No. 19-3590

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AHMED KAMAL,
ON BEHALF OF HIMSELF AND THE PUTATIVE CLASS,
Plaintiff-Appellant

v.

J. CREW GROUP, INC.; J. CREW INC.; J. CREW INTERMEDIATE LLC.;
J. CREW INTERNATIONAL, INC.; J. CREW OPERATING CORP.;
J. CREW SERVICES, INC.; CHINOS ACQUISITION CORPORATION;
CHINOS HOLDINGS, INC.,
Defendants-Appellees

On Appeal from the United States District Court for the District of New Jersey
2:15-cv-00190, Hon. William J. Martini

BRIEF FOR *AMICI CURIAE* NATIONAL RETAIL FEDERATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES

KEVIN B. HUFF
JEREMY S.B. NEWMAN
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Amici Curiae

(additional counsel listed on inside cover)

March 25, 2020

STEPHANIE MARTZ
NATIONAL RETAIL FEDERATION
1101 New York Avenue, N.W.
Washington, D.C. 20005
(202) 783-7971

Counsel for Amicus Curiae
National Retail Federation

STEVEN P. LEHOTSKY
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for Amicus Curiae
Chamber of Commerce of the
United States of America

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* National Retail Federation and the Chamber of Commerce of the United States of America have no parent company and are not a subsidiary or affiliate of a publicly owned corporation that has issued shares to the public.

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

This lawsuit is emblematic of no-injury class actions filed under the Fair and Accurate Credit Transactions Act ("FACTA") that have plagued businesses, including *amici*'s members. Ahmed Kamal bought clothing at J. Crew stores and received receipts displaying the first six and last four digits of his credit card number. The receipts did not display the middle digits of the number, expiration date, or security code. He kept the receipts, and no one else ever saw them. These simple transactions caused no harm to Kamal. Nor did he suffer any conceivable risk of harm. Nevertheless, he sought statutory damages on behalf of a nationwide class, which could reach an astronomical amount depending on the number of transactions at issue. This Court has already held that Kamal lacks standing, in a precedential opinion that forecloses most of his arguments here. *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102 (3d Cir. 2019). This Court should continue to follow the vast majority of courts that reject standing for no-injury lawsuits like this one. Otherwise, it will transform the Third Circuit into a nationwide haven for FACTA class actions seeking vast statutory damages without any allegation of actual harm.

Article III prevents this abuse of the judiciary by requiring every plaintiff to show concrete injury. "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). FACTA was designed to prevent identity theft. Although J. Crew

allegedly violated FACTA, Kamal suffered no actual harm; his identity was concededly not stolen. Nor was there any risk of identity theft; because he kept the receipts, there was zero risk that any identity thief could have stolen his identity. Moreover, the receipts contained far less information than necessary to commit identity theft, so any risk is beyond speculative. For these reasons, the vast majority of courts (including this Court in *Kamal*) have held that technical violations of FACTA (including the type alleged here) are insufficient for standing. Kamal's tortured arguments for standing all suffer from the same fundamental flaw: receiving a receipt displaying a few too many digits is not a concrete injury because it causes no harm or material risk of harm.

Amici urge this Court to enforce Article III's limitations on judicial power and protect businesses from abusive no-injury class actions.

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amicus the National Retail Federation ("NRF") is the world's largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants, and internet retailers in the United States and more than 45 countries. Retail is the

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution toward the preparation or submission of this brief. No person other than *amici curia*e, their members, or their counsel made a monetary contribution to its preparation or submission.

largest private-sector employer in the United States, supporting one in four U.S. jobs — approximately 42 million American workers — and contributing $2.6 trillion to annual GDP. As the industry umbrella group, NRF periodically submits *amicus curiae* briefs in cases raising significant legal issues, including the specific issue of standing that is required to enforce federal statutes regarding retail transactions, which are important to the retail industry at large, and particularly to NRF's members.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including those involving the standing requirement of Article III. For example, the Chamber participated as an *amicus* in the Supreme Court at both the certiorari and merits stages in *Spokeo*.

Amici have a significant interest in the issue presented by this case because their members and the businesses they represent frequently face putative class

action lawsuits alleging technical violations of FACTA's receipt truncation requirements, without allegations that the plaintiff has suffered any injury or even any material risk of injury.

Amici have filed, concurrently with this brief, a motion for leave to file this brief.

ARGUMENT

I. ALLOWING STANDING FOR TECHNICAL FACTA VIOLATIONS WOULD HARM BUSINESS

A. Plaintiff Lawyers Have Weaponized FACTA

FACTA prohibits merchants from printing "more than the last 5 digits of the [credit or debit] card number or the expiration date" on receipts. 15 U.S.C. § 1681c(g)(1). FACTA is part of the Fair Credit Reporting Act ("FCRA"), which provides statutory damages of $100 to $1,000 for each willful violation. *Id.* § 1681n(a)(1)(A). FACTA class action lawsuits follow a familiar pattern (repeated here). A plaintiff makes a purchase and receives a receipt displaying too many digits of a card number or expiration date. The plaintiff does not suffer identity theft. Nor does the plaintiff claim that anyone else saw the receipt. Therefore, there is *no actual harm* from identity theft and *zero risk of harm* because no one saw the receipt and so no one could possibly have stolen the plaintiff's identity.

