16-1113

No. _____

In The
Supreme Court of the United States

JEREMY MEYERS, individually, and
on behalf of all others similarly situated,

Petitioner,

v.

NICOLET RESTAURANT OF DE PERE, LLC,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fair and Accurate Credit Transactions Act ("FACTA") amendment to the Fair Credit Reporting Act ("FCRA"), codified as 15 U.S.C. § 1681, *et seq.*, provides that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1). The FCRA further provides, "Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of . . . damages of not less than $100 and not more than $1,000[.]" 15 U.S.C. § 1681n(a)(1)(A).

> Whether an individual who receives a computer-generated cash register receipt displaying the last four digits of the individual's credit card number and the card's expiration date has suffered a concrete injury sufficient to confer standing under Article III of the United States Constitution.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. Petitioner here is Jeremy Meyers. Respondent here is Nicolet Restaurant of De Pere, LLC.

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The opinion of the Seventh Circuit court of appeals, App. 1-11, is reported at 843 F.3d 724. The opinion of the district court, App. 12-35, is not reported.

JURISDICTION

The judgment in the Seventh Circuit was entered on December 13, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 1681c(g)(1):

> (g) Truncation of credit card and debit card number
>
> (1) In general
>
> Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction.

15 U.S.C. § 1681n(a)(1)(A):

> (a) In general
>
> Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of –
>
> > (1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000[.]

INTRODUCTION

This case involves an important and recurring conflict of federal law regarding the definition of a "concrete injury" sufficient to confer a plaintiff standing under Article III of the United States Constitution, based on the standard set forth in *Spokeo Inc. v. Robins*, ___ U.S. ___, 136 S.Ct. 1540 (2016). Courts are deeply divided as to whether an individual has suffered a concrete injury if he receives a computer-generated cash register receipt displaying the last four digits of his credit card number and the card's expiration date, in violation of the Fair and Accurate Credit Transactions Act ("FACTA") amendment to the Fair Credit Reporting Act ("FCRA"). Through 15 U.S.C. § 1681n(a)(1)(A), Congress provides that such an individual may pursue a private right of action without

proof of actual damages resulting from the FACTA violation if the violation was willful. However, in *Spokeo*, this Court held that the violation of an individual's statutory right, without more, is not an injury sufficiently concrete to confer standing if the violation was "procedural." *Spokeo*, 136 S.Ct. at 1549-50.

As a result, federal courts are split as to whether the credit card truncation requirements of FACTA are mere procedural requirements, the violation of which is insufficient on its own to confer standing, or whether an individual whose credit card information was improperly truncated has already suffered a concrete injury before any further harm results from the violation. Answering this question will not only resolve the split as to FACTA, but it will more broadly clarify this Court's opinion in *Spokeo* for the numerous circuit and district courts that have disagreed over its interpretation.

STATEMENT OF THE CASE

A. Meyers's customer receipts

This Petition is the second of two that Petitioner Jeremy Meyers ("Meyers") has filed with this Court seeking a writ of certiorari on the question of whether a plaintiff who receives an improperly truncated customer receipt in violation of FACTA has Article III standing to bring suit for statutory damages. In *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818 (7th Cir. 2016) ("*Meyers I*"), Meyers brought a claim for

statutory damages after he received three computer-generated customer receipts which displayed more than the last five digits of his credit card number, as well as the card's expiration date, from retail establishments owned by the Oneida Tribe of Indians of Wisconsin.[1]

The underlying case here (*"Meyers II"*) similarly arises out of an improperly truncated customer receipt. On February 10, 2015, Meyers received from Nicolet Restaurant of De Pere, LLC ("Nicolet") a computer-generated customer receipt which displayed the last four digits of Meyers's credit card number in addition to the card's expiration date. App. 2-3.

