Case No. 16-745

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Seventh Circuit erred when it ruled that Congress did not clearly and unequivocally abrogate tribal sovereign immunity in the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq*. ("FCRA"), including the Fair and Accurate Credit Transactions Act ("FACTA") amendment to FCRA.

Whether the issue of Petitioner's alleged standing under Article III of the United States Constitution is appropriate for review by this Court when, as here, the issue was not decided by either lower court, was not briefed before the Seventh Circuit, and no circuit split exists regarding Article III standing under FACTA's truncation requirement.

RULE 29.6 STATEMENT

Respondent Oneida Tribe of Indians of Wisconsin, an Indian tribe, has no parent corporation and there is no publicly held company that owns 10% or more of its stock.

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STATEMENT OF THE CASE

1. Petitioner Jeremy Meyers ("Meyers" or "Petitioner") alleges that in February 2015, he received three computer-generated receipts that displayed more than the last five digits of his credit card number, as well as the card's expiration date. App. 2a. According to Petitioner, all three receipts were given to him by retail establishments owned by the Defendant-Respondent Oneida Tribe of Indians of Wisconsin (the "Tribe" or "Respondent"). *Id.* Petitioner alleges that such conduct violates the truncation requirement of 15 U.S.C. § 1681c(g)(1), which was created by the 2003 FACTA amendments to FCRA. *Id.* Petitioner did not allege any actual damages, but instead sought statutory damages. Pet. at 5.

2. The Tribe moved to dismiss the Complaint for lack of subject matter jurisdiction on the bases that the Tribe was immune from the claims and Meyers lacked standing to bring his claim because he did not suffer an "injury in fact." App. 21a. Both parties briefed these issues. The district court treated the Tribe's motion with respect to sovereign immunity as a motion to dismiss for failure to state a claim under Rule 12(b)(6), Fed. R. Civ. P. *Id.* On September 4, 2015, the district court granted the Tribe's motion and dismissed the Complaint. *Id.* at 20a-28a. The district court found that "[n]otably absent from [the] legislative scheme is any reference to Indian tribes" and held that Congress did not unequivocally waive tribal sovereign immunity and

that Indian tribes are immune from private suits for money damages alleging FCRA violations. *Id.* at 23a-24a. Because the issue of sovereign immunity was dispositive, the district court did not address whether Petitioner had Article III standing necessary to bring suit against the Tribe in federal court. *Id.* at 28a. Petitioner filed a timely notice of appeal to the United States Court of Appeals for the Seventh Circuit.

3. After briefing and oral argument, the Seventh Circuit affirmed the district court's grant of dismissal. App. 19a. Petitioner argued, as he does now, that Congress unequivocally abrogated the Tribe's sovereign immunity by including "any . . . government" in FCRA's definition of "person," because – according to Petitioner – the Tribe is a "government." *Id.* at 11a-12a. In so arguing, Petitioner relied primarily on *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), *as amended on denial of reh'g* (Apr. 6, 2004), *cert. denied*, 543 U.S. 871 (2004). In *Krystal Energy*, the Ninth Circuit held that Congress abrogated the sovereign immunity of Indian tribes under the Bankruptcy Code by abrogating the sovereign immunity of "governmental unit[s]," which the Code defines to include "domestic government[s]." *Id.* at 13a.

4. The Seventh Circuit agreed with the district court that the Tribe was immune from suit, describing the issue of sovereign immunity as "easily and readily resolved here." *Id.* at 7a. The court

addressed Petitioner's "any government" argument head-on, stating:

> 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.

Id. at 17a-18a (emphasis added). The court ultimately "conclude[d] that Congress simply has not unequivocally abrogated the sovereign immunity of Indian Tribes under the FACTA provision at issue in this case." *Id.* at 16a.

