STAYED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV-14-2090-MWF-(PLAx) **Date: May 27, 2014**

Title: Consumer Financial Protection Bureau -*v*- Great Plains Lending, LLC, et al.

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

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

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

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

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

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

has inappropriately declined to resolve issues in the underlying investigation on a government-to-government basis. Given that the CFPA contemplates a certain amount of cooperation between the Bureau, the states, and the tribes, that attitude is understandable, but it falls within the ambit of administrative discretion, not statutory mandate. If the Court has erred in its statutory interpretation, then the Ninth Circuit or the Supreme Court can correct the error.

I. BACKGROUND

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

Respondents are three limited liability companies established and controlled by three Indian tribes. Respondent Great Plains Lending, LLC is wholly owned and operated by the Otoe-Missouria Tribe. Respondent MobiLoans, LLC is wholly owned and operated by the Tunico-Biloxi Tribe of Louisiana. Respondent Plain Green, LLC is wholly owned and operated by the Chippewa Cree Tribe of Rocky Boy's Reservation, Montana. Each Respondent was established by its respective tribe for the purpose of advancing tribal economic development. Each Respondent is subject to the plenary control of tribe members. Each provides financial products and services to a broad consumer base that extends beyond tribal Indians. (*See* Declaration of Richard Morsette (Docket Nos. 14-1, 14-2); Declaration of Marshall Pierite (Docket Nos. 14-3, 14-4); Declaration of John Shotton (Docket Nos. 14-5, 14-6)).

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

II. DISCUSSION

A. Jurisdiction and Venue

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

B. Legal Standard

An administrative agency may not conduct an investigation absent specific authority from Congress. The agency "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986). The scope of judicial review in an administrative subpoena enforcement action is "quite narrow." *United States v. Golden Valley Elec. Ass'n*, 689 F.3d 1108, 1113 (9th Cir. 2012) (quoting *EEOC v. Children's Hosp. Med. Ctr. of N. Cal.*, 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc)) (internal quotation marks omitted). The CIDs must be enforced unless jurisdiction is "plainly lacking." *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001).

C. Interpretation of the CFPA

We start with the general rule in the Ninth Circuit that federal laws of general applicability are presumed to apply with equal force to Indian tribes. The rule has its roots in *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 80 S. Ct. 543, 4 L. Ed. 2d 584 (1960), in which the Supreme Court held that Indian-owned lands

were subject to taking upon the payment of just compensation. *Id.* at 123. The Court stated, in what Respondents and some commentators describe as dictum, that "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." *Id.* at 116.

Whether or not this statement in *Tuscarora* was dictum, the Ninth Circuit adopted the principle wholesale in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), in holding that a commercial farming enterprise wholly owned and operated by the Coeur d'Alene Indian Tribe could be subject to the regulations in the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. § 651 *et seq*. The Act applied to any "employer," defined as "a person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State." 29 U.S.C. § 652(5). A "person" was defined as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." *Id.* § 652(4). The Ninth Circuit held that the Act was generally applicable, and it therefore applied with equal force to Indian tribes, unless the tribes were specifically excluded. *Coeur d'Alene*, 751 F.2d at 1115-16. "In short, we have not adopted the proposition that Indian tribes are subject only to those laws of the United States expressly made applicable to them. Nor do we do so here." *Id.* at 1116.

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

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . ." In any of these three situations, Congress must expressly apply a statute to Indians before we will hold that it reaches them.

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

Respondents argue that *Coeur d'Alene* and its progeny were wrongly decided based on an incorrect interpretation of *Tuscarora*, but, as Respondents acknowledge, this Court is not in a position to reconsider the Ninth Circuit's interpretation of law.

