No. 16-

IN THE

Supreme Court of the United States

JEREMY MEYERS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

ONEIDA TRIBE OF INDIANS OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fair and Accurate Credit Transactions Act (FACTA) amendment to the Fair Credit Reporting Act (FCRA), codified as 15 U.S.C. § 1681, *et seq.*, provides that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1). The FCRA further provides, "Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer[.]" 15 U.S.C. § 1681n(a). A "person" is defined as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." 15 U.S.C. 1681a(b).

1. Whether Congress abrogated the sovereign immunity of an Indian tribe under 15 U.S.C. § 1681, *et seq.*, by providing that "any...government" may be liable for damages.

2. Whether an individual who receives a computer-generated cash register receipt displaying more than the last five digits of the individual's credit card number and the card's expiration date has suffered a concrete injury sufficient to confer standing under Article III of the United States Constitution.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner here is Jeremy Meyers. Respondent here is the Oneida Tribe of Indians of Wisconsin, a federally recognized Indian tribe.

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OPINIONS BELOW

The opinion of the Seventh Circuit court of appeals, App. 1a-19a, is reported as 836 F.3d 818 (7th Cir. 2016). The opinion of the district court, App. 20a-28a, is not reported.

JURISDICTION

The judgment in the Seventh Circuit was entered on September 8, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1681a(b):

> (b) The term "person" means any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

15 U.S.C. § 1681c(g)(1):

> (g) Truncation of credit card and debit card number
>
> (1) In general
>
> Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided

> to the cardholder at the point of the sale or transaction.

15 U.S.C. § 1681n(a)(1)(A):

> (a) In general
>
> Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of –
>
> (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000[.]

INTRODUCTION

This case involves two important and recurring conflicts of federal law. The first conflict concerns tribal sovereign immunity and involves a circuit split over whether Congress's abrogation of the sovereign immunity of "government(s)" unequivocally abrogates the sovereign immunity of Indian tribes. Here, the Seventh Circuit held that Indian tribes are immune from suit under the Fair Credit Reporting Act ("FCRA"), codified as 15 U.S.C. § 1681, *et seq.*, because Congress did not unequivocally abrogate the sovereign immunity of Indian tribes when it authorized that "any...government" may be liable for damages pursuant to 15 U.S.C. §§ 1681a(b) and 1681n(a). In so ruling, the Seventh Circuit split from the Ninth Circuit's opinion in *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), *as amended on denial of reh'g* (Apr. 6, 2004), which held that Indian tribes were not

immune from suit under 11 U.S.C. § 101, *et seq.* because 11 U.S.C. §§ 101(27) and 106(a) authorized a private right of action against "governments[.]"

Although the Seventh Circuit did not acknowledge that its decision split from the Ninth Circuit, a review of these two decisions demonstrates that their rulings are directly contradictory. The Seventh Circuit's decision took the position of the Eighth Circuit Bankruptcy Appellate Panel and the district court for the Eastern District of Michigan, which have expressly disagreed with *Krystal Energy* and ruled that Congress's use of the term "government" does not unequivocally refer to Indian tribes for the purpose of abrogating tribal sovereign immunity. *See, In re Whitaker*, 474 B.R. 687, 697 (Bankr. 8th Cir. 2012); *In re Greektown Holdings, LLC*, 532 B.R. 680, 701 (Bankr. E.D. Mich. 2015). Answering this question will ensure that Congress's authority to abrogate sovereign immunity is applied consistently. Further, it will clarify the degree of specificity required of Congress in order to use its abrogation power, especially with regard to Indian tribes.

The second conflict concerns the definition of a "concrete injury" sufficient to confer a plaintiff standing under Article III of the United States Constitution, based on the standard set forth in *Spokeo Inc. v. Robins*, __ U.S. __, 136 S.Ct. 1540 (2016). Courts are deeply divided as to whether an individual has suffered a concrete injury if he receives a computer-generated cash register receipt displaying more than the last five digits of his credit card number and the card's expiration date, in violation of the Fair and Accurate Credit Transactions Act ("FACTA") amendment to the FCRA. Through 15 U.S.C. § 1681n(a)(1)

(A), Congress provides that such an individual may pursue a private right of action without proof of actual damages resulting from the FACTA violation if the violation was willful. However, in *Spokeo*, this Court held that the violation of an individual's statutory right, without more, is not an injury sufficiently concrete to confer standing if the violation was "procedural." *Spokeo*, 136 S.Ct. at 1549-50.

As a result, federal courts are split as to whether the credit card truncation requirements of FACTA are mere procedural requirements, the violation of which is insufficient on its own to confer standing, or whether an individual whose credit card information was improperly truncated has already suffered a concrete injury before any further harm results from the violation. Answering this question will not only resolve the split as to FACTA, but it will more broadly clarify this Court's opinion in *Spokeo* for the numerous circuit and district courts that have disagreed over its interpretation.

STATEMENT OF THE CASE

A. Meyers's customer receipts

In February 2015, Jeremy Meyers ("Meyers") received three computer-generated customer receipts which displayed more than the last five digits of Meyers's credit card number, as well as the card's expiration date. App. 2a. All three receipts were given to Meyers by retail establishments owned by the Oneida Tribe of Indians of Wisconsin ("Oneida"), a federally recognized Indian tribe. App. 2a.

B. Proceedings in the district court

On April 14, 2015, Meyers filed suit against Oneida in the district court for the Eastern District of Wisconsin for Oneida's failure to properly truncate Meyer's credit card information on his customer receipts pursuant to 15 U.S.C. § 1681c(g)(1). App. 3a. Meyers brought his cause of action individually and on behalf of a putative class of similarly situated individuals and entities. App. 3a. Meyers did not allege any actual damages suffered as a result of Oneida's failure to truncate the receipts, but rather, Meyers sought statutory damages for Oneida's willful FACTA violation pursuant to 15 U.S.C. § 1681n(a)(1)(A).

Oneida moved to dismiss Meyers's cause of action, arguing that Oneida was a sovereign nation and immune from suit. App. 21a. Oneida also moved to dismiss Meyers's claims on the grounds that Meyers lacked standing to sue because he had not suffered an injury in fact sufficient to confer standing under Article III of the United States Constitution. App. 21a.

Meyers contended that Oneida was not immune from suit because Congress abrogated the tribe's sovereign immunity by authorizing a private right of action against "any...government" under 15 U.S.C. §§ 1681a(b) and 1681n(a). App. 23a-24a. Meyers argued that Indian tribes are governments, and, therefore, Congress unequivocally abrogated the sovereign immunity of Indian tribes. App. 23a-24a. In so arguing, Meyers relied on the Ninth Circuit opinion in *Krystal Energy*, which held that Indian tribes are not immune from suit under the Bankruptcy Code, 11 U.S.C. § 101, *et. seq.*, because the Bankruptcy Code allows a private right of action against "governments[.]" App. 24a-25a.

On September 4, 2015, the district court dismissed Meyer's claims, finding that Congress did not unequivocally abrogate the sovereign immunity of Indian tribes under the FCRA. App. 20a-28a. The court relied on the Eighth Circuit Bankruptcy Panel decision in *Whitaker*, which disagreed with *Krystal Energy* and found that Indian tribes are still immune from suit under the Bankruptcy Code because allowing a private right of action against "governments" does not unequivocally abrogate tribal sovereign immunity. App. 25a-27a. The district court found the Eighth Circuit Bankruptcy Panel's analysis "more persuasive than that of the Ninth Circuit" and dismissed Meyers's cause of action on the grounds that Oneida was immune from suit. App. 27a.

Because the district court dismissed Meyers's case on the grounds of sovereign immunity, it never decided whether Meyers had standing to bring suit against Oneida under Article III. App. 28a.

C. Seventh Circuit ruling

Meyers appealed, and the Seventh Circuit affirmed the district court's grant of Oneida's motion to dismiss. App. 1a-19a. The court found that, as an Indian tribe, Oneida was immune from suit under the FCRA because abrogating the sovereign immunity of "any...government" did not unequivocally abrogate the sovereign immunity of Indian tribes. App. 17a-18a.

The Seventh Circuit never held that Indian tribes are *not* governments, but found that "arguing that Indian Tribes are indeed governments...misses the point." App. 17a. Rather, the Seventh Circuit adopted the language of the district court, which held:

> It is one thing to say "any government" means "the United States." That is an entirely natural reading "any government." But it's another to say "any government" means "Indian Tribes." Against the long-held tradition of tribal immunity..."any government" is equivocal in this regard. Moreover, it is one thing to read "the United States" when *Congress* says "government." But it would be quite another, given that ambiguities in statutes are to be resolved in favor of tribal immunity, to read "Indian tribes" when Congress says "government."

App. 17a.

