Nos. 16-16486 & 16-16783

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

Plaintiff-Appellee,

JAMES H. PRICE, ERIC ALAN ISAACSON,

Interested Parties-Appellants,

versus

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
Hon. William P. Dimitrouleas

EN BANC BRIEF FOR NATIONAL RETAIL FEDERATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND INTERNATIONAL FRANCHISE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT ERIC ALAN ISAACSON

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Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1-1, counsel for *amici curiae* National Retail Federation, Chamber of Commerce of the United States of America, and International Franchise Association certifies that the following persons and entities may have an interest in the outcome of this case:

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Amici curiae National Retail Federation, Chamber of Commerce of the United States of America, and International Franchise Association have no parent company and are not a subsidiary or affiliate of a publicly owned corporation that has issued shares to the public.

Dated: December 4, 2019

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INTRODUCTION

Amici represent retailers, franchisors, franchisees, and other businesses. 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. David Muransky bought chocolate at a Godiva store and received a receipt displaying the first six and last four digits of his credit card number. The receipt did not display the middle digits of the number, expiration date, or security code. He kept the receipt, and no one else ever saw it. This simple transaction caused no harm to Muransky. Nor did he suffer any conceivable risk of harm. Nevertheless, he sought statutory damages of hundreds of millions of dollars on behalf of a nationwide class. This threat of *in terrorem* damages compelled Godiva to settle for $6.3 million, with attorneys claiming $2.1 million. The vast majority of courts hold that FACTA plaintiffs like Muransky lack standing because they have suffered no harm or risk of harm. In this case, the Panel held that Muransky had standing. If this Court allows standing for no-injury FACTA claims like this, then businesses in this Circuit would be exposed to job-killing existential damages, even where admittedly no one has been harmed. This Circuit would be transformed into a nationwide haven for no-injury class actions.

Article III prevents this abuse of the court system by requiring every plaintiff to show a concrete injury. As the Supreme Court has held, "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 Godiva allegedly violated FACTA, Muransky suffered no harm; his identity was concededly not stolen. Nor was there any risk of identity theft; because he kept the receipt, there was zero risk that his identity could have been stolen. Moreover, the receipt contained far less information than necessary to commit identity theft, so any risk of identity theft is beyond speculative. For these reasons, the vast majority of courts have held that technical violations of FACTA (including the type alleged here) are insufficient for standing. A handful of courts, including the Panel in its vacated opinions, have invented tortured rationales for finding standing based on technical FACTA violations. But these decisions all suffer from the same fundamental flaw: standing requires a concrete injury, and receiving a receipt displaying a few too many digits 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]

Amici have filed, concurrently with this brief, a motion for leave to file this brief. *Amici* adopt the statement of interest in that motion.

STATEMENT OF ISSUES

Whether Muransky has Article III standing to bring this FACTA lawsuit, where he alleged that he received a receipt displaying the first six digits and last four digits of his credit card number, but he has not alleged or proven facts showing that he has been harmed or suffered a material risk of harm.

SUMMARY OF ARGUMENT

I. A. Plaintiff's lawyers have weaponized FACTA by aggregating statutory damages to bring class actions threatening to "bankrupt[] 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). Most FACTA lawsuits involve unintentional, harmless technical violations, which nonetheless threaten businesses with "annihilative damages." *Id.* at 278.

[1] No counsel for any party authored any portion of this brief. No entity, other than *amici* and their counsel, monetarily contributed to the preparation or submission of this brief.

B. Businesses like Godiva, faced with hundreds of millions of dollars (or more) in potential FACTA statutory damages, are often forced to settle for millions of dollars. These *in terrorem* settlements depend on lax enforcement of Article III standing. If this Circuit permits such lawsuits, then it will become a nationwide haven for no-injury FACTA class actions.

II. A. "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). A statutory violation that causes "neither a harm nor a material risk of harm" is insufficient for standing. *Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998, 1003 (11th Cir. 2016), *reh'g en banc denied*, 855 F.3d 1265 (11th Cir. 2017).

