No. 15-3127

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

Plaintiff-Appellant,

-vs-

THE ONEIDA TRIBE OF INDIANS OF WISCONSIN,

Defendant-Appellee.

On Appeal from the U.S. District Court,
Eastern District of Wisconsin, Green Bay Division
File Number 15 cv 445
The Honorable William C. Griesbach, Presiding.

REPLY BRIEF OF
PLAINTIFF-APPELLANT JEREMY MEYERS

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ORAL ARGUMENT REQUESTED

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ARGUMENT

A. Congress Expressed an Unequivocal Intent to Abrogate Indian Immunity in FCRA Because Indian Tribes are Governments.

The Oneida Tribe of Indians of Wisconsin ("The Oneida Tribe") seeks for this Court to ignore not only its own precedent interpreting the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, *et seq.*, but also decisions of numerous other courts, including the Supreme Court regarding the status of Indian tribes as governments. This Court determined in *Bormes v. United States*, 759 F.3d 793 (7th Cir. 2014), that because FCRA's definition of "person" includes "any government," 15 U.S.C. § 1681a(b), FCRA abrogates immunity for *every* government. *Bormes*, 759 F.3d at 795. Long-standing court precedent and federal statutes both establish that courts and Congress consider Indian tribes to be governments. As such, FCRA's use of the term "any government" unequivocally abrogates Indian sovereign immunity.

1. *Bormes* Correctly Held that FCRA Abrogates Sovereign Immunity for *Every* Type of Government.

Congress may abrogate Indian sovereign immunity by unequivocally expressing its intent to do so. *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2030 (2014). When waiving sovereign immunity, Congress does not need to recite any magic words, but instead only needs to express its unequivocal intent. *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25 (1st Cir. 2006) ("there is no requirement that talismanic phrases be

employed.”). In *Bormes*, this Court held that FCRA waived the federal sovereign immunity for *any* government. 759 F.3d at 795.

The Oneida Tribe asserts that this Court’s statement in *Bormes* that the term “any government” waives sovereign immunity and “authoriz[es] monetary relief against *every* kind of government,” 759 F.3d at 795, was dicta. (Brief of Defendant-Appellant Oneida Tribe of Indians of Wisconsin (“Resp. Br.”) at 6). The Oneida Tribe is wrong, as that determination was fundamental to this Court’s conclusion that FCRA waived the federal government’s immunity for violating FCRA. *See id.* This Court held that FCRA abrogated the federal government’s immunity precisely because this Court held that the term “any government” means “*every* government. *See id.*

To support its claim, the Oneida Tribe argues that the term “any government” cannot mean *every* government because states are immune from FCRA suits. (Resp. Br. at 7-8). However, this Court did not determine that states retain their immunity because states are *not* governments. Instead, states retain their sovereign immunity under FCRA *only* because Congress enacted FCRA through its Commerce Clause power, which Congress cannot use to abrogate a state’s Eleventh Amendment sovereign immunity. *See id.* at 796; *Sorrell v. Illinois Student Asst. Comm’n*, 314 F.Supp.2d 813, 817 (C.D.

Ill. 2004).[1] Further, this Court indicated that even foreign states would not be immune for violating FCRA. *Bormes*, 759 F.3d at 796-97.

Therefore, contrary to the Oneida Tribe's claim, only the Eleventh Amendment prevents FCRA—which was enacted pursuant to the Commerce Clause—from abrogating sovereign immunity for *every* kind of government, to wit: states. However, Indian tribes do not have the Eleventh Amendment protection afforded to states, and tribes are expressly subject to the Commerce Clause. *See* U.S. CONST. Art. I, § 8, cl. 3. Therefore, FCRA abrogates tribal immunity because Indian tribes are governments.

Similarly, *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055 (9th Cir. 2004), properly held that Congress' use of the term "government" was sufficient to abrogate tribal sovereignty. The Oneida Tribe attempts to diminish *Krystal Energy*'s holding by claiming that *Krystal Energy* is "an outlier." (Resp. Br. at 15). However, contrary to the Oneida Tribe's claim, several other courts have reached the same conclusion as *Krystal Energy*. *See, e.g.*, *In re Russell*, 293 B.R. 34 (Bankr. D. Ariz. 2003) ("Sovereign immunity is abrogated as to all domestic governments. Indian tribes are domestic governments. Hence sovereign immunity is abrogated as to Indian tribes."); *In re Vianese*, 195 B.R. 572 (Bankr. N.D.N.Y. 1995) ("Indian nations are

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[1] Some courts have held that the term "any government" does not unequivocally include states. However, those lower court decisions were prior to this Court's decision in *Bormes*. *See, e.g.*, *Peaslee v. Ill. Student Asst. Comm'n*, 08C3167, 2008 WL 4833124 (N.D. Ill. 2008).

considered 'domestic dependent nations' and as such comprise 'governmental units'"); *In re Sandmar Corp.*, 12 B.R. 910 (Bankr. D.N.M. 1981) (finding that the "term entity includes a government unit," which includes Indian tribes).