5. The Seventh Circuit did not decide the issue of Article III standing. It noted that "[n]either party briefed the issues of subject matter jurisdiction raised in *Spokeo*, nor did either party submit supplemental authority regarding *Spokeo*." *Id.* at 5a. Rather, the court "exercise[d] [its] right to 'choose among threshold grounds for denying audience to a case on the merits,' " *id.* at 8a, by resolving the "easily answered" issue of sovereign immunity. *Id.* at 7a. Just like the district court before it, the Seventh Circuit did not determine the issue of Article III standing in light of the Court's *Spokeo* decision, or otherwise.

REASONS FOR DENYING THE PETITION

This case before the Seventh Circuit required the court to review the definition of "person" under FCRA to determine whether Congress clearly and unequivocally abrogated tribal sovereign immunity for private actions seeking money damages under FACTA. FACTA prohibits any "person" who "accepts credit cards or debit cards for the transaction of business" from "print[ing] 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). In turn, any "person" who willfully or negligently fails to comply with FCRA is liable for damages. 15 U.S.C. §§ 1681n(a), 1681o(a).

FCRA defines "person" to mean "any individual, partnership, corporation, trust, estate,

cooperative, association, government or governmental subdivision or agency, or other entity." 15 U.S.C. § 1681a(b). Neither FCRA, nor its FACTA amendment, contains language that unequivocally, unmistakably, and definitively evinces Congress's intent that Indian tribes are "persons" pursuant to FCRA. On this basis, the Seventh Circuit affirmed the district court's dismissal of the Complaint, which alleged violations of 15 U.S.C. § 1681c(g)1 against Respondent, an Indian tribe.

Petitioner has failed to set forth "compelling reasons" for certiorari review of the first question presented — that is, whether Congress unequivocally abrogated tribal sovereign immunity in FCRA, including the FACTA amendment. *See* U.S. Sup. Ct. R. 10. This Court has long held that suits against Indian tribes are barred by sovereign immunity absent an unequivocal and unambiguous waiver by the tribe or congressional abrogation.[1] Nothing in the language of FCRA[2] shows an unequivocal intent by Congress to abrogate the Tribe's sovereign immunity against a private action seeking money damages. While FCRA defines those persons who may be found liable for a FCRA violation to include "any . . . government or governmental subdivision," 15 U.S.C. § 1681a(b), Congress's use of the word

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[1] Meyers has made no allegation that the Tribe waived its sovereign immunity.

[2] Because FACTA is an amendment to FCRA, Respondent will refer to the overall statutory scheme at issue as FCRA throughout this brief, unless a distinction is warranted.

"government" does not unequivocally mean Indian tribes, as explained by the district court and adopted by the Seventh Circuit:

> "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.' "

App. 17a (quoting App. 24a (emphasis in original).) Congress did not clearly, unequivocally, and unambiguously reference Indian tribes when it enacted FCRA and the FACTA amendment, and, therefore, it did not evince an intent to abrogate tribal sovereign immunity. This holding is consistent with long-held Supreme Court precedent and was a proper interpretation of the statute's plain terms. Thus, the Complaint is barred by sovereign immunity and dismissal was proper.

Petitioner argues that there is a conflict of federal law on this question, asserting that there is a

conflict between the Seventh Circuit's decision in this case and the decision of the Ninth Circuit in *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), *as amended on denial of reh'g* (Apr. 6, 2004), *cert. denied*, 543 U.S. 871 (2004). There is no such conflict, however, as *Krystal Energy* deals not with FCRA or FACTA but rather with the Bankruptcy Code, and materially different statutory language. Moreover, *Krystal Energy* appears to be an outlier, as decisions from other courts reject its conclusion regarding abrogation of tribal sovereign immunity under the Bankruptcy Code. App. 14a-15a. In any event, differences concerning tribal sovereign immunity under the *Bankruptcy Code* are of no matter in this case, which deals with tribal sovereign immunity under FCRA.

