No. 16-16486

IN THE

United States Court of Appeals
For the Eleventh Circuit

DAVID S. MURANSKY,
individually and on behalf of all others similarly situated,

Plaintiff – Appellee,

and

JAMES H. PRICE, ERIC ALAN ISAACSON,

Interested Parties – Appellants,

v.

GODIVA CHOCOLATIER, INC.,
a New Jersey Corporation,

Defendant – Appellee.

On Appeal from the United States District Court
for the Southern District of Florida, No. 0:15-cv-60716-WPD

EN BANC BRIEF FOR APPELLANT ERIC ALAN ISAACSON

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December 4, 2019

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, counsel for Appellant Eric Alan Isaacson certifies that the following persons and entities have or may have an interest in the outcome of this case:

1. American Express Company (AXP) – Third Party Seeking Payment of Discovery Expenses
2. Bowman and Brooke LLP – Counsel for Defendant
3. Bret Lusskin, P.A. – Counsel for Plaintiff
4. Chamber of Commerce of the United States of America – Amicus Curiae
5. Crotty, Patrick Christopher – Counsel for Plaintiff-Appellee David S. Muransky
6. Davis, John William – Counsel for Interested Party-Appellant Eric Alan Isaacson
7. Dimitrouleas, Honorable William P. – District Court Judge
8. Dykema Gossett PLLC – Counsel for Defendant-Appellee Godiva Chocolatier, Inc.
9. Feldman, Jonathan Samuel – Objecting Class Member, pro se
10. Flick, Charles Philip – Counsel for Defendant

11. Franklin, Jonathan S. – Counsel for Amicus Curiae Six Flags Entertainment Corp.
12. Godiva Chocolatier, Inc. – Defendant-Appellee
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14. Hilicki, Michael – Counsel for Plaintiff-Appellee David S. Muransky
15. Hogan Lovells US LLP – Counsel for Interested Party-Appellant Eric Alan Isaacson
16. Holt, Michael Aaron – Counsel for American Express Company
17. Huff, Kevin Brent – Counsel for Amici Curiae Chamber of Commerce, International Franchise Association, and National Retail Federation
18. International Franchise Association – Amicus Curiae
19. Isaacson, Eric Alan – Interested Party-Appellant
20. Katyal, Neal Kumar – Counsel for Interested Party-Appellant Eric Alan Isaacson
21. Kellog Hansen Todd Figel & Frederick, PLLC – Counsel for Amici Curiae Chamber of Commerce, International Franchise Association, and National Retail Federation
22. Keogh Law, LTD – Counsel for Plaintiff-Appellee David S. Muransky
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24. Lacy, Price & Wagner, P.C. – Counsel for Interested Party-Appellant James H. Price
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26. Libman, Shawn Y. – Counsel for Defendant
27. Lusskin, Jr., Bret Leon – Counsel for Plaintiff-Appellee David S. Muransky
28. McDonald, W. Allen – Counsel for Interested Party-Appellant James H. Price
29. Melendez, Brian – Counsel for Defendant-Appellee Godiva Chocolatier, Inc.
30. Muransky, David S. – Plaintiff-Appellee
31. National Retail Federation – Amicus Curiae
32. Newman, Jeremy S. – Counsel for Amici Curiae Chamber of Commerce, International Franchise Association, and National Retail Federation
33. Norton Rose Fulbright US, LLP – Counsel for Amicus Curiae Six Flags Entertainment Corp.
34. Nutley, C. Benjamin – Counsel for Interested Party-Appellant Eric Alan Isaacson
35. Price, James H. – Interested Party-Appellant
36. Oracle America Inc. (ORCL) – Third Party
37. Owens, Scott David – Counsel for Plaintiff-Appellee David S. Muransky

38. Reich, Mitchell P. – Counsel for Interested Party-Appellant Eric Alan Isaacson

39. Seipp, Flick & Hosley, LLP – Counsel for Defendant (now merged with Bowman and Brooke)

40. Shook, Hardy & Bacon L.L.P. – Counsel for Third Party American Express Company

41. Siegal, Peter B. – Counsel for Amicus Curiae Six Flags Entertainment Corp.

42. Six Flags Entertainment Corp. – Amicus Curiae

43. Snow, Honorable Lurana S. – District Court Magistrate Judge

44. The Law Office of Scott D. Owens – Counsel for Plaintiff

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to its notice of October 25, 2019, this Court has ordered that oral argument will be conducted the week of February 24, 2020, and that each side will be allotted 20 minutes for oral argument. Interested Party – Appellant Eric Alan Isaacson agrees that, given the importance of the standing issues presented in this appeal, oral argument would assist the Court in its resolution of the case.

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EN BANC BRIEF FOR APPELLANT ERIC ALAN ISAACSON

INTRODUCTION

David Muransky alleges that a cashier at Godiva Chocolatier handed him a receipt that printed 10 out of the 16 digits of his credit card number. That was a few more digits than federal law allows. Muransky does not claim that he suffered any real-world harm from this alleged statutory violation—he does not claim that his identity was stolen, that his credit was affected, or even that his not-quite-

truncated-enough credit card number was seen by someone else. Nor has Muransky demonstrated that he faced any material *risk* of harm; on the contrary, the chances that a thief would obtain Muransky's receipt, correctly guess the remaining six digits of his card number, and steal his identity were infinitesimally small.

Nonetheless, Muransky filed a class-action suit against Godiva under the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), Pub. L. No. 108-159, 117 Stat. 1952, seeking to represent a class composed of every individual who received a technically noncompliant receipt from Godiva over the preceding two years. Although Godiva's potential liability for these violations exceeded one-third of a billion dollars, Muransky and his attorneys agreed to settle the case for merely $6.3 million, of which one-third—or $2.1 million—would go to Muransky's class-action attorneys, $10,000 would go to Muransky, and as little as $12 would go to each of the remaining class members. The District Court accepted that settlement under Federal Rule of Civil Procedure 23(e), thereby binding every member of the plaintiff class, including Mr. Isaacson, to a settlement broadly releasing any and all claims for identity theft and credit card fraud that might have been suffered by other class members.

The District Court lacked authority to approve that settlement, however, because Muransky lacked Article III standing to serve as class representative. As

the Supreme Court recently reaffirmed, "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016). And to be "concrete," an injury must be "real"; that is, "it must actually exist." *Id.* at 1548. Muransky cannot clear that modest but unyielding bar. He did not suffer any harm from his receipt that "history" or "the judgment of Congress" would deem an injury in fact. *Id.* at 1549. And the statutory violation he complains of did not "entail a degree of risk sufficient to meet the concreteness requirement." *Id.* at 1550. Indeed, Godiva's statutory violation consisted of nothing more than printing the first six digits of Muransky's card number—or his card's "Issuer Identification Number"—which reflects information that is "the equivalent of . . . information which need not be truncated under FACTA." *Katz v. Donna Karan Co.*, 872 F.3d 114, 118, 120 (2d Cir. 2017).

Every circuit to consider a suit like Muransky's has found that the plaintiff lacked standing. This Court should not be the sole exception. And it certainly should not buck that trend to permit a single, uninjured individual to release the claims of 342,000 class members for a fraction of the recovery that members with actual injuries might have received. The District Court's judgment should be reversed, and this class-action suit should be dismissed for lack of jurisdiction.

JURISDICTIONAL STATEMENT

For the reasons set forth below, Muransky lacks Article III standing. The District Court accordingly lacked jurisdiction to approve the proposed class settlement pursuant to Federal Rule of Civil Procedure 23(e). *See Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (per curiam) ("A court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing."); *Spokeo*, 136 S. Ct. at 1547 n.6 ("[N]amed plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.' " (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976))).

Eric Alan Isaacson is a member of the plaintiff class, and filed objections to the proposed class settlement in the District Court. DE59 (J.A. 288-306). The District Court entered judgment approving the proposed class settlement on September 28, 2016. DE99 (J.A. 804-810). Isaacson timely filed a notice of appeal on October 25, 2016. DE105 (J.A. 816). This Court has jurisdiction under 28 U.S.C. § 1291. *See Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002) (holding that "nonnamed class members . . . who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal").

STATEMENT OF THE ISSUE

Whether Muransky has Article III standing to bring this lawsuit.

STATEMENT OF THE CASE

A. Statutory Background

Credit card numbers typically consist of sixteen digits. *See* DE16-1 (J.A. 56 n.1). The last ten digits of a card number are personal to the account-holder. The first six digits are known as the card's "Issuer Identification Number" (IIN) or "Bank Identification Number" (BIN), and identify the institution that issued the card. *See, e.g.*, *Bin List (Binlist) & Bin Ranges*, BinDB, https://www.bindb.com/bin-list.html (last visited Dec. 4, 2019) ("*Bin List & Bin Ranges*"). IINs are not personal to the cardholder, and may be obtained online through publicly accessible databases. *See id.*; *Katz*, 872 F.3d at 118, 120.