Further, in the cases relied on by the Oneida Tribe, the courts' decisions were based solely on the fact that the applicable FCRA definition did not include the words "Indian" or "Tribe." *See, e.g.*, *In re Greektown Holdings, LLC*, 532 B.R. 680, 700 (E.D. Mich. 2015) ("Indian tribes are not mentioned by name"); *In re Whittaker*, 474 B.R. 687 (BAP 8th Cir. 2012) (same). However, such a formalistic view goes against the precedent that specific words are *not* required in order to find that Congress abrogated tribal immunity. *Narragansett*, 449 F.3d at 25 ("there is no requirement that talismanic phrases be employed."). Further, the cases cited by the Oneida Tribe were decided by federal district courts and bankruptcy appellate panels. The only Circuit Court to address the issue held that Congress unequivocally abrogates tribal sovereignty by using the term "government." *Krystal Energy*, 357 F.3d 1055. Similarly, FCRA's use of the term "any government" abrogates tribal sovereignty because Indian tribes are governments.

2. Indian Tribes Are Governments.

The Oneida Tribe argues that Indian tribes are not governments and no Supreme Court case has held that tribes are governments. However,

several courts, including the Supreme Court, have described Indian tribes as governments. Further, federal statues establish that Congress considers Indian tribes as governments, similar to other types of governments. As such, Indian tribes fit within FCRA's definition of "any government."

a. Courts describe Indian tribes as governments.

Like the United States and the individual states, "Indian tribes are distinct, independent political communities . . . a separate people, with the power of regulating their internal and social relations." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (quoting *Worcester v. Georgia*, 6 Pet. 515, 559 (1832); *see also Duro v. Reina*, 495 U.S. 676, 679 (1990) (*overruled on other grounds by United States v. Lara*, 541 U.S. 193 (2004)) (describing Indian tribes as "political and social organization[s that] govern [their] own affairs"). The Supreme Court has also described Indian tribes as "domestic dependent nations that exercise inherent sovereign authority." *Bay Mills*, 134 S.Ct. at 2030 (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). In its response brief, the Oneida Tribe attempts to create a distinction between Indian tribes and governments, but such a distinction does not exist. (Resp. Br. at 12).

All sovereign entities are necessarily governments, as "each has the power, inherent in any sovereign, independently to" govern its own affairs. *United States v. Wheeler*, 435 U.S. 313, 320 (1978) (*overruled on other*

grounds by Lara, 541 U.S. 193). It is axiomatic that the United States and the individual States are each sovereigns—*i.e.*, independent political communities, deriving power from the collective will of their people. *See Chae Chan Ping v. U.S.*, 130 U.S. 581 (1889) (describing the sovereignty of the federal government as a collection of the "American people [as] one [forming a] government which is alone capable of controlling and managing their interests. . . .").

An inherent aspect of sovereignty is that an entity acts as a government. *Wheeler*, 435 U.S. at 320. Just as there is no distinction between the United States and individual states as sovereigns and the United States and individual states as governments, there can be no distinction between Indian tribes as sovereigns and Indian tribes as governments. *See Inyo County v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 709 (2003) (holding that Indian tribes are treated like state governments for purposes of 42 U.S.C. § 1983). Thus, while federal and state governments and Indian tribes have different sources of sovereignty, courts apply the same rules to Indian tribes as other types of governments. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982).

In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Supreme Court rejected the argument that Indian tribes are "foreign" states for jurisdictional purposes, but recognized that Indian tribes "remain quasi-

sovereign nations," similar to states. *Id.* at 71. Also, similar to state and federal governments, Indian tribes "have power to make their own substantive laws in internal matters . . . and to enforce that law in their own forums." *Id.* at 55-56 (citations omitted). However, there are limitations on tribal sovereignty. Thus, while Indian tribes "remain a separate people, with the power of regulating their internal and social relations," tribes are "no longer possessed of the full attributes of society," *id.* at 55, because Congress has the power to "impos[e] certain restrictions upon tribal governments." *Id.* at 57. Congress has expressly done so here.