Despite the manner in which the Seventh Circuit's ruling directly contradicts the Ninth Circuit's ruling in *Krystal Energy*, the Seventh Circuit did not acknowledge that it effectively created a circuit split regarding whether, as a matter of law, Congress's abrogation of the sovereign immunity of "government(s)" unequivocally abrogates the sovereign immunity of Indian tribes. App. 15a-16a. Rather, when addressing this ongoing circuit conflict, the Seventh Circuit held, "We need not weigh in on the conflict between these courts" because the interpretation of "governments" in the Bankruptcy Code is not "directly on point for purposes of interpreting a different definition in FACTA[,]" without offering any further distinction. App. 15a-16a.

This Court issued its opinion in *Spokeo* after briefs and oral arguments were already presented before the Seventh Circuit in this case. App. 6a. However, the

Seventh Circuit acknowledged that the decision in *Spokeo* is implicated in this case with regard to whether Meyers had standing under Article III to bring suit. App. 4a-5a. Because the Seventh Circuit ultimately dismissed Meyers's claims on the grounds of sovereign immunity, it never decided the issue of whether Meyers had standing. App. 7a.

REASONS FOR GRANTING THE PETITION

This case involves important and recurring conflicts of federal law involving tribal sovereign immunity and Article III standing after *Spokeo*. This Court's clarification on these issues is greatly needed.

I. The petition should be granted to resolve a circuit conflict regarding whether Congress abrogates the sovereign immunity of Indian tribes when it abrogates the sovereign immunity of "government(s)."

By issuing its opinion in this case, the Seventh Circuit split from the Ninth Circuit regarding whether, as a matter of law, Congress unambiguously abrogates the sovereign immunity of Indian tribes when it abrogates the sovereign immunity of "government(s)." After this Court denied certiorari in *Krystal Energy* (*see, Navajo Nation v. Krystal Energy Co., Inc.*, 543 U.S. 871 (2004)), district courts and federal bankruptcy courts have also disagreed on this issue, and this Court should grant the petition and resolve the conflict of how tribal sovereignty is abrogated.

"Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.'" *Michigan v. Bay Mills Indian Community*, __U.S.__, 134 S.Ct. 2024, 2030 (2014) (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, (1991)). "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). However, tribal immunity from suit is "subject...to congressional action[.]" *Bay Mills*, 134 S.Ct. at 2030 (citing *Santa Clara Pueblo*, 436 U.S. at 58). "To abrogate tribal immunity, Congress must 'unequivocally' express that purpose." *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58). "Congress need not state its intent in any particular way...We have never required that Congress use magic words." *F.A.A. v. Cooper*, 132 S.Ct. 1441, 1448 (2012).

Federal courts have reached different outcomes in deciding when Congress's abrogation of tribal immunity is "unequivocal." In *Krystal Energy*, the Ninth Circuit held that Congress unequivocally abrogates the sovereign immunity of Indian tribes when it allows a private right of action against "governments." *See*, *Krystal Energy*, 357 F.3d at 1056. *Krystal Energy* heard an appeal of a district court's dismissal of a private right of action against an Indian tribe under the Bankruptcy Code on the grounds of sovereign immunity.

Like the FCRA, the Bankruptcy Code does not mention "Indian tribes" by name, but rather, "sovereign immunity is abrogated as to a governmental unit[.]" *See*,

11 U.S.C. § 106(a). "Governmental unit," in turn, is defined as, "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States..., a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or *other foreign or domestic governments*[.]" *Id.* at § 101(27) (emphasis added).

The court in *Krystal Energy* reversed the district court's dismissal, holding that Congress abrogated the sovereign immunity of Indian tribes. *Krystal Energy*, 357 F.3d at 1058 ("[T]he category 'Indian tribes' is simply a specific member of the group of domestic governments, the immunity of which Congress intended to abrogate."). The court recognized, "Indian tribes are certainly governments, whether considered foreign or domestic[.]" *Id.* at 1057. The Ninth Circuit especially relied on what it perceived as Congress's "inten[t] to abrogate the sovereign immunity of *all* 'foreign and domestic governments[,]'" because "[t]he definition of 'governmental unit' first lists a sub-set of all governmental bodies, but then adds a catch-all phrase, 'or other foreign or domestic governments[,]'" and "[t]hus, *all* foreign and domestic governments, including but not limited to those particularly enumerated in the first part of the definition, are considered 'governmental units[.]'" *Id.* at 1057 (emphasis in original). The court found:

> We are well aware of the Supreme Court's admonitions to "tread lightly" in the area of abrogation of tribal sovereign immunity...But the Supreme Court's decisions do not require Congress to utter the magic words "Indian tribes" when abrogating tribal sovereign immunity. Congress speaks "unequivocally"

> when it abrogates the sovereign immunity of "foreign and domestic governments." Because Indian tribes are domestic governments, Congress abrogated their sovereign immunity in 11 U.S.C. § 106(a).

Id. at 1061 (internal citations omitted).

Bankruptcy courts in Ninth Circuit districts have relied on *Krystal Energy*'s ruling that the Bankruptcy Code unequivocally abrogates tribal sovereign immunity because Indian tribes are "domestic governments." *See, In re Platinum Oil Properties, LLC*, 465 B.R. 621 (Bankr. D. New Mex. 2011).

This issue has also been litigated in lower courts. Prior to the Ninth Circuit's decision in *Krystal Energy*, the bankruptcy court for the District of Arizona in *In re Russell* similarly held that Congress unequivocally abrogated tribal sovereign immunity in the Bankruptcy Code by abrogating the sovereign immunity of "domestic governments." *In re Russell,* 293 B.R. 34, 40 (Bankr. D. Ariz. 2003) ("[T]he abrogation of tribal sovereign immunity [in the Bankruptcy Code] can be stated as a simple syllogism: Sovereign immunity is abrogated as to all domestic governments. Indian tribes are domestic governments. Hence sovereign immunity is abrogated as to Indian tribes."). The court held, "[B]ecause the statute expressly abrogates sovereign immunity as to all domestic governments, the statute applies to Indian tribes by deduction rather than by implication...the proscription against abrogation by implication does not require the listing or naming of each government as to which it applies so long as they are unequivocally identified by the statute." *Id.* at 41.

However, other courts disagree with *Krystal Energy*. In *Whitaker*, the Eighth Circuit Bankruptcy Appellate Panel found that Congress did not unequivocally abrogate the sovereign immunity of Indian tribes by abrogating the sovereign immunity of "governments" under the Bankruptcy Code. *In re Whitaker*, 474 B.R. at 697. The panel was not convinced that the Supreme Court intended that Indian tribes be considered "governments," and it perceived this Court's use of the phrases "sovereigns," "nations," "distinct, independent political communities[,]" and "domestic dependent nation[s]" to describe Indian tribes to be "apparent care taken by the Supreme Court *not* to refer to Indian tribes as 'governments[.]'" *Id.* at 695 (internal citations omitted) (emphasis in original). The panel held, "[S]ince the Supreme Court does not refer to Indian tribes as 'governments,' a statute which abrogates sovereign immunity as to domestic governments should not be interpreted to refer to such tribes." *Id.*

Even after this Court recognized that "[t]ribes are domestic governments" (*Bay Mills*, 134 S.Ct. at 2042 (Sotomayor J., concurring)), courts have still disagreed with *Krystal Energy* that Congress unequivocally abrogates tribal sovereign immunity by abrogating the immunity of "governments." In *Greektown*, the bankruptcy court for the Eastern District of Michigan found that Indian tribes are immune from suit under the Bankruptcy Code because Congress's use of the term "domestic governments" was still equivocal with regard to the abrogation of tribal sovereign immunity. *In re Greektown Holdings*, LLC, 532 B.R. 680, 701 (Bankr. E.D. Mich. 2015). The court found that the Supreme Court "has expressed the view that the immunity possessed by Indian tribes is different in kind from that possessed by

foreign entities and different in kind from that possessed by the states." *Id.* at 698 (citing *Cherokee Nation v. State of Georgia,* 30 U.S. 1, 18 (1831); *Bay Mills*, S.Ct. at 2040-41 (Sotomayor, J. Concurring)). While the court recognized that "Congress need not invoke the magic words 'Indian tribes' when intending to abrogate tribal sovereign immunity[,]" the court found that "there is not one example in all of history where the Supreme Court has found that Congress has intended to abrogate tribal immunity without expressly mentioning Indian tribes somewhere in the statute." *In re Greektown*, 532 B.R. at 693 (emphasis in original). The court held:

> While perhaps it may be said with "perfect confidence" that Indian tribes are both "domestic" in character and function as a "government," this court cannot say with "perfect confidence" that Congress combined those terms in a single phrase in § 101(27) to clearly, unequivocally and unmistakably express its intent to include Indian tribes among those sovereign entities specifically mentioned whose immunity was thereby abrogated. While logical inference may support such a conclusion, Supreme Court precedent teaches that logical inference is insufficient to divine Congressional intent to abrogate tribal sovereign immunity.