B. Muransky suffered no concrete injury from getting a receipt displaying the first six and last four digits of his credit card number. He did not suffer identity theft or material risk of identity theft. Because no one saw his receipt, it could not have been used for identity theft. *See Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 727 (7th Cir. 2016). Displaying ten digits of a card number is insufficient to enable identity theft, and any such risk is "highly speculative." *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 116 (3d Cir. 2019). *Amici* know of no instances of identity theft caused by a receipt displaying the first six and last four digits of a credit card number.

C. The vast majority of post-*Spokeo* FACTA cases have rejected standing. The minority opinions (including the Panel's) are unpersuasive. The Panel's circular reasoning that the FACTA violation itself demonstrates concrete risk of harm ignores *Spokeo*'s holding that a statutory violation alone does not establish concrete injury. FACTA violations cause no harm analogous to breach of confidence or privacy torts because no confidential information is disclosed to a third party. Plaintiffs cannot manufacture standing by taking costly efforts to protect a receipt where the risk of identity theft is speculative. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). Other arguments for automatic FACTA standing similarly run afoul of *Spokeo*.

ARGUMENT AND AUTHORITIES

I. ALLOWING STANDING FOR TECHNICAL FACTA VIOLATIONS WOULD DO GREAT DAMAGE TO BUSINESS WITHIN THIS CIRCUIT

A. Plaintiff's 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 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 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.

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. FACTA therefore "threaten[s] businesses of every size with devastating classwide liability for what may be harmless statutory violations." *Id.* at 280; *see also* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 105 (2009) ("When pursued as a nationwide or statewide class action, [FACTA's] statutory damages create devastating liability

that would put the defendant out of business simply for failing to redact information from a retail receipt."). Congress never foresaw or intended that FACTA would be weaponized in this way.[2]

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, e.g.*, *Gardner v. Appleton Baseball Club, Inc.*, No. 09-C-705, 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 FACTA actions either were unaware that their payment processing equipment was set to print receipts in violation of FACTA, were following industry standards (discussed *infra* note 16) that allow for the printing of the first six and last four digits, or were unaware of FACTA's requirements. For example, here, Godiva historically complied with

[2] *See Stillmock*, 385 F. App'x at 276 (Wilkinson, J., concurring) ("[T]he relatively modest range of statutory damages chosen by Congress suggests that bankrupting entire businesses over somewhat technical violations was not among Congress's objectives."); Scheuerman, 74 Mo. L. Rev. at 136 (FACTA legislative history shows "Congress never considered the potential problem of aggregating individual claims through the class action").

FACTA but accidentally began to violate FACTA when third-party payment processing systems were installed that were not properly configured to truncate card numbers. Answer, Dkt. 29, ¶¶ 19, 30-31.

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 broadly to include recklessness. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007). Unfortunately, many courts in FACTA cases have held that boilerplate allegations about FACTA's requirements being generally publicized among merchants, which are cut and pasted into every FACTA complaint, suffice to state a claim for willfulness. *See, e.g., Thompson v. Rally House of Kansas City, Inc.*, No. 15-00886-CV-W-GAF, 2016 WL 9023433, at *3 (W.D. Mo. Jan. 25, 2016) (collecting cases).

Not only are most FACTA violations unintentional, they are almost all merely technical violations, in which merchants print a few too many digits but still far fewer than a criminal would need to commit identity theft (at a minimum, the full card number and expiration date). The most common violations alleged in

FACTA lawsuits are printing the expiration date[3] or the violation alleged here, printing the first six and last four digits of the card number (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. When the low bar that some courts have imposed for pleading willfulness is combined with the class action device, the only protection businesses have from runaway class liability is the basic Article III requirement that a complainant suffer a concrete injury in order to sue.

B. Failure To Enforce Article III Standing Pressures Businesses To Settle, Even in Nonmeritorious 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

[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); *Llewellyn v. AZ Compassionate Care Inc.*, No. CV-16-04181-PHX-DGC, 2017 WL 1437632 (D. Ariz. Apr. 24, 2017).

