No. 14-55900
In the United States Court of Appeals
for the Ninth Circuit

CONSUMER FINANCIAL PROTECTION BUREAU,
Petitioner-Appellee,
v.
GREAT PLAINS LENDING, LLC,
MOBILOANS, LLC, AND PLAIN GREEN, LLC,
Respondents-Appellants.

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

BRIEF OF PETITIONER-APPELLEE CONSUMER FINANCIAL PROTECTION BUREAU

Meredith Fuchs
General Counsel
To-Quyen Truong
Deputy General Counsel
John R. Coleman
Assistant General Counsel
Lawrence DeMille-Wagman
Kristin Bateman
Attorneys
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
(202) 435-7821 (telephone)
(202) 435-7024 (facsimile)
kristin.bateman@cfpb.gov
Counsel for Petitioner-Appellee
Consumer Financial Protection Bureau

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GLOSSARY

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Bureau or CFPB	Consumer Financial Protection Bureau
CFPA	Consumer Financial Protection Act
CID	Civil investigative demand
ER	Respondents-Appellants' Excerpts of Record, Dkt. No. 22
Lenders	Respondents-Appellants Great Plains Lending, LLC; MobiLoans, LLC; and Plain Green, LLC

INTRODUCTION

This appeal concerns the Consumer Financial Protection Bureau's efforts to investigate three companies (the Lenders) making loans over the Internet to consumers nationwide. The Lenders have refused to comply with the Bureau's civil investigative demands (CIDs), claiming that their affiliation with Indian tribes exempts them from regulation under the Consumer Financial Protection Act (CFPA or the Act). They are wrong. The Lenders must comply with the CFPA even assuming (against indications to the contrary) that they are in fact arms of Indian tribes.

This Court's precedent makes crystal clear that tribes engaging in commerce presumptively must follow the same federal laws as everyone else. The Lenders cannot avoid that binding precedent here. Nor can they establish that the CFPA's inclusion of tribes in the definition of "State" somehow shows that Congress intended to give tribal lenders special permission to operate outside the law. By including tribes as "States," Congress did no more than recognize the regulatory role that tribal governments can play in helping to protect consumers in their own jurisdictions. It did not also exempt tribal commercial enterprises from complying with federal law when they transact business in the consumer financial marketplace.

For this reason—and for the independent reason that the Lenders have not sufficiently demonstrated that they are, in fact, arms of Indian tribes—the district court's order enforcing the Bureau's CIDs should be affirmed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this petition to enforce a CID under 12 U.S.C. § 5562(e). The district court issued a final order granting the petition on May 27, 2014 (ER 36), and Respondents appealed on June 3, 2014 (ER 39-40, 349). That appeal was timely, *see* F.R.A.P. 4(a)(1)(B), and this Court has jurisdiction under 28 U.S.C. § 1291.

ISSUE PRESENTED

The Consumer Financial Protection Act requires "any person"—a broadly defined term that includes "compan[ies]" and "other entit[ies]," 12 U.S.C. § 5481(19)—to respond to a civil investigative demand from the Consumer Financial Protection Bureau. *Id.* § 5562(c). The Act contains no exemption excusing tribes or tribally-affiliated companies from complying with this, or any other, provision. The issue presented is: May a company avoid responding to a civil investigative demand from the Bureau by claiming that it is affiliated with an Indian tribe?

PERTINENT STATUTES

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

STATEMENT OF THE CASE

A. Statutory Background

Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act to, among other things, "protect consumers from abusive financial services practices." Pub. L. No. 111-23, 124 Stat. 1376, 1376 (2010). Title X of that Act, known as the Consumer Financial Protection Act, created the Consumer Financial Protection Bureau and charged it with primary responsibility for "regulat[ing] the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a).

The "consumer financial products [and] services" under the Bureau's oversight run the gamut—from mortgage servicing and credit reporting, to debt collection and all kinds of consumer loans, including the payday and other small-dollar loans that the Lenders offer. *See id.* §§ 5481(5), (15). And the "Federal consumer financial laws" that the Bureau administers include the CFPA itself, which (among other things) prohibits "covered persons"—*i.e.*, "persons" who offer consumer financial products and services, 12 U.S.C. § 5481(6)—from engaging in "any unfair, deceptive, or

abusive act or practice." *Id.* §§ 5531, 5536. That body of law also includes 18 pre-existing "enumerated consumer laws," such as the Truth in Lending Act, that govern the consumer financial marketplace. 12 U.S.C. §§ 5481(12), (14). Under the CFPA, the Bureau bears responsibility for protecting consumers in that marketplace, and for establishing a "basic, minimum federal level playing field" in which the law is enforced consistently, without regard to the type of entity offering the financial product or service. S. Rep. No. 111-176, at 11 (2010); *accord* 12 U.S.C. § 5511(b).

To carry out these responsibilities, the Bureau is empowered to "tak[e] appropriate enforcement action to address violations of Federal consumer financial law." *Id.* § 5511(c)(4). As part of its enforcement powers, the Bureau has investigative authority to issue a "civil investigative demand" requiring documents, testimony, or other information from "any person" that the Bureau believes may have information pertaining to a violation. *Id.* § 5562(c)(1). The Act's definition of "person" is comprehensive: It covers "an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity." *Id.* § 5481(19). The CFPA contains numerous carefully drawn provisions explicitly excluding certain persons from the Bureau's enforcement authority in certain circumstances.

See 12 U.S.C. §§ 5516(d), 5517, 5519. It contains no such exclusion for tribes or tribally-affiliated businesses.

While the CFPA establishes the Bureau as the primary federal regulator tasked with protecting consumers in the financial marketplace, it does not leave the Bureau to fulfill its mission alone. The Act ensures that "State[s]"—a term broadly defined to include the fifty states as well as the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, the U.S. Virgin Islands, and "any federal recognized Indian tribe," *id.* § 5481(27)—can supplement the Bureau's efforts. For example, the Act authorizes "State regulator[s]" and "the attorney general (or the equivalent thereof) of any State" to enforce the CFPA and related regulations within the states' respective jurisdictions. *Id.* § 5552. In addition, the Act specifies that the CFPA does not preempt the laws "in effect in any State" that afford consumers greater protection than the CFPA, thereby ensuring that "State" governments can enact and enforce such laws within their own jurisdictions. *Id.* § 5551(a). In recognizing the regulatory role that these other government actors can play in helping to protect consumers, the Act also directs the Bureau to coordinate with these regulators on specified topics, as appropriate, to promote consistent and efficient regulation. *E.g.*,

id. §§ 5493(c)(2)(B), 5495, 5514(b)(3). The Act says nothing about "State"-run commercial enterprises.

B. Factual Background

Payday and similar short-term, small-dollar lending is an area of particular regulatory concern. Consumers may not have adequate information about the costs of these loans, which frequently bear annual interest rates well into the triple digits. Consumer Fin. Prot. Bureau, *Payday Loans and Deposit Advance Products* 44 (2013), *available at* http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-whitepaper.pdf; S. Rep. No. 111-176, at 20 (average interest rate on payday loan is 391-782% APR); *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 974 F. Supp. 2d 353, 355 (S.D.N.Y. 2013) (noting evidence that annual interest rate on loans offered by Great Plains and another tribal lender "exceeds 100 percent and, in some cases, may top 1000 percent of the borrowed principal"). Unable to repay, consumers often find themselves trapped in a cycle of debt and facing coercive collection practices, such as illegal threats of arrest or jail. *See* S. Rep. No. 111-176, at 20-21.

Tribal online payday lending presents unique issues. States, unlike the federal government, face a limitation on their ability to enforce

consumer-protection laws against tribal lenders, because tribes and tribal entities have sovereign immunity from state (and private) lawsuits. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030-31 (2014) (tribes enjoy such immunity absent express congressional authorization or waiver). In addition, some tribally-affiliated lenders, including Great Plains, have claimed they can make loans over the Internet to consumers across the country without complying with the laws in those consumers' states. *See Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105, 107 (2d Cir. 2014). Some nontribal lenders, too, reportedly are now seeking to shield themselves from state regulation by partnering with tribally-affiliated companies. *See, e.g.*, Jessica Silver-Greenberg, *Payday Lenders Join with Tribes*, WALL ST. J. (Feb. 10, 2011).

The Respondents in this case, Great Plains Lending, LLC, MobiLoans, LLC, and Plain Green, LLC, are all limited liability companies assertedly owned and operated by Indian tribes. ER 209, 287, 303, 315; Appellants' Brief ("App. Br.") at 4 (ECF No. 22-1). All three companies offer payday or similar small-dollar loans over the Internet to consumers nationwide. ER 209. After receiving a significant number of consumer complaints about these Lenders (ER 209-10), the Bureau issued each of them a CID seeking information about their lending businesses. ER 208, 212-44. As the CIDs

indicated, the Bureau's investigation sought to determine whether small-dollar online lenders had violated the CFPA, the Truth in Lending Act, the Electronic Fund Transfer Act, the Gramm-Leach-Bliley Act, or other federal consumer financial laws in advertising, marketing, providing, or collecting loans. ER 212, 223, 234. The CIDs also sought information on the Lenders' relationship with tribes and with Think Finance, Inc., a company that has come under scrutiny for attempting to use these Lenders' tribal immunity to evade state regulation. ER 221, 222, 232, 233, 243, 244; *see also* Complaint ¶¶ 44-45, *Commonwealth of Penn. v. Think Finance, Inc.*, No. 14-cv-7139 (E.D. Pa. Dec. 17, 2014) (ECF No. 1-1).

The Lenders jointly petitioned the Bureau to set aside the CIDs, claiming that the Bureau lacks authority over them because they are arms of Indian tribes. ER 208, 246, 264-71. The Bureau's Director denied their petition. ER 208, 324-333. The order denying the petition explained that the Bureau has authority over the Lenders whether or not they are regarded as "arms" of tribes. ER 329-30. In the order, the Director reiterated the Bureau's commitment to engaging with tribal governments on policies relevant to them—but explained that that engagement has no bearing on the Bureau's oversight of tribal commercial businesses. ER 333. Those

businesses "remain subject to the same evenhanded federal oversight and authority as their competitors." ER 333.

After the Lenders refused to respond by the deadline, the Bureau filed a petition to enforce the CIDs in the Central District of California. ER 334.

C. Decision Below

The district court concluded that the Bureau has authority to investigate the Lenders and accordingly granted the Bureau's petition. ER 3 (Order at 1). It stayed enforcement of the CIDs, however, pending the Lenders' appeal. ER 36 (Order at 34). The district court started from the "general rule," adopted by the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), that generally applicable federal laws like the CFPA ordinarily apply with equal force to tribes. ER 5-6 (Order at 3-4). The court declined the Lenders' invitation to disregard that rule in light of the Supreme Court's statement in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000), that the term "person" ordinarily does not include the sovereign. ER 9 (Order at 7). That, the district court held, would "entail overruling decades of Ninth Circuit precedent." *Id.*

As the court explained, *Coeur d'Alene* and *Stevens* did not present the "inescapable conflict" that the Lenders posited, because *Stevens* simply

"does not pull as much weight in statutory interpretation as [the Lenders] argue." ER 12, 20 (Order at 10, 18). Rather, under *Stevens*, "context is critical," ER 16 (Order at 14), and the CFPA's context shows "that Congress likely intended for tribally owned businesses like [the Lenders] to be subject to the Bureau's investigatory authority." ER 27 (Order at 25); *see also* ER 20 (Order at 18) (listing reasons why *Stevens* lacks force in this case). Among other things, the court noted that a "key purpose" of the CFPA was to promote consistent regulation and enforcement—a purpose that "would be undermined" if entities "providing identical products and serving an identical customer base" were treated differently "solely by virtue of their tribal, rather than private, ownership." ER 25-26 (Order at 23-24.)