Despite the absence of harm or even risk of harm, these lawsuits seek statutory damages for thousands or millions of transactions, totaling hundreds of

millions or billions of dollars, threatening defendants with financial ruin. As Judge Wilkinson recognized regarding FACTA class actions, "the exponential expansion of statutory damages through the aggressive use of the class action device is a real jobs killer" because it threatens "bankrupting entire businesses over somewhat technical violations" even "where no plaintiff has suffered any actual harm from identity theft." *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring). FACTA class actions impose a risk of "annihilative damages" because, "[o]rdinarily, a company that violates FACTA will do so not once or twice, but instead thousands or even millions of times, owing to the fact that it has not properly updated its equipment." *Id*. at 278, 280; *see also* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 105 (2009) (FACTA class actions "create devastating liability that would put the defendant out of business."). Congress never foresaw or intended that plaintiffs would weaponize FACTA in this way.[2]

[2] *See Stillmock*, 385 F. App'x at 276 (Wilkinson, J., concurring) ("bankrupting entire businesses over somewhat technical violations was not among Congress's objectives"); Scheuerman, 74 Mo. L. Rev. at 136 ("Congress never considered the potential problem of aggregating individual claims through the class action.").

Most FACTA lawsuits involve unintentional violations that harm no one. Common sense dictates that businesses that violate FACTA are almost certainly doing so unintentionally, because businesses would have nothing to gain and everything to lose (ruinous class statutory damages) from violating FACTA. *See Gardner v. Appleton Baseball Club, Inc.*, 2010 WL 1368663, at *6 (E.D. Wis. Mar. 31, 2010) ("After all, what did a minor league baseball team stand to gain by printing a few extra digits on a receipt for a hot dog and subjecting itself to potential liability of $100 to $1,000 for each transaction?"). Based on a review of dozens of FACTA cases, generally, defendants in such cases either were unaware that their equipment was set to print receipts in violation of FACTA, were following industry standards (discussed *infra* note 14) that allow printing the first six and last four digits, or were unaware of FACTA's requirements.

The limitation of statutory damages to willful violations is intended to protect against massive liability for unintentional violations. However, the Supreme Court has interpreted willfulness to include recklessness, *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007), and plaintiffs invariably allege that even if a violation was unintentional, the defendant was reckless in failing to prevent it.

Moreover, almost all FACTA violations are merely technical violations, involving printing a few extra digits but still far fewer than necessary for a criminal to successfully commit identity theft. The most common FACTA violations

alleged are printing the expiration date[3] or the violation alleged here, printing the card number's first six and last four digits (a "6+4" violation).[4]

Therefore, in a typical FACTA class action, a business faces ruinous liability for an unintentional mistake that harmed no one and caused no material risk of harm. Often, the only protection businesses have from runaway class liability is the basic Article III requirement that a complainant must suffer a concrete injury.

B. Failure To Enforce Article III Standing Pressures Businesses To Settle Even Meritless Lawsuits

Failing to enforce Article III's standing requirement against no-injury FACTA claims would cause real injury to businesses. The prospect of annihilative class statutory damages places immense pressure on businesses to settle even meritless FACTA claims. The Supreme Court has acknowledged "the risk of 'in terrorem' settlements that class actions entail," because, "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). "When representative plaintiffs seek statutory damages, pressure to settle may be

[3] *See, e.g., Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776 (9th Cir. 2018); *Crupar-Weinmann v. Paris Baguette Am., Inc.*, 861 F.3d 76 (2d Cir. 2017); *Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724 (7th Cir. 2016).

[4] *See, e.g., Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175 (11th Cir. 2019), *vacated and reh'g en banc granted*, 939 F.3d 1278 (11th Cir. 2019); *Katz v. Donna Karan Co.*, 872 F.3d 114 (2d Cir. 2017).

heightened because a class action poses the risk of massive liability unmoored to actual injury." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting).

As illustrated by the below chart of recent multimillion dollar FACTA settlements, the enormous potential statutory damages in FACTA class actions frequently coerce defendants into large settlements. In none of the below cases was anyone allegedly harmed:

Defendant	Class Size	Potential Damages	Settlement Amount
Subway[5]	2,687,021	$269MM-$2.7B	$30.9MM
LabCorp[6]	665,000	$66.5MM-$665MM	$11MM
Spirit Airlines[7]	350,000	$35MM-$350MM	$7.5MM
Jimmy Choo[8]	135,588	$13.6MM-$136MM	$2.5MM

Given the prospect of large settlements, plaintiff's lawyers aggressively hunt for noncompliant receipts, treating a scrap of paper with too many digits as a golden ticket to a blockbuster class action and millions of dollars in attorneys' fees. On websites like www.receiptlawsuits.com, plaintiff's lawyers advertise to

[5] *Flaum v. Doctor's Assocs., Inc.*, No. 0:16-cv-61198-CMA (S.D. Fla. Mar. 21, 2017), ECF No. 82, at 2.