Nor has Petitioner established any compelling reason for certiorari review of the second question presented — whether an allegation of a bare violation of FCRA's truncation requirements gives rise to standing under Article III of the United States Constitution. Neither the district court nor the Seventh Circuit decided the standing question and the parties did not brief it before the Seventh Circuit. The issue is not adequately developed to merit review by this Court. Moreover, even if the question of Article III standing had been fully briefed and decided below, Petitioner has failed to demonstrate that such issue meets the criteria for Supreme Court review. With the Court's *Spokeo* decision issued in May 2016, most post-*Spokeo* standing issues have not yet been litigated through the federal circuits. As

such, now is not the time to accept review of that question and this is certainly not the case to do so.

Because there are no compelling reasons for this Court to grant review of the questions presented, the Court should deny the Petition.

I. There Is No Circuit Split Concerning Abrogation Of Tribal Immunity Under FCRA.

The Petition should be denied because it presents no issues worthy of this Court's attention. *See* U.S. Sup. Ct. R. 10 (stating that "[a] petition for a writ of certiorari will be granted only for compelling reasons.") The Seventh Circuit created no new law and it did not err in its interpretation of FCRA's definition of "person." Moreover, Petitioner's attempt to manufacture a circuit split by reference to the Ninth Circuit's interpretation of materially different statutory language *in the Bankruptcy Code* is unavailing. There simply is no circuit split for the Court to resolve.

A. The Law Regarding Abrogation of Tribal Sovereign Immunity Is Well Established.

The law regarding abrogation of tribal sovereign immunity is well established and not in dispute. The Seventh Circuit correctly stated that law. Petitioner merely takes issue with the outcome when the court applied that law to FCRA.

"As a matter of federal law, an Indian tribe is subject to suit *only where* Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.,* 523 U.S. 751, 754 (1998) (emphasis added); *accord Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.,* 498 U.S. 505, 509 (1991) ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." (citations omitted)). The doctrine of tribal sovereign immunity is a "two-century-old-concept" that is rooted in federal common law. App. 10a. As this Court has indicated, tribal sovereign immunity "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986).

Moreover, "[t]o abrogate tribal immunity, Congress must '*unequivocally'* express that purpose." *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.,* 532 U.S. 411, 418 (2001) (citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978)) (emphasis added); *Michigan v. Bay Mills Indian Cmty.,* 134 S. Ct. 2024, 2037 (2014) ("The special brand of sovereignty the tribes retain — both its nature and its extent — rests in the hands of Congress.") Indeed, "Congress may abrogate a sovereign's immunity only by using statutory language that makes its intention unmistakably clear." *Florida v. Seminole Tribe of Florida*, 181 F.3d

1237, 1242 (11th Cir. 1999); *Florida Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126, 1131 (11th Cir. 1999) (Congressional abrogation must come from "the definitive language of the statute itself" and "legislative history and 'inferences from general statutory language' are insufficient.") (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).) Finally, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 766 (1985); *see also F.A.A. v. Cooper,* 566 U.S. 284, 290 (2012) ("Any ambiguities in the statutory language are to be construed in favor of immunity . . . . Ambiguity exists if there is a plausible interpretation of the statute that would not authorize" suit against the Tribe.) (citations omitted).

B. There Is No Circuit Split Regarding Abrogation Of Tribal Sovereign Immunity Under FCRA.

Petitioner argues that Congress intended to abrogate tribal sovereign immunity against private-party damages claims under FCRA through defining "person" to include "any . . . government." *See* Pet. at 2-14. The Seventh Circuit properly rejected this argument.

FCRA does not contain language that unequivocally, unmistakably, and definitively expresses Congress's intent to abrogate tribal immunity. The statute makes no reference to Indian

tribes. Congressional abrogation of tribal immunity "'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo,* 436 U.S. at 58 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976).) As one court recently found, "[t]here 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.'" *In re Greektown Holdings, LLC*, 532 B.R. 680, 698-99 (E.D. Mich. 2015).

