No. 131444

In the Supreme Court of Illinois

CALLEY FAUSETT, Individually and on Behalf of Others Similarly Situated,

Plaintiff/Appellee,

vs.

WALGREEN COMPANY, d/b/a Walgreens,

Defendant/Appellant.

From the Appellate Court for the Second Appellate District of Illinois, No. 2-23-0105
On Appeal from the Circuit Court for the Nineteenth Judicial Circuit of Illinois,
Lake County No. 2019-CH-675
The Honorable Donna-Jo Vorderstrasse, Associate Circuit Judge Presiding

BRIEF OF *AMICUS CURIAE* ILLINOIS DEFENSE COUNSEL IN SUPPORT OF DEFENDANT/APPELLANT, WALGREEN COMPANY

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TABLE OF CONTENTS

Page:

TABLE OF CONTENTS i

POINTS & AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF FACTS 1

ARGUMENT 3

I. The U.S. Supreme Court has Already Held That Non-Injury Claims Under the FCRA are Unconstitutionally Violative of Article II 3

II. Only the Executive Branch has Jurisdiction to Enforce Civil Penalties in Cases That Do Not Claim Actual Injury 5

III. Plaintiffs' Proposed Aggregation of Statutory Damages under FACTA Violates the Due Process Clause. 10

IV. Plaintiffs Who Have Not Suffered Any Concrete Injury Lack Standing to Bring a Claim under the FCRA 12

CONCLUSION 13

CERTIFICATE OF COMPLIANCE 15

CERTIFICATE OF SERVICE 16

POINTS AND AUTHORITIES

STATEMENT OF INTEREST OF AMICUS CURIAE 1

TransUnion, LLC v. Ramirez, 141 S.Ct. 2190 (2021) 1

ARGUMENT 2

TransUnion, LLC v. Ramirez, 141 S.Ct. 2190 (2021) 3

Edward H. Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 371 (1976) 3

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010) 3

I. The U.S. Supreme Court has Already Held That Non-Injury Claims Under the FCRA are Unconstitutionally Violative of Article II. 3