[6] *Legg v. Lab. Corp. of Am. Holdings*, No. 0:14-cv-61543-RLR (S.D. Fla. Oct. 26, 2015), ECF No. 205, at 4.

[7] *Legg v. Spirit Airlines, Inc.*, No. 0:14-cv-61978-JIC (S.D. Fla. Oct. 26, 2015) ECF No. 117, at 6.

[8] *Wood v. J Choo USA, Inc.*, No. 9:15-cv-81487-BB (S.D. Fla. Jan. 20, 2017), ECF No. 79, at 2.

consumers who have received noncompliant receipts, cynically promising that "[y]ou may be able to obtain a recovery *even if you have not suffered any actual harm or actual damages*." ReceiptLawsuits.com, *Credit Card Receipt and Debit Card Receipt Lawsuits*, http://receiptlawsuits.com/ (emphasis added) (last visited Mar. 23, 2020).

Failure of federal courts to enforce standing limitations enables these coercive settlements. Large FACTA settlements occurred frequently before the Supreme Court in *Spokeo* clarified the application of Article III standing to cases involving statutory damages. Post-*Spokeo*, such forced settlements have been slowed by the emergence of the weight of authority rejecting standing for no-injury FACTA violations. Since *Spokeo*, these settlements have tended to occur in jurisdictions where courts have held, against the weight of authority, that a technical FACTA violation confers standing.

This Court should adhere to its precedent in *Kamal* and the nationwide consensus against standing for technical FACTA violations, rather than transforming the Third Circuit into the next nationwide haven for abusive no-injury FACTA class actions.

II. KAMAL LACKS ARTICLE III STANDING

Kamal lacks Article III standing because he suffered no harm or material risk of harm when J. Crew gave him receipts incompletely truncating his credit

card number. Almost all of Kamal's arguments are foreclosed by this Court's precedential *Kamal* opinion, which affirmed the dismissal of his Second Amended Complaint for lack of standing. *Amici* agree with J. Crew that *Kamal* is binding under the doctrines of *stare decisis* and law of the case, and resolves almost all the issues in this appeal. Even if this panel were not constrained by binding precedent, however, the result would be the same. The prior panel's ruling was correct, and none of Kamal's new allegations establishes standing.

A. Standing Requires a Concrete Injury, Even Where a Plaintiff Has Alleged a Statutory Violation

To have Article III standing, "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.'" *Kamal*, 918 F.3d at 110 (quoting *Spokeo*, 136 S. Ct. at 1547). The injury in fact must be "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotation marks omitted). "A 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Spokeo*, 136 S. Ct. at 1548.

"The Supreme Court cautioned that 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.'" *Kamal*, 918 F.3d at 110-11 (quoting *Spokeo*, 136 S. Ct. at 1547) (brackets in

original). That is because "[i]njury in fact is a constitutional requirement, and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" *Spokeo*, 136 S. Ct. at 1547-48 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (second alteration in original). Rather, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* at 1549.

This Court has held that where a statutory violation itself constitutes a concrete injury, a plaintiff need not show further injury to demonstrate standing. But the circumstances in which a statutory violation confers standing without additional harm are limited. This Court has held: "When one sues under a statute alleging 'the very injury the statute is intended to prevent,' and the injury 'has a close relationship to a harm traditionally providing a basis for a lawsuit in English or American courts,' a concrete injury has been pleaded." *Susinno v. Work Out World Inc.*, 862 F.3d 346, 351 (3d Cir. 2017) (quoting *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 639-40 (3d Cir. 2017)) (alterations omitted).

By contrast, where a statute imposes procedures to protect an underlying concrete interest, "[the Third Circuit] — like several of [its] sister circuits — understand[s] *Spokeo* 'to instruct that an alleged procedural violation manifests

concrete injury' if the violation actually harms or presents a material risk of harm to the underlying concrete interest. If the violation does not present a 'material risk of harm to that underlying interest,' however, a plaintiff fails to demonstrate concrete injury." *Kamal*, 918 F.3d at 112-13 (quoting *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016)) (citation and alterations omitted). This "material risk of harm" standard, which numerous other circuits have adopted,[9] derives from *Spokeo*, which instructed courts to assess standing by examining whether statutory violations "cause harm or present any material risk of harm." 136 S. Ct. at 1550.

B. A FACTA Violation Does Not Itself Constitute Concrete Injury

In *Kamal*, this Court correctly held that under *Susinno*'s test, a 6+4 FACTA violation does not, by itself, constitute concrete injury. 918 F.3d at 113-15.