Id. at 697.

Despite the Seventh Circuit's intention to "not weigh in" on this circuit conflict (App. 16a), its opinion in this case effectively created a split between the Seventh and Ninth Circuits regarding whether, as a matter of law, Congress

unequivocally abrogates the sovereign immunity of Indian tribes by abrogating the sovereign immunity of "government(s)." Although the Seventh Circuit suggested that the interpretation of "domestic governments" in the Bankruptcy Code is not "directly on point for purposes of interpreting" the term "government" in the FCRA (App. 15a-16a), Congress's use of "any...government[,]" can infer Congress's intent to include *any* and *every* government, just as the Ninth Circuit found was Congress's intent in the Bankruptcy Code.

The FCRA does not enumerate any specific governments in its definition of "person," but rather provides the catch-all phrase "government." *See*, 15 U.S.C. § 1681a(b). In fact, in *Bormes*, the Seventh Circuit explicitly found that Congress "authoriz[ed] monetary relief against *every* kind of government[]" under the FCRA. *Bormes v. U.S.*, 759 F.3d 793, 795 (7th Cir. 2014) (emphasis in original). Yet, here, the same court found it was "equivocal" whether Congress intended to abrogate the sovereign immunity of Indian tribes. App. 17a-18a. Such a holding is a clear disagreement with the Ninth Circuit's opinion that "the category 'Indian tribes' is simply a specific member of the group of domestic governments, the immunity of which Congress intended to abrogate." *Krystal Energy*, 357 at 1058. The Seventh Circuit never attempted to distinguish these directly contradictory holdings, and this Court should grant the petition to resolve this circuit split.

II. The circuit conflict regarding the abrogation of tribal sovereign immunity is of national importance, implicating Congress's ability to abrogate the immunity of sovereigns.

It is of national importance to ensure that Congress has the authority to abrogate the immunity of sovereigns, including Indian tribes, as well as to ensure that such congressional authority is applied consistently across federal circuits. The circuit split regarding whether Congress's abrogation of the sovereign immunity of "governments" unequivocally abrogates the sovereign immunity of Indian tribes upsets Congress's ability to abrogate tribal sovereign immunity without using "magic words."

Congress should be able to unequivocally abrogate tribal sovereign immunity by abrogating the sovereign immunity of all "governments," because Indian tribes are governments. *See, Bay Mills*, 134 S.Ct. at 2042 (Sotomayor J., concurring) ("Tribes are domestic governments[.]"); *Turner v. U.S.*, 248 U.S. 354, 355 (1919) (An Indian tribe had its "own system of laws, and a government with the usual branches, executive, legislative, and judicial."); *see also, In re Russell*, 293 B.R. at 40 ("Indeed, if [Indian tribes] were not sovereign governments, they would not enjoy sovereign immunity at all.").

In fact, Congress refers to Indian tribes as "governments" throughout the United States Code. *See, e.g.*, 42 U.S.C. § 3797u-6(b) ("Unless one or more applications submitted by any State or unit of local government within such state (other than an Indian tribe)..."); 43 U.S.C. § 373b(c)(2) ("The Secretary of the

Interior may...authorize...law enforcement personnel of any State or local government, including an Indian Tribe..."); 43 U.S.C. § 373b(c)(3) ("The Secretary of the Interior may...cooperate with any State or local government, including an Indian tribe..."); 33 U.S.C. § 709c(b) ("the Secretary shall establish procedures for providing the public and affected governments, including Indian tribes..."); 54 U.S.C. § 311102(a) ("the Secretary, in partnership with the Council, may provide competitive grants to States, local governments (including...Indian tribes..."); 42 U.S.C. § 17156(a)(1) ("units of local government (including Indian tribes) that are not eligible entities[.]"); 42 U.S.C. § 247d-6d(i)(6) ("The term 'program planner' means a state or local government, including an Indian tribe..."); *see also*, Fed. R. Crim. P. 6(e)(3)(A)(ii) ("any government personnel--including those of a state, state subdivision, Indian tribe, or foreign government...").

Further, it is evident that Congress intended to include *every* government as a "person" under the FCRA because Congress chose to use the catch-all phrase "government," without enumerating any specific government to which it was referring. *See*, 15 U.S.C. § 1681a(b). Because Congress legislated that any "person" may be held "liable for damages" under the FCRA, Congress abrogated the sovereign immunity of every government. *See*, 15 U.S.C. § 1681n; s*ee also*, *Bormes*, 759 U.S. at 795 (finding that the FCRA "authoriz[es] monetary relief against *every* kind of kind of government[.]") (emphasis in original).

It begs the question that, if an Indian tribe is unequivocally a government, and if the FCRA unequivocally abrogates the sovereign immunity of all governments, then how can it be equivocal whether the

FCRA abrogates the sovereign immunity of Indian tribes? Further, if Congress's use of the term "government" does not unequivocally refer to Indian tribes, then how else may Congress abrogate tribal sovereign immunity other than explicitly using the words "Indian tribes"? While *Oneida* and *Greektown* suggest that such "magic words" may, in fact, be necessary (*see*, App. 15a; *see also, Greektown*, 532 B.R. at 693), this Court has never before imposed that requirement on Congress. This Court should grant the petition to clarify when Congress's abrogation of tribal sovereign immunity is considered "unequivocal."

III. The petition should be granted to resolve a federal conflict regarding whether a plaintiff who receives a customer receipt containing more than the last five digits of his credit or debit card number and the card's expiration date has suffered a concrete injury sufficient to confer standing under Article III.

The Seventh Circuit never addressed the issue of whether Meyers has standing to bring suit against Oneida for statutory damages, but the "first duty in every case" in federal court for a judge is to "independently" determine whether or not the court has subject matter jurisdiction. *Belleville Catering Co. v. Champaign Market Place, L.L.C.*, 350 F.3d 691, 692-94 (7th Cir. 2003). Federal courts are conflicted in their interpretation of this Court's decision in *Spokeo*, and district courts are split as to whether a plaintiff such as Meyers has suffered a concrete injury sufficient for Article III standing.

In order to confer standing under Article III, a plaintiff must establish: (1) that the plaintiff has suffered

an "injury in fact[;]" (2) that there is "causal connection to the injury and the conduct complained of[;]" and (3) that it is "'likely'...that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted). A plaintiff's injury in fact is "an invasion of a legally protected interest which is...concrete and particularized[.]" *Id.* at 560. "The alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983).

In *Spokeo*, this Court held that the violation of an individual's statutory right, without more, is not a concrete injury sufficient to confer standing if the violation is merely "procedural." *Spokeo*, 136 S.Ct. at 1549 ("Article III standing requires a concrete injury even in the context of a statutory violation."). This Court recognized that "[a] violation of one of the FCRA's procedural requirements may result in no harm[,]" and, therefore, a plaintiff cannot "allege a bare procedural violation divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* at 1549-50. However, this Court still maintained that "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Id.* at 1549 (quoting *Lujan*, 504 U.S. at 580).

Circuit courts have since relied on this Court's decision in *Spokeo* to dismiss suits that sought statutory damages and not actual damages, holding that these plaintiffs' injuries were merely procedural violations and not sufficiently concrete. *See, e.g., Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1002–03 (11th Cir. 2016) (holding that a

plaintiff did not suffer a concrete injury when a mortgage provider failed to present a certificate of discharge of plaintiff's mortgage within the deadline required by New York law); *Braitberg v. Charter Communications, Inc.*, 836 F.3d 925, 931 (8th Cir. 2016) (holding that a plaintiff did not suffer a concrete injury when a cable operator did not destroy his personal information, as required by 47 U.S.C. § 551(e)); *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016) (holding that a plaintiff did not suffer a concrete injury when a retailer requested the plaintiff's zip code unnecessarily, in violation of District of Columbia law).

Prior to *Spokeo*, the Eighth Circuit had held in *Hammer* that a plaintiff who receives a customer receipt, in which the plaintiff's credit card information was not properly truncated under FACTA, has Article III standing to bring suit for statutory damages because the violation of a statutory right amounted to an "actual injury" sufficient for standing. *Hammer v. Sam's East, Inc.*, 754 F.3d 492, 498-99 (8th Cir. 2014) ("Congress gave consumers the legal right to obtain a receipt at the point of sale showing no more than the last five digits of the consumer's credit or debit card number. Appellants contend that [Appellee] invaded this right. Such is the 'actual injury' alleged by the appellants."). However, after *Spokeo*, the Eighth Circuit recognized that *Hammer* and other opinions holding that the "actual injury" requirement of standing can be satisfied solely by the invasion of a statutory right are since "superseded." *See, Braitberg*, 836 F.3d at 930. In recognizing that *Spokeo* superseded *Hammer*, the court in *Braitberg* never addressed FACTA specifically or whether a plaintiff who receives an improperly truncated receipt in violation of FACTA has suffered a concrete

injury. Rather, the Eighth Circuit found that its analysis in *Hammer* was insufficient because its ruling that "'the actual-injury requirement may be satisfied *solely* by the invasion of a legal right that Congress *created*[]" was an "absolute view" since superseded by *Spokeo*. *Id.* (quoting *Hammer*, 754 F.3d at 498) (emphasis in original).