The court rejected the Lenders' argument that Congress's decision to define "State" to include tribes indicated that Congress intended to exempt tribally-affiliated businesses from the Bureau's authority. ER 24 (Order at 22). As the court explained, the provisions referring to "States" simply "acknowledg[e] that the states and tribes are well positioned to participate in the reform of consumer financial products"; they in no way "indicate a statutory purpose to immunize tribal providers of consumer financial products." *Id.*

STANDARD OF REVIEW

Where, as here, an agency's administrative subpoena is attacked for lack of jurisdiction, the reviewing court's role is "strictly limited."[1] *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 848 (9th Cir. 2008). "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." *Id.* (quotations omitted). This Court reviews a district court's order enforcing an administrative subpoena *de novo*. *Id.* at 846.

SUMMARY OF ARGUMENT

1. Even assuming that they could be regarded as arms of Indian tribes, the Lenders must comply with the CFPA. The Act authorizes the Bureau to issue CIDs to "any person"—a broadly defined term that expressly covers "compan[ies]." 12 U.S.C. §§ 5562(c)(1), 5481(19). As limited liability companies, the Lenders undeniably fall within this provision's plain terms. Thus, the Lenders can avoid responding to the Bureau's CIDs only if they can show that *tribal* companies enjoy a special exemption from these provisions—even though the Act mentions no such exemption. They cannot make that showing.

[1] A CID is a type of administrative subpoena. *See United States v. Markwood*, 48 F.3d 969, 975-76 (6th Cir. 1995).

a. Under this Court's precedent, tribes' sovereign status does not excuse them from complying with federal law. On the contrary, tribes and tribally-affiliated entities are presumptively subject to the same laws as everyone else. That presumption has been the settled law of this Circuit for over thirty years—and it applies with full force here. *See Coeur d'Alene*, 751 F.2d at 1115.

The Lenders try to rebut this presumption by claiming that Congress's decision to include tribes in the CFPA's definition of "State" somehow proves that Congress intended to permit tribal lenders to engage in interstate commerce without regard to the CFPA's consumer-protection requirements. It does not. No provision excuses "State"-run commercial enterprises from complying with the Act. Instead, the CFPA's provisions referring to "States" recognize the *regulatory* role that "State" governments can play in helping to police the consumer financial marketplace within their own jurisdictions. By including tribes in the definition of "State," Congress simply ensured that tribal governments could take part in that regulatory effort. Because nothing in the CFPA suggests that Congress intended to give tribal businesses any special exemption from the Act's generally applicable provisions, this Court's firmly established presumption

controls: Tribes and tribally-affiliated companies must comply with the CFPA.

b. The Lenders seek to avoid this result by urging this Court to ignore the tribe-specific *Coeur d'Alene* presumption that has guided this Court for decades in favor of a general interpretive presumption regarding the word "person." In particular, they point to the Supreme Court's statement in *Stevens*, 529 U.S. at 780-81, that the term "person" ordinarily does not refer to the sovereign, unless context indicates otherwise. But that proposition has never had any bearing on whether tribes must comply with generally applicable federal laws when they engage in commercial activity. And nothing in *Stevens* supports the Lenders' ambitious claim that tribes and tribal companies should be presumptively exempt from such laws, notwithstanding the decades of circuit precedent holding just the opposite. Indeed, such a presumptive exemption would fly in the face of the basic principle—recognized by this Court and the Supreme Court—that tribes' sovereignty does not entitle them to operate in interstate commerce without complying with the law. *Stevens* offers no basis to disregard *Coeur d'Alene*.

But even if this Court did disregard *Coeur d'Alene* and instead apply the interpretive approach taken in *Stevens*, the result would be the same.

The presumption regarding the term "person" would have greatly diminished, if any, force in this context. That presumption is based in significant part on sovereign immunity concerns. No such concerns exist here, because neither states nor tribes have any immunity vis-à-vis the federal government—and the CFPA provision at issue authorizes suit only by the federal government. The presumption for interpreting the term "person" also has extremely limited force here because it derives from the understanding that a sovereign itself is not a "person" in common usage. By contrast, companies like the Lenders *are* "persons" both in common usage and under the CFPA's plain text, whether affiliated with a sovereign or not.

Moreover, whatever its force, the presumption cited in *Stevens* is just one interpretive tool for discerning Congress's intent—and Congress's intent must in all events control. The CFPA's context and purposes leave little room to doubt that Congress intended for the CFPA to apply to tribes and tribal lenders. Many consumer-protection statutes that the CFPA charges the Bureau with administering expressly authorize the Bureau to use its powers under the Act to enforce the law against "government[s]"—a clear indication that the Bureau's enforcement powers under the CFPA in fact extend to governments, and to lending companies affiliated with them.

Further, in enacting the CFPA, Congress aimed to ensure robust and uniform consumer protection, with all market participants playing by the same rules. Exempting tribal lenders from the Act would undermine those core purposes. It would also undercut Congress's specific goal of curtailing widespread abuses in the payday lending market—a market in which tribally-affiliated businesses have a significant presence. When federal statutes serve these sorts of remedial purposes, the Supreme Court has repeatedly found those statutes to apply equally to government-affiliated commercial actors.

c. The Lenders also attempt to escape their obligation to comply with the CFPA by invoking two Indian law canons that have no relevance here. First, the canon requiring statutes to be construed liberally in favor of Indians applies only to statutes passed for the benefit of Indian tribes. The CFPA was not. Second, courts require a clear indication of congressional intent before a statute will be interpreted to impede tribal sovereignty—but requiring tribal lenders to follow federal consumer-protection laws when they engage in interstate commerce does not impede tribes' sovereignty.

For all these reasons, the CFPA applies to the Lenders even assuming they are regarded as arms of tribes.

2. But even if arms of tribes were exempt from the CFPA, the CIDs still must be enforced. Under established principles, courts must enforce such CIDs unless the agency "plainly lacks" jurisdiction. The Bureau does not "plainly lack" jurisdiction because it is far from clear that the Lenders are in fact arms of tribes. Because the Lenders have not responded to the CIDs, the Bureau has not had the opportunity to obtain information about their relationships with the tribes, and publicly available information gives reason to doubt that the Lenders are in fact arms of tribes.

ARGUMENT

I. The CFPA Applies to Tribes and Tribally-Affiliated Companies.

The CFPA gives the Bureau broad authority to issue civil investigative demands to "any person" that the Bureau believes may have information relevant to a violation of federal consumer financial law. 12 U.S.C. § 5562(c)(1). A "person" under the Act is defined as "an individual, partnership, *company*, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity." *Id.* § 5481(19) (emphasis added). The Lenders, all limited liability companies, fall squarely within this definition.

The only question, then, is whether this Court should conclude that Congress silently meant to exclude the Lenders from these plain terms

because of their asserted affiliation with Indian tribes. It should not. For decades, this Court has applied the same basic rule: Generally applicable federal laws like the CFPA presumptively apply to tribes and tribally-affiliated entities. This rule rests on this Court's commonsense presumption that when tribes engage in commerce, Congress generally intends for them to follow the same rules as everyone else. The Lenders cannot show that Congress had any different intent here.

To avoid this result, the Lenders claim that this Court's precedent has the background presumption all wrong. According to the Lenders, this Court must instead apply a presumption based on *Stevens* that the term "person" ordinarily does not include a sovereign—or, by extension, lending companies affiliated with sovereign tribes. But that presumption does not displace this Court's longstanding precedent, and does not apply in this case. Even if it did, the result would be the same: Even assuming they are arms of Indian tribes (which the Bureau does not concede, *see infra* Section II), the Lenders must comply with the CFPA.

A. Under this Court's firmly established *Coeur d'Alene* framework, tribes and tribal lending companies must comply with the CFPA.

This Court has held time after time that a generally applicable federal statute that is silent as to its applicability to Indian tribes presumptively

applies to tribes just as it applies to others.[2] *E.g.*, *Nat'l Labor Relations Bd. v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995, 998-99 (9th Cir. 2003); *U.S. Dep't of Labor v. Occupational Safety & Health Review Comm'n* ("*OSHRC*"), 935 F.2d 182, 184 (9th Cir. 1991); *Coeur d'Alene*, 751 F.2d at 1115.[3] Under *Coeur d'Alene*, this presumption of coverage controls except in three circumstances:

> (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."

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[2] This Court has premised this presumption on the Supreme Court's statement in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960), that "a general statute in terms applying to all persons includes Indians and their property interests." The Lenders object that this statement was "likely dictum" (App. Br. at 27), but whether it was or not is beside the point, for *this* Court has adopted the principle in holding after holding. *See, e.g.*, *Chapa De*, 316 F.3d at 998-99; *Coeur d'Alene*, 751 F.2d at 1115. Moreover, contrary to the Lenders' contentions (App. Br. at 28 n.2), *Tuscarora* involved a statute's applicability to a tribe, not an individual Indian. *Tuscarora*, 362 U.S. at 100, 115 (considering whether statute permitted the taking of "certain lands, purchased and owned in fee simpl[e] by the *Tuscarora Indian Nation*" (emphasis added)).

[3] Other courts of appeals apply the same or similar presumptions. *See, e.g.*, *Fla. Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1129 (11th Cir. 1999); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 182 (2d Cir. 1996); *EEOC v. Fond du Lac Heavy Equip. & Constr. Co., Inc.*, 986 F.2d 246, 248-49 (8th Cir. 1993); *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457, 1462 (10th Cir. 1989); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932 (7th Cir. 1989).

Coeur d'Alene, 751 F.2d at 1116 (quoting *United States v. Farris*, 624 F.2d 890, 893-94 (9th Cir. 1980)) (alteration omitted). In those limited circumstances, the law will apply to tribes only if Congress expressly so provided. *Id.* Otherwise, no express mention of tribes is required. *Id.*

This framework controls this case. Because none of the *Coeur d'Alene* exceptions applies, the Lenders must comply with the CFPA, even assuming that they are "arms" of tribes.

1. *The CFPA presumptively applies to tribes and tribal companies under* Coeur d'Alene.

