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,

v.

ONEIDA TRIBE OF INDIANS OF WISCONSIN,

Defendant-Appellee.

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

BRIEF OF DEFENDANT-APPELLEE ONEIDA TRIBE OF INDIANS OF WISCONSIN

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 15-3127

Short Caption: Jeremy Meyers v. Oneida Tribe of Indians of Wisconsin

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Oneida Tribe of Indians of Wisconsin, an Indian tribe.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Whyte Hirschboeck Dudek S.C.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Thomas M. Pyper Date: 10/30/2015

Attorney's Printed Name: Thomas M. Pyper

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: s/ Kenneth R. Nowakowski Date: 10/30/2015

Attorney's Printed Name: Kenneth R. Nowakowski

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** _____ **No** X

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Maria Rivera-Lupu Date: 10/30/2015

Attorney's Printed Name: Maria Rivera-Lupu

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes _____ No X

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N/A

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N/A

Attorney's Signature: s/ Marci V. Kawski Date: 10/30/2015

Attorney's Printed Name: Marci V. Kawski

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Jeremy Meyers' ("Meyers") jurisdictional statement is complete and correct.

STATEMENT OF THE ISSUE

Did Congress expressly and unambiguously abrogate tribal sovereign immunity in the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("FCRA"), including the Fair and Accurate Credit Transactions Act ("FACTA") amendment to the FCRA?

Answer by the District Court: No.

STATEMENT OF THE CASE

Meyers filed this putative class action against the Defendant-Appellee Oneida Tribe of Indians of Wisconsin (the "Tribe") alleging that, on three occasions in February 2015, establishments owned and operated by the Tribe printed receipts displaying more than the last five digits of Meyers' credit card number and the expiration date, in violation of the FACTA amendment to the FCRA. 15 U.S.C. § 1681(c)(g)(1). The Tribe moved to dismiss the Complaint for lack of subject matter jurisdiction and because Meyers lacked standing to bring his claim because he did not suffer an "injury in fact." (A-014[1].) The district court treated the Tribe's motion as a motion to dismiss for failure to state a claim under Rule 12(b)(6), Fed. R. Civ. P. (A-015.) On September 4, 2015, the district court granted the Tribe's motion and dismissed Meyers' claim. (A-020.) The

[1] "A" refers to the Plaintiff-Appellant's appendix.

district court found that "[n]otably absent from [the] legislative scheme is any reference to Indian tribes." (A-016, p. 3.) The district court went on to hold that Congress did not unequivocally waive tribal sovereign immunity, and Indian tribes are immune from private suits for money damages alleging FCRA violations. (A-019.) Meyers filed a timely notice of appeal.

SUMMARY OF THE ARGUMENT

Suits against Indian tribes are barred by sovereign immunity absent an unequivocal and unambiguous waiver by the tribe or congressional abrogation.[2] Nothing in the language of the FCRA or FACTA shows an unequivocal intent by Congress to abrogate the Tribe's sovereign immunity against a private action seeking money damages. While the FCRA defines those persons who may be found liable for an FCRA violation to include "any … government or governmental subdivision," FCRA, 15 U.S.C. § 1681a(b), the word "government" cannot be construed unequivocally to include Indian tribes, as the trial court correctly held.

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

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

> are to be resolved in favor of tribal immunity, to read "Indian tribes" when Congress says "government."

(A-017.) Congress did not clearly, unequivocally and unambiguously reference Indian tribes when it enacted the FCRA and FACTA and, therefore, it has not evinced an intent to waive a tribe's sovereign immunity. The Tribe is immune from suit, and the district court's judgment should be affirmed.

APPELLATE STANDARD OF REVIEW

Courts review the legal question of whether Congress has abrogated tribal sovereign immunity *de novo*. *Ute Distrib. Corp. v. Ute Indian Tribe*, 149 F.3d 1260, 1263 (10th Cir. 1998); *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 929 (7th Cir. 2008).

ARGUMENT

CONGRESS DID NOT EXPRESSLY AND UNEQUIVOCALLY ABROGATE TRIBAL SOVEREIGN IMMUNITY IN THE FCRA AND THE FACTA AMENDMENT TO THE FCRA.

