IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff,

v.

GOLDEN VALLEY LENDING, INC., SILVER CLOUD FINANCIAL, INC., MOUNTAIN SUMMIT FINANCIAL, INC., AND MAJESTIC LAKE FINANCIAL, INC.,

Defendants.

Civil Case No. 2:17-cv-02521-CM-JPO

Hon. Carlos Murguia

AMENDED
MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

This case arises out of an unaccountable agency's efforts to exercise authority it does not have under statutes that do not apply to sovereigns.

Defendants in this case are four economic development arms of the Habematolel Pomo of Upper Lake (HPUL or Tribe), a federally-recognized sovereign Indian Nation. Several years ago, after careful consideration, the Tribe's general membership approved a strategy to use electronic commerce to offer lending services from the Tribe's jurisdiction in order to generate governmental revenues and attain economic self-sufficiency and political self-determination. Recognizing the importance of creating proper governmental protections for its potential consumers, the Tribe enacted a consumer financial services ordinance similar to laws enacted by many of the fifty states; and, like many states, the Tribe created an independent regulatory commission to license and oversee its lending businesses.

The Plaintiff in this case is the Consumer Financial Protection Bureau (CFPB or Bureau)—an independent agency with an unprecedented structure that concentrates enormous power "in a single, unaccountable, unchecked Director." *PHH Corp. v. CFPB*, 839 F.3d 1, 8 (D.C. Cir. 2016), *reh'g en banc granted*. The CFPB's own policies—as well as the federal government's trust relationship with tribal governments—compel it to "engage in meaningful government-to-government dialogue" with the Tribe and its regulatory commission regarding the financial products that Defendants offer.[1] And the CFPB's organic statute, the Consumer Financial

[1] Consumer Financial Protection Bureau Policy for Consultation with Tribal Governments (Apr. 22, 2013), *available at* http://files.consumerfinance.gov/f/201304_cfpb_consultations.pdf; *see also* Exec. Order 13,175, Consultation and Cooperation with Indian Tribal Governments § 5 (Nov. 6, 2000) ("Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials."); Presidential Memorandum for the Executive Departments and Agencies on Tribal Consultation (Nov. 5, 2009) ("Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.").

Protection Act (CFPA), dictates the same outcome, by making clear that the Bureau is to provide equal treatment to states and tribes, and work with both collaboratively. The CFPB does not dispute that Defendants in this case are arms of the Tribe, entitled to the same treatment as the Tribe itself. Yet instead of engaging in meaningful consultation with the Tribe or its regulatory commission regarding Defendants' business practices, the Bureau filed this lawsuit, claiming that the CFPA authorizes it to declare Defendants' loan contracts void, enjoin them from issuing new loans, and seek potentially massive civil penalties.

But the Bureau does not have enforcement authority over Defendants. "In this circuit, respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent express congressional authorization." *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010) (footnote omitted); *see also NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002) (en banc) (tribes retain their "inherent sovereignty" absent express congressional action). The CFPA includes no such "express congressional authorization" to invade the Tribe's sovereignty. To the contrary, Congress included tribes in the defined term "State"—a term that does *not* appear in the extensive list of "person[s]" subject to the Bureau's enforcement authority. The statute makes clear that Congress instead chose to treat States—and thus, Indian tribes—as *co-regulators*.

Further, Congress's decision to define the CFPB's jurisdiction by using the term "person" triggers a separate legal rule confirming the Bureau's lack of authority to bring this suit. The Supreme Court has long held that the term "person" presumptively excludes sovereign governments like the Tribe. *See, e.g.*, *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty. of Bishop Colony*, 538 U.S. 701 (2003). There is nothing in the statute to rebut that presumption—the statutory

treatment of tribes instead confirms that it applies with full force. If that straightforward analysis were not enough to foreclose the Bureau's overreaching interpretation of its own authority, other structural features of the CFPA as well as its legislative history confirm that sovereign tribes are not covered "persons." As just one example, Congress amended an earlier version of the CFPA to add "Indian tribes" to the defined term "State," but did not include them as "persons" subject to the Bureau's enforcement authority. For all of these reasons, it is clear that the CFPA does not authorize lawsuits against an Indian tribe or its economic development arms.

Even if the CFPA applied to sovereign Indian tribes, it would still foreclose the Bureau's legal theory. As the Bureau has repeatedly admitted, its suit seeks to enforce the laws of seventeen different states. Indeed, it has gone so far as to call state law "essential to [its] case." ECF No. 30 (Pl.'s Opp'n to Mot. to Transfer) at 11; *see id.* (claiming Defendants "violated state law"). But the CFPA permits the Bureau to enforce only "*federal* law," not state law. 12 U.S.C. § 5531(a) (emphasis added); *see id.* § 5536(a)(1)(A). Congress knows how to authorize federal enforcement of state law, and how to authorize the application of state laws to Indian tribes. It did not take either step in the CFPA. Nor would permitting such enforcement make sense, given the established federal policy of respecting a tribal sovereign's enactment of its own laws, and the absurd consequences that would ensue if a plaintiff could turn state-law claims into violations of federal law through artful pleading.

The CFPB's claims fail for several additional reasons. Chief among them is the fact that the loan agreements at issue are explicitly governed by *tribal law*. The CFPB acknowledges this feature, ECF No. 1 (Compl.) ¶¶ 95-97, but does not grapple with its meaning: Because fully informed consumers of Defendants' products agreed to the application of tribal law, the various cherry-picked provisions of state law on which the CFPB relies are irrelevant. The CFPA also

expressly precludes the Bureau from "impos[ing a federal] usury limit," 12 U.S.C. § 5517(o), which forecloses several of the Bureau's claims. And even putting aside these many clear limits on the Bureau's authority, the Complaint fails to allege a plausible claim that Defendants committed unfair, deceptive, or abusive practices as a matter of federal law.

The CFPB's Truth In Lending Act (TILA) claims also fail, principally because the CFPB does not have authority to apply TILA to sovereign Indian tribes either. Although the Tribe's consumer financial services ordinance voluntarily incorporates the substantive protections of TILA as a matter of tribal law, that permits only the Tribe's regulatory commission to enforce those provisions—just as any state ordinarily has the exclusive right to enforce its own laws without federal interference. In any event, the TILA claims also fail because they are inconsistent with the First Amendment. For these and other reasons set forth below, the Complaint should be dismissed. But at bottom, the many defects in this lawsuit have a common root: Congress never intended to authorize the CFPB to bring a suit like this one.

BACKGROUND

The CFPB and its policies. The Bureau has been among the most controversial and politically divisive federal institutions in recent years, with members of all three branches of the federal government questioning both its actions and the constitutionality of its structure. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners, *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), *reh'g en banc granted* (No. 15-1177), 2017 WL 1035617. To date, two federal courts have agreed that the Bureau's novel structure is an impermissible abrogation of the President's removal power. *See PHH Corp.*, 839 F.3d at 8-9; *CFPB v. D & D Mktg.*, No. CV 15-9692 PSG, 2016 WL 8849698, at *4-5 (C.D. Cal. Nov. 17, 2016).

