No. 17-184

IN THE
Supreme Court of the United States

GREAT PLAINS LENDING, LLC,
and PLAIN GREEN, LLC,
Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for a writ of certiorari remains accurate.

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INTRODUCTION

There is a well-established circuit split as to whether a generally applicable federal statute that is silent as to its applicability to Indian Tribes should nonetheless be presumed to apply to them. In this case, the Ninth Circuit squarely embraced the wrong side of that split, reaffirming the *Coeur d'Alene* presumption that "laws of general applicability govern tribal entities unless Congress has explicitly provided otherwise." Pet. App. 10a (citing *Donovan* v. *Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985)). In doing so, the Ninth Circuit "repudiated" this Court's precedents establishing an interpretive presumption in favor of Tribes. *Id.* at 20a. And

it declined to apply this Court's holding in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens,* 529 U.S. 765 (2000), which recognized a presumption against interpreting the term "person" to apply to sovereigns. *Id.* at 780-781.

The case therefore presents an opportunity to resolve a clear split with respect to an important question of tribal sovereignty, as well as a chance to reaffirm and clarify the appropriate reach of this Court's own precedents. That is more than enough to warrant this Court's review.

The Government barely disputes any of this. Instead, it attempts to dodge and deflect. The Government contends that the circuit split is not really implicated here because the Ninth Circuit *might* have come to the same ultimate conclusion about the underlying statute even if it had not erroneously applied the *Coeur d'Alene* presumption. But that is not what the Ninth Circuit said: It recognized that "the Tribal Lending Entities make some appealing arguments," Pet. App. 20a, but found that they could not carry the day in light of the *Coeur d'Alene* presumption. Even more to the point, the Government's unfounded speculation as to how the case would have been decided in the absence of the presumption does nothing to diminish the division in the circuits regarding the propriety of that presumption in the first place.

The Government's attempt to diffuse the conflicts with this Court's precedents fares no better. The Government cannot deny the conflict between the Ninth Circuit's decision and this Court's cases articulating a presumption in favor of Tribes when the

Ninth Circuit itself admitted that it was "repudiat[ing]" those precedents. *Id*.

As for *Stevens*, the Government tries to make the non-controlling concurrence the law, asserting that the *Stevens* presumption applies only to suits brought by private parties. But *Stevens* is part and parcel of this Court's general refusal to assume that statutory silence reflects Congress's intent to encroach on a subordinate sovereign, whether it be a Tribe or a State. The Ninth Circuit's rejection of *Stevens* (and the Government's aggressive position with respect to the scope of its enforcement authority in the face of silent statutes) further counsels in favor of this Court's review.

The petition should be granted.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW SQUARELY IMPLICATES AN ACKNOWLEDGED CIRCUIT SPLIT

The Government starts with a detailed defense of why, in its view, the Consumer Financial Protection Act (CFPA) permits the Government to serve civil investigative demands (CIDs) upon Tribes. Br. in Opp. 11-17. But the Government puts the cart before the horse. It attempts to evade the antecedent question that is the key to resolving the meaning of the statute: Whether a generally applicable statute that is silent as to its applicability to Indian Tribes should nonetheless be presumed to apply to Tribes. In this case, the Ninth Circuit answered in the affirmative, reiterating a position it shares with the Second, Sixth, Seventh, and Eleventh Circuits. Pet. 11-12. The Tenth and D.C. Circuits, however, have rejected the *Coeur d'Alene* presumption. That circuit

split is widely acknowledged and will not be resolved without this Court's intervention. *Id.*

The Government barely contests the existence of that split. Instead, the Government suggests that the decision below somehow does not implicate it. The Government's arguments miss the mark.

1. The Government suggests (at 23) that the split is not implicated because the circuits that have rejected the *Coeur d'Alene* presumption nonetheless might reach the same conclusion about the scope of the CFPA that the Ninth Circuit did. That is wrong. The Tenth Circuit, for example, has made very clear 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). Because the CFPA does not state that it applies to Tribes, the Tenth Circuit would rule in Petitioners' favor.

