No. 129783

In the
Supreme Court of Illinois

CALLEY FAUSETT, individually and on behalf of others similarly situated,

Plaintiff-Respondent,

v.

WALGREEN CO.,

Defendant-Petitioner.

On Petition for Leave to Appeal from the Appellate Court of Illinois, Second Judicial District, Appeal No. 2-23-0105, There Heard On Appeal from the Nineteenth Judicial Circuit Court, Lake County, Illinois, Case No. 19 CH 675, the Hon. Donna-Jo Vorderstrasse, Judge Presiding.

REPLY BRIEF OF DEFENDANT-PETITIONER WALGREEN CO.

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INTRODUCTION

In its opening brief, Walgreens explained that Illinois standing law is rooted in the Illinois Constitution, which authorizes courts to hear "justiciable" claims. Br. 17-18. Fausett agrees. Resp. 23-24. Walgreens explained that this Court's decision in *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462 (1988), has long been recognized as setting forth the essential principles of Illinois standing law. Br. 10, 14-16. Fausett agrees. Resp. 25. And *Greer* itself leaves no doubt that an "injury in fact to a legally cognizable interest" is required for standing in Illinois, and that such an "injury in fact" must be, among other things, "distinct and palpable." *Greer*, 122 Ill. 2d at 492-93. Again, Fausett agrees. Resp. 15-16.

So it is puzzling that Fausett asserts that Walgreens is asking this Court to tether Illinois standing law to federal standing law. *See id.* at 13, 17-18, 35. Walgreens acknowledged that Illinois standing law does not track federal standing law. Br. 12. And contrary to Fausett's repeated suggestion, nothing in Walgreens' argument or in this case requires this Court to either adopt or reject the U.S. Supreme Court's federal "concrete harm" requirement, as articulated in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), and *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021). The facts here do not require this Court to define the difference, if any, between the federal "concrete harm" standard and this Court's "distinct and palpable" injury standard because Fausett has not alleged or produced any evidence of an "injury in fact to a legally cognizable interest" as this Court has long understood and applied that standard. That is, Fausett articulates no substantive distinction between the federal and Illinois standards because she asks this Court to abandon *any* injury requirement at all.

Were Fausett proposing to retain the *Greer* standard, her brief would explain how

Walgreens' conduct "in fact" caused any "distinct and palpable injury" to some "legally cognizable interest." But Fausett offers no such explanation because the undisputed record demonstrates that what Walgreens did—*i.e.*, print a bank identification number on Fausett's receipt after she added money to her prepaid reloadable cash card—revealed nothing about her, placed none of her finances at risk, and objectively left her in no respect any differently situated than had the receipt printed only the last five digits. She cannot show, and her brief makes no effort to show, *any injury at all* to a legally cognizable interest. Yet she still demands the right to a judicial forum to assert a claim for statutory damages.

It is no answer to say, as Fausett argues, that Congress has declared that all consumers have some "legally cognizable interest" in the concealment of every digit beyond the last five on their cards, and that the mere printing of any of those numbers on a receipt invades that interest. Illinois law, as even Fausett concedes, requires that the injury in fact be "distinct and palpable." Resp. 15; *Greer*, 122 Ill. 2d at 493. A legislature may create new rights by statute, but doing so does not conjure a "palpable" injury out of thin air. To create a "justiciable" controversy in Illinois, the violation of a right (legislative or common law) must have some perceptible impact on the interest the right protects. Once again, Fausett does not even try to explain how printing the bank identification number on her prepaid cash card had any such impact.

Accepting Fausett's argument would radically rewrite Illinois standing law. Despite claiming consistency with over a century of Illinois caselaw, Fausett cites not a single instance where this Court found standing for a plaintiff who could not identify how the conduct caused her some distinct and palpable injury. To the contrary, every case of

this Court cited in her brief involved allegations of harm or the invasion of a personal interest protected by the law.

Fausett's radical rule would deprive this Court of the authority the Illinois Constitution granted it to determine what is a justiciable controversy in Illinois and, in turn, determine what kinds of controversies may tax the time and resources of our courts. The Supremacy Clause does not deprive this Court of that authority, as Fausett suggests. Congress has the undisputed authority to create substantive law binding in Illinois and in every state. But Congress has not been delegated any authority, via the Supremacy Clause or any other constitutional provision, to displace the standing rules applicable in Illinois courts. And there is no reason to believe that Congress when it enacted FACTA intended that plaintiffs like Fausett, who suffered no injury to a legally cognizable interest, should nonetheless be able to sue in *any* court, federal or state.