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[1] *Meyers v. Oneida Tribe of Indians of Wisconsin*, Docket No. 16-745, 2016 WL 7174593 (U.S.), is currently distributed for conference on March 17, 2017. In *Meyers I*, Meyers brought a class action lawsuit seeking statutory damages under FACTA against the Oneida Tribe of Indians of Wisconsin ("Oneida"), a federally-recognized Indian tribe, on behalf of a class of consumers to whom Oneida gave customer receipts that violated FACTA's truncation requirements. *Meyers I*, 836 F.3d at 820. This Court issued its opinion in *Spokeo* after briefs and oral arguments were already presented before the Seventh Circuit in *Meyers I*. *Id.* at 821. In its opinion, the Seventh Circuit held that Oneida was immune from suit under the FCRA. *Id.* at 826-27. The Seventh Circuit acknowledged that this Court's decision in *Spokeo* was implicated in *Meyers I* with regard to whether Meyers had standing under Article III, but it declined to address the question of standing because it ultimately dismissed Meyers's claims on sovereign immunity grounds. *Id.* at 821-23. In his petition for a writ of certiorari in *Meyers I*, Meyers presented the question of whether Congress abrogated tribal sovereign immunity under the FCRA, and also presented a second question of whether Meyers suffered a concrete injury sufficient to confer standing under Article III. *See generally*, *Meyers*, Docket No. 16-745.

B. Proceedings in the district court

On April 14, 2015, Meyers filed suit against Nicolet in the district court for the Eastern District of Wisconsin for Nicolet's failure to properly truncate Meyers's credit card information on his customer receipt pursuant to 15 U.S.C. § 1681c(g)(1). App. 17. Meyers brought his cause of action individually and on behalf of a putative class of similarly situated individuals and entities. App. 3. Meyers did not allege any actual damages suffered as a result of Nicolet's failure to truncate the receipt, but rather, Meyers sought statutory damages for Nicolet's willful FACTA violation pursuant to 15 U.S.C. § 1681n(a)(1)(A). App. 3.

At the same time that Meyers filed his complaint, Meyers also filed a motion for class certification, in which he sought to certify the class of customers to whom Nicolet gave the non-compliant receipts. App. 17.

Nicolet did not file a motion to dismiss Meyers's complaint or otherwise argue that Meyers lacked standing under Article III at any time before the district court. Rather, on December 18, 2015, Nicolet filed a memorandum in opposition to class certification, arguing that individual issues so predominated the case, such that the putative class failed to meet the commonality and typicality requirements of Fed. R. Civ. P. 23(a) and the predominance and superiority requirements of Fed. R. Civ. P. 23(b)(3). App. 18-34.

On April 1, 2016, the district court denied Meyers's motion for class certification. App. 35. The district court held that the putative class met the commonality and typicality requirements of Fed. R. Civ. P. 23(a) but did not meet the predominance and superiority requirements of Fed. R. Civ. P. 23(b)(3). App. 18-34.

C. Seventh Circuit ruling

Meyers appealed the district court's denial of his motion for class certification to the Seventh Circuit. App. 1. However, while Meyers's appeal was pending, this Court issued its decision in *Spokeo*. Relying on *Spokeo*, Nicolet argued (for the first time) that the court lacked federal jurisdiction because Meyers had not suffered a concrete injury sufficient to confer standing under Article III. App. 4-5.

Meyers maintained that, by receiving an improperly truncated receipt in violation of FACTA, he suffered a concrete injury sufficient to confer standing. App. 7. In so arguing, Meyers relied on district court opinions issued after *Spokeo* that found that a plaintiff such as Meyers has standing to sue for statutory damages under FACTA. App. 7. These cases held that the statutory right to a properly truncated customer receipt was a *substantive* statutory right, which was distinguishable from the "bare, procedural" statutory right at issue in *Spokeo*, and these cases found that the violation of a substantive statutory right was sufficient on its own to confer standing. App. 7.

The Seventh Circuit held that Meyers lacked standing under Article III, vacated the judgment of the district court, and remanded the case with instructions to dismiss for lack of jurisdiction. App. 11. The court found "that without a showing of injury apart from the statutory violation, the failure to truncate a credit card's expiration date is insufficient to confer Article III standing." App. 9-10.

The Seventh Circuit expressly rejected the argument that Congress created a substantive right in FACTA, the violation of which – without more – amounts to a concrete injury. App. 7-8. The court held that "whether the right is characterized as 'substantive' or 'procedural,' its violation must be accompanied by an injury in fact," and "[a] violation of a statute that causes no harm does not trigger a federal case." App. 7-8.

Additionally, the Seventh Circuit did not believe that Meyers's improperly truncated receipt put him in any risk of harm, finding it "hard to imagine how the expiration date's presence could have increased the risk that [Meyers's] identity would be compromised[]" because "Meyers discovered the violation immediately[,]" and "nobody else every saw the non-compliant receipt." App. 7.

