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

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

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INTRODUCTION

The Bureau fails to grapple with the controlling legal principles in this case because it tries to answer the wrong question. Over and over again, the Bureau asks: Did Congress intend to "silently" exempt otherwise-regulated Tribal entities from coverage under the Consumer Financial Protection Act? *See, e.g.*, CFPB Br. 16, 24, 25, 31, 49. Of course, that question just assumes the conclusion. The starting point in a case involving the scope of a federal agency's authority is not the assumption that the agency may regulate whomever it pleases—least of all independent sovereigns like Indian Tribes. Rather, the question that the Bureau should have asked, and never does, is: Did Congress intend to "silently" regulate sovereigns like States and Tribes by giving a federal agency power over "persons"?

The Supreme Court has made clear that the default answer to that question is *no*. Try as it might, the Bureau's 59-page brief never settles on a convincing reason why that default rule should not apply here. It offers up a hodgepodge of possible reasons, including that the *Stevens* presumption contains a "commercial activity" exception, or perhaps that the presumption is weaker for Tribes than for States, or perhaps that it might be limited to cases raising sovereign immunity concerns, or perhaps that it does not extend to tribal entities at all. The problem with all of those proposed limitations is that they find no support in Supreme Court

or Ninth Circuit case law. This Court would have to break new ground—not to mention reject the underlying rationale of *Stevens* as a canon of ordinary usage—if it were to limit the *Stevens* presumption in any one of the ways the Bureau proposes.

The Bureau is left to rely on this Court's *Coeur d'Alene* decision, but it makes no real attempt to reconcile *Coeur d'Alene* with *Stevens*. That is of no help to this Court, which of course cannot ignore binding Supreme Court precedent. In our opening brief, Respondents explained why *Coeur d'Alene* and *Stevens* can exist in harmony, and described how enforcing the ordinary meaning of the term "person" coheres with both decisions.

What the Bureau proposes instead is admirably bold. It asks this Court to give it the power to investigate and regulate all 50 States and all sovereign Indian Tribes, without the faintest indication that Congress realized it was granting such sweeping authority. And the Bureau is no longer shy about this massive power-grab. Previously, it assured the District Court that it was "not necessary here to decide the vast scope of the Bureau's authority as to States and entities." Tr. 17:17-19, No. 14-2090 (C.D. Cal. May 12, 2014), ECF No. 32. It has all but abandoned that position on appeal. Now, the Bureau concedes—indeed, affirmatively argues—that under its interpretation of the CFPA, "States" and "State-run commercial enterprises" would be subject to the Bureau's regulatory

reach. CFPB Br. 24 (internal quotation marks omitted). States engage in thousands of consumer-facing lending activities each year, from housing to student loans. This Court should decline the Bureau's request for such sweeping new regulatory authority.

ARGUMENT

I. THE *STEVENS* PRESUMPTION APPLIES TO THE CFPA.

The *Stevens* presumption is straightforward: In interpreting a statute, a court should presume "that 'person' does not include the sovereign" unless there is an "affirmative showing of statutory intent to the contrary." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000). The Bureau offers several different reasons why that canon of ordinary usage might not apply to the CFPA. Each falls short.

A. There Is No "Commercial Activity" Exception To The Presumption.

1. The Bureau first attempts to distinguish *Stevens* by inventing what appears to be a "commercial activity" exception. Under the Bureau's proposed rule, the *Stevens* presumption would apply to statutes involving "distinctly sovereign rights" but would not apply to "generally applicable federal law[s]" regulating "commercial activities." CFPB Br. 33.

That limitation makes no sense. To begin, the proposed exception flips the presumption on its head. *Stevens* explains that the term "person" does not cover a

sovereign unless context indicates otherwise. *See Stevens*, 529 U.S. at 780-81. The Bureau's "commercial activity" exception dictates the opposite. Under that framework, the term "person" would cover a sovereign except when the sovereign is "asserting distinctly sovereign rights." CFPB Br. 33.

More fundamentally, the proposed exception misunderstands the nature of the *Stevens* presumption. The presumption does not depend on whether the sovereign is engaged in any particular kind of activity. Rather, the presumption rests on the ordinary meaning of the term "person." At its core, it reflects the fact that when people use the term "person," they ordinarily do not mean to refer to entire governments. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 273-74 (2012) (discussing *Stevens* presumption as a canon of ordinary legal usage). Thus, whether a sovereign is engaged in "commercial" or "sovereign" activity is irrelevant. No matter the type of activity involved, the ordinary meaning of "person" remains the same: It does not include the sovereign.