A. Congressional Abrogation Of Tribal Immunity Must Be Unequivocal And Unambiguous.

"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)). 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).

"To 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). "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); *Fla. Paraplegic, Ass'n, Inc. 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); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980) ("Ambiguities in federal law have been construed generously in order to comport with ... traditional notions of sovereignty and with the federal policy of encouraging tribal

independence."); *F.A.A. v. Cooper*, 132 S. Ct. 1441, 1448 (2012) ("Any ambiguities in the statutory language are to be construed in favor of immunity…. Ambiguity exists if there is a plausible interpretation of the statute that would not authorize" suit against the Tribe.) (internal citations omitted); *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 493 (7th Cir. 1993) ("[N]ot only treaties but (other) federal statutes as well are to be construed so far as is reasonable to do in favor of Indians.").

Unlike other federal statues, the FCRA does not contain a provision expressly abrogating sovereign immunity of entities in private actions. *See, e.g.*, 11 U.S.C. § 106(a). Instead, the FCRA contains a definitional section that 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). But neither the FCRA nor FACTA contains language that demonstrates that Congress unequivocally, unmistakably, and definitively intended to include an Indian tribe as a government or governmental subdivision or that it intended to waive a tribe's sovereign immunity against a FCRA/FACTA claim for money

damages brought by a private party. Therefore, Congress has not clearly waived the Tribe's immunity in the FCRA.

B. This Court's Decision In *Bormes v. United States* Is Inapposite.

Meyers relies heavily on this Court's dicta in *Bormes v. United States*, 759 F.3d 793, 795 (7th Cir. 2014), where the Court stated that "[b]y authorizing monetary relief against *every* kind of government, the United States has waived its sovereign immunity." Brief of Plaintiff-Appellant ("Meyers' Br."), at 7-12, 20, 23-24. As the Court's decision makes clear, however, the only question at issue in that case was whether Congress unequivocally abrogated the *United States'* immunity from damages for violations of the FCRA through FCRA § 1681a(b). *Bormes*, 759 F.3d at 795 (emphasis added). *Bormes* is irrelevant to the question of Indian sovereign immunity, and Meyers' attempts to shoehorn the issue into the holding of *Bormes* should be rejected.

In *Bormes*, the United States conceded that it was a government and, thus, subject to regulation under FCRA. *Bormes*, 759 F.3d at 795 ("The United States concedes that it is a 'person' for the purpose of the Act's substantive requirements."). The only issue before this Court was whether the United States could be found liable for the statutory penalties under FCRA. *Id.* This Court was not presented with the question of what Congress intended by its use of the words "government or governmental subdivision" in FCRA's definition of person. And this Court was certainly not asked to, nor did it, define whether Congress unequivocally and unmistakenly intended to include Indian

tribes when it defined persons for purposes of FCRA to include "government" or whether it intended to waive a tribe's sovereign immunity against a claim for money damages brought by a private party. *Id.* at 795-96.

Nonetheless, by its own terms, this Court's analysis in *Bormes* demonstrates that the term "government" standing alone does not pertain to every kind of government in the absence of additional context or definition. First, this Court noted that the term "government" in the FCRA does not pertain to States in the context of private litigation. *Id.* at 796. Second, Congress did not abrogate a foreign government's sovereign immunity by virtue of Congresss' use of the word "government" in the FCRA; rather, "[f]oreign governments that engage in commerce in the United States cannot invoke immunity under the Foreign Sovereign Immunities Act [("FSIA")]." *Id.*at 796-97. Congress unequivocally and unmistakenly abrogated a foreign government's immunity in the separate FSIA rather than through an ambiguous reference to government in the FCRA. Standing alone, the FCRA's use of the term "government" does not abrogate either a State's or a foreign government's sovereign immunity.

Thus, even though this Court 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 and unmistakable indication that Congress intended to do the same for Indian tribes. Such an abrogation can only be found based on clear and unequivocal statutory language; it "cannot be implied." *Santa Clara Pueblo,* 436 U.S. at 58. The

FCRA's use of "any ... government" in its definitional section is equivocal and does not unambiguously express a Congressional intent to abrogate tribal immunity. After all, it makes no reference to Indian tribes nor does it abrogate the immunity of a State or of a foreign government. This Court's decision in *Bormes* does not, as Meyers contends, stand for the contrary. This is especially true, as the trial court noted, in light of the long tradition of tribal immunity and the liberal interpretation of ambiguous statutory provisions in favor of Indian tribes, *Montana*, 471 U.S. at 766. (A-015.)