The court further suggested that FACTA's requirement to truncate a credit or debit card's expiration date from a customer receipt is actually ineffective at preventing identity theft, citing to a Congressional finding that truncation of the card's number alone

"prevents a potential fraudster from perpetrating identity theft or credit card fraud[]" without having to additionally truncate the card's expiration date. App. 8. The Seventh Circuit expressed its concern over what it considered an "abuse of FACTA lawsuits," and believed that "Congress sought to limit FACTA lawsuits to consumers 'suffering from any actual harm.'" App. 8.

REASONS FOR GRANTING THE PETITION

This case involves the question of what constitutes a concrete injury sufficient to confer standing under Article III of the United States Constitution. This question is an important and recurring conflict of federal law, and this Court's clarification is greatly needed.

I. The petition should be granted to resolve a federal conflict regarding whether a plaintiff who receives a customer receipt containing the last four digits of his credit or debit card number and the card's expiration date has suffered a concrete injury sufficient to confer standing under Article III.

Federal courts are conflicted in their interpretation of this Court's decision in *Spokeo*, and they are split as to whether a plaintiff such as Meyers has suffered a concrete injury sufficient for Article III

standing. Prior to the Seventh Circuit issuing its opinion in *Meyers II*, federal district courts outside the Seventh Circuit were deeply divided on the question of whether a FACTA violation creates a concrete injury under *Spokeo.* The *Meyers II* opinion did not resolve this existing split, and, in fact, district courts outside the Seventh Circuit have continued to split even further on this issue in the short time since the Seventh Circuit rendered its decision in this case. The petition should be granted to resolve this conflict, as well as to further guide circuit and district courts struggling in their interpretation of *Spokeo.*

In order to confer standing under Article III, a plaintiff must establish: (1) that the plaintiff has suffered an "injury in fact[;]" (2) that there is "causal connection to the injury and the conduct complained of[;]" and (3) that it is "'likely' . . . that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations omitted). A plaintiff's injury in fact is "an invasion of a legally protected interest which is . . . concrete and particularized[.]" *Id.* at 560. "The alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983)).

In *Spokeo*, this Court held that the violation of an individual's statutory right, without more, is not a concrete injury sufficient to confer standing if the violation is merely "procedural." *Spokeo*, 136 S.Ct. at 1549 ("Article III standing requires a concrete injury even in the context of a statutory violation."). This Court

recognized that "[a] violation of one of the FCRA's procedural requirements may result in no harm[,]" and, therefore, a plaintiff cannot "allege a bare procedural violation divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* at 1549-50. However, this Court still maintained that "'Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Id.* at 1549 (quoting *Lujan*, 504 U.S. at 580).

Circuit courts have since relied on this Court's decision in *Spokeo* to dismiss suits that sought statutory damages and not actual damages, holding that these plaintiffs' injuries were merely procedural violations and not sufficiently concrete. *See, e.g.*, *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1002-03 (11th Cir. 2016) (holding that a plaintiff did not suffer a concrete injury when a mortgage provider failed to present a certificate of discharge of plaintiff's mortgage within the deadline required by New York law); *Braitberg v. Charter Communications, Inc.*, 836 F.3d 925, 931 (8th Cir. 2016) (holding that a plaintiff did not suffer a concrete injury when a cable operator did not destroy his personal information, as required by 47 U.S.C. § 551(e)); *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016) (holding that a plaintiff did not suffer a concrete injury when a retailer requested the plaintiff's zip code unnecessarily, in violation of District of Columbia law).

Prior to *Spokeo*, the Eighth Circuit had held in *Hammer* that a plaintiff who receives a customer receipt, in which the plaintiff's credit card information was not properly truncated under FACTA, has Article III standing to bring suit for statutory damages because the violation of a statutory right amounted to an "actual injury" sufficient for standing. *Hammer v. Sam's East, Inc.*, 754 F.3d 492, 498-99 (8th Cir. 2014) ("Congress gave consumers the legal right to obtain a receipt at the point of sale showing no more than the last five digits of the consumer's credit or debit card number. Appellants contend that [Appellee] invaded this right. Such is the 'actual injury' alleged by the appellants."). However, after *Spokeo*, the Eighth Circuit recognized that *Hammer* and other opinions holding that the "actual injury" requirement of standing can be satisfied solely by the invasion of a statutory right have been since "superseded." *See Braitberg*, 836 F.3d at 930. In recognizing that *Spokeo* superseded *Hammer*, the court in *Braitberg* never addressed FACTA specifically or whether a plaintiff who receives an improperly truncated receipt in violation of FACTA has suffered a concrete injury. Rather, the Eighth Circuit found that its analysis in *Hammer* was insufficient because its ruling that "the actual-injury requirement may be satisfied *solely* by the invasion of a legal right that Congress *created*[]" was an "absolute view" since superseded by *Spokeo*. *Id.* (quoting *Hammer*, 754 F.3d at 498) (emphasis in original).