The Supreme Court explained this ordinary-meaning rationale well over a century ago in *United States v. Fox*, 94 U.S. 315 (1876). At that time, the New York statute of wills permitted devises "to any person capable by law of holding real estate." *Id.* at 321. The Supreme Court held that the term "person" could not "be so extended as to include within its meaning the Federal government." *Id.*

Instead, legislatures were required to provide "an express definition to that effect to give it a sense thus extended." *Id.* The Supreme Court has since cited *Fox* for the same principle: "Since, *in common usage*, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it." *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941) (emphasis added); *see also Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) (same); *United States v. United Mine Workers*, 330 U.S. 258, 275 (1947) (same).

This Court has followed the Supreme Court's lead in applying the *Stevens* presumption as a canon of ordinary usage. In *United States v. Errol D., Jr.*, for example, the defendant was charged under the Indian Major Crimes Act after he allegedly burglarized a government building. 292 F.3d 1159 (9th Cir. 2002). The Act, however, punished only offenses "commit[ted] against the person or property of another Indian *or other person*." 18 U.S.C. § 1153(a) (emphasis added). Citing Supreme Court precedent—including *Stevens* and *Cooper*—the Court explained that as a matter of "ordinary usage and meaning," the word "person" does not extend to governments and government agencies. *See Errol D.*, 292 F.3d at 1162-63. The Court then ruled in favor of the defendant, declining to "extend federal jurisdiction beyond the plain meaning of the statutory language." *Id.* at 1163.

Given all this, even the Bureau concedes that the *Stevens* presumption "derives from the understanding that a sovereign itself would not ordinarily be

considered a 'person' as a matter of 'common usage.' " CFPB Br. 41 (emphasis removed). Because the "common usage" of "person" does not include the sovereign—no matter the type of activity involved—there is no "commercial activity" exception to the *Stevens* presumption.

2. The Bureau nevertheless attempts to justify a "commercial activity" exception in three ways. *First*, it suggests that there should be such an exception because the presumption has not yet been applied in the identical context of (1) Indian Tribes that (2) engage in commercial activity. *See* CFPB Br. 33-34. At the risk of stating the obvious, that is why we are here: to determine whether the presumption should apply in this specific context. And the entire point of an interpretive presumption is to supply a general rule that can be applied to different fact patterns. That the rule has not yet been applied to these precise facts is no reason to carve out a new exception.

Second, the Bureau points to three cases, all decided well before *Stevens*, in which the Supreme Court supposedly "disregarded the presumption" in situations involving commercial activity. CFPB Br. 35-36. None of the cases the Bureau cites, however, purported to create a "commercial activity" exception to the presumption. One merely relied on a prior decision that had extended an analogous statute to cover States. *See Jefferson Cnty. Pharm. Ass'n, Inc. v. Abbott Labs.*, 460 U.S. 150, 155 (1983). And the other two looked to the specific

statutory context in concluding that the term "person" should be extended beyond its usual reach. *See United States v. California*, 297 U.S. 175, 186 (1936) (acknowledging canon but explaining that contrary intention could "fairly . . . be inferred"); *Ohio v. Helvering*, 292 U.S 360, 370 (1934) (assessing "the connection in which the word is found"). Those two decisions also reflect a narrower view of the presumption that no longer governs. *See Stevens*, 529 U.S. at 790-91 (Stevens, J., dissenting) (citing *United States v. California* and arguing that the presumption should not cover "all-embracing" statutes that are "as capable of being violated by state as by individual action"). If anything, Supreme Court precedent suggests that a "commercial activity" exception would be unworkable, for the Court in an analogous context has rejected any line between commercial or proprietary activity, on the one hand, and traditional government functions, on the other. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1958).

Third, the Bureau suggests that it would be "particularly inappropriate" to apply the *Stevens* presumption to Tribes, as opposed to States. CFPB Br. 36; *see also id.* at 36 n.10. There is no basis for creating a Tribe-only "commercial activity" exception. This Court has acknowledged that the *Stevens* presumption applies to Tribes, without suggesting that the presumption is in any way diluted. *See Skokomish Indian Tribe v. United States*, 410 F.3d 506, 515 (9th Cir. 2005).

And the United States has unequivocally taken the position that the *Stevens* presumption applies to Tribes no differently than to States:

> Indian Tribes, like States (and unlike, for example, municipal governments) are also sovereigns under the constitutional structure, albeit sovereigns of a distinct and dependent character. The Constitution expressly refers to the "Indian Tribes," Art. I, § 8, Cl. 3, and the sovereignty of the Tribes has been recognized throughout the Nation's history. Accordingly, the interpretative presumption that "person" does not include the sovereign properly applies to Tribes as well as to States in this context.