In FACTA, Congress required merchants to truncate credit card information on receipts provided to customers at the point of sale. The drafters of that statute expressed concern that some merchants were printing the "entire credit card number" on receipts, enabling thieves to obtain a customer's receipt and ascertain a person's full credit card information. *Identity Theft: Restoring Your Good Name: Hearings Before the Subcomm. on Tech., Terrorism, & Gov't Info. of the S. Comm. on the Judiciary*, 107th Cong. 14 (2002) ("S. Hrg. 107-900") (statement of Sen. Feinstein, Chair, S. Subcomm. on Tech., Terrorism, & Gov't Info.); *see Identity*

Theft: Assessing the Problem and Efforts to Combat It: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce, 108th Cong. 37 (2003) ("H.R. Hrg. No. 108-60") (statement of Rep. Greenwood, Chair, H. Subcomm. on Oversight & Investigations) (same); *The Fair Credit Reporting Act and Issues Presented by Reauthorization of the Expiring Preemption Provisions: Hearings Before the S. Comm. on Banking, Hous., & Urban Affairs*, 108th Cong. 78 (2003) ("S. Hrg. No. 108-579") (statement of Sen. Schumer, Member, S. Comm. on Banking, Hous., & Urban Affairs) (same). California had recently enacted a law requiring merchants to truncate credit card numbers on printed receipts to the last five digits. *See* S. Hrg. 107-900, at 14 (statement of Sen. Feinstein). Congress followed its lead by enacting a "similar" law. *Id.* It added a provision to the Fair Credit Reporting Act of 1970 ("FCRA"), stating that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1). Congress gave merchants up to 3 years to comply with this statutory requirement. *Id.* § 1681c(g)(3).

Shortly after FACTA became effective, plaintiffs began filing "hundreds" of suits alleging that merchants were in technical non-compliance with the statute. Credit and Debit Card Receipt Clarification Act of 2007 ("Clarification Act"), Pub.

L. No. 110-241, § 2(a)(4), 122 Stat. 1565, 1565 (2008). Many merchants had interpreted the statutory language as permitting them to truncate either the credit card number "or" the expiration date. *See id.* § 2(a)(3). As a result, some stores continued to print receipts containing a credit card's expiration date and a truncated card number. *Id.* Invoking a general cause of action in FCRA—which permits recovery of up to $1,000 for any "willful" violation of FCRA, 15 U.S.C. § 1681n(a)—plaintiffs sought hundreds of millions of dollars in damages for these violations. *See* 154 Cong. Rec. S4439-40 (daily ed. May 20, 2008) (statement of Sen. Schumer); 154 Cong. Rec. E925 (daily ed. May 14, 2008) (statement of Rep. Maloney).

Congress responded by enacting the Clarification Act. In the congressional findings, Congress observed that it enacted FACTA "to prevent criminals from obtaining access to consumers' private financial and credit information in order to reduce identity theft and credit card fraud." Clarification Act § 2(a)(1). Yet, it found, "[n]one of these lawsuits contained any allegation of harm to any consumer's identity." *Id.* § 2(a)(5). Congress thus acted "to ensure that consumers suffering from any actual harm to their credit or identity are protected while simultaneously limiting abusive lawsuits that do not protect consumers but only result in increased cost to business and potentially increased prices to consumers." *Id.* § 2(b). It retroactively eliminated liability for "any person who printed an

expiration date on any receipt" but otherwise complied with FACTA's requirements. *Id.* § 3(a).

B. Factual And Procedural Background

1. Following the enactment of the Clarification Act, some class-action attorneys trained their attention on a new source of technical noncompliance with FACTA: the practice of printing a card's IIN on a receipt, along with the card's last four digits. In the wake of FACTA, a number of card issuers continued to advise merchants that it is "best practice" for them to print the first six and last four digits of a card number on the copy of a receipt retained by the merchant. *See, e.g.*, DE1-1 (J.A. 33) (notice of "Visa Best Practices," advising merchants to "display a maximum of the first six and last four digits . . . on the merchant's copy of a transaction receipt" (emphasis omitted)). Some stores erroneously followed this practice for customer receipts as well, leading to a second wave of FACTA class-action suits challenging those violations, again seeking hundreds of millions of dollars in damages.

This is one such suit. In April 2015, Dr. David S. Muransky filed a lawsuit against Godiva Chocolatier, alleging that Godiva issued him a receipt containing the first six digits of his card number, as well as the last four. His allegations concerning that receipt consist, in full, of the following:

> 26. On March 31, 2015, Plaintiff incurred a charge for $19.26 dollars for goods purchased at Defendant's retail store located at the Aventura Mall in Aventura, Florida.
>
> 27. Plaintiff paid for said goods using his personal VISA® credit card. Upon making the payment, he was provided with an electronically printed receipt bearing the GODIVA® logo, which also displayed the last four digits of his credit card as well as the first six digits of his account number.

DE16 (J.A. 45) (First Am. Compl. ¶¶ 26-27) (emphasis omitted). Muransky does not allege that he suffered any harm as a result of this violation. He does not claim, for instance, that his identity was stolen, that his card number was obtained by another party, or even that his receipt was seen by someone else. He alleges only that Godiva committed a violation of FACTA's truncation requirement.

On the basis of this allegation, Muransky filed a class-action complaint on behalf of himself and all other persons who had received a receipt from Godiva in the preceding two years containing more than the last five digits of their credit or debit card number. DE16 (J.A. 49-50) (First Am. Compl. ¶ 52). Muransky sought statutory damages and punitive damages, as well as "[a]ttorneys' fees, litigation expenses and costs of suit." DE16 (J.A. 54). Given the size of the putative class (approximately 342,000 individuals), Godiva faced over one-third of a billion dollars in potential liability. DE39 (J.A. 103); DE75 (J.A. 489). Yet Muransky and his class-action attorneys agreed to settle the case for a small fraction of that amount: $6.3 million. DE39-1 (J.A. 133). Of that proposed settlement amount, over $2.1 million would go to Muransky's lawyers, $10,000 would be paid to

Muransky himself, and as little as $12 would be left for each class member—even those class members who, unlike Muransky, may have suffered actual harm from Godiva's statutory violations. DE39-1 (J.A. 174). The District Court certified the class and granted preliminary approval to the settlement. DE40 (J.A. 267-279).

Four members of the settlement class, including Eric Alan Isaacson and James H. Price, filed objections. Both Isaacson and Price challenged the attorney's fees and incentive award. DE59 (J.A. 288-306); DE61 (J.A. 312-333). Isaacson also challenged Muransky's adequacy as a class representative, explaining that he lacked Article III standing to bring this suit and release the claims of class members who may have suffered injuries from Godiva's statutory violations. J.A. 849-853 (Fairness Hearing 30:22-34:15); DE88 (J.A. 576-580). In a brief order, the District Court found that it had jurisdiction, denied the objections, and approved the settlement. DE99 (J.A. 804-810). Both Isaacson and Price noticed appeals.

2. A panel of this Court affirmed. *Muransky v. Godiva Chocolatier, Inc.*, 905 F.3d 1200 (11th Cir. 2018). It concluded that, notwithstanding the absence of any allegations of harm in his complaint, Muransky had "alleged a concrete injury in fact that confers Article III standing under the Supreme Court's decision in *Spokeo*." *Id.* at 1208. The panel reasoned that Muransky's asserted injury bore a "close relationship" with the common-law torts of breach of confidence and breach

of an implied bailment agreement. *Id.* at 1208-10. Although the panel "recognize[d]" that "there are some differences between these common law causes of action and the willful violation of FACTA's card-truncation duties"—including that bailment claims are limited to "tangible harm to property" and that breach-of-confidence claims require disclosure "to a third party"—the panel thought it immaterial whether Muransky's harm "would have been actionable at common law," because Congress "has the power to define injuries." *Id.* at 1211 (citation omitted). The panel also reasoned that Muransky had standing because he might have used "time (and wallet space) to safely dispose of or keep the untruncated receipt." *Id.*

The panel acknowledged that its holding was contrary to the decisions of the Second and Ninth Circuits, which had rejected standing in materially indistinguishable circumstances. *Id.* at 1212-13 & n.5. But the panel contended that the Second Circuit had overlooked the analogy to the breach-of-confidence and bailment claims. *Id.* at 1212. And although those courts had both relied on the fact that the first six digits of a card number are the IIN, which only discloses the

card's issuer, the panel refused to consider that fact because this case is a "facial challenge" to Muransky's standing. *Id.* at 1212-14.[1]

3. Isaacson filed a petition for rehearing en banc. While that petition was pending, the Third Circuit issued its decision in *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102 (3d Cir. 2019). There, it expressly rejected the reasoning of the panel opinion, and joined two other circuits in holding that a plaintiff raising claims materially indistinguishable from Muransky's lacked standing. *Id.* at 117-119.

