UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JEREMY MEYERS, individually, and on behalf of all others similarly situated,

Plaintiff,

v.

Case No. 15-cv-445

ONEIDA TRIBE OF INDIANS OF WISCONSIN,

Defendant.

THE ONEIDA TRIBE OF INDIANS OF WISCONSIN'S BRIEF IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Plaintiff Jeremy Meyers ("Plaintiff") brings this action against Defendant The Oneida Tribe of Indians of Wisconsin ("Tribe") under the Fair and Accurate Credit Transactions Act ("FACTA") amendment to the Fair Credit Reporting Act ("FCRA"). (Compl. ¶ 1.) Disregarding the many legal deficiencies with Plaintiff's claims for purposes of this motion, this Court need not, and indeed cannot, consider the sufficiency or merits of Plaintiff's claims against the Tribe because it lacks subject matter jurisdiction to do so.

The Tribe – a sovereign Indian Nation – enjoys sovereign immunity barring Plaintiff's suit as a matter of law. *See* Compl. ¶ 6 ("At all relevant times, Defendant [the Tribe] was a sovereign Indian nation…."). Plaintiff, who has the burden of proving that jurisdiction exists, cannot demonstrate that Congress abrogated tribal sovereign immunity when it enacted the FCRA. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014). Moreover, Plaintiff lacks standing because he alleges no concrete and particularized harm. As a matter of law,

therefore, this court lacks subject matter jurisdiction, and Plaintiff's action against the Tribe must be dismissed.

ARGUMENT

I. STANDARD OF REVIEW.

Courts address issues of tribal sovereign immunity pursuant to motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), Fed. R. Civ. P. ("Rule 12(b)(1)"). *E.F.W. v. St. Stephen's Indian High Sch.*, 264 F.3d 1297, 1302–03 (10th Cir. 2001) ("Tribal sovereign immunity is a matter of subject matter jurisdiction, which may be challenged by a motion to dismiss under [Rule] 12(b)(1)."") (citation omitted); *cf. Miller v. Coyhis*, 877 F. Supp. 1262, 1267-68 (E.D. Wis. 1995) (dismissing suit pursuant to Rule 12(b)(1) due to tribal sovereign immunity). Moreover, because standing is an essential jurisdictional requirement, "[a] challenge of standing is [also] a challenge to a court's subject-matter jurisdiction." *Conlon v. Sebelius*, 923 F. Supp. 2d 1126, 1130 (N.D. Ill. 2013). When a defendant challenges subject-matter jurisdiction, the plaintiff, as the party asserting jurisdiction, bears the burden of establishing jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "When reviewing a dismissal for lack of subject-matter jurisdiction . . . [the] district court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff." *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 625 (7th Cir. 2007) (quoting *Long v. Shorebank Dev. Corp.*, 182 F.3d 548, 554 (7th Cir. 1999)).

II. THE TRIBE IS IMMUNE FROM SUIT BECAUSE CONGRESS DID NOT ABROGATE TRIBAL SOVEREIGN IMMUNITY WHEN IT ENACTED THE 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." (internal citation omitted)).[1] The doctrine of tribal sovereign immunity is rooted in federal common law and reflects the federal Constitution's treatment of Indian tribes as sovereign entities under the Indian commerce clause. *See* U.S. Const. art. I, § 8. As the Supreme 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 Enters., 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); *Bay Mills*, 134 S. Ct. at 2037 ("[t]he 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 Fla.*, 181 F.3d 1237, 1242 (11th Cir. 1999) (emphasis added); *Florida Paraplegic, Ass'n v. Miccosukee Tribe of Indians of Fla.*, 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.") (emphasis added). In addition, "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*, 132 S. Ct. 1441, 1448 (2012) ("Any

[1] Because the Tribe has not waived its immunity and the Plaintiff has not alleged that it has done so, the only issue that needs to be examined is whether Congress abrogated the Tribe's immunity.

ambiguities in the statutory language are to be construed in favor of immunity, so that the [Tribe's] consent to be sued is never enlarged beyond what a fair reading of the text requires. Ambiguity exists if there is a plausible interpretation of the statute that would not authorize" suit against the Tribe.) (internal citations omitted).