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

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

Against that background, the Court analyzed the history and application of the FCA to determine whether the FCA contained "some affirmative showing of statutory intent" to authorize suits against the states by private parties. *Id.* at 781. The Court reasoned that the FCA was initially enacted in response to frauds by private contractors, not the states themselves, and the original iteration of the FCA contained no indication that states were intended to be included. *Id.* at 781-82. Future amendments to the FCA broadened its scope to include members of the armed forces, but did not suggest expansion to the states. *Id.* at 782-83. The FCA authorized penalties, which are not generally imposed on governmental entities. *Id.* at 784-85. A sister statute, the Program Fraud Civil Remedies Act of 1986, excluded the states. *Id.* at 786. And perhaps most tellingly, another section of the FCA contains a definition of "person," "for purposes of this section," to include the states. *Id.* at 783-84 (citing 31

U.S.C. § 3733(*l*)(4)). Therefore, the Court reasoned, Congress intended to exclude the states in the statute's other uses of "person." *Id*.

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

In *NLRB v. Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003), the Circuit considered whether the National Labor Relations Act ("NLRA") applied to a financially independent, nonprofit tribal organization, which contracted to provide services to the tribe as well as others, and operated outside a reservation. *Id.* at 998, 1000. The Circuit again stated and applied the general rule, and concluded that the statute did not fall under any of the *Coeur d'Alene* exceptions, since application did not impermissibly touch on intramural matters related to self-governance. *Id.* at 1000.

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

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

interpret statutes containing the term "person," defined in very broad terms to include most legal entities.

Second, according to Respondents, the Ninth Circuit has never applied *Tuscarora* to a statute containing the word "person," and thus has never ruled in conflict with the specific rule in *Stevens*. Respondents are simply incorrect. In *Coeur d'Alene*, the Circuit interpreted a statutory provision applying to any "employer," and "employer" was "a ***person*** engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State." 29 U.S.C. § 652(5) (emphasis added); *see Coeur d'Alene*, 751 F.2d at 1115; *see also U.S. Dep't of Labor v. Occupational Safety & Health Rev. Comm'n*, 935 F.2d 182, 183-84 (9th Cir. 1991) (interpreting the same section). In *Karuk Tribe*, 260 F.3d at 1078, the Circuit examined the Age Discrimination in Employment Act ("ADEA"), which applies to any "employer," defined as "a ***person*** engaged in an industry affecting commerce" who meets certain other qualifications. 29 U.S.C. § 630(b) (emphasis added).

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

A ruling that *Stevens* trumps the longstanding *Coeur d'Alene* presumption would, therefore, entail overruling decades of Ninth Circuit precedent. It is, of course, proper for this Court to hold that a Supreme Court decision has overruled prior Ninth Circuit law. *Miller v. Gammie*, 335 F.3d 889, 893, 900 (9th Cir. 2003) (en banc) (holding that prior Ninth Circuit precedent providing absolute immunity to social workers was "clearly irreconcilable" with intervening Supreme Court authority limiting immunity under certain circumstances); *see* C. Goelz et al., *California Practice Guide: Ninth Circuit Civil Appellate Practice* ("*Ninth Circuit Rutter Guide*") § 8:180.2a (The Rutter Group rev. ed. 2014) ("The mode of analysis is controlling even

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

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

Chapa De is a more difficult case to distinguish, because the Circuit held against the tribe without giving it the benefit of the *Stevens* presumption. Respondents argue that the *Stevens* presumption could not have applied in *Chapa De*, because the tribal health care organization was not an "arm of the tribe" that would be presumptively excluded from the term "person." The organization was a non-profit California corporation operating on non-Indian lands, employing many non-Indians, and serving many non-Indian patients. *Chapa De*, 316 F.3d at 1000. An "arm of the tribe" is an entity that the tribe owns and controls, which is operated for the benefit of the tribe. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1046-47 (9th Cir. 2006) (holding that a casino created and operated to promote "tribal economic development, self-sufficiency, and strong tribal governments" under the Indian Gaming Regulatory Act and fully under the tribe's ownership and control was an "arm of the tribe"). It is not clear that the health care organization at issue in *Chapa De* was not an arm of the tribe,

given that it was established for the purpose of providing health care to tribe members and was exclusively governed by tribal Indians. *Chapa De*, 464 F.3d at 999.