In *Meyers I*, the Seventh Circuit recognized that a plaintiff's cause of action for statutory damages under

FACTA, without allegations of actual damages, requires a standing analysis using the precedent set forth in *Spokeo*. *Meyers I*, 836 F.3d at 821. However, this Court issued its decision in *Spokeo* after briefs and oral arguments were already presented before the Seventh Circuit in *Meyers I*. *Id.* Accordingly, the Seventh Circuit declined to address the question of whether Meyers had standing and, instead, dismissed Meyers's case in *Meyers I* on other grounds. *Id.* at 822-23.

Here, by contrast, the question of whether Meyers suffered a concrete injury sufficient for Article III standing was thoroughly briefed and argued before the Seventh Circuit in *Meyers II*. Indeed, *Meyers II* is the first and only circuit court opinion issued after *Spokeo* that addresses the question of whether a plaintiff who receives a customer receipt in violation of FACTA has suffered a concrete injury. However, district courts outside the Seventh Circuit are split on the question of whether a plaintiff such as Meyers has standing to bring suit for statutory damages under FACTA.

Several district courts have found that *Spokeo* still supports that plaintiffs who receive an improperly truncated customer receipt in violation of FACTA have suffered a concrete injury. *See, e.g.*, *Flaum v. Doctor's Associates, Inc.*, ___ F.Supp.3d ___, 2016 WL 7015823 (S.D. Fla. Aug. 29, 2016); *Wood v. J Choo USA*, ___ F.Supp.3d ___, 2016 WL 4249953 (S.D. Fla. Aug. 11, 2016); *Guarisma v. Microsoft*, ___ F.Supp.3d ___, 2016 WL 4017196 (S.D. Fla. July 26, 2016); *Altman v. White House Black Mkt., Inc.*, 2016 WL 3946780 (N.D. Ga.

July 13, 2016). Generally, these cases distinguish between the "bare, procedural" statutory right at issue in *Spokeo* from a *substantive* statutory right, the violation of which "Congress may 'elevat[e] to the status of legally cognizable injuries, concrete, *de facto* injuries that were previously inadequate at law[.]'" *Spokeo*, 136 S.Ct. at 1549 (quoting *Lujan*, 504 U.S. at 578).

Specifically, the district court for the Southern District of Florida found, "[T]he Supreme Court [in *Spokeo*] recognized where Congress has endowed plaintiffs with a *substantive* legal right, as opposed to creating a procedural requirement, the plaintiffs may sue to enforce such a right without establishing additional harm." *Guarisma*, 2016 WL 4017196 at *3 (emphasis in original) (citing *Spokeo*, 136 S.Ct. at 1549). Ultimately, the court held, "FACTA endows consumers with a legal right to protect their credit identities[,]" and by allowing a private right of action under FACTA, "Congress intended to create a substantive right." *Id.* at *4 (internal citations omitted). Again, in *Wood*, the court recognized, "Through FACTA, Congress created a substantive legal right for Wood and other card-holding consumers similarly situated to receive receipts truncating their personal credit card numbers and expiration dates and, thus, protecting their personal financial information." *Wood*, 2016 WL 4249953 at *6 (citing *Steinberg v. Stitch & Craft, Inc.*, 2009 WL 2589142 at *3 (S.D. Fla. Aug. 18, 2009)). The court therefore concluded that the plaintiff "suffered a concrete harm as soon as [the Defendant] printed the

offending receipt[.]" *Wood*, 2016 WL 4249953 at *6 (citing *Guarisma*, 2016 WL 4017196 at *4).

