No. 128338

IN THE SUPREME COURT OF ILLINOIS

WILLIAM WALTON, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

ROOSEVELT UNIVERSITY,

Defendant-Appellee.

Appeal from the Illinois Appellate Court, First Judicial District, No. 1-21-0011.
There Heard on Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 2009 CH 04176.
The Honorable Anna H. Demacopoulos Judge Presiding

BRIEF OF *AMICUS CURIAE* ILLINOIS CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT-APPELLEE ROOSEVELT UNIVERSITY

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INTEREST OF AMICUS CURIAE

Amicus Illinois Chamber of Commerce (the "Chamber") is the voice of the business community in Illinois. The Chamber is a statewide organization with more than 1,800 members in virtually every industry, including manufacturing, retail, insurance, construction, and finance. The Chamber advocates on behalf of its members to achieve an optimal business environment that enhances job creation and economic growth. Unions also belong to the Chamber, which has supported and promoted, and continues to support and promote, union-related issues.

As an organization representing both businesses with unionized workforces and unions themselves, the Chamber's interest in this appeal is substantial. Employers with unionized workforces have long recognized that collective bargaining rights flow from federal law. As such, these businesses have worked hard to comply with federal labor law (enforced by the National Labor Relations Board) and to negotiate meaningful collective bargaining agreements (enforced exclusively as a matter of federal law under the Labor Management Relations Act ("LMRA")). This is exactly what the Illinois Appellate Court, First District recognized in the underlying opinion at issue in this appeal.

The First District's holding reflects the reality that it is critical that federal labor law be enforced consistently across state and federal forums for businesses and labor leaders to be able to continue to negotiate and interact effectively and efficiently. Neither side can meaningfully negotiate a collective

bargaining agreement's terms or administer compliance with those terms in an uncertain legal environment. Settled expectations and uniform legal standards are crucial to the development of successful labor-management relationships.

The Chamber has members from both sides of these relationships. As such, it can say with certainty that both unions and the companies that employ unionized labor have a strong interest in the ongoing administration of their collective bargaining agreements, collective bargaining negotiations, and the legal precedent governing labor-management relations. It is critical that the agreements these parties have reached, including the established grievance process, continue to be respected equally in both state and federal courts. The Chamber, therefore, submits this brief in the interest of protecting uniform application of labor law for its members and to prevent the creation of a legal environment that encourages forum shopping.

There is no doubt how federal courts have come down on the issue before the Court in this appeal—there is a uniform body of federal case law from the Seventh Circuit and federal district courts holding that the Labor Management Relations Act preempts Illinois Biometric Information Privacy Act (the "Privacy Act") claims brought by unionized plaintiffs. Here, the First District likewise has appropriately applied this uniform body of federal law to hold Privacy Act claims are preempted under federal labor law. With this appeal, however, Plaintiff-Appellant seeks to undermine this uniformity. If he is

successful, the forum in which Privacy Act plaintiffs choose to pursue their claims will be outcome determinative. Encouraging such forum shopping would not only undermine the uniformity that currently exists between Illinois's state and federal appellate courts, but likewise would create precedent that is inconsistent with the United States Congress's strong policy preference for labor disputes to be resolved in arbitration. Moreover, Plaintiff-Appellant's suggestion that the union was not his legally authorized representative for purposes of the Privacy Act flies in the face of both the language of the LMRA itself and the body of federal law interpreting its provisions. Plaintiff-Appellant's arguments simply cannot withstand scrutiny.

The Chamber's concern and interest in this case is not hypothetical. As this Court well knows, Illinois businesses have endured over 1,000 Privacy Act lawsuits in the last several years. Privacy Act litigation has made its way to this Court as well, with several pending Privacy Act appeals on the Court's docket. The targets of Privacy Act lawsuits run the gamut of Illinois businesses, from large businesses that operate nationwide to smaller businesses that operate in multiple states to local employers, such as community hospitals, family-owned grocery stores, nursing homes and rehabilitation centers, restaurants, food-service companies, hotels, and local retailers. These businesses form the backbone of the Illinois economy and provide essential employment and services to Illinois citizens.

Numerous members of the Chamber have been sued in Privacy Act lawsuits over the last six years. Indeed, at least 23 members of the Chamber have been sued in Privacy Act lawsuits since 2016. This Privacy Act litigation surge continues and shows no signs of slowing down. More than 1,664 Privacy Act lawsuits have been filed in state and federal courts since 2016. Since the start of 2022 alone, no fewer than 269 new Privacy Act lawsuits have been filed. Most of these suits seek millions of dollars on behalf of hundreds, if not thousands, of putative class members alleging technical violations of the Privacy Act associated with the use of routine timekeeping systems that purportedly rely on finger, hand, or face scanners. With liquidated damages of up to $5,000 per violation at issue, these lawsuits have the potential to impose devastating damages on businesses across the state.