Coeur d'Alene's framework applies with full force here. The CFPA's provisions governing investigation and enforcement broadly cover "persons." *E.g.*, 12 U.S.C. §§ 5562, 5564. The Act expressly defines "person" to include "compan[ies]," a term that on its face covers the LLC Lenders in this case, as well as "other entit[ies]," a term that readily encompasses a tribe. 12 U.S.C. § 5481(19); *see also* Black's Law Dictionary (9th ed. 2009) (defining "entity" as "[a]n organization (such as a business or a governmental unit) that has a legal identity apart from its members or owners"). The Act contains no exemption for tribes and no suggestion that it excludes any "company" simply because it is established or controlled by a tribe. The Act is therefore a "statute of general applicability that is silent on the issue of applicability to Indian tribes"—precisely the kind of statute

that presumptively applies to tribes under *Coeur d'Alene*. *Coeur d'Alene*, 751 F.2d at 1116.

a. The Lenders attempt to avoid this presumption by distinguishing the CFPA from the statutes at issue in *Coeur d'Alene* and its progeny, but the distinctions they draw are wholly irrelevant under this Court's precedent. The Lenders first object that the CFPA, unlike the statutes in *Coeur d'Alene* and cases following it, mentions tribes in the definition of "State" and thus is not *completely* silent as to tribes. (App. Br. at 29.) But *Coeur d'Alene* is not so limited. Rather, it applies whenever a statute is silent on the relevant issue of its regulatory provisions' "*applicability* to Indian tribes." *Coeur d'Alene*, 751 F.2d at 1116 (emphasis added). Where, as here, a statute neither contains an "expressed exemption for Indians" nor "expressly appl[ies] to Indians," it is "silent" for purposes of *Coeur d'Alene*. *See Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683, 685 (9th Cir. 1991).

Coeur d'Alene is likewise not limited to statutes that expressly exclude other (non-tribal) sovereigns without excluding tribes. The Lenders contend that such express exclusions create a "negative implication" that Congress intended *not* to exclude tribes (App. Br. at 31), but this Court has never relied on such reasoning in holding that *Coeur d'Alene* applied, or in

concluding that tribes were subject to a generally applicable law.[4] Indeed, many cases applying *Coeur d'Alene* do not even mention the existence of express statutory exclusions, much less draw the "negative implication" that the Lenders claim is dispositive. *See, e.g.*, *Lumber Indus. Pension Fund*, 939 F.2d 683; *OSHRC*, 935 F.2d 182.

b. Unable to find support in existing case law for their efforts to avoid *Coeur d'Alene*'s framework, the Lenders concoct a "potential conflict" with Supreme Court precedent to encourage this Court to set new "boundaries" on *Coeur d'Alene*. (App. Br. at 33.) But *Coeur d'Alene* poses no conflict with the interpretive presumption discussed in *Stevens* that the term "person" ordinarily "does not include the sovereign," *Stevens*, 529 U.S. at 780. That interpretive presumption has never had any bearing on the question that *Coeur d'Alene* answers here: whether a tribe or tribal entity is

[4] The Lenders' contrary assertion (App. Br. at 31) mischaracterizes the case law. *See Chapa De*, 316 F.3d at 1001 & n.3 (noting statutory exemption for "the United States" only when discussing tribal entity's argument that it fell within that exemption); *Coeur d'Alene*, 751 F.2d at 1115 & n.1 (citing definition of "employer" and fact that that definition "expressly excluded only" federal government and states in support of point that the "definition of employer clearly includes the [tribal entity]"); *Menominee Tribal Enters. v. Solis*, 601 F.3d 669, 670 (7th Cir. 2010) (remarking that express exemption for federal, state, and local governments indicated neither that tribes were covered nor that tribes were exempt, as tribe contended); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1315-16 (D.C. Cir. 2007) (noting statute's exclusion for federal government and states only *after* concluding that Indian law principles did not exempt tribal enterprise from statute).

subject to a generally applicable federal law regulating commercial activities. And nothing in *Stevens* would permit—much less require—this Court to narrow or disregard binding circuit precedent. *See infra* Section I.B.1.

Moreover, the "boundaries" that the Lenders seek to impose on *Coeur d'Alene*—to avoid the non-existent "conflict" with *Stevens*—make no sense. The Lenders suggest that *Coeur d'Alene* should not apply at all where a statute mentions tribes somewhere and treats them like states for some purposes. (App. Br. at 32.) But such statutory features offer no reason to believe that Congress would have intended to exempt tribes from a generally applicable federal law. Even if they did, that would be no reason to disregard *Coeur d'Alene*'s framework. That framework already ensures that Congress's intent will control by recognizing an exception where there is "proof . . . that Congress intended the law not to apply" to tribes. *Coeur d'Alene*, 751 F.2d at 1116 (alteration omitted). Here, those statutory features reveal no such congressional intent—and they give no reason to depart from *Coeur d'Alene*'s basic understanding that, absent special circumstances, generally applicable federal laws will apply to tribes just as they apply to anyone else.

The Lenders' attempts to avoid *Coeur d'Alene*'s framework cannot be squared with this Court's precedent—and that framework controls this case. Under that framework, the CFPA presumptively applies to the Lenders.

2. *No* Coeur d'Alene *exception shields the Lenders from the CFPA.*

No exception to *Coeur d'Alene*'s presumption of coverage exists here. The Lenders do not dispute that *Coeur d'Alene*'s first and second exceptions have no relevance in this case. Instead, the Lenders invoke the third *Coeur d'Alene* exception and claim that the inclusion of "any federally recognized Indian tribe" in the definition of "State," 12 U.S.C. § 5481(27), provides "proof . . . that Congress intended the law not to apply to [tribes]," *Coeur d'Alene*, 751 F.2d at 1116 (quotations and alteration omitted). (App. Br. at 34.) But the definition of "State" does not even suggest, much less prove, that Congress intended to exempt tribes or their companies from the Act when they conduct business in the consumer financial marketplace. That definition merely recognizes a role for tribal *regulators*; it reveals no congressional intent to permit tribal *commercial enterprises* to disregard the Act's consumer-protection requirements.

a. The Act provides no exemption for "States" or "State" commercial enterprises.

If Congress had wanted to exempt tribes and tribal companies from the Act, including tribes in the definition of "State" would have been an odd way of going about it. That definition has no bearing on the Bureau's investigation and enforcement authority under the CFPA. That authority extends to "any person," 12 U.S.C. §§ 5562(c), 5564(a), and neither "States" nor State-owned "companies" are excluded from the definition of "person."[5] *See* 12 U.S.C. § 5481(19). Nor does any other provision exempt "States," let alone "State"-run commercial enterprises, from the Bureau's authority. Indeed, Congress enacted detailed provisions limiting the Bureau's authority over certain activities by various types of entities—but did not include any limitation for tribes' lending activities. *See* 12 U.S.C. § 5517.

[5] The absence of any "specific reference" to tribes in the definition of "person" does not imply that Congress intended implicitly to *exclude* tribes and their businesses from that term. (*See* App. Br. at 30) Congress had no reason to refer specifically to tribes or tribal businesses in the definition of "person," for that term *already* covered them by covering "other entit[ies]" and "compan[ies]." By contrast, Congress needed to mention tribes explicitly in the definition of "State," for tribes otherwise would not clearly fall within that term.

b. By including tribes in the definition of "State," Congress intended to recognize a role for tribal regulators, not to give tribal businesses an implicit exemption from the Act.

Nor does Congress's decision to include tribes in the definition of "State" suggest that Congress intended to give tribes or their companies an implicit exemption from the CFPA. The CFPA's definition of "State" serves a very different function in the Act—it identifies the government actors that can help *regulate* the consumer financial marketplace, including by enforcing the CFPA within their own jurisdictions. Indeed, the Act makes no mention of "State" *commercial* enterprises, and instead refers only to various State *governmental* actors that can serve as regulators. *See* 12 U.S.C. §§ 5493(c)(2)(B), (g)(3)(E), 5495, 5512(c)(6)(C)(i) ("State regulators"); *id.* §§ 5493(b)(3)(B), 5514(b)(4) ("State agencies"); *id.* §§ 5538(b)(1), 5552(a)(1) ("attorney[s] general of a State"); *id.* §§ 5514(b)(3), 5515(b)(2) ("State bank regulatory authorities"); *id.* § 5515(e)(2) ("State bank supervisors"). Congress's decision to include tribes in the definition of "State" did no more than recognize a role for these sorts of tribal regulators. That decision in no way implies—much less proves—that Congress intended to exempt tribal businesses from regulation under the CFPA.

i. Indeed, such an exemption would flatly contradict the purposes that provisions referring to "State[s]" serve. By recognizing a regulatory role for "State" regulators, Congress aimed to enhance, not diminish, the CFPA's protections. In particular, Congress authorized "the attorney general . . . of any State" and "State regulators" to enforce the CFPA and related regulations within their jurisdictions, 12 U.S.C. § 5552(a)(1), and preserved State governments' ability to enact and enforce laws giving consumers greater protections, *id.* § 5551(a). By including tribes in the definition of "State," Congress empowered tribal governments to help protect consumers in these ways, too. As the Treasury Department explained just after the CFPA's passage, "[t]ribal governments will be permitted to enforce the CFPB's rules in areas under their jurisdiction, the same way that states will be permitted to enforce those rules," and "tribal governments can set standards that are tougher than the federal standards to afford greater protections for their citizens under those codes." U.S. Dep't of Treasury, The Dodd-Frank Wall Street Reform and Consumer Protection Act Benefits Native Americans (Oct. 2010), http://www.treasury.gov/initiatives/wsr/Documents/Fact%20Sheet%20-%20Benefits%20Native%20Americans, %20Oct%202010%20FINAL.pdf. It is implausible that, in promoting more robust regulation in these ways,

Congress silently meant to diminish the CFPA's consumer protections by excusing a whole class of consumer lenders from complying with the Act.

ii. The Lenders nonetheless offer a laundry list of theories for why the inclusion of tribes in the definition of "State" somehow proves that Congress wanted to exempt tribal lenders from regulation. All fall wide of the mark.

Contrary to the Lenders' contentions, treating tribal governments as regulat*ors* is not "inconsistent" with treating tribal commercial enterprises as regulat*ed* entities. (*See* App. Br. at 30.) Indeed, it is entirely commonplace for governments to be both regulat*ors* and regulat*ed*. Consumer financial statutes such as the Truth in Lending Act (TILA), Fair Credit Reporting Act (FCRA), and Equal Credit Opportunity Act (ECOA), for example, all give government entities a regulatory role while at the same time subjecting them to the laws' requirements.[6]

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[6] *Compare, e.g.*, 15 U.S.C. § 1639 (TILA provision imposing disclosure obligations on "creditors," a term that includes a "government or governmental subdivision or agency" under 15 U.S.C. § 1602(d), (e), and (g)); *id.* §§ 1681a(b), 1681b(2), (3) (FCRA provisions imposing obligations on "person[s]" who procure consumer reports and defining "person" to include a "government or governmental subdivision or agency"); *id.* § 1691 (ECOA provision imposing obligations on "creditors," a term defined to include a "government or governmental subdivision or agency" under 15 U.S.C. § 1691a(e) and (f)), *with id.* § 1607(a) (authorizing various federal agencies to enforce TILA); *id.* § 1640(e) (authorizing State attorneys general to enforce TILA); *id.* § 1681s(a)-(c) (authorizing states and various

Nor do provisions requiring the Bureau to coordinate with tribal regulators on certain regulatory efforts somehow suggest that the Bureau may not regulate tribally-affiliated businesses on its own. (*See* App. Br. at 19; *see also id.* at 2, 4, 18-20.) The Act requires the Bureau to coordinate with "State" regulatory authorities on certain specified topics to ensure consistent, efficient, and effective regulation. *See, e.g.*, 12 U.S.C. § 5495 (directing Bureau to "coordinate . . . as appropriate" with various federal and State regulators "to promote consistent regulatory treatment of consumer financial and investment products and services"); *id.* § 5493(c)(2)(B) (requiring coordination on "fair lending efforts . . . to promote consistent, efficient, and effective enforcement of Federal fair lending laws"). But it does not require the Bureau to seek state or tribal governments' cooperation before investigating, or enforcing the law against, a state- or tribally-owned company. Under the Act, the Bureau must notify certain fellow *federal* regulators about some enforcement efforts, *see, e.g.*, *id.* § 5564(d)(2)(B) (Attorney General); *id.* § 5514(c)(3) (FTC), and "State" regulators must notify the Bureau of their actions to

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federal agencies to enforce FCRA against "persons"); *id.* § 1691c (authorizing various federal agencies to enforce ECOA); *compare also Moore v. U.S. Dep't of Agric.*, 55 F.3d 991 (5th Cir. 1995) (federal government agency being sued under ECOA), *with United States v. Am. Future Sys., Inc.*, 743 F.2d 169 (3d Cir. 1984) (federal government bringing suit under ECOA).

enforce the CFPA, *id.* § 5552(b). But the Act does not require the Bureau to notify "State" regulators of its investigations, much less give "States" veto power over the Bureau's enforcement efforts.