Br. for United States at *8, *Inyo Cnty. v. Paiute-Shoshone Indians*, 538 U.S. 701 (2003) (No. 02-281), 2003 WL 252549 (Jan. 23, 2003) (internal quotation marks and citations omitted). In support of a Tribe-only "commercial activity" exception, the Bureau cites cases holding that Tribes are subject to federal law and, in some cases, state law. CFPB Br. 36-38. But nobody disputes that. The question in this case is not whether Congress *has the power* to regulate Tribes; it is whether Congress *has done so* in the CFPA by using the term "person."

If anything is "particularly inappropriate," it is creating a "commercial activity" exception specific to Tribes. The Supreme Court has repeatedly rejected such an exception in the tribal sovereign immunity context, and there is no reason to believe that it would bless the same type of exception in the regulatory context. *See Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998) (holding that tribal sovereign immunity applies regardless of whether the suit "involve[s] governmental or commercial activities"); *Michigan v. Bay Mills Indian Cmty.*, 134

S. Ct. 2024, 2039 (2014) (reaffirming *Kiowa* and declining to "create a freestanding exception to tribal immunity for all off-reservation commercial conduct").

B. The Presumption Is Not Limited To Statutes Affecting Sovereign Immunity.

The Bureau next asserts that the *Stevens* presumption carries little weight here because States and Tribes do not have sovereign immunity from suits brought by the federal government. *See* CFPB Br. 39-40. This contention fares no better. It is true that Justice Ginsburg's concurrence in the judgment in *Stevens* proposed such a limitation. *See* 529 U.S. at 789 (Ginsburg, J., concurring). But her separate opinion is just that, and five Justices in the majority did not join her. Although this Court has not expressly decided the question itself, it has noted that—contrary to Justice Ginsburg's assertion—"[n]othing in the Court's opinion [in *Stevens*] purports to limit its scope solely to *qui tam* suits brought by private parties." *Donald v. Univ. of Cal. Bd. of Regents*, 329 F.3d 1040, 1042 n.3 (9th Cir. 2003).[1]

[1] Indeed, *Stevens* itself arguably involved a suit brought by the federal government against a State, because the government is the real party in interest in a *qui tam* action. *See United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994). Thus, before the Supreme Court's decision, this Court held that a suit brought by a private *qui tam* relator against a State was *not* barred by sovereign immunity because the relator was litigating on behalf of the United States. *See United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 39 F.3d 957, 963 (9th Cir. 1994), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995).

Nor would such a limitation make sense. After all, the *Stevens* presumption rests on the ordinary meaning of the term "person," *see supra* Part I.A, and that meaning excludes the sovereign, regardless of whether any sovereign immunity concerns are implicated. Thus, as the D.C. Circuit has pointed out, "the Supreme Court applies the constructional principle against finding 'person' to include a sovereign even in the absence of sovereign immunity or comity concerns." *Al Fayed v. CIA*, 229 F.3d 272, 275 (D.C. Cir. 2000). For example, the Supreme Court has applied the presumption even in cases in which the sovereign was the *plaintiff*. *See, e.g.*, *Inyo Cnty.*, 538 U.S. 701 (holding that Tribes are not "person[s]" entitled to sue under 42 U.S.C. § 1983); *Breard v. Greene*, 523 U.S. 371 (1998) (per curiam) (holding that foreign nations are not "person[s]" entitled to sue under § 1983); *Cooper*, 312 U.S. 600 (holding that the United States is not a "person" entitled to seek treble damages under the Sherman Act). It has also applied the presumption in other cases in which no sovereign immunity concerns were implicated. *See, e.g.*, *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72 (1991) (holding that a government agency is not a "person" with removal authority). This Court has done the same. *See Errol D.*, 292 F.3d at 1162-63 (excluding government property from a criminal statute punishing offenses committed "against the person or property" of a "person").

In any event, to the extent the *Stevens* presumption is concerned at all about consequences for the sovereign, it should apply whenever "the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979). Here, the Bureau's reading of the statute would authorize suits against States and Tribes and thus impose a burden on them. Even in the absence of any sovereign immunity concerns, then, there would still be concerns about comity, for States and Tribes would still suffer the indignity of being haled into court. *See Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1640 (2011) ("The specific indignity against which sovereign immunity protects is the insult to a State of being haled into court without its consent."); *Stevens*, 529 U.S. at 780 n.9 (explaining that the presumption encourages "both comity and respect for our federal system").

C. For Purposes Of The Presumption, "Arms" Are No Different From Tribes.

In yet another attempt to distinguish *Stevens*, the Bureau argues that the *Stevens* presumption is "especially weak" here because Respondents are companies rather than Tribes themselves. CFPB Br. 41; *see also id.* at 16, 19. That argument is foreclosed by the "arm of the sovereign" doctrine. As our opening brief explained, it is settled law that an entity considered an "arm" of the sovereign receives the same treatment as the sovereign itself. *See* Opening Br. 35-36.