Anyone who suffers some "distinct and palpable" injury from an alleged violation of FACTA may seek redress in Illinois courts. Because Fausett has not and cannot allege or show such an injury, the trial court erred.

ARGUMENT

I. Fausett's Proposed Rule That A Mere Statutory Violation Is Sufficient To Confer Standing Cannot Be Reconciled With This Court's Precedents.

A. *Greer* Establishes The Essential Requirements Of Standing Under Illinois Law, And *Rosenbach* Left The *Greer* Rule Undisturbed.

Fausett *says* that "[t]he *Greer* test remains the law of this state." Resp. 25. But her argument is carefully constructed to gut that test of any meaning. Fausett is arguing, without acknowledging, that she believes *Greer* should be or has been overruled.

Greer "adhere[d] to the principle that standing in Illinois requires … some injury in fact to a legally cognizable interest." 122 Ill. 2d at 492. Among other things, standing

requires that the "claimed injury" must be "distinct and palpable." *Id.* at 492-93. Despite this long-settled requirement, Fausett argues that "*Rosenbach* was clear that a plaintiff is not required to allege harms beyond a statutory violation to bring a lawsuit in Illinois." Resp. 17. That view misreads *Rosenbach*.

Rosenbach does not cite *Greer*, does not discuss standing, and does not address the injury-in-fact requirement. The decision was one of statutory construction: whether a plaintiff who alleged only a violation of the Illinois Biometric Information Privacy Act ("BIPA") qualified as "aggrieved" under the statute. *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶¶ 1, 33. It did not decide what counts as a "justiciable controversy" under the Illinois Constitution, much less revolutionize the law and abandon *Greer*.

Rosenbach did not cite or discuss *Greer* for good reason. Nothing in the facts, reasoning, or holding of *Rosenbach* required abandoning the *Greer* "distinct and palpable" injury standard. Unlike printing the bank-identifying number on a prepaid cash card, the nonconsensual retention and use of biometric data itself invades a legally cognizable interest personal to the plaintiff. Br. 19-23. BIPA did not create that interest out of whole cloth. The unique and immutable characteristics of a person's biometrics make *any* nonconsensual retention of that information an invasion of an individual's privacy. That is a "real and significant" injury even in the absence of any pecuniary losses. *See Rosenbach*, 2019 IL 123186, ¶ 34.

A statutory violation can create a justiciable controversy in Illinois, but only *when that statutory violation causes a distinct and palpable injury that a judgment can redress*. Fausett asks this Court to read *Rosenbach* as if the emphasized qualification has vanished from Illinois law. But the emphasized language is precisely what *Greer* requires and was

not at issue in *Rosenbach.* Fausett's overreading of *Rosenbach* exposes the radical nature of her position, which she studiously avoids saying out loud. To Fausett, *Rosenbach* silently abandoned the *Greer* standard.

The radical nature of Fausett's request has no limit. The rule she proposes to replace *Greer*'s—that a mere statutory violation is sufficient to confer standing in Illinois—would abandon *all* judicially recognized limits on standing in Illinois. For example, "[a] distinct and palpable injury refers to an injury that cannot be characterized as a generalized grievance common to all members of the public." *Ill. Rd. & Transp. Builders Ass'n v. County of Cook*, 2022 IL 127126, ¶ 17. Under Fausett's proposed approach, the legislature could, by statute, authorize suits for generalized grievances. Indeed, as discussed below, the U.S. Congress could impose on Illinois the burden of adjudicating "claims" brought by individuals who dislike a defendant's allegedly unlawful conduct, or see an opportunity to profit from alleging supposedly unlawful conduct, even if they were entirely unaffected by the alleged conduct. Fausett asks this Court to cede the definition of the judicial power under the Illinois Constitution to not just the General Assembly, but to the federal Congress as well, even where, as here, the U.S. Supreme Court has held that Congress may not do so. *See* Br. 29.

Nothing in *People ex rel. Graf v. Village of Lake Bluff*, 206 Ill. 2d 541 (2003), supports Fausett's radical abandonment of settled standing law. It is true that the "legislature may create new justiciable matters by enacting legislation that creates rights and duties that have no counterpart at common law or in equity." Resp. 12 (quoting *Graf*, 206 Ill. 2d at 553). As society evolves, legislatures remain free to recognize new ways that people may be distinctly and palpably injured that were previously unrecognized at

common law. That is exactly what the General Assembly did when it enacted BIPA. The prospect of collecting biometric data is a relatively recent development, unimaginable to our common law forebears. But there is a critical distinction between the legislature recognizing new forms of actual injuries, and the legislature being free to create the right to sue *even in the absence of an actual injury*. *Graf* recognizes as much. Although the legislature may create new justiciable matters by enacting legislation, "[t]he legislature's creation of a new justiciable matter … does *not* mean that the legislature thereby confers jurisdiction on the circuit court. Article VI [of the Illinois Constitution] is clear that, except in the area of administrative review, the jurisdiction of the circuit court flows from the constitution." *Graf*, 206 Ill. 2d at 553 (emphasis changed) (quoting *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 335-36 (2002)). So not just *Greer*, but *Graf* also, would have to fall if this Court were to accept Fausett's view.