[4] *See, e.g.*, *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102 (3d Cir. 2019); *Katz v. Donna Karan Co.*, 872 F.3d 114 (2d Cir. 2017); *Gesten v. Burger King Corp.*, No. 17-22541-Civ-Scola, 2017 WL 4326101 (S.D. Fla. Sept. 27, 2017).

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 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). A defendant in a statutory damages class action "faces a bet-the-company proposition and likely will settle rather than risk shareholder reaction to theoretical billions in exposure even if the company believes the claim lacks merit." *Stillmock*, 385 F. App'x at 281 (Wilkinson, J., concurring) (quoting Scheuerman, 74 Mo. L. Rev. at 104).

This case is a perfect example of settlement pressure resulting from the risk of astronomical statutory damages. Muransky allegedly spent $19 at Godiva and received a receipt that technically violated FACTA. Am. Compl., Dkt. 16, ¶¶ 26-27. He did not allege identity theft or that anyone else had seen his receipt. He therefore suffered no harm or risk of harm. Yet Godiva faced statutory damages of at least $31.8 million to $318 million and was compelled to settle for $6.3 million. This is no outlier, as this table of recent FACTA class settlements within this Circuit demonstrates:

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

None of these lawsuits involved any harm or risk of harm to a consumer. Yet potentially annihilative FACTA liability forced each defendant into a multimillion-dollar settlement.

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 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*." Credit Card Receipt and Debit Card Receipt Lawsuits (emphasis added) (last visited Dec. 4, 2019).

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

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

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

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

Courts' failure to police Article III standing enables lawyer-driven lawsuits that coerce businesses into large FACTA settlements. Large FACTA settlements occurred frequently before the Supreme Court in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), 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. But if this Court rules that a no-injury FACTA violation is sufficient for standing, these coercive settlements will come roaring back in this Circuit.

Indeed, the largest FACTA settlement occurred shortly after a district court in this Circuit held (contrary to most post-*Spokeo* case law) that FACTA violations automatically created standing. *See Flaum v. Doctor's Assocs., Inc.*, 204 F. Supp. 3d 1337, 1341-42 (S.D. Fla. 2016). Just months after that standing ruling, the parties agreed to a $30,900,000 settlement, "the largest FACTA settlement in . . . history." Pl.'s Mot. for Prelim. Approval of Class Action Settlement, *Flaum v. Doctor's Assocs., Inc.*, No. 0:16-cv-61198-CMA, Dkt. 82, at 2 (S.D. Fla. Mar. 21, 2017). The Subway sandwich company was forced to make this payment even though neither the lead plaintiff nor anyone else suffered any actual harm or risk of harm. After several district courts in this Circuit disagreed with *Flaum* and

rejected standing for FACTA violations,[9] the court stayed settlement proceedings pending resolution of this appeal. *See* Order, *Flaum*, Dkt. 143 (Apr. 6, 2018). After the Panel's opinion, but before this Court vacated that opinion, the court approved the settlement and awarded class counsel $10,300,000 in fees. *See* Order, *Flaum*, Dkt. 175, at 2, 15 (Mar. 11, 2019). That settlement was made possible by the district court's and Panel's erroneous standing rulings. If this Court agrees with those rulings, then it will embolden plaintiff's lawyers to file more no-injury FACTA class actions in this Circuit in the hopes of obtaining the next eight-figure payday. Because most other courts have rejected standing for technical FACTA violations, *see infra* Part II, if this Court contradicts the weight of authority, it will transform the Eleventh Circuit into a nationwide haven for no-injury FACTA class actions.

II. MURANSKY LACKS ARTICLE III STANDING

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

"Article III of the Constitution limits the jurisdiction of federal courts to 'cases' and 'controversies,' and '[s]tanding to sue is a doctrine rooted in the traditional understanding of a case or controversy.'" *Wilding v. DNC Servs. Corp.*,

[9] *See, e.g.*, *Gesten*, 2017 WL 4326101; *Tarr v. Burger King Corp.*, No. 17-23776-CIV-MORENO, 2018 WL 318477 (S.D. Fla. Jan. 5, 2018); *Taylor v. Fred's, Inc.*, 285 F. Supp. 3d 1247 (N.D. Ala. 2018); *Kirchein v. Pet Supermarket, Inc.*, 297 F. Supp. 3d 1354 (S.D. Fla. 2018).

