Bureau to file the Petition to Enforce Civil Investigative Demands in this Court. (Docket No. 1). Respondents claim that they are not subject to investigation under the CFPA, because only "persons" are subject to investigation and Indian tribes and arms of the tribes are not "persons" within the meaning of the CFPA's investigative authority provision, 12 U.S.C. § 5562.

Respondents are three limited liability companies established and controlled by three Indian tribes. Respondent Great Plains Lending, LLC is wholly owned and operated by the Otoe-Missouria Tribe. Respondent MobiLoans, LLC is wholly owned and operated by the Tunico-Biloxi Tribe of Louisiana. Respondent Plain Green, LLC is wholly owned and operated by the Chippewa Cree Tribe of Rocky Boy's Reservation, Montana. Each Respondent was estab-

lished by its respective tribe for the purpose of advancing tribal economic development. Each Respondent is subject to the plenary control of tribe members. Each provides financial products and services to a broad consumer base that extends beyond tribal Indians. (*See* Declaration of Richard Morsette (Docket Nos. 14-1, 14-2); Declaration of Marshall Pierite (Docket Nos. 14-3, 14-4); Declaration of John Shotton (Docket Nos. 14-5, 14-6)).

On July 12, 2012, Respondents filed an administrative petition under 12 C.F.R. § 1080.6(e) to set aside the CIDs, arguing that the Bureau lacked statutory authority to issue the CIDs, and that the CIDs failed to provide adequate notice of their purpose and scope and were overbroad and unduly burdensome. The Bureau issued an order denying Respondents' administrative petition on September 26, 2013.

II. DISCUSSION

A. Jurisdiction and Venue

The Court has jurisdiction to enforce the CIDs under 12 U.S.C. § 5562(e), which allows the Bureau to bring an enforcement suit in "any judicial district in which th[e] person resides, is found, or transacts business." Venue is proper because each Respondent transacts business in this District.

B. Legal Standard

An administrative agency may not conduct an investigation absent specific authority from Congress. The agency "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986). The scope of judicial review in an administrative subpoena enforcement

action is "quite narrow." *United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1113 (9th Cir. 2012) (quoting *EEOC v. Children's Hosp. Med. Ctr. of N. Cal.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc)) (internal quotation marks omitted). The CIDs must be enforced unless jurisdiction is "plainly lacking." *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001).

C. Interpretation of the CFPA

We start with the general rule in the Ninth Circuit that federal laws of general applicability are presumed to apply with equal force to Indian tribes. The rule has its roots in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 80 S. Ct. 543, 4 L. Ed. 2d 584 (1960), in which the Supreme Court held that Indian-owned lands were subject to taking upon the payment of just compensation. *Id.* at 123. The Court stated, in what Respondents and some commentators describe as dictum, that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." *Id.* at 116.

Whether or not this statement in *Tuscarora* was dictum, the Ninth Circuit adopted the principle wholesale in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), in holding that a commercial farming enterprise wholly owned and operated by the Coeur d'Alene Indian Tribe could be subject to the regulations in the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. § 651 *et seq*. The Act applied to any "employer," defined as "a person engaged in a business affecting commerce who has employees, but does not include the United

States (not including the United States Postal Service) or any State or political subdivision of a State." 29 U.S.C. § 652(5). A "person" was defined as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." *Id.* § 652(4). The Ninth Circuit held that the Act was generally applicable, and it therefore applied with equal force to Indian tribes, unless the tribes were specifically excluded. *Coeur d'Alene*, 751 F.2d at 1115-16. "In short, we have not adopted the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them. Nor do we do so here." *Id.* at 1116.

The *Coeur d'Alene* court acknowledged three exceptions to its general principle:

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them 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 "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . ." In any of these three situations, Congress must expressly apply a statute to Indians before we will hold that it reaches them.

Id. (alteration in original) (citation omitted) (quoting *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980)).

Respondents argue that *Coeur d'Alene* and its progeny were wrongly decided based on an incorrect

interpretation of *Tuscarora*, but, as Respondents acknowledge, this Court is not in a position to reconsider the Ninth Circuit's interpretation of law.

Respondents argue instead that more recent Supreme Court authority overrides the *Coeur d'Alene* rule. Specifically, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000), the Supreme Court considered whether the False Claims Act ("FCA") authorized a private individual to bring suit in federal court on behalf of the United States against a state or state agency. The FCA subjects to liability "any person" who performs one of the prohibited acts set forth in 31 U.S.C. § 3729. "Person" is not further defined. *See Stevens*, 529 U.S. at 786 (noting that the FCA contains no definition of "persons").

The Court began its analysis with the "longstanding interpretive presumption that 'person' does not include the sovereign." *Id.* at 780 (citing *United States v. Cooper Corp.*, 312 U.S. 600, 604, 61 S. Ct. 742, 85 L. Ed. 1071 (1941); *United States v. Mine Workers*, 330 U.S. 258, 275, 67 S. Ct. 677, 91 L. Ed. 884 (1947)).

Against that background, the Court analyzed the history and application of the FCA to determine whether the FCA contained "some affirmative showing of statutory intent" to authorize suits against the states by private parties. *Id.* at 781. The Court reasoned that the FCA was initially enacted in response to frauds by private contractors, not the states themselves, and the original iteration of the FCA contained no indication that states were intended to be included. *Id.* at 781-82. Future amendments to the

FCA broadened its scope to include members of the armed forces, but did not suggest expansion to the states. *Id.* at 782-83. The FCA authorized penalties, which are not generally imposed on governmental entities. *Id.* at 784-85. A sister statute, the Program Fraud Civil Remedies Act of 1986, excluded the states. *Id.* at 786. And perhaps most tellingly, another section of the FCA contains a definition of "person," "for purposes of this section," to include the states. *Id.* at 783-84 (citing 31 U.S.C. § 3733(*l*)(4)). Therefore, the Court reasoned, Congress intended to exclude the states in the statute's other uses of "person." *Id.*

Nevertheless, Ninth Circuit decisions since *Stevens* have repeated the general *Coeur d'Alene* rule without any indication that the rule has been called into question by Stevens. In *Snyder v. Navajo Nation*, 382 F.3d 892 (9th Cir. 2004), the Ninth Circuit held that the Fair Labor Standards Act ("FLSA") could not be applied against the Navajo Nation Division of Public Safety in a suit brought by law enforcement officers. *Id.* at 894. The Circuit stated that while generally applicable statutes typically apply to Indian tribes, the *Coeur d'Alene* exemption protecting the tribes' right of self-governance in purely intramural matters prevented the FLSA's general terms from being interpreted to include the officers' suit against the Navajo Nation. *Id.* at 895-96.

In *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003), the Circuit considered whether the National Labor Relations Act ("NLRA") applied to a financially independent, nonprofit tribal organization, which contracted to provide services to the tribe as well as others, and operated outside a reservation. *Id.* at 998, 1000. The Circuit again

stated and applied the general rule, and concluded that the statute did not fall under any of the *Coeur d'Alene* exceptions, since application did not impermissibly touch on intramural matters related to self-governance. *Id.* at 1000.

