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 ISSACSON,

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

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

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (CIP)

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:

1. AMERICAN EXPRESS COMPANY (AXP) – Third Party Seeking Payment of Discovery Expenses.
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35. SIX FLAGS ENTERTAINMENT CORP. (NYSE: SIX), *amicus curiae*. No publicly held corporation owns 10% or more of Six Flags Entertainment Corp.'s stock.

36. SNOW, Hon. Lurana S. – District Court Magistrate Judge.

37. URICK, Jonathan D., U.S. Chamber Litigation Center, counsel for *amicus curiae* Chamber of Commerce of the United States of America.

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.

May 20, 2019

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RULE 35-5(c) STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013); *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998 (11th Cir. 2016).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: Whether a plaintiff demonstrates Article III standing merely by alleging a willful violation of the Fair and Accurate Credit Transactions Act ("FACTA"), 15 U.S.C. § 1681c(g), even where the plaintiff has not plausibly alleged any harm or material risk of harm resulting from the violation, and where several circuits have held that a violation of FACTA that does not cause a harm or risk of harm is insufficient for standing. *See Katz v. Donna Karan Co.*, 872 F.3d 114 (2d Cir. 2017); *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102 (3d Cir. 2019); *Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724 (7th Cir. 2016); *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776 (9th Cir. 2018).

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INTEREST OF *AMICI CURIAE*[1]

Amici adopt the statement of interest in the motion seeking leave to file this brief.

STATEMENT OF ISSUES

Amici adopt Petitioner's statement of Issue 1 and take no position on Issue 2.

STATEMENT OF FACTS

Amici adopt Petitioner's statement of facts.

ARGUMENT AND AUTHORITIES

After Petitioner and *amici* demonstrated the fundamental flaws in the Panel's original opinion, the Panel issued an amended opinion. The Panel held (again) that plaintiff has standing to sue for a technical violation of the Fair and Accurate Credit Transactions Act ("FACTA"), *even though the plaintiff suffered no actual harm or risk of harm.* The amended decision creates a split on FACTA standing with the Second, Third, Seventh, and Ninth Circuits, and is contrary to *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), and *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1003 (11th Cir. 2016), all of which require an actual harm or material risk of harm for standing.

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[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.

The Panel's new opinion suffers from many of the same flaws as the prior opinion. The new opinion also offers a new rationale: that Congress's enactment of FACTA establishes that FACTA violations carry a concrete risk of harm. But this new theory directly contradicts *Spokeo*'s holding that a statutory violation alone does not establish a concrete injury.

The Panel's decision threatens devastating effects on retailers, franchisors, franchisees, and other businesses that are located within this Circuit. Article III's standing requirement prevents litigants from abusing the court system by suing absent injury. Without the protection of standing doctrine, businesses in this Circuit will be forced to settle no-injury FACTA cases or face hundreds of millions or even billions of dollars in statutory damages—even where no consumer was harmed. This Circuit will become a haven for no-injury FACTA class actions because it stands alone in allowing such abusive litigation. *Amici* respectfully submit that this Court should grant *en banc* review to correct the Panel's erroneous, and economically destructive, decision.

I. THE PANEL DECISION THREATENS BUSINESSES WITH ANNIHILATIVE CLASS LIABILITY WHERE NO ONE WAS HARMED

Congress enacted FACTA to protect consumers from identity theft. It 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). To obtain statutory damages, a plaintiff need not prove (1) an intentional violation (because "willfulness" includes recklessness[2]), or (2) that plaintiff suffered any actual harm such as identity theft. FACTA therefore permits damages even for unintentional violations that harmed nobody.

A. Plaintiffs' Lawyers Have Weaponized FACTA

FACTA lawsuits follow a familiar pattern (repeated here). A plaintiff makes a purchase and receives a receipt with 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 and so no one could have used it for identity theft.

Despite the absence of harm or risk of harm, these lawsuits seek statutory damages for thousands or millions of transactions, totaling hundreds of millions or billions of dollars, threatening the defendant with financial ruin. As Judge Wilkinson recognized: "[T]he exponential expansion of statutory damages through the aggressive use of the class action device is a real jobs killer" because it

[2] *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007). FACTA violations are often unintentional, either because a business is unaware of FACTA or because of a problem with payment processing equipment. But plaintiffs invariably claim (as plaintiff did here) that the business was reckless in failing to prevent the violation.

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 280. FACTA therefore "threaten[s] businesses of every size with devastating classwide liability for what may be harmless statutory violations." *Id.*; *see also id.* at 280-81 ("mom and pop" restaurant and large retail chains faced ruinous FACTA damages).

The threat of annihilative damages is real. Plaintiff's lawyers have filed dozens of no-injury FACTA class actions virtually identical to David Muransky's lawsuit. Websites like www.receiptlawsuits.com advertise to consumers who have received noncompliant receipts, cynically promising: "*You may be able to obtain a recovery even if you have not suffered any actual harm or actual damages*." *Id.* (emphasis added).