Provisions contemplating that "State" regulators will regulate "persons" likewise offer no reason to think that "State"-affiliated commercial enterprises cannot be "persons" subject to regulation. The Lenders claim it would not be "natural[]" to classify "State"-affiliated commercial enterprises as "persons" subject to regulation by "State" regulators.[7] (App. Br. at 16.) But that is not unnatural at all. Indeed, the Lenders themselves concede that they *are* subject to regulation by tribal (*i.e.*, "State") regulators (App. Br. at 21-22)—proving that they quite "naturally" qualify as "persons" under these very provisions.

In their final attempt to find proof that Congress intended to exempt them from the Act, the Lenders try a linguistic sleight of hand and a leap. First the sleight of hand: They argue that the definition of "State" is an

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[7] In particular, the Lenders cite provisions that (1) grant "a State regulator . . . having jurisdiction over a covered person" access to the Bureau's examination reports about that person, 12 U.S.C. § 5512(c)(6)(C)(i); (2) refer to a "State attorney general or State regulator" enforcing the CFPA "against any covered person," *id.* § 5552(b)(1)(A); (3) refer to "a person regulated by a State insurance regulator" and "a person regulated by any securities commission . . . of any State," *id.* § 5517(f)(1), (h)(1); and (4) clarify that "any person" must comply with laws "in effect in any State," *id.* § 5551(a)(1).

"equivalence provision" that "commands that Tribes be treated as States." (App. Br. at 32.) Then the leap: Because Congress could not have intended to subject the fifty states to regulation, it must not have intended to subject tribally-affiliated businesses to regulation either. As an initial matter, states and state-owned companies are neither exempt from regulation under the CFPA, nor exempt from complying with the Bureau's CIDs. But even accepting the Lenders' premise that the fifty states are exempt from Bureau regulation, it would not follow that tribal businesses would likewise be exempt. The Act's definition of "State" is just that—a definition. It does not command equal treatment for tribes and states for all purposes under the Act. The provision requiring "person[s]" to respond to the Bureau's CIDs does not use the term "State." *See* 12 U.S.C. § 5562. The definition of that term therefore does not suggest that states and tribes must be treated the same under that provision. And while tribes are presumptively covered by generally applicable statutes like the CFPA under *Coeur d'Alene*, no similar presumption exists for states.[8]

[8] Indeed, even putting *Coeur d'Alene* aside, tribes could be subject to the Bureau's authority even if states were not. Supreme Court precedent teaches that the term "person" in a statute may cover one type of sovereign but not another. *Compare United States v. Cooper Corp.*, 312 U.S. 600, 603, 614 (1941) (holding that federal government was not a "person" authorized to sue for treble damages under Sherman Act), *with Georgia v. Evans*, 316 U.S. 159, 162 (1942) (concluding that state was such a "person").

For all these reasons, tribes' inclusion in the definition of "State" does not even come close to providing the "proof . . . that Congress intended the law not to apply to [tribes]" necessary to trigger *Coeur d'Alene*'s third exception. *See Coeur d'Alene*, 751 F.2d at 1116 (alteration omitted). Because no exception applies, *Coeur d'Alene*'s general rule governs: Tribes and tribally-affiliated entities are subject to the CFPA.

B. *Stevens* does not exempt tribes or tribal lending companies from complying with the CFPA.

As in any case involving interpretation of a statute, this Court's "task is to discern congressional intent." *Padilla-Romero v. Holder*, 611 F.3d 1011, 1013 (9th Cir. 2010). The only question in this case is whether, when Congress defined "person" to include "compan[ies]," it (silently) meant to exclude companies affiliated with tribes. Under this Court's precedent, the Coeur d'Alene framework controls that inquiry— and that framework leads inexorably to the conclusion that Congress did not intend to exempt the Lenders from the CFPA.

The Lenders attempt to avoid this conclusion by arguing that this Court must disregard the *Coeur d'Alene* framework and apply instead the interpretive presumption discussed in *Stevens* that the term "person" ordinarily "does not include the sovereign," absent some indication of contrary congressional intent, *Stevens*, 529 U.S. at 780. (App. Br. at 11-13.)

But that presumption has never had any bearing on whether tribes are subject to a federal statute regulating commercial activities—and in no way supports the Lenders' sweeping claim that tribes are presumptively exempt from such laws. The presumption cited in *Stevens* accordingly provides no basis to disregard *Coeur d'Alene*—and the Lenders cannot avoid this Circuit's firmly established presumption that tribes engaging in commerce generally must follow the same laws as other commercial actors.

But even if this Court were to accept the Lenders' invitation to ignore *Coeur d'Alene*, the interpretive presumption that the Lenders emphasize would not win them the exemption they seek. That presumption has little, if any, force where, as here, the provision at issue authorizes suit only by the federal government and thus implicates no sovereign immunity concerns. And this interpretive presumption has even less relevance when a tribe conducts commercial activities though separate legal entities—limited liability companies—that expressly fall within the Act's definition of "person."

Moreover, even where (unlike here) the presumption applies with full force, it is not "a 'hard and fast rule of exclusion,'" and may be overcome by "some affirmative showing of statutory intent" that the law should apply. *Stevens*, 529 U.S. at 781 (quoting *Cooper*, 312 U.S. at 604-05). The CFPA's

statutory context and purposes make that affirmative showing. No other considerations from *Stevens* overcome the strong indications that Congress intended for the CFPA to apply to tribes and tribal lending companies just like their competitors.

1. Stevens' *presumption for interpreting the term "person" does not displace* Coeur d'Alene's *presumption that generally applicable laws apply to tribes.*

a. The interpretive presumption that the term "person" ordinarily does not refer to the sovereign does not displace *Coeur d'Alene*'s presumption that generally applicable laws apply equally to tribes. The presumption for interpreting "person" has never had any bearing on the question that *Coeur d'Alene* answers here: whether a generally applicable federal law applies to a tribe's commercial activities. The Lenders can point to only two cases that even mention that interpretive presumption in connection with a tribe—and neither involved a tribe's obligation to comply with federal laws regulating commercial conduct. Instead, those two cases addressed the entirely different issue of whether a tribe asserting distinctly sovereign rights was a "person" entitled to bring suit under 42 U.S.C. § 1983. *See Inyo Cnty. v. Paiute-Shoshone Indians*, 538 U.S. 701, 709, 712 (2003); *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 515 (9th Cir. 2005) (en banc).

Even in that distinct context, the proposition that the term "person" does not ordinarily include the sovereign carried little, if any, weight. In *Inyo*, the Supreme Court mentioned the proposition but did not rely on it in concluding that a tribe was not a "person" that could sue under Section 1983 in the circumstances in that case.[9] *See Inyo*, 538 U.S. at 711. The Supreme Court instead looked to the "legislative environment" and observed that "Section 1983 was designed to secure private rights against government encroachment, not to advance a sovereign's prerogative." *Id.* at 711-12. Thus, because the tribe was asserting a right that it claimed solely "by virtue of [its] asserted 'sovereign' status," it was not a "person" entitled to bring suit. *Id.* Following *Inyo*, the Ninth Circuit "[r]ecogniz[ed]" a presumption based on *Stevens* when considering another tribe's similar Section 1983 suit—but only in passing. *Skokomish*, 410 F.3d at 515 (quotations and alteration omitted). By contrast, when the Sixth Circuit considered another Section 1983 suit by a tribe, it did not so much as mention *Stevens* or any presumption in concluding that a tribe *was* a "person" entitled to bring such a suit when it sought to assert "private

[9] The U.S. government argued that a presumption that "person" does not include sovereigns, including tribes, should apply to the tribe in that case. Br. for the United States as *Amicus Curiae* at *8, *Inyo Cnty. v. Paiute-Shoshone Indians*, 538 U.S. 701 (No. 02-281), 2003 WL 252549. But it did not maintain that such a presumption applied to tribes in all circumstances. *Id.*

rights" in the same way as "other private, nonsovereign entities could." *Keweenaw Bay Indian Cmty. v. Rising*, 569 F.3d 589, 596 & n.5 (6th Cir. 2009). In all these cases, the statute's context—not any interpretive presumption—controlled.

b. The Lenders nonetheless urge this Court not only to apply the presumption for interpreting "person" in the context here, but also to expand it into a sweeping proposition that tribes are presumptively exempt from generally applicable federal laws—despite the decades of circuit precedent to the contrary. That would give the presumption far more weight than it can bear. Even when it applies, the presumption regarding the term "person" is just a tool for interpreting that term; it does not provide any sovereign, much less a tribe, a presumptive exemption from generally applicable federal laws regulating commercial activity. On the contrary, the Supreme Court has regularly disregarded the presumption in holding that such laws apply to sovereigns acting in a commercial capacity. *See, e.g., Jefferson Cnty. Pharm. Ass'n, Inc. v. Abbott Labs.*, 460 U.S. 150, 154 (1983) (holding that state is subject to antitrust law when it "compete[s] in the private retail market"); *United States v. California*, 297 U.S. 175, 186 (1936) (declining to exempt "business carried on by a state" from law regulating commercial conduct), *abrogated on other grounds by*

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); *Ohio v. Helvering*, 292 U.S. 360, 371 (1934) (holding that "state itself, when it becomes a dealer in intoxicating liquors," qualifies as a "person" subject to tax on alcohol sales), *abrogated on other grounds by Garcia*, 469 U.S. 528.[10]

Where tribes are concerned, it would be particularly inappropriate to convert the presumption for interpreting the term "person" into a presumptive exemption from federal laws regulating commercial activity. It is well established that tribal sovereignty does not provide "absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint." *San Manuel*, 475 F.3d at 443. Thus, tribes "going beyond reservation boundaries have generally been held subject to non-

[10] At any rate, even if the interpretive presumption regarding "persons" could be applied to presumptively exempt states or other sovereigns from federal commercial regulations in some contexts, that would be no reason to abandon *Coeur d'Alene* and give tribes such a presumptive exemption as well. "[T]ribes do not possess the same attributes of sovereignty that the Federal Government and the several States enjoy." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 169 (1982); *see also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (explaining that tribes' sovereignty "is of a unique and limited character"). Federal law accordingly does not necessarily treat tribes the same as other sovereigns. *See, e.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) ("Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other.").

