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Risky Business: The Eleventh Circuit Applies *Spokeo* to Assess the Sufficiency of Risk for Article III Standing in *Muransky v. Godiva Chocolatier, Inc.*

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RISKY BUSINESS: THE ELEVENTH CIRCUIT APPLIES *SPOKEO* TO ASSESS THE SUFFICIENCY OF RISK FOR ARTICLE III STANDING IN *MURANSKY V. GODIVA CHOCOLATIER, INC.*

Abstract: On October 4, 2019, the United States Court of Appeals for the Eleventh Circuit granted the appellants in *Muransky v. Godiva Chocolatier, Inc.* a rehearing en banc. As a result, the court vacated its original holding that violating the truncation requirement in the Fair and Accurate Transactions Act of 2003 results in a concrete injury for the purposes of standing. The requirement forbids merchants from printing more than the last five digits of a credit card number on a point-of-sale receipt. In its original decision, the Eleventh Circuit demonstrated an unwillingness to override congressional findings that merchants who fail to truncate card numbers expose cardholders to an unacceptable risk of identity theft. This Comment argues that the court’s original decision was consistent with FACTA’s legislative purpose and should be upheld on rehearing.

INTRODUCTION

With a valid credit card number, it takes an average of four seconds for a hacker to access a cardholder’s full account information, including the expiration date, the card verification value (CVV) number, and billing address.¹ In

¹ Mohammed Aamir Ali et al., *Does the Online Card Payment Landscape Unwittingly Facilitate Fraud?*, 15 INST. OF ELECTRICAL & ELECTRONIC ENGINEERS SECURITY & PRIVACY 78, 80–82 (2017) (discussing how security flaws in the online payment system permit hackers to extract key credit information for fraudulent purchases and money transfers). A credit card number is a unique identifier that links a credit card to the cardholder’s bank account. *Id.* at 79. A cardholder’s account information is often the only means guarding against fraudulent payments and cash transfers in card-not-present (CNP) transactions in which a merchant must use means other than physical verification to establish a cardholder’s identity. *Id.* Without the standardization of data formats and the centralization of processing identity verification for online CNP transactions, hackers can use website bots and automated scripts to quickly and correctly guess key account information across different web merchants. *Id.* at 80–82. Obtaining a valid credit card number is the starting point to exploiting this system. *Id.* at 79–80. The Federal Trade Commission recognized the value of credit card numbers to fraudsters when the provisions in the Fair and Accurate Credit Transactions Act of 2003 (FACTA) became effective. *See* FED. TRADE COMM’N, BUREAU OF CONSUMER PROTECTION, DIV. OF CONSUMER & BUS. EDUC., FTC BUSINESS ALERT: SLIP SHOWING? FEDERAL LAW REQUIRES ALL BUSINESSES TO TRUNCATE CREDIT CARD INFORMATION ON RECEIPTS (2007), <http://www.reactf.org/ftcdoc/alt007.pdf> (alerting business owners to FACTA truncation requirements). By 2017, more than 50% of the \$25 billion in global losses to credit card fraud was attributable to CNP transactions, while accounting for only 15% of all card purchases and cash withdrawals. 1142 HSN CONSULTANTS INC., THE NILSON REPORT 9 (2018), [II.-264](https://nilsonreport.</p></div><div data-bbox=)

the early 2000s, Congress saw that credit card numbers were increasingly falling into the wrong hands, exposing consumers to a growing risk of identity theft and fraud.² In response, lawmakers passed the Fair and Accurate Credit Transactions Act of 2003 (FACTA).³ FACTA includes a provision that prohibits merchants from printing more than five digits of a cardholder's credit or debit card number on a receipt provided at the point of sale (the five-digit truncation).⁴ Any merchant who willfully violates this requirement is liable to the cardholder for statutory damages, even if the cardholder suffers only an increased risk, but no actual identity theft.⁵

To successfully sue a merchant for FACTA violations, however, plaintiffs must first have standing—a legal doctrine determining who can have a court decide the merits of their case.⁶ Plaintiffs must allege that the defendant's actions caused an “injury-in-fact” and that the court can provide remedy by issuing them a favorable decision.⁷ An injury-in-fact is a harm that meets three elements thereby conferring Article III standing.⁸ First, it must be “actual or imminent, not conjectural or hypothetical,” meaning a plaintiff must have already suffered or will soon suffer the injury barring the court's intervention.⁹ Second, it must be “particularized,” or in other words, the injury must impact

com/publication_newsletter_archive_issue.php?issue=1142 [https://perma.cc/72BM-T5C2] (reporting on the statistics from the global card and mobile payment industry).

² See H.R. DOC. NO. 106-70, at 1 (2000) (statement of Rep. James A. Leach, Chairman, H. Comm. on Fin. Servs.) (expressing concern that hackers, as well as dumpster divers seeking discarded credit card receipts, were obtaining valid credit card numbers and using those numbers to steal cardholders' identities and make fraudulent transactions).

³ See Fair and Accurate Transactions Act of 2003 (FACTA), 15 U.S.C. § 1681(a) (2018) (providing congressional findings and FACTA's statement of purpose); H.R. DOC. NO. 108-47, at 1–2 (2003) (statement of Rep. Michael G. Oxley, Chairman, H. Comm. on Fin. Servs.) (explaining that FACTA reauthorizes the Fair Credit Reporting Act (FCRA) and highlighting new provisions meant to reduce identity theft and fraud).

⁴ 15 U.S.C. § 1681c(g)(1). To “truncate” means to cut short by removing the end. *Truncate*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (3d ed. 1986).

⁵ See 15 U.S.C. § 1681n (providing that those who willfully violate provisions in FACTA may be held liable for statutory damages of between \$100 and \$1000 or for actual damages that the cardholder sustained).

⁶ See *Whitmore v. Arkansas*, 495 U.S. 149, 154–55 (1990) (describing the standing doctrine); ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPAL AND POLICIES 58–62 (Richard A. Epstein et al. eds., 5th ed. 2015) (defining standing and its requirements).

⁷ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); see CHERMERINSKY, *supra* note 6, at 61 (explaining the definition of standing and its requirements of injury, causation, and redressability). The standing doctrine originates from Article III of the United States Constitution, which grants the federal judiciary the power to adjudicate only cases and controversies. See U.S. CONST. art. III, §§ 1–2 (conferring judicial power to federal courts and describing the limits of their authority); *Lujan*, 504 U.S. at 560 (describing standing as a fundamental component of the case-or-controversy requirement); CHERMERINSKY, *supra* note 6, at 59–60 (describing the values standing serves).

⁸ See *Lujan*, 504 U.S. at 560 (describing the three elements of an injury-in-fact).

⁹ *Spokeo, Inc. v. Robins (Spokeo)*, 136 S. Ct. 1540, 1547 (2016); *Lujan*, 504 U.S. at 560.

the plaintiff in some personal and individual way.¹⁰ Lastly, it must be concrete, or simply put, the injury must be “real, and not abstract.”¹¹ Yet, FACTA provides a private right of action for procedural violations without requiring plaintiffs to show any physical harm or monetary damages.¹² The question splitting federal circuit courts—and the focus of this Comment—is thus whether violating FACTA creates enough risk of identity theft such that the harm is “real” or concrete as defined in the standing doctrine.¹³

In 2019, in *Muransky v. Godiva Chocolatier, Inc. (Muransky II)*, the Eleventh Circuit concluded that the plaintiff sufficiently alleged a concrete injury, but it subsequently vacated its decision and granted the appellants a rehearing en banc.¹⁴ The plaintiff, Dr. David Muransky, claimed to have suffered a heightened risk of identity theft when, following a Visa card purchase at a Godiva boutique, he received a printed receipt bearing the first six and last four digits of his credit card number, in violation of FACTA’s five-digit truncation requirement.¹⁵ Part I of this Comment provides an overview of the legal and factual background to *Muransky II*.¹⁶ Part II analyzes the Eleventh Circuit’s discussion and how its ruling departed from those of other circuits.¹⁷ Part III argues that courts should defer to congressional judgment in truncation cases and that the Eleventh Circuit should rule consistently with its original decision on rehearing.¹⁸

¹⁰ *Spokeo*, 136 S. Ct. at 1548; *Lujan*, 504 U.S. at 560.