The 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). The FACTA, for its part, 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). Moreover, any "person" who willfully or negligently fails to comply with the FCRA is liable for damages. 15 U.S.C. §§ 1681n(a), 1681o(a). Neither the FCRA nor FACTA, which was enacted as an amendment to the FCRA, contains language that unequivocally, unmistakably, and definitively suggests that Indian Tribes are "persons" pursuant to the FCRA.

First, the statute makes no reference to Indian Tribes. As one court recently found, "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.'" *In re Greektown Holdings, LLC*, No. 14-14103, 2015 WL 3632202, at *17 (E.D. Mich. June 9, 2015) (reversing bankruptcy court's finding that the Bankruptcy Code's application to "other domestic government" applied to Indian Tribes and concluding that Congress did not abrogate tribal immunity). Conversely, courts often look to definitional sections of statutes to determine whether tribal immunity has been abrogated. *See e.g., Osage Tribal Council v. U.S. Dep't of Labor*, 187 F.3d 1174, 1182 (10th Cir. 1999) (Congress intended

the Safe Drinking Water Act to abrogate tribal sovereign immunity where jurisdiction was granted over "persons" and "persons" was defined to include "municipalities" which in turn was defined to include "Indian tribes"); *United States v. Weddell*, 12 F. Supp. 2d 999, 1000 (D.S.D. 1998) *aff'd*, 187 F.3d 645 (8th Cir. 1999) (concluding that Indian tribe was subject to garnishment under the Federal Debt Collection Procedure Act where "garnishee" defined to include "person" and person defined to include an Indian tribe); *Blue Legs v. U.S. Bureau of Indian Affairs*, 867 F.2d 1094, 1097 (8th Cir.1989) (Congress intended the Resource Conservation and Recovery Act to abrogate tribal immunity where "person" is defined to include a municipality and municipality is defined to include an Indian tribe); *Vandever v. Osage Nation Enter., Inc.*, No. 06-CV-380-GKF-TLW, 2009 WL 702776, at *4 (N.D. Okla. Mar. 16, 2009) (Congress abrogated sovereign immunity of the tribes with respect to certain ERISA plans where the term "governmental plan" includes a plan which is established and maintained by an Indian tribal government).

By contrast, where the definitional section of a statute does not include Indian Tribes or the statute itself does not specifically assert jurisdiction over Indian tribes, courts generally find the statute to be insufficient to express a clear and unequivocal congressional abrogation of tribal sovereign immunity. *See Santa Clara,* 436 U.S. at 59 ("Nothing on the face of Title I of the [Indian Civil Rights Act] purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief."); *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1264 (10th Cir. 1998) ("the [Ute Partition and Termination Act] is devoid of any language clearly expressing an intent to subject the Tribe to lawsuits in federal court over the joint management of the indivisible tribal assets."); *Bassett v. Mashantucket Pequot Tribe,* 204 F.3d 343, 357–58 (2d Cir. 2000) (Indian tribe immune from suit under the Copyright Act because

"[n]othing on the face of the Copyright Act purports to subject tribes to the jurisdiction of the federal courts in civil actions brought by private parties") (internal citations omitted); *Florida Paraplegic,* 166 F.3d at 1131 (Congress did not clearly express an intent in the Americans with Disabilities Act to abrogate tribal sovereign immunity, although it explicitly provided that "states" were not immune from suit under the ADA, because it failed to specifically mention Indian tribes); *Smith v. Babbitt,* 875 F. Supp. 1353, 1365 (D. Minn. 1995), *aff'd,* 100 F.3d 556 (8th Cir. 1996), *cert. denied sub nom. Feezor v. Babbitt*, 522 U.S. 807 (1997) ("RICO contains no language which suggests Congress 'unequivocally' waived Indian tribes' sovereign immunity.") (cited approvingly by *Buchanan v. Sokaogon Chippewa Tribe*, 40 F. Supp. 2d 1043, 1047 (E.D. Wis. 1999) (barring RICO claims against Indian Tribe). A Congressional abrogation of tribal immunity "cannot be implied." *Santa Clara Pueblo,* 436 U.S. at 58.