Fausett denies that her proposal is radical. She baldly asserts that "[f]or more than one-hundred years, this Court has held [that] a violation of one's statutory rights alone is sufficient to sue in Illinois state courts." Resp. 12. She cites no case that reflects her rule, let alone one stretching back a hundred years. She cites only *Rosenbach*, decided in 2019, which, as discussed, does not support her. *See* pp. 3-5, *supra.*

Perhaps Fausett means to refer to *Glos v. People*, 259 Ill. 332 (1913), which is a hundred years old and which *Rosenbach* quoted. *See Rosenbach*, 2019 IL 123186, ¶ 30 (citing *Glos*, 259 Ill. at 340). But Fausett does not discuss *Glos* in her brief, and for good reason. *Glos* did not consider, much less decide, whether "a violation of one's statutory rights alone is sufficient to sue in Illinois state courts." Resp. 12. *Glos* considered whether an individual who claimed an interest in real property that was subject to a

foreclosure order could challenge that foreclosure order when she had not been a party to the original foreclosure proceedings. *Glos*, 259 Ill. at 338, 344. The Court held that she could not, because a foreclosure order can affect only the rights of the parties to the foreclosure proceedings. *Id.* at 344. Because the individual was not a party, the order was "totally void" as to her interests, and she was therefore not aggrieved. *Id.* Contrary to Fausett's suggestion, *Rosenbach* cited *Glos* only for its discussion of the meaning of "aggrieved." *See Rosenbach*, 2019 IL 123186, at ¶ 30; *accord Glos*, 259 Ill. at 340. Nothing in the facts or ruling of *Glos* casts doubt on the *Greer* injury-in-fact requirement.

In fact, *every* Illinois case that found standing cited by Fausett involved the alleged invasion of a legally cognizable interest. *See Midwest Com. Funding, LLC v. Kelly*, 2023 IL 128260, ¶ 14 ("injury of losing her lien priority [was] distinct and palpable"); *Ill. Rd. & Transp. Builders Ass'n*, 2022 IL 127126, ¶¶ 17-18 (loss of "hundreds of millions of dollars' worth of job opportunities they stand to benefit from"); *Lebron v. Gottlieb Mem. Hosp.*, 237 Ill. 2d 217, 224 (2010) ("numerous permanent injuries," including brain injury); *Graf*, 206 Ill. 2d at 548 ("increased financial burdens"); *Greer*, 122 Ill. 2d at 493 ("diminution in the value of property").[1] Fausett is unable to

[1] Fausett also cites *State ex rel. Leibowitz v. Family Vision Care, LLC*, which involved a qui tam relator suing on behalf of the government under the Insurance Claims Fraud Prevention Act. 2020 IL 124754, ¶ 1. There, as is typical in the qui tam context, the relator had standing to sue in the name of the government because she was partially assigned the government's legally cognizable interest. *See id.* ¶¶ 73, 82.

ground her rule in any precedent of this Court.[2]

B. Fausett Has Not Satisfied And Cannot Satisfy *Greer*'s Injury-In-Fact Requirement.

Fausett says that "FACTA was passed by Congress to protect against identity theft." Resp. 2. But she conspicuously does not, because she cannot, say that any interest she has in preventing identity theft was impacted *at all* by the conduct she alleges in her complaint. So even assuming that individuals have a legally cognizable interest in preventing identity theft, that interest is not implicated by her claim.