TransUnion, LLC v. Ramirez, 141 S.Ct. 2190 (2021) 4, 5

Busch v. Graphic Color Corp., 169 Ill.2d 325 (1996) 4

State Bank of Cherry v. CGB Enterprises, Inc., 2013 IL 113836 4

II. Only The Executive Branch has Jurisdiction to Enforce Civil Penalties in Cases that Do Not Claim Actual Injury. 5

U.S. Const., Art. II, §3 5

TransUnion, LLC v. Ramirez, 141 S.Ct. 2190 (2021) 6, 8, 9

Springer v. Government of Philippine Islands, 277 U.S. 189 (1928) 6

J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928) 6

In re Aiken Cnty., 725 F.3d 255 (D.C. Cir. 2020) 6, 7, 9

Massachusetts v. Mellon, 262 U.S. 447 (1923) 6

Lujan v. Defs. Of Wildlife. 504 U.S. 555 (1992) 7

Bond v. United States, 564 U.S. 211 (2011) 8

Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991) 8

Fausett v. Walgreen Company, 2024 IL App (2d) 230105 .....8, 9, 10

Cates v. Cates, 156 Ill.2d 66 (1993) 8, 9

Woods v. Interstate Realty Co., 337 U.S. 535 (1949) 9

United States v. Texas, 599 U.S. 670 (2023) 10

III. Plaintiffs' Proposed Aggregation of Statutory Damages under FACTA Violates the Due Process Clause. 10

Parker v. Time Warner Entertainment Co., L.P., 331 F.3d 12 (2nd Cir. 2003) 10

Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo.L.Rev. 103 (2009) 10, 11

Perrone v. General Motors Acceptance Corp., 232 F.3d 433 (5th Cir. 2000) 11

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1999) 11

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) 11

United States Code, Chapter 15, § 1681n(a)(1)(A) 12

IV. Plaintiffs Who Have Not Suffered Any Concrete Injury Lack Standing to Bring a Claim under the FCRA 12

Midwest Commercial Funding, LLC v. Kelly, 217 N.E.3d 985 (2023) 12

State ex rel. Leibowitz v. Family Vision Care, LLC, 2020 IL 124754 12

Glisson v. City of Marion, 188 Ill.2d 211 (1999) 12

Petta v. Christie Business Holdings Co.,
2023 IL App (5th) 220742 ..... 12, 13

Maglio v. Advocate Health and Hospital Corp.,
2015 IL App (2nd) 140782 13

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Illinois Defense Counsel (IDC) is made up of about 600 Illinois attorneys who devote a substantial portion of their practice to the representation of business, corporate, insurance, professional, governmental, and other individual defendants in civil litigation. For more than 50 years, it has been the mission of the IDC to ensure civil justice with integrity, civility, and professional competence.

The IDC has a substantial interest in maintaining efficient litigation procedures that avoid burdensome and unnecessary lawsuits. The IDC respectfully submits that this Court should employ the reasoning and conclusions of the United States Supreme Court's decision in *TransUnion, LLC v. Ramirez*, 141 S.Ct. 2190, (2021). In that case, the U.S. Supreme Court held that claims brought under the Fair Credit Reporting Act (FCRA), such as this litigation, must allege actual injuries in order to comply with Articles II and III of the U.S. Constitution. While Article III jurisdictional restrictions are not applicable to state court proceedings, the separation of powers principles incorporated in Article II limit federal legislation equally regardless of which court is applying said law. Ignoring the *TransUnion* decision risks prolonging unnecessary litigation since the U.S. Supreme Court maintains appellate jurisdiction over this issue.

STATEMENT OF FACTS

Calley Fausett provided cash to Walgreens for the purpose of reloading her prepaid cash card. Such transactions are governed by the Fair and Accurate Credit Transactions Act (FACTA), which was passed as an amendment to the FCRA. At the conclusion of the transaction, she received a receipt from Walgreens that included the first six and last

four digits of her cash card number rather than the maximum five-digit limit required by FACTA. She has alleged that FACTA applies to prepaid cash cards like the one she used at Walgreens, but otherwise, she claimed no actual injury related to the transaction or the receipt. She also acknowledged that the digits printed on her receipt only identify the issuing bank and contain none of her own personal identifying information.

Ms. Fausett subsequently initiated a class-action lawsuit against Walgreens alleging a FACTA violation. The trial court denied Walgreens' motion to dismiss for lack of standing and ultimately certified a nationwide class of individuals who received receipts from Walgreens that included more than the last five digits of their reloadable cash cards. The trial court held that, at least in Illinois, alleging a statutory violation is sufficient to confer standing regardless of whether any actual injury occurred.

Walgreens appealed the trial court's class certification to the Appellate Court of Illinois, Second District, which denied the appeal. Walgreens then filed a petition for leave to appeal to the Illinois Supreme Court, which was granted. However, on May 17, 2024, the Illinois Supreme Court held that the petition for leave to appeal was improvidently granted. It ordered the Appellate Court of Illinois, Second District, to allow Walgreens' petition for leave to appeal.

The Appellate Court of Illinois, Second District, subsequently affirmed the trial court's decision. Specifically, the Appellate Court held that allegations of willful violations of Section 1681(c)(g)(1) of FACTA provided plaintiffs with standing despite the lack of any actual or concrete injury.

ARGUMENT

The decision of the Circuit Court and the Illinois Appellate Court, Second District conflicts with the U.S. Supreme Court's decision in *TransUnion, LLC v. Ramirez*, 141 S. Ct. 2190 (2021). The Court's *TransUnion* decision established that the Executive Branch has exclusive jurisdiction to enforce civil penalties in cases that do not evidence any actual injury and that such right does not therefore accrue to civil litigants. *Id*. at 429.

The principle of separation of powers is a fundamental element of the United States' constitutional democracy:

> The essence of the separation of powers concept formulated by the Founders from the political experience and philosophy of the revolutionary era is that each branch, in different ways, within the sphere of its defined powers and subject to the distinct institutional responsibilities of the others is essential to the liberty and security of the people. Each branch, in its own way, is the people's agent, its fiduciary for certain purposes. Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 385-386 (1976).