Respondents argue that application of the *Stevens* presumption in this case would be consistent with Ninth Circuit precedent, for two reasons:

First, *Coeur d'Alene* and *Tuscarora* stated a general rule of statutory interpretation, which gives way to the more specific rule stated in *Stevens*. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071, 182 L. Ed. 2d 967 (2012) (holding that a specific rule trumps a general rule to avoid being "swallowed by the general rule"). Under Respondents' argument, the "general" rule of *Coeur d'Alene* applies to all statutes of general applicability, while the "specific" rule applies only those statutes using the term "person." The so-called specific rule is actually extraordinarily broad, as few terms are more general than "person"; the term is nearly synonymous with general applicability. In fact, most cases cited by each party interpret statutes containing the term "person," defined in very broad terms to include most legal entities.

Second, according to Respondents, the Ninth Circuit has never applied *Tuscarora* to a statute containing the word "person," and thus has never ruled in conflict with the specific rule in *Stevens*. Respondents are simply incorrect. In *Coeur d'Alene*, the Circuit interpreted a statutory provision applying to any "employer," and "employer" was "a ***person*** engaged in a business affecting commerce who has employees, but does not include the United States

(not including the United States Postal Service) or any State or political subdivision of a State." 29 U.S.C. § 652(5) (emphasis added); *see Coeur d'Alene*, 751 F.2d at 1115; *see also U.S. Dep't of Labor v. Occupational Safety & Health Rev. Comm'n*, 935 F.2d 182, 183-84 (9th Cir. 1991) (interpreting the same section). In *Karuk Tribe*, 260 F.3d at 1078, the Circuit examined the Age Discrimination in Employment Act ("ADEA"), which applies to any "employer," defined as "a ***person*** engaged in an industry affecting commerce" who meets certain other qualifications. 29 U.S.C. § 630(b) (emphasis added).

Respondents perhaps wish to suggest a distinction between the regulatory provision itself in the CFPA, which applies to any "person," and the regulatory provision in the aforementioned statutes, which applies to any "employer." But there appears to be no principled basis to limit *Stevens* to statutes using the term "person" in a regulatory provision, rather than as part of a definition of a term in a regulatory provision.

A ruling that *Stevens* trumps the longstanding *Coeur d'Alene* presumption would, therefore, entail overruling decades of Ninth Circuit precedent. It is, of course, proper for this Court to hold that a Supreme Court decision has overruled prior Ninth Circuit law. *Miller v. Gammie*, 335 F.3d 889, 893, 900 (9th Cir. 2003) (en banc) (holding that prior Ninth Circuit precedent providing absolute immunity to social workers was "clearly irreconcilable" with intervening Supreme Court authority limiting immunity under certain circumstances); *see* C. Goelz et al., *California Practice Guide: Ninth Circuit Civil Appellate Practice* ("*Ninth Circuit Rutter Guide*") § 8:180.2a

(The Rutter Group rev. ed. 2014) ("The mode of analysis is controlling even though the issue decided by the Supreme Court is not identical to the issue before the Ninth Circuit. Where the reasoning or theory of prior circuit authority is 'clearly irreconcilable' with the reasoning or theory of intervening Supreme Court authority, a three-judge panel should consider itself bound by the later and controlling authority and reject the prior circuit opinion as having been effectively overruled." (citing *Miller*)). However, *Stevens* is not a new case. The Ninth Circuit has stated and applied the *Coeur d'Alene* rule in the years since *Stevens* was decided. Respondents' argument invites the Court to rule that a *prior* Supreme Court decision overrules *subsequent* Ninth Circuit authority.

Respondents argue that the Ninth Circuit has not applied *Coeur d'Alene* in contravention of *Stevens*, and thus a ruling in their favor would not imply that the recent cases were wrongly decided. In a technical sense, Respondents may be correct that both *Snyder* and *Chapa De* would have come out the same way even if the Ninth Circuit had applied the *Stevens* presumption in the way that Respondents suggest, *i.e.*, to conclude that "person" does not include Indian tribes. *Snyder* ruled in favor of an Indian tribe under an exception to the *Coeur d'Alene* presumption for purely intramural activities. *Snyder*, 382 F.3d at 895-96. Therefore, the *Stevens* presumption, as argued by Respondents, would have been another basis for the tribe's position.

Chapa De is a more difficult case to distinguish, because the Circuit held against the tribe without giving it the benefit of the *Stevens* presumption. Respondents argue that the *Stevens* presumption could not have applied in *Chapa De*, because the tribal

health care organization was not an "arm of the tribe" that would be presumptively excluded from the term "person." The organization was a non-profit California corporation operating on non-Indian lands, employing many non-Indians, and serving many non-Indian patients. *Chapa De*, 316 F.3d at 1000. An "arm of the tribe" is an entity that the tribe owns and controls, which is operated for the benefit of the tribe. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1046-47 (9th Cir. 2006) (holding that a casino created and operated to promote "tribal economic development, self-sufficiency, and strong tribal governments" under the Indian Gaming Regulatory Act and fully under the tribe's ownership and control was an "arm of the tribe"). It is not clear that the health care organization at issue in *Chapa De* was not an arm of the tribe, given that it was established for the purpose of providing health care to tribe members and was exclusively governed by tribal Indians. *Chapa De*, 464 F.3d at 999.

Even assuming that Respondents are correct that a ruling in their favor would not necessarily call into question the outcomes of these two post-*Stevens* Ninth Circuit cases, it nevertheless would require the Court to hold that the analysis in each case was critically deficient. Both the *Snyder* court and the *Chapa De* court specifically held that the statutes at issue, each of which used the term "person" to describe the subject of its regulation, were statutes of general applicability presumptively applicable to Indian tribes. *Snyder*, 382 F.3d at 895; *Chapa De*, 316 F.3d at 998. Respondents ask this Court to hold that these Ninth Circuit panels were incorrect on that point of law. *Accord Chapa De*, 316 F.3d at 998-99 ("Even if the NLRA is a statute of general applica-

tion, Chapa-De argues that it still would not apply to Indian tribes or to their tribal organizations because the statute does not expressly state that it does. . . . To accept Chapa-De's position would be effectively to overrule *Coeur d'Alene*, which, of course, this panel cannot do.").

Generally, "[w]here a panel confronts an issue germane to eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that decision becomes the law of the circuit (i.e., it is precedential) regardless of whether the decision was 'necessary in some strict logical sense.'" *Ninth Circuit Rutter Guide* § 8:176 (quoting *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc)). Since neither *Snyder* nor *Chapa De* considered the argument Respondents here are making, it would likely be proper for a three-judge panel of the Ninth Circuit to ignore these precedents and adopt Respondents' interpretation of *Stevens*. *See Ninth Circuit Rutter Guide* § 8:176 ("[A] prior decision is not controlling on issues that were not presented to the panel." (citing *United States v. Vroman*, 975 F.2d 669, 672 (9th Cir. 1992))). It may, then, be proper for the Court to adopt Respondents' argument notwithstanding contrary Ninth Circuit authority, since the parties in *Snyder* and *Chapa De* did not present the panels with this argument. Nevertheless, the Court hesitates to overrule Ninth Circuit precedent because of a possible tension with reasoning in a Supreme Court case decided *prior* to the Ninth Circuit cases.