To be clear, Fausett alleges no identity theft. She ultimately conceded that nobody but her, the cashier, and her lawyer ever saw her receipt, and her brief offers no argument for how it would even have been possible for anyone to use the bank-identifying number that was printed on the receipt to compromise the security of her identity. *See* Br. 7-8. Walgreens presented unrebutted expert testimony explaining, as multiple courts have found as a matter of law, that a bank-identifying number carries not even an increased risk of identity theft. *See id.* at 8, 24-25. Fausett asserts that she "has not had the opportunity [to] present a rebuttal expert." Resp. 34 n.9. But in fact she has. Walgreens disclosed its experts on October 14, *see* App. 248, but when briefing on class certification was set at an October 25 hearing, Fausett chose to proceed without presenting or even asking to present any rebuttal experts. *See* C. 634. That is why the circuit court properly

[2] Fausett argues that three Illinois Appellate Court decisions have held that a mere violation of FACTA is sufficient to confer standing. Not only are these decisions not binding on this Court, but this Court granted petitions to review two of them, and both were vacated before the Court had completed its review. The third decision did not squarely address the question. Rather, in the context of ruling on objections to a class action settlement, the court held that the defendant waived the issue of standing, and the objector had no basis to object on standing grounds because he had failed to intervene. *See Lee v. Buth-Na-Bodhaige, Inc.*, 2019 IL App (5th) 180033, ¶ 68.

found that there "seems to be no dispute that Fausett is a no-injury plaintiff." App. 169. Fausett's brief ignores this finding.

The Presidential Signing Statement from 2003, which Fausett repeatedly cites, cannot help her. It says nothing about whether the disclosure of a bank-identifying number increases the risk of identity theft. *See* Statement By President George W. Bush Upon Signing H.R. 2622, 2004 U.S.C.C.A.N. 1755, 2003 WL 23279833. As Walgreens' experts explain, contrary to Fausett's unsupported conclusion, the receipts at issue here did not "hold the key to [her] savings and financial secrets." Resp. 4. President Bush in 2003 was not talking about bank-identifying numbers like that on Fausett's receipt. Rather, in 2003 the President and Congress were concerned with "dumpster diving" for receipts that at the time included full card numbers and expiration dates. App. 259. That is the context of the language Fausett quotes from President Bush's statement. Here, it is and has always been undisputed that the bank-identifying number for a prepaid cash card is not unique to the cardholder, reveals nothing about the cardholder, and is not linked to any credit or banking information of the cardholder.[3] Br. 5-8, 11-12.

Fausett claims in passing that her "injury is … palpable because it appears on the face of the receipt itself." Resp. 16 n.7. This is verbal sleight of hand. The appearance of the bank identification number is "palpable" in the sense that it physically appears on the face of the receipt, but that is not what *Greer* requires. *Greer* demands that a plaintiff

[3] Fausett asserts that, according to Walgreens' website, a prepaid cash card is "essentially identical to other debit cards." Resp. 5 n.4 (quoting C. 132). As the website makes clear, Walgreens does not market prepaid cash cards as "essentially identical" to debit cards. The website stated only that they "work like traditional debt cards," which is true when the cards are used to make purchases. C. 132. In fact, unlike traditional debit cards, prepaid cash cards are not linked to an account holding money unique to the individual cardholder. Br. 8.

explain how that physical fact caused a distinct and palpable injury to her. On that question, for all the reasons discussed above, Fausett has conceded that it did not. *Supra* at 8. Thus, even if Fausett were right that printing those numbers on her receipt violated FACTA (a point Walgreens disputes on the merits), at most what would be "palpable" is a violation of FACTA's legal requirement, not any injury to Fausett. Put simply, Fausett is collapsing the distinction between conduct that violates some law and an "injury in fact" suffered by a plaintiff. *See* § II.B, *infra*. That distinction is the heart of *Greer*.

Finally, Fausett claims to have subjectively feared that she might suffer identity theft after learning that the receipt printed the bank-identifying number. Resp. 6. But the bare subjective "fear" of possible injury is not an injury in fact. *See, e.g.*, *Petta v. Christie Bus. Holding Co.*, 2023 IL App (5th) 220742, ¶ 14 ("[S]peculation or fear alone [i]s insufficient to confer standing."); *Maglio v. Advocate Health & Hosps. Corp.*, 2015 IL App (2d) 140782, ¶¶ 28-29 (same). Fausett never actually argues that the law is or should be otherwise. As a practical matter, such a rule would be just another way of abandoning the injury-in-fact requirement entirely. There would be nothing to constrain anyone from declaring a subjective "fear" of some harm from any conduct that displeases them.

C. Ruling That Fausett Fails *Greer*'s Injury-In-Fact Requirement Does Not Require This Court To Follow *Spokeo* Or *TransUnion*.