C. The Reference To "Any ... Government" In The FCRA Does Not Show An Unambiguous And Unequivocal Intent By Congress To Include Indian Tribes Within Its Reach.

1. The FCRA Does Not Specifically Include Indian Tribes.

The FCRA makes no reference to Indian Tribes. Since a Congressional abrogation of tribal immunity "cannot be implied," Congress has not unequivocally abrogated tribal sovereign immunity by the general reference to governments in the FCRA. *Santa Clara Pueblo,* 436 U.S. at 58.

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 Indian tribes without specifically using the words 'Indians' or 'Indian tribes.'" *In re Greektown Holdings, LLC*, 532 B.R. 680, 693 (E.D. Mich. 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). In fact,

when courts look to definitional sections of statutes to determine whether Congress has abrogated tribal immunity, they focus on whether Congress expressly referenced Indian tribes in the definition. *See, e.g.*, *Osage Tribal Council ex rel. Osage Tribe of Indians 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 "municipality" 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);[3] *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

[3] The Federal Debt Collection Procedure Act, 28 U.S.C. § 3001, *et seq.* ("FDCPA"), was enacted in 1990. It expressly defines "person" to include Indian tribes. FDCPA, 28 U.S.C. § 3002(10). Just six years later in 1996, Congress amended the FCRA to make it more broadly applicable to persons rather than just to consumer reporting agencies. In contrast to FDCPA's definition of person, however, Congress did not include Indian tribes in the definition of person for purposes of the FCRA.

plan which is established and maintained by an Indian tribe). Through the definitional section of a statute, Congress can – and does – unambiguously express its intent to bring Indian tribes into the ambit of the statute by expressly referencing tribes. Indeed, Meyers' reference to statutes where Congress uses definitional sections to explicitly abrogate tribal immunity, *see* Meyers' Br., at 18, makes this point.

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.*, 149 F.3d at 1264 ("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 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).

2. References To Tribes As "Governments" Or The Fact That Tribes Possess Sovereign Attributes Is Irrelevant To The Question Of Whether Congress's Use Of "Government" In The FCRA Was Intended To Abrogate Tribal Sovereign Immunity.

Relying only on *Turner v. United States*, 248 U.S. 354 (1919) and Justice Sotomayor's concurring opinion in *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2031 (2014), Meyers argues that Tribes are "governments" because the Supreme Court has referred to Tribes as governments in those two discrete instances. Meyers' Br., at 13-14. The Supreme Court most commonly refers to Indian tribes as "domestic dependent nations." *See, e.g.*, *Bay Mills Indian Cmty.*, 134 S. Ct. at 2030 (quoting *Okla. Tax Comm'n*, 498 U.S. at 509 (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141 (1982). Nonetheless, whether the Supreme Court has occasionally referred to tribes as "governments" (or as anything else for that matter) is not determinative of whether Congress's use of government in the FCRA can be construed unequivocally as a Congressional intent to include Indian tribes.

As Meyers acknowledges, the *Turner* Court noted that the Creek Nation "exercised within a defined territory the powers of a sovereign people, *having* a tribal organization, their own system of laws, and *a government* with the usual branches, executive, legislative, and judicial." *Turner*, 248 U.S. at 355 (emphases added). Because tribes have a "government," however, does not lead to the unmistakable conclusion that Congress was thinking of Indian tribes when it used the word government in FCRA half a century after the *Turner* case was decided. Likewise, Justice Sotomayor's concurrence in *Bay Mills* did not explicitly consider the definition of "government" in the context of congressional abrogation and whether that included Indian tribes. Furthermore, Justice Sotomayor's concurrence actually reinforces the fact that the Supreme Court has "repeatedly relied on [the] characterization [of Indian Tribes as domestic dependent nations] in subsequent cases." *Bay Mills Indian Comty.*, 134 S. Ct. at 2040-41 (Sotomayor, J. Concurring). Accordingly, these cases have no bearing on the issue at hand.