The Bureau's argument to the contrary relies on the fact that the CFPA defines "person" to include a "company." 12 U.S.C. § 5481(19).[2] As our opening brief also explained, however, Respondents' formal status as companies is irrelevant if they are "arms" of the sovereign. *See* Opening Br. 40-41. Any decision to the contrary would gut the doctrine, because an "arm" of a sovereign can always be described as something else—such as an "individual," "company," "corporation," or "other entity." 12 U.S.C. § 5481(19).

Indeed, as the Bureau forthrightly admits, its reading would give it sweeping power to regulate not only the arms of *Tribes*, but also those of *States*. *See* CFPB Br. 24. After all, States (like Tribes) conduct many activities through "companies" or "corporations." *See* Opening Br. 23 & n.1 (giving examples of housing finance corporations and student loan authorities). States also often act through "individuals." That is why the Supreme Court in *Will* rejected an argument similar to the Bureau's. There, the plaintiff argued that, unlike a State itself, an individual state official should be characterized as a "person" for purposes of § 1983. *Will*, 491 U.S. at 70. The Supreme Court dismissed that semantic point. "Obviously,

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[2] The fact that the CFPA defines "person" without mentioning sovereign entities is yet another reason to believe that Congress meant to exclude those entities. *See Cooper*, 312 U.S. at 607 (noting that the statute's detailed definitional provision "emphasizes the fact that if [the sovereign] was intended to be included Congress would have so provided"); *cf. Bond v. United States*, 134 S. Ct. 2077, 2091 (2014) (explaining that a court should "consider the ordinary meaning of a defined term," especially where that ordinary meaning plays a "limiting role").

state officials literally are persons. But a suit against a state official in his or her official capacity . . . is no different from a suit against the State itself." *Id.* at 71; *see also United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 579 (4th Cir. 2012) (explaining that "the critical inquiry" is not whether state agencies are organized as "corporations" but whether they "are truly subject to sufficient state control to render them a part of the state"). So too here. Respondents literally are companies. But if they are "arms" of their Tribes—and they are—then they are subject to regulation only if the Tribes are, too.

Against the weight of this authority, the Bureau points to a decision involving the U.S. Postal Service. CFPB Br. 42. That decision does not help the Bureau; in fact, it *subscribes* to the basic "arm of the sovereign" doctrine. When that case was originally before the Ninth Circuit, this Court took for granted that if the Postal Service were an instrumentality of the federal government, it would not be subject to antitrust liability. *See Flamingo Indus. (USA) Ltd. v. U.S. Postal Serv.*, 302 F.3d 985, 992 (9th Cir. 2002). The Court concluded, however, that "the Postal Service should be treated as a private corporation" rather than an instrumentality of the sovereign, because Congress had withdrawn from the Postal Service "the cloak of sovereignty." *Id.* The Supreme Court reversed, but not because it disagreed with the longstanding "arm of the sovereign" doctrine. *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004). It held that the

Postal Service, although independent, was "part of the Government" and so was not subject to antitrust liability. *Id.* at 746.

Neither this Court nor the Supreme Court stated that a corporate "arm" of the sovereign loses the rights of the sovereign. The Supreme Court observed in passing that its analysis might differ if Congress had "chosen to create the Postal Service as a federal corporation." *Id.* But it made that comment in the context of analyzing whether Congress intended to "strip [the Postal Service] of its governmental status," indicating that the key question was whether the sovereign treated its own entity as an "arm." *Id.* at 744. There is no suggestion in this case that the Tribes have withdrawn their "cloak of sovereignty" or have "strip[ped]" Respondents of their tribal status. To the contrary, the Tribes have expressly vested Respondents with all of the privileges and immunities that a sovereign Tribe enjoys. *See* ER 51 (Plain Green); ER 127 (MobiLoans); ER 176 (Great Plains).

D. The CFPA's Context Only Buttresses The Presumption.

The Bureau contends that the context and purpose of the CFPA demonstrate Congress's intention to regulate States and Tribes—and do so clearly enough to overcome the *Stevens* presumption. To support that proposition, the Bureau relies on several inferences that, when examined, turn out to favor Respondents.