As such, no circuit court has addressed the issue of whether a plaintiff who receives a customer receipt that violates FACTA has standing to bring suit in the wake of *Spokeo*,[1] and district courts are split on the issue.

Several district courts have found that *Spokeo* still supports that a plaintiff who receives an improperly truncated customer receipt in violation of FACTA has suffered a concrete injury. *See e.g., Flaum v. Doctor's Associates, Inc.*, No. 16-61198 (Aug. 29, 2016); *Wood v. J Choo USA*, __ F.Supp.3d __, 2016 WL 4249953 (S.D. Fla. Aug. 11, 2016); *Guarisma v. Microsoft*, __ F.Supp.3d __, 2016 WL 4017196 (S.D. Fla. July 26, 2016); *Altman v. White House Black Mkt., Inc.*, __ F.Supp.3d __, 2016 WL 3946780 (N.D. Ga. July 13, 2016). Generally, these cases distinguish between the "bare, procedural" statutory right at issue in *Spokeo* from a *substantive* statutory right, the violation of which "Congress may 'elevat[e] to the status of legally cognizable injuries, concrete, *de facto* injuries that were previously inadequate at law[.]'" *Spokeo*, 136 S.Ct. at 1549 (quoting *Lujan*, 504 U.S. at 578).

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1. On November 3, 2016, Meyers argued this very issue before the Seventh Circuit in another case, *Meyers v. Nicolet Restaurant of De Pere, LLC*, Case No. 16-2075, but the Seventh Circuit has not yet issued its decision.

Specifically, the district court for the Southern District of Florida found, "[T]he Supreme Court [in *Spokeo*] recognized where Congress has endowed plaintiffs with a *substantive* legal right, as opposed to creating a procedural requirement, the plaintiffs may sue to enforce such a right without establishing additional harm." *Guarisma*, 2016 WL 4017196, at *3 (emphasis in original) (citing *Spokeo*, 136 S.Ct. at 1549). Ultimately, the court held, "FACTA endows consumers with a legal right to protect their credit identities[,]" and by allowing a private right of action under FACTA, "Congress intended to create a substantive right." *Id.* at *4 (internal citations omitted). Again, in *Wood*, the court recognized, "Through FACTA, Congress created a substantive legal right for Wood and other card-holding consumers similarly situated to receive receipts truncating their person credit card numbers and expiration dates and, thus, protecting their personal financial information." *Wood*, 2016 WL 4249953, at *6 (citing *Steinberg v. Stitch & Craft, Inc.*, 2009 WL 2589142, at *3 (S.D. Fla. Aug. 18, 2009)). The court therefore concluded that the plaintiff "suffered a concrete harm as soon as [the Defendant] printed the offending receipt[.]" *Wood*, 2016 WL 4249953, at *6 (citing *Guarisma*, 2016 WL 4017196, at *4).

Similarly, in *Altman*, the Northern District of Georgia reached the same conclusion that plaintiffs who receive improperly truncated receipts have standing to sue under FACTA. *Altman*, 2016 WL 3946780, at *6. The court in *Altman* relied on "the Congressional creation of a right and injury, as well as the language of the Senate Report which indicates that Congress did not find the risk of identity theft to be speculative." *Id.* The court found, "[A]s determined by Congress, once private information

is exposed, harm has already occurred regardless of whether that injury is compounded by a resulting credit card fraud." *Id.* at *5 (citations omitted).

However, other district courts disagree and have relied on *Spokeo* to find that a plaintiff who receives a customer receipt containing more than the last five digits of his credit or debit card number or the card expiration date has *not* suffered a concrete injury sufficient to confer standing under Article III. *See e.g., Kamal v. J. Crew Group Inc.*, 2015 WL 4663524 (D. N.J. October 20, 2016); *Thompson v. Rally House of Kansas City et al.*, 15-cv-00886-GAF (W.D. Mo. Oct. 6, 2016). In *Kamal*, the district court for the District of New Jersey described such an injury as merely "an increased risk of a data breach sometime in the future." *Kamal*, 2016 WL 6133827, at *3. The court further found:

> There is no evidence that anyone has accessed or attempted to access or will access Plaintiff's credit card information...Nothing has been disclosed to third parties...Nor does the record indicate that anyone will *actually* obtain one of Plaintiff's discarded [] receipts, and—through means left entirely to the Court's imagination—identify the remaining six digits of the card number and then proceed undetected to ransack Plaintiff's Discover account.

Id. at *3 (internal citations omitted) (emphasis in original).

Similarly, the district court for the Western District of Missouri found:

> Divorced from the statutory violation, Plaintiff has not and cannot allege his personal credit card information has been exposed generally or that he faces an imminent risk of identity theft...Plaintiff has not alleged he "suffered so much as a sleepless night or any other psychological harm" and has not claimed to "have undertaken costly and burdensome measures to protect [himself] from the risk [he] supposedly face[s]"... There is no real risk of harm as the improper receipt has only been in Plaintiff's possession since receiving it from Defendants.

Thompson, 15-cv-00886-GAF, at p.9 (quoting *Hammer*, 754 F.3d at 504 (Riley, C.J. dissenting)).

As such, federal courts are deeply divided as to whether FACTA merely provides a procedural requirement, a violation of which on its own does not give rise to a concrete injury, or whether a violation of FACTA creates a concrete harm. This Court should grant the petition to address this split, as well as further specify the definition of a "concrete injury" in order for federal courts to find commonality in their interpretation of *Spokeo*.

IV. The federal conflict regarding the standing of individuals who receive improperly truncated receipts to bring suit for statutory damages under FACTA is one of national importance.

It is of national importance for this Court to clarify whether plaintiffs seeking statutory damages under FACTA, without actual damages, still have standing to

bring suit after *Spokeo*. While *Spokeo* provided instruction as to what a "concrete injury" is *not* – i.e. violation of a procedural statutory right, without more – federal courts are in serious need of guidance in defining what a concrete injury actually *is*.

This Court's ruling in *Spokeo* that a standing analysis is incomplete if it fails to inquire beyond whether a statutory right has been violated should not be interpreted as the blanket dismissal of claims for statutory damages, as some federal courts have interpreted it. Congress's ability to regulate consumer transactions is frustrated if its ability to elevate injuries to legally cognizable status is obscured. The line distinguishing between an injury in fact for standing purposes and the presence of well-plead, actual, tangible, and quantifiable damages has become increasingly blurred, and federal courts have drawn this line inconsistently.

Surely, the various statutory rights created by Congress in federal statutes, like the FCRA, provide relief for a range of injuries, some of which are concrete, even if others are not. While this Court opined, "It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm[,]" (*Spokeo*, 136 S.Ct. at 1550), the purported injury in *Spokeo* is different from the harm suffered by Meyers. By receiving a customer receipt containing more than the last five digits of his credit card number and the card's expiration date, Meyers's private information became accessible to anyone who encountered his receipt, and Meyers was charged with protecting or destroying the receipt, less Meyers risk that the receipt find itself it the hands of identity thieves.

For courts to disregard credit card truncation laws as mere procedural requirements is to undermine Congress's purpose in enacting FACTA. Indeed, "Congress enacted FACTA 'to prevent identity theft,'...and the restriction on printing more than the last five digits of a card number is specifically intended to 'to limit the number of opportunities for identity thieves to 'pick off' key card account information.'" *Hammer*, 754 F.3d at 500 (quoting Pub. L. No. 108-159, 117 Stat. 1952; S. Rep. No. 108-166 at 13 (2003)). FACTA "'arose from [Congress's] desire to prevent identity theft that can occur when card holders' private financial information...is exposed on electronically printed payment card receipts.'" *Guarisma*, 2016 WL 4017196, at *4 (S.D. Fla. July 26, 2016) (quoting *Creative Hosp. Ventures, Inc. v. U.S. Liab. Ins. Co.*, 655 F.Supp.2d 1316, 1333 (S.D. Fla. 2009)). Compliance with FACTA would completely eliminate the risk of this particular form of identity theft identified by Congress.

As such, Congress has "articulate[d] chains of causation" between the risk of identity theft and FACTA's statutory protections of personal credit card information. *See*, *Spokeo*, 136 S.Ct. at 1549; *see also*, *Strubel v. Comenity Bank*, __ F.3d __, 2016 WL 6892197, at *6 (2d Cir. November 23, 2016) ("Because Strubel has sufficiently alleged that she is at risk of concrete *and* particularized harm...we reject Comenity's standing challenge[.]") (emphasis in original). This clear legislative intent of protecting consumers distinguishes the statutory right provided by FACTA from the statutory right against the publication of an incorrect zip code at issue in *Spokeo*.