941 F.3d 1116, 1124 (11th Cir. 2019) (quoting *Spokeo*, 136 S. Ct. at 1547); *see also* U.S. Const. art. III, § 2. "Standing promotes the separation of powers by preventing 'overjudicialization of the process of self-governance.'" *Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998, 1001 (11th Cir. 2016) (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983)); *see also* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1224 (1993) ("The need to insist upon meaningful limitations on what constitutes injury for standing purposes . . . flows from an appreciation of the key role that injury plays in restricting the courts to their proper function in a limited and separated government.").

"To have standing, plaintiffs must . . . establish that they '(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.'" *Wilding*, 941 F.3d at 1124 (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.

Spokeo reaffirmed that, even in a case involving statutory damages established by Congress (like FACTA), Article III still requires that a plaintiff

show a concrete injury to prove standing to sue. *Spokeo* held that "[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.'" *Id.* at 1547-48 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)). *Spokeo* rejected the argument 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.* at 1549. Rather, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.*

Spokeo made clear that even though a statute might impose a requirement to protect a plaintiff, that plaintiff must still show actual harm or at least a material risk of harm in order to establish standing. *Spokeo* involved alleged violations of provisions of the Fair Credit Reporting Act ("FCRA"),[10] in which "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." 136 S. Ct. at 1550. In describing the type of statutory violation that would be insufficient for Article III standing, the Court explained that "not all inaccuracies" caused by FCRA violations "cause harm or present any material risk of harm." *Id.*

[10] FACTA is part of FCRA, and FACTA violations are subject to FCRA's statutory damages provision. *See* 15 U.S.C. § 1681n(a).

This Circuit and most others have understood *Spokeo* as imposing a requirement that a statutory violation cause harm or a material risk of harm to establish standing. Standing does not automatically emanate from the creation of statutory damages for violation of a statutorily created right. In *Nicklaw*, the defendant lender allegedly violated a statute by failing to record the satisfaction of plaintiff's mortgage in a timely manner. 839 F.3d at 1000. Acknowledging that plaintiff alleged a statutory violation, this Court explained that "the relevant question is whether [plaintiff] was harmed when this statutory right was violated," and held that plaintiff lacked standing because he "allege[d] neither a harm nor a material risk of harm." *Id.* at 1002-03. Numerous other circuits, in cases involving FACTA and other statutes, have found no standing where an alleged statutory violation caused no harm or material risk of harm.[11]

[11] *See, e.g.*, *Kamal*, 918 F.3d at 112 ("We — like several of our sister circuits — understand *Spokeo* 'to instruct that an alleged procedural violation . . . manifest[s] concrete injury' if the violation actually harms or presents a material risk of harm to the underlying concrete interest.") (quoting *Strubel v. Comenity Bank*, 842 F.3d 181, 190 (2d Cir. 2016)); *see also Crupar-Weinmann*, 861 F.3d at 81; *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; *Owner-Operator Indep. Drivers Ass'n, Inc. v. U.S. Dep't of Transp.*, 879 F.3d 339, 344 (D.C. Cir. 2018).

B. Muransky Lacks Standing Because the Alleged 6+4 FACTA Violation Caused No Harm or Material Risk of Harm

Muransky's alleged technical FACTA violation caused no concrete injury. FACTA's receipt truncation provision "seeks to prevent identity theft." *Crupar-Weinmann*, 861 F.3d at 78.[12] But Muransky did not suffer identity theft or face any risk (let alone a material risk) of identity theft.

The sum total of Muransky's factual allegations are that he spent $19.26 at a Godiva store, paid using a VISA credit card, and received a receipt that displayed his card number's first six and last four digits. Am. Compl., Dkt. 16, ¶¶ 26-27.[13] Muransky did not actually suffer identity theft or any other actual harm. *See* Am. Compl., Dkt. 16, ¶ 62 (seeking only statutory damages, no actual damages).