More importantly, the Government's musings about how the courts on the other side of the split would come out with respect to the CFPA are simply irrelevant. The question presented here does not ask the Court to consider the reach of the CFPA once it is interpreted under the correct analytical framework; it asks the Court to decide what the correct framework is in the first place. On that question, there can be no dispute that the Tenth and the D.C. Circuits would have a different answer than the one the Ninth Circuit gave here because those courts would not presume that Congress intended for a silent statute to apply to Tribes.

The Government attempts (at 25) to muddy the split by asserting that the Tenth Circuit invokes a

presumption against applying a silent statute to Tribes only when the statute impinges on "sovereign" interests, and not when the interests involved are merely "proprietary." Of course, that approach still diverges markedly from the Ninth Circuit's presumption *in favor* of applying generally applicable statutes to Tribes. And the distinction the Government identifies does it no favors even with respect to the underlying dispute here: The Tenth Circuit has held that the application of legislation to a "business operated by an Indian tribe" implicates the Tribe's sovereign interests because the law's "application would dilute principles of tribal self-government." *Dobbs*, 600 F.3d at 1283 (citing *Donovan* v. *Navajo Forest Prods. Indus.*, 692 F.2d 709, 714 (10th Cir. 1982)).

The D.C. Circuit has also unequivocally rejected the *Coeur d'Alene* presumption. *San Manuel Indian Bingo & Casino* v. *NLRB*, 475 F.3d 1306, 1315 (D.C. Cir. 2007) (concluding that cases in other circuits have applied "a framework (*Coeur d'Alene*) different from the one we employ here"). The Government tries to minimize that holding by suggesting (at 24) that the D.C. Circuit's analysis did not differ meaningfully from *Coeur d'Alene*. That is incorrect. The D.C. Circuit noted that a presumption in favor of applying statutes to Tribes is "in tension with the longstanding principles" in this Court's precedents. *San Manuel*, 475 F.3d at 1311. Thus, rather than presuming that generally applicable statutes apply to Tribes, the D.C. Circuit undertook "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Id.* at 1313 (internal quotation mark omitted). That "fact-intensive analysis of the tribal activity at issue" is a marked depar-

ture from the Ninth Circuit's approach. *Soaring Eagle Casino & Resort* v. *NLRB*, 791 F.3d 648, 673 (6th Cir. 2015).

2. The Government also argues that the split is not implicated because the other cases that make up the split have involved statutes besides the CFPA. Again, the Government misses the point. The question presented concerns the general presumption that should be applied to any silent, generally applicable statute. Naturally, the cases involved are not limited to a specific law.

This Court routinely grants certiorari to resolve a general disagreement as to whether or how a rule of interpretation should apply across a range of contexts. *See M & G Polymers USA, LLC* v. *Tackett*, 134 S. Ct. 2136 (2014) (granting review to resolve a circuit split regarding the appropriate interpretive presumption for collective-bargaining agreements); *City of Arlington* v. *FCC*, 569 U.S. 290, 295 (2013) (reviewing whether "a court should apply *Chevron* to * * * an agency's determination of its own jurisdiction") (internal quotation mark omitted). The Court should do the same here.

3. In the end, the Government spends much of its brief arguing that the *Coeur d'Alene* presumption was not essential to the Ninth Circuit's holding that the CFPA provision in question covers Tribes. Br. in Opp. 11-17. That is flatly contradicted by the Ninth Circuit's opinion: The Ninth Circuit *first* decided the applicability of the *Coeur d'Alene* presumption and then performed an analysis that was entirely tainted

by it.[1] Pet. App. 10a-12a. And it explicitly acknowledged the persuasiveness of Petitioners' arguments that the statute should not cover Tribes. *Id.* at 20a.

The Government's arguments with respect to the meaning of the statute are also wrong. The Government asserts (at 12) that Petitioners are "companies" and therefore fall within the CFPA's definition of "person[s]" on that basis. It fails to mention, however, that the Ninth Circuit already rejected that argument, concluding that—at least at this stage—Petitioners have done enough to demonstrate that they are arms of the sovereign whose legal identities are indistinguishable from the Tribes. *See* Pet. App. 14a n.3.