¹¹ *Spokeo*, 136 S. Ct. at 1548; *Lujan*, 504 U.S. at 560.

¹² 15 U.S.C. § 1681n. A private right of action is an individual’s right to personally seek judicial relief to remedy a violation of the law. *Private Right of Action*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹³ See Elizabeth C. Pritzker, *Making the Intangible Concrete: Litigating Intangible Privacy Harms in a Post-Spokeo World*, 26 COMPETITION J. ANTITRUST, UCL & PRIVACY SEC. ST. BOARD CAL. 1, 3 (2017) (framing the issue of standing in privacy-related cases and noting the divergence of opinions at the circuit-court level). Compare *Muransky v. Godiva Chocolatier, Inc. (Muransky II)*, 922 F.3d 1175, 1188 (11th Cir.), *reh’g granted*, 939 F.3d 1278 (11th Cir. 2019) (concluding that a heightened risk of identity theft is an injury sufficiently concrete to confer standing), with *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 113 (3d Cir. 2019) (concluding that the plaintiff did not suffer a concrete injury for the purposes of standing when alleging solely a heightened risk of identity theft). See generally Pritzker, *supra*, at 3–9 (outlining the approaches circuit courts have taken on standing in privacy-related cases generally, not limited to FACTA truncation cases).

¹⁴ *Muransky II*, 922 F.3d at 1188.

¹⁵ *Id.* at 1181; see also Complaint at 6, *Muransky v. Godiva Chocolatier, Inc. (Muransky I)*, No. 0:15-cv-60716-WPD, slip op. at 6–7 (S.D. Fla. Sept. 28, 2016) (providing further details on Muransky’s factual allegations).

¹⁶ See *infra* notes 19–68 and accompanying text.

¹⁷ See *infra* notes 69–87 and accompanying text.

¹⁸ See *infra* notes 88–110 and accompanying text.

I. LEGAL AND FACTUAL BACKGROUND OF *MURANSKY*

In 2019, in *Muransky II*, the Eleventh Circuit held that violating FACTA's truncation requirement created enough risk of identity theft to establish standing for plaintiffs to sue.¹⁹ The court subsequently vacated its decision and granted the appellants a rehearing en banc.²⁰ Section A of this Part describes the legal context behind the Eleventh Circuit's opinion.²¹ Section B provides a factual and procedural history of the case.²²

A. Legal Background

The question of standing asks who has the legal right to challenge another's conduct in court.²³ In 1992, in *Lujan v. Defenders of Wildlife*, the Supreme Court held that a plaintiff must have suffered an "injury-in-fact"—a harm sufficient to confer standing—to sue in federal court.²⁴ Through legislation, Congress can define rights, and when deprived of those rights, plaintiffs may have standing, even if they would not have suffered a harm in absence of the statute.²⁵ FACTA is one such piece of legislation.²⁶ The Act prohibits merchants from printing more than the last five digits of consumers' credit card numbers and requires them to fully mask the expiration dates on receipts at the point of sale.²⁷ FACTA gives cardholders the ability to sue merchants who willfully violate its provisions for statutory damages without requiring the cardholders to show that their identity was in fact stolen.²⁸ It thereby creates a previously non-existent right—the right to expect merchants to follow certain procedures

¹⁹ *Muransky II*, 922 F.3d at 1188.

²⁰ *Muransky v. Godiva Chocolatier, Inc. (Muransky III)*, 939 F.3d 1278, 1279 (11th Cir. 2019).

²¹ See *infra* notes 23–57 and accompanying text.

²² See *infra* notes 58–68 and accompanying text.

²³ See *Whitmore*, 495 U.S. at 154–55 (explaining that the United States Constitution allows federal courts to adjudicate only “cases and controversies,” and the standing doctrine identifies which disputes fall within the meaning of these words); *Standing*, BLACK'S LAW DICTIONARY, *supra* note 12 (defining standing).

²⁴ See 504 U.S. at 560 (noting that Article III standing requires, at a minimum, that plaintiffs show they suffered an injury-in-fact traceable to the defendant's conduct and redressable by judicial decision).

²⁵ See *Warth v. Seldin*, 422 U.S. 490, 513–14 (1975) (explaining that Congress may confer a statutory right that, when violated, creates harm that the courts will recognize as an injury-in-fact).

²⁶ See 15 U.S.C. § 1681n (providing that those who willfully violate provisions in FACTA may be held liable for statutory damages of between \$100 and \$1000 or for actual damages that the cardholder sustained).

²⁷ *Id.* § 1681c(g)(1) (defining the truncation requirements).

²⁸ See *id.* § 1681n(a)(1)(A) (providing for statutory damages for willful violations of FACTA); *Warth*, 422 U.S. at 513–14 (explaining how violations of statutory rights can also be sufficient to demonstrate an injury-in-fact for standing purposes). Willful noncompliance includes both knowingly and recklessly violating a statute. See *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 56–57 (2007) (holding that the common-law usage of the term “willfully” includes knowing and reckless disregard of the law).

safeguarding consumer identity.²⁹ When violating FACTA truncation requirements, merchants harm cardholders by depriving them of this right.³⁰

Yet, what harms qualify to confer standing is not merely a matter of what occurred, but also a question of what courts recognize as injury-in-fact.³¹ The Court in *Lujan* held that judicially cognizable harms must be “concrete and particularized,” as well as “actual and imminent, not conjectural or hypothetical.”³² Although a harm may arise out of a statutory violation, the inquiry does not end there.³³ A plaintiff must have already suffered or will imminently

²⁹ See *Muransky II*, 922 F.3d at 1188 (noting that, in passing the FACTA truncation requirement, Congress imposed on merchants a procedural requirement designed to protect consumers from identity theft).

³⁰ See *id.* (concluding that when the defendant violated the five-digit truncation requirement, the plaintiff could no longer expect that the merchant followed procedures enacted to prevent the theft of consumer identity).

³¹ Daniel Townsend, Note, *Who Should Define Injuries for Article III Standing?*, 68 STAN. L. REV. ONLINE 76, 77–78 (2015), http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2015/12/68_Stan_L_Rev_Online_76_Townsend.pdf (explaining the concept of injury-in-fact). Judge William A. Fletcher, of the U.S. Court of Appeals for the Ninth Circuit, recounted a helpful anecdote illustrating the difference between an injury as commonly understood and an injury that confers standing in the eyes of the law. *Id.* at 78. He told his younger daughter, Leah, who was upset because Judge Fletcher and his wife gave her older sister, Anne, a new bike, that Anne receiving the bike did not cause Leah injury. *Id.* But, Leah was hurt—just not in a way that the family chose to recognize as legitimate. *Id.* Analogously, when a court determines which injuries it chooses to recognize, the definition of injury is no longer based on reality, but is instead rooted in its legitimacy under the law. See *id.* at 78 (explaining how injury-in-fact differs from the common conception of injury using Judge Fletcher’s example).