Even assuming that Respondents are correct that a ruling in their favor would not necessarily call into question the outcomes of these two post-*Stevens* Ninth Circuit cases, it nevertheless would require the Court to hold that the analysis in each case was critically deficient. Both the *Snyder* court and the *Chapa De* court specifically held that the statutes at issue, each of which used the term "person" to describe the subject of its regulation, were statutes of general applicability presumptively applicable to Indian tribes. *Snyder*, 382 F.3d at 895; *Chapa De*, 316 F.3d at 998. Respondents ask this Court to hold that these Ninth Circuit panels were incorrect on that point of law. *Accord Chapa De*, 316 F.3d at 998-99 ("Even if the NLRA is a statute of general application, Chapa-De argues that it still would not apply to Indian tribes or to their tribal organizations because the statute does not expressly state that it does. . . . To accept Chapa-De's position would be effectively to overrule *Coeur d'Alene*, which, of course, this panel cannot do.").

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

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

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

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

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

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

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

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

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

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

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

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

The *Stevens* dissent questioned whether the general presumption could apply to the interpretation of a federal statute enforceable by the federal government. *Stevens*, 529 U.S. at 790 (Stevens, J., dissenting). The Court distinguished the dissent's authority by noting that none of the three cases involved a statutory provision authorizing a *private* suit against a state. *Id.* at 780 n.9 (majority opinion). The *Stevens* Court did not overrule these prior authorities that interpreted the term "person" to include the state and state agencies as parties subject to suit by the federal government. *See California v. United States*, 320 U.S. 577, 586, 64 S. Ct. 352, 88 L.

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

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

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

Stevens, 529 U.S. at 787 (citations omitted). Neither doctrine is implicated by a statute authorizing a suit by the federal government against the states. Congress is unquestionably entitled to authorize investigations and suit against states, Indian tribes, and associated agencies. While authorizing private parties to bring suits against the states in the name of the United States alters the balance between the sovereigns, suits brought by the federal government are well within the usual constitutional balance. And a suit brought by the federal government does not raise serious Eleventh

Amendment questions, because the states ceded their immunity from federal suit during the Constitutional Convention. *See Alden v. Maine*, 527 U.S. 706, 759-60, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) (holding that the states' waiver of sovereign immunity respecting suits by the United States did not reach private actions against a state to enforce federal laws); *see also Will*, 491 U.S. at 67 ("We cannot conclude that § 1983 was intended to disregard the well-established immunity of a State from being sued without its consent.").

At least one district court has reached a contrary conclusion in its reading of *Stevens*. In *United States v. Menominee Tribal Enterprises*, 601 F. Supp. 2d 1061 (E.D. Wis. 2009), the district court rejected the government's argument that the rule in *Stevens* is limited to FCA suits brought by private parties. The district court reasoned that all FCA suits are claims on behalf of the United States, and the identity of the party in fact prosecuting the suit is irrelevant. Furthermore, the *Stevens* Court interpreted the term "person" under the FCA, and the district court reasoned that "[t]he meaning of a specific term in a statute does not change depending on who the plaintiff is." *Id.* at 1068-69.

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

Second, context is critical. "[Q]ualification of a sovereign as a 'person' who may maintain a particular claim for relief depends not 'upon a bare analysis of the word "person,"' but on the 'legislative environment' in which the word appears." *Inyo Cnty., Cal. v. Paiute-Shoshone Indians*, 538 U.S. 701, 711, 123 S. Ct. 1887, 155 L. Ed.