First, the Bureau argues that the word "person" in the CFPA should be construed to cover government entities because Congress has expressly extended

other consumer-protection statutes to governments. *See* CFPB Br. 44-46. That argument actually cuts the other way. In a host of other consumer protection laws—namely, the Truth in Lending Act, the Home Ownership and Equity Act, the Fair Credit Billing Act, the Equal Credit Opportunity Act, and the Consumer Leasing Act—Congress expressly defined "person" to include a "government or governmental subdivision or agency." 15 U.S.C. §§ 1602(d) & (e), 1691a(e) & (f). That shows that when Congress wanted to include the sovereign in the definition of "person," it knew how to do so. The natural inference is that when, as here, Congress chose not to define "person" to include a "government or governmental subdivision or agency," *see* 12 U.S.C. § 5481(19), that choice was intentional: Congress intended the CFPA to have a different scope. *See United States v. Ressam*, 553 U.S. 272, 277 (2008) (where Congress chooses to use different language in related statutes, the choice "virtually commands" that the statutes be given distinct meanings).

The fact that the Bureau has some authority to enforce these other consumer protection laws does not enlarge the scope of the Bureau's investigatory powers over "person[s]" under the CFPA. *Contra* CFPB Br. 44-46. The Bureau's investigatory powers appear in Title X of Pub. L. No. 111-203. And Congress provided that the definition of "person" in § 5481 "shall apply" "for purposes of [Title X]." 12 U.S.C. § 5481. Accordingly, the Bureau may issue CIDs only to

"person[s]" as defined in § 5481, regardless of how "person" may be defined in other consumer protection statutes. That does not mean the federal government is powerless to investigate or regulate government entities that fall within the broader definitions of "person" found in those other statutes. It just means that the power to enforce those other statutes with respect to government entities resides with a different federal agency—the Federal Trade Commission, not the Bureau. *See* 15 U.S.C. §§ 1607(c), 1681s(a)(1), 1691c(c).

Second, the Bureau asserts that the purposes of the CFPA make clear that Congress wanted to give the Bureau power to regulate States and Tribes. *See* CFPB Br. 46-50. But it cites only the highest-level purposes of the Act, such as ending abusive lending practices and establishing a remedial scheme. Those generally worded purposes cannot suffice to overcome *Stevens*. After all, a similar argument could have been made in many of the cases already discussed. In *Will*, for example, the plaintiff brought a § 1983 action against a state agency and a state official. The Supreme Court held that the term "person" did not cover States, even though the statute was meant to "provide[] a federal forum to remedy many deprivations of civil liberties." *Will*, 491 U.S. at 66. And in *Stevens* itself, the plaintiff brought a False Claims Act against a state agency. The Court held that the state agency was not a "person" subject to suit, over the dissent's protests that the statute was "all-embracing in scope, national in its purpose, and as capable of

being violated by state as by individual action." *Stevens*, 529 U.S. at 791 (Stevens, J., dissenting).

The Bureau insists that in enacting the CFPA, Congress sought to establish uniform federal regulation, "regardless of *what type of provider* offered the financial product or service." CFPB Br. 47. That is true only in a limited sense. What Congress said was that "[f]ederal consumer law [should be] enforced consistently, without regard to the status of a person *as a depository institution*." 12 U.S.C. § 5511(b)(4) (emphasis added); *see* S. Rep. No. 111-176, at 11 (2010) (explaining that the Bureau will promulgate and enforce rules that apply both to banks and to non-depository institutions). There is nothing in the statute or its legislative history to suggest that Congress sought to regulate without regard to a provider's status *as a sovereign*.

In a similar vein, the Bureau declares that the broad purposes of the CFPA will be frustrated if consumers who deal with tribal entities are left "unprotected." CFPB 47. That hyperbole ignores the reality that tribal entities are in fact regulated—the regulator is simply one sovereign, the Tribe, rather than another, the federal government. *See* Opening Br. 21-22 (describing regulatory oversight of each Tribe). It also ignores the possibility that other federal agencies, such as the FTC, may attempt to exercise jurisdiction in the area. Finally, by again pointing to only the broadest purposes of the statute, the Bureau ignores the basic principle

that "[t]he role of this Court is to apply the statute as it is written—even if [it] think[s] some other approach might accord with good policy." *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) (internal quotation marks and alteration omitted).

Third, the Bureau contends that no other considerations from *Stevens* apply to the CFPA. That is incorrect. *Stevens* looked to the "historical context" of the False Claims Act, 529 U.S. at 781-82, and the Bureau has not rebutted either the statutory context or the legislative history described in our opening brief. *See* Opening Br. 18-20 (describing role of States as co-regulators); *id.* at 23-25 (describing amendments to account for Tribes as sovereigns only).