There is one final reason to avoid ruling in contravention of *Coeur d'Alene* and its progeny based on the *Stevens* decision. The *Stevens* Court stated that it applied a longstanding, uncontroversial principle

of statutory construction; it did not set up a new interpretive rule. *See Stevens*, 529 U.S. at 780 (citing *Cooper Corp.*, 312 U.S. at 604 ("Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it."); *Mine Workers*, 330 U.S. at 275 ("In common usage that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so.")); *see also Guarantee Title & Trust Co. v. Title Guar. & Sur. Co.*, 224 U.S. 152, 32 S. Ct. 457, 56 L. Ed. 706 (1912) (stating common law rule that the enacting sovereign is not bound by general language of a statute that could be read to include it). The *Stevens* and *Coeur d'Alene* presumptions have thus existed side by side for decades; Respondents here appear to be the first to raise what they suggest is an inescapable conflict between them.

At the hearing, counsel for Respondents raised a nuanced argument against application of the *Coeur d'Alene* presumption to the CFPA. In all of the Ninth Circuit cases presented by the parties applying the *Coeur d'Alene* presumption, the statutes under consideration were silent as to their applicability to Indian tribes, but were not silent regarding states. *See Coeur D'Alene*, 751 F.2d at 1115 (OSHA's definition of employer specifically excludes the states, 29 U.S.C. 652(5)); *Karuk Tribe*, 260 F.3d at 1078 (ADEA's definition of employer specifically includes the states, 29 U.S.C. § 630(b)); *Chapa De*, 316 F.3d at 998 (NLRA's definition of employer specifically excludes the states, 29 U.S.C. § 152(2)); *Snyder*, 382 F.3d at 895 (FLSA's definition of employer specifically includes "public agenc[ies]").

None of these statutes purported to treat Indian tribes and states the same; rather, each delineated

its applicability to the states while remaining silent as to the tribes. None contain what Respondents describe as the CFPA's "equivalence" provision, 12 U.S.C. § 5841(27): "The term 'State' means any State, territory, or possession of the United States, . . . or any federally recognized Indian tribe, as defined by the Secretary of the Interior under section 479a-1(a) of Title 25." Respondents suggest that grouping the states and the tribes together in the same term shows congressional intent to treat the two sovereigns the same for all purposes.

Respondents argue that Congress's decision to specify the statutes' applicability to states while remaining silent as to Indian tribes fueled the Ninth Circuit's application of the *Coeur d'Alene* presumption, because the statement regarding the states underscores the silence regarding the tribes. Respondents suggest, essentially, that *Coeur d'Alene* and the cases following it are impliedly limited to statutes that are silent as to Indian tribes, but not silent as to states.

It is not clear that the common canons of statutory construction support Respondents' argument. The canon of *expressio unius est exclusio alterius* suggests that when Congress has expressed its intention with regard to some members of a group, then it is assumed to have intentionally excluded the other members of an associated group or series. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, 123 S. Ct. 748, 154 L. Ed. 2d 653 (2003) (clarifying that the negative implication only arises between "things that should be understood to go hand in hand"). If the states and tribes are understood as members of a group associated by their respective sovereignty, the specific *inclusion* of the states would entail the *exclu-*

sion of the tribes, and vice versa. The rule in *Coeur d'Alene* is only a rule of *inclusion* of tribes, regardless of whether the states are expressly included or expressly excluded.

While the present case is indeed distinct from the prior cases because the CFPA's investigatory provision is silent with respect to both states and tribes, the distinction is without a difference. Furthermore, Respondents invite the Court to add an implied layer of reasoning to prior Ninth Circuit authority that the Circuit has made no indication of supporting. Without any guidance from the higher court that *Coeur d'Alene* and cases following it are so limited, the Court is not in a position to amend the Ninth Circuit's reasoning.

For these reasons, this Court must conclude that, until such time as the Ninth Circuit or the Supreme Court rules otherwise, *Stevens* did not overrule *Coeur d'Alene*, and a statutory provision of general applicability like the one at issue here is presumptively applicable to Indian tribes.

D. Reconciling *Stevens* with *Coeur d'Alene*

Since both cases are good law, the question remains: How can the Court reconcile the rule of *Coeur d'Alene* that statutes of general applicability presumptively apply to Indian tribes with the rule of *Stevens* that the term "person" presumptively excludes the sovereign? Both rules require Congress to make its intention with regard to Indian tribes explicit. The rules, taken together, appear to mean that a statute of general applicability that uses the term "person," which is silent as to its applicability

to Indian tribes, presumptively includes and presumptively excludes Indian tribes.

The answer appears to be that the holding in *Stevens* is not as broad as Respondents suggest, for two reasons:

First, *Stevens* appears to leave open the question whether its holding applies when a suit is brought by the federal government or a federal agency against the sovereign. *See Stevens*, 529 U.S. at 789 (Ginsburg, J., concurring) ("[T]he clear statement rule applied to private suits against a State has not been applied when the United States is the plaintiff. I read the Court's decision to leave open the question whether the word 'person' encompasses States when the United States itself sues under the False Claims Act." (citations omitted)); *see also Donald v. Univ. of Cal. Bd. of Regents*, 329 F.3d 1040, 1042 n.3 (9th Cir. 2003) (citing Justice Ginsburg's concurrence and opining that it remains unclear whether the *Stevens* holding applies to suits brought by the United States, but noting that "[n]othing in the Court's opinion purports to limit its scope solely to *qui tam* suits brought by private parties").

The *Stevens* dissent questioned whether the general presumption could apply to the interpretation of a federal statute enforceable by the federal government. *Stevens*, 529 U.S. at 790 (Stevens, J., dissenting). The Court distinguished the dissent's authority by noting that none of the three cases involved a statutory provision authorizing a *private* suit against a state. *Id.* at 780 n.9 (majority opinion). The *Stevens* Court did not overrule these prior authorities that interpreted the term "person" to include the state and state agencies as parties subject to suit by

the federal government. *See California v. United States*, 320 U.S. 577, 586, 64 S. Ct. 352, 88 L. Ed. 322 (1944) (the Shipping Act, which authorized suit against "common carrier[s] by water" and "other person[s] subject to this Act," applied to publicly owned wharves and piers); *Georgia v. Evans*, 316 U.S. 159, 62 S. Ct. 972, 86 L. Ed. 1346 (1942) (the term "person" in the Sherman Act includes the states, because otherwise the Sherman Act would leave it with no redress for injuries resulting from outlawed practices); *see also United States v. California*, 297 U.S. 175, 56 S. Ct. 421, 80 L. Ed. 567 (1936) (statute providing for taxation of any "common carrier" applied to state-owned railroads because the "all-embracing language" of the statute indicated a "plain" "objective[]" to include the states).