As this case shows, the prospect of annihilative damages frequently forces businesses to settle. Muransky allegedly spent $19 at Godiva and received a receipt containing the first six and last four digits of his card number (a 6+4 violation). Am. Compl. ¶¶ 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 the table below of FACTA class settlements within this Circuit demonstrates:

Defendant	Class Size	Potential Damages	Settlement Amount
Subway	2,687,021	$269MM-$2.7B	$30.9MM
LabCorp	635,000	$63.5MM-$635MM	$11MM
Spirit Airlines	350,000	$35MM-$350MM	$7.5MM
Jimmy Choo	135,000	$13.5MM-$135MM	$2.5MM

None of these lawsuits involved any harm or risk of harm to a consumer. Yet each defendant was forced to settle for millions of dollars in the face of potentially annihilative FACTA liability.

The proliferation of FACTA litigation in this Circuit underscores this issue's importance. Three pending appeals involve whether a 6+4 FACTA violation suffices for standing: *Taylor v. Fred's, Inc.*, No. 18-10832 (11th Cir.); *Tarr v. Burger King Corp.*, No. 18-10279 (11th Cir.); *Kirchein v. Pet Supermarket, Inc.*, No. 18-10921 (11th Cir.). Many other FACTA class actions are pending in district courts throughout this Circuit, affecting businesses ranging from restaurant

franchisors[3] to parking garages[4] to discount retailers[5] to amusement parks[6] to nightclubs,[7] and even local governments.[8]

B. Article III's Standing Requirement Prevents Such Abuse of the Court System

Article III's case-or-controversy requirement precludes abusive lawsuits seeking sky-high damages absent a real injury. To establish standing, a plaintiff must show an "injury-in-fact" that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

In *Spokeo*, the Supreme Court held that an alleged violation of a federal statute—even one providing statutory damages—is insufficient to create standing without a concrete injury-in-fact. 136 S. Ct. at 1549. This Court followed *Spokeo* in *Nicklaw*, rejecting a statutory damages claim because plaintiff "allege[d] neither a harm nor a material risk of harm." 839 F.3d at 1002-03.

Since *Spokeo*, dozens of courts have confronted no-injury FACTA lawsuits like this one. The vast majority—*including every other court of appeals*—have

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[3] *Gesten v. Burger King Corp.*, No. 1:18-cv-20450 (S.D. Fla.).

[4] *Kleg v. SP Plus Corp.*, No. 1:17-cv-03997 (N.D. Ga.).

[5] *Wallace v. Fred's Stores of Tenn. Inc.*, No. 2:17-cv-01100 (N.D. Ala.).

[6] *Bailey v. Six Flags Entm't Corp.*, No. 1:17-cv-03336 (N.D. Ga.).

[7] *Saleh v. Miami Gardens Square One, Inc.*, No. 1:17-cv-20001 (S.D. Fla.).

[8] *Cano Lopez v. Miami-Dade County*, No. 1:15-cv-22943 (S.D. Fla.).

rejected standing. Approximately 57 cases (including seven cases from four other circuits) have rejected standing because FACTA violations cause no harm or risk of harm, and only 14 have held that FACTA violations automatically confer standing.

The courts rejecting standing have correctly reasoned that many FACTA violations cause no concrete injury. There is no actual harm where, as here, plaintiff's identity was not stolen.[9] Nor is there a material risk of harm where, as here, no one else saw the receipt.[10] And even if an identity thief saw the receipt, it is too speculative that the thief could obtain the rest of the card number and other information necessary for identity theft.[11]

II. THE PANEL DECISION SPLITS WITH FOUR CIRCUITS AND IS CONTRARY TO *SPOKEO* AND *NICKLAW*

The Panel held that a plaintiff alleging a FACTA violation automatically has standing. The Panel split with the Second, Third, Seventh, and Ninth Circuits, all

[9] *See*, *e.g.*, *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 783 (9th Cir. 2018); *Taylor v. Fred's, Inc.*, 285 F. Supp. 3d 1247, 1258-59 (N.D. Ala. 2018).

[10] *See*, *e.g.*, *Bassett*, 883 F.3d at 783; *Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 727 (7th Cir. 2016).

[11] *See*, *e.g.*, *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 116 (3d Cir. 2019); *Taylor*, 285 F. Supp. 3d at 1267.

of which have rejected standing where a FACTA plaintiff does not plausibly allege an actual harm or material risk of harm.[12]

The split is most stark with the Third Circuit in *Kamal*, which rejected standing on identical allegations as here: a 6+4 violation where the plaintiff retained the receipt, and no one else ever saw it or committed identity theft. 918 F.3d at 107. *Kamal* held that a FACTA violation "is not itself a concrete injury," and standing requires a "material risk" of harm. *Id.* at 115-16. Kamal lacked standing because his allegations (identical to Muransky's) presented no "material risk," but only a "conjectural" threat hinging on a "highly speculative chain of future events." *Id.* at 116. *Kamal* explicitly rejected the Panel's original opinion, *id.* at 117-18, and the Panel's amended opinion acknowledged the split. Amended Op. 21-22, 28. The Second Circuit has also rejected standing for a 6+4 FACTA violation, in conflict with the Panel. *Katz v. Donna Karan Co.*, 872 F.3d 114, 117-21 (2d Cir. 2017).[13]

Similarly, the Panel decision conflicts with the Seventh and Ninth Circuits, which have found no "appreciable risk of harm" where "nobody else ever saw the

[12] *See* Pet. 8-9 (citing cases).