2d 933 (2003) (quoting *Evans*, 316 U.S. at 161; *Pfizer Inc. v. Gov't of India*, 434 U.S. 308, 317, 98 S. Ct. 584, 54 L. Ed. 2d 563 (1978)). Hence, in *Inyo County*, the Court did not rely on the presumptive exclusion, but rather looked to both the purpose of the statute and the facts of the case. The Court held that the tribe was not a person entitled to sue under 42 U.S.C. § 1983, because the statute "was designed to secure private rights against government encroachment, not to advance a sovereign's prerogative to withhold evidence relevant to a criminal investigation." *Id.* at 712 (citation omitted). The purpose of § 1983 excluded the tribe's intended use of the statute. Here, the purpose of the CFPA does not exclude branches of Indian tribes providing consumer financial products to broad sections of the population extending outside tribe members.

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

A second justification for the presumption was a simple matter of English style and usage: "Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it." *Cooper Corp.*, 312 U.S. at 604. This usage argument is strong when referring to a sovereign as sovereign, which is logically outside the scope of the term "person," and less strong when referring to a sovereign in a proprietary capacity as any other citizen. Hence a statute that applies to a "person" in ways that would presumptively not apply to a sovereign entity is therefore presumed to exclude the sovereign. *See id.* at 606 (holding that the Sherman Act's definition of "person" would not include the United

States because, *inter alia*, a person could be criminally liable or liable to suit for treble damages, and the sovereign is not generally subject to punitive remedies).

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

The Court has found the presumption easily overcome or even "disregarded," *United States v. California*, 297 U.S. at 187, when none of these justifications were present. In *United States v. California*, the Court looked to the "all-embracing language" of the Federal Safety Appliance Act, 45 U.S.C. §§ 2, 6 (repealed 1994), to determine that both publicly owned and privately owned railroads were intended to be included. 297 U.S. at 185. The Court considered and rejected application of the presumption that a sovereign is not included in general statutory language:

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

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

Substantially similar reasoning was used by the Court to hold that federal statutes applicable to "persons" engaged in the business of selling liquor were intended to apply against the states. In *Ohio v. Helvering*, 292 U.S. 360, 54 S. Ct. 725, 78 L. Ed. 1307 (1934), *overruled on other grounds by Garcia*, 469 U.S. at 541 & n.6, the Court avoided application of a presumption that state agencies were not included by use of the term "person," and rather looked to the "connection in which the word is found" to determine whether application to the states was intended:

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

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

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

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

Congress legislates against the backdrop of the Supreme Court's statutory interpretation decisions, and Congress is presumed to "expect[] its statutes to be read in conformity with th[e] Court's precedents." *United States v. Wells*, 519 U.S. 482, 495, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997). Both parties here invoke this rule, arguing that Congress, armed with the precedents discussed above, knew that its intention with respect to the CFPA's application to sovereigns should have been made clear, and its decision to remain silent should be afforded great weight. The Bureau points to *Tuscarora*'s holding that generally applicable statutes are presumed to include Indians, while Respondents' argument is based in *Stevens* and the centuries-old presumption against application of general statutes to the sovereign. Each side claims that the Supreme Court has clearly instructed Congress on how to communicate its intent regarding sovereigns. But this argument proves too much for both sides. Over the past

century, Congress has passed many generally applicable statutes: many expressly include sovereigns, many expressly exclude sovereigns, and many are silent. The Supreme Court has relied much more heavily on the legislative context than on canons of construction in interpreting these statutes. There is no plain mandate from the Supreme Court on which Congress can reasonably rely in deciding to remain silent as to sovereigns.

E. CFPA's Application to Indian Tribes

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

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

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

Put simply, there is no provision of the CFPA that expressly or impliedly suggests that the defined terms "persons" and "States" are mutually exclusive.