Stevens also observed that the False Claims Act imposed punitive damages, suggesting that the statute did not apply to government entities. 529 U.S. at 784-85. The Bureau does not dispute that, like the False Claims Act, the CFPA "imposes damages that are essentially punitive in nature." *Id.* at 784; *see also* Opening Br. 17-18. Instead, the Bureau's primary response is simply that "those penalties are not at issue in this case." CFPB Br. 51. Of course they are not: In this the first case testing the scope of the Bureau's authority over "person[s]," the Bureau has asserted only the power to issue CIDs to independent sovereigns. The Bureau's power to assess civil penalties, however, rests on that same authority over "person[s]." 12 U.S.C. § 5565(c)(1). And the Bureau gives no reason why

"person" should have one meaning when it comes to the statute's investigatory provisions, but a different meaning when it comes to the statute's penalty provisions. *See Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) ("Undoubtedly, there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."). Thus, although the Bureau has not yet sought penalties against Respondents, the CFPA's penalty provisions should nevertheless inform this Court's interpretation of the statutory term "person"—and should give this Court serious pause about construing that term to cover sovereign entities.[3]

[3] The Bureau also asserts that the presumption against the imposition of punitive damages on government entities would not apply because that presumption exists to protect blameless taxpayers, and because the Tribes would be insulated from Respondents' liability. But even if that were true, the Bureau offers no support for the notion that the original purpose of the canon should limit its application in future cases. And in any event, because Respondents are wholly owned by the Tribes, monetary judgments against Respondents directly harm the Tribes' treasuries. *See Cook v. AVI Casino Enters.*, 548 F.3d 718, 726 (9th Cir. 2008); *see also* Br. for United States at *13, *Inyo Cnty.*, 538 U.S. 701 (No. 02-281), 2003 WL 252549 (Jan. 23, 2003) (explaining that "any money judgment against the [Tribal] Corporation would necessarily deplete what would otherwise be tribal funds").

II. THE BUREAU FAILS TO RECONCILE *COEUR D'ALENE* WITH *STEVENS*.

A. *Coeur d'Alene* Does Not Stand In The Way Of The Best Reading Of The Statute.

The most challenging part of this case, to be sure, is reconciling the Supreme Court's decision in *Stevens* with this Court's decision in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 113 (9th Cir. 1985). The Bureau hardly disguises its view that, if *Stevens* means what it says, this Court would have to choose either its own case law or the Supreme Court's. *See, e.g.*, CFPB Br. 52 (discussing disposition "if this Court were to ignore *Coeur d'Alene* and *instead follow* the Supreme Court's interpretive approach in *Stevens*") (emphasis added); *id.* at 13 (similar).

Respondents, by contrast, believe that the two cases exist in harmony. *See* Opening Br. 29-35. Under Respondents' theory, if a statute explicitly accounts for Tribes by treating them as regulating sovereigns, then *Coeur d'Alene* does not require presuming that they are regulated subjects. That is so for two distinct reasons: (1) because the statute is not truly silent about its applicability to Tribes, and so *Coeur d'Alene*'s presumption does not apply at all; and (2) because there is sufficient proof that Congress did not intend the law to cover Tribes, and so *Coeur d'Alene*'s presumption is rebutted. The bottom line is the same either way—Congress thought about Tribes, specified how they should be treated, and chose not to include them among the regulated parties.

Here, the statutory features supporting that conclusion are the following:

1. *The lack of an express exclusion for other government entities* forecloses the possibility of a negative inference that Congress meant to regulate Tribes, but not other sovereigns. *See* Opening Br. 30-32. The Bureau counters that this *expressio unius* reasoning was not important in prior cases applying *Coeur d'Alene*. *See* CFPB Br. 20-21. But the fact remains that the statutes in those prior cases expressly excluded other sovereigns but not Tribes—which could be read as an "affirmative showing of statutory intent" sufficient to rebut the *Stevens* presumption. *Stevens*, 529 U.S. at 781. Here, the CFPA does not distinguish Tribes from other sovereigns, so this Court must confront *Stevens* for the first time.

2. *The presence of Tribes in the CFPA's definitions* means that Congress actually considered how to deal with Tribes. In every other case in which this Court has applied *Coeur d'Alene*, the relevant statute did not mention Tribes at all. *See* Opening Br. 30. One reasonable inference was that Congress had not thought about the question, and this Court's default assumption in such circumstances is that Tribes are regulated. Here, by contrast, Congress did think about Tribes. And it chose not to include them in the definition of "person," despite on-point Supreme Court precedent about the consequences of failing to do so. *See Stevens*, 429 U.S. at 784-85 (supporting its conclusion that the term "person" did not include States by pointing to another definitional provision that accounted for States); *Davis v.*

Pringle, 268 U.S. 315, 318 (1925) (concluding that the term "person" did not include the United States in part because the United States was mentioned elsewhere in the statute).