discriminatory *state* law otherwise applicable to all citizens of the State."[11] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) (emphasis added) (applying this principle to tribal commercial enterprise). Yet, as the Lenders would have it, tribes engaging in commerce beyond reservation boundaries would be presumptively *exempt* from generally applicable *federal* laws—even though they are presumptively *subject* to generally applicable *state* laws. Such a regime would be entirely inexplicable, particularly given that the federal government, but not states, has "plenary" power over tribes. *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 891 (1986) ("[T]ribal sovereignty . . . is subject to plenary federal control and definition," but is "privileged from

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[11] The Supreme Court's sovereign immunity precedent does not suggest otherwise. That precedent holds that tribes enjoy *sovereign immunity* from suits by states and private plaintiffs even when they act in a commercial capacity. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998). But sovereign immunity—which concerns "whether an Indian tribe may be *sued* for violating a statute," *Fla. Paraplegic*, 166 F.3d at 1130 (emphasis in original)—is not an issue here because sovereign immunity never bars the *federal government* from suing a tribe. *EEOC v. Peabody W. Coal Co.*, 400 F.3d 774, 781 (9th Cir. 2005). Rather, the issue here is the entirely different question whether a tribe must comply with the statute. *See Chapa De*, 316 F.3d at 1002 (noting that "question of sovereign immunity . . . is different from whether a statute applies"). In answering that distinct question, the Supreme Court has explicitly noted that a tribe engaging in commerce outside Indian country would still be "subject to any generally applicable state law," even where its sovereign immunity protects it from private or state suit for violations of that law. *Bay Mills*, 134 S. Ct. at 2034-35; *accord Kiowa*, 523 U.S. at 755.

diminution by the States."). In short, the Lenders cannot transform the presumption for interpreting the term "person" into a presumption that tribes are exempt from federal laws regulating the commercial activities of "persons." No such presumption exists, and nothing in *Stevens* offers any basis for this Court to disregard its well-established *Coeur d'Alene* presumption here.

2. *Even under* Stevens, *the CFPA applies to tribes and tribal lending companies.*

In any event, even if this Court were to ignore *Coeur d'Alene* and its progeny, and instead apply the "person" interpretive presumption as the Lenders desire, the Lenders still would not prevail. Even if it applied, that presumption would have little, if any, force in this context. And even at its peak, that interpretive presumption could not overcome the strong indications in the CFPA's context and purposes that Congress intended for tribes and tribal lending companies to comply with the CFPA just like everyone else. Nothing in *Stevens* casts any doubt on that conclusion.

a. Even if it applied, the interpretive presumption cited in Stevens *would have little, if any, force in this context.*

i. The presumption carries little weight here because federal-government enforcement does not affect sovereign immunity.

The Supreme Court's decision in *Stevens* was principally "driven by canons of statutory construction relating to protection of the state's sovereign immunity." *Stoner v. Santa Clara Cnty. Office of Educ.*, 502 F.3d 1116, 1121 (9th Cir. 2007). Those canons—including the proposition that the term "person" ordinarily does not include a sovereign—have greatly diminished, if any, force where (as here) the federal government brings suit. In these circumstances, there is no sovereign immunity to protect, because neither states nor tribes ever have any sovereign immunity from suit by the federal government. *See West Virginia v. United States*, 479 U.S. 305, 311 (1987) (states); *Peabody W. Coal*, 400 F.3d at 781 (tribes). Thus, for purposes of "lawsuits brought by the United States against a State . . . , States are naturally just like any non governmental entity [and] there are no special rules dictating when they may be sued by the Federal Government." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 11 (1989) (quotations omitted), *overruled on other grounds by Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

Consistent with this understanding, the Supreme Court in *Stevens* held that a state was not a "person" subject to *private* suit under the False Claims Act—but left open the question whether the term "encompasses States when the United States itself sues under the False Claims Act." *Stevens*, 529 U.S. at 789 (Ginsburg, J., concurring); *accord Donald v. Univ. of Cal. Bd. of Regents*, 329 F.3d 1040, 1042 n.3 (9th Cir. 2003) (noting same open question). In that context, the interpretive presumption discussed in *Stevens* would have little, if any, force. *Cf. Stevens*, 529 U.S. at 789 (Ginsburg, J., concurring) (noting that "the clear statement rule applied to private suits against a State has not been applied when the United States is the plaintiff"). And it is even less germane here because, unlike the False Claims Act provision in *Stevens*, the CFPA provisions at issue in this case—which authorize the Bureau to issue CIDs to "any person," and to sue to enforce the CID if the person does not comply—authorize suit *only* by the federal government. *See* 12 U.S.C. §§ 5562(c), (e). Indeed, *no* provision of the CFPA authorizes the kind of "unconsented private suit against [states]" (or tribes) that led the Court in *Stevens* to interpret "person" to exclude states.[12] *See Stevens*, 529 U.S. at 780 n.9.

[12] The provisions authorizing "State" regulators to enforce the CFPA do not permit such regulators to sue other states, tribes, or their instrumentalities. Those provisions do not contain the "unequivocal[]" statement required to

The sovereign immunity concerns underlying *Stevens* therefore never have any relevance to the CFPA—and offer no reason to construe "person" to exclude tribes or tribal companies.

ii. The presumption is particularly weak here because the Lenders are not sovereigns themselves, but sovereign-affiliated companies.

In addition, even assuming it could apply here at all, the interpretive presumption regarding the term "person" would be especially weak because the asserted "persons" are not any sovereign itself, but rather *companies* affiliated with sovereigns. That presumption derives from the understanding that a *sovereign itself* would not ordinarily be considered a "person" as a matter of "common usage." *See Cooper*, 312 U.S. at 604; *accord Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989); *United States v. United Mine Workers of Am.*, 330 U.S. 258, 275 (1947). In this case, however, "common usage" cuts in precisely the opposite direction. Unlike a sovereign, a company ordinarily is considered a "person" in common usage. *Stevens*, 529 U.S. at 782 ("[C]orporations . . . are presumptively covered by the term 'person'" (emphasis omitted)). Equally important, the CFPA expressly defines "person" to include "compan[ies]." 12 U.S.C. § 5481(19). Under any common understating of that term, the

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abrogate those entities' sovereign immunity from suits by states or tribes. *See Bay Mills*, 134 S. Ct. at 2031; *Seminole Tribe*, 517 U.S. at 55.

LLC Lenders are undeniably "compan[ies]," and thus "persons"—whether they are arms of sovereigns or not.

In similar circumstances, courts have recognized that a corporate arm of a sovereign may be a "person," even if the sovereign itself is not. For instance, in holding that the U.S. Postal Service was not a "person" under the Sherman Act, the Supreme Court noted that the inquiry would be different "had the Congress chosen to create the Postal Service as a federal corporation." *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 746 (2004). Had Congress done that, the court explained that it would have to determine whether the Postal Service was covered under the "definitional text" defining "'person' to include corporations." *Id.* Following that case, the Sixth Circuit held that a wholly owned federal corporation *was* a "person" under the Sherman Act because it, unlike the Postal Service, "is organized as a corporation." *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 414 (6th Cir. 2006).

While courts at times have found some that sovereign-affiliated corporations not to be "persons," they did so only where sovereign immunity concerns warranted that narrow reading. *See, e.g., U.S. ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 578-80 (4th Cir. 2012); *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah,*

472 F.3d 702, 717-18 (10th Cir. 2006). Because no sovereign immunity concerns exist here, there is no reason to give "company" under the CFPA anything other than its ordinary meaning.

b. The CFPA's context and purposes show that Congress intended for the CFPA to apply to tribes and tribal lenders.

As discussed above, the interpretive presumption cited in *Stevens*—if it applied here at all—would carry exceedingly little weight. In any event, regardless of its weight, that presumption is no more than one tool for discerning Congress's intent. *See Stevens*, 529 U.S. at 781; *Cooper*, 312 U.S. at 604-05; *see also United States v. Persichilli*, 608 F.3d 34, 37 (1st Cir. 2010) ("[W]ith or without a presumption, context still controls."). Other familiar "aids to construction," such as "the purpose, the subject matter, the context, the legislative history, and executive interpretation of the statute" apply with full force as well. *Cooper*, 312 U.S. at 605; *accord Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 83 (1991). Here, the CFPA's statutory context and purposes demonstrate that Congress did not intend to give tribal lenders a special exemption from the CFPA's consumer-protection provisions.

i. Other consumer-protection statutes that the Bureau administers expressly contemplate that the Bureau has enforcement authority over "governments" under the CFPA.

Surrounding statutes reveal that the Bureau's authority under the CFPA extends to governments—leaving no question that its authority also extends to tribes and companies *affiliated* with tribes or tribal governments. *Cf. Stevens*, 529 U.S. at 786 n.17 (noting that "a court can, and should, interpret the text of one statute in the light of text of surrounding statutes"). As noted, the CFPA authorizes the Bureau to implement and enforce "Federal consumer financial law," a body of law that includes eighteen pre-existing consumer-protection statutes called the "enumerated consumer laws." 12 U.S.C. §§ 5481(12), (14), 5511(a), 5564(a). No fewer than six of these enumerated consumer laws expressly apply to governments. In particular, the Truth in Lending Act (TILA), Home Ownership and Equity Protection Act (HOEPA), Fair Credit Billing Act (FCBA), Consumer Leasing Act (CLA), Fair Credit Reporting Act (FCRA), and Equal Credit Opportunity Act (ECOA) all impose requirements on "persons" or specific categories of "persons"[13]—which those statutes define to include a "government or governmental subdivision or agency."[14]

[13] *See, e.g.*, 15 U.S.C § 1631 (TILA requirements for "creditor[s]"); *id.* § 1639 (HOEPA provision governing "creditor[s]"); *id.* § 1666 (FCBA

The Lenders cannot credibly claim to be exempt from these statutes. TILA, for example, requires "persons" who act as creditors to provide consumers important disclosures about the costs and terms of loans. *See, e.g.*, 15 U.S.C. §§ 1637, 1638; *see also id.* § 1602(g). Given that TILA's definition of "person" includes both "government[s]" and "corporation[s]," there can be no doubt that companies affiliated with tribal or other governments must comply. *See id.* § 1602(d), (e). The Bureau issued the CIDs here to determine whether the Lenders may have violated TILA (or other federal consumer financial laws) as part of their extensive lending operations. *See* ER 212, 223, 234. Yet, in the Lenders' view, the CFPA does not permit the Bureau to investigate those possible violations.

That position is untenable. When Congress created the Bureau, it amended TILA and these other enumerated consumer laws to authorize the Bureau to enforce compliance "with respect to any person subject to [those

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provision governing "creditor[s]"); *id.* § 1602(g) (defining "creditor" as certain "persons" for purposes of TILA, HOEPA, and FCBA); *id.* § 1667a (CLA requirements for "lessor[s]," which 15 U.S.C. § 1667(3) defines as certain "person[s]"); *id.* § 1681m (FCRA requirements for "person[s]"); *id.* § 1691 (ECOA requirements for "any creditor," a term that 15 U.S.C. § 1691a(e) defines as certain "person[s]").