Moreover, courts have repeatedly defined Indian tribes as governments. In *Turner v. United States*. 248 U.S. 354 (1919), the Supreme Court addressed a claim against an Indian tribe, which the Court repeatedly described as a government. *See id.* The Oneida Tribe attempts to distinguish the Supreme Court's descriptions of Indian tribes in *Turner*, by contorting the Court's phrasing. (Resp. Br. at 12). The Oneida Tribe points to the *Turner* Court's statement that the tribe "then 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," 248 U.S. at 355, and argues that this statement means that Indian tribes are not governments, but instead have governments. (Resp. Br. at 12).

However, the *Turner* Court was not drawing a distinction between an entity having a government and being a government. Instead, the Court simply articulated why the Indian tribe was a sovereign entity—that is, a government. *Turner*, 248 U.S. at 357-58 (noting that Indian tribes, as governments, have no liability for persons injured by mob violence). Indeed, the *Turner* Court repeatedly used the words "Creek Nation" interchangeably with the term "government." *Id.* at 355 ("the Creek Nation enacted a statute"), *id.* at 357 ("like other governments, municipal as well as state, the Creek Nation was free from liability"). Thus, the *Turner* Court's statement that the tribe had a government was merely part of the Court's description of the tribe at the time the underlying events occurred. *Id.* at 354-55.

In *Jicarilla Apache Tribe*, 455 U.S. 130, the Supreme Court held that as a government, the Jicarilla Tribe had the power to levy taxes, and the Court repeatedly referred to the Jicarilla Tribe as a government. *Id*. at 138 (noting that "numerous other governmental entities levy a general revenue tax similar to that imposed by the Jicarilla Tribe" and referring to the Jicarilla Tribe as "the government imposing the tax"), *id.* at 141 ("the Tribe's authority to tax nonmembers is subject to constraints not imposed on other governmental entities"), *id.* at 147 (comparing waiver of the Jicarilla Tribe's sovereignty to circumstances where "other governmental bodies have waived

a sovereign power"). These decisions establish that the Supreme Court considers Indian tribes to be governments.

In addition to the ability to tax its members, Indian tribes possess and exercise other rights and powers of governments. For example, Indian tribes have the power to enact their own laws and enforce those laws over their members in the tribe's territory. *See Santa Clara*, 436 U.S. at 55-56. Tribes can also "determine tribal membership, regulate domestic relations among members, prescribe rules of inheritance among members, and punish tribal offenders." *NLRB v. Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537, 544 (6th Cir. 2015) (citing *Montana v. United States*, 450 U.S. 544, 564 (1981)).

Further, "Indian tribes, like states and *other governmental entities*, have standing to sue" under the doctrine of *parens patriae. Quapaw Tribe of Oklahoma v. Blue Tee Corp.*, 653 F. Supp. 2d 1166, 1179 (N.D. Okla. 2009) (emphasis added). The doctrine of *parens patriae* allows sovereign governments to maintain suits seeking to remedy injuries that, "if it could, would likely attempt to address through its sovereign lawmaking powers." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982), *see also Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994) ("State governments may act in their *parens patriae* capacity as representatives for all their citizens in a suit to recover damages for injury to

a sovereign interest."). As sovereign governments, Indian tribes have successfully maintained *parens patriae* lawsuits on behalf of tribal members. *See, e.g.*, *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 468 n. 7 (1976); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1241 (10th Cir. 2001); *Quapaw*, 653 F. Supp. 2d at 1181. Given the availability of the *parens patriae* doctrine to Indian tribes, it is clear that they are governments.

Similarly, whether an entity can be recognized as an Indian tribe in the first place depends on whether the entity acts as a government. "Subordinate, semi-autonomous tribal entities" are not considered Indian tribes because they are not governing bodies that represent interests of the Indian tribe as a whole. *Navajo Tribal Util. Auth. v. Arizona Dep't of Revenue*, 608 F.2d 1228, 1231, 1234 (9th Cir. 1979). Similarly, the Ninth Circuit "*require[s]* that the group claiming tribal status show that they [exercise] at least the minimal functions of a governing body." *Native Vill. of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992) (emphasis added). Moreover, Indian tribes must function as a government to be federally recognized by the Secretary of the Interior, pursuant to the Indian Reorganization Act. 25 U.S.C. § 476. Therefore, as a prerequisite to asserting sovereign immunity as a federally-recognized Indian tribe, the tribe must first establish that it is a government.