Nor did Muransky suffer a material risk of harm. He does not allege that anyone else ever saw or had access to the receipt. Since no identity thief could have seen his receipt, there is *zero* risk it could have been used for identity theft.[14]

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[12] *See also*, *e.g.*, *Kamal*, 918 F.3d at 106 ("FACTA was part of Congress's effort to prevent identity theft."); *Bassett*, 883 F.3d at 780 (FACTA directed at "preventing identity theft and credit card fraud"); *Meyers*, 843 F.3d at 725 ("Congress enacted the FACTA in response to what it considered to be the increasing threat of identity theft.").

[13] Muransky did not testify, produce documents, or offer any evidence of a concrete injury. *See* Isaacson Opening Br. 19-20.

[14] *See*, *e.g.*, *Meyers*, 843 F.3d at 727 ("Meyers discovered the violation immediately and nobody else ever saw the non-compliant receipt. In these circumstances, it is hard to imagine how the expiration date's presence could have increased the risk that Meyers' identity would be compromised."); *Bassett*, 883

Even if Muransky relinquished control of the receipt, the theoretical threat of identity theft "consists of a highly speculative chain of future events: [Muransky] 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).[15] "Unsurprisingly, [Muransky] cites no specific examples of this actually occurring." *Kamal v. J. Crew Grp., Inc.*, No. 2:15-0190 (WJM), 2017 WL 2587617, at *5 (D.N.J. June 14, 2017), *aff'd in relevant part*, 918 F.3d 102 (3d Cir. 2019).

Moreover, a 6+4 FACTA violation poses no risk of identity theft because of the nature of credit card numbers. FACTA permits printing the last five digits of a credit card number on a receipt. 15 U.S.C. § 1681c(g)(1). But printing the first six digits in addition to the last five does not materially increase the risk of identity theft because "the first six digits merely identify the institution that issued the card,

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F.3d at 783 (no material risk of harm where plaintiff "did not allege . . . even that another person apart from his lawyers viewed the receipt"); *Kamal*, 918 F.3d at 116; *Gesten*, 2017 WL 4326101, at *3; *Hendrick v. Aramark Corp.*, 263 F. Supp. 3d 514, 520-21 (E.D. Pa. 2017).

[15] *See also Stelmachers v. Verifone Sys., Inc.*, No. 5:14-cv-04912-EJD, 2016 WL 6835084, at *4 (N.D. Cal. Nov. 21, 2016) (identity theft could not result from FACTA card number truncation violation "unless a litany of speculative events come about").

and are not part of the consumer's unique account number." *Gesten*, 2017 WL 4326101, at *2 (citing cases); *see also Katz v. Metro. Transp. Auth.*, No. 17-CV-472 (KAM), 2017 WL 6734185, at *4, *6 (E.D.N.Y. Dec. 29, 2017) (first six digits are the "issuer identification number," or "IIN," which are not specific to the cardholder); Bin List and Bin Ranges – List of Issuer Identification Numbers, https://www.bindb.com/bin-list.html (last visited Dec. 4, 2019) (describing IIN and listing financial institutions associated with various IINs). Perhaps because the first six digits are not unique to the cardholder, 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 of the card number on receipts and internal displays (such as retailer computer screens). *See* Payment Card Industry (PCI) Data Security Standard, Requirements and Security Assessment Procedures, Version 3.2.1, at 39 (May 2018), https://www.pcisecuritystandards.org/document_library?category=pcidss&document=pci_dss.[16]

[16] *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 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.