Similarly, in *Altman*, the Northern District of Georgia reached the same conclusion that plaintiffs who receive improperly truncated receipts have standing to sue under FACTA. *Altman*, 2016 WL 3946780 at *6. The court in *Altman* relied on "the Congressional creation of a right and injury, as well as the language of the Senate Report which indicates that Congress did not find the risk of identity theft to be speculative." *Id.* The court found, "[A]s determined by Congress, once private information is exposed, harm has already occurred regardless of whether that injury is compounded by a resulting credit card fraud." *Id.* at *5 (citations omitted).

However, other district courts disagree and have relied on *Spokeo* to find that a plaintiff in receipt of a customer receipt containing more than the last five digits of his credit or debit card number or the card's expiration date has *not* suffered a concrete injury sufficient to confer standing under Article III. *See, e.g.*, *Kamal v. J. Crew Group Inc.*, 2015 WL 4663524 (D. N.J. Oct. 20, 2016); *Thompson v. Rally House of Kansas City et al.*, 2016 WL 8136658 (W.D. Mo. Oct. 6, 2016). In *Kamal*, the district court for the District of New Jersey described such an injury as merely "an increased risk of a data breach sometime in the future." *Kamal*, 2016 WL 6133827 at *3. The court further found:

> There is no evidence that anyone has accessed or attempted to access or will access Plaintiff's credit card information. . . . Nothing has been disclosed to third parties. . . . Nor does the record indicate that anyone will *actually* obtain one of Plaintiff's discarded [] receipts, and – through means left entirely to the Court's imagination – identify the remaining six digits of the card number and then proceed undetected to ransack Plaintiff's Discover account.

Id. at *3 (internal citations omitted).

Similarly, the district court for the Western District of Missouri found:

> Divorced from the statutory violation, Plaintiff has not and cannot allege his personal credit card information has been exposed generally or that he faces an imminent risk of identity theft. . . . Plaintiff has not alleged he "suffered so much as a sleepless night or any other psychological harm" and has not claimed to "have undertaken costly and burdensome measures to protect [himself] from the risk [he] supposedly face[s]. . . ." There is no real risk of harm as the improper receipt has only been in Plaintiff's possession since receiving it from Defendants.

Thompson, 2016 WL 8136658 at *5 (quoting *Hammer*, 754 F.3d at 504 (Riley, C.J., dissenting)).

Notably, these conflicting decisions were all decided before the Seventh Circuit rendered its opinion

in this case, but none of the aforementioned district courts are within the Seventh Circuit. As such, the *Meyers II* opinion did not resolve this existing split, but merely chose a side. In fact, the split amongst federal district courts outside the Seventh Circuit has widened even in the brief time since *Meyers II* was decided.

Two months after the Seventh Circuit decided *Meyers II*, the district court for the District of Arizona held in *American Valet* that a plaintiff who is given a customer receipt containing the plaintiff's credit card's expiration date has suffered a concrete injury sufficient to confer standing under Article III. *Deschaaf v. American Valet & Limousine Incorporated*, 2017 WL 610522, *4 (D. Ariz. Feb. 15, 2017). The court reasoned:

> A person or entity who prints an expiration date on a receipt . . . does not simply violate a procedural provision of FACTA but creates a real risk of identity theft – the very harm that FACTA was enacted to combat. There is a real risk that the customer's right to the privacy of their credit or debit card information is violated. Nor is this harm made harmless when, as here, the risk fails to materialize because no potential identity thief actually sees the receipt. Even in this situation, the consumer must take additional steps to ensure the safety of her identity; she may not simply crumple the receipt and throw it into a nearby trash can, but must review it to assess what was printed, hold on to it, and perhaps shred it or cut it up later. The inconvenience may be

> minor; but the additional inconvenience that a consumer must undertake in order to secure their own rights, when a statute places that burden on others, is surely a concrete harm.

Id. (footnotes omitted).

Also after *Meyers II*, the Southern District of New York in *Wolfgang's Steakhouse* dismissed a plaintiff's suit for statutory damages under FACTA for lack of standing, but, unlike *Meyers II*, the court granted the plaintiff leave to amend his complaint. *Fullwood v. Wolfgang's Steakhouse, Inc., et al.*, 2017 WL 377931, *7 (S.D. N.Y. Jan. 26, 2017). In doing so, the court expressly held that its ruling was "not based on the conclusion that Defendants' willful violation of FACTA did not, or could not as a matter of law, inflict such an injury on Plaintiff." *Id.* (citing *cf Meyers II*, 843 F.3d at 728). Rather, the district court found that the plaintiff's allegation that the plaintiff was harmed from the violation was "conclusory," and the court did not believe that "re-pleading with greater specificity as to the concrete and particularized injuries alleged suffered would be a futile exercise." *Wolfgang's Steakhouse*, 2017 WL 377931 at *7 (internal citations omitted).