³² 504 U.S. at 560. In contexts unrelated to statutory provisions on privacy, the Supreme Court has held that an injury is concrete when plaintiffs suffer harm to a judicially cognizable interest. See *id.* at 566–67 (holding that those who worked with and studied endangered animals suffered a concrete injury when federal action threatened those animals, because they had a judicially cognizable interest in the continued existence of their objects of study); *Allen v. Wright*, 468 U.S. 737, 756 (1984) (explaining that one of the injuries the plaintiffs alleged was concrete because a policy of segregation harmed the judicially cognizable interest of securing their children’s access to racially integrated schools); *Warth*, 422 U.S. at 514 (holding that a statute can create a judicially cognizable interest, harm to which would constitute a concrete injury). What qualifies as a judicially cognizable interest is case-specific and lacks a general rule. CHEMERINSKY, *supra* note 6, at 71, 77. Compare *Lujan*, 504 U.S. at 566–67 (holding the wish to observe an animal species to be a judicially cognizable interest), and *Int’l Primate Prot. League v. Adm’rs of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991) (holding that the right to sue in one’s chosen forum is a judicially cognizable interest), with *Allen*, 468 U.S. at 755–56 (holding that the desire to be free of stigma is not an interest the Court recognizes), and *Roe v. Wade*, 410 U.S. 113, 128 (1973) (holding that marital satisfaction is not a judicially cognizable interest).

³³ See *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979) (emphasizing that, even if Congress can define harms, it cannot do away with the minimum requirements for constitutional standing, such that a plaintiff must always have suffered concrete and redressable injury); see also Peter C. Ormerod, *A Private Enforcement Remedy for Information Misuse*, 60 B.C. L. REV. 1893, 1920 (2019) (arguing that the Supreme Court holds in tension two conflicting conclusions: on the one hand, the Constitution empowers Congress to pass laws defining injuries-in-fact, and on the other, Congress’s exercise of that power can, at times, violate Article III requirements for standing).

suffer the harm for the court to adjudicate the dispute.³⁴ The harm must also be particularized, meaning it must impact the plaintiff in an individualized and personal manner.³⁵ And, the harm must be concrete, or in other words, it must be “real and not abstract.”³⁶

In 2016, in *Spokeo, Inc. v. Robins*, a privacy-related class action lawsuit alleging violations of the Fair Credit Reporting Act (FCRA), the Supreme Court provided new guidance for cases in which statutory violations placed plaintiffs at risk for intangible harms.³⁷ *Spokeo, Inc.*, a consumer reporting agency, had disseminated inaccurate consumer reports to Thomas Robins’s potential employers.³⁸ Robins brought a class action lawsuit in federal district court claiming that *Spokeo* violated FCRA by failing to establish procedures that would have prevented the publication of inaccurate reports.³⁹ The district court dismissed the case for failure to allege an injury-in-fact, and Robins appealed to the United States Court of Appeals for the Ninth Circuit.⁴⁰ The Ninth Circuit reversed, holding that Robins adequately pled an injury-in-fact when he alleged that *Spokeo* violated a statutory right affecting his personal interests.⁴¹ On review, the Supreme Court agreed that Robins suffered a personal harm when *Spokeo* disseminated inaccurate information to his potential employers.⁴² Nonetheless, the Court remanded the case for the Ninth Circuit to reconsider standing because the lower court’s analysis addressed only whether Robins’s harm was particularized but not whether it was concrete.⁴³

³⁴ *Spokeo*, 136 S. Ct. at 1548; *Lujan*, 504 U.S. at 560.

³⁵ *Spokeo*, 136 S. Ct. at 1548; *Lujan*, 504 U.S. at 560.

³⁶ *Spokeo*, 136 S. Ct. at 1548; *Lujan*, 504 U.S. at 560.

³⁷ See Fair Credit Reporting Act of 1970 (FCRA), 15 U.S.C. § 1681(a)(1) (2018) (stating the need for procedures ensuring “fair and accurate credit reporting”); *Spokeo*, 136 S. Ct. at 1548 (emphasizing the necessity of a separate concreteness analysis for the purposes of standing).

³⁸ *Spokeo*, 136 S. Ct. at 1546.

³⁹ Complaint at 2–3, *Robins v. Spokeo, Inc. (Robins I)*, No. CV10–05306 ODW(AGRx), 2011 WL 597867 (C.D. Cal. Jan. 27, 2011). *Spokeo, Inc.* ran a search engine where users could look up a person’s photograph and personal information, such as age, educational and professional background, marital status, and economic health. *Id.* at 5. Robins alleged that *Spokeo* violated FCRA by posting a photograph of him under his profile that was not, in fact, him. *Id.*; see 15 U.S.C. § 1681e(b) (requiring consumer reporting agencies to reasonably ensure consumer reports are published with “maximum possible accuracy”). He was also incorrectly listed as a married man in the top ten percent of wealth and employed in a technical field with strong academic credentials. Complaint, *supra*, at 5. In fact, he was single, unemployed and actively seeking work. *Id.* He alleged that *Spokeo* harmed his job prospects by making him seem overqualified, with higher salary expectations, and less mobile as a result of familial obligations. *Spokeo*, 136 S. Ct. at 1555.

⁴⁰ See *Robins I*, 2011 WL 597867, at *2 (dismissing the case for lack of standing); Notice of Appeal at 2, *Robins I*, 2011 WL 597867.

⁴¹ *Robins v. Spokeo, Inc. (Robins II)*, 742 F.3d 409, 413–14 (9th Cir. 2014).

⁴² *Spokeo*, 136 S. Ct. at 1548, 1550.

⁴³ *Id.* Because of the novel and intangible nature of identity-theft risk, privacy-related statutory violations required a new test to balance standing’s injury-in-fact requirement with Congress’s intent to confer a broad private right of action. See Pritzker, *supra* note 12, at 1 (2017) (discussing the impetus for clarity on the concreteness question prior to *Spokeo*).

To start, the Court held that, although a judicially cognizable harm must be “real” so as to be concrete, it does not have to be tangible.⁴⁴ When a harm is intangible, like one arising from the release of inaccurate personal information to prospective employers, courts should consider two factors.⁴⁵ The first factor examines whether the alleged harm resembles a violation of a right historically entitling a person to seek remedy in English or American courts.⁴⁶ The second considers whether Congress intended for plaintiffs to have standing if they suffered the harm.⁴⁷ The Court proceeded to emphasize that, despite these considerations, alleging a mere deprivation of procedural rights would still fail to meet Article III requirements for standing.⁴⁸ Procedural rights give parties the ability to require that others follow certain rules, but not the right to an end result.⁴⁹ A procedural violation confers standing only if it results in a risk of harm sufficiently elevated so as to be concrete.⁵⁰

In *Spokeo*, the Supreme Court reasoned that the harm from disseminating inaccurate personal information has common-law analogs in libel and defamation that characterize the publishing of slanderous material as an injury sufficient to establish a plaintiff’s standing without proof of actual damages.⁵¹ And, the Court recognized that the FCRA’s legislative history clearly indicated congressional intent to provide plaintiffs a private right of action.⁵² The FCRA, however, provided a procedural right granting Robins the right to sue when Spokeo failed to implement procedures for accurate reporting.⁵³ It did not give Robins the right to demand that consumer reporting agencies only release personal reports with

⁴⁴ *Spokeo*, 136 S. Ct. at 1549.

⁴⁵ *See id.* (explaining that courts must weigh history and congressional intent when evaluating an intangible harm).

⁴⁶ *Id.* Because the doctrine of standing finds its roots in the case-or-controversy requirement in Article III of the Constitution, the Court drew on historical practice to inform its analysis of intangible harms. *Id.*

⁴⁷ *Id.* This factor acknowledges that through legislation, Congress can identify new harms establishing standing when, prior to a statute’s passage, courts would not recognize such harms as injuries-in-fact. *Id.*

⁴⁸ *Id.*

⁴⁹ Devin Mc Dougall, Note, *Reconciling Lujan v. Defenders of Wildlife and Massachusetts v. EPA on the Set of Procedural Rights Eligible for Relaxed Article III Standing*, 37 COLUM. J. ENVTL. L. 151, 156 (2012).