A recent decision from the Eastern District of Michigan is instructive. *In re Greektown Holdings, LLC, supra*. In *Greektown Holdings*, the court held that a Tribe was entitled to sovereign immunity, refusing to find that Congress abrogated tribal immunity under sections 106(a) and 101(27) of the Bankruptcy Code. The court reasoned that "[w]hile 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[]'" and that "Congress did not do so in sections 106(a) and 101(27) of the Bankruptcy Code". *Id.* at *19 (emphasis added). The court added that:

> While one may question the historical legitimacy of the doctrine, and one may be uncomfortable with the notion that Indian tribes are subject to many laws yet in many cases we are powerless to enforce them against the tribes, and ***while one may find it tempting to deduce that Congress actually meant to include Indian tribes when it employed the catchall phrase "other domestic governments," notwithstanding the fact that Indian tribes are not mentioned by name in any provision of the Bankruptcy Code,***

> ***this Court has recent, explicit direction from the Supreme Court rejecting this interpretation.*** This Court is instructed in *Bay Mills* that Indian tribes retain every bit of sovereign immunity they have historically possessed and that, absent clear, unequivocal and unmistakable language abrogating that immunity, it is not our place to lightly depart from centuries of unwavering judicial deference to Congress's role in defining with exactitude the instances in which it is appropriate to abrogate the sovereign immunity of Indian tribes.

Id. (emphasis added.) The term "government" in the FCRA is equally ambiguous as the term "other domestic governments" in the Bankruptcy Code. Such ambiguity, therefore, counsels against a finding of Congressional abrogation and would run afoul of the Supreme Court's recent affirmation in *Bay Mills*. 134 S. Ct. at 2039 ("We will not rewrite Congress's handiwork. Nor will we create a freestanding exception to tribal immunity for all off-reservation commercial conduct. [. . .] To choose it now would entail both overthrowing our precedent and usurping Congress's current policy judgment.").

Second, nothing in the text of the FCRA leads to the unambiguous conclusion that "government" as listed in the statute means an Indian Tribe. In a number of statutes, for instance, Congress has clearly considered Indian tribes to be different from other forms of "government," and needing 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, Indian Tribes and other persons."); 42 U.S.C. § 9601(16) ("CERCLA") (listing "any State or local government, any foreign government, any Indian Tribe…."); 16 U.S.C. § 698v–4(b)(4) (listing "Federal, State, and local governmental units, and [ ] Indian Tribes and Pueblos…."); 49 U.S.C. § 5121(g) (listing "a unit of State or local government, an Indian Tribe, a foreign government…."). Even the Indian Commerce Clause in the U.S. Constitution distinguishes foreign nations and states

from Indian tribes. U.S. Const. art I, § 8. Congress knows how to expressly make its statutes applicable to Indian tribes and here it elected not to do so.

Moreover, even though the Seventh Circuit has found that FCRA § 1681a(b) waives the United States' immunity from damages for violations of the FCRA, *Bormes v. United States*, 759 F.3d 793, 795 (7th Cir. 2014), the Court also found that "federal statutes can apply to the national government even if principles of sovereign immunity prevent awards of damages against the states" and "Congress can give consent for itself even though not for the states". *Id.* at 797. The same is true of sovereign Tribal governments. *See, e.g.*, *Stellick v. U.S. Dep't of Educ.*, No. 11-CV-0730 (PJS/JJG), 2013 WL 673856, at *3 (D. Minn. Feb. 25, 2013) (waiver of United States' sovereign immunity does not constitute waiver of tribal immunity); *United States v. Karlen*, 476 F. Supp. 306, 310 (D.S.D. 1979) ("A waiver of the immunity of the United States alone cannot also waive Tribal immunity in the absence of the 'unequivocal expression of legislative intent' that *Santa Clara Pueblo* contemplated.") Thus, even though the Seventh Circuit has found that the FCRA abrogates the United States' immunity, the definition of a "person" under the FCRA cannot be said to be an unequivocal indication that Congress intended to encompass Indian Tribes.[2] 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.