[13] The Panel (at 22-24) attempts to distinguish *Katz* as relying on case-specific factual findings. But if *Katz* had adopted the Panel's reasoning that FACTA violations automatically confer standing, it would have come out the other way.

non-compliant receipt." *Meyers*, 843 F.3d at 727; *see also Bassett*, 883 F.3d at 783. The Panel (at 25) "decline[d] to adopt" *Bassett*'s reasoning, concluding instead that a FACTA violation conferred standing even without "actual disclosure[]" of the receipt to any third party.

The Panel also conflicts with *Spokeo* and *Nicklaw*. *Spokeo* held that "standing requires a concrete injury even in the context of a statutory violation." 136 S. Ct. at 1549. *Nicklaw* similarly held that a plaintiff lacked standing because he "allege[d] neither a harm nor a material risk of harm." 839 F.3d at 1002-03. Yet the Panel held Muransky had standing even though he suffered no harm or material risk of harm.[14]

III. THE PANEL DECISION IS WRONG

The Panel ignored *Spokeo*'s core lesson: a statutory violation is not, in itself, sufficient for standing. Standing requires an actual concrete harm or a material risk of harm. *See Nicklaw*, 839 F.3d at 1003.

FACTA is intended to prevent identity theft. However, Muransky's 6+4 violation caused no risk of identity theft. Muransky kept the receipt, which no one

[14] The Panel suggests (at 29) that *Nicklaw* found standing lacking because "the defendant . . . remedied the risk of harm" before the lawsuit. But *Nicklaw* reasoned that "the relevant question is whether Nicklaw was harmed *when this statutory right was violated*." 839 F.3d at 1002 (emphasis added). *Nicklaw* would have come out the other way on the Panel's reasoning.

else saw. Accordingly, there was no risk it would be used for identity theft. *See*, *e.g.*, *Bassett*, 883 F.3d at 783.

The Panel attempts to evade *Spokeo* through circular reasoning: the statutory violation caused a concrete risk of harm because it is a statutory violation. *See* Amended Op. 17 ("Muransky's injury is concrete" because "Congress judged the risk of identity theft Dr. Muransky suffered to be sufficiently concrete to confer standing"). This reasoning violates *Spokeo*'s admonition 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 requirements may result in no harm." 136 S. Ct. at 1549-50. If a statutory violation itself established a concrete risk of harm, then all statutory violations would confer standing, and *Spokeo* would be meaningless.

Moreover, the Panel is simply wrong (at 20) that Congress made a specific "judgment" that a 6+4 violation causes a "concrete" "risk of identity theft." As *Kamal* explained, 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." 918 F.3d at 115 n.5. To the contrary, the legislative history demonstrates Congress's concern 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). Moreover, "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; *see* Credit and Debit Card Receipt Clarification Act, Pub. L. No. 110-241, § 2, 122 Stat. 1565 (2008) (bemoaning "abusive lawsuits" lacking "an allegation of harm to any consumer's identity").[15]

The Panel further erred in holding (at 24-28) that a FACTA violation automatically conferred standing because it purportedly bore a "close relationship" to breach of confidence. That tort is not analogous to a FACTA violation because it requires concrete injury: In breach of confidence, as the Panel concedes (at 26), the injury occurs when a "third party reveals . . . information" provided in confidence. But in a FACTA violation, the receipt is handed to the card owner and is not revealed to anyone. Pet. 16-17. The analogy fails on its face.

The Panel recognized this flaw in conceding that "the match is not exact," but argued that a "close relationship" to a common-law injury was sufficient under *Spokeo*. Amended Op. 27. However, the "relationship" between this case and

[15] The Panel reasons (at 20) that "a marginal increase in the risk of harm . . . is sufficient" for standing. But because no one saw Muransky's receipt, he did not even suffer a marginal risk of harm; he suffered *zero* risk of harm. Further, *Spokeo*, *Nicklaw*, and other circuits addressing FACTA uniformly require a "material risk" of harm (not a "marginal" risk). *See Spokeo*, 136 S. Ct. at 1550; *Nicklaw*, 839 F.3d at 1003; *Kamal*, 918 F.3d at 112.

breach of confidence is not "close" because this case lacks the fundamental component required for that tort—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. 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.

CONCLUSION

This Court should review this important standing issue *en banc*.

Respectfully submitted,

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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(b)(4). This brief was prepared using a proportionally spaced typeface (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 29-3, this brief contains 2,578 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 May 20, 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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