Following *Kamal*, the panel *sua sponte* vacated its previous opinion and issued a substantially revised opinion in its place. *See Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175, 1180 (11th Cir. 2019). In its revised opinion, the panel eliminated large portions of its initial opinion, including the contention that Muransky's claim is analogous to a claim for breach of an implied bailment agreement and the suggestion that Muransky had standing because of the loss of "time" and "wallet space." Instead, the panel added a new section contending that Congress had chosen where to "set the tolerable level of risk" in FACTA, and that the court lacked authority to "substitute [its] judgment" for Congress's. *Id.* at 1188. The panel also opined that a violation of FACTA could confer standing if it presented "even a marginal increase in the risk of harm." *Id.*

[1] The panel also rejected Isaacson's challenge to the settlement on the merits. *Muransky*, 905 F.3d at 1214-19. That issue is outside the scope of the question presented for en banc review.

This Court granted rehearing en banc. Its review is *de novo*. *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005).

SUMMARY OF ARGUMENT

A district court "is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing." *Frank*, 139 S. Ct. at 1046. Muransky lacks standing to bring this class-action lawsuit—and settle the claims of 342,000 class members for a fraction of their potential recovery—because he has not suffered any legally cognizable injury from the statutory violation of which he complains.

A. In *Spokeo*, the Supreme Court reaffirmed the settled principle that "Article III standing requires a concrete injury even in the context of a statutory violation." 136 S. Ct. at 1549. Accordingly, a plaintiff does not "automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* Rather, a plaintiff must demonstrate that either (1) the statutory violation itself entails a "concrete injury," when considered in light of "history and the judgment of Congress," or (2) the statutory violation presents a "material risk" of harm. *Id.* at 1549-50. Muransky satisfies neither of these requirements.

B. Godiva's alleged statutory violation did not itself inflict "concrete injury" on Muransky. Muransky has not alleged that Godiva's conduct caused him to

suffer a tangible harm, such as identity theft or a reduction in his credit score. And Muransky cannot show that printing the first six digits of Muransky's credit card number on Muransky's own receipt inflicted an "intangible injur[y]" that is "concrete" when considered in light of "history" and "the judgment of Congress." *Id.* at 1549.

First, Godiva's conduct does not bear "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* Traditional privacy torts permit recovery only where the defendant has "*disclos[ed]* [the plaintiff's] personal information" to a third party. *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1341 (11th Cir. 2017) (emphasis in original). An action for breach of an implied bailment agreement permits recovery only for the loss of or injury to personal property. 8A Am. Jur. 2d Bailments § 203 (Nov. 2019 update). Muransky's asserted injury is "significant[ly] differen[t]" than these actions in both "kind and degree." *Salcedo v. Hanna*, 936 F.3d 1162, 1172 (11th Cir. 2019). The panel analogized Muransky's complaint to the tort of "breach of confidence," but breach of confidence has not "traditionally been regarded as a basis for a lawsuit," *Spokeo*, 136 S. Ct. at 1549, and like other privacy torts it makes actionable the disclosure of a person's personal information to a third party, not the provision of the plaintiff's own information to the plaintiff himself.

Second, far from making a "judgment" that every violation of FACTA inflicts concrete harm, Congress explicitly rejected that view. In the Clarification Act, Congress stated that FACTA was designed "to reduce identity theft and credit card fraud," Clarification Act § 2(a)(1), and specifically disapproved of suits in which plaintiffs alleged bare violations of FACTA without identifying any "actual harm to their credit or identity," *id.* § 2(b). Furthermore, Congress has continued to permit merchants to print the name of a credit card issuer on a cardholder's receipt, allowing them to print information that is the "equivalent" of a cardholder's IIN. *Katz*, 872 F.3d at 120.

C. Godiva's conduct also did not present a "material risk of harm." To "entail a degree of risk sufficient to meet the concreteness requirement," a statutory violation must pose a risk of harm that is imminent, non-speculative, and certainly impending. *Spokeo*, 136 S. Ct. at 1548-50. Yet Muransky has made no allegation that Godiva's conduct subjected him to a material risk of harm. Indeed, Godiva's conduct would have caused Muransky to suffer harm only if a thief obtained his receipt and then correctly guessed the *remaining six digits* of his card number—a profoundly unlikely chain of events.

The panel concluded otherwise only because it read the materiality requirement out of *Spokeo*. It asserted, in direct conflict with *Spokeo*, that even a "*marginal* increase in . . . risk" is sufficient to confer standing. *Muransky*, 922

F.3d at 1188 (emphasis added). It also claimed that it was required to defer to Congress's judgment as to the "tolerable level of risk." *Id.* But Congress "cannot erase Article III's standing requirements" by permitting suit in the absence of a "material risk of harm." *Spokeo*, 136 S. Ct. at 1548, 1550. And, in any event, Congress did not make the judgment that every technical violation of FACTA poses a risk of harm. Rather, both FACTA and the Clarification Act indicate that it drew the opposite judgment.

D. The conclusion that Muransky lacks standing accords with the great weight of authority in other circuits. The Second, Third, and Ninth Circuits have all held that materially indistinguishable plaintiffs lack standing, and the Seventh Circuit has found standing lacking in similar circumstances. Only the D.C. Circuit has found that a violation of FACTA, by itself, confers standing, and in that case the defendant printed the plaintiff's *entire* "sixteen-digit credit card number" *and* her "credit card expiration date" on her cardholder receipt. *Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059, 1062 (D.C. Cir. 2019). Muransky's asserted risk of injury is far more conjectural than even the minimal risk that any other circuit has recognized as a basis for standing.

ARGUMENT

I. MURANSKY LACKS ARTICLE III STANDING.

A. Under *Spokeo*, A Statutory Violation Confers Article III Standing Only If It Entails Concrete Harm Or A Material Risk Of Concrete Harm.

1. Article III of the Constitution vests federal courts with "[t]he judicial Power of the United States," U.S. Const. art. III, § 1, and provides that courts may exercise that power only by deciding "Cases" and "Controversies." *Id.* § 2. These limits on judicial authority are "fundamental to the judiciary's proper role in our system of government." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citation omitted). Adherence to the case-or-controversy requirement "serves to prevent the judicial process from being used to usurp the powers of the political branches," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013), and guarantees that "the Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society,' " *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

The doctrine of standing "enforces the Constitution's case-or-controversy requirement." *Elk Grove Unif. Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). It limits the class of litigants who may maintain a suit in federal court to those who "ha[ve] 'alleged . . . a personal stake in the outcome of the controversy.' " *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204

(1962)). "[T]he 'irreducible constitutional minimum' of standing consists of three elements": A plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-561 (1992)). Proposed class representatives, no less than other plaintiffs, "must allege and show that they personally have been injured" in order to maintain a class-action suit in federal court. *Id.* at 1547 n.6 (quoting *Simon*, 426 U.S. at 40 n.20). "A court is powerless to approve a proposed class settlement if . . . no named plaintiff has standing." *Frank*, 139 S. Ct. at 1046.

In *Spokeo*, the Supreme Court clarified the circumstances in which an alleged violation of a plaintiff's statutory rights gives rise to Article III standing. 136 S. Ct. at 1549-50. That case arose when Thomas Robins filed a class-action complaint alleging that Spokeo, an online search engine, violated the Fair Credit Reporting Act (FCRA) by disclosing inaccurate information about Robins. *Id.* at 1544. The Ninth Circuit found that Robins had standing simply because he "alleged that 'Spokeo violated *his* statutory rights' " and because "his 'personal interests in the handling of his credit information are individualized rather than collective.' " *Id.* at 1546 (citation omitted). The Supreme Court, however, vacated

the judgment, explaining that the Ninth Circuit's "standing analysis was incomplete." *Id.* at 1550.

"[I]t is settled," the Court explained, "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." *Id.* at 1547-48 (quoting *Raines*, 521 U.S. at 820 n.3); *see Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("In no event . . . may Congress abrogate the Art. III minima . . . ."). Thus, a plaintiff complaining of a statutory violation must "establish injury in fact" by showing that "he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized,' and 'actual or imminent, not conjectural or hypothetical.' " *Spokeo*, 136 S. Ct. at 1547-48. To qualify as "concrete," the Court added, an injury "must be '*de facto*'; that is, it must actually exist." *Id.* at 1548.