However, another case from the Southern District of New York agreed with *Meyers II* and held that a plaintiff who receives an improperly truncated receipt in violation of FACTA, but has not alleged additional harm, lacks standing under Article III as a matter of law. *Cruper-Weinmann v. Paris Baguette America, Inc.*, ___ F.Supp.3d ___, 2017 WL 398657 (S.D. N.Y. Jan.

30, 2017). In *Paris Baguette*, the district court interpreted the Second Circuit opinion in *Strubel* to have developed a two-part test for whether the violation of a statutory right was sufficient to confer a plaintiff standing after *Spokeo*: "(1) whether Congress conferred the procedural right at issue in order to protect a concrete interest of the plaintiff, and (2) whether the violation of the procedure at issue presented a material risk of harm to that interest." *Id.* at *3 (citing *Strubel v. Comenity Bank*, 842 F.3d 181, 191-92 (2d Cir. 2016)). The *Paris Baguette* court found that the right to a properly truncated receipt satisfied the first of these prongs, but not the second. *Paris Baguette*, 2017 WL 398657 at *4 (quoting *Strubel*, 842 F.3d at 190) ("[I]t is not apparent how the presence of the full expiration date of [the plaintiff's] credit card on that receipt might have threatened the security of her identity. Therefore, it is not the case that 'the procedural violation present[ed] a risk of real harm to [plaintiff's] concrete interest' in protecting her identity."). Nevertheless, the court recognized that "[c]ourts addressing the issue have not been unanimous," and its decision was in conflict with other federal districts. *Paris Baguette*, 2017 WL 398657 at *4 no. 3.

As such, federal courts are deeply divided as to whether FACTA merely provides a procedural requirement, a violation of which on its own does not give rise to a concrete injury, or whether a violation of FACTA creates a concrete harm. *See American Valet*, 2017 WL 610522 at *3 ("Courts around the country have grappled with the application of *Spokeo* to cases under

FCRA and FACTA . . . thoughtful jurists have come to different conclusions in similar cases.") (internal citations omitted). This Court should grant the petition to address this split, as well as to more clearly define what constitutes a "concrete injury" in order for federal courts to find commonality in their interpretation of *Spokeo*.

II. The federal conflict regarding the standing of individuals who receive improperly truncated receipts to bring suit for statutory damages under FACTA is one of national importance.

It is of national importance for this Court to clarify whether plaintiffs seeking statutory damages under FACTA, without actual damages, still have standing to bring suit after *Spokeo*. While *Spokeo* provided instruction as to what a "concrete injury" is *not* – *i.e.*, the violation of a procedural statutory right, without more – federal courts are in serious need of guidance in defining what a concrete injury actually *is*.[2]

This Court's ruling in *Spokeo* that a standing analysis is incomplete if it fails to inquire beyond whether a statutory right has been violated should not be interpreted as the blanket dismissal of claims for statutory

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[2] As acknowledged by *American Valet*, "*Spokeo* did not purport to draw the line between a 'bare procedural violation' lacking concrete harm and a concrete injury in fact." *American Valet*, 2017 WL 61022 at *2 (citing *Spokeo*, 136 S.Ct. at 1550 ("We take no position as to whether the Ninth Circuit's ultimate conclusion – that Robins adequately alleged an injury in fact – was correct.")).

damages, as some federal courts have interpreted it. Congress's ability to regulate consumer transactions is frustrated if its ability to elevate injuries to legally cognizable status is obscured. The line distinguishing between an injury in fact for standing purposes and the presence of well-pled, actual, tangible, and quantifiable damages has become increasingly blurred, and federal courts have drawn this line inconsistently.

Surely, the various statutory rights created by Congress in federal statutes, like the FCRA, provide relief for a range of injuries, some of which are concrete, even if others are not. While this Court opined, "It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm[,]" (*Spokeo*, 136 S.Ct. at 1550), the purported injury in *Spokeo* is different from the harm suffered by Meyers. By receiving a customer receipt that improperly displayed his credit card's expiration date, Meyers's private information became accessible to anyone who encountered his receipt, and Meyers was substantively injured before any further harm occurred.