This Court's clarification as to what constitutes a "concrete injury" is not only needed to resolve the federal

split over a plaintiff's standing under FACTA, but such instruction would sorely aid the circuit and district courts nationwide struggling to understand the relationship between a congressional right to statutory damages and Article III standing in a post-*Spokeo* world.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: DECEMBER 2016

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED SEPTEMBER 30, 2016

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 15-3127

JEREMY MEYERS, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

ONEIDA TRIBE OF INDIANS OF WISCONSIN,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin. No. 1:15-cv-00445-WCG — **William C. Griesbach**, *Chief Judge.*

February 19, 2016, Argued
September 8, 2016, Decided

Before MANION and ROVNER, *Circuit Judges*, and BLAKEY, *District Judge.*[*]

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[*] The Honorable John Robert Blakey, of the Northern District of Illinois, sitting by designation.

Appendix A

ROVNER, *Circuit Judge.* In response to the burgeoning problem of identity theft, when Congress enacted the Fair and Accurate Credit Transaction Act (FACTA) in 2003, it included within the Act a provision to reduce the amount of potentially misappropriateable information produced in credit and debit card receipts. The Act prohibits merchants from printing on the receipt the credit card expiration date and more than the last five digits of the credit or debit card number. The plaintiff in this case, Jeremy Meyers, used his credit card to make purchases at two stores owned by the defendant, the Oneida Tribe of Indians of Wisconsin, and received an electronically-printed receipt at each store that included more than the last five digits of his credit card as well as the card's expiration date. Meyers brought a putative class action in the eastern District of Wisconsin for violations of FACTA, but the district court determined that the defendant, an Indian Tribe, was immune from suit under the Act. Meyers appeals and we affirm.

I.

The facts in this case are simple and not in dispute. Between February 6 and 17, 2015, Meyers used his credit card to make purchases at the Oneida Travel Center and two Oneida One Stop retail locations in and around Green Bay, Wisconsin. All three stores are owned and operated by a federally-recognized Indian tribe, the Oneida Tribe of Indians of Wisconsin. At each store he received electronically printed receipts that included more than the last five digits of his credit card as well as the card's expiration date. He alleges that the Tribe issued these receipts in violation of FACTA.

Appendix A

FACTA, an amendment to the Fair Credit Reporting Act, states that,

> [n]o person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

15 U.S.C. § 1681c(g)(1). FACTA defines a person as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." 15 U.S.C. § 1681a(b).

Meyers sued the Oneida Tribe for these alleged violations of FACTA and brought a putative class action on behalf of all credit and debit card holders who, after June 3, 2008, received from the Oneida Tribe, an electronically printed receipt that displayed more than the last five digits of the person's credit or debit card or displayed the card's expiration date. The district court judge stayed a decision on certification of the class. (R. 7).[1]

The Oneida Tribe moved to dismiss Meyers' claim for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The Tribe argued that Meyers' claims were barred under the doctrine of tribal sovereign immunity and that Meyers had not suffered an "injury

1. Unless otherwise noted, references are to the record in the district court.

in fact" granting him standing under Article III of the Constitution.

The district court correctly noted, as we discuss below, that the question of sovereign immunity is not jurisdictional. Nevertheless, the court properly treated the Tribe's motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) as a motion to dismiss for failure to state a claim for which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). *See Miller v. Herman*, 600 F.3d 726, 732-33 (7th Cir. 2010); citing *Peckmann v. Thompson*, 966 F.2d 295, 297 (7th Cir. 1992) (when appropriate, a court may treat a motion filed under Rule 12(b)(1) as if it were a Rule 12(b)(6) motion). The district court subsequently concluded that the Tribe was immune from suit and granted the motion to dismiss. This appeal followed.

II.

A.

We begin with the threshold matter of jurisdiction. Just recently, the Supreme Court issued its decision in *Spokeo* which considered whether a plaintiff had adequately alleged injury in fact so as to acquire standing under Article III of the Constitution. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016). The plaintiff in that case alleged injury pursuant to a different part of the Fair Credit Reporting Act than the one at issue in this case—one that set forth requirements concerning the accurate creation and use of consumer reports. The

Supreme Court explained that in order to satisfy the "case or controversy" requirement of Article III of the Constitution, the injury must be both particularized and concrete and thus a plaintiff cannot satisfy these demands by alleging a bare procedural violation. *Id.* at 1550. It went on to explain:

> Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation.

Id. at 1549.

In the district court, the defendants raised a claim of subject matter jurisdiction, and noted the then-pending *Spokeo* case (R. 14, p.15-16), but it has abandoned that issue on appeal and instead focuses only on the issue of sovereign immunity as decided by the district court. Neither party briefed the issues of subject matter jurisdiction raised in *Spokeo*, nor did either party submit supplemental authority regarding *Spokeo*. It is certainly true that a court may not decide the merits of a case without subject matter jurisdiction even if the parties have not themselves raised it. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998), *United States v. Cook County*, 167 F.3d 381, 387 (7th Cir. 1999). This form of "'hypothetical jurisdiction'

that enables a court to resolve contested questions of law when its jurisdiction is in doubt" was squarely rejected by the Supreme Court in *Steel Co.*, 523 U.S. at 101. Shortly thereafter, however, the Supreme Court made clear that its ruling in *Steel Co.* did not mean that a federal court must consider subject matter jurisdiction over all other threshold matters. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584-85, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999). To the contrary, "a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007), citing *Ruhrgas*, 526 U.S. at 584-85.

The issue of Article III constitutional standing after *Spokeo*, which was decided after all of the briefing and argument had concluded in this case, has not been presented to this court.[2] We could remand this case to the district court to determine whether Meyers has standing in light of *Spokeo* (or request additional briefing in this court). That would answer the threshold question of whether the plaintiff is properly before this court for purposes of subject matter jurisdiction. However, another

2. In another pending matter by this same plaintiff before this court, Meyers has alleged an almost identical violation of FACTA against a different defendant. The parties in that matter did brief the issue of standing after the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016). *See Meyers v. Nicolet Restaurant, De Pere, LLC*, No. 16-2075, Appellate Record No. 8, 11, 13. And the parties have presented letters of supplemental authority informing the court of recently decided cases which cite *Spokeo*. *Id.* at 15, 16, & 17.

threshold issue is easily answered—that is whether the plaintiff can obtain relief from the defendant through this suit. We conclude that the defendant has sovereign immunity and therefore it cannot. The Supreme Court has instructed that a court "may find that concerns of judicial economy and restraint are overriding" and therefore decide other threshold issues before subject matter jurisdiction. *See Ruhrgas*, 526 U.S. at 586. It makes little sense for this court to waste the resources of the district court (and the time for remand, and the parties in briefing) asking it to determine one threshold issue when another is so easily and readily resolved here.

There is one wrinkle to this conclusion: this circuit has clearly held that the question of sovereign immunity is not a jurisdictional one. *See, e.g., Smoke Shop, LLC v. United States*, 761 F.3d 779, 782, n.1 (7th Cir. 2014); *Blagojevich v. Gates*, 519 F.3d 370, 371 (7th Cir. 2008), *Parrott v. United States*, 536 F.3d 629, 634-35 (7th Cir. 2008).[3] "What sovereign immunity means is that relief against the United States depends on a statute; the question is not the competence of the court to render a binding judgment, but the propriety of interpreting

3. Other courts disagree. *See, e.g., Black v. Wigington*, 811 F.3d 1259, 1270 (11th Cir. 2016); *Patchak v. Jewell*, No. 15-5200, 828 F.3d 995, 2016 U.S. App. LEXIS 12984, 2016 WL 3854056, at *8 (D.C. Cir. July 15, 2016); *Puckett v. Lexington-Fayette Urban Cty. Gov't, No. 15-6097*, 833 F.3d 590, 2016 U.S. App. LEXIS 14956, 2016 WL 4269802, at *3 (6th Cir. Aug. 15, 2016); *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1302 (10th Cir. 2001)). It is not entirely clear, however, whether the disagreement in each case is a matter of substance or labels. *See* note 4, infra.