Petitioner contends that the Seventh Circuit's decision in this case creates a "circuit split" as a result of the Ninth Circuit's *Krystal Energy* decision holding that Congress abrogated tribal sovereign immunity under the *Bankruptcy Code*. Pet. at 2-3, 8-14. *Krystal Energy* did not decide abrogation of tribal sovereign immunity under FCRA and therefore it presents no conflict with this case. As discussed *infra*, material differences exist between the Bankruptcy Code provision at issue in *Krystal Energy* and FCRA's definition of "person." Petitioner cannot point to a single case outside of the bankruptcy context that supports his argument that a purported circuit split exists. Moreover, Petitioner cites no cases holding that FCRA's definition of "person" abrogates tribal sovereign immunity. To the extent the words "any . . . government" in that definition leave room for competing interpretations as to whether Indian tribes are included, that dispute *must* be resolved in favor of preserving tribal sovereign immunity, in accordance with this Court's long-

standing precedent. That is precisely what the lower courts did in this case.

Petitioner cites no case where a court has found that Congress has abrogated tribal sovereign immunity under FCRA or FACTA. Instead, Petitioner relies on cases interpreting provisions of the Bankruptcy Code. *See* Pet. at 9-13 (citing *Krystal Energy*, 357 F.3d 1055); *In re Russell*, 293 B.R. 34 (Bankr. D. Ariz. 2003); *In re Whitaker,* 474 B.R. 687 (B.A.P. 8th Cir. 2012); *Greektown Holdings*, 532 B.R. 680.) At most, these cases demonstrate that some disagreement may exist between the Eighth and Ninth Circuits regarding congressional abrogation of tribal sovereign immunity under the Bankruptcy Code. They do not demonstrate any split concerning congressional abrogation of tribal sovereign immunity under FCRA.[3] No circuit split exists with respect to whether FCRA has abrogated tribal sovereign immunity.

1. ***Krystal Energy* Determined Sovereign Immunity Under The Bankruptcy Code, Not FCRA.**

Petitioner resorts to decisions considering another statutory scheme, the Bankruptcy Code, to

[3] In its ruling, the Seventh Circuit noted the distinction between "the specific definition of 'domestic government' *in the Bankruptcy Code*" and the "*different definition in FACTA*" at issue in this case. App. 15a-16a (emphasis added).

argue that there is a circuit split created by this case. Petitioner argues that "the Seventh Circuit's ruling directly contradicts the Ninth Circuit's ruling in *Krystal Energy*." Pet. at 7. That is not true. Moreover, to the extent there may be a circuit split with respect to congressional abrogation of tribal sovereign immunity *under the Bankruptcy Code*, this FCRA case is not the appropriate vehicle by which to resolve it.

In *Krystal Energy*, the Ninth Circuit held that Congress abrogated the sovereign immunity of Indian tribes under the Bankruptcy Code. Under the Bankruptcy Code, 11 U.S.C. § 106(a), "sovereign immunity is abrogated as to a governmental unit" in causes of action under specifically enumerated sections of the Code. In turn, "governmental unit" is defined by the Bankruptcy Code, 11 U.S.C. § 101(27), as "the United States; State; Commonwealth; District; Territory; municipality . . . ; or other foreign or domestic governments." The Ninth Circuit reasoned that because Congress intended to abrogate the sovereign immunity of all "governmental unit[s]," and "Indian tribes are certainly governments," "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 F.3d at 1057-58. *Krystal Energy* pointed out that the definition of "governmental unit" in section 101(27) first lists a sub-set of all governmental bodies but then adds a catch-all phrase, "or other foreign or domestic governments." *Id.* at 1057. Thus, the court reasoned that "all

foreign and domestic governments, including but not limited to those particularly enumerated in the first part of the definition, are considered 'governmental units' for the purpose of the Bankruptcy Code" for which sovereign immunity is abrogated under § 106(a). *Id.*

These conclusions are irrelevant to this case. *Krystal Energy* does not give rise to a conflict with the Seventh Circuit's interpretation of FCRA directly or indirectly. *Krystal Energy* is materially distinguishable.