3. *The inclusion of an equivalence provision* means that Congress intended to treat Tribes as regulators. The Bureau asserts that the equivalence provision "in no way implies" that Congress did not also intend to treat Tribes as regulated subjects. CFPB Br. 25. But the provision does just that: It demonstrates that Congress drew a line between "person[s]" (who are regulated subjects) and "State[s]" (which are not), and consciously placed Tribes on the "State" side of the line. Although the Bureau retorts that other statutes treat governments as "both regulat*ors* and regulat*ed*," CFPB Br. 27 & n.6, those statutes prove the point. Congress understands that government entities sometimes play both roles, and it is perfectly capable of enacting statutes that treat them as both. The CFPA is not one of those statutes. It envisions one role only for Tribes—as regulators.

B. The Bureau's Last-Ditch Argument That States And Tribes Should Be Treated Differently Fails.

The Bureau argues, apparently in the alternative, that Tribes are subject to the CFPA even if States are not. *See* CFPB Br. 30 & n.8. For the most part, the Bureau appears to agree with Respondents that States and Tribes should be treated equally under the CFPA. *See id.* at 12 ("No provision excuses 'State'-run commercial enterprises from complying with the Act."); *id.* at 24 ("[N]either

'States' nor State-owned 'companies' are excluded from the definition of 'person.' Nor does any other provision exempt 'States,' let alone 'State'-run commercial enterprises, from the Bureau's authority." (footnote omitted)); *id.* at 30 ("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."). It is curious, then, that the Bureau accuses Respondents of making a "leap" by arguing that Congress intended neither to regulate the 50 States nor to regulate Tribes. *Id.* at 30.

Regardless, the Bureau is wrong to contend that this Court can deal with *Stevens* by treating the two sovereigns differently. That contention runs headlong into the CFPA's equivalence provision, which specifies that, "for purposes of" the Act, "[t]he term 'State' means any State . . . or any federally recognized Indian Tribe." 12 U.S.C. § 5481(27). It also contradicts the precedent of both the Supreme Court and this Court. In *Inyo County*, for example, the Supreme Court assumed that Tribes, "like States of the Union," were not subject to suit under § 1983. 538 U.S. at 709. It conducted its analysis of the term "person" by treating a Tribe as a "sovereign" no different from a State. *See id.* at 711. And in *Skokomish Indian Tribe*, this Court applied the *Stevens* presumption to Tribes without any suggestion that Tribes differ from States. *See* 410 F.3d at 515. The

Bureau's assertion that Tribes might not receive the same treatment as States runs afoul of all these authorities.

Moreover, the Indian law canons, *see* Opening Br. 25-26, and longstanding federal government policy, *see id.* at 22, make clear that Congress and the courts have a special solicitude for tribal sovereignty. The Bureau argues that the Indian law canons do not apply because federal government regulation of tribal entities would not "impair tribal sovereignty." CFPB Br. 54. But its argument rests on a cramped view of tribal sovereignty, coextensive with the *Coeur d'Alene* exception for "purely intramural matters." *See, e.g., U.S. Dep't of Labor v. Occupational Safety & Health Review Comm'n*, 935 F.2d 182, 184 (9th Cir. 1991). The Supreme Court has taken a broader view of tribal sovereignty; in fact, the Tribes' sovereign rights not to be subject to the Bureau's investigations are comparable to the sovereign rights discussed in *Inyo County*. *See* 538 U.S. at 712 (observing that the Tribe and tribal gaming corporation were bringing suit based on the "sovereign's prerogative to withhold evidence"). At any rate, it would be a significant departure from precedent and policy to afford Tribes less favored status than States under the CFPA.

III. THE BUREAU'S SUGGESTION THAT RESPONDENTS MIGHT NOT BE "ARMS" OF THEIR TRIBES IS BASELESS.

A. The Record Conclusively Establishes That Respondents Are "Arms" Of Their Tribes.

The Bureau agrees that the correct test for determining whether an entity is an "arm" of a Tribe comes from *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718 (9th Cir. 2008). *See* CFPB Br. 55-56.[4] And the Bureau does not appear to dispute that, given the facts in the record, Respondents qualify as "arms" of their Tribes under the *Cook* test.

What the Bureau argues instead is that the CIDs must be enforced because the agency cannot be sure that the factual representations in the record are accurate. In other words, even if the Bureau does not have jurisdiction over Tribes, and even if Respondents have introduced unrebutted evidence that they are "arms" of their Tribes, the Bureau believes it can still exercise jurisdiction over Respondents just by claiming that it is not sure about their status. That cannot be squared with the CFPA, which authorizes the Bureau to issue CIDs only to those who actually *are* (as opposed to merely *might be*) "person[s]" under the Act. It would also be a serious affront to tribal sovereignty. *See EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001) ("[T]he prejudice of subjecting the Tribe to a

[4] The Bureau hints at the possibility that the test for whether an entity is an "arm" of the Tribe might be different in sovereign immunity cases and regulatory cases. *See* CFPB Br. 55. But it does not propose an alternative test—likely because, as far as Respondents are aware, no court has ever adopted one.

subpoena for which the agency does not have jurisdiction results in irreparable injury vis-à-vis the Tribes' sovereignty.").