First, Kamal does not allege that he suffered "the very injury [FACTA] is intended to prevent." *Susinno*, 862 F.3d at 351. This Court and many others have recognized that FACTA is intended to prevent identity theft,[10] a conclusion

[9] *See, e.g.*, *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 463 (6th Cir. 2019); *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 338 (7th Cir. 2019); *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016); *Bassett*, 883 F.3d at 783; *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1003 (11th Cir. 2016); *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 879 F.3d 339, 344 (D.C. Cir. 2018).

[10] *See, e.g.*, *Kamal*, 918 F.3d at 115; *Crupar-Weinmann*, 861 F.3d at 78; *Meyers*, 843 F.3d at 725.

consistent with FACTA's text and legislative history.[11] Kamal, however, did not suffer identity theft.

Second, "Kamal's injury does not have the requisite 'close relationship' with" any traditional, common-law harm. *Kamal*, 918 F.3d at 114. Kamal's injury is unlike unreasonable publicity (a traditional privacy tort) or breach of confidence (a newer tort) "because he does not allege disclosure of his information to a third party." *Id.* "[T]he harm underlying both of these actions transpires when a third party gains unauthorized access to a plaintiff's personal information." *Id.* Handing someone a paper with his own credit card information bears no relationship, let alone a close relationship, to any traditionally recognized harm based on unauthorized third-party disclosures of private information — for the obvious reason that it involves no disclosure to a third party. *See Bassett*, 883 F.3d at 780 ("[E]ven assuming that 'unauthorized disclosures of information' are legally cognizable, ABM did not disclose Bassett's information to anyone but Bassett.").[12]

[11] FACTA's preamble states that it is "[a]n [a]ct . . . to prevent identity theft." 117 Stat. 1952. The truncation provision, § 113, is in a subtitle called: "Identity Theft Prevention." *Id.* § 1(b) (table of contents); *see also* S. Rep. No. 108-166, at 3 (2003) (truncation provision "protect[s] consumers from identity thieves").

[12] In *Jeffries v. Volume Services America, Inc.*, the D.C. Circuit wrongly concluded that FACTA violations bear a close relationship to the harm from breach of confidence based on its incorrect conclusion that "[*p*]*art of the harm* involved in a breach of confidence is actual disclosure to a third party." 928 F.3d

This case is therefore unlike *Horizon*, in which this Court held that *actual* disclosure of sensitive information to a computer thief (a third party) had a close relationship to common-law invasion of privacy. 846 F.3d at 639.

C. Kamal Has Not Shown a Material Risk of Harm to the Underlying Concrete Interest Protected by FACTA

Because a FACTA violation does not in itself constitute a concrete injury, Kamal must show that his alleged violation "actually harms or presents a material risk of harm to the underlying concrete interest" protected by FACTA, meaning actual identity theft or a material risk of identity theft. *Kamal*, 918 F.3d at 112. This he cannot do.

Because Kamal still has the receipts, there is *zero* risk of identity theft. *See id.* at 116 (no real risk of harm where Kamal has not alleged "third-party access of his information"); *Meyers*, 843 F.3d at 727 ("hard to imagine" risk where "nobody else ever saw the non-compliant receipt"); *Bassett*, 883 F.3d at 783 (similar). The

1059, 1065 (D.C. Cir. 2019) (emphasis added). In fact, disclosure to a third party is *the entire harm* recognized by breach of confidence. *See* Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 Colum. L. Rev. 1426, 1455 (1982). Tellingly, even the concurring judge in *Jeffries* viewed the analogy to breach of confidence as not "compelling" or "persuasive." 928 F.3d at 1069 (Rogers, J., concurring in part and concurring in the judgment). In any event, *Jeffries* is distinguishable because it involved a receipt with the *entire* credit card number *and* expiration date printed on it.

fundamental fact that Kamal kept his receipts should end the inquiry into risk of harm.

Even if Kamal lost the receipts, there is still no *material* risk of harm. The theoretical threat of identity theft "consists of a highly speculative chain of future events: Kamal loses or throws away [the receipt], which is then discovered by a hypothetical third party, who then obtains the six remaining truncated digits along with any additional information required to use the card, such as the expiration date, security code or zip code." *Kamal*, 918 F.3d at 116 (citation and internal quotation marks omitted; brackets in original). "Unsurprisingly, [Kamal] cites no specific examples of this actually occurring." *Kamal v. J. Crew Grp., Inc.*, 2017 WL 2587617, at *5 (D.N.J. June 14, 2017), *aff'd in relevant part*, 918 F.3d 102 (3d Cir. 2019). Despite dozens of lawsuits alleging 6+4 FACTA violations, involving millions of receipts, *amici* are not aware of a single instance in which a 6+4 receipt has caused identity theft.

Indeed, even if a 6+4 receipt were lost or stolen, several facts about credit card numbers and payment systems make it virtually impossible that the receipt would cause a consumer any harm.