"As Madison stated on the floor of the first Congress, 'if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010). Allowing plaintiffs who have not suffered any injury to collect statutorily prescribed penalties for statutory violations violates the basic principle that the courts cannot infringe on the executive's responsibility to enforce federal law. See: *Id*. at 496.

I.
The U.S. Supreme Court has Already Held That Non-Injury Claims Under the FCRA are Unconstitutionally Violative of Article III.

The ultimate issue presented for this Court's determination on this appeal is whether this Court should adopt the reasoning applied by the United States Supreme

Court's holding in *TransUnion, LLC v. Ramirez*, 141 S.Ct. 2190 (2021) and apply that decision in this case and others similarly situated. *TransUnion* addressed the issue presented when claims brought under the FCRA lack any allegation of concrete injury. *Id*. at 424-429. The United States Supreme Court in that case expressly held that "[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." *Id*. at 429.

When interpreting federal statutes, we look to the decisions of the United States Supreme Court and federal circuit and district courts. *Busch v. Graphic Color Corp.*, 169 Ill.2d 325, 335 (1996). The United States Supreme Court's interpretation of federal law is clearly binding on this court. However, in the absence of a United States Supreme Court decision, the weight this court gives to federal circuit and district court interpretations of federal law depends on factors such as uniformity of law and the soundness of the decisions. *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶ 33.

Here, the issue presented for determination has already been decided by the United States Supreme Court in *TransUnion*. In that case, the litigants were a class of plaintiffs who had brought an action against TransUnion for violations of the Fair Credit Reporting Act (FCRA). *TransUnion* at 413 (2021). All of the class members claimed to have had credit reports furnished by TransUnion that had inaccurate information related to their status as "terrorists, drug traffickers, or other serious criminals." *Id*. However, only a relatively small number of the class members had their misleading credit reports provided to third parties. *Id*.

Plaintiffs are claiming here that Walgreens violated the FCRA and that Plaintiffs are therefore entitled to statutory damages regardless of whether they suffered any concrete injury. The United States Supreme Court, however, determined that the consumers whose misleading credit reports were not disseminated to third parties lacked Article III standing to sue. *Id*. at 438. The Court held that the plaintiffs, without concrete injury, did not satisfy the standing requirements under Article III of the U.S. Constitution since their allegations amounted to a mere "risk of future harm." *Id*. at 435. In addition to the Article III finding, the Court also held that allowing Congress to authorize unharmed plaintiffs to recover statutory damages also violated Article II of the U.S. Constitution for infringing upon Executive authority. *Id*. at 429. Although the Supreme Court did not dismiss the Plaintiffs' claim directly, it remanded the matter for further proceedings consistent with its opinion. *Id.*

The same issues are presented for determination in this case. If the Plaintiffs in *TransUnion*, who had not suffered any concrete injury, lacked Article III standing to sue in that case, then it must be determined by this Court, adhering to the United States Supreme Court's interpretation of the same federal law, that these Plaintiffs, who similarly have not suffered any concrete injury, also lack standing to sue.

II.
Only the Executive Branch has Jurisdiction to Enforce Civil Penalties in Cases without Actual Injury.

Article II of the U.S. Constitution provides that the Executive Branch of the federal government is charged with the responsibility to see that the government's laws are enforced. U.S. Const., Art. II, §3. Accordingly, decisions regarding how to prioritize and how

aggressively to pursue legal actions against defendants who violate the law are vested "solely at the discretion of the Executive Branch and may not be left to the purview of private plaintiffs (and their attorneys.)" *TransUnion* at 429. Irrespective of whether a state or federal court is analyzing and construing federal legislation, it is the legislature that has the authority to prescribe a remedy and the executive to enforce those rights.