Respondents have introduced sworn affidavits of tribal leaders, along with each entity's charter. Those materials conclusively establish that Respondents are "arms" of their Tribes. *See* Opening Br. 37-39. Even if the submitted materials did not, the appropriate solution would not be to grant the Bureau uninhibited access to Respondents' documents. The CIDs demand a wide variety of information that bears no relation to Respondents' status as tribal entities. *See, e.g.*, E.R. 221-22 (Great Plains CID requesting 21 categories of documents). If this Court believes that the Tribes' submissions are inadequate, the Bureau should be permitted only to conduct limited discovery aimed at ascertaining the nature of Respondents' structure and organization.

B. The "Plainly Lacking" Standard Does Not Help The Bureau.

The Bureau argues that it may enforce its broad CIDs in part because the standard used for judicial review of agency subpoenas is whether "jurisdiction is plainly lacking." *Karuk*, 260 F.3d at 1077. But *Karuk*, on which the Bureau relies, demonstrates that the "plainly lacking" standard governs a different type of question altogether. That standard relates to the underlying *justification for* an agency's investigation: It means that when "subpoenaed parties could, under some set of facts, be found in violation of federal law," courts will not scrutinize whether

they actually violated the law before enforcing a subpoena. *Id.* at 1078. But the question whether the subpoenaed party is *subject to* a particular federal law is different. "Whether [that] is so is a pure question of law," which is reviewed de novo. *Id.* at 1078.

The only other case the Bureau cites regarding the "plainly lacking" standard is *EPA v. Alyeska Pipeline Service Co.*, 836 F.2d 443 (9th Cir. 1988). In *Alyeska Pipeline*, however, the subpoenaed party conceded that the agency had regulatory jurisdiction over it. *See id.* at 446. The issue was simply whether the agency needed to demonstrate that it had sufficient reason to believe that the relevant statute had been violated. *See id.* at 447. That is exactly the type of case in which, as *Karuk* explained, the "plainly lacking" standard is appropriately deferential. *See* 260 F.3d at 1077-78. And it is not the type of case presented here.

C. The Bureau's New "Evidence" Is Inadmissible And Irrelevant.

The Bureau says that it has "cause to doubt" that Respondents are in fact "arms" of their Tribes because of a news article and two filings in other cases. *See* CFPB Br. 56-58. Those three sources are nowhere to be found in the record and should not be considered. *See United States v. W.R. Grace*, 504 F.3d 745, 766 (9th Cir. 2007) ("In general, we consider only the record that was before the district court."). Judicial notice is an exception to the rule against newly submitted evidence, as the Bureau points out. *See id.* But in requesting that this Court take

judicial notice of an undisputed fact, a party must "proceed by motion or formal request" to supplement the record, and the Bureau has not done so. *See Lowry v. Barnhart*, 329 F.3d 1019, 1025 (9th Cir. 2003).

Even if the Bureau had filed the appropriate motion, its "evidence" would still not be the proper subject of judicial notice. The Court may take judicial notice only of "a fact that is not subject to reasonable dispute." Fed. R. Evid. 201(b). The Bureau asserts that it is attempting to use the newspaper article and court filings "only to show the existence of their allegations," not for "the truth of their contents." CFPB Br. 58 n.20. The Bureau's theory, though, relies on the credibility of the documents' contents: If their allegations were patently false, then the Bureau would have no "cause to doubt" Respondents' factual submissions. *Id.* at 56. The Bureau thus seeks to introduce the materials for the truth of their contents. And because the truth of their contents is disputed, the three documents are not the appropriate subjects of judicial notice.

In any event, this extra-record evidence is irrelevant to the case at hand. The Bureau cites a news article and a court filing that discuss different lending entities and never even mention Respondents. *Id.* at 57-58. The other remaining court filing is nothing more than a one-sided complaint that includes inflammatory characterizations of Respondents' lending activities but does not directly contradict the facts in the record. *Id.* at 56. So even if the Court were to consider these three

inadmissible documents, they would not cast doubt on the conclusion made clear by the record: that Respondents are "arms" of their respective Tribes.

CONCLUSION

For all of the foregoing reasons and those stated in Respondents' opening brief, the District Court's order granting the petition to enforce the Bureau's civil investigative demands should be reversed.

Respectfully submitted,

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March 20, 2015

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,989 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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

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CERTIFICATE OF SERVICE

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

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