⁵⁰ *Spokeo*, 136 S. Ct. at 1550.

⁵¹ *See Robins v. Spokeo, Inc. (Robins III)*, 867 F.3d 1108, 1114–15 (9th Cir. 2017) (concluding that the inaccurate dissemination of Robins’s personal information was similar to the common-law torts of libel and defamation). The judicially cognizable interest, in this case, was the right to privacy and reputation. *See id.* (explaining that FCRA protects interests historically recognized in the law). To commit libel is to disparage a person on false grounds using a fixed format, especially in writing, while defamation includes both written and oral statements of disparagement. *Defamation*, BLACK’S LAW DICTIONARY, *supra* note 12; *Libel, id.*

⁵² *Spokeo*, 136 S. Ct. at 1550.

⁵³ *See id.* at 1545 (describing provisions in Section 1681e(b) of the FCRA).

correct information.⁵⁴ Some inaccurate publications, such as an incorrect zip code, do not create a high risk of harm to a plaintiff's reputation.⁵⁵ For the Court, the question thus became whether the misinformation exposed Robins to a risk of reputational harm sufficient enough to be concrete.⁵⁶ It therefore remanded the case for the Ninth Circuit for a determination on this issue.⁵⁷

B. Factual Background

In *Muransky II*, the Eleventh Circuit considered whether a consumer had standing when alleging that Godiva Chocolatier, Inc. violated FACTA's five-digit truncation requirement.⁵⁸ Following a purchase at a Godiva store in March 2015, Dr. David Muransky received a receipt displaying his credit card number's first six and last four digits.⁵⁹ He then brought a class action lawsuit against Godiva, alleging willful violations of FACTA provisions that exposed him and the class to a heightened risk of identity theft.⁶⁰ In September 2015, the District Court for the Southern District of Florida denied Godiva's motion to dismiss.⁶¹

⁵⁴ See 15 U.S.C. § 1681e(b) (providing no bar on publishing inaccurate reports).

⁵⁵ *Spokeo*, 136 S. Ct. at 1550.

⁵⁶ *Id.*

⁵⁷ *Id.* On remand, the Ninth Circuit held that Robins's alleged harms were sufficiently concrete for Article III standing. *Robins III*, 867 F.3d at 1118. First, the court considered whether the procedural rights in the FCRA guard against concrete harms. *Id.* at 1114–15. It concluded that his alleged harm was sufficiently analogous to harm that would traditionally serve as the basis for a lawsuit alleging privacy violations or defamation. *Id.* at 1114. It also held that Congress recognized that dissemination of false information alone can constitute a concrete harm because the legislative record warned extensively about the real-life implications of errors in consumer reports. *Id.* at 1115. Second, because the FCRA's procedural rights guard against concrete harms, the court next considered with *Spokeo* placed Robins in enough risk of harm to confer standing. *Id.* Although *Spokeo* inflated Robins's credentials in the reports it released to his potential employers, the court noted that errors inaccurately stating a candidate's skills and education level, even for the better, could hurt employment chances. *Id.* at 1117. As a result, it held that Robins suffered a risk of harm sufficient to be a concrete injury and remanded the case to the district court for a finding consistent with its ruling. *Id.* at 1118. The Ninth Circuit did not examine the question of standing for the other members of the class action. *Id.* The defendant appealed, and the Supreme Court denied certiorari. Order List at 3, 583 U.S. 17-806 (2018) (order denying certiorari). The case went back to the district court, and after settlement negotiations, both parties filed for voluntary dismissal, which the district court granted. *Robins v. Spokeo, Inc. (Robins IV)*, No. CV10-05306 ODW(AGRx), slip op. at *2 (C.D. Cal. Mar. 13, 2019); Stipulation for Dismissal with Prejudice, *Robins IV*, slip op. at *2.

⁵⁸ *Muransky II*, 922 F.3d at 1181; see also Complaint at 6, *Muransky I*, No. 0:15-cv-60716-WPD (S.D. Fla. Sept. 28, 2016) (detailing Muransky's factual allegations).

⁵⁹ *Muransky II*, 922 F.3d at 1181.

⁶⁰ *Id.* Dr. Muransky alleged that five-digit truncation violations occurred in all United States Godiva retail stores, of which there were over two-hundred, for at least sixty days prior to the filing of the complaint on April, 6, 2015. Complaint, *supra* note 58, at 7.

⁶¹ *Muransky II*, 922 F.3d at 1181; see also *Muransky I*, No. 0:15-cv-60716-WPD, slip op. at 6–7 (S.D. Fla. Sept. 2, 2015) (order denying motion to dismiss first amended complaint). Shortly thereafter, Godiva admitted that the violations had taken place over the alleged time period but not to the number of retail stores. Answer to First Amended Complaint at 9–10, *Muransky I*, No. 0:15-cv-60716-WPD (S.D. Fla. Sept. 16, 2015).

As the parties approached their third month of discovery, they agreed to mediation and reached a settlement.⁶² Upon receiving an order of preliminary approval of the settlement from the district court, 318,000 class members received a notice of the agreement.⁶³ Five class members objected to the settlement.⁶⁴ At the settlement hearing, the opposing class members raised several objections, one of which challenged Dr. Muransky's standing.⁶⁵ The district court approved the class settlement over these objections without deciding on the issue of standing.⁶⁶ On appeal, the Eleventh Circuit affirmed the district court's ruling after deciding that Dr. Muransky suffered a risk of identity theft sufficiently elevated so as to be a concrete harm for the purposes standing.⁶⁷ The objector-appellants

⁶² *Muransky II*, 922 F.3d at 1181. The parties filed a notice of settlement and motion to stay all proceedings on November 20, 2015. Notice of Settlement at 1, *Muransky I*, No. 0:15-cv-60716-WPD (S.D. Fla. Nov. 20, 2015). They agreed to settle for \$6.3 million. *Muransky II*, 922 F.3d at 1181. Dr. Muransky also applied for an incentive award totaling \$10,000. *Id.* Counsel for the class requested an award of attorney's fees equaling one-third of the settlement or \$2.1 million. *Id.*

⁶³ *Muransky II*, 922 F.3d at 1182. 47,000 class members submitted claim forms to receive money from the settlement fund and only fifteen opted out. *Id.*

⁶⁴ *Id.* In their briefs, the opposing class members alleged insufficient notice of the attorney's fees motion per Federal Rule of Civil Procedure 23(h). *Id.* Rule 23(h) requires notice to be provided in a reasonable manner, and the objectors argued that the deadlines for objections to the settlement should have been set after counsel filed the attorney's fees motion. FED. R. CIV. P. 23(h); Objections to Proposed Settlement at 3, *Muransky I*, No. 0:15-cv-60716-WPD (S.D. Fla. Aug. 23, 2016). They also objected to the amount of Dr. Muransky's \$10,000 incentive award, as well as to his failure to use a lodestar analysis to determine whether attorney's fees were reasonable. *Muransky II*, 922 F.3d at 1182. The lodestar analysis is a method of reviewing attorney's fees for abuse of discretion in a settlement. *Purdue v. Kenney A. ex rel. Winn*, 559 U.S. 542, 551 (2010). It sets a benchmark by estimating fees a prevailing attorney would earn on a similar case if paid by the hour. *Id.*

⁶⁵ *Muransky II*, 922 F.3d at 1183. The district court found no procedural violations as to notice and did not rule on objections to the incentive award. *Muransky I*, slip op. at 3. The court declined to use the lodestar method because, in cases involving class actions with a common settlement fund, circuit precedent required district courts to award attorney's fees based on a benchmark of approximately thirty-three percent of the fund with adjustments based on case-specific circumstances. *Id.* at 5. The court concluded that the attorney's fees were reasonable because they were consistent with other fee awards in the Eleventh Circuit. *Id.* at 5.