But the question whether the CFPB has jurisdiction over Indian tribes should not be controversial. Congress vigorously debated the statute creating the Bureau for more than a year, with lawmakers offering dozens of amendments to the bill before it finally passed. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). While early versions of the CFPA were silent as to the Bureau's jurisdiction over Indian tribes, the law Congress enacted includes "any federally recognized Indian tribe" in the definition of "State"—but does *not* include tribes (or the term "State") in the definition of "person[s]" covered by the Act and subject to the CFPB's enforcement authority. *Compare* Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (introduced July 8, 2009) (defining "State" as "any State, territory, or possession of the United States, the District of Columbia, Commonwealth of Puerto Rico, Commonwealth of the Northern Mariana Islands, Guam, American Samoa, or the United States Virgin Islands"), *with* 12 U.S.C. § 5481(27) (defining "State" as "any State, territory, or possession of the United States, the District of Columbia, . . . or *any federally recognized Indian tribe*" (emphasis added)).

In addition, one proposed amendment would have capped the interest rate at which loans could be offered at the maximum rate permitted by the State in which the consumer resided. S. Amdt. 3746 to S.3217, 111th Cong. (introduced May 13, 2010) ("Whitehouse Amendment"). That proposal was rejected. *Id.* (rejected May 19, 2010).

The Habematolel Pomo of Upper Lake. Defendants are wholly-owned companies incorporated under the laws of the Habematolel Pomo of Upper Lake, a federally-recognized Indian tribe with ancestral roots in Northern California. Compl. ¶ 7. The Tribe's history—including its perseverance in the face of federal persecution—is set forth more fully in the declaration accompanying Defendants' motion to transfer, *see* ECF No. 18-2 (Treppa Decl. in

Support of Mot. to Transfer). While the Indians of the Upper Lake Tribe previously occupied over 564 acres of land in California, the federal government terminated the Tribe's recognition in the 1950s, rendering it landless until 2008. *Id.* ¶¶ 9, 11, 15. Today, the Tribe has just over 11 acres of trust lands in a remote part of California, meaning that economic ventures that depend on physical visits to tribal lands have not generated revenues sufficient to support basic governmental services.

The Tribe's governing body, the Executive Council, thus began exploring opportunities in the online financial services sector. At the start, the Tribe enacted a comprehensive ordinance governing consumer financial services offered from its jurisdiction. *See* Tribal Consumer Financial Services Regulatory Ordinance (as amended Dec. 29, 2015), Ex. C.[2] This ordinance was enacted pursuant to the Tribe's sovereign authority, and it voluntarily adopts, as a matter of tribal law, many standards of federal law—including those set forth in the Truth in Lending Act and Section 5 of Federal Trade Commission Act. *Id.* § 7.2.[3]

The Tribe also established a Consumer Financial Services Regulatory Commission to regulate and oversee its financial services industry. Under its governing ordinance, the Commission and any corporate entities it licenses share in the Tribe's sovereign immunity. *Id.*

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[2] Defendants have attached that ordinance, as well as the Tribe's Business Corporate Ordinance, Ex. B, and Defendants' Articles of Incorporation, Exs. D-G, as exhibits. This Court can take judicial notice of these documents because they are public records. *See, e.g.*, *Johnson v. Wyandotte Tribe of Okla.*, No. 14-CV-2117-DDC, 2014 WL 5025901, at *3 n.2 (D. Kan. Oct. 8, 2014) (taking judicial notice of tribal constitution); *Prairie Band of Potawatomi Indians v. Wagnon*, 276 F. Supp. 2d 1168, 1180 & n.53 (D. Kan. 2003) (taking judicial notice of "Tribal Code"); *see also N. Cty. Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 746 n.1 (9th Cir. 2009) (taking judicial notice of tribal gaming ordinance); *Omaha Tribe of Neb. v. Miller*, 311 F. Supp. 2d 816, 819 (S.D. Iowa 2004) (taking "judicial notice of certain public documents, including the Constitution and Bylaws of the Omaha Tribe of Nebraska, the Corporate Charter of the Omaha Tribe of Nebraska, the Omaha Tribe of Nebraska Business Corporation Ordinance, Articles of Incorporation of Omaha Nation Enterprises, Inc., and the Bylaws of Omaha Nation Enterprises, Inc").

[3] The full list of federal laws whose requirements are incorporated by the Ordinance to be enforced as Tribal law by the Commission is as follows: the Dodd-Frank Wall Street Reform and Consumer Protection Act; the Truth in Lending Act; the Consumer Leasing Act; the Fair Credit Billing Act; the Equal Credit Opportunity Act; the Electronic Fund Transfer Act; the Fair Credit Reporting Act; the privacy provisions of Title V of the Gramm-Leach-Bliley Act; the Fair Debt Collection Practices Act, the Talent Amendment; the Telephone Consumer Protection Act of 1991; the Telemarketing Sales Rule; Section 5 of the Federal Trade Commission Act; and Servicemembers' Civil Relief Act.

The Commission actively regulates, licenses, and audits the tribal lending entities within its jurisdiction, including Defendants. *See id.* § 4. As the Bureau notes in its complaint, the loans at issue here are all made pursuant to tribal law. Compl. ¶ 95. The Commission thus has jurisdiction over any issues that may arise from these agreements.

STANDARD OF REVIEW

When evaluating a motion to dismiss, the Court must "accept as true all well-pleaded factual allegations in the complaint," *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 878 (10th Cir. 2017) (quoting *S.E.C. v. Shields*, 744 F.3d 633, 640 (10th Cir. 2014)), even where, as here, many of those factual allegations are incorrect. But the Court need not accept the plaintiff's "legal conclusions." *Id.* To survive a motion to dismiss, a plaintiff must provide more than "mere labels" or a "formulaic recitation of the elements of a cause of action." *Id.* (quoting *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011) (internal quotation marks omitted)). Instead, the complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Shields*, 744 F.3d at 640 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (same).

ARGUMENT

I. THE BUREAU'S CLAIMS UNDER THE CONSUMER FINANCIAL PROTECTION ACT SHOULD BE DISMISSED.

A. Defendants Are Not Subject To The Bureau's Enforcement Authority.

"In this circuit, respect for Indian sovereignty means that federal regulatory schemes do not apply to tribal governments exercising their sovereign authority absent *express* congressional authorization." *Dobbs*, 600 F.3d at 1283 (emphasis added). Accordingly, the government has the "burden to show . . . congressional intent" to apply a statute to a tribe. *Pueblo of San Juan*, 276

F.3d at 1192 (en banc); *see Dobbs*, 600 F.3d at 1283 ("We do not assume Congress intended to infringe on Indian tribal sovereignty in this manner absent an express statement or strong evidence of congressional intent."). For this reason, the Tenth Circuit has consistently held that federal statutes that do not expressly cover tribes do not apply to them. *See, e.g.*, *Dobbs*, 600 F.3d at 1284 (ERISA does not apply to tribes); *Pueblo of San Juan*, 276 F.3d at 1200 (same for NLRA); *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) (same for ADEA); *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709, 714 (10th Cir. 1982) (same for OSHA).