There are further indications in the *Stevens* opinion to suggest that its rule does not apply to a statute authorizing suit only by a federal agency. The Court stressed two doctrines of statutory construction in support of its holding:

> [F]irst, "the ordinary rule of statutory construction" that "if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute," [*Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)] (internal quotation marks and citation omitted), and second, the doctrine that statutes should be construed so as to avoid difficult constitutional questions. We of course express no view on the question whether an action in federal court by a qui tam relator against a State would run

> afoul of the Eleventh Amendment, but we note that there is "a serious doubt" on that score.

Stevens, 529 U.S. at 787 (citations omitted). Neither doctrine is implicated by a statute authorizing a suit by the federal government against the states. Congress is unquestionably entitled to authorize investigations and suit against states, Indian tribes, and associated agencies. While authorizing private parties to bring suits against the states in the name of the United States alters the balance between the sovereigns, suits brought by the federal government are well within the usual constitutional balance. And a suit brought by the federal government does not raise serious Eleventh Amendment questions, because the states ceded their immunity from federal suit during the Constitutional Convention. *See Alden v. Maine*, 527 U.S. 706, 759-60, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) (holding that the states' waiver of sovereign immunity respecting suits by the United States did not reach private actions against a state to enforce federal laws); *see also Will*, 491 U.S. at 67 ("We cannot conclude that § 1983 was intended to disregard the well-established immunity of a State from being sued without its consent.").

At least one district court has reached a contrary conclusion in its reading of *Stevens*. In *United States v. Menominee Tribal Enterprises*, 601 F. Supp. 2d 1061 (E.D. Wis. 2009), the district court rejected the government's argument that the rule in Stevens is limited to FCA suits brought by private parties. The district court reasoned that all FCA suits are claims on behalf of the United States, and the identity of the party in fact prosecuting the suit is irrelevant. Furthermore, the *Stevens* Court interpreted the term "person" under the FCA, and the district court rea-

soned that "[t]he meaning of a specific term in a statute does not change depending on who the plaintiff is." *Id.* at 1068-69.

Even if the *Menominee* court is correct and Justice Ginsburg's concurring opinion is incorrect in reading *Stevens* on this point, such a reading does not help Respondents. Unlike the CFPA, the FCA authorized a suit to be brought by either the federal government or by a private person suing on behalf of the government. *Menominee* reasoned that a single statutory term cannot have opposite meanings depending on the circumstance; this concern does not apply in the context of the CFPA, which authorizes *only* federal agencies to bring suit to enforce CIDs. The *Stevens* Court acknowledged the importance of this distinction in distinguishing the dissent's contrary authority. *Stevens*, 529 U.S. at 790 n.9 (citing *California v. United States*, 320 U.S. at 585-86).

Second, context is critical. "[Q]ualification of a sovereign as a 'person' who may maintain a particular claim for relief depends not 'upon a bare analysis of the word "person,"' but on the 'legislative environment' in which the word appears." *Inyo Cnty., Cal. v. Paiute-Shoshone Indians*, 538 U.S. 701, 711, 123 S. Ct. 1887, 155 L. Ed. 2d 933 (2003) (quoting *Evans*, 316 U.S. at 161; *Pfizer Inc. v. Gov't of India*, 434 U.S. 308, 317, 98 S. Ct. 584, 54 L. Ed. 2d 563 (1978)). Hence, in *Inyo County*, the Court did not rely on the presumptive exclusion, but rather looked to both the purpose of the statute and the facts of the case. The Court held that the tribe was not a person entitled to sue under 42 U.S.C. § 1983, because the statute "was designed to secure private rights against government encroachment, not to advance a

sovereign's prerogative to withhold evidence relevant to a criminal investigation." *Id.* at 712 (citation omitted). The purpose of § 1983 excluded the tribe's intended use of the statute. Here, the purpose of the CFPA does not exclude branches of Indian tribes providing consumer financial products to broad sections of the population extending outside tribe members.

Likewise, the Supreme Court has been careful to avoid applying the presumption heavy-handedly, without regard to the purposes for which the presumption arose. The original reason for the presumption was that the United States, when acting as legislator, would use precise language to restrict its own power or authorize litigation against itself. *See United States v. California*, 297 U.S. at 186 (discussing the presumption as a "canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it"); *Guarantee Title & Trust Co.*, 224 U.S. at 155 (holding that the United States is not bound by the Bankruptcy Act unless it is specifically mentioned). Hence the Court held that a statute limiting the availability of injunctions in certain suits involving "employers" or "employees" did not restrict the power of the United States to seek an injunction, even when acting as an employer. *United Mine Workers*, 330 U.S. at 270-71.

A second justification for the presumption was a simple matter of English style and usage: "Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it." *Cooper Corp.*, 312 U.S. at 604. This usage argument is strong when referring to a sovereign as sovereign, which is logically outside the scope of the term "person," and less

strong when referring to a sovereign in a proprietary capacity as any other citizen. Hence a statute that applies to a "person" in ways that would presumptively not apply to a sovereign entity is therefore presumed to exclude the sovereign. *See id.* at 606 (holding that the Sherman Act's definition of "person" would not include the United States because, *inter alia*, a person could be criminally liable or liable to suit for treble damages, and the sovereign is not generally subject to punitive remedies).

A third justification was stressed by the *Stevens* Court: "[B]oth 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 [the states]." *Stevens*, 529 U.S. at 780 n.9 (emphasis added). As discussed above, the authorization of unconsented private suit against the states raises serious constitutional questions and alters the "usual constitutional balance" between the states and the federal government. *Id.* at 787. Hence, the presumption is "particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before." *Id.* at 781 (quoting *Will*, 491 U.S. at 64) (internal quotation marks omitted).

The Court has found the presumption easily overcome or even "disregarded," *United States v. California*, 297 U.S. at 187, when none of these justifications were present. In *United States v. California*, the Court looked to the "all-embracing language" of the Federal Safety Appliance Act, 45 U.S.C. §§ 2, 6 (repealed 1994), to determine that both publicly owned and privately owned railroads were intended

to be included. 297 U.S. at 185. The Court considered and rejected application of the presumption that a sovereign is not included in general statutory language:

> The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated. We can perceive no reason for extending it so as to exempt a business carried on by a state from the otherwise applicable provisions of 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. Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial.

Id. at 186 (citation omitted). This case was overruled in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 541 & n.6, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985), because it limited state immunity from the federal taxing power to "activities in which the states have traditionally engaged," but *Garcia* does not call into question the Court's methods of statutory interpretation.

Substantially similar reasoning was used by the Court to hold that federal statutes applicable to "persons" engaged in the business of selling liquor were intended to apply against the states. In *Ohio v. Helvering*, 292 U.S. 360, 54 S. Ct. 725, 78 L. Ed. 1307 (1934), *overruled on other grounds by Garcia*,

469 U.S. at 541 & n.6, the Court avoided application of a presumption that state agencies were not included by use of the term "person," and rather looked to the "connection in which the word is found" to determine whether application to the states was intended:

> We find no merit in the further contention that a state is not embraced within the meaning of the word 'person,' as used in [26 U.S.C. § 205] . . . . By section 205 the tax is levied upon every 'person who sells, etc.'; and by section 11 the word 'person' is to be construed as meaning and including a partnership, association, company, or corporation, as well as a natural person. . . . [T]he state itself, when it becomes a dealer in intoxicating liquors, falls within the reach of the tax either as a 'person' under the statutory extension of that word to include a corporation, or as a 'person' without regard to such extension.