⁶⁶ *See id.* at 1–8 (lacking an opinion as to Dr. Muransky's standing).

⁶⁷ *Muransky II*, 922 F.3d at 1185, 1192. The Eleventh Circuit initially issued its holding on October 3, 2018, before vacating sua sponte and replacing it with its later opinion published on April 22, 2019. *Id.* at 1180; *Muransky v. Godiva Chocolatier, Inc.*, 905 F.3d 1200, 1204 (11th Cir. 2018), vacated, 922 F.3d 1175 (11th Cir. 2019). In the intervening months, the court received several filings; the appellants had petitioned for a rehearing, and Six Flags Entertainment Corporation, as well as industry associations, filed amicus briefs in support of that petition. Petition for Rehearing and Rehearing En Banc, *Muransky*, 905 F.3d 1200; Brief for Amicus Curiae Six Flags Entm't Corp., *id.*; Brief for Amicus Curiae National Retail Federation, *id.* Six Flags, at the time, had pending litigation, facing allegations of five-digit truncation violations in the District Court for the Northern District of Georgia. *Bailey v. Six Flags Entm't Corp.*, No. 1:17-CV-3336-MHC, 2019 WL 3503732, at *1 (N.D. Ga. 2019). Citing the Eleventh Circuit superseding opinion, a district court judge ultimately denied Six Flags's motion to dismiss. *Id.* at *2.

petitioned for a rehearing en banc, and the Eleventh Circuit granted that motion and vacated the panel opinion on October 4, 2019.⁶⁸

II. APPLYING THE *SPOKEO* FRAMEWORK: THE ELEVENTH CIRCUIT SPLITS WITH THE SECOND, THIRD, AND NINTH CIRCUITS

Because the truncation requirement is a procedural right under FACTA, after the Supreme Court's 2016 ruling in *Spokeo, Inc. v. Robins*, the question became whether defendants who violated that right exposed plaintiffs to a risk of identity theft sufficiently elevated so as to be a concrete harm.⁶⁹ In 2017, the United States Court of Appeals for the Second Circuit, in *Katz v. Donna Karan Co.*, affirmed a district court's dismissal of a FACTA truncation case for lack of standing.⁷⁰ In *Katz*, the defendant, a women's clothing retailer, gave the plaintiff a copy of his receipt displaying the first six and last four digits of his credit card number.⁷¹ The district court concluded that the first six digits of a card number establish only the card's issuer, not the identity of the cardholder.⁷² Exposing these numbers thus created little risk to the plaintiff who, in turn, suffered no concrete harm.⁷³ The Second Circuit found no clear error in the district court's risk assessment, allowing lower courts within its jurisdiction to take an ad hoc approach to deciding whether plaintiffs suffered enough risk to have standing for violations of FACTA's procedural requirements.⁷⁴ Shortly

⁶⁸ *Muransky III*, 939 F.3d at 1279 (order granting petition for rehearing en banc and vacating panel opinion).

⁶⁹ *See Spokeo, Inc. v. Robins (Spokeo)* 136 S. Ct. 1540, 1549–50 (2016) (explaining that procedural violations are not concrete injuries when there is an insufficient risk of harm to a judicially cognizable interest); *e.g.*, *Katz v. Donna Karan Co.*, 872 F.3d 114, 119–21 (2d Cir. 2017) (affirming a district court dismissal for lack of standing due to the plaintiff's insufficient exposure to the risk of identity fraud following a credit card truncation violation). FACTA amended the FCRA with the goal of reducing identity theft and credit fraud. Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-159, 117 Stat. 1952 (2003) (codified as 15 U.S.C. § 1681 (2018)); H.R. Doc. No. 108-47, at 1–2 (2003) (statement of Rep. Michael G. Oxley, Chairman, H. Comm. on Fin. Servs.). Prior to *Spokeo*, courts did not assess the sufficiency of risk when determining whether a plaintiff suffered a concrete injury for the purposes of standing in FACTA truncation cases. *See, e.g.*, *Robins v. Spokeo, Inc. (Robins II)*, 742 F.3d 409, 413–14 (9th Cir. 2014) (determining that Robins suffered a concrete injury because the violation personally affected him); *see also Hammer v. Sam's E., Inc.*, 754 F.3d 492, 498–99 (8th Cir. 2014) (concluding that the plaintiffs suffered a concrete injury because the defendants violated their statutory rights).

⁷⁰ 872 F.3d at 121.

⁷¹ *Id.* at 117.

⁷² *Id.*

⁷³ *Id.* at 119–21. The court made its decision based on information alleged in the defendant's motion to dismiss and similar findings from other district courts. *Id.* at 119–20. The court also considered a web article attached to the defendant's brief explaining that the first six digits of a cardholder's number is the card's Bank or Issuer Identification Number. *Id.* at 120.

⁷⁴ *See id.* (concluding that the district court did not clearly err in its risk assessment despite the abbreviated fact-finding procedure, while noting that courts in future cases should establish a more developed evidentiary basis for their findings).

thereafter, the United States Court of Appeals for the Ninth Circuit took a similar approach, affirming a dismissal on comparable facts and procedural history.⁷⁵

In its original 2019 opinion, the United States Court of Appeals for the Eleventh Circuit, in *Muransky v. Godiva Chocolatier Inc. (Muransky II)*, rejected the Second and Ninth Circuits' approach to applying *Spokeo*.⁷⁶ For the *Muransky II* court, the FACTA truncation requirement reflected congressional findings that printing anything more than the last five digits of a credit card number exceeds the acceptable level of identity theft risk.⁷⁷ The court declined to conduct its own risk assessment because it believed Congress possessed a superior understanding of the mechanisms behind credit card fraud.⁷⁸ According to the court, Godiva's procedural violations exposed Dr. Muransky to a level of risk beyond what is tolerable in Congress's judgment.⁷⁹ As a result, this heightened exposure constituted a concrete harm sufficient to qualify as an injury-in-fact for Article III standing.⁸⁰

The *Muransky II* court also declined to infer from later amendments to FACTA that Congress intended to limit its private right of action to plaintiffs who, in fact, suffered fraud.⁸¹ Known as the Clarification Act, the amendment provides a grace period between 2004–2007 to merchants who would have otherwise been in willful noncompliance for printing the expiration date on consumers' point-of-sale receipts.⁸² Thus, plaintiffs who allege expiration date violations dating back to this period would only have a private right of action if they incurred actual damages.⁸³ The United States Court of Appeals for the Third Circuit in *Kamal v. J. Crew Group, Inc.*, had affirmed a district court

⁷⁵ See *Noble v. Nev. Checker Cab Corp.*, 726 F. App'x 582, 583–84 (9th Cir. 2018) (concluding that a plaintiff alleging a violation of FACTA's five-digit truncation requirement lacked standing because printing the first digit of a cardholder's credit card number poses minimal risk).

⁷⁶ Compare *Muransky v. Godiva Chocolatier, Inc. (Muransky II)*, 922 F.3d 1175, 1189 (11th Cir.), *reh'g granted*, 939 F.3d 1278 (11th Cir. 2019) (rejecting the premise that a federal district court could, based on its own findings of fact, decide how many digits revealed would result in a sufficient risk of harm for the purposes of standing), with *Katz*, 872 F.3d at 121 (applying *Spokeo* and deciding that the plaintiff did not suffer a sufficient risk of harm to establish standing), and *Noble*, 726 F. App'x at 583–84 (same).

⁷⁷ *Muransky II*, 922 F.3d at 1187.