Most important, as the study Kamal incorporates in his Complaint acknowledges, the card number's first six digits (known as the BIN or IIN) do not contain information specific to the cardholder, but instead correspond to "the

card's brand, issuing bank name, and card type," and can be "quer[ied] . . . through well-known online databases." Mohammed A. Ali et al., *Does The Online Card Payments Landscape Unwittingly Facilitate Fraud?*, at 3, 15 IEEE Sec. & Privacy (2017), https://bit.ly/2JbQYwM (footnote omitted) ("Study").[13] For this reason, several courts have held that printing the first six digits of a credit card number creates no material risk of harm. *See, e.g.*, *Katz*, 872 F.3d at 119-20; *Gesten v. Burger King Corp.*, 2017 WL 4326101, at *2 (S.D. Fla. Sept. 27, 2017); *Katz v. Metro. Transp. Auth.*, 2017 WL 6734185, at *6-8 (E.D.N.Y. Dec. 29, 2017).

Moreover, given that a merchant could lawfully print "Wells Fargo Platinum Visa" on a receipt, it strains credulity to think that printing 442518 — which means exactly the same thing — would cause harm. Indeed, the Payment Card Industry ("PCI") Data Security Standard ("PCI DSS") — a security standard created by a consortium of credit card companies — specifically permits displaying the first six and last four digits on receipts. *See* PCI *Data Security Standard — Requirements and Security Assessment Procedures, Version 3.2.1*, at 39 (May 2018), https://bit.ly/2QL5IXJ.[14]

[13] Kamal's accusation (at 28) that the District Court "fabricated" the fact that most IINs are available online is baseless because this fact is established by the study incorporated into Kamal's Complaint.

[14] *Amici* believe that the fact that the first six digits comprise the IIN, and PCI DSS permits display of the IIN, may explain the prevalence of technical 6+4

Kamal's argument (at 24) that printing the IIN might cause risk by giving clues to "the consumer's geographical location" is both speculative (because there is no basis to think any such clues would be revealed) and irrelevant (because FACTA allows printing a cardholder's full address on the receipt, and so any attendant risk is not risk that FACTA is intended to prevent).

D. The Vast Majority of Cases Correctly Reject Standing for Technical FACTA Violations

The vast majority of cases — including binding precedent from this Court in this very case — reject standing for technical FACTA violations like this one. This Court and the Second Circuit have rejected standing for 6+4 violations, *Kamal*, 918 F.3d 102; *Katz*, 872 F.3d 114, and the Ninth Circuit has also rejected standing for partial but incomplete card number truncation, *Noble v. Nevada Checker Cab Corp.*, 726 F. App'x 582 (9th Cir. 2018). The Second, Seventh, and Ninth Circuits have rejected standing for expiration date violations. *See Crupar-Weinmann*, 861 F.3d 76; *Meyers*, 843 F.3d 724; *Bassett*, 883 F.3d 776. These expiration date cases "reached . . . pertinent conclusions" that support rejecting

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FACTA violations. Businesses unaware of FACTA may believe that, by following PCI DSS, they are fully compliant with the law. Additionally, payment software updates may set internal computer screens to display the IIN — which complies with PCI DSS and does not violate FACTA — while mistakenly also setting receipts to display the IIN.

standing in 6+4 cases. *Kamal*, 918 F.3d at 119 n.12. The vast majority of district court cases to address 6+4 FACTA violations have likewise rejected standing.[15]

Kamal ignores this near-consensus rejecting standing and instead focuses almost entirely on two cases: the D.C. Circuit's *Jeffries* decision and the Eleventh Circuit's vacated panel opinions in *Godiva*. Neither case supports reversing course from *Kamal*.

In *Jeffries*, the defendant printed the *entire* card number *and* expiration date — not the situation here. *Amici* know of no other cases in the past decade alleging such a violation, and *Jeffries* specifically distinguished *Kamal* on that basis. *See* 928 F.3d at 1067. *Jeffries* is also inconsistent with *Spokeo* and *Kamal*. *Jeffries*