Meyers also contends that "this Court should find that Indian tribes are governments because tribes are treated as governments and possess the rights and powers of governments," adding that, as self-governing entities, tribes exercise powers reserved to governments, including enacting and enforcing their own laws even against non-Indians within their jurisdiction and entering into treaties with other governments. Meyers' Br., at 21, 22-23. Indian tribes' attributes of sovereignty, however, are simply

the bedrock of their sovereign immunity. They provide no indication of what Congress intended when it used the word government in FCRA, and they provide no basis for a conclusion that Congress unequivocally intended to abrogate the most basic of those very sovereign attributes: tribal sovereign immunity.

Regardless of whether courts have at times referred to tribes as "governments" or considered tribes' sovereign attributes, the reference to "any ... government" in the FCRA does not show an explicit and unequivocal intent by Congress to include Indian tribes within its reach. *See e.g. In re Greektown Holdings, LLC*, 532 B.R. at 698 ("one cannot presume that Congress intended to include [Indian tribes], without mentioning them but solely by force of deduction, as among a group of sovereign entities with whom they share very little other than their sovereign status"). Indeed, even the Supreme Court has more frequently referred to tribes as "domestic dependent nations" than as "governments," which alone makes a general reference to governments ambiguous. *See, e.g., Bay Mills Indian Cmty.*, 134 S.Ct. at 2030; *Okla. Tax Comm'n.*, 498 U.S. at 509; *Merrion*, 455 U.S. at 141.

As other statutes demonstrate, Congress has 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, domestic or international associations, 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…."); and 28 U.S.C. § 3701(2), which expressly defines "governmental entity" to include Indian tribes (by reference to 25 U.S.C. § 2703(5)). If Congress's general reference to a "government" already includes Indian tribes, there would be no need for Congress elsewhere to include Indian tribes in addition to its reference to, and definition of, government and governmental units.

Congress knows how to expressly make its statutes applicable to Indian tribes, and it elected not to do so in the FCRA. Meyers' argument that "these statutes list specific forms of government – federal, state, or foreign – which do not include Indian tribes," thereby making it "necessary to also list Indian tribes to include them within the scope of the statute" is unpersuasive. Meyers' Br., at 19-20. Under Meyers' position, all Congress ever needs to do is reference "any" or "a government" to reach every conceivable type of government. Yet why then does Congress instead specify which types of governments it intends to include for clarity purposes? The mere fact that Congress specifies when it intends to include Indian tribes makes the more general use of government in FCRA ambiguous and equivocal by definition, as the trial court noted.

3. The Ninth Circuit's Decision In *Krystal Energy* Is Not Only Distinguishable, It Is An Outlier.

Meyers relies heavily on *Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1057 (9th Cir. 2004), *as amended on denial of reh'g* (Apr. 6, 2004), *cert. denied*, 543 U.S. 871 (2004) to support his argument that Congress intended to abrogate tribal sovereign immunity against private party money damage claims under FACTA. Meyers' Br., at 14-21. In *Krystal Energy*, the Ninth Circuit held that Congress abrogated the sovereign immunity of Indian tribes under the Bankruptcy Code, which abrogates the sovereign immunity of "governmental units" in causes of action under specifically enumerated sections of the Code, 11 U.S.C. § 106(a), and further defines "governmental unit" as "the United States, State, Commonwealth, District, Territory, municipality ... or other foreign or domestic government." 11 U.S.C. § 101(27). The Ninth Circuit reasoned that because Congress intended to abrogate the sovereign immunity of all "governmental units," and "Indian tribes are certainly governments," "the category 'Indian tribes' is simply a specific member of the group of domestic governments, the immunity of which Congress intended to abrogate." *Krystal Energy Co.*, 357 F.3d at 1057-58. The *Krystal* court pointed out that the definition of "governmental unit" in section 101(27) first lists a sub-set of all governmental bodies but then adds a catch-all phrase, "or other foreign or domestic governments." Thus, the court reasoned that all foreign and domestic governments, including but not limited to those particularly enumerated in the first part of the definition are considered "governmental units" for the purpose of the

Bankruptcy Code and, under § 106(a), are subject to suit. *Krystal Energy*, however, is distinguishable.