First, the two cases deal with different statutory schemes. *Krystal Energy* interprets § 106 and § 101(27) of the Bankruptcy Code. Section 106 specifically "abrogate[s]" "sovereign immunity" for "governmental units" and that term is defined in section 101(27) to include "other foreign and domestic governments." The court in *Krystal Energy* held that "domestic governments" unequivocally includes Indian tribes. 357 F.3d at 1057-58.

In contrast, FCRA defines "person" to include "any . . . government or governmental subdivision or agency." 15 U.S.C. § 1681a(b). Unlike the Bankruptcy Code, however, FCRA does not define "government" or "governmental subdivision." The scope of these terms under FCRA is undetermined and unclear. Thus, these terms are ambiguous (equivocal) as to whether they are intended to include Indian tribes. Indeed, there is a strong basis to conclude they do not include Indian tribes since

tribes are not referenced as is commonly done in many other statutes. (*See infra* at pages 23 to 24.) Accordingly, it cannot be said that FCRA's definition of "person" unequivocally abrogates tribal sovereign immunity

Krystal Energy is also distinguishable because, as the court there explained and the Seventh Circuit noted in this case, section 106(a) of the Bankruptcy Code "explicitly uses the terms 'sovereign immunity' and 'abrogate.' " *Id.* at 1059; *see also* App. 13a. ("The Bankruptcy Code at issue specifically stated that it abrogated sovereign immunity as to a 'governmental unit' . . . .") Under those circumstances — in the context of a statute expressly abrogating sovereign immunity for "governmental unit[s]," defined to include "domestic governments" — *Krystal Energy* held that such language unequivocally abrogated tribal immunity. In contrast, FCRA and FACTA have no express sovereign immunity abrogation language.

Thus, *Krystal Energy* determined whether the express sovereign immunity abrogation provision of the Bankruptcy Code applying to "governmental units," which is defined to include "domestic governments," applies to Indian tribes. Whether *Krystal Energy* adopted the correct interpretation regarding tribal sovereign immunity cannot be resolved in this case, which involves FCRA and FACTA, different statutes without an express abrogation provision and also lacking a definition of

the material term (FCRA's "any . . . government" term).

The Seventh Circuit reasoned that the competing interpretations of the Bankruptcy Code are of no matter in this case and rightly answered the only question at issue here: whether Congress has unequivocally abrogated tribal sovereign immunity under FCRA and FACTA:

> We need not weigh in on the conflict between these courts on how to interpret the breadth [of] 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.

App. 16a (emphasis added).

2. *Bormes* Decided The United States' Immunity, Not Tribal Sovereign Immunity.

Petitioner also argues that certiorari review is necessary by virtue of the Seventh Circuit's holding in *Bormes v. United States*, 759 F.3d 793, 795 (7th Cir. 2014). *See* Pet. at 14. Petitioner relies on the Seventh Circuit's dicta in *Bormes,* where the court stated that "[b]y authorizing monetary relief against *every* kind of government, the United States has

waived its sovereign immunity." *Id.* (emphasis in original). However, the question in *Bormes* was whether Congress unequivocally abrogated the *United States'* immunity from damages for violations of FCRA through FCRA § 1681a(b). *Id.* *Bormes* does not answer the question of abrogation of *Indian tribe* sovereign immunity under FCRA — which is subject to a materially different, exacting standard. That standard is not considered or applied in *Bormes* since tribal sovereign immunity was not at issue.

In *Bormes*, the United States conceded that it was a government and, thus, subject to regulation under FCRA. *Bormes*, 759 F.3d at 795 ("The United States concedes that it is a 'person' for the purpose of the Act's substantive requirements."). However, the United States argued that it could not be held liable for damages under FCRA. If it is a "person" subject to FCRA regulation, the court reasoned that there was no reason to hold differently for purposes of its exposure to damages for FCRA violations. *Id.* The court held that the United States "is a government." *Id.* Therefore, sovereign immunity is abrogated under FCRA for claims against the United States.