The doctrine of tribal immunity arose "to protect nascent tribal governments." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 758 (1998). The *Kiowa Tribe* Court stated that the tribal immunity doctrine applies equally to both a tribe's governmental and commercial activities. *Id.* at 760. Thus, even a tribe's commercial activities—such as operating a convenience store—are considered actions of the tribal government. *See id.* In fact, the Tenth Circuit noted that the formation of a tribal corporate entity "does not affect the power of the tribe to act in a governmental capacity." *United Keetoowah Band of Cherokee Indians v. State of Oklahoma*, 927 F.2d 1170, 1174 (10th Cir. 1991).

In its brief, the Oneida Tribe cites to *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010), but fails to acknowledge the holding in that case. In *Breakthrough Management*, the Court found that a private business was entitled to tribal immunity because it was connected to the *government* of the Tribe. *Id.* at 1184. In making this determination, the Court asked, "Does the resulting entity have a distinct, nongovernmental character and therefore is not immune, or is it merely an administrative convenience, *i.e.,* a 'subordinate [tribal] economic organization,' and therefore immune?" *Id.* at 1184 (quotation omitted). "Put differently, we must determine whether the [tribal entities claiming immunity] are 'the kind[s] of tribal entit[ies], analogous to a governmental

agency, which should benefit from the defense of sovereign immunity, or whether [they] [are] more like . . . commercial business enterprise[s], instituted solely for the purpose of generating profits for [their] private owners.'" *Id.* (alterations in original) (quotations omitted).

Here, the Oneida Tribe owned and operated the retail stores that violated FACTA. (A-002-3).[2] There were no private owners.

As set forth above, Indian tribes are governments, governing over their own territories and peoples. Accordingly, Courts consistently describe Indian tribes as governments. Because FCRA expresses Congress' unequivocal intent to abrogate sovereign immunity for "any government," the District Court erred in dismissing Meyers' claim.

b. The federal statutes cited by the Oneida Tribe establish that Indian tribes are governments.

Throughout its brief, the Oneida Tribe cites to federal statutes that explicitly list Indian tribes in the statutes, and argues that those statutes prove that Congress must specifically use the words "Indians" or "Tribes" to abrogate tribal immunity. However, contrary to the Oneida Tribe's contention, the statutes actually support Meyer's claim that Congress considers Indian tribes to be governments. Thus, use of the term "any

[2] "A" refers to the Short Appendix of Plaintiff-Appellant Jeremy Meyers, attached to the Brief and Required Short Appendix of Plaintiff-Appellant Jeremy Meyers.

government" in FCRA expresses Congress' unequivocal intent to abrogate tribal immunity for FCRA violations.

In the Indian Civil Rights Act ("ICRA"), 15 U.S.C. § 1301, *et seq.*, Congress defined "Indian tribes" as "any tribe . . . or group of Indians . . . recognized as possessing powers of self-government." *Id.* at § 1301(1). ICRA further defines "powers of self-government" as "including all governmental powers . . . executive, legislative, and judicial." *Id.* at § 1301(2). Further, the Indian Gaming Rights Act, 25 U.S.C. § 2701, *et seq.*, defines "Indian tribe" to mean "any Indian tribe . . . recognized as possessing powers of self-government." *Id.* at § 2703(5). Additionally, as a basis for enacting the Indian Tribal Justice Support Act, 25 U.S.C. § 3601, *et seq.*, Congress found and declared that "there is a *government-to-government relationship* between the United States and each Indian tribe." *Id.* at § 3601(1). (emphasis added). These statutes establish that Congress considers Indian tribes to be governments.

In other statutes cited by the Oneida Tribe, while Congress lists Indian tribes separately, tribes are categorically listed alongside other governments. For example, in the Safe Water Drinking Act ("SWDA"), 42 U.S.C. § 330f, *et seq.*, "Indian Tribe" is included in the definition of "municipality." *Id.* at § 300f(10). Further, the statute defines "Indian Tribe" to mean any Indian

Tribe "having a . . . governing body carrying out substantial governmental duties and powers over any area." *Id.* at § 300f(14).