It has long been held that the legislature possesses the authority to make laws and to provide remedies, and that the executive possesses the authority to enforce those laws. *Springer v. Government of Philippine Islands*, 277 U.S. 189, 202 (1928). It is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928). Congressional authority was therefore purposefully confined to legislative matters. *Id.*

Inherent in the Executive Branch's authority to enforce laws is the authority to decline such enforcement. *In re Aiken Cnty.*, 725 F.3d 255, 264 (D.C. Cir. 2020). One of the greatest unilateral powers an executive possesses under the Constitution is the power to protect individual liberty by the manner and to the extent to which it enforces federal statutes regulating private behavior; more precisely, by exercising the power to either enforce or not enforce violations of a federal law. *Id.* To allow otherwise would enable the legislature to empower the courts to assume a position of authority over the acts of another, co-equal, branch of government. *Massachusetts v. Mellon*, 262 U.S. 447, 489

(1923). Such permission clearly violates the separation of powers embodied in the Constitution. *Id.*

The requirement that federal legislation not ignore the "concrete injury" requirement has been enshrined in American law since the U.S. Supreme Court's landmark decision, *Lujan v. Defs. Of Wildlife*, 504 U.S. 555 (1992). That court provided:

> If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest … into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," U.S. Const., Art. II, § 3. *Lujan* at 577.

To delegate the Executive Branch's discretionary authority to prosecute statutory violations to plaintiffs, absent any actual injury, is to infringe on one of the Executive's most fundamental sources of authority. See: *Id*.

This long-established principle is threatened by any interpretation of federal law that allows plaintiffs to recover statutory damages without having suffered any concrete injury or any involvement from executive authorities. The proper separation of powers would involve the Executive Branch monitoring and enforcing statutory compliance in instances where individuals experience no actual injury. By allowing uninjured plaintiffs to enforce statutory compliance, Congress would be effectively eliminating the Executive's established right to use its discretionary power to enforce statutes that regulate private behavior in which no actual harm occurs. *Aiken Cnty.* at 264.

Walgreens has the right by itself to invoke separation of powers principles to protect itself from injury. The principle of separation of powers was instituted by the founding

fathers to establish checks and balances between the federal branches of government, however, private individuals are also protected by the separation of powers and intergovernmental checks and balances, and they are not disabled from relying on those principles in otherwise justiciable cases and controversies. *Bond v. United States*, 564 U.S. 211, 223 (2011). "The ultimate purpose of the separation of governmental powers is to protect the liberty and security of those governed." *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). Walgreens likewise seeks to enforce the Executive Branch's authority against judicial overreach as a means of protecting itself against injury stemming from an unconstitutional infringement upon Executive authority.

The Appellate Court erred in its interpretation of *TransUnion* in that regard. The Court, in its decision, cites the relevant portion of the *TransUnion* Article II argument, then states in conclusory fashion that *TransUnion* "is rooted in Article III, not Article II". *Fausett v. Walgreen Company*, 2024 IL App (2d) 230105, ¶ 48. The Appellate Court's only support for such a conclusion is the fact that multiple portions of the *TransUnion* decision include reference to the Article III issue but not the Article II issue. *Id*. This reasoning is dubious on multiple fronts.

First, even if *TransUnion's* Article II conclusions were not essential to dispose of the issues before the Court, Illinois precedent still holds that such conclusions are precedential as judicial dictum. See: *Cates v. Cates*, 156 Ill.2d 66, 80 (1993) (Judicial dictum is "an expression of opinion upon a point in a case argued by counsel and deliberately passed upon by the court, though not essential to the disposition of the cause"). As opposed to

obiter dictum, judicial dictum is entitled to much weight and should be followed unless found to be erroneous. *Id*. With respect to dictum from the U.S. Supreme Court, the Court has been clear that "where a decision rests on two or more grounds, none can be relegated to obiter dictum." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949). To put it succinctly, the fact that the *TransUnion* decision relied primarily on Article III reasoning to reach its conclusion does not make its conclusions as to the scope of Article II any less precedential.