The Supreme Court has held that, for future harm to qualify as injury in fact, the "threatened injury must be certainly impending," or at least there must be "a 'substantial risk' that the harm will occur." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410, 414 n.5 (2013); *see also Spokeo*, 136 S. Ct. at 1549 (citing *Clapper*). The risk that a criminal will find a receipt containing ten digits of a credit card number, somehow obtain the remaining five to six digits and the expiration date, and then go on to commit successful identity theft is so speculative as to be virtually nonexistent. *Amici* are aware of dozens of FACTA class actions alleging 6+4 violations, involving millions of alleged noncompliant receipts. Tellingly, *amici* are not aware of a single instance in which any consumer has ever suffered identity theft caused by a 6+4 receipt. Muransky's alleged statutory violation, which caused no harm or risk of harm, is the type of "bare procedural violation . . . result[ing] in no harm," *Spokeo*, 136 S. Ct. at 1550, that is insufficient for standing.

C. This Court Should Follow the Majority of Post-*Spokeo* Decisions Rejecting Standing for Technical FACTA Violations and Reject the Erroneous Minority Decisions

Since *Spokeo*, the vast majority of courts to address FACTA — including the Second, Third, Seventh, and Ninth Circuits, and dozens of district courts throughout the country — have rejected standing for a technical FACTA

violation.[17] Many of these cases have involved 6+4 violations. The Panel's now-vacated opinions join a small minority of cases finding standing, against the overwhelming weight of authority. Those minority opinions have offered several tortured rationales for standing, but all are inconsistent with Article III's and *Spokeo*'s fundamental requirement of a concrete injury.

1. The Panel's Arguments Were Incorrect

a. The amended Panel opinion held that Muransky had standing because "Congress judged the risk of identity theft Dr. Muransky suffered to be sufficiently concrete to confer standing." *Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175, 1187 (11th Cir. 2019). In effect, the Panel concluded that Godiva's alleged conduct caused a concrete injury because Congress made that conduct a statutory violation. That circular reasoning squarely contradicts *Spokeo*'s core holding that "Article III standing requires a concrete injury even in the context of a statutory violation," and its conclusion that "[a] violation of one of the FCRA's procedural

[17] *See, e.g.*, *Katz*, 872 F.3d 114; *Crupar-Weinmann*, 861 F.3d 76; *Kamal*, 918 F.3d 102; *Meyers*, 843 F.3d 724; *Bassett*, 883 F.3d 776; *Kirchein*, 297 F. Supp. 3d 1354; *Taylor*, 285 F. Supp. 3d 1247; *Tarr*, 2018 WL 318477; *Gesten*, 2017 WL 4326101; *Woods v. Luby's, Inc.*, No. 4:17-CV-01146, 2018 WL 1535470 (S.D. Tex. Mar. 29, 2018); *Everett v. Memphis Light Gas & Water Div.*, No. 16-cv-2810-SHL-TMP, 2017 WL 1830165 (W.D. Tenn. Apr. 18, 2017); *Coleman v. Exxon Mobil Corp.*, No. 1:17-CV-119-SNLJ, 2018 WL 1785477 (E.D. Mo. Apr. 13, 2018); *Weinstein v. Intermountain Healthcare, Inc.*, No. 2:16-cv-00280-DN, 2017 WL 1233829 (D. Utah Apr. 3, 2017).

requirements may result in no harm." 136 S. Ct. at 1549-50. *Spokeo* therefore requires an inquiry into whether a specific statutory violation "cause[d] harm" or "material risk of harm." *Id.* at 1550.[18]

In any event, the Panel is wrong that "Congress[ ]" made a "judgment" that a 6+4 violation causes a "heightened risk of identity theft" that "constitutes a concrete injury." *Godiva*, 922 F.3d at 1190. FACTA's legislative history "is not particularized" to 6+4 violations like Muransky's; 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. To the contrary, Congress was concerned with preventing thieves from obtaining "the full [credit card] number," which did not happen here. 149 Cong. Rec. H8128 (daily ed. Sept. 10, 2003) (statement of Rep. Shadegg).

