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.
2. BEALL, Suzanne, International Franchise Association, counsel for *amicus curiae* International Franchise Association.
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4. BRET LUSSKIN, P.A. – Counsel for Plaintiff.
5. CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *amicus curiae*.
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8. DIMITROULEAS, Hon. William P. – District Court Judge.
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31. SEIPP, FLICK & HOSLEY, LLP – Counsel for Defendant (now merged with Bowman & Brooke).

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

33. 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.

October 31, 2018

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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); *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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CONSTITUTION AND STATUTES

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 Issue 1 in the Petition's statement of issues and take no position on Issues 2 and 3.

STATEMENT OF FACTS

Amici adopt the Petition's statement of facts.

ARGUMENT AND AUTHORITIES

The Panel held that plaintiff has Article III 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 Panel adopted a flawed rationale that was not briefed by the parties and has not been adopted by any other court. The decision creates a split on FACTA standing with the Second, 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 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 decision threatens devastating effects on businesses within this Circuit. Article III's standing requirement prevents litigants from abusing the court system by bringing suit in the absence of injury. Without the protection of the 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 – all in cases 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 with no showing of injury. *Amici* represent retailers, franchisors, franchisees, and other businesses that bear the brunt of FACTA class actions. *Amici* believe that the Panel decision will harm business in this Circuit. 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 passed FACTA in 2003 to protect consumers from identity theft. Slip op. 10. It prohibits merchants from printing "more than the last 5 digits of the [credit or debit] card number or the expiration date upon any receipt provided to the cardholder." 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 that (1) the business intentionally

violated the statute (because "willfulness" includes mere recklessness[2]), or (2) plaintiff suffered any actual harm such as identity theft. The statute therefore permits damages even for an unintentional violation that harmed no one.

A. Plaintiffs' Lawyers Have Weaponized FACTA

Plaintiffs' lawyers follow a similar pattern in bringing FACTA cases (repeated here). A plaintiff makes a purchase and receives a receipt printed with too many digits of a credit card number or the expiration date. The plaintiff does not claim to have suffered identity theft. Nor does plaintiff claim that anyone else ever saw the receipt. Therefore, there is *no actual harm* from identity theft and *zero risk of harm* because no one ever saw the receipt and so no one could have used it for identity theft.

Despite the absence of any actual harm or risk of harm, these lawsuits seek statutory damages for thousands or millions of transactions, totaling hundreds of millions or billions of dollars, thereby threatening to put the targeted company out of business. As Judge Wilkinson has recognized: "[T]he 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

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[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.

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 asserting similar claims of unintentional FACTA violations with no resulting harm. 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).

The prospect of annihilative damages frequently forces businesses to settle. This case is an example: David Muransky allegedly spent $19 at Godiva and received a receipt containing the first six and last four digits of his card number. Am. Compl. ¶¶ 26-27. He did not allege that his identity was stolen 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 – two settled after the courts held (against the great weight of authority) there was standing for FACTA claims, and two settled before the Supreme Court clarified standing in *Spokeo*.

The proliferation of FACTA litigation in this Circuit underscores the importance of the standing issue here. At least three pending FACTA appeals involve whether the violation alleged here (printing the first six and last four digits of a card number, or 6+4) 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 when no one suffered any harm or risk of harm. 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). "It 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." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997).

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. The Court held that "standing requires a concrete injury even in the context of a statutory violation." 136 S. Ct. at 1549. This Court

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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.).

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 court of appeals decision prior to the Panel's* – have rejected standing. Approximately 52 cases have rejected standing because FACTA violations cause no harm or risk of harm (including six cases from the Second, Seventh, and Ninth Circuits), and only 11 (including the Panel decision) have held that FACTA violations automatically confer standing (although the Panel's reasoning is different from the other cases).

The courts rejecting standing have correctly reasoned that a FACTA violation on its own causes 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 ever 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]

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[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.*, *Taylor*, 285 F. Supp. 3d at 1267; *Kamal v. J. Crew Grp., Inc.*, 2017 WL 2443062, at *5 (D.N.J. June 6, 2017).

