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

PETITION FOR A WRIT OF CERTIORARI

MARY ELIZABETH KIRBY
THOMAS A. ZIMMERMAN, JR.*
MATTHEW C. DE RE
ZIMMERMAN LAW OFFICES, PC
77 W. Washington Street, Suite 1220
Chicago, Illinois 60602
tom@attorneyzim.com

Counsel for Petitioner

* *Counsel of Record*

269698

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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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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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; *see 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).

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,

MARY ELIZABETH KIRBY
THOMAS A. ZIMMERMAN, JR.*
MATTHEW C. DE RE
ZIMMERMAN LAW OFFICES, PC
77 W. Washington Street, Suite 1220
Chicago, Illinois 60602
tom@attorneyzim.com

Counsel for Petitioner

* *Counsel of Record*

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