[18] Contrary to *Spokeo* and the consensus that standing requires a "material risk of harm," *see supra* note 11, the Panel held that "the risk need be no more than an 'identifiable trifle' to be concrete" and that "even a marginal increase in the risk of harm" is sufficient. *Godiva*, 922 F.3d at 1186, 1188. The Panel cited the Second Circuit's opinion in *Strubel* and the Ninth Circuit's remand opinion in *Spokeo*, but those opinions specifically required a "material risk of harm." *Strubel*, 842 F.3d at 193 ("material risk of harm" is "necessary to demonstrate concrete injury"); *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1113 (9th Cir. 2017) (standing test is whether alleged violations "actually harm, or present a material risk of harm" to concrete interests). Holding that a harmless statutory violation is a concrete injury merely because one can imagine an infinitesimal, highly speculative risk of future harm would eviscerate Article III's requirement of an "actual or imminent" injury. *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560).

Moreover, in the Credit and Debit Card Receipt Clarification Act, Pub. L. No. 110-241, § 2, 122 Stat. 1565 (2008) ("Clarification Act"), Congress bemoaned "abusive" FACTA class actions lacking "an allegation of harm to any consumer's identity." While the Clarification Act specifically targeted expiration date lawsuits, it "expresses Congress's judgment that not all procedural violations of FACTA will amount to concrete harm." *Kamal*, 918 F.3d at 113. Indeed, a district court in this Circuit correctly concluded that a 6+4 FACTA lawsuit "typifies the abusive lawsuits brought under [FACTA] that prompted Congress to enact the [Clarification Act]." *Tarr*, 2018 WL 318477, at *4.

b. The Panel also reasoned that Muransky had standing because his FACTA violation purportedly bore a close relationship to two common-law torts — breach of confidence and breach of an implied bailment agreement. *Godiva*, 922 F.3d at 1190-91; *Muransky v. Godiva Chocolatier, Inc.*, 905 F.3d 1200, 1208-10 (11th Cir. 2018).

These torts are not analogous to FACTA violations because they require concrete injury: in breach of confidence, as the Panel concedes, the injury occurs when a "third party reveals . . . information" provided in confidence. *Godiva*, 922 F.3d at 1190. In breach of implied bailment, the injury is loss or damage to property. *See, e.g.*, *Assucrazioni Generali SPA v. Agility Logistics Corp.*, No. 08-22825-CIV, 2009 WL 4421262, at *3 (S.D. Fla. Nov. 25, 2009). But, in a FACTA

violation, the receipt is handed to the cardholder and is not revealed to anyone, nor is the cardholder's card or data lost or damaged. The analogies fail on their face.

The Panel recognized this flaw in conceding that "the match is not exact," but argued that a "close relationship" to common-law torts was sufficient under *Spokeo*. *Godiva*, 922 F.3d at 1191; *see also Godiva*, 905 F.3d at 1211 (recognizing "some differences"). However, the "relationship" between this case and breach of confidence or breach of implied bailment is not "close," because this case lacks the fundamental component required for each of those torts — an injury. "Absent disclosure to a third party, [a FACTA violation] is unlike the harm[ ] recognized by" breach of confidence. *Kamal*, 918 F.3d at 114. Likewise, absent loss or damage to property, a FACTA violation is unlike the harm recognized by breach of implied bailment. Unable to identify any injury, the Panel merely asserts that Congress recognized a new harm purely from the FACTA violation. That circular reasoning is exactly what *Spokeo* rejected in holding that Congress's decision to create statutory damages does not automatically satisfy Article III.

c. In a single sentence, the Panel speculated that "[t]he effort Dr. Muransky put into doing away with the risky receipt would suffice for standing." *Godiva*, 922 F.3d at 1192; *see also Godiva*, 905 F.3d at 1211. This rationale fails for three reasons. First, Muransky did not allege he took any efforts to destroy or protect his receipt. Second, the minimal effort of securing a receipt is not a

concrete injury. *See, e.g.*, *Bassett*, 883 F.3d at 783; *Taylor*, 285 F. Supp. 3d at 1268; *Paci v. Costco Wholesale Corp.*, No. 16-cv-0094, 2017 WL 1196918, at *3 (N.D. Ill. Mar. 30, 2017). It is, at most, a "brief, inconsequential annoyance" that is "distinct" from "real but intangible[] harms." *Salcedo v. Hanna*, 936 F.3d 1162, 1172 (11th Cir. 2019) (rejecting standing for receiving a single text message). Third, parties "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper*, 568 U.S. at 416. Because any risk from the receipt was speculative, Muransky cannot manufacture standing by taking steps to protect or destroy the receipt.