In the Federal Debt Collection Procedure Act ("FDCPA"), 28 U.S.C. § 3001, *et seq.*, Congress defined "person" to include "any other public or private entity, including a State or local government or an Indian tribe." *Id.* at § 3002(10). By listing Indian tribes as a component of public entities, along with states and local governments, instead of elsewhere in the definition of "person," Congress considered Indian tribes to be governments. Further, in examining the FDCPA, one court compared Indian tribes to state and local governments, and held that Indian tribes "may be sued . . . just as other sovereigns—state or local governments—may be sued." *United States v. Weddell*, 12 F.Supp.2d 999, 1000-1001 (D. S.Dak. 1998).

Thus, the mere fact that Congress listed Indian tribes separately in other statutes does not prevent this Court from finding that Congress intended to include Indian tribes in the term "any government" in FCRA. *See Osage Tribal Council ex rel. Osage Tribe of Indians v. United States Dept. of Labor*, 187 F.3d 1174, 1182 (10th Cir. 1999) ("Congress' achievement of particular clarity in one waiver (while laudable and to be encouraged) does not mean that every waiver must be explicit to the same degree.").

Finally, the Oneida Tribe cites to the now-repealed federal statute creating the Valles Caldera Trust, 16 U.S.C. § 698v-4. That statute listed

"Federal, State, and local governmental units, and [] Indian tribes and Pueblos." *Id.* at §698v-4(b)(4). Following the Oneida Tribe's rationale, because Pueblos are listed separately from other Indian tribes, Pueblo Indians are not Indian tribes. Therefore, Pueblo Indians would be excluded from every other federal statute that lists only Indian tribes. However, such an interpretation would be unreasonable because Pueblos are Indian tribes, and are, therefore, encompassed in the term "Indian tribes." Similarly, because Indian tribes are governments, they are therefore encompassed in the term "any government." Congress demonstrated that Indian tribes are governments by including Indian tribes and Pueblos with other government entities.

Plaintiff acknowledges that statutes that list *only* the federal and state governments do not include Indian tribes. *See Santa Clara Pueblo*, 436 U.S. at 56, n.7 (stating that Indian tribes are exempt from constitutional provisions specifically addressed to state or federal governments, such as the Fifth and Fourteenth Amendments). However, the term "any government" includes more than just federal and state governments. *See Bormes*, 759 F.3d at 795-96. Thus, while "Congress *could* have been more clear . . . 'that degree of explicitness is not required.'" *Osage Tribal Council*, 187 F.3d at 1182 (emphasis in original) (quoting *Davidson v. Board of Governors*, 920 F.2d 441, 443 (7th Cir. 1990) (finding that the SWDA abrogated Indian immunity).

In sum, Congress considers Indian tribes to be governments, and expressly intended to abrogate their sovereign immunity in FCRA.

B. FCRA is a Statute of Generally Applicability.

In addition to its immunity claim, the Oneida Tribe contends that FCRA does not even apply to Indian tribes. (Resp. Br. at 25). However, FCRA is a law of general applicability that is *presumed* to apply to Indian tribes. Further, none of the exceptions to general applicability exist here. As such, the Court should reject the Oneida Tribe's claim and find that Indian tribes are required to comply with FCRA.

The Oneida Tribe does not contest that FCRA is a statute of general applicability. (See Resp. Br. at 25). Nor can it. The Supreme Court determined that Indian tribes are not immune from general federal laws. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). In fact, federal laws of general applicability are *presumed* to apply to Indian tribes. *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932 (7th Cir. 1989) (citing *Tuscarora*, 362 U.S. at 116). Thus even when the statute is silent on applicability to Indian tribes, "a general statute in terms of applying to all persons includes Indians and their property interests". *Id.*

FCRA is a generally applicable law because its broad scope applies to all persons and easily encompasses Indian tribe's operating commercial enterprises. The Fair and Accurate Credit Transactions Act ("FACTA"), 15

U.S.C. § 1681c, prohibits any "person" from printing more than the last five digits or the expiration date of a credit or debit card on a receipt. *Id.* at § 1681c(g)(1). Under FCRA, a "person" is defined as "any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity." *Id.* at § 1681a(b).

Further, a federal law is a statute of general applicability if the statute creates a "comprehensive regulatory scheme." *See, e.g.*, *Little River Band*, 788 F.3d at 547; *Solis v. Matheson*, 563 F.3d 425, 430 (9th Cir. 2009); *Taylor v. Ala. Intertribal Council Title IV JTPA*, 261 F.3d 1032, 1034-35 (11th Cir. 2001); *United States v. Wadena*, 152 F.3d 831, 841-42 (8th Cir. 1998). In this case, FCRA is a comprehensive regulatory scheme, which is presumed to apply to Indian tribes.