Id. at 370-71 (citing various state and federal decisions extending the term "person" to the states in various contexts); *see also South Carolina v. United States*, 199 U.S. 437, 448, 26 S. Ct. 110, 50 L. Ed. 260 (1905) (determining without significant discussion that agents of the state were "persons who sold liquors" within the meaning of the statute), *overruled on other grounds by Garcia*, 469 U.S. at 541 & n.6; *see United States v. California*, 297 U.S. at 186 (holding that the presumption that "person" excludes the sovereign was "disregarded" in *South Carolina v. United States* and *Ohio v. Helvering*).

Similarly, the presumption was either disregarded or easily overcome in *California v. United States*, in

which the Court held that the Shipping Act of 1916 included states and state agencies within the meaning of "person." 320 U.S. at 586. The Court relied both on the "plan purposes" of the statute, which logically must include public entities that "furnish[] precisely the facilities subject to regulation under the Act," and the legislative history, which showed that Congress was aware that the Act would regulate publicly owned facilities. *Id.* at 585-86. This evidence from the statute and legislative history obviated the need to "waste time on useless generalities about statutory construction." *Id.* at 585.

Clearly, then, the presumption against inclusion of sovereigns within the term "person" does not pull as much weight in statutory interpretation as Respondents argue. The present case is much more analogous to *California v. United States* and *Ohio v. Helvering* than to *Stevens* and its ilk. In the CFPA, Congress used broadly applicable, "all-embracing language" to describe the parties subject to the Bureau's investigatory authority. The statute's purpose extends just as clearly to state and tribal businesses as to private ones. Unlike cases like *Cooper Corp.* and *Inyo County*, there is no logical inconsistency in applying the Bureau's authority to sovereign entities. The concern expressed in *Stevens* about altering the balance between state and federal sovereigns is not present here. Sovereign immunity is not implicated, unlike in *Will*.

Congress legislates against the backdrop of the Supreme Court's statutory interpretation decisions, and Congress is presumed to "expect[] its statutes to be read in conformity with th[e] Court's precedents." *United States v. Wells*, 519 U.S. 482, 495, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997). Both parties here in-

voke this rule, arguing that Congress, armed with the precedents discussed above, knew that its intention with respect to the CFPA's application to sovereigns should have been made clear, and its decision to remain silent should be afforded great weight. The Bureau points to *Tuscarora*'s holding that generally applicable statutes are presumed to include Indians, while Respondents' argument is based in *Stevens* and the centuries-old presumption against application of general statutes to the sovereign. Each side claims that the Supreme Court has clearly instructed Congress on how to communicate its intent regarding sovereigns. But this argument proves too much for both sides. Over the past century, Congress has passed many generally applicable statutes: many expressly include sovereigns, many expressly exclude sovereigns, and many are silent. The Supreme Court has relied much more heavily on the legislative context than on canons of construction in interpreting these statutes. There is no plain mandate from the Supreme Court on which Congress can reasonably rely in deciding to remain silent as to sovereigns.

E. CFPA's Application to Indian Tribes

Having determined that both *Stevens* and *Coeur d'Alene* apply here—while acknowledging the weakness of the *Stevens* presumption under the reasoning of *California v. United States* and similar cases—the Court must look to the "legislative environment," *Inyo County*, 538 U.S. at 711, to determine whether Congress intended the term "person" to apply to the Indian tribes. *See Stevens*, 529 U.S. at 781; *Coeur d'Alene*, 751 F.2d at 1116 (presumption only applies

when the statute is "silent on the issue of applicability to Indian tribes").

Respondents argue that *Coeur d'Alene* does not apply here, because the CFPA is not silent with respect to Indian tribes. Indeed, the CFPA explicitly includes Indian tribes in its definition of "State," 12 U.S.C. § 5481(27), and empowers "States" to enforce the Act's provisions, *id.* § 5552(a)(1). Respondents argue that a statute that includes an Indian tribe as regulator in one provision, cannot be read, in a separate provision, to include the tribe as a regulated party.

Respondents are correct that, textually, the CFPA is not silent with respect to Indian tribes. But *Coeur d'Alene* is not so easily distinguished. The exclusion of statutes that are not silent with respect to Indian tribes is intended to avoid undermining the expressed intent of Congress. Congress does not express such intent by merely mentioning Indian tribes as sovereign regulators, while remaining silent on whether the unrelated provision at issue is also intended to regulate Indian tribes.

Put simply, there is no provision of the CFPA that expressly or impliedly suggests that the defined terms "persons" and "States" are mutually exclusive. Accordingly, the provision creating the Bureau's authority to investigate "persons" is silent with respect to the tribes.

Respondents argue, however, that the particular mention of Indian tribes as co-regulators under the CFPA should be understood as a decision on behalf of Congress to refrain from regulating the tribes in other provisions of the CFPA. "The CFPA thus erects a clear demarcation between regula***ted*** entities—

"covered persons"—and sovereign entities who are to be co-regula***tors***." (Opp. at 13 (citations omitted)). Respondents find support for this conclusion in provisions of the CFPA that (a) require the Bureau to coordinate with states and tribes to promote consistent regulatory treatment, 12 U.S.C. § 5495;[1] (b) require the Bureau to coordinate its fair lending efforts with states and tribes to promote consistent enforcement, *id.* § 5493(c)(2)(B);[2] (c) give states and tribes a significant role in collecting and tracking consumer complaints, *id.* § 5493(b)(3)(B);[3] (d) require

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[1] 12 U.S.C. § 5495 provides:

> 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.

[2] 12 U.S.C. § 5493(c)(2)(B) provides:

> The Office of Fair Lending and Equal Opportunity shall have such powers and duties as the Director may delegate to the Office, including . . . 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 . . . .

[3] 12 U.S.C. § 5493(b)(3)(B) provides:

> Routing calls to States
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> To the extent practicable, State agencies may receive appropriate complaints from the systems established under subparagraph (A) [providing for the Bureau's centralized complaint collection system], 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 infor-

the Bureau to share its data with states and tribes, *id.* § 5493(b)(3)(D);[4] and (e) allow officials of the states and tribes to bring a civil action in the name of the state or tribe to enforce the CFPA, *id.* § 5552(a)(1).[5] Respondents argue that these provi-

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mation 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).

[4] 12 U.S.C. § 5493(b)(3)(D) provides:

Data sharing required

To facilitate preparation of the reports required under subparagraph (C) [providing for reports to Congress], 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.

[5] 12 U.S.C. § 5552(a)(1) provides:

Action by State

Except as provided in paragraph (2) [limiting actions by states against national banks and federal savings associations], the attorney general (or the equivalent thereof) of

sions indicate Congress's intention that the federal, state, and tribal governments should be coequal partners in enforcing the CFPA.

This argument is unpersuasive because a federal statute could regulate the states and Indian tribes while acknowledging and preserving the states' and tribes' prerogative to aid in enforcement of federal policy and to enact their own regulations within their respective jurisdictions. It is not logically inconsistent for an Indian tribe to be regulated under a portion of the Act while acting as a regulator under another portion of the Act.