[14] 15 U.S.C. § 1602(d), (e) (definition covering TILA, HOEPA, FCBA, and CLA); *id.* § 1681a(b) (FCRA); *id.* § 1691a(f) (ECOA); *see also* 12 U.S.C. § 5481(12)(B), (D), (E), (F), (L), (O) (identifying those statutes as "enumerated consumer laws").

statutes]"—that is, with respect to entities including "government[s]."[15] The amendments further specify that the Bureau should use its powers "under . . . subtitle E of the [CFPA]" to conduct that enforcement.[16] Those powers—which include the power under subtitle E to issue the CIDs here, *see* 12 U.S.C. § 5562—thus must extend to governments.[17] Given this statutory context, there can be no question that the Bureau's authority under the CFPA also extends to companies affiliated with tribal (or other) governments.

ii. The CFPA's purposes demonstrate that Congress intended no special exemption for tribal lenders.

a. The CFPA's purposes strongly reinforce the conclusion that the CFPA applies to tribal lenders. Congress charged the Bureau with ensuring, among other things, that "consumers are protected from unfair, deceptive,

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[15] Pub. L. No. 111-203, § 1100A(8), 124 Stat. 1376, 2108 (amending 15 U.S.C. § 1607(a)(6)) (covering enforcement of TILA, HOEPA, FCBA, and CLA); *id.* § 1088(10)(B), 124 Stat. at 2089-90 (amending 15 U.S.C. § 1681s(b)(1)(H)) (FCRA); *id.* § 1085(4), 124 Stat. at 2084 (amending 15 U.S.C. § 1691c(a)(9)) (ECOA).

[16] 15 U.S.C. §§ 1607(a)(6), 1681s(b)(1)(H), 1691c(a)(9).

[17] The absence of an express reference to "government[s]" in the CFPA's definition of "person" does not suggest that governments are excluded from the CFPA's definition. Congress broadly defined "person" to include "other entit[ies]," a term whose ordinary meaning encompasses governments. *See* Black's Law Dictionary (9th ed. 2009) (defining "entity" as "[a]n organization (such as a business *or a governmental unit*) that has a legal identity apart from its members or owners" (emphasis added)).

or abusive acts and practices," 12 U.S.C. §§ 5511(b)(2), and with "establish[ing] a basic, minimum federal level playing field," regardless of what type of provider offered the financial product or service, S. Rep. No. 111-176, at 11 (2010); *see also* 12 U.S.C. § 5511(b)(4). Excluding tribally-affiliated entities from the Bureau's authority would leave consumers doing business with those entities unprotected and would tilt the playing field in tribal entities' favor, in direct contravention of these expressed purposes.

Worse, exempting the tribally-affiliated lenders would frustrate Congress's specific goal of curbing abuses in the payday lending market. In enacting the CFPA, Congress specifically identified payday lending as an area in which "consumers have long faced problems." S. Rep. No. 111-176, at 17, 20. As a Senate Report explained, interests rates on those loans average between 391% and 782% APR, rates that force many consumers onto a "perpetual debt treadmill." *Id.* at 20-21. Congress was so concerned about payday lending abuses that it specifically empowered the Bureau to conduct examinations of any payday lender, regardless of its size, to ensure that it is complying with the law. 12 U.S.C. § 5514(a)(1)(E).

Tribal entities represent a significant segment of this market that caused Congress such particular concern. Jessica Silver-Greenberg, *Payday Lenders Join With Indian Tribes*, WALL ST. J. (Feb. 10, 2011) (over

10% of online payday lenders are tribally affiliated). That segment is reportedly poised to grow with the proliferation of arrangements in which nontribal payday lenders partner with tribes in order to assert sovereign immunity as a shield against state and private enforcement. *See id.* (quoting industry consultant describing this business model as "exploding"); *see also Bay Mills*, 134 S. Ct. at 2052 (Thomas, J., dissenting) (noting that "payday lenders . . . often arrange to share fees or profits with tribes so they can use tribal immunity as a shield for conduct of questionable legality"). Exempting tribal enterprises from the CFPA could potentially insulate these lenders from *all* law enforcement outside the tribe itself—private, state, and federal alike. That would seriously undermine the CFPA's purposes.

b. There is no reason to think that Congress would have wanted to sacrifice those purposes by giving tribal lenders a special exemption from the Act. Contrary to the Lenders' contentions (App. Br. at 22), requiring tribes to comply with the CFPA does not affect tribal self-government—which this Court has made clear does not include the right to engage in commerce without regard to federal laws regulating commercial activities. *See OSHRC*, 935 F.2d at 184 (explaining that "the right to conduct

commercial enterprises free of federal regulation" is not "an aspect of tribal self-government").

Nor does tribes' status as sovereigns suggest that Congress (silently) intended to exempt their businesses from the Act. When statutes serve remedial purposes like the CFPA does, the Supreme Court has repeatedly found those statutes to apply to sovereigns' commercial activities. For instance, the Supreme Court held that a state-owned railroad was subject to a railroad safety law because "[t]he danger to be apprehended is as great and commerce may be equally impeded whether the defective appliance is used on a railroad which is state-owned or privately-owned." *United States v. California*, 297 U.S. at 185. It has likewise held that states acting in a commercial capacity were "persons" subject to federal laws on anticompetitive conduct, *Jefferson Cnty. Pharm.*, 460 U.S. at 153-56, taxation of alcohol sales, *Helvering*, 292 U.S. at 371, and preferential and unreasonable practices by wharves and piers, *California v. United States*, 320 U.S. 577, 585-86 (1944). In these contexts, the statutes' remedial purposes are "as capable of being obstructed by state as by individual action." *United States v. California*, 297 U.S. at 186. Thus, it would "defeat[] the very purpose for which Congress framed the scheme . . . to

exempt [entities] operated by government agencies." *California v. United States*, 320 U.S. at 585-86. The same principles apply here.

Finally, tribes' authority to regulate their own businesses does not suggest that *the Bureau's* regulation of those businesses is unnecessary to honor the CFPA's purposes. Congress established the Bureau as a primary federal regulator specifically charged with enforcing the CFPA "consistently" to ensure "that markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. § 5511(a). Leaving regulation to tribal regulators alone would flout that core purpose of the Act. And given that the Lenders assertedly provide the tribes an "important" source of revenue (App. Br. at 37-38), it is especially unlikely that Congress intended to leave the regulation of tribal businesses in the *exclusive* hands of the tribes themselves. Indeed, when Congress wanted to leave regulatory responsibility to some regulator other than the Bureau, it said so expressly. For instance, the CFPA limits the Bureau's authority over "person[s] regulated by" State insurance regulators, State securities commissions, the Commodity Futures Trading Commission, and other regulators. *E.g.*, 12 U.S.C. §§ 5517(f), (h)-(k). It does not limit the Bureau's authority over persons making loans to consumers over the Internet just because those companies are also regulated by tribal regulators.

c. No other considerations from Stevens *weigh against applying the CFPA to tribes or tribal lending companies.*

No other considerations underlying the Court's decision in *Stevens* can overcome these strong indications that Congress intended the CFPA to apply to tribes and tribal lending companies. This case, unlike *Stevens*, presents no concern about "alter[ing] the usual constitutional balance between States and the Federal government," or about "avoid[ing] difficult constitutional questions." *Stevens*, 529 U.S. at 787. Tribes' sovereignty, unlike states', "exists only at the sufferance of Congress and is subject to complete defeasance." *Rice v. Rehner*, 463 U.S. 713, 719 (1983). Applying the CFPA to tribes' commercial activities thus neither alters the usual constitutional balance nor poses any difficult constitutional question.

Moreover, this case, unlike *Stevens*, does not implicate the "presumption against imposition of punitive damages on governmental entities." *Stevens*, 529 U.S. at 784. Seeking to rely on that presumption, the Lenders point to CFPA provisions authorizing civil penalties that the Lenders deem punitive. (App Br. at 17-18); *see also* 12 U.S.C. § 5565(c). But, punitive or not, those penalties are not at issue in this case. Whether those penalties would apply to the Lenders has no bearing on whether the

Lenders are "persons" obligated to respond to the Bureau's CIDs.[18] *See City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 401-02 (1978) (explaining that conclusion that municipalities are "persons" subject to a law "do[es] not necessarily require the conclusion" that they would be subject to all remedies under the law). And even if the civil penalty provisions were at issue here, the punitive-damages presumption would still have no relevance, because that presumption exists to protect blameless taxpayers from being "unfairly taxed for [their government's] wrongdoing." *Cook Cnty., Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 132 (2003). That is not a worry here, as the Lenders' corporate charters expressly insulate the tribes (and thus tribal taxpayers) from liability for any judgment against the Lenders. ER 52, 128, 170.

For all these reasons, even if this Court were to ignore *Coeur d'Alene* and instead follow the Supreme Court's interpretive approach in *Stevens*, the result would be the same: The Lenders must comply with the CFPA.

[18] Those are distinct issues because the term "person" may have different meanings at different places in the statute. *See Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004) (noting "presumption that identical words used in different parts of the same act are intended to have the same meaning" but explaining that this presumption "readily yields" when warranted by context (quotations omitted)).

C. The Indian law canons that the Lenders invoke do not support an exemption for tribes or tribally-affiliated companies.

Under both *Coeur d'Alene* and *Stevens*, tribal entities are "persons" subject to the CFPA. In yet another attempt to avoid this result, the Lenders invoke two pro-Indian canons of construction (App. Br. at 25-26), but neither of those canons applies here.

The first canon that the Lender cite provides that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992). (App. Br. at 25.) That canon, however, "applies *only* to federal statutes that are passed for the benefit of dependent Indian tribes." *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003) (emphasis added, quotations omitted); *accord Chapa De*, 316 F.3d at 999 (applying this canon to a generally applicable federal law "would be effectively to overrule *Coeur d'Alene*, which, of course, this panel cannot do"); *San Manuel*, 475 F.3d at 1312 ("We have found no case in which the Supreme Court applied this principle of pro-Indian construction when resolving an ambiguity in a statute of general application."). The CFPA is not such a statute.

The second canon that the Lenders invoke requires "clear indications of legislative intent" before a court will construe a statute to impair tribal sovereignty, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). (App. Br. at 25.) But applying the CFPA to tribal commercial enterprises does not impair tribal sovereignty, for that sovereignty does not include "the right to conduct commercial enterprises free of federal regulation."[19] *OSHRC*, 935 F.2d at 184; *see also Lumber Indus. Pension Fund*, 939 F.2d at 685; *Coeur d'Alene*, 751 F.2d at 1116.

II. At a Minimum, the CIDs Must Be Enforced Because the Bureau Does Not "Plainly Lack" Jurisdiction Over the Lenders.

For the reasons stated in Section I, the Bureau has jurisdiction over tribes and tribally-affiliated companies. But even assuming (wrongly) that tribes are *not* subject to the CFPA, the CIDs here must still be enforced. In this Circuit, an administrative subpoena must be enforced "unless

[19] By contrast, in the cases that the Lenders cite (App. Br. at 26), the Supreme Court required a clear indication from Congress where the statute would impede tribal sovereignty or abrogate tribal treaty rights (the second *Coeur d'Alene* exception). *See Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999) (treaty rights); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (statute would affect an "inherent attribute[] of sovereignty" by limiting jurisdiction of tribal courts); *United States v. Dion*, 476 U.S. 734, 739-40 (1986) (treaty rights); *Merrion*, 455 U.S. at 137, 149 (statute would divest tribe of "power to tax," an "essential attribute of Indian sovereignty").

jurisdiction is plainly lacking." *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001) (quotations omitted).