The Court then identified two ways in which a statutory violation may inflict a concrete injury in fact. *First*, the Court explained, the statutory violation itself may entail an "intangible injur[y]" that is "nevertheless . . . concrete." *Id.* at 1549. "In determining whether an intangible harm constitutes injury in fact," the Court explained, courts should consult "both history and the judgment of Congress." *Id.*

History supports a finding of concreteness where an "alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* (citing *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 775-777 (2000)). In addition, Congress "may 'elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law,' " and " 'define injuries . . . that will give rise to a case or controversy where none existed before.' " *Id.* (quoting *Lujan*, 504 U.S. at 578; *id.* at 580 (Kennedy, J., concurring in part and concurring in judgment)). But the Court cautioned that "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* Rather, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.*

Second, the Court held that a statutory violation may give rise to standing if it subjects a plaintiff to a "risk of real harm." *Id.* (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013). "For example," the Court noted that "the law has often permitted recovery by tort victims even if their harms may be difficult to prove or measure," as in cases of "slander per se." *Id.* "Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be

sufficient in some circumstances to constitute injury in fact." *Id.* "[A] plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified." *Id.*

The Court then illustrated how those principles applied to the case before it. In FCRA, it explained, "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." *Id.* at 1550. Yet "Robins cannot satisfy the demands of Article III by alleging a bare procedural violation." *Id.* That is because "[a] violation of one of the FCRA's procedural requirements may result in no harm"—for instance, if it involves the release of information that is "entirely accurate." *Id.* And even if a violation of FCRA results in the release of inaccurate information, "not all inaccuracies cause harm or present any material risk of harm," as in the case of an "incorrect zip code." *Id.* The Court held that standing would exist only if "the particular procedural violations alleged . . . entail a *degree of risk* sufficient to meet the concreteness requirement." *Id.* (emphasis added).

2. In the wake of *Spokeo*, Circuits have generally interpreted that decision as setting forth a two-part inquiry for finding standing in cases involving statutory violations. *See, e.g.*, *Kamal*, 918 F.3d at 112-113; *Macy v. GC Servs. Ltd. P'ship*, 897 F.3d 747, 755 (6th Cir. 2018); *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1113 (9th Cir. 2017); *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016). First,

courts ask whether the alleged statutory violation itself entails a "concrete harm" under the guideposts set forth in that opinion—that is, whether the violation entails an "intangible injur[y]" that is "nevertheless . . . concrete" when considered in light of "history" and "the judgment of Congress." *Spokeo*, 136 S. Ct. at 1549; *see, e.g.*, *Kamal*, 918 F.3d at 112-115; *Robins*, 867 F.3d at 1115-17. Second, if the violation does not itself entail concrete harm, courts ask whether the violation nonetheless presents a "risk of real harm," meaning a "material risk" that the plaintiff will suffer a concrete injury as a result of the statutory violation. *Spokeo*, 136 S. Ct. at 1549-50; *see, e.g.*, *Kamal*, 918 F.3d at 115-117; *Macy*, 897 F.3d at 756-761; *Strubel*, 842 F.3d at 190-195.

Although this Circuit has not yet announced a comprehensive standard for analyzing cases under *Spokeo*, its precedents are consistent with this approach. In *Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998 (11th Cir. 2016), *reh'g en banc denied*, 855 F.3d 1265 (2017) (per curiam), this court considered whether a plaintiff had standing to challenge the defendant's temporary failure to record a mortgage within the time period dictated by a New York statute. 839 F.3d at 1000. The court explained that, under *Spokeo*, "[a] plaintiff must suffer some *harm* or *risk of harm* from the statutory violation to invoke the jurisdiction of a federal court." *Id.* at 1003 (emphasis added). It then found that the plaintiff did not satisfy either requirement. Nicklaw did not allege "that he lost money," "that his credit

suffered," or "that he or anyone else was aware that the certificate . . . had not been recorded during the relevant time period." *Id.* Further, Nicklaw "fail[ed] to allege even a material risk of harm at this late date." *Id.* The court rejected Nicklaw's attempt to analogize his asserted injury to the types of harms actionable at "common law," explaining that the common law "provided a remedy to prevent the risk of harm that occurred while title to property was wrongfully clouded, not a remedy *after* the cloud was lifted." *Id.*

The court followed a similar approach in *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019). There, the court held that a plaintiff did not suffer a concrete injury where he received a "single unsolicited text message" in violation of the Telephone Consumer Protection Act (TCPA). *Id.* at 1165. The panel observed that the plaintiff did not allege any actual "costs" from receiving the text message, such as an appreciable loss of "time" or a "loss of opportunity" to use his phone. *Id.* at 1167-68. Further, the panel found "little support" in "history and the judgment of Congress" for treating the receipt of a single unwanted text message as a concrete injury in fact. *Id.* at 1168. The court explained that Congress said nothing in "the TCPA's provisions and findings about harms from telemarketing via text message[s]," which are "qualitatively different from the kinds of things Congress was concerned about when it enacted the TCPA." *Id.* at 1168-69 (footnote omitted). And the plaintiff's alleged injury was "significant[ly]

differen[t] in . . . kind and degree" than the harms recognized in various common-law torts, all of which required a far more "serious" intrusion on privacy, or a physical invasion of real or personal property. *Id.* at 1170-72.

In contrast, this court has found standing when the defendant's asserted statutory violation entailed a concrete injury when considered in light of both history and the judgment of Congress. In *Pedro v. Equifax, Inc.*, 868 F.3d 1275 (11th Cir. 2017), the court found that the publication of inaccurate credit information inflicted concrete injury, because the plaintiff's credit score "dropped 100 points as a result of the challenged conduct," and because falsely stating that another person has " 'refus[ed] to pay his debts' " has long been deemed defamation "per se." *Id.* at 1279-80 (quoting Restatement (First) of Torts § 569 cmt. g (1938)). In *Perry v. Cable News Network, Inc.*, 854 F.3d 1336 (11th Cir. 2017), the court held that a plaintiff had standing to challenge the disclosure of his online viewing history because Congress enacted the Video Privacy Protection Act (VPPA) specifically "to preserve personal privacy with respect to" a person's viewing history, *id.* at 1340 (citation omitted), and because longstanding privacy torts "prevent[ ] *disclosure* of personal information," *id.* at 1341. So too in *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245 (11th Cir. 2015), the court held that a plaintiff suffered concrete injury where the defendant sent an unsolicited fax in violation of the TCPA, because the fax

temporarily rendered the plaintiff's telephone lines " 'unavailable for legitimate business messages,' " the very harm that Congress enacted the TCPA to prevent. *Id.* at 1252-53 (quoting H.R. Rep. No. 102-317, at 10 (1991)); *see also Cordoba v. DirecTV, LLC*, No. 18-12077, 2019 WL 6044305, at *6 (11th Cir. Nov. 15, 2019) (similar).

These cases dictate the inquiry that governs this case. Muransky's claim to standing is premised, in full, on his allegation that Godiva provided him a receipt containing the "first six digits of his [credit card] account number" in violation of FACTA. DE16 (J.A. 45) (First Am. Compl. ¶¶ 26-27) (emphasis omitted). *Spokeo* makes plain that Muransky "cannot satisfy the demands of Article III by alleging a bare procedural violation." 136 S. Ct. at 1550. Rather, Muransky must demonstrate that Godiva's violation inflicted an injury in fact that is "concrete," by showing that either (1) Godiva's statutory violation *itself* entailed "concrete injury," when considered in light of "history and the judgment of Congress," *id.* at 1549; or (2) Godiva's statutory violation subjected Muransky to a "material risk" of concrete injury, *id.* at 1550. For the reasons that follow, Muransky cannot make either showing.

B. Godiva's Alleged Statutory Violation—Providing Muransky A Receipt Containing The First Six Digits Of Muransky's Own Credit Card Number—Did Not Itself Entail Concrete Harm.

Muransky has not demonstrated that Godiva's FACTA violation itself entailed a concrete harm. As an initial matter, he does not allege that the violation caused him *tangible* harm: He does not, for instance, allege that the violation caused him to lose money, *Nicklaw*, 839 F.3d at 1003, or caused his credit score to drop, *Pedro*, 868 F.3d at 1280. Further, neither "history" nor "the judgment of Congress" supports the contention that being provided a receipt containing the first six digits of one's own credit card number is the sort of "intangible injur[y]" that is "nevertheless . . . concrete" for purposes of Article III. *Spokeo*, 136 S. Ct. at 1549.

1. Muransky's asserted injury does not bear a "close relationship" to a harm traditionally recognized as giving rise to a legal claim.

The Supreme Court explained in *Spokeo* that "history" supports a finding of concreteness only where "an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* To bear the requisite "close relationship," an injury must be substantially similar in "kind and degree" to a harm that traditionally has been the basis for suit. *Salcedo*, 936 F.3d at 1170-72; *accord Kamal*, 918 F.3d at 114 (requiring that "the harm be of the same character of previously existing legally cognizable injuries" (citation and internal quotation

marks omitted)). For instance, this court found a close relationship in *Pedro* and *Perry* because the plaintiffs' asserted injuries were virtually identical to harms traditionally actionable as defamation per se, *Pedro*, 868 F.3d at 1279-80, or as violations of various privacy torts, *Perry*, 854 F.3d at 1340-41; *see also Vermont Agency of Nat. Res.*, 529 U.S. at 774 (finding that history supports standing for *qui tam* relators because of "the long tradition" of permitting "*qui tam* actions" themselves). In contrast, this court found such a relationship lacking in *Salcedo* because the common-law claims the plaintiff identified were limited to "serious" intrusions on privacy and "infringe[ments] upon . . . property"—harms substantially dissimilar in "kind and degree" from the plaintiff's complaint of receiving a single unwanted text message. 936 F.3d at 1171-72; *see also Nicklaw*, 829 F.3d at 1003.