There is no evidence—much less an "express statement"—that Congress intended to apply the CFPA to tribes. *Dobbs*, 600 F.3d at 1284 (citing *Pueblo of San Juan*, 276 F.3d at 1200). There is no reference to tribes in any of the CFPA provisions cited in the Complaint. *See* Compl. ¶¶ 13, 19, 24, 29 (citing 12 U.S.C. § 5481(5)(A), (6)(A), (15)(A)(i), 15(A)(x)); *id.* ¶¶ 32-34 (citing 12 U.S.C. § 5531(a), (a)(1), (c), (d)(2)(A); *id*. § 5536(a)(1)). Nor is there any reference to tribes in the provisions defining the CFPB's enforcement authority—*see* 12 U.S.C. §§ 5561-67. And the CFPB does not dispute that Defendants are arms of the Tribe, entitled to the same statutory treatment as the Tribe.[4] Thus, under binding circuit precedent, the CFPA does not apply to

[4] Because all sovereigns act by delegating their power, the Supreme Court has repeatedly held that the arms of sovereigns are entitled to the same treatment as the sovereigns themselves. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989) ("[G]overnmental entities that are considered 'arms of the State'" are not "persons" under 42 U.S.C. § 1983); *Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty. of Bishop Colony*, 538 U.S. 701, 705 n.1, 706, 712 (2003) (same for tribes and tribal gaming corporations). As noted above, the documents incorporating Defendants under tribal law also confer tribal immunity on Defendants. *See* Ex. D at 3 (conferring "sovereign immunity from suit to the same extent that the TRIBE would have such sovereign immunity if it engaged in the activities undertaken by the Corporation or any of its subsidiary entities"); Ex. E at 3 (same); Ex. F at 3 (same); Ex. G at 3 (same). The CFPB also effectively acknowledges that Defendants are arms of the Tribe, by admitting that they are tribally owned and operated, and incorporated under tribal law. *See* Compl. ¶ 7; Pl.'s Opp'n to Mot. to Transfer at 1. The Tenth Circuit has held that all of these factors are key determinants of whether an entity is an arm of the Tribe. *See Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010) (analysis turns on, among other things, "the method of creation of the economic entities," "their structure, ownership, and management," and "the tribe's intent with respect to the sharing of its sovereign immunity"); *Howard v. Plain Green, LLC*, No. 2:17-CV-302, 2017 WL 3669565, at *2-4 (E.D. Va. Aug. 7, 2017) (same). The CFPB's regulations reflect their agreement that tribes and their arms should receive the same treatment. *See* 82 Fed. Reg.

Defendants. And for similar reasons, the Tribe is also immune from suit under the CFPA. As sovereign entities, Indian tribes cannot be sued unless Congress has "clearly and unequivocally" expressed an intention to abrogate their tribal immunity. *Nanomantube v. Kickapoo Tribe in Kan.*, 631 F.3d 1150, 1151-52 (10th Cir. 2011); *see also Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). The CFPA contains no such clear and unequivocal expression.[5]

The above analysis is enough to resolve this case. But the words that Congress *did* use in defining the CFPB's enforcement and litigation authority further confirm that the statute does not apply to Defendants. Specifically, the CFPA imposes a critical limitation on the Bureau's reach: The Bureau can "commence a civil action" only against a "person," 12 U.S.C. § 5564(a), and courts can order civil penalties under the CFPA only against a "person," *id.* § 5565(c). For more than a century, the Supreme Court has held that the term "person" applies "to natural persons and also to artificial persons," but presumptively does *not* include sovereign governments. *United States v. Fox*, 94 U.S. 315, 321 (1876); *see also United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941) ("[I]n common usage, the term 'person' does not include the sovereign.").

The Court made this point most explicitly in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), in holding that the term "person" in the False Claims Act (FCA) does not cover States or state agencies. The Court began its analysis with the "longstanding interpretive presumption that 'person' does not include the sovereign"—a

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33,210, 33,352 (July 19, 2017) (adopting a "status-based exemption" to arbitration rule for tribes and "an arm of the . . . Tribe within the meaning of Federal law concerning sovereign immunity").

[5] The fact that the federal government is the plaintiff here changes nothing. The Constitution grants *Congress* "plenary and exclusive" authority over Indian affairs—not the Executive Branch. *United States v. Lara*, 541 U.S. 193, 200 (2004); *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 580-81 (1832) (Marshall, C.J.). Only Congress can abrogate tribal immunity, and if a statute does not take that step, then the federal agency is powerless to act. *See, e.g.*, *Michigan v. Bay Mills v. Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014) ("[U]nless and until Congress acts, the tribes retain their historic sovereign authority."); *Kiowa Tribe*, 523 U.S. at 754 ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.").

presumption that has special force where "it is claimed that Congress has subjected the States to liability to which they had not been subjected before." *Id.* at 781 (quoting *Will*, 491 U.S. at 65). It then held that the presumption "may be disregarded only upon some affirmative showing of statutory intent to the contrary," which the Court held was not present in *Stevens. Id.* The Court also relied on the fact that the FCA "imposes damages that are essentially punitive in nature," which would be inconsistent with the "presumption against imposition of punitive damages on governmental entities." *Id.* at 785; *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 273-77 (2012) (explaining canon that "the word person traditionally excludes the sovereign"). More recently, the Court has confirmed that the same logic applies in determining whether the term "person" includes tribes, because they, too, are sovereigns. *Paiute-Shoshone Indians of the Bishop Cmty.,* 538 U.S. at 709-12.

As in *Stevens*, there is no "affirmative showing" that Congress intended to include sovereigns within the term "person" in the CFPA. On the contrary, Congress *did* include tribes within the defined term "State," but *not* within the list of "persons" subject to the Bureau's enforcement authority. *See supra* p. 5. That is far from the "affirmative showing of statutory intent" needed to apply this federal regulatory scheme to tribal governments. *Stevens*, 529 U.S. at 781. And here, as in *Stevens*, the statute imposes punitive penalties—of up to $1,000,000 per violation, per day, that can be imposed not just based on a consumer's loss, but on the financial resources of the "person" charged, any history of violations, and "such other matters as justice may require." *See* 12 U.S.C. § 5565(c)(2)-(3). So the *Stevens* presumption applies with full force.

This treatment of tribes as "states" but not "persons" is no accident. The initial version of the CFPA was silent with respect to Indian tribes. *See* Consumer Financial Protection Agency Act of 2009, H.R. 3126, 111th Cong. (introduced July 8, 2009). Congress then amended the statute to

include tribes in the defined term "State." *See* 12 U.S.C. § 5481(27) (defining "State" as "any State, territory, or possession of the United States, the District of Columbia, . . . or any federally recognized Indian tribe").[6] Critically, Congress did not further amend the CFPA to include tribes in the defined term "person"—or to include the defined term "State" as a person. *See* 12 U.S.C. § 5481(19) (defining "person" as "an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity"). Congress takes those steps when it means to cover Indian tribes as part of a generally-applicable statutory regime. *See Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Dept. of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999) (explaining that the "express language" of the Safe Water Drinking Act makes clear that the statute applies to Indian tribes, by including them within the term "municipality," and then including that term within the definition of "person"). Where