Congress created FCRA as a comprehensive statutory scheme to regulate consumer reporting. *See Ross v. FDIC*, 625 F.3d 808, 812 (4th Cir. 2010) ("The FCRA is a comprehensive statutory scheme designed to regulate the consumer reporting industry."); *Kodrick v. Ferguson*, 54 F.Supp.2d 788, 796 (N.D. Ill. 1999) ("It appears that Congress was meticulous in its enactment of the FCRA . . . creating a comprehensive statutory scheme.") (quotation omitted). Therefore, because FCRA is a comprehensive statutory scheme, and the Oneida Tribe does not contest that FCRA is a statute of

general applicability, this Court should *presume* that FCRA applies to Indian tribes.

The Oneida Tribe attempts to counter that presumption by claiming that two exceptions to applicability relieve it from the obligations imposed by FCRA. (Resp. Br. at 26-28). In *Smart*, this Court stated:

> A federal statute of general applicability that is silent on the issue of applicability to Indian Tribes will not apply to them if: (1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended [the law] not apply to Indians on their reservations . . . ."

868 F.2d at 932-33 (alterations in original) (quoting *Donovan v. Coeur d'Alene*, 751 F.2d 1113, 1116 (9th Cir. 1985)). In this case, the Oneida Tribe contends that the first and third exceptions prevent applying FCRA to Indian tribes. The Oneida Tribe's claims are without merit.

1. FACTA Does Not Touch Indian Tribes' Exclusive Rights of Self-Governance in Purely Intramural Matters.

Contrary to the Oneida Tribe's claim, nothing in FACTA affects an Indian Tribe's "exclusive rights of self-governance in purely intramural matters." The exception was created to except "purely intramural matters," not an Indian tribe's "commercial dealings." *In re National Cattle Congress*, 247 B.R. 259, 265 (Bankr. N.D. Iowa 2000) (citing *Florida Paraplegic Assoc.,*

Inc. v. Miccosukee Tribe, 166 F.3d 1126, 1129 (11th Cir. 1999)). Purely intramural self-governance matters are issues such as "conditions of tribal membership, inheritance rules, and domestic relations." *Coeur d'Alene*, 751 F.2d at 1116. Undeniably, information printed on credit card or debit card receipts that a convenience store provides to customers has no relation to the Oneida Tribe's membership, inheritance rules, or internal domestic relations.

The Oneida Tribe ignores that precedent and contends that FACTA affects the Tribe's right of self-governance in that Meyers' claim implicates the Tribe's treasury. (Resp. Br. at 26). To support its claim, the Oneida Tribe cites to *Breakthrough Management Group*, 629 F.3d 1173. However, that case does not support the Tribe's claim. In that case, the court addressed whether entities created and owned by an Indian tribe can claim tribal sovereign immunity. *Id.* at 1176 ("This appeal asks us to explore the relationship between an Indian tribe and the economic entities created by the tribe, and to determine how close that relationship must be in order for those entities to share in the tribe's sovereign immunity."). That case did *not* address whether the plaintiff's causes of action were laws of general applicability, whether the laws touched on the tribe's purely intramural self-governance rights, or even whether Congress intended to abrogate Indian sovereign immunity. *See id.* at 1196, n. 17 ("[plaintiff] does not contend that Congress has abrogated the

immunity of these entities."). As such, *Breakthrough Management* does not support the Oneida Tribe's argument.

To contrast, the instant case is substantially similar to the statutes at issue in *Coeur d'Alene* and *Florida Paraplegic*. In *Coeur d'Alene*, the Court addressed whether the Occupational Safety and Health Administration ("OSHA") had authority to regulate a "commercial enterprise wholly owned and operated" by an Indian tribe. 751 F.2d at 1114. The Court rejected the tribe's claim that OSHA regulations interfere with purely intramural self-government matters. *Id.* at 1116. The Court noted that the tribe's farm sells produce on the open market and in interstate commerce, and the farm employs non-Indians. *Id.* The tribe's farm was "in virtually every respect a normal commercial farming enterprise." *Id.* As such, the operation of the farm was "neither profoundly intramural . . . nor essential to self-government." *Id.* (internal quotation omitted) (alteration in original).