[15] *See, e.g.*, *Gennock v. Kirkland's, Inc.*, 2019 WL 5328883 (W.D. Pa. Sept. 24, 2019), *report and recommendation adopted*, 2019 WL 5310210 (W.D. Pa. Oct. 21, 2019); *Anton v. Prospera Hotels, Inc.*, 2019 WL 4266528 (C.D. Cal. July 18, 2019); *McCloud v. Save-A-Lot Knoxville, LLC*, 388 F. Supp. 3d 954 (E.D. Tenn. 2019); *Katz v. Six Flags Great Adventure, LLC*, 2018 WL 3831337 (D.N.J. Aug. 13, 2018); *Hullinger v. Park Grove Inn, Inc.*, 2018 WL 3040571 (E.D. Tenn. June 19, 2018); *Coleman v. Exxon Mobil Corp.*, 2018 WL 1785477 (E.D. Mo. Apr. 13, 2018); *Kirchein v. Pet Supermarket, Inc.*, 297 F. Supp. 3d 1354 (S.D. Fla. 2018); *Taylor v. Fred's Inc.*, 2018 WL 684841 (N.D. Ala. Feb. 2, 2018), *appeal docketed*, No. 18-10832 (11th Cir. Mar. 5, 2018); *Parker v. J. Crew Grp., Inc.*, 2018 WL 385033 (D.N.J. Jan. 11, 2018); *Tarr v. Burger King Corp.*, 2018 WL 318477 (S.D. Fla. Jan. 5, 2018), *appeal docketed*, No. 18-10279 (11th Cir. Jan. 19, 2018); *Katz*, 2017 WL 6734185; *Gesten*, 2017 WL 4326101; *Lindner v. Roti Rests., LLC*, 2017 WL 3130755 (N.D. Ill. July 24, 2017); *Hendrick v. Aramark Corp.*, 263 F. Supp. 3d 514 (E.D. Pa. 2017); *Everett v. Memphis Light Gas & Water Div.*, 2017 WL 1830165 (W.D. Tenn. Apr. 18, 2017); *Paci v. Costco Wholesale Corp.*, 2017 WL 1196918 (N.D. Ill. Mar. 30, 2017); *Thompson v. Rally House of Kansas City, Inc.*, 2016 WL 8136658 (W.D. Mo. Oct. 6, 2016).

reasoned that, because FACTA purportedly protects the interest "in using . . . credit and debit cards without facing an increased risk of identity theft," *any* "risk of identity theft" would qualify for standing, no matter how small. *Id.* at 1064-65. But this circular reasoning is contrary to *Spokeo*: As previously explained, standing requires a "material risk of harm," and there is no material risk of harm from a FACTA technical violation. *See supra* pp. 11-12 & note 9. In any event, this case is distinguishable from *Jeffries* — the risk of harm from a 6+4 violation is much smaller than any risk from printing the entire card number and expiration date.

Godiva, a 6+4 case, is the only appellate decision finding standing for anything less than the full card number and expiration date. But the full Eleventh Circuit voted to vacate the panel's opinion for *en banc* rehearing. The Eleventh Circuit had good reason to vacate *Godiva*, as this Court already explained how *Godiva*'s reasoning for finding automatic standing for FACTA violations was unpersuasive and inconsistent with *Spokeo*. *Kamal*, 918 F.3d at 117-18.

E. Kamal's and His Supporting *Amici*'s Arguments for Standing Are Misguided

1. Kamal repeatedly argues that FACTA contains an "evidentiary presumption" that every FACTA card number truncation violation causes a concrete risk of harm. That argument fails for many reasons.

First, FACTA's text contains no evidentiary presumption. FACTA merely prohibits "print[ing] more than the last 5 digits of the card number," 15 U.S.C. § 1681c(g)(1), and FCRA's general statutory damages provision provides that a consumer can recover statutory damages for "willful[]" violations of FCRA, 15 U.S.C. § 1681n(a)(1)(A). No provision states or implies that all FACTA violations cause harm or mentions an evidentiary presumption.

Second, Kamal's argument is inconsistent with *Spokeo* and *Kamal*. *Spokeo* rejected the notion 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." 136 S. Ct. at 1549. And *Spokeo* specifically concluded that some FCRA violations "may result in no harm," without mentioning any evidentiary presumption. *Id.* at 1550. If FCRA created an unspoken evidentiary presumption then *Spokeo* would have come out the other way. Similarly, *Kamal* already held that "the procedural violation" alleged by Kamal "is not itself an injury in fact." 918 F.3d at 113. Kamal's argument of an "evidentiary presumption" of concrete injury simply regurgitates the "automatic standing" argument this Court already rejected.

Third, no case law supports Kamal's evidentiary presumption of standing. To the contrary, this Court has rejected a plaintiff's argument that it should presume that alleged statutory violations caused harm, holding: "such

presumptions would turn the standing question on its head. It is well-settled law that '[w]e presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record.'" *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Liab. Litig.*, 903 F.3d 278, 288 (3d Cir. 2018) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006)) (brackets in original). To the extent any presumption applies, the presumption runs *against* standing.