[6] In light of this statutory definition, if the CFPA applies to Tribes, then it must apply with equal force to states as well, as the Bureau has argued elsewhere. *See* Brief of Petitioner-Appellee CFPB at 30, *CFPB v. Great Plains Lending, LLC*, 846 F.3d 1049 (9th Cir. 2017), 2015 WL 890556 ("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 like the Tribe, many states have created their own consumer finance businesses designed to further education and economic development goals. To take just a few examples: The Bank of North Dakota is a state-chartered bank that offers loans to farmers, small businesses, homeowners, and students "[f]or the purpose of encouraging and promoting agriculture, commerce, and industry." *See* N.D. Cent. Code § 6-09-01; https://bnd.nd.gov. The Alaska Commission on Postsecondary Education has the authority to "collect all fees and costs incurred in collection of the amount owed on a [student] loan," Alaska Stat. § 14.42.030(6), while the Alaska Student Loan Corporation has the authority to "set a loan origination fee on a loan funded by the corporation," Alaska Admin. Code tit. 20, § 14.050(e). Texas offers student loans via the Texas Higher Education Coordinating Board. Tex. Educ. Code § 52.32(a); *see also* http://www.hhloans.com/index.cfm?objectid=21A41908-C7D3-A868-66FB91774CF078CB. And Virginia Community Capital is a state-run corporation that provides real-estate and small-business loans to "people, businesses, and communities not served by mainstream lenders." http://www.vacommunitycapital.org/about; *see also* http://www.vacommunitycapital.org/lending. If this Court were to accept the Bureau's argument here, each of these state entities—and many others like them nationwide—would necessarily be subject to the CFPB's overreaching. Given the Bureau's expansive and unprecedented regulatory power—and the controversy surrounding the enactment of the CFPA—one would expect that some member of Congress would have said something if the statute really was intended to give the Bureau such sweeping authority over states and state programs. *See Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991) (Congress typically makes an important policy choice "explicit in the statute, or at least some Members would have identified or mentioned it at some point."). But there is no such indication anywhere in the statutory text or legislative history. *See United States ex rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 351 n.8 (S.D.N.Y. 1998) (explaining that "[w]hen Congress desires to refer to states and their political subdivisions, it knows how to make that intention clear" and collecting ten statutes where Congress expressly included states within the definition of "person"); *see also Stevens*, 529 U.S. at 783-84 (same).

Congress does not take those steps, by contrast, Indian tribes are not subject to a generally-applicable law. *See Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 824 (7th Cir. 2016) (Indian tribes are not "persons" for purposes of the Fair and Accurate Credit Transaction Act because "Congress did not specifically list Indian tribes in FACTA's definition of 'person'"); *Pakootas v. Teck Cominco Metals, Inc.*, 632 F. Supp. 2d 1029, 1033 (E.D. Wash. 2009) (same for CERCLA). Further, none of the entities that Congress *did* include in the definition of "person" could reasonably be understood to refer to States or tribes, because none of those entities has sovereign status—the defining feature of a State or tribe. *See Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) ("[A] word is known by the company it keeps."). The legislative history of the CFPA thus underscores that tribes (and, thus, their arms) are not "persons" subject to the CFPA's enforcement and litigating authority.

Other structural features of the statute further confirm this straightforward reading of the statute. For starters, the CFPA makes clear that "States" (which by definition includes tribes) are to be treated as *co-regulators* alongside the Bureau. The statute requires the CFPB to "coordinate with . . . State regulators, as appropriate, to promote consistent regulatory treatment of consumer financial and investment products and services." 12 U.S.C. § 5495. It likewise requires coordination with States of "fair lending efforts," *id.* § 5493(c)(2)(B); registration requirements applicable to covered persons, *id.* § 5512(c)(7)(C); "supervisory activities," *id.* § 5514(b)(3); and "customer complaint information," *id.* 12 U.S.C. § 5552(a)(1). And the statute also allows States to bring civil actions *enforcing the CFPA*, *id.* § 5552(a)(1). It would be strange if Congress had used one statute to encourage federal-state cooperation and give states the power to enforce the CFPA's provisions, but used another statute to make states subject to the Bureau's sweeping and

invasive enforcement authority. It would be incomprehensible if—as the Bureau's theory suggests—Congress had enacted those contradictory provisions *within a single statute*.

This cooperative role makes good sense with respect to Indian tribes, given the federal policy of encouraging tribal self-determination and economic self-sufficiency. Just last year, Congress reaffirmed the "unique Federal responsibility to Indians," which includes "a duty to promote tribal self-determination regarding governmental authority and economic development." *See* Indian Trust Asset Reform Act, 25 U.S.C. §§ 5601-02. Other statutes reflect the same goals. *See, e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5302(b) ("[T]he United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities."); Native American Business Development, Trade Promotion, and Tourism Act of 2000, 25 U.S.C. § 4301(a)(6) ("[T]he United States has an obligation to guard and preserve the sovereignty of Indian tribes in order to foster strong tribal governments, Indian self-determination, and economic self-sufficiency among Indian tribes."); Indian Gaming Regulatory Act, 25 U.S.C. § 2701(4) ("[A] principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government.").

Tribal enterprises like Defendants further this policy: They are not "mere profit-making ventures that are wholly separate from the Tribes' core government functions," but instead are "critical to the goals of tribal self-sufficiency because such enterprises in some cases may be the only means by which a tribe can raise revenues." *Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J., concurring); *see id.* (noting the "insuperable (and often state-imposed) barriers Tribes face in raising revenue through more traditional means," such as income and property taxes). The CFPA, properly understood, advances this overarching federal policy, because it treats tribes as

empowered, sovereign co-regulators. The CFPB's construction of the statute, by contrast, would render tribes, their economies, and their ability to exercise sovereign functions subordinate to the Bureau's unchecked, overreaching exercise of purported authority.

The Ninth Circuit's decision in *CFPB v. Great Plains Lending, LLC*, 846 F.3d 1049 (9th Cir. 2017), *pet. for cert. pending*, does not compel a different outcome, for two reasons. *First*, the Ninth Circuit based its decision on a line of circuit precedent holding that "a law of general applicability" is presumed to "govern tribal entities unless Congress has explicitly provided otherwise." *Id.* at 1053.[7] That line of cases has been rejected by this circuit, *see Pueblo of San Juan*, 276 F.3d at 1199, and could not, in any event, displace the binding presumption that sovereigns are not "persons" set forth by the Supreme Court in *Stevens*. *Second*, *Great Plains* arose in an entirely different procedural posture: The CFPB had sought to enforce subpoenas against tribal lending entities. As a result, the *Great Plains* court was required to apply a standard of review that was exceptionally deferential to the Bureau's position. *Great Plains*, 846 F.3d at 1052. Specifically, the question before that court was only whether the agency "*plainly* lacked jurisdiction to issue the investigative demands." *Id.* at 1051 (emphasis added). The question before this Court is a meaningfully different one, and requires this Court to decide *de novo* the proper construction of the statute—without any thumb on the Bureau's side of the scale.

Finally, even if the statute were ambiguous as to whether it applied to Defendants, the Court would need to resolve that ambiguity in Defendants' favor, under the long-standing Indian law canons requiring courts to liberally interpret statutes in favor of Indian tribes. *See, e.g.*,

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[7] After *Great Plains* was decided, a different panel of the Ninth Circuit applied the *Stevens* presumption and held that the term "person" in the False Claims Act does not include tribes. *See United States ex rel. Cain v. Salish Kootenai Coll., Inc.*, 862 F.3d 939 (9th Cir. 2017). The court purported to distinguish *Great Plains*, explaining that the term "person" in the FCA clearly does not include Indian tribes. *Id.* at 943. But if anything, the CFPA is even more express about the fact that tribes are excluded, because it not only fails to expressly include tribes in the definition of persons (like the FCA), but also includes them in the defined term "State" (unlike the FCA). *See supra* pp. 9-10.