The Seventh Circuit in *Meyers II* was incorrect to hold that, as a matter of law, Meyers and similar plaintiffs have not suffered a concrete injury sufficient to confer standing. Properly truncating an individual's credit or debit card number is a congressionally mandated precaution imposed to provide an individual with a security protection. Meyers's injury was not limited to the deprivation of his statutory right, but rather, Meyers was denied the actual security protection

that he would have received if Nicolet had not violated FACTA. It is improper and irrelevant in the context of an Article III standing analysis to debate the effectiveness of credit card truncation requirements at preventing widespread identity theft because, at the very least, they are an additional security protection to which consumers are entitled by law. Meyers was already injured at the moment that Nicolet denied him this additional protection, and he need not wait to have his identity stolen to have suffered a concrete injury.

The Seventh Circuit debated the likelihood of an identity thief actually finding Meyers's receipt and using it to extract his personal information, but this misses the point that personal information *cannot* be extracted from a properly truncated credit card receipt in the first place. If Nicolet had properly complied with FACTA, then Meyers would have received this additional security protection. But for Nicolet's FACTA violation, it would have been impossible for any individual to use Meyers's receipt to steal his identity, regardless of whether Meyers physically encountered someone who intended to do so.

Further, because Nicolet violated FACTA, Meyers was charged with protecting or destroying the receipt, less Meyers risk that the receipt find itself in the hands of identity thieves. The Seventh Circuit made note of the fact that "Meyers discovered the violation immediately and nobody ever saw the non-compliant receipt[.]" App. 7. However, Meyers was burdened with the responsibility of making sure that no one saw his

receipt because the receipt was not properly truncated. Had Nicolet complied with FACTA, Meyers's risk of identity theft would never be affected by any individual encountering his receipt. If the receipt did not display Meyers's personal information, it would not have mattered who saw it, whether it was his attorney, someone who found the receipt in a trash can, or an identity thief. Nicolet's FACTA violation stripped Meyers's receipt of this shield against exposure, and the information on the receipt became Meyers's responsibility to protect.

For courts to disregard credit card truncation laws as mere procedural requirements is to undermine Congress's purpose in enacting FACTA. Indeed, "Congress enacted FACTA 'to prevent identity theft,' . . . and the restriction on printing more than the last five digits of a card number is specifically intended 'to limit the number of opportunities for identity thieves to 'pick off' key card account information.'" *Hammer*, 754 F.3d at 500 (quoting Pub. L. No. 108-159, 117 Stat. 1952; S. Rep. No. 108-166 at 13 (2003)). FACTA "'arose from [Congress's] desire to prevent identity theft that can occur when card holders' private financial information . . . is exposed on electronically printed payment card receipts.'" *Guarisma*, 2016 WL 4017196 at *4 (S.D. Fla. July 26, 2016) (quoting *Creative Hosp. Ventures, Inc. v. U.S. Liab. Ins. Co.*, 655 F.Supp.2d 1316, 1333 (S.D. Fla. 2009)). Compliance with FACTA would completely eliminate the risk of this particular form of identity theft identified by Congress. This clear legislative intent of protecting consumers distinguishes the

statutory right provided by FACTA from the statutory right against the publication of an incorrect zip code at issue in *Spokeo*.

Relative to FACTA violations, Congress has "articulate[d] chains of causation" between the risk of identity theft and FACTA's statutory protections of personal credit card information. *See Spokeo*, 136 S.Ct. at 1549; *see also Strubel*, 842 F.3d at 191) ("Because Strubel has sufficiently alleged that she is at risk of concrete *and* particularized harm . . . we reject Comenity's standing challenge[.]") (emphasis in original). Therefore, Meyers suffered a "'concrete, *de facto* injur[y]'" that Congress merely "'elevat[ed] to the status of legally cognizable[.]'" *Spokeo*, 136 S.Ct. at 1549 (quoting *Lujan*, 504 U.S. at 578).

This Court's clarification as to what constitutes a "concrete injury" is not only needed to resolve the federal split over a plaintiff's standing under FACTA, but such instruction would sorely aid the circuit and district courts nationwide struggling to understand the relationship between a congressional right to statutory damages and Article III standing in a post-*Spokeo* world.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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