Since the United States was admittedly a government, *Bormes* did not discuss what Congress intended by its use of the word "government" in FCRA's definition of "person." As the Seventh Circuit held in this case, *Bormes*' passing observation that FCRA provides relief against "*every* kind of government" was dicta as to all other sovereigns beyond the United States. App. 17a. And the *Bormes*

court was certainly not asked to, nor did it, determine whether Congress unequivocally and unmistakably intended to include Indian tribes when it defined persons for purposes of FCRA to include "government" or whether it intended to abrogate a tribe's sovereign immunity against a claim for money damages brought by a private party. *Bormes*, 759 F.3d at 795-96. The court's holding in *Bormes* that the United States is a "government" falling within the definition of "person" under FCRA does not provide guidance as to whether Indian tribes likewise would fall within the term "government," a term not defined by FCRA.

Thus, even though the Seventh Circuit held in *Bormes* that FCRA abrogates the *United States*' sovereign immunity, the definition of a "person" under FCRA cannot be said to be an unequivocal and unmistakable statement of congressional intent to do the same for Indian tribes. Such an abrogation can only be found based on clear and unequivocal statutory language; " 'it cannot be implied.' " *Santa Clara Pueblo,* 436 U.S. at 58. FCRA's definition of "person" to include "any . . . government" is equivocal and does not unambiguously express a congressional intent to abrogate tribal immunity, and *Bormes* does not, as Petitioner contends, stand for the contrary. This is especially true, as both lower courts noted, in light of the long-held tradition of tribal sovereign immunity and the liberal construction of ambiguous statutes in favor of Indian tribes. App. 18a; *see also Montana*, 471 U.S. at 766. The Seventh Circuit also aptly noted this distinction:

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). Meyers would like us to interpret this statement to mean that "every government" must also include Indian tribes. . . .

. . . . 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.

App. 16a-18a. Despite this clear explanation and distinction of the *Bormes* decision, Petitioner asserts that "[t]he Seventh Circuit never attempted to distinguish" the purported "directly contradictory holdings" as between *Krystal Energy*, *Bormes*, and this case. Pet. at 14. As demonstrated above and in the Seventh Circuit's opinion, *see* App. 16a-18a, the holdings of these cases are not contradictory and are readily reconciled.

The Seventh Circuit's decision in this case does not conflict with any decisions of the Seventh Circuit or any other federal circuit. This case gives rise to no circuit split.

C. FCRA Does Not Clearly And Unequivocally Abrogate Tribal Sovereign Immunity.

Petitioner asserts that this case presents an issue of national importance with respect to tribal sovereign immunity. That argument is based on two flawed premises: first, that a circuit split actually exists, and, second, that "Congress should be able to unequivocally abrogate tribal sovereign immunity" by using the equivocal and ambiguous term "government" in a statute to encompass Indian tribes. Pet. at 15. For the reasons set forth above, this case presents no circuit split whatsoever, much less a split

worthy of certiorari review, let alone one of national importance. Yet, according to Petitioner, the alleged "circuit conflict regarding the abrogation of tribal sovereign immunity is of national importance" because "Congress should be able to unequivocally abrogate tribal sovereign immunity by abrogating the sovereign immunity of all 'governments,' because Indian tribes are governments." Pet. at 15. Such a notion is inconsistent with decades' worth of well-settled jurisprudence. (*See supra*, pages 8 to 10.) The undefined category of "any . . . government" in FCRA's definition of "person" does not evince congressional intent to include Indian tribes and therefore to clearly and unequivocally abrogate tribal sovereign immunity.