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." (collecting cases)); *EEOC v. Cherokee Nation*, 871 F.3d 937, 939 (10th Cir. 1989) ("[N]ormal rules of construction do not apply when . . . matters involving Indians are at issue." (collecting cases)); *Dobbs*, 600 F.3d at 1285 (same). When faced with two plausible interpretations of a statute—one that favors and one that hinders tribal rights—courts must interpret the statute to benefit tribes. *See Blackfeet Tribe of Indians*, 471 U.S. at 766; *Oneida Cty v. Oneida Indian Nation of N.Y. State*, 470 U.S. 226, 247 (1985). But given the two presumptions against applying statutes like the CFPA to tribes as well as the text of the statute itself, there is no ambiguity to resolve here. Because Defendants are the economic development arms of a sovereign Indian nation, the CFPA does not apply to them. The Bureau's CFPA claims should therefore be dismissed.

B. The CFPB Cannot Enforce State Law.

The Bureau has effectively admitted that its legal theory under the CFPA has no statutory basis. On several occasions, the Bureau has made clear that its central legal theory is that the Tribe's loans are unlawful because they violate the laws of seventeen different states. *See* Pl.'s Opp'n to Mot. to Transfer at 10, 11 (claiming Defendants "violated state law," and that provisions of state law "are *essential to the Bureau's case*" (emphasis added)); *see also* Compl. ¶¶ 138-42, 145-47, 150-52. But when Congress enacted the CFPA, it did not give the Bureau power to enforce state law—directly or indirectly. Instead, Congress gave the CFPB the authority to prevent "unfair, deceptive, or abusive act[s] or practice[s] under *Federal law*." 12 U.S.C. § 5531(a) (emphasis added); *see also id.* § 5536(a)(1)(A) ("It shall be unlawful . . . 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*. . . ." (emphasis added)). And Congress did not refer to state law in defining the terms "unfair,"

"abusive," or "deceptive." *See* 12 U.S.C. § 5531(c)(1) (unfair); *id.* § 5531(d) (abusive); *CFPB Supervision and Examination Manual*, at UDAAP 5-8 (2d ed. 2012) (deceptive). The absence of any reference to state law in these definitional provisions confirms that the CFPA does not incorporate—or permit the CFPB to enforce—any provisions of state law.

Indeed, Congress knows how to authorize federal enforcement of state law—or enforcement of state law against Indian tribes—and chose not to do either here. When Congress wants to permit the federal government to enforce state law, it writes the words "state law" into the substantive standards the government must enforce. *See, e.g.*, 18 U.S.C. § 1961(1) (defining racketeering activity, in part, as certain acts that "are *chargeable under State law* and punishable by imprisonment for more than one year" (emphasis added)); *id.* § 922(b)(2) ("It shall be unlawful . . . to sell or deliver . . . any firearms to any person in any State where the purchase or possession . . . *would be in violation of any State law. . . .*" (emphasis added)). Congress could easily have taken a similar approach here, for example by defining unfair, deceptive, or abusive practices as those that "would be in violation of any state consumer protection law." But it did not. Likewise, while state law does not generally apply to tribes absent federal authorization, *see, e.g.*, *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 170-71 (1973), Congress has used specific language when it wants to permit the enforcement of state law against tribes*, see, e.g.*, 18 U.S.C. § 1162(a) (providing that the criminal laws of certain states "shall have the same force and effect [on tribal land] as they have elsewhere" within those states). Congress did not include such language here either. There is no basis for presuming that Congress took *both* of those steps silently and authorized a federal agency to enforce state law against a sovereign Indian nation.

As with the Bureau's argument that tribes are "persons," its state-law legal theory cannot be squared with other structural features of the CFPA or with broader federal policy. As noted

above, the CFPA makes clear that states and tribes are to be treated the *same* under the statute. *See* 12 U.S.C. § 5481(27) (defining "Indian tribe[s]" as "State[s]" for the purposes of the CFPA). It is hardly similar treatment to conclude that tribes are subject to state law, especially when the CFPB also takes the position that tribal law must yield to state law, *see infra* Section I.C—that is subordination, not equalization. The Bureau's position is also inconsistent with the broader federal policy of tribal self-sufficiency, *see supra* p. 13, as well as the Supreme Court's repeated admonitions that tribes are generally supposed to be "free from state jurisdiction and control." *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) (quoting *McClanahan*, 411 U.S. at 168); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980) ("[I]t must be remembered that tribal sovereignty is [not] dependent on . . . the States.").

Reading the CFPA to cover violations of state law would also lead to absurd results beyond the tribal context. To name just a few, the same underlying conduct could carry different penalties depending on which regulatory scheme an enforcer chose to invoke. For example, violations of the Arkansas deceptive and unconscionable trade practices law carry fines of up to $10,000 per violation. *See* Ark. Code § 4-88-113(a)(3). But state attorneys general are also allowed to bring suits regarding deceptive practices under the CFPA, which authorizes fines of up to $1,000,000 per day. 12 U.S.C. §§ 5552(a)(1); 5565(c)(2)(C). Under the Bureau's theory, the Arkansas Attorney General could seek civil penalties 100 times more severe than what the Arkansas legislature authorized him to seek for a single violation of Arkansas law. To take another example, under the Bureau's theory, a loan could shape-shift from lawful to unlawful depending on the consumer's state of residence. If a consumer residing in Ohio took out a loan, the CFPB might not attempt to declare it unlawful, because Ohio is not one of the states in the Complaint—but if that consumer then moved across the border to Indiana or Kentucky, she would qualify as an

injured person under the CFPB's theory here. These examples highlight the problems with the theory the Bureau has advanced in this case.

C. The CFPB's State Law Theory Is Also Inapposite Because The Loans At Issue Are Governed By Tribal Law.

Even if the CFPB had the authority to enforce state law against Defendants, its arguments would still rest on a faulty premise—that state law applies to the loans Defendants issue from tribal jurisdiction. The CFPB's theory appears to be that Defendants' loans are void and unenforceable because they violate the laws of seventeen states. But as the CFPB acknowledges, Defendants' loan agreements include a choice-of-law provision declaring that they are "governed by applicable tribal law." Compl. ¶¶ 95-97. And "[t]he Supreme Court has consistently held" that forum-selection and choice-of-law provisions are "presumptively valid." *Mitsui & Co. (USA), Inc. v. Mira M/V*, 111 F.3d 33, 35 (5th Cir. 1997) (per curiam) (collecting Supreme Court authority); *accord Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 956-57 (10th Cir. 1992); *Bowen Eng'g Corp. v. Pac. Indem. Co.*, 83 F. Supp. 3d 1185, 1193 (D. Kan. 2015) (noting that "under Tenth Circuit precedent" forum-selection and choice-of-law provisions "are favored under federal law"). As a result, "a party resisting enforcement carries a heavy burden of showing that the provision itself is invalid due to fraud or overreaching or that enforcement would be unreasonable and unjust under the circumstances." *Riley*, 969 F.2d at 957.