The Government also observes (at 12) that the statute exempts certain "person[s]" from the Bureau's enforcement authority, but not Tribes. Congress, however, would not have seen a need to exempt Tribes if it assumed that they were not included in the meaning of "person" to begin with. And the statute itself provides strong reason to think that is the case. When Congress wished to include Tribes elsewhere in the CFPA, it explicitly did so, including in the definition of the term "State." 12 U.S.C. § 5481(27). And unlike the CFPA, other consumer protection laws *have* defined "person" to include a

[1] The Government points to the District Court's statement that the Government's interpretation was correct "whether or not the *Coeur d'Alene* framework applies." Pet. App. 56a. Tellingly, the Ninth Circuit did not repeat that assertion, and the District Court in any event did not suggest that the same result would obtain even under the Tenth Circuit's approach, which would require a presumption *against* application to Tribes. *See supra* pp. 4-5.

"government or governmental subdivision or agency." *See, e.g.*, 15 U.S.C. §§ 1602(d)-(e), 1691a(f). Congress's decision to leave Tribes out of the definition of "person" in the CFPA is therefore significant.

Finally, the Government alleges (at 14) that the CFPA's purposes would be thwarted if the Bureau could not serve CIDs upon Tribes. Not so. The Government still can enforce the CFPA in other ways. For example, the Tribes here "offered to cooperate with the Bureau as co-regulators," as permitted under the CFPA. Pet. App. 5a; *see* 12 U.S.C. § 5495. Yet the Bureau declined the Tribes' invitation. The Government has enforcement tools at its disposal, and it cannot cry wolf when it has opted not to use them.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

The decision below conflicts with several of this Court's longstanding presumptions: the presumption that statutes "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit," *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (internal quotation mark omitted); the presumption that statutes will not be construed in a manner that impairs tribal sovereignty absent "clear indications of legislative intent," *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 60 (1978); and the presumption that the term "person" "does not include the sovereign" absent an "affirmative showing of statutory intent to the contrary," *Stevens*, 529 U.S. at 780-781.

The Government cannot wave away the conflict between the decision below and these precedents. Its arguments fail at every turn.

1. The Government rejects the applicability of the "deeply rooted" presumptions that statutes "are to be construed liberally in favor of the Indians," *County of Yakima*, 502 U.S. at 269 (internal quotation mark omitted), and that "clear indications of legislative intent" are required before a statute will be construed in a manner that impairs "tribal sovereignty." *Santa Clara Pueblo*, 436 U.S. at 60. But even the Ninth Circuit expressly acknowledged in this case that it was "repudiat[ing]" these precedents by choosing to follow the *Coeur d'Alene* framework instead. Pet. App. 20a.

The Government responds (at 18) that this Court's longstanding presumptions in favor of Tribes apply only to "statutes that expressly deal with Indian affairs." That is contradicted by several of this Court's decisions, which apply the presumptions to generally applicable statutes. For example, in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982), this Court applied the *County of Yakima* presumption to the Natural Gas Policy Act of 1978. *Id.* at 152. Likewise, in *Iowa Mutual Insurance Co.* v. *LaPlante*, 480 U.S. 9 (1987), this Court applied the *Santa Clara Pueblo* presumption to the federal diversity jurisdiction statute. *Id.* at 17-18; *see also United States* v. *Dion*, 476 U.S. 734, 739 (1986) (applying a clear statement rule protecting tribal sovereignty to the Bald Eagle Protection Act).

Moreover, the Government entirely ignores the underlying justification for these presumptions: safeguarding Indian tribal sovereignty. *See, e.g.*,

Merrion, 455 U.S. at 152 (presumptions exist to protect "traditional notions of sovereignty" and "the federal policy of encouraging tribal independence") (internal quotation marks omitted). That justification applies with full force whether or not the statute expressly concerns Indian affairs.