References to cooperation with the states and tribes are isolated within the CFPA, and hardly support the conclusion that Congress intended the Bureau to be partners in enforcement with the states and tribes, much less that the states and tribes are fully immune from the Bureau's investigatory authority. The cited portions amount to little more than an acknowledgment that the states and tribes are well positioned to participate in the reform of

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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.

consumer financial products. The states and tribes have access to significant information about the financial product markets within their territories, and the CFPA requires the Bureau to tap into that information.

These provisions do not indicate a statutory purpose to immunize tribal providers of consumer financial products that are identical in all respects to the products provided by private entities. If the CFPA authorized Indian tribes to issue CIDs to "persons," Respondents would have a much stronger argument that Indian tribes are not persons within the statutory meaning. But only the Bureau, a federal agency, may issue CIDs under 12 U.S.C. § 5562(c).[6] The only section cited by Respondents that provides the states and tribes with affirmative authority is section 5552, titled "Preservation of enforcement powers of States," which simply allows the states to enforce the CFPA and related state laws, while requiring that state officials consult with the Bureau before bringing suits under the CFPA.

Furthermore, there is a strong statutory basis to believe that consistency in both the application of

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[6] 12 U.S.C. § 5562(c) provides:

> 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 [respond to investigatory demands.]

consumer financial laws and the treatment of participants in consumer financial products markets is a key purpose of the CFPA. Section 5511(a) states the purpose of the Bureau itself, which must seek to implement and enforce consumer financial law consistently to foster fair and competitive markets.[7] The provision requiring coordination with "State regulators" similarly seeks to promote "consistent regulatory treatment of consumer financial and investment products and services." 12 U.S.C. § 5495. Section 5511(b) describes the objectives of the Bureau, and again focuses on consistent application: The Bureau is authorized to exercise its authority to ensure that "Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition."[8] *Id.* § 5511(b)(4). This purpose of con-

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[7] 12 U.S.C. § 5511(a) provides:

> Purpose
>
> The Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.

[8] 12 U.S.C. § 5511(b) provides:

> Objectives
>
> The Bureau is authorized to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services—
>
> . . . .
>
> (4) Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository institution, in order to promote fair competition . . . .

sistency 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. *See California v. United States*, 320 U.S. at 585 (treating public and private wharves and piers differently would undermine the purpose of the Shipping Act).

Both the Bureau and Respondents argue that the legislative history of the CFPA supports their respective positions. Neither presents a particularly persuasive argument, since the legislative history is almost completely silent as to the issue present here. (And either argument assumes that legislative history should be considered at all. *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* at 369-90 (2012) (discussing "[t]he false notion that committee reports and floor speeches are worthwhile aids in statutory construction").)

The Bureau cites to a draft of the bill circulated during a "markup" meeting of the Senate Committee on Banking, Housing, and Urban Affairs on November 19, 2009. *See Executive Session: to Consider Opening Statements on an Original Bill Entitled: "Restoring American Financial Stability Act of 2009*, U.S. Senate Comm. on Banking, Housing & Urb. Aff., http://www.banking.senate.gov. The definition of "person" in the draft bill explicitly excluded the states. This draft bill was never adopted by, nor even presented to, the full Senate. The Bureau asks the Court to interpret the Committee's decision not to proceed with a definition that *excludes* the states as an affirmative decision to *include* the states.

Respondents argue that this committee print is extremely weak evidence of congressional intent, given that neither house of Congress was even given the opportunity to pass on this draft of the bill. Furthermore, Respondents argue that inference to be drawn from this legislative history actually supports their position, since the draft bill both expressly excluded the states and was silent as to tribes, just like the statute at issue in *Coeur d'Alene*. The draft bill did not contain the provision of the final CFPA that included tribes in the definition of "State."

Respondents are correct that the text of this committee draft provides little if any guidance on the intent of Congress. The most that can be gleaned is a weak inference regarding the intent of the Senate committee that considered the draft. While the weak inference supports the Bureau, it provides little useful guidance on the correct interpretation of the statute.

The other argument regarding legislative history was made at the hearing by counsel for Respondents, who argued that the CFPA's application to states and tribes is "the dog that didn't bark." That is, Respondents were unable to find any discussion of the states and tribes in the extensive legislative history of the CFPA. Respondents argue that if Congress had intended for the Bureau to have investigatory authority over the states and tribes, there would have been some discussion and argument over the issue.

It would be mere speculation to conclude that the legislative history's silence as to the CFPA's applicability to states and tribes indicates the legislators' collective confidence that the CFPA could not apply

to the sovereigns. The silence of the individual members of Congress could just as easily indicate their belief that the tribal ownership of a particular business providing services under the Bureau's scrutiny is not a relevant factor in whether that business should be subjected to the Bureau's authority. Furthermore, while statements by individual members of Congress made during congressional debates are weak indicators of the intent of Congress as a whole, the *lack* of such statements is weaker still. *Cf. Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 115, 109 S. Ct. 414, 102 L. Ed. 2d 408 (1988) ("It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history . . . .").

While the CFPA's civil investigative provisions are silent as to whether Indian tribes may be subject to CIDs, the legislative environment in which the provision appears indicates that Congress likely intended for tribally owned businesses like Respondents to be subject to the Bureau's investigatory authority. Hence, whether or not the *Coeur d'Alene* framework applies, the CIDs must be upheld.

F. *Coeur d'Alene* Exceptions

Under *Coeur d'Alene*, the CFPA's general applicability and silence as to Indian tribes carries the presumption that the statute was intended to apply with equal force to the tribes. The *Coeur d'Alene* court recognized three exceptions to this rule:

> (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 intend-

> ed [the law] not to apply to Indians on their reservations . . . ."

Coeur d'Alene, 751 F.2d at 1116 (alteration in original) (quoting *Farris*, 624 F.2d at 893-94). Respondents argue that the third exception applies here, for the same reasons that they argue that the CFPA is not silent as to its applicability to Indian tribes. Specifically, the CFPA includes tribes within its definition of "State" and contemplates the states and tribes as co-regulators. As discussed above, the Court is not persuaded by these arguments. Respondents have not shown proof that Congress intended the law not to apply to Indian tribes.

Respondents argue that there is a fourth exception to the *Coeur d'Alene-Tuscarora* rule stated by the Tenth Circuit, which held that *Tuscarora* does not apply when "the matter at stake is a fundamental attribute of sovereignty and a necessary instrument of self-government and territorial management . . . which derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1200 (10th Cir. 2002) (en banc) (alterations and internal quotation marks omitted).

This Court cannot carve out an exception to Ninth Circuit law beyond those the Circuit has created. Furthermore, *Pueblo of San Juan* is easily distinguished. The Tenth Circuit held that *Tuscarora* "does not apply where an Indian tribe has exercised its authority as a sovereign—here, by enacting a labor regulation—rather than in a proprietary capacity such as that of employer or landowner." *Id.* at 1199. In the present case, the tribe is acting in a proprietary capacity in creating the Respondent entities to

provide consumer financial products to the public, and thus the rule of *Pueblo of San Juan*, if ever adopted by the Ninth Circuit, would not apply in this case.