[2] Even though the definition of "person" under the FCRA includes a "government," courts have held that states are nonetheless immune from suit under the FCRA. *See Bardes v. South Carolina,* C/A No. 2:10-559-PMD-RSC, 2010 WL 1498332, at *4 (D.S.C. Mar.11, 2010) (State of South Carolina has Eleventh Amendment immunity with respect to claims raised under the FCRA); *Densborn v. Trans Union, LLC,* No. 08 C 3631, 2009 WL 331466 (N.D. Ill. Feb.10, 2009) (State agency entitled to sovereign immunity in debtor's suit brought under the FCRA); *Peaslee v. Ill. Student Assistance Comm'n,* 2008 No. 08 C 3167, 2008 WL 4833124 (N.D. Ill. Oct.27, 2008); *Alexander v. Dist. Ct. of Md. for Charles Cnty.*, No. DKC 2007-1647, 2008 WL 6124449, at *7 (D. Md. Mar. 20, 2008) (FCRA claims raised against Maryland state courts are barred by Eleventh Amendment immunity); *Betts v. Commw. of Va.*, No. Civ. 3:06CV753, 2007 WL 515406, at *3 (E.D. Va. Feb.2, 2007).

Finally, even if the statute itself did not unambiguously demonstrate that Congress did not intend to abrogate tribal sovereign immunity, the evolution of the statute shows that to be the case. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). "[T]he meaning of statutory language, plain or not, depends on context." As the Seventh Circuit has explained:

> Legislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood. It may show, too, that words with a denotation "clear" to an outsider are terms of art, with an equally 'clear' but different meaning to an insider . . . . Clarity depends on context, which legislative history may illuminate.

In re Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989).

At the time that the FCRA was enacted in 1970, its remedial provisions applied not to "person[s]," but to consumer reporting agencies. *See* Pub. L. No. 104–208, § 2412(a), 110 Stat. 3009, 3446 (1996). No Indian Tribe was acting as a consumer reporting agency in 1970, and thus no Tribe could have been held liable under the FCRA at the time that the FCRA was enacted. Thus, Congress did not include within the FCRA a provision explicitly waiving tribal sovereign immunity because Congress never intended Indian tribes to be subject to liability under the FCRA. The remedial provisions of the FCRA were not broadened to apply to all "persons" until 1996, and the word "persons" was not drafted to include Indian tribes as it has done numerous times with its other statutes, *see supra*, even though Congress broadened the reach of the FCRA beyond consumer reporting agencies. Thus, the history of the FCRA shows that Congress did not abrogate Indian sovereign immunity because Congress never intended Indian tribes to be liable under the FCRA.

Thus, nothing in the express language or the history of the FCRA shows Congressional intent to abrogate tribal sovereign immunity. As such, the Court lacks subject matter jurisdiction over Plaintiffs' claims against the Tribe, and this action must be dismissed.

III. PLAINTIFF LACKS ARTICLE III STANDING TO PURSUE HIS CLAIM AGAINST DEFENDANT.

Plaintiff's Complaint must be dismissed for the additional, independent reason that Plaintiff alleges no concrete and particularized harm; therefore, he lacks standing to invoke this Court's jurisdiction. Instead of an injury-in-fact, Plaintiff asserts only that a statutorily-created interest of his under the FCRA has been violated. However, a bare violation of a statute, without more, is insufficient to create a "case" or "controversy" to establish standing under the U.S. Const. Art. III, § 2, cl. 1. Because of this jurisdictional defect, the Complaint must be dismissed.

Before a federal court may entertain a claim, "the threshold question" is whether the plaintiff's claim properly invokes the jurisdiction of the federal courts: in other words, whether the plaintiff has alleged a claim that gives rise to standing under Article III. *Freedom from Religion Found., Inc. v. Bugher*, 249 F.3d 606, 609 (7th Cir. 2001) (citation omitted).

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan , 504 U.S. at 560-61(1992) (internal citations omitted); *see also Tobin for Governor v. Ill. State Bd. of Elections*, 268 F.3d 517, 527 (7th Cir. 2001). These three elements establish the "irreducible constitutional minimum of standing." *Lujan*, 504 U.S. at 560. Plaintiff bears the burden of establishing these elements. *Id.* at 563.