Similarly, in *Florida Paraplegic*, the Court held that the Americans with Disabilities Act ("ADA") applied to a restaurant owned by an Indian tribe. *Florida Paraplegic*, 166 F.3d at 1129. The Court stated that the tribe's restaurant was "a commercial enterprise open to non-Indians from which the Tribe intends to profit." *Id.* The Court rejected the tribe's claim that the ADA implicated the right of self-governance in intramural matters, as the operation of the restaurant "does not relate to the government functions of

the Tribe, nor does it operate exclusively within the domain of the Tribe and its members." *Id.*

For the same reasons, the Oneida Tribe's "operation of [a convenience store] that sells [products] on the open market and in interstate commerce is not an aspect of tribal self-government." *See Coeur d'Alene*, 751 F.2d at 1116. The Oneida Tribe's convenience stores are not "purely intramural" matters, as the stores are open to and engage in business with non-Indians, including Meyers, from which the tribe intends to profit. (*See* A-002-3). The Oneida Tribe's operation of the convenience stores is "in virtually every respect a normal commercial . . . enterprise." *Coeur d'Alene*, 751 F.2d at 1116. Thus, while the convenience stores may impact the Oneida Tribe's treasury, "to accept [the Oneida Tribe's argument] would bring within the embrace of 'tribal self-government' all business and commercial activity." *See id.* As such, FACTA does *not* touch the Oneida Tribe's exclusive rights of self-governance in purely intramural matters.

2. Congress Did Not Express an Intent to Exclude Indian Tribes.

The Oneida Tribe next argues that FCRA is not applicable to Indian tribes because the statute's legislative history is silent on applicability. However, the Oneida Tribe fails to cite any authority to support its claim that silent legislative history can overcome the presumption of applicability.

Federal laws of general applicability are *presumed* to apply to Indian tribes. *Smart*, 868 F.2d at 932. As such, *silence* in the legislative history is not sufficient to find that Congress *expressly* intended the law not to apply to Indian tribes. The Oneida Tribe ignores this Court's precedent that, despite silence in a federal law's legislative history, statutes of general applicability still apply to Indian tribes.

In *Menominee Tribal Ents. v. Solis*, this Court addressed whether OSHA, 29 U.S.C. § 651, *et seq.*, applied to Indian tribes. *Menominee Tribal Ents.*, 601 F.3d 669 (7th Cir. 2010). OSHA does not mention Indians or Indian tribes. *See* 29 U.S.C. § 652(4) (defining "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives or any organized group of persons"); *id.* at § 652(5) (defining "employer" as "a person engaged in business affecting commerce who has employees, but does not include the United States . . . or any State or political subdivision of a State."). This Court noted that the legislative history of OSHA was silent on its application to Indian tribes. *Menominee Tribal Ents.*, 601 F.3d at 671. Despite that silence, this Court held that OSHA still applied to Indian tribes, as there was no affirmative indication that "Congress intended for OSHA not be applicable to tribes." *Id.* Thus, silence in a generally applicable law's legislative history is not sufficient to overcome the presumption of applicability.

In this case, the Oneida Tribe fails to point to any part of FACTA's legislative history that affirmatively demonstrates that Congress expressly intended to exclude Indian tribes. The silence in FACTA's legislative history is not sufficient to overcome the presumption that FCRA and FACTA apply to Indian tribes. *See Smart*, 868 F.2d at 932 (courts "presume[] that when Congress enacts a statute of general applicability, the statute reaches everyone within federal jurisdiction not specifically excluded, including Indians and Tribes."). As such, Indian tribes, including the Oneida Tribe, are obligated to comply with FACTA's truncation requirement.

CONCLUSION

This Court should reverse and remand with instructions for the district court to vacate its order granting the Oneida Tribe's motion to dismiss Meyers' complaint, and reinstate the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLAINCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,279 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2010 in 12 point Century Schoolbook font.

s/ Thomas A. Zimmerman, Jr.
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CERTIFICATE OF SERVICE

I, Thomas A. Zimmerman, Jr., an attorney, certify that I served the foregoing ***Reply Brief of Plaintiff-Appellant Jeremy Meyers*** upon counsel of record in this case via the U.S. Court of Appeals' CM/ECF system, on this day December 17, 2015.

s/ Thomas A. Zimmerman, Jr.
Thomas A. Zimmerman, Jr.