2. Arguments of the Minority of Courts Finding FACTA Standing Are Incorrect

None of the other arguments for FACTA standing adopted by other courts are consistent with *Spokeo* or this Court's precedents.

a. In several decisions issued shortly after *Spokeo*, district courts in this Circuit held that a FACTA violation "constitutes a concrete injury in and of itself" because FACTA conferred a "substantive right" to a truncated receipt. *E.g.*, *Guarisma v. Microsoft Corp.*, 209 F. Supp. 3d 1261, 1264 (S.D. Fla. 2016). This analysis of substantive versus procedural rights is a distinction without a difference in standing law. "[W]hether the right is characterized as 'substantive' or 'procedural,' its violation must be accompanied by an injury-in-fact. A violation

of a statute that causes no harm does not trigger a federal case. That is one of the lessons of *Spokeo*." *Meyers*, 843 F.3d at 727 n.2. *Nicklaw* likewise rejected the argument that violation of a statute "intended to create a substantive right" was sufficient. 839 F.3d at 1002.

Even if the substantive/procedural distinction mattered for standing law, a FACTA violation is a procedural, not substantive, violation. Most courts have correctly held that, because FACTA imposes procedures to avoid identity theft, a FACTA violation "is 'a bare procedural violation' that does not create Article III standing" absent material risk of identity theft. *Kamal*, 918 F.3d at 117; *see also*, *e.g.*, *Crupar-Weinmann*, 861 F.3d at 78.

b. One court concluded that a FACTA violation constituted a concrete injury to "privacy interests." *Gennock v. Kirkland's, Inc.*, No. 17-454, 2017 WL 6883933, at *5 (W.D. Pa. Nov. 29, 2017) (report and recommendation). But a FACTA violation "does not have the requisite 'close relationship' with" privacy torts because it does not involve "disclosure of [plaintiff's credit card information] to a third party." *Kamal*, 918 F.3d at 114; *see also Bassett*, 883 F.3d at 780 (no privacy injury "[w]ithout disclosure of private information to a third party"). After *Kamal*, the *Gennock* court reversed course and dismissed for lack of standing. *Gennock v. Kirkland's, Inc.*, No. 17-454, 2019 WL 5328883 (W.D. Pa. Sept. 24,

2019) (report and recommendation), *adopted by* 2019 WL 5310210 (W.D. Pa. Oct. 21, 2019).

c. The D.C. Circuit recently held that printing the entire card number and expiration date was sufficient for standing. *Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059 (D.C. Cir. 2019). *Amici* are aware of no other case alleging this type of violation, and *Jeffries* specifically distinguished *Kamal* (a 6+4 case, like this one, rejecting standing) on that basis. *See id.* at 1067. *Jeffries* 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, as previously explained, standing requires a "material risk of harm," and there is no material risk of harm from a technical violation of FACTA. *See supra* p. 16 & notes 11, 18. In any event, Muransky's case is distinguishable from *Jeffries* — the risk of harm from a 6+4 violation is by definition much smaller than any risk from printing the entire card number and expiration date.

CONCLUSION

No-injury class actions like Muransky's are an assault on Article III's limitations on judicial power. Allowing such lawsuits would injure businesses in this Circuit by subjecting them to massive class statutory damages for technical statutory violations that harm no one. This Court should join the nationwide

weight of authority in rejecting no-injury FACTA class actions and accordingly reverse the district court's approval of the settlement and remand for dismissal for lack of subject-matter jurisdiction.

Respectfully submitted,

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December 4, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned certifies that this brief complies with the applicable type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5). This brief was prepared using a proportionally spaced type style and typeface (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32-4, this brief contains 6,500 words. This word count relies on the word-processing system (Microsoft Office Word 2013) used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that, on December 4, 2019, I caused a true and correct copy of the foregoing brief to be filed electronically with the Clerk of the Court using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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