An injury-in-fact is "more than an injury to a cognizable interest." *Id.* Rather, to meet the "injury-in-fact" test, the plaintiff must be "'directly' affected" by the injury. *Id.* To put it another way, the plaintiff must "show that he personally has suffered some actual or threatened

injury as a result of the putatively illegal conduct of the defendant." *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99 (1979); *see also Tobin for Governor*, 268 F.3d at 528 ("[T]he plaintiff must establish that he has sustained or is immediately in danger of sustaining some direct injury."). When a complaint lacks allegations of an injury-in-fact that is (1) actual or imminent and (2) concrete or particularized, the complaint must be dismissed for lack of jurisdiction. *See, id.* at 527.

It necessarily follows, therefore, that in the absence of an injury-in-fact, the second element of standing also cannot be satisfied. There can be no "causal connection" between a "non-injury" and the alleged conduct about which is complained. *See Lujan,* 504 U.S. at 560. Conduct cannot "cause" a non-existent injury that is traceable to the allegedly offending party.

Plaintiff alleges that the Tribe provided him with receipts that contained more than five digits of his credit card number. (Compl. ¶¶ 11-13.) Nonetheless, Plaintiff does not allege that he suffered an actual or threatened injury by the provision of such receipts. For example, Plaintiff fails to allege that someone used the information on his receipts to make unauthorized charges on his credit card, or that such information was used to steal his identity in some way. Plaintiff alleges no harm that would demonstrate an injury-in-fact that is concrete and particularized. Accordingly, Plaintiff does not (and cannot) allege any injury-in-fact was caused by and traced back to the Tribe.

Rather, Plaintiff alleges that even though he has asserted no actual injury, he is nonetheless entitled to the statutory damages between $100 and $1,000 found at 15 U.S.C. § 1681c(g)(1) of the FCRA because of the Tribe's alleged violation of the FACTA. (Compl. ¶ 2.) This section states: "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." The FCRA provides that "[a]ny 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 . . . 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 . . . ." 15 U.S.C. § 1681n(a)(1)(A). Plaintiff has alleged no actual injury and seeks only statutory damages. (Compl., WHEREFORE clause.)

Such statutorily-created remedies, however, are insufficient to establish Article III standing. "It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). Although Congress may statutorily broaden "the categories of injury that may be alleged in support of standing" it may not do so at the expense of "abandoning the requirement that the party seeking review must himself have suffered an injury." *Lujan*, 504 U.S. at 578 (internal citation omitted). In other words, Congress may establish a statutory right and authorize a plaintiff to pursue that right (*i.e.*, provide statutory standing), but it does not necessarily follow that because a plaintiff has statutory standing, he or she automatically has Article III standing.

For example, the Employee Retirement Income Security Act of 1974 ("ERISA") provides that "[a] civil action may be brought . . . by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title . . . ." 29 U.S.C. § 1132(a)(2). In analyzing claims brought under this section by the plaintiff-appellants (participants on behalf of their pension plans), the Fourth Circuit determined that this section conferred statutory standing upon them to do so. *David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013). This was not, however,

the end of the court's standing inquiry; it then went on to address the issue of Article III standing.

The plaintiff-appellants argued that "deprivation of their statutory right . . . is sufficient to constitute an injury-in-fact for Article III standing." *David*, 704 F.3d at 338. Defendant-appellees, however, contended that the plaintiff-appellants suffered no injury-in-fact because the plaintiff-appellants were "entitled to receive a set level of retirement benefits that is unaffected by the performance of the Plan's underlying investments" and the plaintiff-appellants "could not demonstrate actual or imminent harm because the Plan was overfunded when they filed their claims." *Id.* at 334. The Fourth Circuit rejected the plaintiff-appellants' argument that a deprivation of statutory rights conferred on them Article III standing; instead, it agreed with defendant-appellees that because the plaintiff-appellants did not suffer any concrete harm, they lacked the requisite standing to invoke federal court jurisdiction on certain of their claims. *Id.* at 338-9; *see also Kendall v. Emps. Ret. Plan of Avon Prods.*, 561 F.3d 112, 121 (2d Cir. 2009) (concluding that "[w]hile plan fiduciaries have a statutory duty to comply with ERISA under § 1104(a)(1)(D), [the plaintiff] must allege some injury or deprivation of a specific right that arose from a violation of that duty in order to meet the injury-in-fact requirement.")

