IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONSUMER FINANCIAL PROTECTION BUREAU, Appellee, v. GREAT PLAINS LENDING, LLC, MOBILOANS, LLC, and PLAIN GREEN, LLC, Appellants.	No. 14-55900

MOTION OF APPELLANTS GREAT PLAINS LENDING, LLC, AND PLAIN GREEN, LLC, TO STAY THE MANDATE

Pursuant to Federal Rule of Appellate Procedure 41(d), appellants Great Plains Lending, LLC, and Plain Green, LLC, move to stay the mandate pending the filing of a petition for a writ of certiorari and the final disposition of that petition by the Supreme Court. Counsel for appellee the Consumer Financial Protection Bureau has stated that the Bureau opposes this motion.

BACKGROUND

The Consumer Financial Protection Act of 2010 (CFPA) gives the Bureau the authority to regulate and investigate certain "person[s]." 12 U.S.C. §§ 5511(c)(4), 5562(c)(1). Invoking that authority, the Bureau issued civil investigative demands (CIDs) to three tribal lending entities, which operate as

wholly owned "arms" of their respective Tribes. *See* ER51, 127, 176. The wide-reaching CIDs sought detailed information about the Tribes' business activities, customers, and staff. *See* ER218-222. The Tribes jointly petitioned the Bureau to set aside the CIDs, explaining that the CFPA regards Tribes as co-regulating "States" rather than as "persons" subject to the Bureau's regulatory and investigative authority. ER264-271.

The Bureau refused, ER324-333, and then filed a petition to enforce the CIDs in federal district court. *See* 12 U.S.C. § 5562(e). The District Court granted the Bureau's petition, but stayed enforcement of the CIDs pending appeal to this Court. ER36. The Bureau did not object to the stay.

A panel of this Court affirmed. Op. 20. The panel observed that "the Tribal Lending Entities make some appealing arguments," Op. 19, but concluded that the CFPA "applies to tribal businesses like the Tribal Lending Entities," even though they function as "arms of the tribe." Op. 12, 13 n.3. That conclusion was compelled, the panel believed, by this Court's decision in *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985), which had held that generally applicable statutes apply to Indian Tribes. Thus, the panel concluded that the Bureau had jurisdiction to issue the contested CIDs. Op. 20. Rehearing en banc was denied on April 5, 2017.

ARGUMENT

A motion to stay the mandate should be granted when (1) a petition for certiorari "would present a substantial question" and (2) "there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A). Both conditions are met here.

I. THE PETITION FOR CERTIORARI WILL PRESENT A SUBSTANTIAL QUESTION FOR SUPREME COURT REVIEW

Great Plains and Plain Green intend to file a petition for certiorari seeking Supreme Court review of whether a generally applicable federal statute that is silent about Indian Tribes should be presumed to cover Tribes or to exclude them. That question is a substantial one, for two reasons.

First, there is an acknowledged circuit split on the question. Applying the framework set forth in this Court's decision in *Coeur d'Alene*, the panel in this case held that "generally applicable laws may be enforced against tribal enterprises," Op. 11, unless the statute "expressly provide[s] that tribes are excluded," Op. 13. In other words, under this Court's *Coeur d'Alene* framework, a generally applicable statute that is silent about Tribes is presumed to apply to them. Three other circuits have adopted the *Coeur d'Alene* framework. *See Fla. Paraplegic, Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126 (11th Cir. 1999); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996); *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989), *superseded by* 29 U.S.C. § 1002(32).

The Tenth Circuit, by contrast, "has rejected the *Coeur d'Alene* framework." *Soaring Eagle Casino & Resort v. NLRB*, 791 F.3d 648, 672 (6th Cir. 2015). In the Tenth Circuit, "respect for Indian sovereignty means that federal regulatory schemes do *not* apply to tribal governments exercising their sovereign authority absent express congressional authorization." *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1283 (10th Cir. 2010) (emphasis added). The Tenth Circuit thus presumes that "silence does *not* work a divestiture of tribal power," at least where the "tribe's sovereign authority to enact and enforce laws [is] at stake"—the opposite of this Court's presumption under *Coeur d'Alene*. *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1196-97 (10th Cir. 2002) (en banc) (emphasis added).

At least one Sixth Circuit panel has also rejected *Coeur d'Alene*, though that court's governing precedent is unclear. First, in a divided decision, the majority applied the *Coeur d'Alene* test. *See NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 541-42, 547 (6th Cir. 2015). Judge McKeague wrote a scathing dissent, criticizing *Coeur d'Alene* as "exactly 180-degrees backward," creating a rule that both "ignores Supreme Court precedent" and "impermissibly intrudes on tribal sovereignty." *Id.* at 565. Less than a month later, a unanimous Sixth Circuit panel agreed. *See Soaring Eagle*, 791 F.3d 648. Although it felt bound to apply the *Little River* holding, the panel took the remarkable step of disavowing "the *Little River* majority's adoption of the *Coeur d'Alene* framework."