Finally, legislative history refutes the argument that Congress believed that a 6+4 violation caused a presumptive concrete risk of harm. There is no "part of the congressional record that considers the risk of identity theft when only the first six and last four digits of a consumer's credit card are printed on a receipt." *Kamal*, 918 F.3d at 115 n.5. Rather, Congress repeatedly expressed concern that printing the *full* card number was harmful. As Senator Feinstein, who introduced FACTA in the Senate, stated: "Printed store receipts are real assets for identity thefts because they often contain a card-holder's entire credit card number." *Identity Theft: Hearing Before the Subcomm. on Tech., Terrorism, & Gov't Info. of the S. Comm. on the Judiciary*, 107th Cong. 14 (2002) (statement of Sen. Feinstein) ("Senate Hearing").[16] Even the sources quoted by Kamal (at 21) state that

[16] *See also* 149 Cong. Rec. H8122, H8128 (daily ed. Sept. 10, 2003) (statement of Rep. Shadegg), 2003 WL 22097591 (card number "has to be

"receipts that include *full* account numbers . . . are a gold mine for identity thieves" (emphasis added). Congress set the truncation level at five digits simply because Senator Feinstein's home state, California, "ha[d] just established a similar truncation law." Senate Hearing at 14. Congress made no finding that printing more than five digits always causes harm.

The Credit and Debit Card Receipt Clarification Act of 2007 ("Clarification Act"), Pub. L. No. 110-241, 122 Stat. 1535, confirms that Congress did not view all FACTA violations as presumptively harmful. Congress enacted the Clarification Act to curtail "abusive lawsuits," in which plaintiffs filed class actions seeking enormous statutory damages for FACTA violations that did not "contain[ ] an allegation of harm to any consumer's identity." §§ 2(a)(5), 2(b), 122 Stat. 1565-66.[17] In explaining why certain FACTA violations were harmless, several representatives reiterated that FACTA's concern was that the "credit card receipt does not contain the full credit card number."[18]

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truncated so that someone who wants to steal your identity by grabbing ahold of your credit card number will not have the full number").

[17] *See* 154 Cong. Rec. H3730 (daily ed. May 13, 2008) (statement of Rep. Mahoney), 2008 WL 2038627 ("[N]ot one of these suits has alleged any harm to the consumer. In the event that a consumer does experience identity theft, account fraud, or some other harm, my legislation preserves a consumer's right to sue.").

[18] *Id.*; *see also id.* at H3731 (statement of Rep. Bean) ("it 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

2. Kamal argues that the district court engaged in improper factfinding. But the court applied the proper standard for a facial challenge under Rule 12(b)(1). It identified which allegations from the Third Amended Complaint ("TAC") were conclusory and which were factual. A2. It then assumed the "truthfulness" of the TAC's allegations and considered whether, as pleaded, the allegations "create standing." A2-A3. The court concluded that the non-conclusory factual allegations demonstrated that, as a matter of law, Kamal did not have a plausible claim that he suffered a concrete harm or material risk of harm. A4-A8. That conclusion was correct.

3. The Study by British computer scientists, incorporated into the TAC, does not demonstrate any risk of harm from a 6+4 receipt.

First, the Study is irrelevant because it describes (at 3) a method to make fraudulent credit card purchases *once the hacker already has the entire card number*, by using the full card number as "the starting point" to generate other information necessary to commit identity theft. Kamal concedes that no one saw his receipts, let alone his entire card number. So the Study simply has no bearing on whether he suffered any risk of harm.

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account number"); 154 Cong. Rec. E925 (daily ed. May 14, 2008), 2008 WL 2051340 (statement of Rep. Maloney) ("a potential fraudster would not be able to perpetrate account fraud without having the entire correct credit card number").

Second, the Study does not establish any material risk of harm to Kamal from a 6+4 receipt. To be sure, the Study notes (at 4) in passing that "[i]t is also possible to generate PAN [Personal Account Numbers, i.e. credit card numbers] using the first six digits of a PAN and the Luhn's algorithm and getting it verified." But crucially, as this Court recognized in dismissing the Study's relevance, "this method generates *a* valid card number (as opposed to a random collection of digits)," but "that anonymous card number" would not be Kamal's number. *Kamal*, 918 F.3d at 117. He therefore could not suffer any risk of harm from any such hypothetical random number generator.

Kamal argues (at 22-23) that the Study shows that hackers can generate a specific cardholder's card number from the first six digits. *See* A128-29 (TAC ¶ 5). But the Study contradicts (at 4) that assertion, stating only that the algorithm can generate valid credit card numbers, not a specific person's card number. Kamal is stuck with the content of the Study that he incorporated in his Complaint and that content refutes his own argument. *See Boldrini v. Wilson*, 542 F. App'x 152, 155 (3d Cir. 2013) (per curiam) (written document attached to complaint controls over contrary allegations in complaint).

4. Finally, Kamal argues (at 38) that he suffered a concrete injury by being "forced to take steps to destroy or secure" the receipts. As an initial matter, Kamal does not allege any specific steps he took to destroy or secure the receipts.

Kamal's failure to plead the basic facts of his alleged injury on his fourth try is inexcusable. Moreover, other courts have reasoned that the ease of removing any risk by destroying or securing a receipt justifies *rejection* of standing. *See Bassett*, 883 F.3d at 783 (rejecting standing because plaintiff "could shred the offending receipt along with any remaining risk of disclosure"); J. Crew Br. 13-14 (collecting cases).