The Seventh Circuit has not specifically addressed whether a mere violation of a federal statute, such as the FCRA, without an allegation of concrete and particularized harm, confers Article III standing on a plaintiff. In *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 952-54 (7th Cir. 2006), the Seventh Circuit permitted a putative class action under the FCRA to proceed on the basis of a claim for statutory damages. Relying on *Murray*, this Court held in *Schroeder v. Capitol Indemnity Corp.*, No. 05-C-643, 2006 WL 2009053, at *5 (E.D. Wis. July 17, 2006), that "actual damages are not an essential element to a claim for willful violation of the FCRA."

However, neither this Court nor the Seventh Circuit in *Murray* considered whether an allegation of statutory damages under the FCRA, without more, satisfies Article III standing.[3]

The issue of Article III standing is presented squarely and independently here. The Seventh Circuit has not addressed the question and decisions of other district courts are not binding precedent. "[D]ecisions of other district judges are not binding precedent. . . .Until guidance from . . . the Seventh Circuit comes along, each judge in this district is entitled to add his own interpretation to the mix." *Budgetel Inns, Inc. v. Micros Sys., Inc.*, 34 F. Supp. 2d 720, 725 (E.D. Wis. 1999) citing *TMF Tool Co. v. Muller*, 913 F.2d 1185, 1191 (7th Cir. 1990); *United States v. Articles of Drug Consisting of 203 Paper Bags*, 818 F.2d 569, 572 (7th Cir. 1987).

This Court should not conflate constitutional standing with statutory standing. *See David*, 704 F.3d at 338. Plaintiff has not alleged actual injury, and therefore, has not established Article III standing. Accordingly, Plaintiff has not met the threshold standing requirement to invoke this Court's jurisdiction, and the Complaint must, therefore, be dismissed.

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[3] District courts in the Seventh Circuit have generally interpreted *Murray* to mean that an allegation of actual damages is not a necessary precondition for a court's enforcement of a statute when the statute provides for statutory damages. *See Bernal v. Corestar Fin. Group*, No. 06C0009, 2006 WL 2038195, at *1 (E.D. Wis. July 20, 2006); *Bonner v. Home123 Corp.*, No. 2:05-CV-146 PS, 2006 WL 1518974, at *12 (N.D. Ind. May 25, 2006). However, these decisions, like the decision from this Court in *Schroeder*, 2006 WL 2009053, did not address the Article III standing question that is presented here.

In analyzing standing under the FCRA, Judge Clevert in *Armes v. Sogro, Inc.*, 932 F. Supp. 2d 931, 938-39 (E.D. Wis. 2013), recognized that *Murray* did not specifically address the question of Article III standing. *See id.* at 937-8. Nonetheless, relying on *Murray*, the *Armes* court reasoned that because the Seventh Circuit "did not mention any standing issue," there must not have been any. *Id.* at 937.

When presented with the same question (whether plaintiffs had Article III standing when they had alleged no actual harm in connection with a purported FCRA violation) District Judge Springmann in *Brittingham v. Cerasimo, Inc.*, 621 F. Supp. 2d 646, 649 (N.D. Ind. 2009), agreed that the Seventh Circuit had not addressed this question. However, she arrived at a similar conclusion as Judge Clevert. *Id.* at 650. That is, she found that because the Seventh Circuit did not address the standing issue in *Murray*, the inference is "not that the plaintiffs lack standing." *Id.*

IV. THE UNITED STATES SUPREME COURT HAS ACCEPTED CERTIORARI OF A CASE PRESENTING THIS EXACT QUESTION.

The United States Supreme Court has recently granted a petition for certiorari on the very question that the Tribe presents here: "Whether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute."[4] Petition for Writ of Certiorari, *Spokeo, Inc. v. Robins*, 135 S. Ct. 1892 (2015), *Spokeo, Inc. v. Robins*, No. 13–1339 (U.S.).[5]