Muransky's asserted injury—being provided the first six digits of his own credit card number—is fundamentally unlike any traditional basis for a lawsuit. Muransky analogizes his asserted injury to various common-law privacy torts. But those torts permit recovery only where the defendant "*disclos[ed]* [the plaintiff's] personal information" to a third party. *Perry*, 854 F.3d at 1341 (emphasis in original). The tort of unreasonable publicity, for instance, prohibits "giv[ing] publicity to a matter concerning the private life of another . . . if the matter publicized is of a kind that . . . would be highly offensive to a reasonable person."

Restatement (Second) of Torts § 652D (1977) (Second Restatement). The tort of false light prohibits "giv[ing] publicity to a matter concerning another that places the other before the public in a false light" and is "highly offensive." *Id.* § 652E. In each case, "the gravamen of the claimed injury is the publication of information." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 489 (1975); *see Elec. Privacy Info. Ctr. v. U.S. Dep't of Commerce*, 928 F.3d 95, 102 (D.C. Cir. 2019) (similar); *Kamal*, 918 F.3d at 114 (similar).

Muransky, however, does not allege that his personal information was *disclosed* to any third party. His sole complaint is that his credit card information was given *to him*. DE16 (J.A. 45) (First Am. Compl. ¶ 27). What is more, that information—his card number's IIN—is far less private or sensitive than the types of "highly offensive" disclosures that give rise to a privacy claim. *See* Second Restatement § 652D cmt. c. & illus. 10-11 (giving as examples of privacy violations the publication of "a picture of B nursing her child" or a motion picture of a woman's "caesarian operation"). In both "kind and degree," Muransky's asserted injury lacks a close relationship to the harms that traditionally form the basis for a privacy suit at common law. *Salcedo*, 936 F.3d at 1171-72; *accord Kamal*, 918 F.3d at 114-115; *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 780 (9th Cir. 2018).

The panel suggested that the tort of "breach of confidence" provides a closer analogue to Muransky's claim than the traditional privacy torts. *Muransky*, 922 F.3d at 1190-91. But breach of confidence is not a tort "traditionally . . . regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 136 S. Ct. at 1549. As of 1982, breach of confidence was still—in the words of the leading article on the subject—"an emerging tort." *See* Alan B. Vickery, *Breach of Confidence: An Emerging Tort*, 82 Colum. L. Rev. 1426, 1454-55 (1982). By 1995, courts in "[o]nly two States, California and New York, recognize[d] a separate but limited tort of breach of confidence," and in each state the courts of last resort had expressly declined to rule on its validity. Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 Buff. L. Rev. 1, 53 & nn.228-229 (1995) (footnotes omitted). When *Spokeo* instructed courts to examine "history" to determine whether a violation of the Fair Credit Reporting Act of 1970 constitutes an injury in fact, *see* 136 S. Ct. at 1549, it surely was not referring to torts that had barely attained recognition in two jurisdictions more than two decades after FCRA's enactment. *Cf. Vermont Agency of Nat. Res.*, 529 U.S. at 774 (relying on "the long tradition of *qui tam* actions" dating to "the end of the 13th century").

In any event, breach of confidence is no more analogous to Muransky's claim than the traditional privacy torts. Like those torts, it establishes liability only

where the plaintiff's "nonpublic information" has been "disclos[ed] to a third party." Vickery, *supra*, at 1455; *Kamal*, 918 F.3d at 114 (same). Moreover, it is limited to circumstances in which the plaintiff and the defendant have a relationship of special trust and confidence, such as a "physician-patient relationship." *Biddle v. Warren Gen. Hosp.*, 715 N.E.2d 518, 523 (Ohio 1999); *see* Gilles, *supra*, at 52-55. Muransky's asserted injury checks neither of those boxes.

The panel acknowledged, with a touch of understatement, that "the match" between Muransky's asserted injury and breach of confidence "is not exact," but argued that breach of confidence "bears sufficient similarity" to Muransky's asserted injury because Godiva's conduct "create[d] a *risk* that information FACTA makes confidential will fall into a third party's hands." *Muransky*, 922 F.3d at 1191 (emphasis added). But conduct that merely entails a *risk* of *inadvertent* disclosure is not similar in kind or degree to conduct that involves an *actual* and *intentional* disclosure; those actions differ in terms of intent, causality, and the extent to which the plaintiff's trust has been breached. *See* Vickery, *supra*, at 1434 (describing the "interests invaded" by a breach of confidence). Further, *Spokeo* makes clear that a "risk" of harm is not enough to establish concrete injury; rather, the plaintiff must demonstrate that the statutory violation imposed a "*material* risk of harm," which Muransky cannot. 136 S. Ct. at 1550 (emphasis added); *see infra* pp. 39-49. Hence, even if breach of confidence were a traditional

tort (which it is not), and even if printing extra digits on a receipt entailed an injury comparable to that breach (which it does not), Muransky's mere fear of a *risk* of such an injury would not suffice to establish the "close relationship" that *Spokeo* requires.[2]

In addition to comparing Muransky's asserted injury to the privacy torts, the panel initially held that Muransky's injury is analogous to the harm giving rise to breach of an implied bailment agreement. *Muransky*, 905 F.3d at 1209-10. The panel later revised its opinion to remove the comparison. *See Muransky*, 922 F.3d at 1180. That revision was sound: The analogy to bailment claims is even more strained than the analogy to privacy torts.

At common law, a "bailment" refers to the "delivery of personal property by one person (the *bailor*) to another (the *bailee*) who holds the property for a certain purpose . . . under an express or implied-in-fact contract." Black's Law Dictionary

[2] The panel's own analogy confirms that its logic proves too much. The panel suggested that because the common law prohibits trespass, Congress would necessarily confer Article III standing if it "passed a statute to minimize the risk of trespass." *Muransky*, 922 F.3d at 1191. But surely a statute that reduced the risk of trespass by a trivial degree—say, a requirement that local governments print property markers in a slightly larger font—would not automatically give landowners standing to challenge every violation, no matter how harmless. Under the plain language of *Spokeo*, would-be plaintiffs would be required to demonstrate that the violation posed a "material risk" of the harm that the law of trespass is designed to prevent. *See Spokeo*, 136 S. Ct. at 1550 (indicating that the disclosure of an "incorrect zip code" would not give rise to standing because "[i]t is difficult to imagine how . . . , without more, [it] could work any concrete harm").

(11th ed. 2019). A breach of a bailment agreement occurs when the bailee "negligent[ly] fail[s] to perform his or her duty of care," and "the property [i]s lost or injured." 8A Am. Jur. 2d Bailments § 203; *see, e.g.*, *Millennium Partners, L.P. v. Colmar Storage, LLC*, 494 F.3d 1293, 1299 (11th Cir. 2007).

Muransky's claim of injury is fundamentally different. Muransky is not complaining about Godiva's handling of his "personal property"; he is objecting to Godiva's use of his credit card information. Yet the common law is unequivocal that "personal information is neither property nor personalty that can serve as the basis of a bailment claim, regardless of whether the information belongs to an employee or a consumer." 8A Am. Jur. 2d Bailments § 3 (Nov. 2019 update) (footnote omitted); *see, e.g.*, *In re Sony Gaming Networks & Customer Data Sec. Breach Litig.*, 903 F. Supp. 2d 942, 974 (S.D. Cal. 2012) (rejecting argument that alleged misuse of personal information gives rise to bailment claim); *Enslin v. Coca-Cola Co.*, 136 F. Supp. 3d 654, 679 (E.D. Pa. 2015) (same, and citing additional cases). That defeats any contention that the type of "intangible injury" Muransky alleges is one historically actionable at common law. *Spokeo*, 136 S. Ct. at 1549; *see Salcedo*, 936 F.3d at 1171-72 (rejecting proposed common-law analogues because they were limited to intrusions on "real property" or "personal property," whereas plaintiff was complaining of an unwanted text message).