Id. at 662. For many of the same reasons that Judge McKeague had articulated, the panel explained that "[t]he *Coeur d'Alene* framework unduly shifts the analysis away from a broad respect for tribal sovereignty, and the need for a clear statement of congressional intent to abrogate that sovereignty." *Id.* at 674; *see also id.* at 675 (White, J., concurring in part and dissenting in part) (agreeing that "*Coeur d'Alene* . . . is inconsistent with Supreme Court precedent and premised on inapplicable dictum").

The D.C. Circuit has declined to adopt the *Coeur d'Alene* test as well. *See San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1312-13, 1315 (D.C. Cir. 2007) (acknowledging that it was employing a framework "different from" *Coeur d'Alene*). In doing so, the D.C. Circuit has steered a middle course, settling on a case-by-case inquiry into "the extent to which application of the general law will constrain the tribe with respect to its governmental functions." *Id.* at 1313.

In recent years, then, at least three circuits have examined *Coeur d'Alene* and rejected it. In asking the Supreme Court to resolve this split, the certiorari petition will thus present a substantial question, warranting a stay of the mandate.

Second, an unflinching application of the *Coeur d'Alene* test led the panel into a direct conflict with the Supreme Court's decision in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000). In *Stevens*, the Supreme Court established a clear rule: A statute that uses the term

"person" "does not include the sovereign" unless there is an "affirmative showing of statutory intent to the contrary." *Id.* at 780-81. The panel in this case applied the opposite rule. It held that because the CFPA is "a law of general applicability" that uses the word "person," Tribes are *included* unless the statute "expressly provide[s]" otherwise. Op. 10, 13. Put differently, the Supreme Court has held that the word "person" presumptively excludes sovereigns; the panel held that the word "person" presumptively includes Tribes. The panel believed that the tribal entities here could not overcome that presumption because there is no clear statement in the CFPA that Tribes are exempt from the Bureau's regulatory power. *See* Op. 16-18. Under the Supreme Court's *Stevens* presumption, however, the roles should have been reversed: It should have been the *Bureau's* burden to point to "some affirmative showing of statutory intent" that Congress intended to *include* States and Tribes in the definition of "person." *Stevens*, 529 U.S. at 781.

In short, the panel's decision in this case cannot be reconciled with either the decisions of other circuits or the Supreme Court's decision in *Stevens*. Accordingly, the petition for certiorari will present a substantial question for Supreme Court review.

II. THERE IS GOOD CAUSE FOR A STAY

"Ordinarily, . . . a party seeking a stay of the mandate following this court's judgment need not demonstrate that exceptional circumstances justify a stay."

Bryant v. Ford Motor Co., 886 F.2d 1526, 1528 (1989). Under Rule 41(d), "good cause" suffices. Fed. R. App. P. 41(d)(2)(A).

That standard is satisfied here. In the District Court, the Bureau did not object to a stay of enforcement of the CIDs, and the District Court granted a stay pending resolution of this appeal. ER36. Staying the mandate would have the effect of merely maintaining the status quo while Great Plains and Plain Green seek review in the Supreme Court. Moreover, the District Court's reasons for granting a stay are just as applicable now as they were at the time of the District Court's ruling; those reasons justify keeping the stay in place, by withholding this Court's mandate. If the mandate issues and the CIDs are enforced, Great Plains and Plain Green "are likely to suffer irreparable harm because [their] disclosure of sensitive proprietary documents to the Bureau is a bell that cannot be unrung." ER36. By contrast, the District Court explained, "[t]he Bureau will not be injured by the temporary delay in compliance with the CIDs"; "the delay will pose only minimal hardship." ER36. There is thus good cause for a stay.

CONCLUSION

For the foregoing reasons, this Court should grant the motion to stay the mandate. The mandate should be stayed pending the filing of a certiorari petition and the Supreme Court's final disposition of that petition.

Respectfully submitted,

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April 11, 2017

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CORPORATE DISCLOSURE STATEMENT FOR APPELLANTS GREAT PLAINS LENDING, LLC AND PLAIN GREEN, LLC

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants Great Plains Lending, LLC, and Plain Green, LLC, make the following disclosure statements:

Great Plains Lending, LLC, is wholly owned by the Otoe-Missouria Tribe of Indians. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Plain Green, LLC (formerly First American Asset Recovery, LLC) is wholly owned by Atoske Holding Company. Atoske Holding Company is wholly owned by the Chippewa Cree Tribe of the Rocky Boy's Reservation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

/s/ Neal Kumar Katyal
Neal Kumar Katyal

Counsel for Appellants Great Plains Lending, LLC and Plain Green, LLC

April 11, 2017

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 11, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Neal Kumar Katyal
Neal Kumar Katyal

Counsel for Appellants Great Plains Lending, LLC and Plain Green, LLC

April 11, 2017