Second, even if the Appellate Court was correct in concluding that *TransUnion* did not necessarily conclude that FACTA constituted a scheme violative of Article II, the proper course of action would have been to analyze the FACTA injury issues in light of the Article II conclusions made in *TransUnion*. Rather than do so, the Appellate Court simply concluded that FACTA "did not constitute such a scheme." *Fausett* at ¶ 48.

Immediately after reaching its conclusion on the Article II issue, the *TransUnion* decision states, "[i]n sum, the concrete-harm requirement is essential to the Constitution's separation of powers." *TransUnion* at 429. Viewed in the context of the previous paragraph's statements regarding the scope of Article II, this language makes clear that any federal statute that allows plaintiffs to recover damages without a showing of actual or concrete injury is an infringement on the Executive Branch's constitutional authority. Therefore, if the Appellate Court wants to hold that FACTA does not allow statutory damages to plaintiffs that lack actual injury, it must provide some reasoning to support that conclusion, which it failed to do in this case.

Finally, the Appellate Court's reasoning is undercut by the fact that *TransUnion's* Article II holding has been cited as precedential by subsequent decisions. In *United States v. Texas*, 143 S.Ct. 1964 (2023) the Court cited *TransUnion* when holding that "the Executive Branch possesses authority to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.'" *Id*. at 678. The fact that this language is subsequently cited and reaffirmed by the U.S. Supreme Court directly contradicts the Appellate Court's contention that *TransUnion* "is rooted in Article III, not Article II." *Fausett* at ¶ 48.

III.
Plaintiffs' Proposed Aggregation of Statutory Damages under FACTA Violates the Due Process Clause.

Statutory damages were never intended to function as a sanction for violating regulatory standards. Such a function removes the Executive Branch's discretionary authority and vests it with plaintiffs' attorneys who have no responsibility to balance the public interest when seeking enforcement. When Congress seeks to create such an arrangement via legislation, such legislation is facially unconstitutional for being violative of Article II.

Statutory damages are usually enacted to encourage use of the courts as a means of private enforcement of consumer protection laws. See: *Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13, 22 (2nd Cir. 2003). Class actions and statutory damages serve a similar function of encouraging litigation in instances where the alleged wrongdoing involves nominal financial harm. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo.L.Rev. 103, 110 (2009).

The distinction between statutory and actual damages can be summarized by saying that statutory damages are reserved for cases in which the damages caused by a violation are small or difficult to ascertain. *Perrone v. General Motors Acceptance Corp.*, 232 F.3d 433, 436 (5th Cir. 2000). By contrast, actual damages may be recovered where they are probably caused by the violation. *Id.* This distinction is central to separation of powers considerations since another purpose of statutory damages is to "encourage private attorneys general to police [statutory] compliance even where no actual damages exist." *Id*.

In the context of FACTA, statutory damages are much more akin to punitive damages and should be treated as such for Due Process considerations under the Excessiveness Doctrine. See: Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo.L.Rev. 103 (2009). Likewise, the fact that statutory damages have been expressly recognized in law does not insulate the imposition of such damages from constitutional scrutiny. See: *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1999).

The Due Process Clause of the Fourteenth Amendment "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). An award is "grossly excessive" if "it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id*. at 417. The U.S. Constitution limits a defendant's liability to "conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id*. at 423. Additionally, the size or wealth of the defendant cannot justify an otherwise excessive award of damages. *Id*. at 427. Following these guideposts, the United States Supreme Court has held that "few

awards exceeding a single-digit ratio between punitive and compensatory damages … will satisfy due process." *Id*. at 425.

Here, Plaintiffs make no allegation that they sustained any actual injury. If FACTA is strictly applied, Defendant could be liable for between $100 and $1000 for every technical violation against a class member, even if no member of the class of Plaintiffs incurred any actual injury. 15 U.S.C. § 1681n(a)(1)(A). Without any actual damages to compare to the statutory damages, such an outcome would guarantee an outrageously excessive award against the Defendant.