When analyzing a choice-of-law provision in a federal-question case, federal courts turn to federal common law. *See Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006). And "[f]ederal common law follows the approach outlined in the Restatement (Second) of Conflict of Laws," *id.*, under which "[t]he law of the state *chosen by the parties . . . will be applied*." Restatement (Second) of Conflict of Laws § 187(1) (emphasis added). That is so "even if the particular issue is one which the parties could not have resolved" themselves; such as whether a

lender must be licensed or whether there should be a maximum rate of interest notwithstanding the parties' agreement. *Id.* § 187(2) & cmt. d.

This rule makes good sense. It "protect[s] the justified expectations of the parties"—as demonstrated in the contractual provisions to which they agree—and "make[s] it possible for them to foretell with accuracy what their rights and liabilities will be under the contract." *Id.* § 187 cmt e. "Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations." *Id.* So where, as here, parties freely consent to a fully-disclosed choice-of-law provision, *see* Compl. ¶¶ 95-97, that provision should be enforced.

Further, this case does not implicate the two narrow exceptions to this generally-applicable rule. *See* Restatement (Second) of Conflict of Laws § 187(2)(a), (b). There is no question that the Tribe has a "substantial relationship" to the parties that made the agreement, *see id.* § 187(2)(a), because courts "consistently" hold that a jurisdiction has a substantial relationship to the parties if one of the parties is incorporated there. *See Landis v. Jarden Corp.*, No. 2:11-CV-101, 2014 WL 790917, at *3 (N.D. W. Va. Feb. 26, 2014) (collecting cases); *accord ABF Capital Corp. v. Osley*, 414 F.3d 1061, 1065 (9th Cir. 2005); *CIENA Corp. v. Jarrard*, 203 F.3d 312, 324 (4th Cir. 2000); *see also* Restatement (Second) of Conflict of Laws § 187 cmt. f. The CFPB admits that all four Defendants are incorporated under tribal law. *See* Compl. ¶ 7; Exs. D-G.

Applying tribal law also would not contradict "a fundamental policy of a state which has a materially greater interest than the [Tribe] in the determination of the particular issue." Restatement (Second) of Conflict of Laws § 187(2)(b). Indian tribes are allowed to regulate the terms of contracts with non-members. *Montana v. United States*, 450 U.S. 544, 565 (1981). The CFPB does not allege that application of tribal law would violate the "fundamental policy" of any

state—nor could it, consistent with the respect for tribal sovereignty that is itself a fundamental tenet of law. *See supra* pp. 16-17. And while the CFPB asserts that other states have struck a different balance than the Tribe in terms of certain consumer protection standards, *see* Compl. ¶¶ 116-27, it does not and cannot allege that those states have a materially greater interest in the validity of the loans. As the Tenth Circuit has held, "[a] mere difference between the local law rules of two states" is not enough to invoke the public policy exception. *Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215, 1223 (10th Cir. 1991) (alteration in original, quoting Restatement (Second) of Conflict of Laws § 90 cmt. b); *accord Teran v. GB Int'l, S.P.A.*, 920 F. Supp. 2d 1176, 1188 (D. Kan. 2013); *K.R. Smith Trucking, LLC v. PACCAR, Inc.*, No. 08-1351-WEB, 2009 WL 3488064, at *2 (D. Kan. Oct. 23, 2009); *see also* Restatement (Second) Conflict of Laws § 187 cmt. g ("The forum will not refrain from applying the chosen law merely because this would lead to a different result than would be obtained under the local law of the state of the otherwise applicable law."). A contrary approach would allow the public policy exception to "consum[e] the rule." *Mirville v. Mirville*, 10 F. App'x 640, 645 (10th Cir. 2001).

The CFPB does not appear to dispute *any* of the foregoing analysis—it admits that the loans contain a tribal choice-of-law provision, but then alleges (without explanation) that the loans are invalid because they are inconsistent with state law. The absence of any argument in support of this logical leap reflects that there is no principled basis for it.

D. Claims Based On Violations Of State Interest Rate Caps Should Be Dismissed Because The Bureau Lacks Authority To Establish Interest Rate Limits.

There is an additional, fundamental problem with the Bureau's claims that rest on violations of "the usury limit" in seven states. Compl. ¶¶ 116-17. The CFPA explicitly prohibits the Bureau from establishing a limit on interest rates. 12 U.S.C. § 5517(o) ("No provision of this title shall be construed as conferring authority on the Bureau to establish a usury limit[.]"). And,

as noted above, Congress rejected a proposed amendment that would have capped the interest rate on consumer loans—as a matter of federal law—to the same extent as the law of the state in which the consumer resides. *See supra* p. 5. Congress thus considered and rejected the precise legal theory that the CFPB presses here.

The CFPB itself used to acknowledge these limitations on its authority—making its decision to flout them now all the more surprising. In February 2016, David Silberman, the acting deputy director of the CFPB, testified before Congress that the Bureau "agree[s] completely that we cannot [establish a federal interest rate limit]. We have not proposed doing so. We have not contemplated doing so. We will not do so." *Short-term, Small Dollar Lending: The CFPB's Assault on Access to Credit and Trampling of State and Tribal Sovereignty: Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Serv.*, 114th Cong. 31 (2016) ("CFPB Hearing") (statement of David Silberman). But now, the CFPB seeks to establish exactly that kind of "usury limit," set at the maximum interest rate that certain individual states would require, notwithstanding any provisions of tribal law. The CFPB lacks the authority to take that step. *See Illinois ex rel. Madigan v. CMK Invs., Inc.*, No. 14 C 2783, 2014 WL 6910519, at *7 n.5 (N.D. Ill. Dec. 9, 2014) (concluding that the plaintiff could not challenge an "account protection fee" as "usurious" because the CFPB "has no authority to 'establish a usury limit applicable to an extension of credit'" (quoting 12 U.S.C. § 5517(o))).

E. The CFPB Has Failed To Allege Facts Stating A Plausible Claim Of Unfair, Deceptive, Or Abusive Conduct.

The CFPB's reliance on state law creates another problem with its allegations—the Bureau fails to state a plausible claim that Defendants committed unfair, deceptive, or abusive practices under the CFPA. As explained above, the CFPA does not allow the Bureau to establish an unfair, deceptive, or abusive practice simply by establishing a violation of state law—it instead imposes

specific, substantive standards for establishing an unfair, deceptive, or abusive practice as a matter of *federal* law. The CFPB's allegations do not state a plausible claim under those standards.

To begin, while the Complaint alleges that Defendants' lending practices are "unfair," Compl. ¶¶ 143-47, the CFPA makes clear that a practice is not unfair if the injury it causes is "reasonably avoidable by consumers." 12 U.S.C. § 5531(c). And the alleged injuries here were, on their face, "reasonably avoidable." The linchpin of the analysis is "whether the consumers had a free and informed choice." *CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878, 916 (S.D. Ind. 2015) (quoting *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012)). Here, there is no question that borrowers made a free and informed choice to enter into loan agreements with Defendants and were aware of the key terms of those loans. The CFPB's complaint excerpts portions of Defendants' loan agreements specifically disclosing the loans' interest rate, finance charges, and repayment schedule, as well as the fact that the loans are governed by tribal law. *See* Compl. ¶¶ 51, 96. Indeed, the CFPB's Acting Deputy Director has previously acknowledged that Defendants' loans are an "alternative" to traditional payday loans that actually "allow more people to be able to repay." CFPB Hearing 23. So to the extent any consumers were allegedly injured, they could have avoided those injuries by not taking out the loans. *FTC v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 951 (N.D. Ill. 2008) (alleged injury "could have been reasonably avoided merely by not signing on with NorVergence").