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

Respondents argue, however, that the particular mention of Indian tribes as co-regulators under the CFPA should be understood as a decision on behalf of Congress to refrain from regulating the tribes in other provisions of the CFPA. "The CFPA thus erects a clear demarcation between regula***ted*** entities—"covered persons"—and sovereign entities who are to be co-regula***tors***." (Opp. at 13 (citations omitted)). Respondents find support for this conclusion in provisions of the CFPA that (a) require the Bureau to coordinate with states and tribes to promote consistent regulatory treatment, 12 U.S.C. § 5495;[1] (b) require the Bureau to coordinate its fair lending efforts with states and tribes to promote consistent enforcement, *id.* § 5493(c)(2)(B);[2] (c) give states and tribes a significant role in collecting and tracking consumer complaints, *id.* § 5493(b)(3)(B);[3] (d) require the Bureau to share its data with states and

[1] 12 U.S.C. § 5495 provides:

> The Bureau shall coordinate with the Commission, the Commodity Futures Trading Commission, the Federal Trade Commission, and other Federal agencies and State regulators, as appropriate, to promote consistent regulatory treatment of consumer financial and investment products and services.

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

> The Office of Fair Lending and Equal Opportunity shall have such powers and duties as the Director may delegate to the Office, including . . . coordinating fair lending efforts of the Bureau with other Federal agencies and State regulators, as appropriate, to promote consistent, efficient, and effective enforcement of Federal fair lending laws . . . .

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

> Routing calls to States
> To the extent practicable, State agencies may receive appropriate complaints from the systems established under subparagraph (A) [providing for the Bureau's centralized complaint collection system], if—
>
> > (i) the State agency system has the functional capacity to receive calls or electronic reports routed by the Bureau systems;
> > (ii) the State agency has satisfied any conditions of participation in the system that the Bureau may establish, including treatment of personally identifiable

tribes, *id.* § 5493(b)(3)(D);[4] and (e) allow officials of the states and tribes to bring a civil action in the name of the state or tribe to enforce the CFPA, *id.* § 5552(a)(1).[5]

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information and sharing of information on complaint resolution or related compliance procedures and resources; and
(iii) participation by the State agency includes measures necessary to provide for protection of personally identifiable information that conform to the standards for protection of the confidentiality of personally identifiable information and for data integrity and security that apply to the Federal agencies described in subparagraph (D).

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

> Data sharing required
> To facilitate preparation of the reports required under subparagraph (C) [providing for reports to Congress], supervision and enforcement activities, and monitoring of the market for consumer financial products and services, the Bureau shall share consumer complaint information with prudential regulators, the Federal Trade Commission, other Federal agencies, and State agencies, subject to the standards applicable to Federal agencies for protection of the confidentiality of personally identifiable information and for data security and integrity. The prudential regulators, the Federal Trade Commission, and other Federal agencies shall share data relating to consumer complaints regarding consumer financial products and services with the Bureau, subject to the standards applicable to Federal agencies for protection of confidentiality of personally identifiable information and for data security and integrity.

[5] 12 U.S.C. § 5552(a)(1) provides:

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

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

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

References to cooperation with the states and tribes are isolated within the CFPA, and hardly support the conclusion that Congress intended the Bureau to be partners in enforcement with the states and tribes, much less that the states and tribes are fully immune from the Bureau's investigatory authority. The cited portions amount to little more than an acknowledgment that the states and tribes are well positioned to participate in the reform of consumer financial products. The states and tribes have access to significant information about the financial product markets within their territories, and the CFPA requires the Bureau to tap into that information.

These provisions do not indicate a statutory purpose to immunize tribal providers of consumer financial products that are identical in all respects to the products provided by private entities. If the CFPA authorized Indian tribes to issue CIDs to "persons," Respondents would have a much stronger argument that Indian tribes are not persons within the statutory meaning. But only the Bureau, a federal agency, may issue CIDs under 12 U.S.C. § 5562(c).[6] The only section cited by

[6] 12 U.S.C. § 5562(c) provides:

> Demands
> (1) In general
> Whenever the Bureau has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation, the Bureau may, before the institution of any proceedings under the Federal consumer financial law, issue in writing, and cause to

Respondents that provides the states and tribes with affirmative authority is section 5552, titled "Preservation of enforcement powers of States," which simply allows the states to enforce the CFPA and related state laws, while requiring that state officials consult with the Bureau before bringing suits under the CFPA.