2. The Government's attempt to distinguish *Stevens* is also flawed. *Stevens* holds that there is a general presumption that the statutory term "person" does not include *any* sovereign absent an "affirmative showing of statutory intent to the contrary." 529 U.S. at 781.

The Government first attempts to avoid *Stevens* altogether, arguing that it is inapplicable because the CFPA expressly defines "person" to include "compan[ies]," and Petitioners are companies, even if they also are arms of a sovereign. But a sovereign can always be characterized in a literal manner as acting through, for example, a person or a company. This Court has explained that when a person or company is an arm of the sovereign, their literal status as a person or company is legally irrelevant. *See Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) ("[S]tate officials literally are persons. But a suit against a state official in his or her official capacity * * * is no different from a suit against the State itself."). Thus, the question is whether Tribes—acting through persons, companies, or any other entities—count as "person[s]" under the CFPA. That question squarely implicates *Stevens*.

The Government next takes the stark position (at 21) that *Stevens* applies only in suits brought by private individuals. But that is contrary to the basic principle that courts will not lightly assume that

Congress intends to intrude on the sovereignty of other government actors. *Stevens* fits comfortably within the range of interpretive presumptions—including the presumption against preemption, the clear statement rule for abrogating sovereign immunity, and the clear statement rule for interference with core governmental powers—designed to protect sovereignty from federal intrusion. *See, e.g.*, *PLIVA, Inc.* v. *Mensing*, 564 U.S. 604, 637-638 (2011); *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000); *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991).

The Government's attempt to narrow the applicability of the *Stevens* presumption unmoors the presumption from these foundations. The Government encroaches on subordinate sovereigns when it subjects them to CIDs and massive penalties, not just when it subjects them to private litigation. And in either case, the Court should not assume that Congress intended the encroachment merely because it enacted a generally applicable statute.

Further, the Government's position with respect to *Stevens* has consequences far beyond the tribal context. The *Stevens* principle protects *all* sovereigns from federal encroachments; indeed, *Stevens* itself was a case involving the application of federal law to a State. The Government's position therefore leaves States vulnerable to federal infringements on their sovereignty that go far beyond what Congress intended. This case illustrates the difficulty. As the Bureau forthrightly acknowledged below, the same statutory interpretation that allegedly permits it to regulate Tribes also gives it power over States. *See* Bureau C.A. Br. 24.

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED

Finally, the Government flyspecks this case's suitability as a vehicle for review of the question presented. Those efforts are unavailing.

First, the Government asserts (at 26) that this case does not "squarely present" the question because the Ninth Circuit allegedly applied a "deferential standard of review." But this case presents a "pure question of law": the interpretation of a federal statute. Pet. App. 67a. The deferential standard is therefore irrelevant. *See Pakootas* v. *Teck Cominco Metals, Ltd.*, 830 F.3d 975, 980 (9th Cir. 2016) ("[T]he district court's interpretation of a statute is a question of law which we review de novo.") (internal quotation mark omitted). And the panel did not indicate that its legal analysis was at all tentative or influenced by a deferential standard of review. Pet. App. 12a ("In keeping with our precedent, we similarly conclude that the Consumer Financial Protection Act, a law of general applicability, applies to tribal businesses.").

Second, the Government claims (at 27) that this case presents "unresolved, antecedent factual and legal questions" regarding whether Petitioners qualify as arms of their Tribes. That is wrong. Before concluding that the CFPA applies to Tribes, the Ninth Circuit ensured that such a conclusion was necessary. It held that, "at this preliminary stage, the record is sufficient to demonstrate" that the companies were arms of the Tribes based on the Tribes' "creation and operation" of the entities. *See* Pet. App. 14a n.3; *see also id.* at 64a (calling the Government's argument "weak"). To be sure, if the Ninth Circuit's holding is overturned because the

CFPA provision does not reach Tribes, the Government may have another chance to demonstrate that the companies are *not* arms of the Tribes. But it would be wasteful to require a definitive holding on that issue before deciding whether the tribal status of the entities makes a difference under the statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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