For similar reasons, the CFPB has failed to state a plausible claim that Defendants' lending practices are "deceptive." Compl. ¶¶ 135-42. Because the CFPA does not provide any guidance as to what practices qualify as "deceptive," courts have looked to how this term has been interpreted in the Federal Trade Commission Act (FTCA). *See CFPB v. Gordon*, 819 F.3d 1179, 1192-93 & n.7 (9th Cir. 2016). And FTCA caselaw instructs that "deceptive" practices are merely

a "subset" of "unfair" practices. Because Defendants' lending practices are not unfair, they are by definition not deceptive. *See FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 245 & n.4 (3d Cir. 2015); *In re Figgie Int'l*, 107 F.T.C. 313, 373 n.5 (1986), 1986 WL 722111 ("[U]nfair practices are not always deceptive but deceptive practices are always unfair."). Further, to prove that an act is "deceptive" under the FTCA, the plaintiff "must establish among other things that the representation "was likely to mislead customers acting reasonably under the circumstances." *FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003); *accord Gordon*, 819 F.3d at 1192. Because Defendants fully disclose all of the material terms of their loans, their agreements are not likely to mislead. *See, e.g.*, *Delgado v. Ocwen Loan Serv., LLC*, No. 13-CV-4427-NGG, 2014 WL 4773991, at *8 (E.D.N.Y. Sept. 24, 2014) ("Where a defendant fully discloses the terms and conditions of a transaction, . . . the defendant's conduct is not materially misleading.").

Finally, the CFPB has failed to allege that Defendants' lending practices are abusive. The Bureau alleges that Defendants violated the prohibition on abusive practices by taking "unreasonable advantage" of consumers' "lack of understanding" of the "material risks, costs, or conditions" of their loans. Compl. ¶¶ 134, 148-52. Because Defendants disclose all of the material terms of their loans to consumers, *id.* ¶¶ 51, 96, there is no basis for concluding that consumers have a "lack of understanding" of the terms of their loans.

II. THE CFPB'S CLAIMS UNDER THE TRUTH IN LENDING ACT SHOULD BE DISMISSED.

A. Defendants Are Not "Persons" Under TILA.

The CFPB's attempt to enforce TILA against Defendants suffers from the same fundamental problem as its CFPA claims: Defendants are not "persons" subject to the statute's restrictions. The Bureau claims that the Defendant arms of the Tribe are "creditors as defined under TILA," Compl. ¶ 154, but to be a "creditor," one must first be a "person" within the statutory

definition. *See* 15 U.S.C. § 1602(g) ("The term 'creditor' refers only to a *person* who [engages in various financial activities]." (emphasis added)). TILA further defines a person as "a natural person or an organization." *Id.* § 1602(e). Defendants are not natural persons. And a long line of Supreme Court precedent establishes that "Indian tribes" are "a good deal more than 'private, voluntary organizations.'" *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (citing *Worcester*, 31 U.S (6 Pet.) at 557 and *United States v. Kagama*, 118 U.S. 375, 381-382 (1886)). They are *sovereigns*. *Pueblo of San Juan*, 276 F.3d at 1192. Because Indian tribes, and thus their arms, are neither natural persons nor organizations, it follows that they cannot be "creditor[s]." They are accordingly not subject to, and are immune from suit under, TILA. *See supra* Section I.A.

Further, to accept the CFPB's strained reading of TILA to the contrary, this Court would have to ignore not just the statutory text, but three interpretive rules set forth in binding precedent that plainly foreclose the Bureau's claims. First, like the CFPA, TILA is a generally applicable statute that is presumptively inapplicable to tribes—even though tribes may voluntarily incorporate the same standards as a matter of their own law, to be enforced by their own regulator. *Pueblo of San Juan*, 276 F.3d at 1192; *see supra* pp. 7-9. Second, as in the CFPA, Congress's use of the term "person" only reinforces that the statute is inapplicable here, in view of the "longstanding interpretive presumption that [the term] 'person' does not include the sovereign." *Stevens*, 529 U.S. at 780; *see Paiute-Shoshone Indians of the Bishop Cmty.*, 538 U.S. at 708-11 (same analysis applies to tribes); *see also Will*, 491 U.S. at 64; *Cooper Corp.*, 312 U.S. at 604; *Fox*, 94 U.S. at 321. There is nothing in TILA even hinting that Congress intended for the presumed meaning of "person" to be ignored—much less the affirmative showing required to override the presumption. Third, as with the CFPA analysis, any residual doubt would be resolved by the canon requiring courts to liberally interpret statutes in favor of Indian tribes—and to conclude that Congress did

not abrogate Indian rights absent express indication to the contrary. *See, e.g.*, *Blackfeet Tribe*, 471 U.S. at 766; *Dobbs*, 600 F.3d at 1284; *EEOC v. Cherokee Nation*, 871 F.3d at 939. Because there is no such express indication here, the Bureau's TILA claims should be dismissed.

B. Application Of TILA To Penalize Defendants' Speech Would Violate The First Amendment.

The TILA counts also suffer from another fundamental flaw—they cannot be squared with the First Amendment. The CFPB is not seeking to sanction Defendants for what they *do*, but for what they *say*. And because Defendants provided their customers only truthful, non-misleading information, the First Amendment forbids the imposition of civil penalties.

There is no dispute that Defendants complied with the central purpose of TILA: "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). The statute requires creditors to disclose, among other things, the applicable finance charge and annual percentage rate before extending credit to a consumer. *See id.* § 1638. The CFPB admits that Defendants made these disclosures—indeed, the Complaint includes an "excerpt" from one of Defendants' loan applications that includes a fully compliant "Truth In Lending Disclosure." *See* Compl. ¶ 51; *see also Herrera v. First N. Sav. & Loan Ass'n*, 805 F.2d 896, 900 (10th Cir. 1986) (explaining that these disclosures are "[t]he most important" because they "are those on which consumers can compare competing loans"). The Bureau also does not dispute that these disclosures were accurate. *See* Compl. ¶ 51.

The Bureau's complaint challenges the disclosure of other accurate information—that Defendants sometimes told borrowers how credit would be calculated in a different fashion. *Id.* ¶¶ 60-61. Here too, the CFPB does not allege that any such disclosures were untruthful: Taking the complaint as true, Defendants told consumers how their repayment obligations would be

calculated in straightforward, non-misleading terms: "a block rate of $30 per $100 of principal," a "30% finance charge," or "the total amount the consumer would have to repay." *Id.* ¶ 67. Yet the Bureau seeks massive penalties for Defendants' alleged use of these words in advertisements on their webpages, *see id.* ¶¶ 158-63, and in some alleged phone conversations with unidentified customers, *id.* ¶¶ 164-68.