First, even under the reasoning of *Krystal Energy*, § 106 of the Bankruptcy Code requires an additional definitional section, § 101(27), to bring "other foreign and domestic governments" into the realm of "governmental unit." In the absence of this additional definitional section in the Bankruptcy Code, "governmental unit" under § 106 would have been insufficient to include Indian Tribes. Similarly, if "government" alone was all that was needed to abrogate immunity in the FCRA, "governmental unit" would have been enough in the Bankruptcy Code without further defining "governmental unit" to include "domestic governments." In contrast, FCRA does not define "government" or "governmental unit" to include "domestic governments," which the *Krystal Energy* Court held to be necessary to include an Indian tribe.

Krystal Energy is also distinguishable because, as the court there explains, Section 106(a) of the Bankruptcy Code "explicitly uses the terms 'sovereign immunity' and 'abrogate.'" *Krystal Energy Co.*, 357 F.3d at 1059. Therefore, the Court's rationale was based on the fact that the provision at issue was specifically designed to abrogate sovereign immunity. *Id.* Under those circumstances – in the context of an explicit abrogation provision for not just "any government" but specifically defined to include "domestic governments," the *Krystal Energy* Court concluded that this is an explicit abrogation of tribal immunity. In contrast, no such sovereign immunity abrogation

language exists in FCRA or FACTA. Thus, the *Krystal Energy* decision provides at most only a competing – and distinguishable – interpretation of whether the general phrase "other foreign or domestic government" – language not appearing in FCRA/FACTA – applies to Indian tribes.

The Supreme Court has not decided whether these sections abrogate tribal sovereign immunity for purposes of the Bankruptcy Code, but other courts addressing the issue have held that they do not. For example, numerous other courts outside the Ninth Circuit have held that because Indian tribes are not specifically named in the Bankruptcy Code, a court would have to infer that Congress intended the phrase "other foreign or domestic government" to encompass tribes and such an inference is inappropriate. *See e.g.*, *In re Whitaker*, 474 B.R. 687 (B.A.P. 8th Cir. 2012); *In re Mayes,* 294 B.R. 145 (B.A.P. 10th Cir. 2003); *In re Greektown Holdings*, 532 B.R. at 698; *In re Nat'l Cattle Cong.*, 247 B.R. 259, 265-67 (Bankr. N.D. Iowa 2000). Unlike *Krystal*, the conclusions of these courts comport with the principle that tribal immunity can only be abrogated by express, unequivocal and unambiguous language.

Concluding that 11 U.S.C. § 106(a) does not evince Congress's unequivocal intent to abrogate the sovereign immunity of Indian tribes, in *In re National Cattle Congress*, the Bankruptcy Court for the Northern District of Iowa noted that the Bankruptcy Code makes no specific mention of Indian tribes, and unlike states and foreign governments, Indian tribes are not specifically included in the definition of "governmental unit" in 11

U.S.C. § 101(27). 247 B.R. at 265-67. The court emphasized that, where the language of a federal statute does not include "Indian tribes" in a definition of parties subject to suit or does not specifically assert jurisdiction over "Indian tribes," courts find the statute insufficient to express an unequivocal congressional abrogation of tribal sovereign immunity. The *In re National Cattle Congress* court further noted that, to conclude that Congress intended to subject Indian tribes to suit under the Bankruptcy Code, it would need to infer such intent from language that does not unequivocally and unambiguously apply to Indian tribes. Considering the Supreme Court's pronouncement that an abrogation of tribal sovereign immunity cannot be found by inference, such an inference is inappropriate. *Id.*

Similarly, and relying in part on *In Re National Cattle Congress*, the Bankruptcy Appellate Panel for the Eighth Circuit in *In re Whitaker* expressly rejected the Ninth Circuit's reasoning in *Krystal,* and held that absent a specific mention of "Indian tribes" in the Bankruptcy code, any finding of abrogation under § 106(a) necessarily must rely on inference or implication, both of which are prohibited by Supreme Court precedent. The Tenth Circuit Bankruptcy Appellate Panel suggested the same conclusion in *In re Mayes*. Although not a basis for the holding in *In re Mayes,* the panel noted that § 106(a) "probably" could not be interpreted as an unequivocal expression of Congressional intent to abrogate tribal sovereign immunity. The court reached its conclusion because "Section 101(27) does not refer to Indian nations or tribes" and "[t]he only portion of

that section that could be said to apply to an Indian nation or tribe is its reference to a 'domestic government.'" *In re Mayes*, 294 B.R. at 148, n. 10. The court added that its "conclusion comports with the general proposition that Congress must make its intent to abrogate an Indian nation's immunity clear and unequivocal, and actions against tribes cannot merely be implied." *Id.*