The panel's bailment analogy is inapt for the additional reason that Muransky does not allege that Godiva caused his information to be "lost or injured." 8A Am. Jur. 2d Bailments § 203. The "los[s] or injur[y]" to property is a defining element of a bailment claim, and has been for centuries. *Id.*; *see Woodruff v. Painter*, 24 A. 621, 622 (Pa. 1892) (requiring proof that property was "lost," "stolen," or "return[ed] . . . in a damaged state" to establish bailment claim); *Bunnell v. Stern*, 25 N.E. 910, 912 (N.Y. 1890) (holding bailee "liable . . . for the damages [the plaintiff] sustained" when her cloak was stolen); *Armored Car Serv., Inc. v. First Nat'l Bank of Miami*, 114 So. 2d 431, 435-436 (Fla. Dist. Ct. App. 1959) (finding breach of implied bailment where bank lost a "bag of money"); *see also* Joseph Story, *Commentaries on the Law of Bailments* §§ 25-40 (1832) (delineating bailee's obligation to protect property from "losses" and "thefts"). Muransky, however, has not alleged that Godiva lost or somehow damaged his credit card information. On the contrary, he alleges that Godiva returned the information to *Muransky himself*—the very thing that a bailee is supposed to do with respect to the bailor's property. *See* 8A Am. Jur. 2d Bailments § 129 (Nov. 2019 update) (describing the bailee's obligation to "return" property to the bailor). That too renders Muransky's asserted injury far too removed from any claim traditionally actionable at common law to establish the "close relationship" *Spokeo* requires.

2. Muransky cannot identify a "judgment of Congress" that Godiva's alleged statutory violation entails a concrete injury.

The "judgment of Congress" also does not support the contention that Godiva's conduct entailed a concrete harm. *Spokeo*, 136 S. Ct. at 1549. *Spokeo* gave limited guidance as to how courts should ascertain Congress's judgments. But it made one proposition pellucidly clear: The bare fact that "a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right" is not sufficient. *Id.* Rather, litigants must point to something more, which shows that Congress "identif[ied] [the] intangible harms" the plaintiff complains of and sought to "elevat[e] [those harms] to the status of legally cognizable injuries." *Id.* (quoting *Lujan*, 504 U.S. at 578). Justice Kennedy's concurrence in *Lujan*—which the *Spokeo* Court explicitly invoked—reinforces this point. "In exercising this power [to define legally cognizable injuries]," Justice Kennedy explained, "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment).

Following those directives, this court has insisted on some affirmative evidence in a statute's "findings" or its "legislative history" that Congress made a judgment that the plaintiffs' alleged harm constitutes a concrete injury. *Salcedo*, 936 F.3d at 1168-69 & n.6. In *Perry*, for example, the court deemed it relevant that the plaintiff's injury—the unauthorized disclosure of the plaintiff's video

viewing history—was "precisely the same" injury that Congress enacted the VPPA to prevent, as evidenced by its legislative history. *See id.* at 1172 n.11; *Perry*, 854 F.3d at 1340 (observing that "[t]he statute . . . seeks 'to preserve personal privacy with respect to the rental, purchase, or delivery of video tapes or similar audio visual materials' " (quoting 134 Cong. Rec. S5396-08 (daily ed. May 10, 1988)). Conversely, in *Salcedo*, the court found that Congress's judgment did not support a finding of concrete injury because there was "nothing" in the statute's congressionally enacted findings suggesting that Congress was concerned about "telemarketing via text message," and because those messages were "qualitatively different from the kinds of things Congress was concerned about when it enacted the TCPA." 936 F.3d at 1168-70 (emphasis omitted).

So too here, Muransky is unable to point to any congressional judgment deeming each technical violation of FACTA a concrete harm. The statute contains no findings setting forth such a judgment. *See* Pub. L. No. 108-159, 117 Stat. 1952. And the statute's operative text does not evidence any such judgment, either: It merely imposes a duty on retailers to truncate card numbers to the last five digits, without identifying any class of plaintiffs whom Congress deemed to suffer injury from such a violation. 15 U.S.C. § 1681c(g). An entirely separate provision of FCRA—the same general provision at issue in *Spokeo*—enables consumers to bring suit whenever "[a]ny person . . . willfully fails to comply with

any requirement imposed under this subchapter with respect to any consumer . . . ." *Id.* § 1681n(a). But much like the provision at issue in *Lujan*, this statute-wide cause of action does nothing to "identify the injury" Congress wished to vindicate with FACTA or "relate the injury to the class of persons entitled to bring suit." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment).

Furthermore, to the extent that FACTA does shed light on Congress's judgment, it affirmatively suggests that Congress would not have deemed the violation at issue here—the disclosure of the first six digits of a credit card number—a concrete harm. As noted above, "the first six digits of a credit card number constitute the IIN for the card's issuer," which "identif[ies] the institution that issued the card to the card holder." *Katz*, 872 F.3d at 118, 120 (quoting *Bin List & Bin Ranges*, *supra*); *see, e.g.*, *In re Toys "R" Us–Delaware, Inc.–Fair & Accurate Credit Transactions Act (FACTA) Litig.*, No. MDL 08-01980 MMM (FMOx), 2010 WL 5071073, at *12 (C.D. Cal. Aug. 17, 2010). Yet FACTA does not "prohibit printing the identity of the card issuer on a receipt." *Katz*, 872 F.3d at 120. Printing the first six digits of a card number on a receipt is thus "the equivalent of printing . . . information which need not be truncated under FACTA." *Id.* It is passing unlikely that Congress made a judgment that printing effectively the same information that it lawfully permitted retailers to print inflicts a "concrete

injury" under the statute. *See Noble v. Nevada Checker Cab Corp.*, 726 F. App'x 582, 584 (9th Cir. 2018).[3]

The Clarification Act further confirms that Congress would not have deemed printing some but not all of the digits of a card number a concrete injury. As noted above, Congress enacted the Clarification Act in response to a wave of lawsuits alleging that retailers had violated FACTA by "fail[ing] to remove the expiration date" from printed receipts. Clarification Act § 2(a)(4). In the Clarification Act's findings, Congress stated that it enacted FACTA "to prevent criminals from obtaining access to consumers' private financial and credit information in order to reduce identity theft and credit card fraud." *Id.* § 2(a)(1). It further observed that "[n]one of the lawsuits" alleging that retailers had failed to truncate expiration

[3] The panel refused to consider the fact that "the first six digits of a credit card number identify only the card issuer" because it believed this fact required record support. *Muransky*, 922 F.3d at 1189-90. But the fact that the first six digits of a card number constitute the IIN is a fact "not seriously open to dispute" of which a court may appropriately take judicial notice. *Dippin' Dots, Inc. v. Frosty Bites Distribution, LLC*, 369 F.3d 1197, 1204 (11th Cir. 2004) (giving examples). This fact has been referenced in numerous judicial opinions, regulatory documents, and publicly available sources whose accuracy and reliability cannot reasonably be questioned. *See, e.g.*, *Katz*, 872 F.3d at 118 (citing cases); Supplemental Nutrition Assistance Program, Regulation Restructuring: Issuance Regulation Update and Reorganization To Reflect the End of Coupon Issuance Systems, 75 Fed. Reg. 18,377, 18,392 (2010); *Bin List & Bin Ranges*, *supra*; Katie Bird, *Changes to the Issuer Identification Number (IIN) Standard*, Int'l Organization for Standardization (ISO) (Nov. 21, 2016), https://www.iso.org/news/2016/11/Ref2146.html. And a record document attached to Muransky's complaint alludes to this fact when it describes the "best practice" of not truncating the first six digits of a credit card number on a merchant receipt. DE1-1 (J.A. 33).

dates properly "contained an allegation of harm to any consumer's identity." *Id.* § 2(a)(5). The Clarification Act therefore retroactively eliminated liability for retailers who had improperly included expiration dates in order to "ensure that consumers suffering from any *actual harm* to their credit or identity are protected while simultaneously limiting abusive lawsuits that do not protect consumers but only result in increased cost to business and potentially increased prices to consumers." *Id.* § 2(b) (emphasis added).

In other words, this statute expressly confirms that the harm that Congress enacted FACTA to prevent was "identity theft and credit card fraud," not the truncation of card information in and of itself. *Id.* § 2(a)(1); *see id.* § 2(b). And it distinguishes technical violations of the statute from cases in which consumers suffered "actual harm," making clear that Congress believed the two were not equivalent. Clarification Act § 2(b); *see id.* § 2(a)(5). As the Third Circuit explained, "the Clarification Act . . . expresses Congress's judgment that not all procedural violations of FACTA will amount to concrete harm." *Kamal*, 918 F.3d at 113.

The panel drew the opposite inference based on Congress's finding that "[e]xperts in the field agree that proper truncation of the card number . . . prevents a potential fraudster from perpetrating identity theft or credit card fraud." *Muransky*, 922 F.3d at 1187 (quoting Clarification Act § 2(a)(6)). But this finding

reaffirms that the harm Congress sought to prevent with FACTA was "identity theft or credit card fraud," and that Congress viewed the truncation requirement merely as a means of "prevent[ing]" that harm. Clarification Act § 2(a)(6). A violation of the truncation requirement thus does not inflict the actual harm Congress identified in FACTA; at most, it violates a "procedure[ ] designed to decrease th[e] risk" of that harm. *Spokeo*, 136 S. Ct. at 1550. And *Spokeo* made clear, time and again, that a plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* at 1549.