In sum, Respondents are "person[s]" subject to the Bureau's civil investigative authority under 12 U.S.C. § 5562(c)(1).

Respondents make two further arguments to avoid responding to the CIDs. ***First***, they argue that tribal sovereign immunity bars enforcement of the CIDs. ***Second***, they argue that the CIDs are unenforceable because they are indefinite, overbroad, and do not provide adequate notice.

G. Tribal Immunity

Respondents argue that enforcement of the CIDs is barred by tribal sovereign immunity. Under settled Ninth Circuit law, tribal sovereign immunity does not bar a suit by a federal agency, even when Congress has not specifically abrogated tribal immunity. *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 781 (9th Cir. 2005) (citing *United States v. Yakima Tribal Court*, 806 F.2d 853, 861 (9th Cir. 1986)).

Respondents claim that the reasoning in *Yakima* is in "tension" with a 1991 Supreme Court decision. In *Blatchford v. Native Village* of *Noatak & Circle Village*, 501 U.S. 775, 111 S. Ct. 2678, 115 L. Ed. 2d 686 (1991), the Court held that the Eleventh Amendment bars a suit by an Indian tribe against a state. *Id.* at 787-88. The Court rejected the tribes' argument that because the states had surrendered sovereign immunity with respect to one another at the Constitutional Convention, they must also have surrendered their immunity as against Indian tribes:

> What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties.

Id. at 782 (citation omitted). Respondents lean heavily on the final phrase of the quoted passage, arguing that it calls into question the underlying basis of the *Yakima* line of cases, because it is absurd to suggest that the Indian tribes surrendered their immunity at the Constitutional Convention.

Respondents may be correct that *Blatchford* is in tension with *Yakima*. But under no plausible reading did *Blatchford* overrule *Yakima*. Its holding was not related in any way to the general rule that Indian tribes enjoy no sovereign immunity against the federal government. This Court applies the rule of the Ninth Circuit, under which tribal sovereign immunity does not bar this action to enforce the CIDs.

H. Adequate Notice

Finally, Respondents argue that the CIDs are invalid because they do not provide adequate notice of the purpose and scope of the Bureau's investigation, and because they are vague and overbroad. Under the CFPA, the CIDs must "state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation." 12 U.S.C. § 5562(c)(2).

The scope of judicial review in an administrative subpoena enforcement action is "quite narrow."

United States v. Golden Valley Elec. Ass'n, 689 F.3d 1108, 1113 (9th Cir. 2012) (quoting *EEOC v. Children's Hosp. Med. Ctr. of N. Cal.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc)) (internal quotation marks omitted). The subpoena "may not be too indefinite or broad." *Id.* (quoting *Peters v. United States*, 853 F.2d 692, 699 (9th Cir. 1988)) (internal quotation marks omitted). "The critical questions are: (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation." *Children's Hosp.*, 719 F.2d at 1428. "If these factors are shown by the agency, the subpoena should be enforced unless the party being investigated proves the inquiry is unreasonable because it is overbroad or unduly burdensome." *Id.* (citing *Okla. Press Pub'g Co. v. Walling*, 327 U.S. 186, 217, 66 S. Ct. 494, 90 L. Ed. 614 (1946*); United States v. Morton Salt Co.*, 338 U.S. 632, 653, 70 S. Ct. 357, 94 L. Ed. 401 (1950); *Gen. Ins. Co. of Am. v. EEOC*, 491 F.2d 133, 136 (9th Cir. 1974)).

Respondents argue that the CIDs do not provide them with adequate notice of the scope and purpose of the investigation. The CIDs provide a "Notification of Purpose," stating that the investigation was

> to determine 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 [12 U.S.C. § 5536, 15 U.S.C. §§ 1601, 1693, 15 U.S.C. §§ 6802-6809], or any other Federal consumer financial law.

(Osborn Decl. Ex. A, at 5). Respondents suggest that this notification "amount[s] to no notice whatsoever" (Opp. at 24), but the CIDs both identify the "nature of the conduct constituting the alleged violation" and the "provision of law applicable to such violation." 12 U.S.C. § 5562(c)(2). The phrase "any other Federal consumer financial law" is given a specific definition in the CFPA. *See id.* § 5481(14). Accordingly, the Bureau has fulfilled its notice responsibility.

Respondents further argue that the Bureau has demanded evidence beyond the scope of any possible violation. The requirement that requested evidence be "relevant and material to the investigation," *Children's Hosp.*, 719 F.2d at 1428, is "not especially constraining." *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 854 (9th Cir. 2009) (internal quotation marks omitted). The Court "must enforce administrative subpoenas unless the evidence sought by the subpoena is plainly incompetent or irrelevant to any lawful purpose of the agency." *Karuk Tribe*, 260 F.3d at 1076 (internal quotation marks and alteration omitted). The information subpoenaed need not be relevant to a violation, so long as it is relevant to a proper investigation. The investigation may be used simply to "dissipate any suspicion of a crime." *Golden Valley Elec. Ass'n*, 689 F.3d at 1113-14 (upholding subpoena seeking broad, generalized information about energy consumption concerning three residences under suspicion of drug law violations).

Here, although the CIDs seek general information about Respondents, none of the requested information is "plainly incompetent or irrelevant to any lawful purpose." Respondents suggest that the CIDs ask them to account for every loan and every customer they have served since their inception, but the

CIDs do not appear to be so broad. While the CIDs seek extensive accounting with respect to Respondents' employees and partner organizations, it only seeks customer-specific information for "all persons who became consumers of the Company's goods and services related to credit from January 1, 2011 through January 31, 2011." (Osborn Decl. Ex. A, at 7). Respondents have not identified any interrogatory or request that is irrelevant to the stated purpose of the CIDs.

Respondents' final argument is that the CIDs are overbroad or unduly burdensome. *See Children's Hosp.*, 719 F.2d at 1428; *Peters*, 853 F.2d at 699 ("An administrative subpoena thus may not be so broad so as to be in the nature of a 'fishing expedition.'").

The Ninth Circuit held that an administrative subpoena was overly broad when the Immigration and Naturalization Service sought information about individuals presently unknown to the agency in a so-called "John Doe" subpoena. *Peters*, 853 F.2d at 699-700. The Ninth Circuit held that such a third-party group subpoena was broader than necessary to achieve the agency's purpose, and thus it quashed the subpoena. *Id.* at 700. *Peters* is easily distinguished because the CIDs are limited to interrogatories and documents related to Respondents' business practices; the Bureau is not seeking to uncover the identities or details of as-yet-unknown third parties that may be responsible for violations of the CFPA.

Contrary to Respondents' assertion, the burden is not on the Bureau to establish that the CIDs are "no broader than necessary to achieve its purpose." *Id.* at 700. Rather, the party seeking to avoid enforcement of the CID must prove that the inquiry is over-

broad or unduly burdensome. *FDIC v. Garner*, 126 F.3d 1138, 1143 (9th Cir. 1997). Respondents have not demonstrated that the CIDs seek any information beyond that necessary to determine whether Respondents "have engaged or are engaging in unlawful acts or practices relating to the advertising, marketing, provision, or collection of small-dollar loan products," according to the stated purpose of the CIDs. (Osborn Decl. Ex. A, at 5). Accordingly, the CIDs are not overbroad.