Finally, Meyers argues that "this Court should give extra weight to the Ninth Circuit's holding in *Krystal Energy* because the Ninth Circuit is more experienced with issues involving Indian tribes." Meyers' Br., at 20. That argument is disingenuous because *Krystal Energy* is a case construing a provision of the Bankruptcy Code, not an Indian law case. Nothing about the issues in that case gives the Ninth Circuit any unique expertise above and beyond that of any other court.

D. Congress Did Not Abrogate An Indian Tribe's Sovereign Immunity Against A Private Claim For Money Damages Under FCRA.

1. The Legislative History Of FCRA Demonstrates That Congress Did Not Intend To Include Tribes Under The Statute.

The language of FCRA does not unambiguously demonstrate a Congressional intent to abrogate tribal sovereign immunity, and 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 FCRA was enacted in 1970, its remedial provisions applied not to "person[s]," but only 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 FCRA. 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. Even though the remedial provisions of FCRA were broadened to apply to "persons" in 1996, Congress did not include Indian tribes under the definition as Congress has done numerous times with its other statutes. *See Part C.1. and n. 2., supra*. Thus, the history of the FCRA shows that Congress did not intend to abrogate Indian sovereign immunity because Congress never intended Indian tribes to be subject to a private money damages claim under FCRA.

2. Consumer Protection Concerns Do Not Trump Tribal Immunity.

Meyers contends that "[i]t would be absurd to conclude that Congress intended to protect consumers from the actions of the federal government, and foreign governments, but expose them to harm from the actions of Indian tribes." Meyers' Br.,

at 26. Meyers' contention is unsupported and completely at odds with the required showing of unequivocal, unambiguous and unmistakable Congressional abrogation of tribal immunity. Indeed, consumer protection policy – like many other important and competing policies – can (and does) give way in the context of tribal sovereign immunity. *Kiowa Tribe of Okla.*, 523 U.S. at 758–59 ("Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area.... [Thus, even if policy] considerations might suggest a need to abrogate tribal immunity,... we defer to the role Congress may wish to exercise in this important judgment."); *see also In re Greektown Holdings*, 532 B.R. at 700 ("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." (Emphasis added.)). If Congress had believed that consumer protection policy considerations outweighed tribal sovereign immunity policy considerations for purposes of FCRA/FACTA, it would have expressly abrogated tribal immunity to allow a private right of action for damages against Indian Tribes. Its choice not to do so is determinative.

E. Congress Has Not Waived Tribal Sovereign Immunity For A Private Right Of Action For Money Damages.

The general applicability of a statute to a tribe and congressional abrogation of tribal sovereign immunity in an action brought by a private party seeking money damages from a tribe are distinct inquiries. *See, e.g.*, *Bassett*, 204 F.3d at 357; *Fla. Paraplegic Ass'n, Inc.*, 166 F.3d at 1129–33; *Louis v. Stockbridge-Munsee Cmty.*, No. 08-C-558, 2008 WL 4282589, at *3 (E.D. Wis. Sept. 16, 2008) (analysis "concern[ing] the applicability of a federal or state statute to an Indian tribe" is inapplicable "where the issue presented is whether a private party may maintain a suit against the Tribe pursuant to 42 U.S.C. § 1983 and the WFEA."). This distinction is critical. The determinative question here is not whether FCRA/FACTA applies generally to the Tribe, but rather whether Meyers' private suit seeking money damages is barred by the Tribe's sovereign immunity. The relevant analysis under longstanding Supreme Court precedent remains whether Congress has unequivocally abrogated tribal sovereign immunity to allow such a private action. *Santa Clara Pueblo*, 436 U.S. at 58.