Even if the Bureau lacked jurisdiction over tribes, it would not "plainly lack[]" jurisdiction over the Lenders because it is not at all clear that the Lenders are in fact sufficiently connected to the tribes to qualify as the tribes themselves for purposes of the CFPA. The Lenders claim that they must be treated as tribes under the CFPA because they are tribal "arms" that would share in tribes' sovereign immunity from state and private suit. It is far from clear, however, that an entity's status as a tribal "arm" for sovereign immunity purposes would have any bearing on whether the entity is subject to regulatory enforcement by the federal government—against which neither tribes nor tribal "arms" have sovereign immunity in the first place. *See Peabody W. Coal*, 400 F.3d at 781.

At any rate, even if "arms" sharing in tribes' sovereign immunity were exempt from the CFPA, the Bureau would not "plainly lack[]" jurisdiction over the Lenders, because they have not sufficiently demonstrated that they have a close enough affiliation with tribes to fall within such an exemption. This Court has identified several factors that inform whether an entity is an "arm" of a tribe for sovereign immunity purposes, including whether the entity is tribally owned and operated, whether the economic benefits of the

enterprise inure to the tribe's benefit, and whether the controlling managers are tribal members. *See Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 726 (9th Cir. 2008). The Lenders claim that they meet all of the relevant factors, but those factual claims are based solely on their own statements. Because the Lenders have not responded to the Bureau's CIDs, the Bureau has not yet had the chance to investigate whether those claims reflect reality. For that reason alone, the Bureau's jurisdiction is not "plainly lacking," and its CIDs must be enforced. *See EPA v. Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 447 (9th Cir. 1988) ("An independent regulatory administrative agency has the power to obtain the facts requisite to determining whether it has jurisdiction over the matter sought to be investigated." (quotations omitted)).

Moreover, the Bureau has cause to doubt the Lenders' claims that they are "arms" of their affiliated tribes. Another regulator recently filed a lawsuit alleging that these three Lenders are no more than "nominal" lenders that a non-tribal payday lending business uses as a "façade" in an attempt to circumvent state law. *See* Complaint ¶¶ 44-45, *Commonwealth of Penn. v. Think Finance, Inc.*, No. 14-cv-7139 (E.D. Pa. Dec. 17, 2014) (ECF No. 1-1). In addition, news reports have indicated that the Otoe-Missouria Tribe keeps only one percent of the money earned by its lending

enterprises, casting doubt on the claim that the economic benefits of the enterprise inure to the tribe's benefit, a key factor in the arm-of-tribe analysis, where it applies. Zeke Faux, *Behind 700% Loans, Profits Flow Through Red Rock to Wall Street*, Bloomberg (Nov. 24, 2014), *available at* http://www.bloomberg.com/news/2014-11-24/payday-loan-fortune-backed-by-medley-found-behind-indian-casino.html; *cf. Cook*, 548 F.3d at 726 (finding casino to be "arm" of tribe where "*all* capital surplus from the casino [would] be deposited in the Tribe's treasury" (emphasis added)); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1195 (10th Cir. 2010) (finding casino to be "arm of tribe" where "*[o]ne hundred percent* of the Casino's revenue goes to the [tribe's Economic Development] Authority and then to the Tribe" (emphasis added)).

There is also reason to question whether the tribes are in substance the controlling managers of the enterprises. One news report quotes the former vice chairman of the Otoe-Missouria Tribe as saying that he realized over time "that we [the tribe] didn't have any control at all." Faux, *Behind 700% Loans*, *supra*. Documents that the Chippewa Cree Tribe and Plain Green filed in another case similarly indicate that a non-tribal "Manager" bears responsibility for "[a]ll business and affairs in connection with the

day-to-day operation, management and maintenance" of the tribal lending entities. Complaint, Ex. B (Management Agreement) at 6, *Chippewa Cree Tribe of the Rocky Boy's Reservation v. Roberts*, No. 14-cv-0063 (D. Mont. Aug. 28, 2014) (ECF No. 1-2).[20] Particularly in light of these allegations, the Bureau would not "plainly lack" jurisdiction over these Lenders even if it lacked jurisdiction over arms of tribes. For that independent reason, the CIDs must be enforced.

[20] This Court may take judicial notice of the litigation documents and news reports cited here. Those documents' existence is "not subject to reasonable dispute" because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The Bureau does not offer these sources to demonstrate the truth of their contents, but rather only to show the existence of their allegations, which call the Lenders' claims into question. *See United States v. W.R. Grace*, 504 F.3d 745, 766 (9th Cir. 2007) ("[W]e have discretion to take judicial notice under Rule 201 of the existence and content of published articles."); *cf. also Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001) (court may judicially notice another court's opinion, "not for the truth of the facts recited therein, but for the existence of the opinion").

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order enforcing the Bureau's CIDs.

Respectfully submitted,

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/s/ Kristin Bateman

Meredith Fuchs
General Counsel
To-Quyen Truong
Deputy General Counsel
John R. Coleman
Assistant General Counsel
Lawrence DeMille-Wagman
Kristin Bateman
Attorneys
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
(202) 435-7821 (telephone)
(202) 435-7024 (facsimile)
kristin.bateman@cfpb.gov
Counsel for Petitioner-Appellee
Consumer Financial Protection Bureau

STATUTORY ADDENDUM

Consumer Financial Protection Act

12 U.S.C. § 5481. Definitions

Except as otherwise provided in this title, for purposes of this title, the following definitions shall apply:

* * *

(6) Covered person

The term "covered person" means--

(A) any person that engages in offering or providing a consumer financial product or service; and

(B) any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person.

* * *

(12) Enumerated consumer laws

Except as otherwise specifically provided in section 5519 of this title, subtitle G or subtitle H, the term "enumerated consumer laws" means--

(A) the Alternative Mortgage Transaction Parity Act of 1982 (12 U.S.C. 3801 et seq.);

(B) the Consumer Leasing Act of 1976 (15 U.S.C. 1667 et seq.);

(C) the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.), except with respect to section 920 of that Act;

(D) the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.);

(E) the Fair Credit Billing Act (15 U.S.C. 1666 et seq.);

(F) the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), except with respect to sections 615(e) and 628 of that Act (15 U.S.C. 1681m(e), 1681w);

(G) the Home Owners1 Protection Act of 1998 (12 U.S.C. 4901 et seq.);

(H) the Fair Debt Collection Practices Act (15 U.S.C. 1692 et seq.);

(I) subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act (12 U.S.C. 1831t(c)-(f))2;

(J) sections 502 through 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6802-6809) except for section 505 as it applies to section 501(b);

(K) the Home Mortgage Disclosure Act of 1975 (12 U.S.C. 2801 et seq.);

(L) the Home Ownership and Equity Protection Act of 1994 (15 U.S.C. 1601 note);

(M) the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 et seq.);

(N) the S.A.F.E. Mortgage Licensing Act of 2008 (12 U.S.C. 5101 et seq.);

(O) the Truth in Lending Act (15 U.S.C. 1601 et seq.);

(P) the Truth in Savings Act (12 U.S.C. 4301 et seq.);

(Q) section 626 of the Omnibus Appropriations Act, 2009 (Public Law 111-8); and

(R) the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701).

* * *

(14) Federal consumer financial law

The term "Federal consumer financial law" means the provisions of this title, the enumerated consumer laws, the laws for which authorities are transferred under subtitles F and H, and any rule or order prescribed by the Bureau under this title, an enumerated consumer law, or pursuant to the authorities transferred under subtitles F and H. The term does not include the Federal Trade Commission Act.

* * *

(19) Person

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

* * *

(27) State

The term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the

Commonwealth of the Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands or any federally recognized Indian tribe, as defined by the Secretary of the Interior under section 479a-1(a) of Title 25.

* * *

12 U.S.C. § 5531(a). Prohibiting unfair, deceptive, or abusive acts or practices—In general

The Bureau may take any action authorized under part E to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.

12 U.S.C. § 5536. Prohibited acts

(a) In general

It shall be unlawful for--

(1) any covered person or service provider--

(A) to offer or provide to a consumer any financial product or service not in conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a Federal consumer financial law; or

(B) to engage in any unfair, deceptive, or abusive act or practice;

(2) any covered person or service provider to fail or refuse, as required by Federal consumer financial law, or any rule or order issued by the Bureau thereunder--

(A) to permit access to or copying of records;

(B) to establish or maintain records; or

(C) to make reports or provide information to the Bureau; or

(3) any person to knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of the provisions of section 5531 of this title, or any rule or order issued thereunder, and notwithstanding any provision of this title, the

provider of such substantial assistance shall be deemed to be in violation of that section to the same extent as the person to whom such assistance is provided.

(b) Exception

No person shall be held to have violated subsection (a)(1) solely by virtue of providing or selling time or space to a covered person or service provider placing an advertisement.

12 U.S.C. § 5551. Relation to State law

(a) In general

(1) Rule of construction

This title, other than sections 1044 through 1048, may not be construed as annulling, altering, or affecting, or exempting any person subject to the provisions of this title from complying with, the statutes, regulations, orders, or interpretations in effect in any State, except to the extent that any such provision of law is inconsistent with the provisions of this title, and then only to the extent of the inconsistency.

(2) Greater protection under State law

For purposes of this subsection, a statute, regulation, order, or interpretation in effect in any State is not inconsistent with the provisions of this title if the protection that such statute, regulation, order, or interpretation affords to consumers is greater than the protection provided under this title. A determination regarding whether a statute, regulation, order, or interpretation in effect in any State is inconsistent with the provisions of this title may be made by the Bureau on its own motion or in response to a nonfrivolous petition initiated by any interested person.

(b) Relation to other provisions of enumerated consumer laws that relate to State law

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

(c) Additional consumer protection regulations in response to State action

(1) Notice of proposed rule required

The Bureau shall issue a notice of proposed rulemaking whenever a majority of the States has enacted a resolution in support of the establishment or modification of a consumer protection regulation by the Bureau.

(2) Bureau considerations required for issuance of final regulation

Before prescribing a final regulation based upon a notice issued pursuant to paragraph (1), the Bureau shall take into account whether--

(A) the proposed regulation would afford greater protection to consumers than any existing regulation;

(B) the intended benefits of the proposed regulation for consumers would outweigh any increased costs or inconveniences for consumers, and would not discriminate unfairly against any category or class of consumers; and

(C) a Federal banking agency has advised that the proposed regulation is likely to present an unacceptable safety and soundness risk to insured depository institutions.

(3) Explanation of considerations

The Bureau--

(A) shall include a discussion of the considerations required in paragraph (2) in the Federal Register notice of a final regulation prescribed pursuant to this subsection; and

(B) whenever the Bureau determines not to prescribe a final regulation, shall publish an explanation of such determination in the Federal Register, and provide a copy of such explanation to each State that enacted a resolution in support of the proposed regulation, the Committee on Banking, Housing, and Urban Affairs of the Senate, and the Committee on Financial Services of the House of Representatives.

(4) Reservation of authority

No provision of this subsection shall be construed as limiting or restricting the authority of the Bureau to enhance consumer

protection standards established pursuant to this title in response to its own motion or in response to a request by any other interested person.

(5) Rule of construction

No provision of this subsection shall be construed as exempting the Bureau from complying with subchapter II of chapter 5 of Title 5.

(6) Definition

For purposes of this subsection, the term "consumer protection regulation" means a regulation that the Bureau is authorized to prescribe under the Federal consumer financial laws.