a given statute to allow particular relief." *Parrott*, 536 F.3d at 634-35, citing *Cook County*, 167 F.3d at 389. Sovereign immunity, therefore, is a waivable defense. *Sung Park v. Indiana Univ. Sch. of Dentistry*, 692 F.3d 828, 830 (7th Cir. 2012). In addition to being a defense, however, sovereign immunity, like qualified immunity, also bears the characteristics of "immunity from trial and the attendant burdens of litigation." *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 667 (7th Cir. 2012); *Herx v. Diocese of Fort Wayne-S. Bend, Inc.*, 772 F.3d 1085, 1089 (7th Cir. 2014) (Sovereign immunity is part of a class "of cases [that] involve claims of immunity from the travails of a trial and not just from an adverse judgment."); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 672, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (qualified immunity "is both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation."). This is why "an order rejecting a foreign government's claim of sovereign immunity also meets the criteria for collateral-order appeal." *Herx*, 772 F.3d at 1089. Thus, no matter whether we give sovereign immunity the label "jurisdictional" or not, it is nevertheless a "threshold ground[] for denying audience to a case on the merits." *Ruhrgas*, 526 U.S. at 585.[4]

In short, at the same time that we exercise our right to "choose among threshold grounds for denying audience to a case on the merits," *Id.*, we emphasize two issues while doing so. First, the question of sovereign immunity is not

4. *See* Radha A. Pathak, *Statutory Standing and the Tyranny of Labels*, 62 Okla. L. Rev. 89 (2009).

one on the merits so we do not run afoul of the Supreme Court's prohibitions in *Steel Company. See Steel Co.*, 523 U.S. at 93-94. "[J]urisdiction is vital only if the court proposes to issue a judgment on the merits." *Sinochem Int'l*, 549 U.S. at 431, citing *Intec USA, LLC v. Engle*, 467 F.3d 1038, 1041 (7th Cir. 2006).

Second, our decision to decide the question of sovereign immunity rather than remand for a determination of standing under *Spokeo* is not meant to declare that the question of sovereign immunity is a jurisdictional one. "Customarily, a federal court first resolves doubts about its jurisdiction over the subject matter." *Ruhrgas*, 526 U.S. at 578. As the Supreme Court noted, however, there are numerous circumstances in which a court appropriately accords priority to a non-merits threshold inquiry other than subject matter jurisdiction, such as pendent jurisdiction, forum non conveniens, abstention, and others. *Sinochem*, 549 U.S. at 431. As it was pending, we predicted that this would be the Supreme Court's likely ruling in *Sinochem*, noting that "there are many reasons for *not* adjudicating—lack of subject-matter jurisdiction, lack of personal jurisdiction, lack of ripeness, abstention, and *forum non conveniens*." *Intec USA*, 467 F.3d at 1041 (emphasis in original). And, in fact, the Supreme Court adopted this court's statement that "jurisdiction is vital only if the court proposes to issue a judgment on the merits." *Sinochem Int'l*, 549 U.S. at 431, citing *Intec*, 467 F.3d at 1041. In this case, the Supreme Court issued the *Spokeo* decision after this case was already briefed and argued. The question as to whether the injuries sustained in FACTA cases such as this one are concrete enough to

satisfy the standard in *Spokeo* is still unresolved. *Compare Guarisma v. Microsoft Corp.*, F.Supp.3d ,, 2016 U.S. Dist. LEXIS 97729, 2016 WL 4017196, at *3 (S.D. Fla. July 26, 2016) ("violation of the FACTA constitutes a concrete injury in and of itself") *and Wood v. J Choo USA, Inc.*, No. 15CV81487BLOOMVALLE, 2016 U.S. Dist. LEXIS 106029, 2016 WL 4249953, at *6 (S.D. Fla. Aug. 11, 2016) (noting that printing the violating receipt is, in and of itself, a concrete injury) *with Noble v. Nevada Checker CAB Corp.*, No. 215CV02322RCJVCF, 2016 U.S. Dist. LEXIS 110799, 2016 WL 4432685, at *4 (D. Nev. Aug. 19, 2016) ("Plaintiffs have no standing to complain of the putative technical violations of the statute alleged here, because the putative violations created no 'concrete' harm of the type sought to be prevented by Congress, and Plaintiffs have not separately alleged any actual harm.") A later court might decide it best to address the Article III standing issue first, but because a federal court has leeway to choose among threshold grounds for denying an audience on the merits, and our conclusion that the defendants have sovereign immunity resolves a non-merits threshold matter without further burden on the courts and parties, we choose that route today.

B.

In evaluating the Tribe's claim of sovereign immunity, we begin with the uncontroversial, two-century-old-concept that Indian tribes have inherent sovereign authority. *Michigan v. Bay Mills Indian Comty.*, 134 S. Ct. 2024, 2030, 188 L. Ed. 2d 1071 (2014). More could be said of the history and philosophy behind this sovereignty

as the court described it in *Bay Mills*, but the upshot is that Indian tribes possess "common-law immunity from suit traditionally enjoyed by sovereign powers. ... Thus unless and until Congress acts, the tribes retain their historic sovereign authority" *Id.* This is true even for a tribe's commercial activities. *Id.* at 2031.

The Supreme Court has instructed time and again that if it is Congress' intent to abrogate tribal immunity, it must clearly and unequivocally express that purpose. *Id. See also, C & L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001); *United States v. Dion*, 476 U.S. 734, 738-39, 106 S. Ct. 2216, 90 L. Ed. 2d 767 (1986); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). The list of cases could continue at length. Any ambiguity must be interpreted in favor of sovereign immunity. *Dolan v. United States Postal Serv.*, 546 U.S. 481, 498, 126 S. Ct. 1252, 163 L. Ed. 2d 1079 (2006); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980) ("Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence."). We review the legal question of whether Congress has abrogated tribal sovereign immunity de novo. *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 929 (7th Cir. 2008).

Congress did not specifically list Indian tribes in FACTA's definition of "person." *See* 15 U.S.C. § 1681 a(b). Meyers claims that the definition of "person" which

includes "any ... government" is broad enough to include Indian tribes. Perhaps if Congress were writing on a blank slate, this argument would have more teeth, but Congress has demonstrated that it knows full well how to abrogate tribal immunity. *See, e.g.*, Safe Water Drinking Act, 42 U.S.C. §§ 300j-9(i)(2)(A), 300f(10), 300f(12) (defining person to include municipality and municipality to include an Indian tribe);[5] Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901, 6903(13)(A), 6903(15);[6] Fair Debt Collection Procedures Act, 28 U.S.C. §§ 3002(7), 3002(10) (defining "person" to include "a natural person (including an individual Indian) ... or an Indian tribe."[7]

It is true that Congress need not invoke "magic words" to abrogate immunity. *F.A.A. v. Cooper*, 566 U.S. 284, 132 S. Ct. 1441, 1448, 182 L. Ed. 2d 497 (2012). In fact, in both *Blue Legs* and *Osage Tribal Council*, the courts had to take an indirect route to determine that Congress meant to abrogate immunity by finding that the term "person"

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5. *See Osage Tribal Council ex rel. Osage Tribe of Indians v. U.S. Dep't of Labor*, 187 F.3d 1174, 1180-81 (10th Cir. 1999) ("the language of the Safe Drinking Water Act contains a clear and explicit waiver of tribal immunity.").

6. *See Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir. 1989) ("It thus seems clear that the text and history of the RCRA clearly indicates congressional intent to abrogate the Tribe's sovereign immunity with respect to violations of the RCRA.").

7. *See United States v. Weddell*, 1998 DSD 25, 12 F. Supp. 2d 999, 1000 (D.S.D. 1998), *aff'd*, 187 F.3d 645 (8th Cir. 1999) (finding "the clear language supports a conclusion that Congress waived the sovereign immunity of Indian tribes.").

in the respective statute covered municipalities, and that the term "municipalities," in turn, was defined to cover "Indian tribes," *See Blue Legs*, 867 F.2d at 1097; *Osage Tribal Council*, 187 F.3d at 1182. As one federal district court noted while surveying the field, however, "there is not one example in all of history where the Supreme Court has found that Congress intended to abrogate tribal sovereign immunity *without* expressly mentioning Indian tribes somewhere in the statute." *In re Greektown Holdings*, LLC, 532 B.R. 680, 693 (E.D. Mich. 2015) (emphasis in original).

There is, however, one example of a circuit court abrogating tribal immunity without an express mention of Indian tribes somewhere in the statute, and Meyers attempts to hitch himself to this wagon. *See Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), *cert. denied*, 543 U.S. 871, 125 S. Ct. 99, 160 L. Ed. 2d 118 (2004). In *Krystal Energy*, the Ninth Circuit found that Congress intended to abrogate Indian immunity under the Bankruptcy Code despite the fact that no definition in the Bankruptcy Code actually lists "Indian tribes" as either a foreign or domestic government. *Id.* at 1057. The Bankruptcy Code at issue specifically stated that it abrogated sovereign immunity as to a "governmental unit" which it defined to include:

> United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this

> title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; *or other foreign or domestic government.*

11 U.S.C.A. § 101(27) (emphasis added). *Id.* at 1057. The Ninth Circuit concluded that the category of "Indian tribes" is simply a specific member of the group of domestic governments, the immunity of which Congress intended to abrogate. *Id.* at 1058.