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

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be served upon such person, a civil investigative demand requiring such person to [respond to investigatory demands.]

[7] 12 U.S.C. § 5511(a) provides:

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

[8] 12 U.S.C. § 5511(b) provides:

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

undermined by a holding that certain financial institutions providing identical products and serving an identical customer base are treated differently under the CFPA solely by virtue of their tribal, rather than private, ownership. *See California v. United States*, 320 U.S. at 585 (treating public and private wharves and piers differently would undermine the purpose of the Shipping Act).

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

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

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

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

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

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

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

F. ***Coeur d'Alene* Exceptions**

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

> (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations . . . ."

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

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

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

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

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

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

G. Tribal Immunity

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

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

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

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

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

H. Adequate Notice

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

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

S. Ct. 357, 94 L. Ed. 401 (1950); *Gen. Ins. Co. of Am. v. EEOC*, 491 F.2d 133, 136 (9th Cir. 1974)).

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

> to determine whether small-dollar online lenders or other unnamed persons have engaged or are engaging in unlawful acts or practices relating to the advertising, marketing, provision, or collection of small-dollar loan products, in violation of [12 U.S.C. § 5536, 15 U.S.C. §§ 1601, 1693, 15 U.S.C. §§ 6802-6809], or any other Federal consumer financial law.

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

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

generalized information about energy consumption concerning three residences under suspicion of drug law violations).

Here, although the CIDs seek general information about Respondents, none of the requested information is "plainly incompetent or irrelevant to any lawful purpose." Respondents suggest that the CIDs ask them to account for every loan and every customer they have served since their inception, but the CIDs do not appear to be so broad. While the CIDs seek extensive accounting with respect to Respondents' employees and partner organizations, it only seeks customer-specific information for "all persons who became consumers of the Company's goods and services related to credit from January 1, 2011 through January 31, 2011." (Osborn Decl. Ex. A, at 7). Respondents have not identified any interrogatory or request that is irrelevant to the stated purpose of the CIDs.

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

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

Contrary to Respondents' assertion, the burden is not on the Bureau to establish that the CIDs are "no broader than necessary to achieve its purpose." *Id.* at 700. Rather, the party seeking to avoid enforcement of the CID must prove that the inquiry is overbroad or unduly burdensome. *FDIC v. Garner*, 126 F.3d 1138, 1143 (9th Cir.

1997). Respondents have not demonstrated that the CIDs seek any information beyond that necessary to determine whether Respondents "have engaged or are engaging in unlawful acts or practices relating to the advertising, marketing, provision, or collection of small-dollar loan products," according to the stated purpose of the CIDs. (Osborn Decl. Ex. A, at 5). Accordingly, the CIDs are not overbroad.

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

Respondents have not shown that compliance with the CIDs would pose any threat to the normal operations of their business; indeed, they have not attempted to show any burden at all. They merely argue that the CIDs document requests are extensive and not "narrow and specific." There is no binding authority, however, requiring that the requests be narrow and specific. The Court must enforce the CIDs in the absence of a showing by Respondents that they are overbroad or unduly burdensome.

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

I. Arm of the Tribe

The Bureau argues that even if the *Stevens* presumption applies and the CFPA's definition of "person" excludes the tribes, then Respondents are private businesses

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

J. Applicability to States

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

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

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

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

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

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

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

STAYED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV-14-2090-MWF-(PLAx) **Date: May 27, 2014**
Title: Consumer Financial Protection Bureau -*v*- Great Plains Lending, LLC, et al.

III. CONCLUSION

The Petition is **GRANTED**.

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

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

Accordingly, enforcement of the CIDs pursuant to this Order is **STAYED** pending Respondents' appeal to the Ninth Circuit. The parties are **ORDERED** to file a status report with the Court every 180 days indicating the progress of the appeal, and a status report within 5 court days upon conclusion of the appeal.

IT IS SO ORDERED.