⁷⁸ See *id.* at 1188 (declining to state that, as a matter of law and contrary to Congress's assessment, the risk of identity theft is not concrete until a merchant prints a number of credit card digits greater than the number specified by statute).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 1188–89.

⁸² 15 U.S.C. § 1681n(d).

⁸³ See *id.* (clarifying what conduct constitutes willful noncompliance). The court noted that Congress amended FACTA in 2007 to address the large number of abusive lawsuits against merchants who printed the expiration dates of consumer credit cards but otherwise complied with FACTA. *Muransky II*, 922 F.3d at 1187; see also Credit and Debit Card Receipt Clarification Act of 2007 (Clarification Act), Pub. L. No. 110-241, 122 Stat. 1565, 1566 (2008) (codified as 15 U.S.C. § 1681n(d)) (stating the purpose of the amendment).

decision that a plaintiff lacked standing when a retail clothing store printed the first six and last four digits of his credit card number.⁸⁴ The Third Circuit acknowledged that an untruncated expiration date was not at issue, but it nevertheless concluded that by passing the Clarification Act, Congress intended to limit any private right of action under FACTA to plaintiffs who suffered actual damages.⁸⁵ The *Muransky II* court drew the opposite conclusion.⁸⁶ By leaving the five-digit truncation requirement in place, the Eleventh Circuit reasoned, Congress distinguished the measure from other procedural violations as one that plays a more crucial role in protecting consumers from fraud and identity theft.⁸⁷

III. THE AFTERMATH OF THE ELEVENTH CIRCUIT'S RULING IN *MURANSKY II*

In 2019, the United States Court of Appeals for the Eleventh Circuit granted the appellants in *Muransky v. Godiva Chocolatier, Inc. (Muransky II)* a rehearing en banc.⁸⁸ In doing so, the court vacated its original holding that when merchants print more than five digits of a card number on a point-of-sale receipt, the cardholder suffers a risk of identity sufficiently elevated so as to be a concrete harm for the purposes of standing.⁸⁹ The Eleventh Circuit in *Muransky II* had ample reason to place such deference in the legislature, and it should therefore rule consistently with its original decision upon rehearing.⁹⁰

Congress is uniquely competent to define acceptable levels of risk because lawmakers are better equipped to develop an evidentiary foundation anchoring modern conceptions of harm.⁹¹ As opposed to the judiciary, the legisla-

⁸⁴ *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 107, 120 (3d Cir. 2019).

⁸⁵ *Id.* at 107 (excerpting language from the Clarification Act and discussing its implications on the concreteness analysis).

⁸⁶ See *Muransky II*, 922 F.3d at 1188 (declining to infer from later amendments to FACTA that Congress decided to limit the private right of action to only consumers who can allege that hackers in fact committed fraud).

⁸⁷ *Id.* at 1189. Compare *id.* at 1188–89 (reasoning that, by leaving the requirement in place, Congress specifically determined that five-digit truncation protects consumers from identity theft), with *Kamal*, 918 F.3d at 113 (concluding that the plaintiff lacked standing because he did not show actual harm stemming from the violation). The Eleventh Circuit also underscored Congress's assertions in the Clarification Act that the five-digit truncation itself prevents fraud and identity theft. *Muransky II*, 922 F.3d at 1188–89.

⁸⁸ *Muransky v. Godiva Chocolatier, Inc. (Muransky II)*, 922 F.3d 1175, 1181, 1188 (11th Cir.), *reh'g granted*, 939 F.3d 1278 (11th Cir. 2019).

⁸⁹ *Muransky II*, 922 F.3d at 1181, 1188.

⁹⁰ See *id.* (emphasizing Congress's greater institutional capacity to define injuries); Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 3 (1986) (arguing that the Supreme Court's relative inability to develop a strong evidentiary foundation for its standing opinions results in numerous contradictory rulings, thus impairing judge-made law from delivering consistent holdings on similar facts); *infra* notes 92–93 and accompanying text (discussing Congress's advantages in defining new concepts of injuries).

⁹¹ See *Spokeo, Inc. v. Robins (Spokeo)* 136 S. Ct. 1540, 1549 (2016) (holding that congressional intent is helpful because the legislature is in a good position to identify intangible harms sufficiently

ture benefits from the staff, money, and time dedicated to information gathering.⁹² The judiciary's fact-finding ability is further hindered because standing is a jurisdictional question often answered before discovery.⁹³ As a result,

concrete for the purposes of standing); *Muransky II*, 922 F.3d at 1188 (underscoring Congress's institutional capacity to define concrete injuries for Article III standing); Townsend, *supra* note 31, at 81–83 (examining congressional advantages in defining injuries); *infra* note 92 and accompanying text (discussing characteristics that make the legislature well-positioned to define new concepts of injuries).

⁹² Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 578 (1994) (discussing the relative advantages to enacting laws by representative democracy in the legislature, as opposed to by referenda in a direct democracy, and arguing that even judicial review of laws enacted by popular vote do not cure their defects). To enact complex and far-reaching laws, the legislature relies on a committee system unavailable to the judiciary that allows it to develop subject-matter expertise in any particular area of policymaking. *Id.* at 578 n.195. Congress held eighteen hearings on identity theft alone when considering FACTA provisions. REBA BEST, FEDERAL IDENTITY THEFT LAW: MAJOR ENACTMENTS OF THE 108TH CONGRESS: A LEGISLATIVE HISTORY OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT AND IDENTITY THEFT PENALTY ENHANCEMENT ACT 48–51 (2005). The 115th Congress (2017–2018) had twenty permanent standing committees in the House and sixteen in the Senate. CONG. RESEARCH SERV. NO. 99-241, COMMITTEE TYPES AND ROLES (2017). In fiscal year 2019, salaries and expenses for standing committees were budgeted at over \$120 million, and the government allotted over \$130 million to Senate inquiries and investigations alone. OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2019, at 11–12 (2019). Procedurally, unlike the courts, the legislature is not hindered by prohibitions against ex parte communications, stare decisis, or the time constraints of active litigation, nor is it limited to the parties' framings of the issues. Neal Devins, *Congressional Fact-finding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1178–81 (2001) (recognizing the numerous procedural advantages that Congress has over courts in pursuing information). Still, some commentators contend that legislation can lack strong evidentiary support. *See id.* at 1182 (arguing that, although lawmakers are equipped with better fact-finding tools, they may lack the incentives to seek accurate information); *see, e.g.*, Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 891 (1987) (outlining the economic theory of legislation where, instead of voting for the public interest, legislators primarily vote to ensure their reelection). In particular, lobbyists and special interest groups can, for example, hijack the legislative agenda. *See* Farber & Frickey, *supra* at 892 (explaining the theory whereby “rent-seeking” interest groups dominate political activity). *But see id.* at 894–95 (finding that empirical evidence does not support the theory that special interest groups have had an outsized role in crafting legislation to the detriment of the public's interest). Partisan politics may also prevent legislators from opposing the decisions of agenda-setters within their party, even if the evidence is substandard or undermines the legislative actions taken. Devins, *supra*, at 1183–84.