* * *

In short: A violation of FACTA is substantially unlike any traditional basis for a legal action in English or American courts. And not only does FACTA contain no evidence that Congress determined that the disclosure of the first six digits of a card number itself entails concrete injury, but several indicia of congressional intent support the opposite conclusion. In light of "history and the judgment of Congress," Muransky cannot carry his burden of demonstrating that the violation he complains of entails a "concrete injury" under Article III.

C. Godiva's Conduct Did Not Present A Material Risk Of Concrete Harm.

Godiva's statutory violation also did not "entail a *degree of risk* sufficient to meet the concreteness requirement." *Spokeo*, 136 S. Ct. at 1550 (emphasis added).

Spokeo made clear that, to present the requisite "degree of risk," a statutory violation must pose a "material risk of harm." *Id.* And it further indicated that a "material risk" is present only where a harm is both imminent and certainly impending: It reaffirmed the longstanding rule that an injury in fact must be "*actual or imminent*, not conjectural or hypothetical." *Id.* at 1548 (emphasis added) (quoting *Lujan*, 504 U.S. at 560). It illustrated the principle that a "risk of real harm" may "satisfy the requirement of concreteness," *id.* at 1549, by citing *Clapper*, in which the Court held that a " 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury' are not sufficient." *Clapper*, 568 U.S. at 409 (emphases and alteration in original; citation omitted). And, as an example of a non-material risk, the Court offered the disclosure of an "incorrect zip code," explaining that "[i]t is *difficult to imagine* how the dissemination of an incorrect zip code, without more, could work any concrete harm." *Spokeo*, 136 S. Ct. at 1550 (emphasis added).

Other Circuits have interpreted *Spokeo*'s "material risk" requirement similarly. The Sixth Circuit has held that "[a] material risk of harm . . . may establish standing" only if "the 'threatened injury [is] *certainly impending*,' " and that a "highly speculative" or "remote" risk of harm is insufficient. *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 463 (6th Cir. 2019) (quoting *Clapper*, 568 U.S. at 409). The Eighth Circuit has held that "a speculative or hypothetical risk is

insufficient" to establish a "material risk of harm." *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016). And the Third Circuit—considering allegations virtually identical to this case—held that the failure to truncate a card number does not pose a material risk of injury because any risk depends on "a highly speculative chain of future events." *Kamal*, 918 F.3d at 116 (citation and internal quotation marks omitted); *see also Bassett*, 883 F.3d at 783 (printing an expiration date in violation of FACTA does not pose a material risk of injury, because the threat of identity theft from such a violation is "too speculative for Article III purposes" (citing *Lujan*, 504 U.S. 555, and *Clapper*, 568 U.S. 398)); *Meyers v. Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724, 727-728 (7th Cir. 2016) (reaching same conclusion).

Under these standards, Muransky has failed to carry his burden of demonstrating that Godiva's conduct presented a material risk of concrete harm. Because this case arises on review of a final judgment approving a class-action settlement, Muransky had an obligation to prove—not merely plead—that he faced a material risk of harm. *See Lujan*, 504 U.S. at 561 ("[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1280 (11th Cir. 2000) (explaining that the inquiry into Article III

standing at the class-certification stage "is necessarily fact-specific and requires factual proffers, through affidavits and other evidentiary documents"). Yet Muransky's complaint is barren of any allegations claiming, let alone substantiating, that Godiva's conduct subjected him to such a risk. He does not allege, for instance, that there was a substantial risk that a thief would obtain his receipt, or that someone could plausibly have used the limited information on his receipt to commit identity theft,. He alleges simply that Godiva violated the statute. That "[t]hreadbare" allegation would be insufficient to establish standing at any stage of the litigation, and certainly does not suffice at final judgment. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Furthermore, any asserted risk here would be far too "conjectural" to support standing. *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). For Godiva's conduct to cause actual harm to Muransky, the following chain of events would need to occur: A thief would need to (1) obtain a copy of Muransky's receipt; (2) deduce the remaining six digits of Muransky's card number, his expiration date, and the other information necessary to use his credit card, such as his security code and zip code; and (3) use that information to commit identity theft. *See Kamal*, 918 F.3d at 116; *Bassett*, 883 F.3d at 783. Muransky identifies no realistic risk of even the first step occurring; he has pled no facts suggesting he

was at risk of losing his receipt.[4] And basic arithmetic makes clear that the probability of a thief correctly deducing six unknown digits of his credit card number and discovering the remaining information necessary to use his card is infinitesimally small. *See Toys "R" Us*, 2010 WL 5071073, at *12 (estimating odds of guessing the remaining 6 digits as between 10,000,000:1 and 100,000,000:1). By any measure, that falls far short of the "certainly impending" risk that Article III requires. *Clapper*, 568 U.S. at 409 (citation omitted).

The panel reached a contrary conclusion only by effectively reading the materiality requirement out of *Spokeo*. It asserted that even a "marginal increase in . . . risk" is sufficient to confer standing. *Muransky*, 922 F.3d at 1188 ("The risk may not be great, but a great risk is not necessary to satisfy Article III's minimal demand . . . ."). *Spokeo*, however, explicitly instructs otherwise: It states that a statutory violation may confer standing only if it "entail[s] a *degree* of risk sufficient to meet the concreteness requirement"—namely, a "material risk of harm." 136 S. Ct. at 1550 (emphasis added). To support its watered-down rule, the panel cited the familiar maxim that the loss of an "identifiable trifle" may

[4] The panel attached some significance to Muransky's allegation that "Godiva has experienced data breaches." *Muransky*, 922 F.3d at 1191. That allegation, however, has no bearing on Muransky's claim to standing. FACTA regulates the content of only those receipts "provided to the cardholder," not receipts retained by the merchant, *see* 15 U.S.C. § 1681c(g), and Muransky's complaint contains no allegations about the content of a receipt retained by Godiva in any event.

constitute injury in fact. *Muransky*, 922 F.3d at 1188 (quoting *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009)). But that maxim refers to the *quantum* of injury necessary to confer standing, not the requisite *concreteness* or *imminence* of the injury. *See Salcedo*, 936 F.3d at 1172-73 (distinguishing between the "quantitative" and "qualitative" aspects of an injury in fact). While a plaintiff's injury need not be large to establish standing, it must always be "real" and "imminent." *Spokeo*, 136 S. Ct. at 1548-49. For instance, the loss of $5 may confer standing, *see United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973), but a one-in-10,000,000 chance of losing $5 assuredly does not.

The panel also contended that it was obligated to deem Muransky's risk of harm sufficient because it is not appropriate for a court to "substitute [its] judgment for Congress's" as to the "tolerable level of risk." *Muransky*, 922 F.3d at 1188; *see id.* at 1189 (similar). That is incorrect several times over.

First, Congress may not confer standing based on whatever "level of risk" it deems "tolerable." *Id.* at 1188. Article III dictates the degree of risk necessary to establish a "concrete injury": a "material risk of harm," or—put differently—a risk of harm that is " 'actual or imminent, not conjectural or hypothetical.' " *Spokeo*, 136 S. Ct. at 1548-1550 (quoting *Lujan*, 504 U.S. at 560); *see Clapper*, 568 U.S. at 409. *Spokeo* reaffirmed 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." *Spokeo*, 136 S. Ct. at 1547-48 (citation omitted). Congress therefore cannot "abrogate the Art. III minima," *Gladstone*, 441 U.S. at 100, by permitting a plaintiff to sue based on a remote or conjectural risk of harm, rather than by satisfying the constitutional requirement of an injury that is "imminent" and "certainly impending," *Clapper*, 568 U.S. at 409 (citations omitted).

Second, even as to the matters that are within Congress's purview, Congress's judgments are "instructive," not dispositive. *Spokeo*, 136 S. Ct. at 1549. *Spokeo* took special care to make this point clear, cautioning that "Congress' role in identifying and elevating intangible harms does *not* mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* (emphasis added). It made a similar point one paragraph later, explaining that "the violation of a procedural right granted by statute *can* be sufficient in *some* circumstances to constitute injury in fact," not that the violation of a procedural right *always* and *invariably* constitutes such an injury. *Id.* (emphases added). Where, as here, there is simply no plausible account that anyone can offer (or has even attempted to offer) as to how the printing of 10 out

of 16 digits of a card number creates a material risk of harm, courts cannot simply defer to an unreasoned congressional judgment to the contrary.

In any event, Congress has *not* made a judgment to the contrary. In FACTA itself, Congress permitted the printing of the name of a card's issuer on a customer receipt, which is equivalent to the information revealed by the first six digits of a credit card number. *See supra* pp. 35-36. And in the Clarification Act, Congress specifically disapproved of suits alleging bare violations of FACTA's truncation requirement absent any allegation of harm. *See supra* pp. 37-38.