The Ninth Circuit has provided little guidance on what constitutes an "unduly burdensome" investigative demand. District courts in this Circuit have adopted the rule of the Fourth and D.C. Circuits, which define "unduly burdensome" as a demand that "threatens to unduly disrupt or seriously hinder normal operations of a business." *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 479 (4th Cir. 1986); *see FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977); *EEOC v. Bashas', Inc.*, 828 F. Supp. 2d 1056 (D. Ariz. 2011) (citing *Maryland Cup* and district court cases within the Ninth Circuit adopting this rule). "[T]he burden of proving that an administrative subpoena is unduly burdensome is not easily met." *Maryland Cup*, 785 F.2d at 477. This strict rule is consistent with a statutory purpose to permit broad investigations of possible violations under the CFPA.

Respondents have not shown that compliance with the CIDs would pose any threat to the normal operations of their business; indeed, they have not attempted to show any burden at all. They merely argue that the CIDs document requests are extensive and not "narrow and specific." There is no binding authority, however, requiring that the requests be

narrow and specific. The Court must enforce the CIDs in the absence of a showing by Respondents that they are overbroad or unduly burdensome.

Respondents have failed to show that the CIDs are unenforceable because they fail to provide adequate notice or are indefinite, overbroad, or unduly burdensome.

I. Arm of the Tribe

The Bureau argues that even if the *Stevens* presumption applies and the CFPA's definition of "person" excludes the tribes, then Respondents are private businesses instead of "tribes" that would be excluded from CFPA's ambit. In light of the Court's interpretation of "person" in the Act, this Court need not decide this issue. Were it necessary to do so, the Bureau's position is weak. *See, e.g.*, *United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 579 (4th Cir. 2012) ("critical inquiry" is whether the corporate entity is "truly subject to sufficient state control to render [it] a part of the state, and not a 'person'").

J. Applicability to States

Respondents' final argument is that the Court's ruling that the CFPA empowers the Bureau to investigate tribal agencies entails, by necessary implication, a holding that states and state agencies are similarly subject to investigation under the CFPA. While the question is not directly presented here and the Court makes no ruling on whether state agencies would be subject to CIDs, Respondents' contention is a subtle argument that must be addressed.

Respondents' argument is based in what they call the CFPA's "equivalence" provision mentioned above:

The CFPA defines the term "State" to include "any federally recognized Indian tribe." 12 U.S.C. § 5481(27). Respondents argue that this provision shows Congress's unmistakable intent that any application of the CFPA must treat tribes and states in the same manner.

The "equivalence" provision, however, is nothing more than a definition written to guide interpretation of any provision that uses the term "State." It clarifies that all such provisions apply to the states, the tribes, and various other entities. The CFPA's civil investigation provision does not use the term "State": it only uses the term "person." Accordingly, the definition of "State" is not applicable to this provision.

There is reason to believe that a statutory provision that is silent with respect to both states and tribes may apply differently to states and tribes. Of course, as discussed above, the *Coeur d'Alene* and *Tuscarora* presumption applies in favor of inclusion of tribes in generally applicable statutes, but no similar presumption suggests inclusion of states.

Furthermore, tribes and states have different levels of sovereignty. States have an irreducible minimum sovereignty guaranteed by the Constitution, while tribal sovereignty powers are subject to complete defeasance by Congress. *See United States v. Oregon*, 657 F.2d 1009, 1013 (9th Cir. 1981) ("Like other sovereign powers possessed by Indian tribes, [tribal immunity] exists only at the sufferance of Congress and is subject to complete defeasance. Consequently, all parties agree that tribal immunity may be pierced by congressional act." (citations omitted)). It is not obvious, then, that Congress's silence

as to the two sovereigns must have an equivalent effect as to both.

Finally, the argument that the states and tribes must rise and fall together would only support Respondents' position if the CFPA indisputably did ***not*** apply to the states. Indeed, if the CFPA did authorize investigation of the states, then section 5481(27) would, in Respondents' view, favor enforcement of the CIDs. While this Court is not deciding the issue, there are tenable interpretations of the statute pursuant to which the Bureau could investigate those arms of the states engaging in activities that affect consumers.

As discussed above, a purpose found throughout the CFPA is consistency in the treatment of consumers and enforcement of financial laws. *E.g.*, 12 U.S.C. §§ 5495, 5511. This purpose is undermined by disparate treatment of businesses offering the same products and services solely on the basis of their state ownership. And the Supreme Court has regularly held that generally applicable federal statutes, which include regulation of market activity, and which are silent as to their applicability to state entities, are equally applicable to states and state agencies engaging in the market activity subject to the statute's regulation. *See California v. United States*, 320 U.S. at 586; *United States v. California*, 297 U.S. at 185; *Ohio v. Helvering*, 292 U.S. at 370-71*; South Carolina v. United States*, 199 U.S. at 448. Like the tribes, the states are authorized to enforce the CFPA and cooperate with the Bureau in certain tasks, but this recognition of the states' sovereignty does not show that the states are not in-

tended to be regulated when they provide financial products and services to consumers.

III. CONCLUSION

The Petition is **GRANTED**.

At the hearing, Respondents requested that a ruling in favor of the Bureau be stayed pending appeal. The Bureau did not argue against such a stay. The Court's decision whether to grant a stay pending appeal is guided by four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009).

The Petition presents a pure question of law; the proper answer is something over which judges and lawyers could reasonably disagree. If the Court's decision to grant the Petition is incorrect, and the CIDs are enforced, Respondents are likely to suffer irreparable harm because Respondents' disclosure of sensitive proprietary documents to the Bureau is a bell that cannot be unrung. The Bureau will not be injured by the temporary delay in compliance with the CIDs. The public interest may favor denial of a stay, since the Bureau's investigation is part of its mission to protect consumers, but again, the delay will pose only minimal hardship.

Accordingly, enforcement of the CIDs pursuant to this Order is **STAYED** pending Respondents' appeal to the Ninth Circuit. The parties are **ORDERED** to file a status report with the Court every 180 days indicating the progress of the appeal, and a status re-

port within 5 court days upon conclusion of the appeal.

IT IS SO ORDERED.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 14-55900

D.C. No.
2:14-cv-02090-MWF-PLA
Central District of California,
Los Angeles

CONSUMER FINANCIAL PROTECTION BUREAU,
Petitioner-Appellee,
v.

GREAT PLAINS LENDING, LLC;
MOBILOANS, LLC;
PLAIN GREEN, LLC,
Respondents-Appellants.

FILED APR 05 2017

ORDER

Before: FERNANDEZ, RAWLINSON, and BEA, Circuit Judges.

Judges Rawlinson and Bea voted, and Judge Fernandez recommended, to deny the Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc, and no judge of the court has requested a vote.

The Petition for Rehearing En Banc of Appellants Great Plains Lending, LLC and Plain Green, LLC, filed on March 6, 2017, is DENIED.