Relying on *Turner v. United States*, 248 U.S. 354 (1919), and Justice Sotomayor's concurring opinion in *Bay Mills Indian Cmty.*, 134 S. Ct. at 2042, Petitioner argues that Indian tribes are "governments" because this Court has used the word governments to refer to tribes in those two discrete instances. Pet. at 15-16. Yet the Court most commonly refers to Indian tribes as " 'domestic dependent nations.' " *See, e.g.*, *Bay Mills Indian Cmty.*, 134 S. Ct. at 2030 (quoting *Okla. Tax Comm'n,* 498 U.S. at 509 (quoting *Cherokee Nation v. Georgia,* 30 U.S. 1, 17 (1831)); *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 141 (1982). Nonetheless, whether this Court has occasionally referred to tribes as "governments" (or as anything else for that matter) is not determinative of whether Congress's use of "government" in defining "person" in *FCRA*

without making reference to Indian tribes can nonetheless be construed unequivocally to include Indian tribes and abrogate tribal sovereign immunity. *See Greektown Holdings*, 532 B.R. at 698 ("[O]ne cannot presume that Congress intended to include [Indian tribes], without mentioning them but solely by force of deduction, as among a group of sovereign entities with whom they share very little other than their sovereign status.")

Turner noted that the Creek Nation "exercised within a defined territory the powers of a sovereign people, *having* a tribal organization, their own system of laws, and *a government* with the usual branches, executive, legislative, and judicial." *Turner*, 248 U.S. at 355 (emphasis added). That tribes *have* a "government," however, does not lead to the unmistakable conclusion that Congress was thinking of Indian tribes when it included the word "government" in FCRA half a century after *Turner* was decided.

Likewise, Justice Sotomayor's concurrence in *Bay Mills* did not explicitly consider the definition of "government" in the context of congressional abrogation and whether that included Indian tribes. Indeed, the concurrence actually reinforces the fact that the Supreme Court has "repeatedly relied on [the] characterization [of Indian tribes as domestic dependent nations] in subsequent cases." *Bay Mills Indian Comty.,* 134 S. Ct. at 2041 (Sotomayor, J., concurring).

These cases reinforce the fact that Indian tribes are domestic dependent nations that are sovereign. Indian tribes have attributes of sovereignty, such as *having* a government. The cited case law provides no indication of what Congress intended when it used the word "government" in FCRA, and no basis to conclude that Congress unequivocally intended FCRA to abrogate tribal sovereign immunity, one of the components of such sovereignty.

As other statutes demonstrate, Congress has considered Indian tribes to be different from other forms of "government," necessitating separate and distinct appellation. *See, e.g.,* 7 U.S.C. § 8310(a) (listing "States or political subdivisions of States, national governments of foreign countries, local governments of foreign countries, domestic or international organizations, domestic or international associations, Indian tribes, and other persons"); 42 U.S.C. § 9601(16) (listing "any State or local government, any foreign government, any Indian tribe"); 16 U.S.C. § 698v-11(b)(3)(C)(iii) (listing "State and local governments; Indian tribes and pueblos"); 49 U.S.C. § 5121(g) (listing "a unit of State or local government, an Indian tribe, a foreign government"); 28 U.S.C. § 3701(2) (expressly defining "governmental entity" to include Indian tribes by reference to 25 U.S.C. § 2703(5).) And, where Congress intends "government" or similar terms to include Indian tribes, it says so expressly. *See* Pet. at 16 (listing U.S. Code provisions containing language

"including Indian Tribes" to qualify references to government.)

If the word "government" in a statute were intended by Congress to unequivocally include Indian tribes, there would be no need for Congress elsewhere to separately list Indian tribes in addition to the words "government" and "governmental units." Congress knows how to make its statutes applicable to Indian tribes, and it elected not to do so in FCRA. Under Petitioner's position, Congress would simply need to reference "any" or "a" "government" to reach every conceivable type of government including nations or communities that possess the characteristic of self-governing or that have governments. Yet why then does Congress instead specify which types of governments it intends to include? The mere fact that Congress specifies when it intends to include Indian tribes makes the more general word "government" in FCRA ambiguous and equivocal, as both lower courts correctly held. The decision in this case correctly stated well-established law regarding tribal sovereign immunity and properly applied that law to FCRA to hold that it does not unequivocally and clearly abrogate tribal sovereign immunity.