As a basis for its conclusion that Congress identified a risk of harm from any violation of FACTA's truncation requirement, the panel pointed to the Clarification Act's statement that "proper truncation of the card number . . . *prevents* a potential fraudster from perpetrating identity theft or credit card fraud." Clarification Act § 2(a)(6) (emphasis added). But, again, the panel overread that language. Congress found merely that proper truncation of a card number is a prophylaxis that "prevents" fraud; it did not find, and it does not logically follow, that every *failure* to fully truncate a card number *creates* a *material risk* of fraud. Indeed, the expert testimony to which Congress was referring stated that printing less than the *full* card number is sufficient to avoid fraud. *See* 154 Cong. Rec. E925 (daily ed. May 14, 2008) (statement of Rep. Maloney) ("Identity theft prevention experts have testified that the truncation of the credit card numbers

accomplishes the intent of the statute because a potential fraudster would not be able to perpetrate account fraud without having the *entire* correct credit card number." (emphasis added)); 154 Cong. Rec. H3731 (daily ed. May 13, 2008) (statement of Rep. Bean) ("[I]t is noted by many identity theft experts that individuals who commit fraud by stealing consumers' credit and debit card numbers cannot do so without having the *entire* correct account number." (emphasis added)); *see also* 154 Cong. Rec. H3730 (daily ed. May 13, 2008) (statement of Rep. Mahoney) (the fact that a "credit card receipt does not contain the *full* credit card number . . . helps prevent criminals from obtaining the receipt and using it to make fraudulent purchases" (emphasis added)).

The legislative history of FACTA further confirms that Congress did not conclude that every technical violation of FACTA's truncation requirement presents a material risk of harm. *See Salcedo*, 936 F.3d at 1168-70 (considering legislative history in determining the judgment of Congress); *Perry*, 854 F.3d at 1340 (same). The concern that prompted Congress to enact FACTA was the practice of printing a full credit card number on a receipt. Senator Feinstein, the provision's principal sponsor in the Senate, explained that the provision was necessary because "[p]rinted store receipts are real assets for identity thefts because they often contain a card-holder's *entire* credit card number." S. Hrg. 107-900, at 14 (emphasis added). Representative Greenwood, the lead sponsor in

the House, stated that the provision was necessary because, when "a smaller retail shop . . . doesn't truncate [credit card] information," a "receipt can be picked up by a perpetrator, taken to a department store, and that number used there to perpetrate a crime on another retailer." H.R. Hrg. No. 108-60, at 37. Senator Schumer repeated this concern: "We should truncate credit card receipts," he argued, so that "the receipt . . . does not show the *whole* number on there so people cannot go into the garbage can, pick it up, and duplicate your credit card number." S. Hrg. No. 108-579, at 78 (emphasis added).

At no point in the consideration of FACTA did the drafters indicate that they believed that printing more than five digits of a card number, standing alone, posed a risk of harm to a customer. To the contrary, supporters of the bill made clear that they believed that any truncation of the card number would "stop[ ] a thief cold." S. Hrg. No. 107-900, at 15 (statement of Sen. Feinstein). The Federal Trade Commission, testifying in support of the bill, also explained that "identity theft results from thieves obtaining access to card numbers on receipts," and that "[t]his source of fraud could be reduced by requiring merchants to truncate (*i.e.*, print *less than the full card number* on the receipt)." *H.R. 2622—Fair and Accurate Credit Transactions Act of 2003, Hearing on H.R. 2622 Before the H. Comm. on Fin. Servs.*, 108th Cong. 219 (2003) (statement of Timothy Muris, Chair, Fed. Trade Comm'n) (emphasis added). As far as the legislative record discloses, Congress

set the cutoff at five digits simply because California had recently passed an identity theft law that required truncation to five digits, and Congress did not wish to impose inconsistent requirements on retailers. *See* S. Hrg. No. 107-900, at 14 (statement of Sen. Feinstein) (explaining that California "has just established a similar truncation law"); S. Hrg. No. 108-579, at 184 (statement of Linda Foley, Exec. Dir., Identity Theft Res. Ctr.) (explaining that Cal. Civ. Code § 1747.9 provides that "[n]o more than the last five digits of a credit card number may be printed on the electronic receipts").

The "risk of harm" inquiry thus leads to the same place as the "concrete injury" inquiry. Muransky has not suffered any "concrete harm" by virtue of Godiva's statutory violation. And he has not suffered any "material risk" of such an injury, either. He has simply failed to satisfy the "constitutional requirement" of "injury in fact," and his suit should be dismissed for lack of jurisdiction. *Spokeo*, 136 S. Ct. at 1547-48.

D. The Conclusion That Muransky Lacks Standing Accords With The Great Weight Of Authority In Other Circuits.

The conclusion that Muransky lacks standing accords with the substantial weight of authority in other circuits. Three other circuits have held that plaintiffs alleging injuries closely similar or identical to Muransky's lack standing. In *Katz*, the Second Circuit affirmed a judgment dismissing a materially indistinguishable claim for lack of standing, explaining that "the first six digits of a credit card

number constitute the IIN," which is "the equivalent of printing the name of the issuing institution, information which need not be truncated under FACTA." 872 F.3d at 120. In *Noble*, the Ninth Circuit dismissed a claim alleging that the defendants violated FACTA by printing the first and last four digits of the plaintiffs' card numbers on receipts, reasoning that the plaintiffs "did not allege that anyone else had received or would receive a copy of their credit card receipts," and that the first digit merely revealed the "identity of the credit card issuer," which "Congress has not prohibited printing." 726 F. App'x at 583-584. In *Kamal*, the Third Circuit likewise explained that an asserted injury exactly like Muransky's "d[id] not have the requisite 'close relationship' with" a breach of confidence claim and other privacy torts, that the "judgment of Congress" did not support the plaintiff's claim of standing in light of the Clarification Act, and that the "speculative chain of events" that would have to occur for the improperly printed receipt to cause injury did not present a "material risk of harm." 918 F.3d at 110, 112-116.

Likewise, every circuit to consider the question has held that plaintiffs lack standing where they allege that merchants violated FACTA by failing to truncate a card's expiration date. *See Bassett*, 883 F.3d at 777; *Crupar-Weinmann v. Paris Baguettte Am., Inc.*, 861 F.3d 76, 78 (2d Cir. 2017); *Meyers*, 843 F.3d at 725, 727-729. Each of those decisions employed logic irreconcilable with the panel

decision: Among other differences, the Ninth Circuit expressly rejected the common law analogies on which the panel relied, *see Bassett*, 883 F.3d at 780-781, and all three circuits demanded a showing of "material risk of harm" that the panel here deemed unnecessary, *see id.* at 782-783; *Cruper-Weinmann*, 861 F.3d at 81-82; *Meyers*, 843 F.3d at 727-729.

To date, only one circuit has found standing in a case complaining of a violation of FACTA's truncation requirement, and the facts there were notably different. In *Jeffries v. Volume Services America, Inc.*, 928 F.3d 1059 (D.C. Cir. 2019), the plaintiff alleged that she had been provided a receipt that contained her *entire* "sixteen-digit credit card number" *and* her "credit card expiration date." *Id.* at 1062. The D.C. Circuit declined to hold that "every FACTA violation creates a concrete injury in fact"—and in so doing, distanced itself from the panel decision, to which it attributed a contrary view. *Id.* at 1065-66. But it held that Jeffries faced a sufficient risk of harm because her receipt "bore sufficient information for a criminal to defraud her," "creating the nightmare scenario FACTA was designed to prevent." *Id.* at 1066. The court asserted that this conclusion was in accord with the Third Circuit's decision in *Kamal*, in which the court noted that "the potential for fraud [would be] significantly less conjectural" if the plaintiff there "had alleged that the receipt included all sixteen digits of his credit card number." *Id.* at 1067 (quoting *Kamal*, 918 F.3d at 116).

Jeffries thus involved, at minimum, a substantially stronger case for "material risk" than this one. In reaching that conclusion, the D.C. Circuit did echo some aspects of the panel's reasoning, including its erroneous comparison of the plaintiff's harm to a breach of confidence tort, and its near-total deference to Congress's supposed judgment as to "the tolerable level of risk." *Id.* at 1064-65 (citation omitted). But the D.C. Circuit gave no more persuasive basis for those conclusions than the panel here did. Further, Judge Rogers filed a partial concurrence to express her disagreement with some aspects of the panel's analysis. *Id.* at 1069-70 (Rogers, J., concurring in part and concurring in judgment) (deeming it "unclear whether the proffered analogy between a FACTA violation and a breach of confidence supports Jeffries' claim of standing"). And, in the end, even that decision—the most aggressive FACTA standing determination to date by any other circuit—still did not find standing based on a supposed risk nearly as conjectural as the one identified by the panel here. This Court should thus join its sister circuits and hold that Muransky lacks Article III standing to bring this suit.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

Respectfully submitted,

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I hereby certify that on this 4th day of December, 2019, I caused a copy of the foregoing to be served by electronic means via the Court's CM/ECF system on all counsel registered to receive electronic notices.

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