Contrary to Fausett's repeated suggestion, Walgreens is not attempting to bind this Court to the U.S. Supreme Court's view of standing under the U.S. Constitution. Resp. 13-14, 17-19, 30, 35, 37. In truth, Walgreens' view, like *Greer* itself, derives from a faithful reading and application of this Court's standing decisions. It is Fausett who would tether this Court to the views of others, most notably the views of the *dissenting* justices of the U.S. Supreme Court in *TransUnion*, 594 U.S. 413. *See* Resp. 10, 19, 22, 32

(each time citing a dissent in *TransUnion*).

Walgreens does not deny that there are differences between federal and Illinois standing law. Federal courts are courts of limited jurisdiction, whereas Illinois courts are courts of general jurisdiction, and in federal court, standing is a jurisdictional requirement that cannot be waived, whereas in Illinois standing is an affirmative defense that can be waived. *See id.* at 12. These differences are beside the point. They do not address whether the mere violation of a statute is sufficient to satisfy *Greer*'s injury-in-fact requirement.

Walgreens is not arguing that this Court must adopt *TransUnion*'s "concrete harm" standard. To the contrary, Walgreens maintains that it has been true since long *before TransUnion* that in Illinois a claim is not justiciable unless the plaintiff alleges some distinct and palpable injury to a legally cognizable interest. Whether *TransUnion* requires anything more—and Fausett does not explain what more it should be read to require—is simply not a question this case requires this Court to answer. That is because Fausett wants to be relieved of the obligation to show *any* injury however defined.

Regardless, if this Court were to decide to fully embrace the "concrete harm" requirement as it has been articulated in *Spokeo* and *TransUnion*, this Court would not, as Fausett suggests, be joining any revolution in standing law. The majority opinions in both cases grounded their rulings in longstanding federal standing decisions. *See Spokeo*, 578 U.S. at 338-42; *TransUnion*, 594 U.S. at 422-30. By contrast, the radical, no-injury-required view Fausett proposes finds no support in either federal or this Court's caselaw. As shown above, her proposal cannot be squared with *Greer*. And her proposal was rejected in federal courts long before *Spokeo* and *TransUnion*. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), shows that the requirement of an injury in fact—as

opposed to the mere violation of a statute—had been recognized decades earlier. If the violation of a statutory right were sufficient to confer Article III standing, *Lujan* would have come out the other way. There, the Endangered Species Act authorized "any person" to sue to enforce its terms. *See Lujan*, 504 U.S. at 571-72 (quoting 16 U.S.C. § 1540(g)). This was a basis of the lower court's decision. *See Defenders of Wildlife v. Lujan*, 911 F.2d 117, 121 (8th Cir. 1990) ("[W]e are persuaded that the Act is a statute imposing statutory duties which create correlative procedural rights in a given plaintiff, the invasion of which is sufficient to satisfy the requirement of injury in fact in article III."). The Supreme Court reversed, holding that a violation of the Endangered Species Act was insufficient to confer standing on the plaintiffs, because they did not allege a concrete injury in fact personal to them. *Lujan*, 504 U.S. at 572-73. The principle that the mere violation of a statute does not automatically confer Article III standing on a plaintiff was settled well before *Spokeo* and *TransUnion*.

D. Federal Courts' Standing Decisions On BIPA Do Not Bind This Court And In Any Event Do Not Undermine Walgreens' Argument.

Despite spilling much ink arguing that Illinois courts should not follow federal courts on issues of standing, Fausett relies on several Seventh Circuit federal appellate decisions discussing standing for BIPA claims. Resp. 29. Of course these decisions do not bind this Court. But even if this Court looks to federal cases for guidance (as it has in the past, *see, e.g.*, *Greer*, 122 Ill. 2d at 493 (citing a federal case for each aspect of the standing requirement)), it will find no support for Fausett's view in those decisions.

Fausett suggests that the Seventh Circuit has held that violations of sections 15(a) and 15(c) of BIPA *never* satisfy Article III standing because they *never* produce a "concrete harm." Resp. 30. That is incorrect. A section 15(a) claim *can* allege an injury

that satisfies Article III where the plaintiff claims, for example, that the defendant failed to timely destroy her biometric information. *See, e.g.*, *Fox v. Dakkota Int. Sys., LLC*, 980 F.3d 1146, 1154-55 (7th Cir. 2020) (Article III satisfied for Section 15(a) claim). As the Seventh Circuit explained, "[a]n unlawful retention of biometric data inflicts a privacy injury in the same sense that an unlawful collection does." *Id.* at 1154. Accordingly, it "follows that an unlawful *retention* of a person's biometric data is as concrete and particularized an injury as an unlawful *collection*." *Id.* at 1155.