In *Florida Paraplegic*, the Eleventh Circuit held that, while the Americans with Disabilities Act applies to tribes, tribal sovereign immunity prevents private lawsuits for money damages under it because the Act did not abrogate tribal sovereign immunity. *Fla. Paraplegic Ass'n, Inc.*, 166 F.3d at 1129–33. Indeed, the court noted that "[f]rom the language of the legislation itself and from the legislative history, it is evident that the ADA is a general statute that Congress intended to have broad

applicability." *Id.* at 1128. Nonetheless, the court explained that "whether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions." *Id.* at 1130. Accordingly, the court found:

> In short, Congress declined to abrogate Indian tribes' sovereign immunity from suit either by direct statement in Title III itself or by reference to other statutes having that effect. No support exists in the statute for a finding that Congress has waived tribal sovereign immunity under Title III of the ADA.

Id. at 1132. Finally, the court added that "[a]lthough the omission of this remedy may seem inconsistent with the rights granted by Title III, and even patently unfair, '[i]mmunity doctrines inevitably carry within them the seeds of occasional inequities.... Nonetheless, the doctrine of tribal immunity reflects a societal decision that tribal autonomy predominates over other interests.'" *Id.* at 1135 (citing *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 781 (D.C. Cir. 1986)).[4] *Accord Kiowa Tribe*, 523 U.S. at 755 ("There is a difference between the right to demand compliance with state laws and the means available to enforce them.")

Federal courts have adopted this analysis in applying a number of statutes in different contexts. The Second Circuit Court of Appeals has similarly explained that

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[4] The *Florida Paraplegic* Court noted that its holding that the tribe could not be sued by private parties for violating the ADA did not mean that the tribe could not be compelled to conform to the law through an action by the U.S. Attorney General. *Fla. Paraplegic Ass'n, 166 F.3d* at 1134. Similarly here, if FACTA is a statute of general applicability and if it can apply to the Tribe, then the Federal Trade Commission can compel the Tribe to comply with its terms. 15 U.S.C. §§ 1681s(a)-(b) and 15 U.S.C. § 45(a)(2).

simply because a statute may be of general applicability, the abrogation inquiry is nonetheless necessary. *Bassett*, 204 F.3d at 357-58. The *Bassett* court emphasized that "[Plaintiff] also maintains that the Copyright Act is a federal statute of 'general application [and therefore] presumably applies to Indian Tribes.' However, the fact that a statute applies to Indian tribes *does not mean that Congress abrogated tribal immunity in adopting it*." *Id.* (citations omitted) (emphasis added); *see also Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1291-92 (11th Cir. 2001) ("The bare proposition that broad general statutes have application to Native American tribes does not squarely resolve whether there was an abrogation of tribal immunity.... First,... case law since *Tuscarora* has made clear that any purported abrogation must be express and unequivocal."); *Specialty House of Creation, Inc. v. Quapaw Tribe*, No. 10-CV-371-GKF-TLW, 2011 WL 308903, at *1 (N.D. Okla. Jan. 27, 2011) *dismissed sub nom, Specialty House of Creation, Inc. v. Quapaw Tribe of Okla.*, 454 F. App'x 899 (Fed. Cir. 2011) (rejecting argument that federal patent law, as a statute of general applicability, waives tribal sovereign immunity and concluding that the Quapaw Tribe is immune from private suits under federal patent law because plaintiff "points to no authority that Congress has expressly abrogated tribal sovereign immunity with respect to the enforcement of patents"); *In re Nat'l Cattle Cong.*, 247 B.R. at 265-67 (relying on *Florida Paraplegic* to hold that, whereas Bankruptcy Code applied to tribe, the tribe could nevertheless retain its sovereign immunity from suit under the Code); *Bales v. Chickasaw Nation Indus.*, 606 F. Supp. 2d 1299, 1302-03 (D.N.M. 2009)

("The issue of whether a statute of general applicability should apply to a tribe or tribal entity is distinct from the issue in this case, i.e., whether a tribal entity enjoys immunity from suit.").

Accordingly, even statutes of general applicability that include provisions for the recovery of money damages for their violation, such as those in the cases cited above (e.g., copyright, patent and ADA statutes), do not constitute a declaration by Congress of an abrogation of tribal sovereign immunity. More is required: an unequivocal, unambiguous and unmistakable expression of Congressional intent to waive tribal sovereign immunity. Since that is lacking in FCRA/FACTA, Meyers' action against the Tribe is barred.