II. THE PANEL DECISION CREATES A SPLIT WITH THE SECOND, SEVENTH, AND NINTH CIRCUITS AND IS CONTRARY TO *SPOKEO* AND *NICKLAW*

The Panel held that a FACTA plaintiff automatically has standing despite no allegation of actual harm or risk of harm. In so holding, the Panel split with the Second, Seventh, and Ninth Circuits, all of which have held that a FACTA plaintiff must allege an actual harm or risk of harm to establish standing.[12]

For example, in *Katz v. Donna Karan Co.*, 872 F.3d 114 (2d Cir. 2017), the Second Circuit, as here, addressed a 6+4 FACTA violation. Like Muransky, Katz did not allege that his identity was stolen or that anyone else saw his receipt. *Id.* at 117. The Second Circuit held that, under *Spokeo*, Katz needed to show "a material risk of harm," *id*. at 118, and affirmed the district court's dismissal because there was no risk of harm, *see id*. at 120-21.

The Panel opinion tries to distinguish *Katz*, arguing that it affirmed a factual finding that a 6+4 violation does not create risk of harm because the card number's first six digits merely identify the card type and issuing bank. Slip. op. 21-26. That is no distinction, however, because both *Katz* and this case involve a 6+4 violation, but *Katz* required actual harm or risk of harm, and the Panel did not. *Katz* and the Panel decision therefore conflict.

[12] *See* Pet. 10-11 (citing cases).

Similarly, the Panel decision conflicts with the Seventh and Ninth Circuits, which have held that there is no "appreciable risk of harm" where "nobody else ever saw the non-compliant receipt." *Meyers*, 843 F.3d at 727; *see also Bassett*, 883 F.3d at 783; *Noble v. Nev. Checker Cab Corp.*, 726 F. App'x 582, 584 (9th Cir. 2018). Although those cases involved different FACTA violations (printing the card number's first digit in *Noble* and expiration dates in *Meyers* and *Bassett*), their *rationale* applies fully here: there is no risk of harm when no one else saw the receipt. The Panel ignores this rationale. Instead, it tries (at 19-21) to distinguish the expiration-date cases (but not *Noble*) because, in the Clarification Act of 2007, Congress suggested that printing the expiration date did not risk harm. But those cases' primary rationale was that there is no risk of harm when no one sees the receipt, *see Meyers*, 843 F.3d at 727; *Bassett*, 883 F.3d at 783, and that rationale applies here. The Clarification Act analysis in *Meyers* and *Bassett* is an alternative holding, not a reason to ignore these cases.

The Panel decision is also contrary to *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 must suffer some harm or risk of harm from the statutory violation to invoke the jurisdiction of a federal court." 839 F.3d at 1003. Yet the Panel held Muransky had standing even though he alleged no harm or risk of harm.

The Panel's decision will cause a flood of no-injury FACTA lawsuits in this Circuit. This Circuit now stands alone in permitting FACTA lawsuits without an allegation of harm or risk of harm. Plaintiffs' lawyers often can choose where to bring a FACTA claim – especially when suing businesses with operations in multiple states. To protect businesses in the Eleventh Circuit from a proliferation of no-injury FACTA cases, the full Court should rehear this case to reconcile this Circuit's law with that of other circuits and the Supreme Court.

III. THE PANEL DECISION IS WRONG

The Panel erred in holding (at 12-15) that a FACTA violation automatically conferred standing because it purportedly bore a "close relationship" to the common-law torts of breach of confidence and breach of implied bailment agreement. Neither tort is analogous to a FACTA violation. Both torts require a concrete injury: In breach of confidence, as the Panel concedes (at 17), the injury is when "the person entrusted with property or information gives it to a third party or uses it for their own personal gain." In breach of implied bailment, the injury is loss or damage to property. Pet. 13. None of these injuries occurs in a FACTA violation – the credit card information is not disclosed to any third party, misused for personal gain, or lost or damaged. Pet. 11-14. The analogy fails on its face.

The Panel appeared to recognize this flaw in conceding that "there are some differences" between these torts and a FACTA violation. Slip op. 17. It dismissed

those differences because *Spokeo* looked to whether a statutory violation bears a "close relationship" to a traditional common-law injury. *Id*. But the "relationship" between this case and the torts cited by the Panel is not "close" because this case lacks the fundamental component required for those torts – an injury. 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.[13]

CONCLUSION

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

[13] The Panel's alternative reasoning (at 18-19), that merely holding onto a receipt is a concrete injury-in-fact, is absurd. There is no harm from holding a receipt, as many courts have held. *See*, *e.g.*, *Bassett*, 883 F.3d at 783; *Taylor*, 285 F. Supp. 3d at 1268; *Paci v. Costco Wholesale Corp.*, 2017 WL 1196918, at *3 (N.D. Ill. Mar. 30, 2017). This reasoning also conflicts with the Supreme Court's admonition that plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 416 (2013); *see* Pet. 14-15.

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 2,584 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 October 31, 2018, 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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