In *Robins*, the plaintiff asserted a willful violation of the FCRA, without any actual harm. *Robins v. Spokeo, Inc*., No. CV10-05306 ODW (AGRx), 2011 WL 597867, at *1 (C.D. Cal. Jan. 27, 2011) *reinstatement granted*, No. CV10-05306 ODW (AGRx), 2011 WL 11562151 (C.D. Cal. Sept. 19, 2011). After amending his complaint to add an allegation of actual harm, District Judge Wright found that plaintiff's alleged harm was "speculative, attenuated and implausible." *Robins*, 2011 WL 11562151, at *1. Moreover, he concluded that "[m]ere violation of the Fair

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[4] There is a circuit split on this question. The Sixth Circuit in *Beaudry v. TeleCheck Servs., Inc.*, 579 F.3d 702, 707 (6th Cir. 2009) held that there was no Article III standing problem for a plaintiff who asserted a willful violation of FCRA but alleged no actual injury because "Congress has the power to create new legal rights, [including] right[s] of action whose only injury-in-fact involves the violation of that statutory right." (Internal citations omitted.)

In contrast, as discussed in Section III. above, the Second and Fourth Circuits have found that even though a statute passed by Congress may confer statutory standing, such standing is not to be conflated with Article III standing; they are wholly distinct requirements. *David*, 704 F. 3d at 333, 338-39; *see also Kendall*, 561 F.3d at 118-19.

Further, the Eight Circuit has opined that "[i]t does not necessarily follow from [FCRA, 15 U.S.C. § 1681n(a)(1)(A)] that statutory damages are available where a plaintiff fails to prove actual damages. A reasonable reading of the statute could still require proof of actual damages but simply substitute statutory rather than actual damages for the purpose of calculating the damage award." *Dowell v. Wells Fargo Bank, NA*, 517 F.3d 1024, 1026 (8th Cir. 2008).

[5] Petition for Writ of Certiorari available at http://tinyurl.com/qch334t.

Credit Reporting Act does not confer Article III standing, moreover, where no injury in fact is properly pled." *Id.* As a result, the court dismissed the action.

On appeal, the Ninth Circuit considered only the question of whether plaintiff had Article III standing for the alleged FCRA violation. *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014). The Ninth Circuit first found that the statute did not require a showing of actual harm. *Id.* It next decided that, although the "Constitution limits the power of Congress to confer standing," "violations of statutory rights created by the FCRA are 'concrete, *de facto* injuries'" that Congress had the authority to elevate to "legally cognizable injuries." *Id.* at 413.

In so holding, however, the Ninth Circuit recognized that it was "boiling down" the three-prong Article III standing inquiry into a one-prong test: whether the statute creates an "injury-in-fact." *Robins*, 742 F.3d at 414. "When the injury in fact is the violation of a statutory right that we inferred from the existence of a private cause of action, causation and redressability will usually be satisfied." *Id.* Put another way, the Ninth Circuit's holding has the practical effect of disregarding the second and third elements of Article III standing. *See id.*

Accordingly, in *Spokeo*, the Supreme Court will have the opportunity in the context of Article III standing to address whether a violation of the FCRA constitutes a sufficient injury without a showing of any actual harm. That is, it will determine whether a mere violation of a federal statute without a showing of any actual injury (and the other two standing elements) is sufficient to invoke the jurisdiction of the federal courts.

With this background, this Court has occasion to determine that Plaintiff's claim fails to give rise to the bedrock requirement of standing to invoke federal jurisdiction. The reasoning of the Second and Fourth Circuits is persuasive. Even though Congress may have the authority to

create a statutory right, a plaintiff must still suffer a distinct injury-in-fact to invoke federal jurisdiction. On this basis, the Court should dismiss Plaintiff's Complaint.

CONCLUSION

For the foregoing reasons, the Tribe respectfully requests that the Court dismiss Plaintiff's Complaint.

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