⁹³ *See* Townsend, *supra* note 31, at 82 (comparing the abilities of Congress and those of the judiciary to define injuries); *see e.g.* *Katz v. Donna Karan Co.*, 872 F.3d 114, 120–21 (2d Cir. 2017) (concluding that the district court permissibly dismissed the case for lack of standing despite expressing reservations about the limited fact-finding procedure available to the court at the motion-to-dismiss stage). *See generally* *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (explaining that standing is a requirement plaintiffs must satisfy before federal courts can consider the substantive merits of their cases). Challenges to standing may be mounted at any stage of litigation. *See Lujan v. Defs. of Wildlife*, 514 U.S. 555, 561 (1992) (establishing that standing is not only required at pleading, but it must also be supported with the proof appropriate at different stages of litigation).

courts are likely to dismiss cases for lack of standing without being presented with all relevant factors bearing on a comprehensive assessment of risk.⁹⁴

For instance, the probability of guessing a valid credit card number increases from one chance out of one billion when a card number is properly truncated to one out of only one hundred thousand when it is not—a startling figure that neither the court in *Kamal v. J. Crew Group, Inc.* nor the court in *Katz v. Donna Karen Co.* considered in their decisions.⁹⁵ The Third Circuit in *Kamal* concluded that revealing anything less than the full sixteen-digit card number made the risk of identity theft too conjectural for the purposes of standing.⁹⁶ In a similar vein, for the Second Circuit in *Katz*, because the defendant disclosed ostensibly public information, the plaintiffs suffered no higher risk than if the defendants had not violated their procedural rights.⁹⁷

Congress, however, created a per se rule leaving little room for judicial assessments of risk.⁹⁸ As a matter of law, defendants are liable when they print any more than five digits of a consumer's credit card number.⁹⁹ Such a procedural violation is not “divorced” from a concrete harm, as each additional digit revealed can statistically increase the risk of identity theft in a dramatic fash-

⁹⁴ See *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 116 (3d Cir. 2019) (affirming the lower court's ruling even though the district court relied only on facts in the pleadings in a motion to dismiss); *Katz*, 872 F.3d at 120–21 (acknowledging that the fact-finding procedure at the lower-court level was not as expansive as would be desired).

⁹⁵ See *Kamal*, 918 F.3d 102 (lacking discussion on mathematical probabilities); *Katz*, 872 F.3d at 114 (same); KENNETH ROSEN, *DISCRETE MATHEMATICS AND ITS APPLICATIONS* 370–71 (6th ed. 2007) (explaining n^k as the formula to calculate the possible permutations of a set (k) of elements (n) where repetition of elements is allowed and order of the elements matters); Jeff Stapleton & Ralph Spencer Poore, *Tokenization and Other Methods of Security for Cardholder Data*, 20 INFO. SECURITY J.: A GLOBAL PERSP. 91, 93–94 (discussing truncation as a tool for securing cardholder data). When unmasked, the possible permutations of credit card numbers from which a hacker must derive a valid entry for any one cardholder is 10^9 , but this number decreases to 10^5 when properly truncated. See Stapleton & Poore, *supra*, at 93–94 (noting that, with a sixteen-digit card number, there are 10^9 possible permutations for a known card issuer); Rosen, *supra*, at 370–71 (providing a mathematical formula for the possible number of permutations with five digits between zero to ten revealed). The plaintiffs in *Kamal* and *Katz* did not assert, and the courts therefore did not consider, that they are, at the very least, *statistically* more at risk to have a hacker correctly guess their full card numbers as a result of the defendants' failure to properly truncate. See *Kamal*, 918 F.3d at 102 (lacking a discussion of statistical probabilities); *Katz*, 872 F.3d at 114 (same).

⁹⁶ 918 F.3d at 116–17.

⁹⁷ 872 F.3d. at 118, 120. The court was referring to Bank or Issuer Identification Numbers, which identify the credit card's issuing bank. *Id.* at 118.

⁹⁸ See 15 U.S.C. § 1681c(g)(1) (2018) (prohibiting merchants from printing no more than the last five digits of a consumer credit or debit card number); *Muransky II*, 922 F.3d at 1188 (noting that in the truncation requirement, Congress created a rule setting the permissible behavior within a fixed parameter, and that the rule contains the definition of acceptable risk without reference to other factual circumstances). A per se rule creates standards, and their breach results in violations as a matter of law without accounting for other factual circumstances. *Per se, Rule*, BLACK'S LAW DICTIONARY, *supra* note 12 (defining “per se” and “rule”).

⁹⁹ 15 U.S.C. § 1681c(g)(1).

ion.¹⁰⁰ The bright-line rule in FACTA truncation cases stands in contrast to the FCRA violation at issue in *Spokeo, Inc. v. Robins (Spokeo)*.¹⁰¹ Defendants were only liable under the FCRA if they failed to have reasonable procedures in place ensuring consumer credit reports are as accurate as possible.¹⁰² There, Congress left the courts to decide whether any single procedural flaw, or combination thereof, resulted in a risk of reputational harm to the consumer.¹⁰³ The Eleventh Circuit recognized this distinction and deferred to congressional findings that certain conduct exceeding prescribed limits results in risk great enough to confer standing.¹⁰⁴ On rehearing, the court should similarly distinguish the bright-line rule at issue in *Muransky II* from the statutory provision at issue in *Spokeo*.¹⁰⁵

Since the opinion in *Muransky II*, district courts ruling consistently with the opinion have also fallen within the Eleventh Circuit's jurisdiction.¹⁰⁶ In the

¹⁰⁰ Compare *Spokeo*, 136 S. Ct. at 1549 (explaining that Robins would not have Article III standing if only alleging a procedural violation "divorced" from any concrete harms), with 15 U.S.C. § 1681c(g)(1) (allowing merchants to print only the last five digits of a cardholder's credit card number); Stapleton & Poore, *supra* at 95, at 93–94 (explaining the increase in statistical likelihood that hackers could arrive at correct full card numbers with each digit unmasked).

¹⁰¹ Compare 15 U.S.C. § 1681c(g)(1) (requiring merchants to publish no more than five digits of a consumer credit or debit card number), with *id.* § 1681e(b) (providing that consumer reporting agencies must follow reasonable procedures to ensure maximum possible accuracy in their reporting).

¹⁰² 15 U.S.C. § 1681e(b); *Spokeo*, 136 S. Ct. at 1550 (citing the publication of incorrect zip codes to demonstrate an instance where a violation may not result in a sufficient degree of risk to confer Article III standing). The statutory provision at issue in *Spokeo, Inc. v. Robins* does not impose strict liability. See 136 S. Ct. at 1550 (discussing Section 1681(e)(b) of the FCRA); Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995) (concluding that, because Section 1681(e)(b) of the FCRA requires courts to assess liability using a reasonableness standard, the provision does not impose strict liability). Errors alone do not constitute a violation if they are not misleading in a way that would potentially affect credit decisions when consumers seek loans. *Shaw v. Experian Info. Sol., Inc.* 891 F.3d 749, 756 (9th Cir. 2018). Similarly, a credit reporting agency will not be liable for inaccuracies if it can demonstrate that the errors occurred despite following reasonable procedures. *Guimond*, 45 F.3d at 1333. The jury decides on questions of reasonableness. *Id.*

¹⁰³ See *Spokeo*, 136 S. Ct. at 1550 (noting that a violation of any one procedural requirement under the FCRA may result in no harm, and remanding the case to the lower court to determine whether the totality of errors and the circumstances in which the defendant committed them resulted in a risk of harm sufficiently elevated to confer standing).

¹⁰⁴ See *Muransky II*, 922 F.3d at 1189–90 (rejecting the conclusion in *Katz* that district courts can make factual findings on tolerable risk levels when Congress sets a uniform standard based on supererogatory empirical judgment).

¹⁰⁵ See FCRA, 15 U.S.C. § 1681e(b) (2018) (requiring consumer reporting agencies to have reasonable procedures to ensure consumer information is published accurately to the maximum extent possible); *Spokeo*, 136 S. Ct. at 1545, 1549–50 (requiring the lower court to determine whether the defendant's lack of procedural safeguards resulted in a risk of harm to the plaintiff's reputation); *Muransky II*, 922 F.3d at 1189 (declining to interpret *Spokeo* to mean that lower courts may jettison uniform standards set by Congress when those standards are in conflict with their own findings of fact).