In any event, even if Kamal had alleged that he took costly steps to safeguard the receipts, that still would not constitute injury in fact. In *Clapper v. Amnesty International USA*, 568 U.S. 398 (2013), as in this case, the plaintiffs contended that their risk of suffering future harm (allegedly unconstitutional surveillance) was a concrete injury, but the Supreme Court held that this risk was too remote to meet the standard of concreteness. *Id.* at 410-14. Alternatively, the plaintiffs argued that they had undertaken "costly and burdensome measures" to prevent surveillance. *Id.* at 415. But the Court held that the plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.* at 416. In other words, if the risk of future harm is insufficient to establish concrete injury, then measures taken to prevent such harm (even if costly) are insufficient to establish concrete injury.

Clapper is dispositive here. The risk of identity theft from a 6+4 receipt, even if discarded in the first available trash can, is speculative. "[A]llowing [Kamal] to bring this action based on costs [he] incurred in response to a speculative threat would be tantamount to accepting a repackaged version of [Kamal's] first failed theory of standing." *Id.*; *see also McCloud*, 388 F. Supp. 3d at 969 ("While Plaintiff may be a very cautious person who chooses to take the extra step of retaining or destroying his receipt regardless of his true exposure to risk, he cannot manufacture his own injury based on speculation about a threat which does not present any material risk of real harm.").

Kamal's efforts to distinguish *Clapper* are unavailing. Kamal contends (at 40-41) that *Clapper* is inapposite because "J. Crew actually subjected [Kamal] . . . to conduct proscribed by Congress," and there was "Congressional factfinding articulating why a violation of the statute would create a risk of harm." But as explained above, the "conduct proscribed by Congress" was not itself a concrete injury, and FACTA's legislative history did not establish that 6+4 violations cause any risk of harm. Therefore, Kamal cannot bootstrap his efforts to avoid speculative future harm into a concrete injury. Kamal's argument is "simply a 'repackaged version' of [his] first, failed, theory of standing." *McCloud*, 388 F. Supp. 3d at 969 (quoting *Clapper*, 568 U.S. at 416).

Moreover, Kamal's attempt (at 39) to analogize his purported efforts to safeguard his receipts to the injuries recognized as concrete in *Susinno* and *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262 (3d Cir. 2016), fails on multiple levels.

First, this Court concluded that the injuries of *Susinno* and *Nickelodeon* were concrete because they constituted an invasion of privacy: the Court held that the alleged browser tracking in *Nickelodeon* was common-law intrusion upon seclusion, *id.* at 293-94, and that the telemarketing call in *Susinno* caused a privacy injury "of the same character" as intrusion upon seclusion, 862 F.3d at 352. No such invasion of privacy is alleged here.

Second, contrary to Kamal's assertion (at 38), he was not "forced" to safeguard his receipts. Whatever efforts he took were entirely voluntary actions to reduce an already speculative risk of harm. *Clapper* is therefore squarely on point.

CONCLUSION

The judgment of the District Court should be affirmed.

March 25, 2020

Respectfully submitted,

/s/ *Kevin B. Huff*

KEVIN B. HUFF
JEREMY S.B. NEWMAN
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
khuff@kellogghansen.com
jnewman@kellogghansen.com

Counsel for Amici Curiae National Retail Federation and Chamber of Commerce of the United States of America

STEPHANIE MARTZ
NATIONAL RETAIL FEDERATION
1101 New York Avenue, N.W.
Washington, D.C. 20005
(202) 783-7971

Counsel for Amicus Curiae National Retail Federation

STEVEN P. LEHOTSKY
JONATHAN D. URICK
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for Amicus Curiae Chamber of Commerce of the United States of America

CERTIFICATE OF BAR ADMISSION

Pursuant to Local R. 28.3(d) and Local R. 46.1(e), I hereby certify that I, Kevin B. Huff, am admitted as an attorney and member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: March 25, 2020

/s/ *Kevin B. Huff*
Kevin B. Huff

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), Fed. R. App. P. 29(a)(4)(G), and Local R. 31.1, I certify the following:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because the brief contains 6,463 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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 it has been prepared using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: March 25, 2020

/s/ *Kevin B. Huff*
Kevin B. Huff

ELECTRONIC DOCUMENT CERTIFICATE

Pursuant to the Court's Notice Regarding Operations to Address the COVID-19 Pandemic of March 17, 2020, this brief is being filed electronically, with paper filing deferred pending further direction of the Court.

Pursuant to Third Circuit Local Appellate Rule 31.1(c), I hereby certify that if paper copies are later filed, the text of the electronic brief will be identical to the text in the paper copies.

The brief was scanned for viruses using Cylance 2.1.1550.17 and no viruses were detected.

Dated: March 25, 2020

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Kevin B. Huff

CERTIFICATE OF SERVICE

I, Kevin B. Huff, hereby certify that on March 25, 2020, the foregoing *amici curiae* brief was filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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/s/ *Kevin B. Huff*
Kevin B. Huff