F. Even If FCRA/FACTA Is Generally Applicable, The Tribe Is Nonetheless Immune.

There are three specific exceptions to the rule that statutes of general application apply to Indian tribes: "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.'" *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (citation omitted). The first and third exceptions apply here.

1. FACTA Touches On Exclusive Rights Of Self-Governance.

Applying FACTA to allow Meyers' putative class to recover money damages would affect the Tribe's sovereign right of self-governance by directly implicating the tribal treasury. *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1183-84 (10th Cir. 2010). In *Breakthrough Mgmt.*, the plaintiff and an "agent" of Chukchansi Gold Casino and Resort ("Casino") executed a license agreement for online business management training and consulting services. *Id.* at 1176-78. The tribe allegedly paid for the license. *Id.* The Chukchansi Economic Development Authority ("Authority") owned and operated the Casino. *Id.* The plaintiff alleged that the terms of the license were violated and sued the tribe, Authority, Casino and individual Casino employees. *Id.* at 1177.

The district court dismissed the tribe on sovereign immunity grounds but held that the Authority and the Casino were not immune from suit. *Id.* at 1181. The Tenth Circuit reversed, finding that the Authority and the Casino were also immune:

> Tribal sovereign immunity may extend to subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity…. As the Ninth Circuit has noted, immunity for subordinate economic entities "*directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general*."

Id. at 1183-84 (citations omitted) (emphasis added).

Here Meyers is seeking certification of a class to seek substantial statutory damages that would be paid from the Tribe's sovereign treasury. Such a large drain on the Tribe's treasury funds would deprive the Tribe of funds needed to pay for essential tribal member services. Accordingly, if successful, Meyers' action will directly interfere with the Tribe's right of "self governance in purely intramural matters." As a result, the first *Coeur d'Alene Tribal Farm* exception applies and makes FCRA/FACTA inapplicable to the Tribe.

2. Congressional Intent Demonstrates That FACTA Does Not Apply To Indians.

The chronology of Congress's passage of the FCRA in 1970 and the FDCPA in 1990, 28 U.S.C. § 3001, *et seq.*, demonstrates that Congress did not intend to include Indian tribes under FCRA. When Congress passed the FCRA in 1970, it did not include Indian tribes in its definition of "person." FCRA, 15 U.S.C. § 1681a(b). Yet, when Congress passed FDCPA in 1990, it expressly included Indian tribes as a "person" under its definitional section. FDCPA, 28 U.S.C. § 3002(10). If Congress had likewise intended Indian tribes to be governed by FCRA, it would have amended FCRA to so provide at the same time it was making Indians subject to the FDCPA in 1990. Alternatively, Congress would have clarified that it intended FCRA to include Indian tribes when it broadened its reach to include "persons" in 1996, just six years after it expressly included Indian tribes in the definition of "person" in the FDCPA in 1990.

Instead, Congress intentionally chose not to include Indians in the FCRA's definition of "person," even though it had done so in 1990 with the FDCPA.

As indicated earlier, when Congress intends to include Indian tribes under the reach of a federal statute, it has stated its intention to do so by expressly referencing Indian tribes. *See, e.g.*, 7 U.S.C. § 8310(a); 42 U.S.C. § 9601(16); 16 U.S.C. § 698v-4(b)(4); 49 U.S.C. § 5121(g); and 28 U.S.C. § 3701(2). Its failure to do so with regard to the FCRA/FACTA can only be construed as an intention by Congress that they not be included under the reach of the Act. Thus, the third *Coeur d'Alene Tribal Farm* exception is applicable and also makes FCRA/FACTA inapplicable to the Tribe.

CONCLUSION

For the reasons set forth herein, the District Court's September 4, 2015 Decision and Order, and the Judgment entered on that same date, should be affirmed.

Dated this 3rd day of December, 2015.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief of Defendant-Appellee complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,978 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The undersigned further certifies that 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 Palatino Linotype font.

WHYTE HIRSCHBOECK DUDEK S.C.

By: /s/ Thomas M. Pyper
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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2015, the Brief of Defendant-Appellee was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

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