IV.
Plaintiffs Who Have Not Suffered Any Concrete Injury Lack Standing to Bring a Claim under the FCRA

Standing doctrine only allows parties to raise issues when they have a real interest in the outcome of the controversy. *Midwest Commercial Funding, LLC v. Kelly*, 217 N.E.3d 985, 989 (Ill. 2023). When a party lacks an interest in controversy, they have no standing to sue. *State ex rel. Leibowitz v. Family Vision Care, LLC*, 2020 IL 124754, ¶ 26.

In Illinois, a plaintiff has standing when he or she has a claimed injury that is (1) distinct and palpable; (2) fairly traceable to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief. *Glisson v. City of Marion*, 188 Ill.2d 211, 221 (1999). Two recent Illinois decisions illustrate how Plaintiff's claims in this case fail to satisfy state standing requirements. First, in *Petta v. Christie Business Holdings Co.*, 2023 IL App (5th) 220742, a defendant physician-owned medical group was the victim of a major data breach that resulted in the possible theft of individuals' "names, addresses, social security numbers, medical information, and health insurance

information." *Id*. at ¶ 3-4. Two aggrieved individuals brought actions alleging violations of the Illinois Consumer Fraud and Deceptive Business Practices Act and common-law negligence. *Id*. at ¶¶ 5-6. The Appellate Court rejected those plaintiff's claims, holding that they were "simply too speculative and not imminent so as to confer standing." *Id*. at ¶ 15.

The *Petta* decision was extensively cited *Maglio v. Advocate Health and Hospital Corp.*, 2015 IL App (2d) 140782, which also involved patients and former patients who brought suit against a healthcare provider following a data breach. *Id*. at ¶ 5. There, the Appellate Court held that the "arguably increased risk [of identity theft] as a result of [the defendant's] data breach" was an insufficient basis on which to confer standing on those plaintiffs." *Id*. at ¶ 26.

In this case, the Plaintiffs have an even weaker argument in favor of their being accorded standing to bring the pending claim. The plaintiffs in *Petta* and *Maglio* had sensitive information disclosed in a data breach instigated by an unauthorized party. Here, Plaintiffs make no allegation that anyone gained unauthorized access to identifying information from their cash cards. Plaintiffs here only allege the bare printing of the last six digits on a receipt and fail to claim any unauthorized access or any injury resulting from the disclosure. These Plaintiffs clearly do not have standing as would permit them to bring claims under the FCRA.

CONCLUSION

The U.S. Supreme Court's decision in *TransUnion* has clearly and definitively determined that the courts do not possess any authority that allows uninjured plaintiffs to recover damages under the FCRA. This Court should consequently embrace the reasoning

and conclusions expressed in *TransUnion* to further judicial consistency and protect the essential safeguards provided by the U.S. Constitution's separation of powers principles. Plaintiffs' claims should also fail for being violative of Illinois standing requirements as well as the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

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CERTIFICATE OF COMPLIANCE

CONNOR FITCH, of BROWN, HAY + STEPHENS, LLP of Springfield, Illinois, one of the attorneys for AMICUS CURIAE, ILLINOIS DEFENSE COUNSEL, hereby certifies that this Brief complies with the length and form requirements of Illinois Supreme Court Rule 341(a)&(b). The length of this Brief, excluding 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 14 pages.

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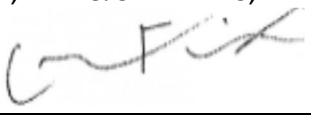
BY: 

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CERTIFICATE OF SERVICE

Now comes Connor Fitch, of Brown, Hay & Stephens, LLP of Springfield, Illinois, and hereby certifies by and pursuant to Illinois Compiled Statutes, Chapter 735, paragraph 5/1-109 (735 ILCS 5/1-109) that he caused to be served upon the following named persons, a copy of **BRIEF OF *AMICUS CURIAE* ILLINOIS DEFENSE COUNSEL**, to which this Certificate is attached, said service being made by email transmission from cfitch@bhslaw.com or mbeatty@bhslaw.com to the following on this 21st day of May 2025, at or before 5:00 p.m.

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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 in this instrument are true and correct.

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