II. This Case Does Not Present A Standing Question Meriting Review.

Petitioner also presents to this Court the question of 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 [and thus, violating FACTA] has suffered a concrete injury sufficient to confer standing under Article III of the United States Constitution." Pet. at *i*. However, this question is not adequately developed in this case because it was not decided by the district court or the Seventh Circuit. Further, there is no conflict among the circuits on the Article III standing question. In short, this is not the case to consider the posited Article III question. It certainly does not present compelling reasons for review.

A. Article III Standing Was Not Determined In This Case.

As an initial matter, review of the Article III question presented by Petitioner should be denied because neither the district court nor the Seventh Circuit substantively considered or decided the matter. " 'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.' " *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212–13 (1998) (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)); *see also Meyer v. Holley,* 537 U.S. 280, 291 (2003) ("But in the absence of consideration of that matter by the Court of Appeals, we shall not consider it.") Review generally will not be granted to address questions not pressed by the parties or passed upon by the court of appeals. 17 Wright & Miller, Fed. Prac. & Proc. § 4036 (3d ed.).

In addition, should the Court desire to entertain the question of Article III standing under FCRA, this is not the case to do so. The post-*Spokeo* law has not yet been fully developed and applied in the federal appeals courts. Consideration of that question would be more prudent after the law has developed to see if any conflict arises, and, at a minimum, to decide such question in a case where it has been pressed by the parties and decided by the lower courts. This case, however, is not the appropriate vehicle for the Court to consider the question. Because neither the district court nor the Seventh Circuit addressed the issue substantively or with *Spokeo* in mind, the issue is not even minimally developed for the Court's review. The Petition should be denied for this reason alone.

B. There Is No Circuit Split Regarding Article III Standing Under FACTA.

Even if the lower courts had decided the issue of Article III standing, review would still be inappropriate because no circuit split exists on this issue. A conflict potentially meriting Supreme Court review is where the "*United States court of appeals* has entered a decision in conflict with the decision of *another United States court of appeals on the same important matter* . . . ." U.S. Sup. Ct. R. 10(a) (emphasis added); *see also United States v. O'Malley,* 383 U.S. 627, 630 (1966). It may also consider whether "a United States court of appeals has decided *an important question of federal law* that has not been, but should be, settled by this Court, or has

decided *an important federal question* in a way that conflicts with relevant decisions of this Court." U.S. Sup. Ct. R. 10(c) (emphasis added.)

The Seventh Circuit's decision in this case does not create any such conflict regarding Article III standing for an alleged FACTA violation. Because the decision did not determine Article III standing, there is no conflict with *Spokeo* or any other federal decision. Further, Petitioner identifies no other conflict among the circuits regarding Article III standing for an alleged FACTA violation, apparently because no such conflict exists.[4]

Petitioner asserts a "federal conflict" among the district courts post-*Spokeo* as to whether a person who claims an alleged violation of FACTA has Article III standing. Pet. at 17. Yet, none of the district court decisions cited by Petitioner, other than *Meyers II* (*see supra*, footnote 4), has given rise to a decision by a court of appeals on the question presented to

[4] Petitioner has submitted *Meyers v. Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724, 725 (7th Cir. 2016) ("*Meyers II*") to this Court as supplemental authority. In *Meyers II*, a FACTA case involving the same plaintiff, the Seventh Circuit determined Article III standing, holding there was no such standing alleged for the FACTA claim. *Meyers II* does not conflict with this case since the issue was not decided here.

this Court.[5] A mere district court split does not provide a basis for Supreme Court review.

There is no conflict among the circuits regarding the question of Article III standing for a claim of violation of the FACTA truncation requirements. The Petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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[5] The lack of a circuit split is confirmed in *Meyers II*: "We note that while we are the first circuit to address the question of standing in FACTA cases after *Spokeo*, our decision is in accord with those of our sister circuits in similar statutory-injury cases." *Meyers II*, 843 F.3d at 728.

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