Likewise, a section 15(c) claim *can* allege an injury that satisfies Article III if the plaintiff alleges that her own biometric information was sold by the defendant. "A plaintiff might assert, for example, that by selling her data, the collector has deprived her of the opportunity to profit from her biometric information. Or a plaintiff could assert that the act of selling her data amplified the invasion of her privacy … by disseminating it to … other people." *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1247 (7th Cir. 2021). Thus, contrary to Fausett's suggestion, there is no risk that a ruling in Walgreens' favor would imply that "violations of several sections of BIPA are not actionable in Illinois." Resp. 30. What would be true in Illinois is what has long been true: so long as a plaintiff alleges an injury in fact in connection with any BIPA violation, the claim will be heard in Illinois courts.

II. Fausett Provides No Good Reason Why Illinois Should Adopt An Outlier Position.

A. Adopting Fausett's Rule Would Make This Court An Outlier.

As Walgreens explained, and as demonstrated by the amicus brief of Cinemark USA, Inc., the overwhelming majority of courts across the country have adhered to an injury-in-fact requirement. Br. 26; Cinemark Br. 10-14 & Cinemark App. (table listing

cases). Fausett does not address those cases. *See* Resp. 35-37.

Instead, she asserts that "many states reject the federal test for standing." *Id.* at 35. But she cites only five. *Id.* at 35-36. All of these states deviated from federal standing requirements based on legal history, statutory context, or constitutional language unique to those states. *See Comm. to Elect Dan Forest v. Emp's Pol. Action Comm.*, 853 S.E.2d 698, 733-34 (N.C. 2021) (reviewing North Carolina state constitution and historical jurisprudence in the context of a North Carolina statute regarding a campaign disclosure requirement); *Lansing Schools Educ. Ass'n v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 690-92, 699 (Mich. 2010) (reviewing historical Michigan-specific treatment of standing in the context of a Michigan statute regarding discipline in public-school context); *State ex rel. Dodrill Heating & Cooling, LLC v. Akers*, 874 S.E.2d 265, 273 (W. Va. 2022) (West Virginia statute prohibiting threats of attorney's fees in communications to consumers; plaintiffs had "legally protected interest in remaining free from fraudulent, deceptive, and misleading representations," which was a "concrete, actual, non-hypothetical, non-conjectural injury-in-fact"); *Freemantle v. Preston*, 728 S.E.2d 40, 44-45, 194-95 (S.C. 2012) (standing to assert claims for declaratory and injunctive relief, not damages, in the special context of the South Carolina Freedom of Information Act); *Kline v. SouthGate Prop. Mgmt., LLC*, 895 N.W.2d 429, 437-41 (Iowa 2017) (Iowa statute prohibited landlords from including punitive provisions in lease agreements).

None of these cases concerned a federal statute or considered the specific question presented here: whether the U.S. Congress has, through legislation creating a private right of action, conferred upon uninjured individuals a right to sue in state court even though the U.S. Supreme Court has held that Congress lacks authority to grant those individuals

access to federal court. Indeed, Fausett cites only a single decision from the Massachusetts Court of Appeals that addresses that question. Resp. 36-37 (citing *Kenn v. Eascare, LLC*, 103 Mass. App. Ct. 643 (2024)). That case held that a plaintiff who failed to allege any injury could satisfy Massachusetts's test for standing merely by alleging a violation of the federal Fair Credit Reporting Act, but in so ruling the decision acknowledged that it had to break with other Massachusetts cases that required a concrete injury as articulated in federal cases. *See Kenn*, 103 Mass. App. Ct. at 654 ("at least two Massachusetts cases appear to have imported art. III's concrete injury requirement"). Moreover, the court did not consider the arguments discussed below regarding the lack of any reason to believe that Congress, when enacting FACTA, intended to allow uninjured plaintiffs to sue in state court when federal courts would not hear their claims. That Fausett can muster only a single decision from an intermediate court of appeals in one state that expressly deviated from its own prior decisions shows how little precedent there is for the radical position she urges this Court to adopt.

B. Fausett's Rule Collapses Standing And The Merits.

Fausett claims that Walgreens' proposed rule would lead to "confusion between standing and the merits of the suit." Resp. 31. Fausett has it exactly backward. *Greer* asks whether there is an injury in fact—a distinct and palpable injury caused by a violation of a law—which necessarily maintains a distinction between the conduct by the defendant alleged to violate the law and the injury suffered by the plaintiff. A defendant may engage in conduct that technically violates the law (*e.g.*, polluting a stream in Cairo) that has no impact on the plaintiff (*e.g.*, a Chicago resident). The Chicago plaintiff has no justiciable claim. That is the essential purpose of standing law: to ensure that parties without a genuine stake in the outcome of a dispute do not highjack litigation away from

those who do. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472-73 (1982).