12 U.S.C. § 5552. Preservation of enforcement powers of States

(a) In general

(1) Action by State

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

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

(A) In general

Except as permitted under subparagraph (B), the attorney general (or equivalent thereof) of any State may not bring a civil

action in the name of such State against a national bank or Federal savings association to enforce a provision of this title.

(B) Enforcement of rules permitted

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

(3) Rule of construction

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

(b) Consultation required

(1) Notice

(A) In general

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

(B) Emergency action

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

(C) Contents of notice

The notification required under this paragraph shall, at a minimum, describe--

(i) the identity of the parties;

(ii) the alleged facts underlying the proceeding; and

(iii) whether there may be a need to coordinate the prosecution of the proceeding so as not to interfere with any action, including any rulemaking, undertaken by the Bureau, a prudential regulator, or another Federal agency.

(2) Bureau response

In any action described in paragraph (1), the Bureau may--

(A) intervene in the action as a party;

(B) upon intervening--

(i) remove the action to the appropriate United States district court, if the action was not originally brought there; and

(ii) be heard on all matters arising in the action; and

(C) appeal any order or judgment, to the same extent as any other party in the proceeding may.

(c) Regulations

The Bureau shall prescribe regulations to implement the requirements of this section and, from time to time, provide guidance in order to further coordinate actions with the State attorneys general and other regulators.

(d) Preservation of State authority

(1) State claims

No provision of this section shall be construed as altering, limiting, or affecting the authority of a State attorney general or any other regulatory or enforcement agency or authority to bring an action or other regulatory proceeding arising solely under the law in effect in that State.

(2) State securities regulators

No provision of this title shall be construed as altering, limiting, or affecting the authority of a State securities commission (or any agency or office performing like functions) under State law to adopt rules,

initiate enforcement proceedings, or take any other action with respect to a person regulated by such commission or authority.

(3) State insurance regulators

No provision of this title shall be construed as altering, limiting, or affecting the authority of a State insurance commission or State insurance regulator under State law to adopt rules, initiate enforcement proceedings, or take any other action with respect to a person regulated by such commission or regulator.

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

(1) In general

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

(A) produce such documentary material for inspection and copying or reproduction in the form or medium requested by the Bureau;

(B) submit such tangible things;

(C) file written reports or answers to questions;

(D) give oral testimony concerning documentary material, tangible things, or other information; or

(E) furnish any combination of such material, answers, or testimony.

* * *

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

(1) In general

Whenever any person fails to comply with any civil investigative demand duly served upon him under this section, or whenever satisfactory copying or reproduction of material requested pursuant to the demand cannot be

accomplished and such person refuses to surrender such material, the Bureau, through such officers or attorneys as it may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person, a petition for an order of such court for the enforcement of this section.

(2) Service of process

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

12 U.S.C. § 5563(a). Hearings and adjudication proceedings—In general

The Bureau is authorized to conduct hearings and adjudication proceedings with respect to any person in the manner prescribed by chapter 5 of Title 5 in order to ensure or enforce compliance with--

> (1) the provisions of this title, including any rules prescribed by the Bureau under this title; and
>
> (2) any other Federal law that the Bureau is authorized to enforce, including an enumerated consumer law, and any regulations or order prescribed thereunder, unless such Federal law specifically limits the Bureau from conducting a hearing or adjudication proceeding and only to the extent of such limitation.

12 U.S.C. § 5564(a). Litigation authority—In general

If any person violates a Federal consumer financial law, the Bureau may, subject to sections 5514, 5515, and 5516 of this title, commence a civil action against such person to impose a civil penalty or to seek all appropriate legal and equitable relief including a permanent or temporary injunction as permitted by law.

Enumerated Consumer Laws

15 U.S.C. Ch. 41, Subch. I: *Truth in Lending Act, Home Ownership and Equity Protection Act, Fair Credit Billing Act, and Consumer Leasing Act*

15 U.S.C. § 1602. Definitions and rules of construction

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

* * *

(d) The term "organization" means a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

(e) The term "person" means a natural person or an organization.

* * *

(g) The term "creditor" refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement. Notwithstanding the preceding sentence, in the case of an open-end credit plan involving a credit card, the card issuer and any person who honors the credit card and offers a discount which is a finance charge are creditors. For the purpose of the requirements imposed under part D of this subchapter and sections 1637(a)(5), 1637(a)(6), 1637(a)(7), 1637(b)(1), 1637(b)(2), 1637(b)(3), 1637(b)(8), and 1637(b)(10) of this title, the term "creditor" shall also include card issuers whether or not the amount due is payable by agreement in more than four installments or the payment of a finance charge is or may be required, and the Bureau shall, by regulation, apply these requirements to such card issuers, to the extent appropriate, even though the requirements are by their terms applicable only to creditors offering open-end credit plans. Any person who originates 2 or more mortgages referred to in subsection (aa) of this section in any 12-month period or any person who originates 1 or more such mortgages through a

mortgage broker shall be considered to be a creditor for purposes of this subchapter. The term "creditor" includes a private educational lender (as that term is defined in section 1650 of this title) for purposes of this subchapter.

* * *

(s) The term "State" refers to any State, the Commonwealth of Puerto Rico, the District of Columbia, and any territory or possession of the United States.

15 U.S.C. § 1607(a). Administrative enforcement—Enforcing agencies

Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with the requirements imposed under this subchapter shall be enforced under--

(1) section 1818 of Title 12, by the appropriate Federal banking agency, as defined in section 1813(q) of Title 12, with respect to--

(A) national banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act; and

(C) banks and State savings associations insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), and insured State branches of foreign banks;

(2) the Federal Credit Union Act, by the Director of the National Credit Union Administration, with respect to any Federal credit union;

(3) part A of subtitle VII of Title 49, by the Secretary of Transportation, with respect to any air carrier or foreign air carrier subject to that part;

(4) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture, with respect to any activities subject to that Act;

(5) the Farm Credit Act of 1971, by the Farm Credit Administration with respect to any Federal land bank, Federal land bank association, Federal intermediate credit bank, or production credit association; and

(6) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this subchapter.

(7) sections 78u-2 and 78u-3 of this title, in the case of a broker or dealer, other than a depository institution, by the Securities and Exchange Commission.

15 U.S.C. Ch. 41, Subch. III: *Fair Credit Reporting Act*

15 U.S.C. § 1681a. Definitions; rules of construction

(a) Definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

(b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

* * *

15 U.S.C. § 1681s(b). Administrative enforcement—Enforcement by other agencies

(1) In general

Subject to subtitle B of the Consumer Financial Protection Act of 2010, compliance with the requirements imposed under this subchapter with respect to consumer reporting agencies, persons who use consumer reports from such agencies, persons who furnish information to such agencies, and users of information that are subject to section 1681m(d) of this title shall be enforced under--

(A) section 1818 of Title 12, by the appropriate Federal banking agency, as defined in section 1813(q) of Title 12, with respect to--

(i) any national bank or State savings association, and any Federal branch or Federal agency of a foreign bank;

(ii) any member bank of the Federal Reserve System (other than a national bank), a branch or agency of a foreign bank (other than a Federal branch, Federal agency, or insured State branch of a foreign bank), a commercial lending company owned or controlled by a foreign bank, and any organization operating under section 25 or 25A of the Federal Reserve Act; and

(iii) any bank or Federal savings association insured by the Federal Deposit Insurance Corporation (other than a member of the Federal Reserve System) and any insured State branch of a foreign bank;

(B) the Federal Credit Union Act (12 U.S.C. 1751 et seq.), by the Administrator of the National Credit Union Administration with respect to any Federal credit union;

(C) subtitle IV of Title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board;

(D) part A of subtitle VII of Title 49, by the Secretary of Transportation, with respect to any air carrier or foreign air carrier subject to that Act;

(E) the Packers and Stockyards Act, 1921 (7 U.S.C. 181 et seq.) (except as provided in section 406 of that Act), by the Secretary of Agriculture, with respect to any activities subject to that Act;

(F) the Commodity Exchange Act, with respect to a person subject to the jurisdiction of the Commodity Futures Trading Commission;

(G) the Federal securities laws, and any other laws that are subject to the jurisdiction of the Securities and Exchange Commission, with respect to a person that is subject to the jurisdiction of the Securities and Exchange Commission; and

(H) subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this subchapter.

(2) Incorporated definitions

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 1813(s) of Title 12 have the same meanings as in section 3101(b) of Title 12.

15 U.S.C. Ch. 41, Subch. IV: *Equal Credit Opportunity Act*

15 U.S.C. § 1691a. Definitions; rules of construction

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

* * *

(e) The term "creditor" means any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original creditor who participates in the decision to extend, renew, or continue credit.

(f) The term "person" means a natural person, a corporation, government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association.

* * *

15 U.S.C. § 1691c(a). Administrative enforcement—Enforcing agencies

Subject to subtitle B of the Consumer Protection Financial Protection Act of 20101 with2 the requirements imposed under this subchapter shall be enforced under:

(1) section 1818 of Title 12, by the appropriate Federal banking agency, as defined in section 1813(q) of Title 12, with respect to--

(A) national banks, Federal savings associations, and Federal branches and Federal agencies of foreign banks;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations

operating under section 25 or 25A of the Federal Reserve Act; and

(C) banks and State savings associations insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), and insured State branches of foreign banks;

(2) The Federal Credit Union Act [12 U.S.C.A. § 1751 et seq.], by the Administrator of the National Credit Union Administration with respect to any Federal Credit Union.

(3) Subtitle IV of Title 49, by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board.

(4) Part A of subtitle VII of title 49, by the Secretary of Transportation with respect to any air carrier or foreign air carrier subject to that part.

(5) The Packers and Stockyards Act, 1921 [7 U.S.C.A. § 181 et seq.] (except as provided in section 406 of that Act [7 U.S.C.A. §§ 226, 227]), by the Secretary of Agriculture with respect to any activities subject to that Act.

(6) The Farm Credit Act of 1971 [12 U.S.C.A. § 2001 et seq.], by the Farm Credit Administration with respect to any Federal land bank, Federal land bank association, Federal intermediate credit bank, and production credit association;

(7) The Securities Exchange Act of 1934 [15 U.S.C.A. § 78a et seq.], by the Securities and Exchange Commission with respect to brokers and dealers;

(8) The Small Business Investment Act of 1958 [15 U.S.C.A. § 661 et seq.], by the Small Business Administration, with respect to small business investment companies; and

(9) Subtitle E of the Consumer Financial Protection Act of 2010, by the Bureau, with respect to any person subject to this subchapter.

The terms used in paragraph (1) that are not defined in this subchapter or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) in that it contains 12,911 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Georgia.

Dated: February 20, 2015 /s/ Kristin Bateman

Kristin Bateman
Attorney for Petitioner-Appellee
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
(202) 435-7821 (telephone)
(202) 435-7024 (facsimile)
kristin.bateman@cfpb.gov

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 20, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 20, 2015 /s/ Kristin Bateman

Kristin Bateman
Attorney for Petitioner-Appellee
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
(202) 435-7821 (telephone)
(202) 435-7024 (facsimile)
kristin.bateman@cfpb.gov

STATEMENT OF RELATED CASES

Counsel is aware of no cases pending in this Court that are related within the meaning of Ninth Circuit Rule 28-2.6.