Other federal courts to have considered this question disagree. These other courts hold that because Indian tribes are not specifically named in the Bankruptcy Code, a court would have to infer that Congress intended the phrase "other foreign or domestic government" to encompass tribes and that such an inference is inappropriate. For example, in *In re Whitaker*, 474 B.R. 687, 695 (B.A.P. 8th Cir. 2012), the Bankruptcy Appellate Panel of the Eighth Circuit rejected the Ninth Circuit's conclusion that Congress can express its intent to abrogate sovereign immunity as to Indian tribes without specifically saying so. Instead, the *Whitaker* court adhered to the general principle that statutes are to be interpreted for the benefit of Indian tribes and that inferences like the one made by the Ninth Circuit were therefore impermissible. *Id.* It concluded, as a result, that in enacting the provision of the Bankruptcy Code, Congress did not unequivocally express its intent to abrogate the sovereign immunity of Indian tribes. *Id.* In the same vein, the district court in *In re Greektown* holdings, sitting in review of the United States Bankruptcy Court for the Eastern District of Michigan, reasoned as follows:

> This Court cannot say with "perfect confidence" that the phrase "other domestic government" unambiguously, clearly, unequivocally and unmistakably refers to Indian tribes. The Bankruptcy Court's conclusion does not give appropriate deference to the Supreme Court's recent admonition that "[t]he special brand of sovereignty the tribes retain—both the nature and its extent—rests in the hands of Congress." *Bay Mills*, 134 S. Ct. at 2037. While Congress may not have to utter "magic words," Supreme Court precedent clearly dictates that it utter words that beyond equivocation or the slightest shred of doubt mean "Indian tribes." Congress did not do so in sections 106(a) and 101(27) of the Bankruptcy Code and thus the Tribe is entitled to sovereign immunity from suit in the underlying MUFTA proceeding.

In re Greektown Holdings, 532 B.R. at 700-01. The bankruptcy court for the Northern District of Iowa came to the same conclusion, noting that the bankruptcy statute makes no specific mention of Indian tribes, and thus was insufficient to express an unequivocal congressional abrogation of tribal sovereign immunity. *In re Nat'l Cattle Cong.*, 247 B.R. 259, 267 (Bankr. N.D. Iowa 2000).

Of course we are not beholden to the precedent of any of these courts.[8] Nor is the interpretation of the specific

8. Meyers implores us to give extra weight to the Ninth Circuit's holding because it has more experience with issues involving Indian Tribes. This is a frivolous imploration. Courts of

definition of "domestic government" in the Bankruptcy Code directly on point for purposes of interpreting a different definition in FACTA. We need not weigh in on the conflict between these courts on how to interpret the breadth the term "other domestic governments" under the Bankruptcy Code, because we conclude that Congress simply has not unequivocally abrogated the sovereign immunity of Indian Tribes under the FACTA provision at issue in this case.

Meyers makes much of this court's decision in *Bormes v. United States*, 759 F.3d 793 (7th Cir. 2014), in which we held that, in enacting the Fair Credit Reporting Act, Congress abrogated the United States' sovereign immunity. We reasoned that the Act declares that any "person" who willfully or negligently fails to comply with the Fair Credit Reporting Act is liable for damages, and then defines "person" as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." *Bormes*, 759 F.3d at 795, citing 15 U.S.C. §§ 1681n(a), 1681o(a), 1681a(b). Because there is no debate that the United States is a government, we held, the answer was plain. *Bormes*, 759 F.3d at 795. In *Bormes*, we concluded that, "[b]y authorizing monetary relief against *every* kind of government, the United States has waived its sovereign immunity." *Id.* (emphasis in original).

Appeals hear cases on everything from bankruptcy to maritime law to ERISA to diversity suits about matters of state law. It is the job of the Court of Appeals to become expert on any area of law before it. The Ninth Circuit has no more access to legal research on Indian tribe immunity than any other court.

Meyers would like us to interpret this statement to mean that "every government" must also include Indian tribes. As the district court noted, however, if there was any implication about other sovereigns, it was clearly dicta. In fact, the government conceded that it was a "person" for purposes of the Act so the court had no reason to engage in a full analysis of the scope of the term "any government." *Id.* The district court hit the nail on the head when it explained that:

> It is one thing to say "any government" means "the United States." That is an entirely natural reading of "any government." But it's another thing to say "any government" means "Indian Tribes." Against the long-held tradition of tribal immunity ... "any government" is equivocal in this regard. Moreover, it is one thing to read "the United States" when *Congress* says "government." But it would be quite another, given that ambiguities in statutes are to be resolved in favor of tribal immunity, to read "Indian tribes" when Congress says "government."

D. Ct. Order at 4 (R. 23, p.4) (emphasis in original).

Meyers argues that the district court dismissed his claim based on its erroneous conclusion that Indian tribes are not governments. He then dedicates many pages to arguing that Indian Tribes are indeed governments. Meyers misses the point. The district court did not dismiss his claim because it concluded that Indian tribes are not

governments. It dismissed his claim because it could not find a clear, unequivocal statement in FACTA that Congress meant to abrogate the sovereign immunity of Indian Tribes. Meyers has lost sight of the real question in this sovereign immunity case—whether an Indian tribe can claim immunity from suit. The answer to this question must be "yes" unless Congress has told us in no uncertain terms that it is "no." Any ambiguity must be resolved in favor of immunity. *Cooper*, 132 S. Ct. at 1448. Abrogation of tribal sovereign immunity may not be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). Of course Meyers wants us to focus on whether the Oneida Tribe is a government so that we might shoehorn it into FACTA's statement that defines liable parties to include "any government." *See Bormes*, 759 F.3d at 795. But when it comes to sovereign immunity, shoehorning is precisely what we cannot do. Congress' words must fit like a glove in their unequivocality. *See Bay Mills*, 134 S. Ct. at 2031; *C & L Enters.*, 532 U.S. at 418. It must be said with "perfect confidence" that Congress intended to abrogate sovereign immunity and "imperfect confidence will not suffice." *Dellmuth v. Muth*, 491 U.S. 223, 231, 109 S. Ct. 2397, 105 L. Ed. 2d 181 (1989), superseded by statute on other grounds as recognized in *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 45, n.14, 112 S. Ct. 1011, 117 L. Ed. 2d 181 (1992). Congress has demonstrated that it knows how to unequivocally abrogate immunity for Indian Tribes. It did not do so in FACTA.

This leaves one last loose end. Meyers argues that the Fair Credit Reporting Act is a statute of general applicability and thus is assumed to apply to Indian tribes.

See Smart v. State Farm Ins. Co., 868 F.2d 929, 932 (7th Cir. 1989), *superseded by statute on other grounds*, Pub. L. No. 109-280, § 906(a)(2)(A), 120 Stat. 780, 1051 (2006), *as recognized in Bolssen v. Unum Life Ins. Co. of Am.*, 629 F. Supp. 2d 878, 881 (E.D. Wis. 2009) ("when Congress enacts a statute of general applicability, the statute reaches everyone within federal jurisdiction not specifically excluded, including Indians and Tribes."). As the district court correctly pointed out, "the question here is not whether the Tribe is subject to FCRA; it is whether Plaintiff can sue the Tribe for violating FCRA." D. Ct. Order at 6 (R. 23, p.6). "[W]hether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions." *Florida Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1130 (11th Cir. 1999) (emphasis in original); *see also Kiowa Tribe v. Manufacturing Techs., Inc.*, 523 U.S. 751, 755, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998) ("There is a difference between the right to demand compliance with state laws and the means available to enforce them."); *In re Nat'l Cattle Cong.*, 247 B.R. at 265.

The Tribe has sovereign immunity and thus the district court's grant of the Tribe's motion to dismiss is AFFIRMED.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN, FILED, SEPTEMBER 4, 2015

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 15-CV-445

JEREMY MEYERS, INDIVIDUALLY, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

ONEIDA TRIBE OF INDIANS OF WISCONSIN,

Defendant.

DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Plaintiff Jeremy Meyers filed this proposed class action against the Oneida Tribe of Indians of Wisconsin (the Tribe) alleging that on three occasions in February 2015, establishments owned and operated by the Tribe printed receipts displaying more than the last five digits of Plaintiff's credit card number and the expiration date, in violation of the Fair and Accurate Credit Transactions

Act (FACTA) amendment to the Fair Credit Reporting Act (FCRA). 15 U.S.C. § 1681c(g)(1). The Tribe has moved to dismiss Plaintiff's claims for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). As explained below, the motion to dismiss will be granted.