As the Supreme Court recently confirmed, the First Amendment does not permit the Bureau to micromanage Defendants' speech in this manner. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144 (2017). The state law at issue in *Expressions* regulated what merchants could say about the cost of using a credit card: It permitted them to describe the cost of an item as "$103 with a 3% discount for cash payment," but forbade them from describing the cost of that same item as "$100 with a 3% credit card surcharge." *Id.* at 1155 (Sotomayor, J., concurring). As the Court noted, the law told merchants "nothing about the amount they are allowed to collect from a cash or credit card payer." Instead, the law regulated "how sellers may communicate their prices." *Id.* at 1151 (majority opinion). As the Court explained, because the law "regulat[ed] the communication of prices rather than prices themselves," it "regulate[d] speech" and was thus subject to heightened scrutiny under the First Amendment. *Id.*

TILA similarly regulates speech. The law does not forbid lenders to make loans at certain interest rates.[8] It instead forbids lenders to use certain words to describe those rates: They can describe the rates as an APR, but not in other truthful and non-misleading ways. Because TILA also regulates how lenders "may communicate their prices," it is subject to heightened First Amendment scrutiny. *See id.*

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[8] *See, e.g.*, 15 U.S.C. § 1610(b) (precluding any effort to "annul, alter or affect in any manner the meaning, scope or applicability of the laws of any State, including, but not limited to, laws relating to the types, amounts or rates of charges . . . permissible under such state laws in connection with the extension or use of credit").

The First Amendment thus forbids the imposition of penalties on Defendants unless the restraint on commercial speech is "reasonably related to the State's interest in preventing deception of consumers," *see Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *United States v. Wenger*, 427 F.3d 840, 849 (10th Cir. 2005) (applying *Zauderer* to compelled speech claim). Because Defendants disclosed the APR to consumers before they entered into their loan agreements, Compl. ¶ 51, consumers had the statutorily-mandated information about how credit would be calculated. And the Bureau does not allege any deception in Defendants' additional disclosures of the rates applicable to the loans, *see supra* pp. 22-23. It is therefore difficult to imagine what interest is served by attempting to punish companies for educating customers with truthful, non-misleading information. The simple fact is that Defendants tried to communicate truthful and accurate information in ways that an ordinary consumer would understand. The First Amendment does not permit the government to dictate the precise words they used in doing so.

III. THE CFPB LACKS AUTHORITY TO BRING THIS SUIT BECAUSE ITS STRUCTURE VIOLATES THE CONSTITUTION.

The CFPB's structure is like nothing this country has ever seen before. The agency is led by a single individual who can be fired only "for cause." 12 U.S.C. § 5491(c)(3). For that reason, he is not accountable to, or meaningfully checked by, the President. Because the Director acts alone rather than as a member of a multi-member commission, *see id.* § 5491(b)(1), he is not accountable to, or meaningfully checked by, any peers. And because the Director can fund his agency from the Federal Reserve System's operating expenses, *id.* § 5497(a)(1), he is not accountable to, or meaningfully checked by, Congress. Despite this lack of accountability, the Director possesses enormous and unprecedented power over American businesses, consumers, and the U.S. economy: He unilaterally enforces 19 federal consumer protection statutes—previously

the purview of seven different agencies—covering everything from home finance to student loans to credit cards to banking and lending practices. *Id.* § 5481(12), 5581(b).

The CFPB's novel structure confirms its unconstitutionality. The Supreme Court has instructed that "the most telling indication of the severe constitutional problem with [an agency] is the lack of historical precedent for th[e] entity." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) (internal quotation marks omitted). Indeed, the Court has long treated historical practice "as an important interpretive factor." *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819) and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Throughout history, the Court has tolerated restrictions on the President's removal authority in only two circumstances, recognizing that he "cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Free Enter. Fund*, 561 U.S. at 484 (quoting U.S. Const. art. II § 3); *see Myers v. United States*, 272 U.S. 52, 134 (1926) ("[T]he President must have the power to remove [executive officers] without delay."). Neither is present here.

The first permitted restriction is on the President's ability to remove members of a multi-member "body of experts," which obviously does not apply to an agency headed by a single individual. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625 (1935). With multi-member bodies, the collegial structure acts as a critical additional check on the excesses of any individual. Such bodies also typically have a narrowed, non-partisan charter, or are "called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'" *Id.* at 624 (internal quotation marks omitted). The CFPB Director, by contrast, acts alone and need not have any expertise in consumer protection.

The other historically permitted restriction on the President's removal power involves inferior officers with limited tenure and narrow authority—a description that likewise does not fit the Director. *See Morrison v. Olson*, 487 U.S. 654, 671-73 (1988). The Court has allowed such officers to operate with limited Presidential control precisely because—at least in theory—they have "limited jurisdiction and tenure" or "lack[] policymaking or significant administrative authority," and thus cannot significantly interfere with the workings of the Executive Branch. *Id.* at 691. The CFPB Director, by contrast, has authority over vast sectors of the American economy—and, within his domain, he decides what rules to issue; how to enforce them; when to enforce them; against whom to enforce them; and what penalties to seek against those who—in his view—violate them. *See* 12 U.S.C. § 5491(b)(1).

Because there is no historical precedent for the CFPB's encroachment on the President's removal power, the ordinary rule must apply: In order to carry out his duty to faithfully execute the laws, the President must have the power to hire and fire the CFPB Director. Permitting a single, unaccountable person to wield a massive amount of power violates the separation of powers—which the Framers viewed "as the absolutely central guarantee of a just Government." *Morrison*, 487 U.S. at 697 (Scalia, J., dissenting); *see PHH Corp*, 839 F.3d at 8-9 (holding that CFPB's structure violates the Constitution); *D & D Mktg.*, 2016 WL 8849698, at *4-5 (same).

And the only remedy for this fundamental structural flaw is to strike down the agency's ultra vires actions because the agency cannot lawfully exist. Any alternative would involve judicial rewriting of the statute to create an entity that Congress never intended. Congress expressly sought to create an agency "completely independent, with an independently appointed director, an independent budget, and an autonomous rulemaking authority," 156 Cong. Rec. 12,434 (2010) (statement of Rep. Maloney), and gave that agency an unprecedented structure

designed to preserve that independence. A remedy that involves severing some of those structural features would result in "legislation that Congress would not have enacted," and a body that will not "function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). This Court's job is to judge the validity of the agency Congress enacted—not create a new one. Because the agency is unconstitutional in its entirety, its enforcement actions are likewise unlawful, and should be dismissed. *See Noel Canning v. NLRB*, 705 F.3d 490, 515 (D.C. Cir. 2013) ("vacating" the NLRB's decision because the Board was constituted in an unconstitutional manner), *aff'd*, 134 S. Ct. 2550.

* * *

The CFPB's legal theories cannot be squared with the text and structure of the statutes it invokes, case law, or common sense. And these are not just technical or theoretical flaws: This lawsuit strikes at the heart of Indian tribes' ability to freely contract with non-members—a core area of sovereign self-regulation, *see Pueblo of San Juan*, 280 F.3d at 1285—and threatens a critical pathway for rural, remotely-located tribes to pursue the federal policy of political self-determination and economic self-sufficiency, *see supra* pp. 13-14. This type of regulatory overreach is precisely the danger that the President's removal power is designed to check. The CFPB's complaint should be dismissed.

CONCLUSION

WHEREFORE, Defendants respectfully move this Honorable Court to grant their motion to dismiss the Complaint in its entirety with prejudice.

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 10, 2017, a true and correct copy of the foregoing AMENDED MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS was electronically filed with the Clerk of the Court for the United States District Court for the District of Kansas using the Court's CM/ECF system, and that an electronic copy of the foregoing was transmitted to all counsel of record by email or secure file transfer protocol.

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