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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CONSUMER FINANCIAL PROTECTION BUREAU, Petitioner, v. GREAT PLAINS LENDING, LLC, MOBILOANS, LLC & PLAIN GREEN, LLC, Respondents.	No. 2:14-cv-02090-MWF-PLA The Hon. Michael W. Fitzgerald **RESPONDENTS' JOINT MEMORANDUM OF LAW IN OPPOSITION TO THE PETITION TO ENFORCE CIVIL INVESTIGATIVE DEMANDS** Date: Mon., April 28, 2014 Time: 11:30 A.M. Room: 1600

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INTRODUCTION

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

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

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

(1945)), and that legal status is dispositive here. Second, when the Bureau finally adverts to Indian law, it does so in passing, asserting only that generally applicable statutes reach Indians and that the Dodd-Frank Act is a generally applicable statute. Mem. 6. But that truism fails to acknowledge that the Dodd-Frank Act is not a generally applicable law silent as to the role of Tribes but instead gives them a special role—that of co-regulator—by including Tribes in the definition of "State." *See* 12 U.S.C. § 5481(27). And it completely fails to grapple with the Supreme Court's specific holdings on how to interpret the particular statutory term—"person"—that Congress used here. The Dodd-Frank Act and precedent thus make clear that the Bureau lacks authority to issue CIDs to Respondents.

Though this Court need go no further to deny the petition, the Bureau's CIDs are also defective for multiple other reasons. For one, tribal sovereign immunity protects Respondents from the issuance and enforcement of the CIDs. For another, even setting Indian law to the side, the CIDs are unenforceable because they are overbroad and unreasonable. The petition should be denied.

BACKGROUND

A. The Tribes And Their Lending Entities

Respondents in this case are Great Plains Lending, LLC ("Great Plains"); MobiLoans, LLC ("MobiLoans"); and Plain Green, LLC ("Plain Green"). Each was created by, is wholly owned and controlled by, and exists for the benefit of a federally recognized Indian Tribe. And the Tribes have explicitly vested each Respondent with all of the "privileges and immunities" of the Tribe itself, including its immunity from suit, from taxation, and from regulation. *See* Shotton Decl., Ex. B (Resolution Creating Great Plains); Pierite Decl. 5; Morsette Decl. 2.

The Otoe-Missouria Tribe and Great Plains. Great Plains is wholly owned and operated by the federally recognized Otoe-Missouria Tribe, descendants of the Otoe and Missouria people. Shotton Decl. 2-3. The Tribe's corporate law provides that all companies wholly owned by the Tribe "shall be considered to be

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

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

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

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

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

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

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

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

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

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

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

C. The Bureau's Civil Investigative Demands

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

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

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

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

ARGUMENT

This Court should deny the Bureau's petition to enforce the CIDs. When an agency petitions for enforcement of a CID or administrative subpoena, a "court must ask (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." *FDIC* v. *Garner*, 126 F.3d 1138, 1142 (9th Cir. 1997) (internal quotation marks omitted). The agency must "establish[] these factors," after which "the subpoena should be enforced unless the party being investigated proves the inquiry is unreasonable because it is overbroad or unduly burdensome." *Id.* (internal quotation marks omitted).

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

I. RESPONDENTS ARE SOVEREIGN ARMS OF THEIR RESPECTIVE TRIBES AND ARE NOT "PERSONS" WITHIN THE MEANING OF THE CFPA.

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

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

A. Tribes And Arms Of Tribes Are Presumptively Not "Persons" Under The CFPA.

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

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

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

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

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

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

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

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

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

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

B. Respondents Are Arms Of Their Respective Tribes.

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

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

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

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

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

C. The Bureau Cannot Overcome the *Stevens* Presumption Because The CFPA Demonstrates A Clear Intention Not To Treat Tribes As "Persons."

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

1. Congress specifically references Tribes in the CFPA. That reference occurs in the definition of "State":

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

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

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

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

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

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

[1] *Available at* http://www.treasury.gov/initiatives/wsr/Documents/Fact%20Sheet-%20%20Benefits%20Native%20Americans,%20Oct%202010%20FINAL.pdf

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

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

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

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

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

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

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

D. The Bureau's Contrary Arguments Are Misplaced.

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

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

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

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

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

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

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

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

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

[4] The Bureau's argument fails for yet another reason: The *Tuscarora* dictum 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) (quotation marks and alterations omitted); *accord EEOC* v. *Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 250 (8th Cir. 1993); *EEOC* v. *Cherokee Nation*, 871 F.2d 937, 938 (10th Cir. 1989). Here the three Tribes exercise powers of "self-government," *Santa Clara*, 436 U.S. at 59-60, and inherent sovereign authority in regulating Respondents' activities. *See supra* at 2-5. The Bureau seeks to interfere with that authority by subjecting the Tribes to its coercive investigatory power. The government must present "'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian . . . rights on the other, and chose to resolve that conflict by abrogating [the tribal rights].'" *Fond du Lac*, 986 F.2d at 250 (quoting *United States* v. *Dion*, 476 U.S. 734, 740 (1986)); *see also see Dobbs*, 600 F.3d at 1283-84. In the CFPA, that evidence is conspicuously lacking. *See supra* 13-16.

2. The CFPA's Other Arguments Fare No Better.

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

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

E. Any Ambiguity About The Word "Person" Must Be Construed In Favor Of The Tribe.

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

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

II. THE CIDs ARE BARRED BY RESPONDENTS' SOVEREIGN IMMUNITY.

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

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

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

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

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

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

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

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

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

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

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

Most importantly, the CIDs as written do not provide adequate notice of the purpose and scope of the Bureau's investigation. The CFPA explicitly states that "[e]ach civil investigative demand shall 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); *see also* 12 C.F.R. § 1080.5 (same). The CIDs fail to satisfy this notice requirement. They purport to seek information in furtherance of an undefined investigation of "small dollar online lenders" pursuant to any of four elaborate statutory schemes and "*any other* Federal consumer financial law." Osborn Decl., Ex. A (Great Plains CID 1). These generalities amount to no notice whatsoever.

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

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

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

CONCLUSION

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

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Respectfully submitted,

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