Fausett would do away with this distinction. To Fausett, once a plaintiff alleges a violation of some law, the only question that remains is whether the legislature authorized that plaintiff to sue. The plaintiff never has to demonstrate any way the defendant's conduct affected her. She need only demonstrate statutory authority to sue. Under Fausett's view, there is standing for anyone who alleges a violation of a statute and seeks statutory damages. Standing, in Fausett's view, thus becomes coextensive with the merits: every claim asserting a violation of a statute is justiciable. *Greer* rightly rejected importing merits questions into this State's standing analysis when it rejected the federal "zone of interests" test. *See Greer*, 122 Ill. 2d at 490-92. Fausett invites this Court to turn away from this aspect of *Greer* as well.

C. Fausett's Rule Raises Separation-Of-Powers Concerns.

Fausett argues that Walgreens' rule would "undermine[] the separation of powers because it second guesses the wisdom of legislative enactments." Resp. 33. This argument misunderstands the separation of powers. Walgreens' approach rightly maintains the separation of powers by respecting the legislature's authority to define unlawful conduct, and *also* respecting this Court's authority to define what are justiciable controversies that Illinois courts may hear.

Under Illinois law, standing is a question of justiciability and therefore goes to the heart of the "judicial power" vested in Illinois courts. It thus "must [] be judicially defined." *In re Estate of Burgeson*, 125 Ill. 2d 477, 485 (1988). This Court in *Greer* defined justiciability as requiring the plaintiff to allege that the unlawful conduct at issue caused her an injury in fact. That is an appropriate exercise of the judicial power.

This Court's exercise of that judicial power does not intrude upon the General Assembly's legislative authority to define unlawful conduct in new ways not previously recognized. The General Assembly (or, as in this case, Congress) can, for example require that receipts print only the last five numbers for a consumer credit card transaction. And when the legislature does so, it may create a cause of action for private parties alleging a violation of that law. That, too, is a proper exercise of legislative authority. *See Graf*, 206 Ill. 2d at 553. The legislature may not, however, force courts to hear matters that are not justiciable, *i.e.*, claims in which a plaintiff alleges no distinct and palpable injury. These two powers—the judicial and the legislative—coexist side-by-side: the state's judicial power can be invoked by any private party who has suffered an injury in fact as a result of conduct that the legislature has said is unlawful. What Fausett proposes is that the legislature may seize from this Court the authority to define what is a justiciable controversy. As she would have it, the legislature may declare that a violation of law by itself *is* a justiciable controversy. That usurps the judicial power.

When this Court stands by *Greer* and *Burgeson*, and retains its authority to define what makes a controversy justiciable, it does not "second guess" the wisdom of any legitimate exercise of legislative authority. Resp. 33. It merely holds fast to the legitimate exercise of the judicial power vested in this Court, which includes the power "to cull [court] dockets so as to preserve for consideration only those disputes which are truly adversarial and capable of resolution by judicial decision." *Greer*, 122 Ill. 2d at 488. This Court would lose that power under Fausett's view.

III. Congress Did Not Authorize Uninjured Cardholders Like Fausett To Sue Under FACTA.

Fausett does not dispute that this Court should avoid interpreting FACTA to raise

a significant constitutional question, at least in the absence of clear language compelling such an interpretation. *Compare* Br. 32, *with* Resp. 39-40. As Walgreens explained, allowing uninjured plaintiffs like Fausett to sue in Illinois courts raises significant constitutional questions. Those include the separation of powers, as the Supreme Court recognized. Br. 31-33; *TransUnion*, 594 U.S. at 429. In addition, Fausett's view raises due process concerns because when an uninjured plaintiff is allowed to recover substantial statutory damages, especially aggregated statutory damages in a class action, the punitive nature of the award cannot be justified. Br. 34-35. Fausett pushes these substantial concerns aside because, she claims, FACTA includes a clear statement that Congress intended this result, citing Section 618 of FACTA. Resp. 40.

Fausett overreads Section 618. That provision states that "[a]n action to enforce any liability created under this title may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction[.]" Pub. L. 108-159, § 618. Nothing in this statement *expressly* grants authority for uninjured plaintiffs to sue. It merely authorizes state courts to decide FACTA cases. This language expresses no disapproval of the U.S. Supreme Court's standing decisions. Notably, it does not say that Congress means to upset the default rule that only those who allege injury may sue in either state or federal courts. To the contrary, that federal district courts and "other courts of competent jurisdiction" are linguistically treated as equivalent suggests that Congress intended to authorize federal and state courts to hear FACTA claims to the same degree. After all, "federal statutes are generally intended to have uniform nationwide application." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989). Nothing in the language of Section 618

signals an intent to upset that general presumption. And there is no reason to think Congress intended for the scope of FACTA to hinge on variation in state standing law.