¹⁰⁶ Compare *Lawrence v. S. Racing Assoc., LLC*, No. 18-cv-24264, 2019 WL 3890314, at *3 (S.D. Fla. 2019) (concluding that, based on the reasoning in *Muransky II*, the plaintiff had standing to allege a violation of FACTA's five-digit truncation requirement); *Bailey v. Six Flags Entm't Corp.*, No. 1:17-CV-3336-MHC, 2019 WL 3503732, at *3–4 (N.D. Ga. 2019) (same); *Nowe v. Essex Tech.*

sole federal appellate case outside of the circuit postdating *Muransky II*, the court benefitted from factual distinctions, allowing it to avoid assessing risk entirely.¹⁰⁷ In contrast, after *Spokeo*, plaintiffs brought five-digit truncation cases in three other circuit courts—the Second, Third, and Ninth Circuits—and each court concluded that the plaintiffs lacked standing.¹⁰⁸ The opinion in *Muransky II* had been a rare departure.¹⁰⁹ Indeed, the beginnings of a circuit split

Grp., LLC, No 1:18-CV-0623-MLB-JFK, 2018 WL 6720506, at *5 (N.D. Ga. 2018) (same), with Report and Recommendation at 5–6, *Gennock v. Kirkland’s Inc.*, No. 17-454 (E.D. Pa. Sept. 24, 2019) (recommending dismissal of a case alleging a violation of the five-digit truncation requirement based on the reasoning in *Kamal* and adopting a district court’s opinion that follows the rationale in *Katz*). *Muransky II* is controlling precedent only for district courts within the Eleventh Circuit. See Colin Wrabley, *Applying Federal Court of Appeals’ Precedent: Contrasting Approaches to Applying Court of Appeals’ Federal Law Holdings and Erie State Law Predictions*, 3 SETON HALL CIR. REV. 1, 1 (2006) (explaining that federal courts of appeals’ decisions on federal law are binding for district courts within their circuits, unless there are superseding statutes or decisions from a review en banc or the Supreme Court); see, e.g., *Bailey*, 2019 WL 3503732, at *3 (holding that, irrespective of what other circuit courts may have decided, the decision in *Muransky* was binding for the *Bailey* court).

¹⁰⁷ See *Jefferies v. Volume Servs. Am. Inc.*, 928 F.3d 1059, 1065–67 (D.C. Cir. 2019) (acknowledging the reasoning in *Muransky II* and *Kamal*, but determining that the violation fell squarely within the definition of the FACTA truncation requirement because the merchant printed all sixteen digits of the plaintiff-cardholder’s credit card number). Decisions from other circuits are persuasive but not binding authority for circuit courts. THOMAS BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS 15 (2d ed. 2009) (providing an introductory exploration into subject-matter jurisdiction of the United States Courts of Appeals). A recent Illinois state court, however, found the reasoning in *Muransky II* persuasive and, with support from state-law jurisprudence, concluded that the plaintiff had standing to bring her FACTA claim. *Duncan v. FedEx Office & Print Servs. Inc.*, 123 N.E.3d 1249, 1255 (Ill. App. 2019) (holding that the plaintiff suffered a concrete injury for the purposes of Article III standing). State courts are not bound by Article III constraints and are generally not as restrictive on issues of justiciability and standing. See *id.* at 1256 (discussing Illinois standing law); *Soto v. Great Am. LLC*, No. 17-cv-6902, 2018 WL 2364916, at *4 (N.D. Ill. May 24, 2018) (same). But requirements for standing in Illinois state law are similar to those in federal law, and state courts find federal law persuasive. See *Duncan*, 123 N.E.3d at 1255 (finding the reasoning from *Muransky II* persuasive); *Maglio v. Advocate Health & Hosps. Corp.*, 40 N.E.3d 746, 753 (Ill. App. Ct. 2015) (explaining the position of Illinois courts on federal standing principals). Notably, the Illinois Supreme Court held that plaintiffs alleging injury to a statutory right do not need to meet any further requirements for standing. *Glisson v. City of Marion*, 70 N.E.2d 1034, 1040 (Ill. 1999). For the court, any test of standing that asked whether plaintiffs were the intended beneficiaries of the statutory protection unavoidably questioned the merits of the suit. *Id.* Questions of merit are impermissible considerations for standing. *Id.*

¹⁰⁸ See *Kamal*, 918 F.3d at 113, 119 (concluding that a plaintiff alleging that a retail store violated FACTA’s five-digit truncation requirement lacked standing because he did not show actual harm stemming from the violation nor sufficient risk of harm); *Noble v. Nev. Checker Cab Corp.*, 726 F. App’x. 582, 583–84 (9th Cir. 2018) (concluding that the plaintiff lacked standing because printing additional credit card digits in excess of FACTA limitations posed minimal risk); *Katz*, 872 F.3d at 118–19 (same).

¹⁰⁹ See *Muransky II*, 922 F.3d at 1192 (holding that Dr. Muransky suffered a concrete injury when a merchant violated FACTA by failing to truncate his credit card number on his point-of-sale receipt); *supra* note 108 and accompanying text (discussing circuit court cases post-*Spokeo* wherein each court dismissed the plaintiff’s case for lack of standing); e.g., *Noble*, 726 F. App’x. at 583–84 (holding that the plaintiff’s suit could not survive dismissal because printing the first digit of a credit card number resulted in insufficient risk of harm).

likely gave impetus to the Eleventh Circuit's subsequent decision to grant a rehearing en banc, and a desire to maintain national uniformity in FACTA truncation cases could be the original opinion's ultimate undoing.¹¹⁰

CONCLUSION

In 2019, in *Muransky v. Godiva Chocolatier, Inc.*, the Eleventh Circuit had held that plaintiffs had standing to sue when alleging a violation of FACTA's truncation requirements—a procedural right guarding against identity theft. The opinion was in keeping with the 2016 Supreme Court ruling in *Spokeo, Inc. v. Robins* whereby a procedural violation can result in a concrete harm to establish standing when the violation places plaintiffs in sufficient risk of harm. The Eleventh Circuit subsequently vacated its opinion and granted the appellants a rehearing en banc. Unlike its sister circuits, the court had initially chosen to defer to congressional findings that violations of FACTA's truncation requirements exposed cardholders to an unacceptable risk of identity theft. The Eleventh Circuit had solid grounds to conclude that Congress is better positioned to develop an evidentiary foundation upon which to assess risk. Therefore, despite any desire to avoid inter-circuit conflict, the court should rule consistently with its original decision.

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¹¹⁰ See Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 236 (1999) (noting that legal insiders often credit circuit splits for prompting courts to rehear a case en banc); see also Stephen L. Wasby, *Intercircuit Conflicts in the Court of Appeals*, 63 MONT. L. REV. 119, 146 (2002) (arguing that federal appeals court judges generally seek to avoid conflict with their sister circuits, and, although judges do not view consistency as an end in itself, they will tend towards uniformity on principle). *But see* Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900) (holding that decisions from sister courts do not have the weight of stare decisis, and, although uniformity and discouraging repeat litigation are important goals, they do not oblige appellate judges to inter-circuit comity); Martha Dragich, *Uniformity, Inferiority, and the Law of Circuit Doctrine*, 56 LOY. L. REV. 535, 563 (2010) (arguing that there is little obligation for an appellate judge to follow decisions from sister circuits). The Federal Rules of Appellate Procedure generally discourage rehearing a case en banc unless the case presents an issue dividing judges within the circuit or the case is of “exceptional importance.” FED. R. APP. P. 35(a). To illustrate this latter category, the procedural rules for the Eleventh Circuit cite cases with decisions diverging from those of its sister circuits. 11TH CIR. R. 35(b).