The Tribe argues that Plaintiff's claims are barred under the doctrine of tribal sovereign immunity and that Plaintiff has not suffered an "injury in fact" as required to satisfy the standing requirement of Article III of the Constitution. The immunity issue is technically not a jurisdictional one in the Seventh Circuit, *see Blagojevich v. Gates*, 519 F.3d 370, 371 (7th Cir. 2008); *Stifel, Nicolaus & Co. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 980 F. Supp. 2d 1078, 1084–85 (W.D. Wis. 2013), but the court can treat the Tribe's Rule 12(b)(1) motion as a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Peckmann v. Thompson*, 966 F.2d 295, 297 (7th Cir. 1992). Where, as here, the immunity issue is clearly raised by the facts in the complaint, it can be addressed at the pleading stage. *See Brooks v. Ross*, 578 F.3d 574, 579–80 (7th Cir. 2009).

That Indian tribes are generally immune from suit is well-settled. *Michigan v. Bay Mills Indian Community*, --- U.S. ---, 134 S.Ct. 2024 (2014) (re-affirming that tribal immunity applies even to off-reservation commercial conduct). The Supreme Court has "time and again treated the doctrine of tribal immunity [as] settled law and dismissed any suit against a tribe absent congressional authorization (or a waiver)." *Id.* at 2030–31 (quotations omitted). As the Court explained in *Bay Mills*:

> Our decisions establish . . . that such a congressional decision must be clear. The baseline position, we have often held, is tribal immunity; and [t]o abrogate [such] immunity, Congress must "unequivocally" express that purpose. That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government.

Id. at 2031–32 (internal quotations and citations omitted). Moreover, because of the "unique trust relationship between the United States and the Indians," ambiguous statutes are supposed to be interpreted in favor of immunity. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–44 (1980) ("Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence.").

FCRA was enacted in 1970. The law was amended in 1996 to authorize damages against any "person" who negligently or willfully failed to comply with its provisions. Pub. L. No. 104-108, § 2412 (amending 15 U.S.C. § 1681n). "Person" is defined as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." 15 U.S.C. § 1681a(b). In 2003, Congress enacted the "truncation requirement" Plaintiff invokes,

which provides: "Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." FACTA, Pub. L. No. 108-159, § 113 (creating 15 U.S.C. § 1681c(g)(1)).

Notably absent from this legislative scheme is any reference to Indian tribes. Congress did not specifically list Indian tribes in the list of entities considered "persons" under § 1681a(b). There is little doubt that Congress knows how to abrogate tribal immunity. *See, e.g., United States v. Weddell*, 12 F. Supp. 2d 999 (D.S.D. 1998) (finding unequivocal abrogation of tribal immunity because Fair Debt Collection Practices Act's definition of "person" included "a natural person (including an individual Indian), a corporation, a partnership, an unincorporated association, a trust, or an estate, or any other public or private entity, including a State or local government or an Indian tribe."); *cf. In re Greektown Holdings, LLC*, 532 B.R. 680, 698–99 (E.D. Mich. 2015) ("There is not a single example of a Supreme Court decision finding that Congress intended to abrogate the sovereign immunity of the Indian tribes without specifically using the words 'Indians' or 'Indian tribes.'").

Nevertheless, Plaintiff argues FCRA's definition of "person" is broad enough. Plaintiff relies on *Bormes v. United States*, 759 F.3d 793 (7th Cir. 2014), where the Seventh Circuit found the same definition evinced Congress's "unequivocal" intent to waive the United

States' sovereign immunity from suit. In *Bormes*, the court wrote: "By authorizing monetary relief against *every* kind of government, the United States has waived its sovereign immunity." *Id.* at 795 (emphasis in original). To the extent the court implied that other sovereigns (besides the United States) would not be entitled to immunity in view of this definition of person, the implication was clearly dicta, as the case only addressed whether Congress unequivocally waived the United States' immunity. On the issue of tribal immunity, *Bormes* is distinguishable. It is one thing to say "any government" means "the United States." That is an entirely natural reading of "any government." But it's another thing to say "any government" means "Indian tribes." Against the long-held tradition of tribal immunity discussed above, "any government" is equivocal in this regard. Moreover, it is one thing to read "the United States" when *Congress* says "government." But it would be quite another, given that ambiguities in statutes are to be resolved in favor of tribal immunity, to read "Indian tribes" when Congress says "government."

Plaintiff also relies on *Kryztal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), in which the Ninth Circuit allowed an adversary action against an Indian tribe in a bankruptcy proceeding. Section 106 of the Bankruptcy Code provides: "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section . . . ." 11 U.S.C. § 106(a). "Governmental unit" is in turn defined as "United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality

of the United States . . . , a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; *or other foreign or domestic governments. . . .*" 11 U.S.C. § 101(27) (emphasis added). In *Kryztal Energy* the Ninth Circuit held that the language "other foreign or domestic government" was sufficient to unequivocally express Congress' intent to abrogate tribal immunity from suit in adversary proceedings under the Bankruptcy Code.

But *In re Whittaker*, 474 B.R. 687 (8th Cir. BAP 2003), went the other way with the Bankruptcy Appellate Panel for the Eighth Circuit concluding that Congress did not unequivocally express its intent to abrogate tribal sovereign immunity in adversary actions under the Bankruptcy Code. In *Whittaker*, the Eighth Circuit Bankruptcy Appellate Panel noted that the legislative history of the Bankruptcy Code provided no evidence that Congress even considered the effect of § 106 on tribal sovereign immunity:

> Indeed, despite the fact that *Santa Clara Pueblo* was decided six months before the 1978 Bankruptcy Code was enacted and held that abrogation of tribal sovereign immunity must be "unequivocally expressed," Congress did not mention Indian tribes in the statute. Nor did it do so in 1994 when it amended § 106 to clarify its intent with respect to the sovereign immunity of states following *Hoffman v. Connecticut Department of Income Maintenance* and *United States v. Nordic Village, Inc.*, which held that former § 106(c) did not state with

> sufficient clarity a congressional intent to abrogate the sovereign immunity of the states and the federal government. Indeed, the House Report for the Bankruptcy Reform Act of 1994 refers specifically to the sovereign immunity of the "States and Federal Government," neither of which could even remotely be interpreted to include Indian tribes.

474 B.R. at 693 (footnotes omitted). The Bankruptcy Appellate Panel also rejected the Ninth Circuit's conclusion that the term "domestic governments" could naturally be read to include Indian tribes. In fact, the Panel noted that the Supreme Court had never referred to tribes in such terms:

> While the Supreme Court did say in that case that Indian tribes are a form of "domestic sovereign," it is noteworthy that the Supreme Court did not refer to Indian tribes as "domestic governments," which is the phrase used in § 101(27). Indeed, while the Supreme Court has referred to Indian tribes as "sovereigns," "nations," and even "distinct, independent political communities, retaining their original natural rights," the trustees cite no case in which the Supreme Court has referred to an Indian tribe as a "government" of any sort—domestic, foreign, or otherwise. The apparent care taken by the Supreme Court not to refer to Indian tribes as "governments" reinforces Justice Marshall's pronouncement in *Cherokee Nation*

> that Indian tribes are exceptionally unique, unlike any other form of sovereign, which is why he coined the phrase "domestic dependent nation." If the Supreme Court considered an Indian tribe to be a "government," it would not go to such great lengths to avoid saying so.

474 B.R. at 695 (footnotes omitted); *see also In re Greektown Holdings, LLC*, 532 B.R. 680 (E.D.Mich. 2015). I find the analysis of the Panel in *Whittaker* more persuasive than that of the Ninth Circuit and therefore reject Plaintiff's contention that the phrase "any government" unequivocally includes Indian tribes.

Finally, relying on *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989), Plaintiff argues that applying the doctrine of tribal immunity "ignores well-settled law that Indian Tribes are not immune from federal laws of general applicability." (ECF No. 17 at 2.) But the question here is not whether the Tribe is subject to FCRA; it is whether Plaintiff can sue the Tribe for violating FCRA. *See Florida Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1130 (11th Cir. 1999) ("[W]hether an Indian tribe is subject to a statute and whether the tribe may be sued for violating the statute are two entirely different questions."); *see also Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 755 (1998) ("There is a difference between the right to demand compliance with state laws and the means available to enforce them."). *Smart* involved a suit by a tribe member against an insurance company and the issue was whether ERISA governed an employee benefits

plan established by a tribe. 868 F.2d at 932. No tribe was sued, and thus the question of tribal immunity was not addressed. Plaintiff's reliance on *Smart* is therefore not persuasive.

I therefore conclude that the Tribe is immune from Plaintiff's suit and its motion to dismiss should be granted. Because I find the Tribe is entitled to dismissal on immunity grounds, I need not address the standing issue. For all of these reasons, the Tribe's motion to dismiss is **GRANTED**. The Clerk is directed to enter judgment forthwith.

SO ORDERED this 4th day of September, 2015.

s/ William C. Griesbach
William C. Griesbach, Chief Judge
United States District Court