As for the Article II problem, Fausett asserts that the Supreme Court did not "make an Article II violation a part of its holding." Resp. 42. Fausett misreads the reasoning of the Court. The Court's discussion of Article II provided an additional basis for its ruling. It considered one consequence of accepting the expansive view of standing that Fausett advocates here. Had the U.S. Supreme Court abandoned its own standing precedent (as Fausett urges this Court to do here), the opinion explains, the Court would be authorizing a legislative encroachment on the Article II authority of the executive to determine how best to enforce violations of regulatory requirements. "A regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law *not only* would violate Article III *but also* would infringe on the Executive Branch's Article II authority." *TransUnion*, 594 U.S. at 429 (emphasis changed). This is not dicta, but rather an extra (and important) reason in support of the holding. "[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

As for the due process problem, Fausett argues that "large damage awards do not in and of themselves create due process violations." Resp. 42. This is a straw man. It is not the sheer size of a damages award that creates the due process violation; it is that a large damages award in a case with uninjured class members could not be proportionate to the harm caused by the statutory violations. *See* Br. 34-35. And proportionality is the touchstone of due process. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576 (1996).

Finally, Fausett's argument that the federal Supremacy Clause requires Illinois

courts to hear claims brought by uninjured plaintiffs like Fausett is meritless. Resp. 38. No one disputes that Congress can create binding substantive law in Illinois and in every other state. Nor does anyone dispute that Illinois courts must enforce federal law. As Fausett's own case recognizes, "the supremacy clause forbids state courts to disassociate themselves from federal law because they disagree with its substance or because they refuse to recognize the superior authority of federal law," but they may refuse to hear a federal claim "based on 'a neutral state rule regarding the administration of the courts.'" *Italia Foods, Inc. v. Sun Tours, Inc.*, 2011 IL 110350, ¶¶ 23-24 (quoting *Howlett v. Rose*, 496 U.S. 356, 372 (1990)). Illinois' injury-in-fact requirement is precisely such a rule. Fausett's Supremacy Clause argument is especially weak here because there is no dispute that federal courts would *not* be able to hear Fausett's claim. There is no Supremacy Clause violation when a state court enforces federal law to the same extent as federal courts. *Cf. Miles v. Ill. Cent. R. Co.*, 315 U.S. 698, 704 (1942) ("Since the existence of the cause of action and the privilege of vindicating rights under the F.E.L.A. in state courts spring from federal law, the right to sue in state courts of proper venue where their jurisdiction is adequate is of the same quality as the right [to] sue in federal courts.").

Fausett urges this Court to radically alter Illinois standing law, to break with the vast majority of state courts and with federal law, and to create a regime where uninjured plaintiffs can flock to Illinois to assert claims they could assert virtually nowhere else. There is no reason to think Congress intended such an anomalous result.

CONCLUSION

For the foregoing reasons and those explained in Walgreens' opening brief, Walgreens respectfully requests that this Court reverse the class certification order and direct the circuit court to dismiss the case for lack of standing.

Dated: April 17, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

/s/ Robert N. Hochman
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No. 129783

IN THE SUPREME COURT OF ILLINOIS

CALLEY FAUSETT, individually and on behalf of others similarly situated,	)	On Petition for leave to Appeal from the Illinois Appellate Court, Second Judicial District,
Plaintiff-Respondent,	)	No. 2-23-0105
v.	)	On Appeal from the Nineteenth Judicial Circuit Court,
WALGREEN CO.,	)	Lake County, Illinois
	)	Case No. 19 CH 675
Defendant-Petitioner.	)	
	)	Hon. Donna-Jo Vorderstrasse,
	)	Judge Presiding

NOTICE OF FILING AND PROOF OF SERVICE

I, Robert N. Hochman, an attorney, hereby certify that on April 17, 2024, I caused the foregoing Reply Brief of Defendant-Petitioner Walgreen Co. to be electronically filed and served upon the Clerk of the Supreme Court of Illinois through the Illinois e-filing system. I further certify that on April 17, 2024, I caused a true and correct copy of the foregoing to be served via e-mail upon the counsel of record listed below.

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Reply Brief bearing the court's file-stamp will be sent to the above court.

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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