In sum, securing the continued consistent application of federal labor law in federal and state courts is important to union and business Chamber members alike. This brief will assist the Court by addressing the implications of Plaintiff-Appellant's position for the Illinois business community and unions, and will highlight why maintaining uniform application of federal labor law in Illinois state courts is crucial for both unions and business with unionized workforces.

INTRODUCTION

The issue before the Court is not, as Plaintiff-Appellant suggests, whether unionized employees have rights under the Illinois Biometric Information Privacy Act ("Privacy Act"), 740 ILCS 14/1, *et seq*. Rather, the

issue is a question of the proper forum to resolve Privacy Act claims when their resolution requires the interpretation or administration of a collective bargaining agreement. There is no dispute among the First District, the Seventh Circuit, or the federal district courts on how this question is answered. Following a uniform body of the Seventh Circuit and federal district court precedent, the First District conclusively and correctly held that "Privacy Act claims asserted by bargaining unit employees covered by a collective bargaining agreement are preempted under federal law." *Walton v. Roosevelt Univ.*, 2022 IL App (1st) 210011, ¶ 27; *see also Fernandez v. Kerry, Inc.*, 14 F.4th 644 (7th Cir. 2021); *Miller v. Southwest Airlines Co.*, 926 F.3d 898 (7th Cir. 2019).[1]

The reasoning of the First District is sound and, like its federal counterparts, shows exactly why Plaintiff-Appellant's arguments fall flat. If a union is the Privacy Act plaintiff's authorized representative, which requires nothing more than the plaintiff being a member of a union, the plaintiff's Privacy Act claims are preempted by the LMRA, 29 U.S.C. § 141 *et seq.*, and

[1] Recently, the Second District also affirmed dismissal of Privacy Act claims brought by unionized plaintiffs because the "defendant properly raised the defense that the Privacy Act claims were preempted" by federal labor law. *Soltysik v. Parsec, Inc.*, 2022 IL App (2d) 200563, ¶ 83. There, the court did not need to tackle the preemption analysis because, unlike here, the Privacy Act plaintiffs conceded that their claims were preempted if the issue were timely raised by the defendant. *Id.* ¶ 76. Thus, while Plaintiff-Appellant has sought review of the First District's decision in *Walton*, there is no real question (even among the plaintiffs' bar) that Privacy Act claims cannot exist independently of a collective bargaining agreement where, as here, a union is the legally authorized representative of the Privacy Act plaintiff.

courts must enforce the grievance and arbitration process in the agreed-upon collective bargaining agreement.

The First District, the Seventh Circuit, and federal district courts have been uniform in analyzing how federal labor law interplays with Privacy Act claims brought by unionized plaintiffs. With his appeal, however, Plaintiff-Appellant seeks to undermine this uniformity and to craft a new approach to federal labor law preemption. The analysis he and his *amici* offer is inconsistent with federal labor law. Under settled law, the only relevant questions considered at the onset of the Privacy Act claim are whether a union is the legally authorized representative of a Privacy Act plaintiff (meaning whether the plaintiff is unionized), and whether timekeeping and related privacy concerns are topics of negotiation that require the interpretation or administration of a collective bargaining agreement.

As the First District recognized, if there is a mere nonfrivolous argument that these questions are answered in the affirmative, the claim is preempted—the Privacy Act claim cannot exist independently of a collective bargaining agreement, the case must be dismissed, and the plaintiff must be referred to the grievance and arbitration process in the collective bargaining agreement. In other words, instead of pursuing a class action in court, the plaintiff must go through the grievance procedures agreed to and negotiated by the union—his legally authorized representative—in the collective bargaining agreement.

Plaintiff-Appellant suggests there must be a reference to timekeeping or biometric privacy rights in the collective bargaining agreement for the union to be considered his "legally authorized representative" for preemption to apply to his Privacy Act claims. This is simply not how federal labor law works. Under the LMRA, "a certified union is each worker's *exclusive* representative on collective issues." *Fernandez*, 14 F.4th at 646 (citing 29 U.S.C. § 159(a)) (emphasis in original). Said differently, "the union is the workers' agent." *Id.* As such, "[i]t is not possible *even in principle* to litigate a dispute about how an employer acquires and uses fingerprint information for its whole workforce without asking whether the union has consented on the employees' collective behalf." *Id*. (quoting *Miller*, 926 F.3d at 904) (emphasis added and brackets omitted). The question of consent under the Privacy Act must be reserved for arbitration. Plaintiff-Appellant's arguments are simply misguided.

Just as the First District concluded, a broadly worded management-rights clause, like the one at issue here, is more than sufficient to conclude there is a nonfrivolous argument that a unionized plaintiff's Privacy Act claims are preempted. Despite Plaintiff-Appellant's arguments regarding the purported scope of the management-rights clause and the terms of the agreement at issue, courts—whether state or federal—are prohibited from attempting to interpret the parties' collective bargaining agreement and history on their own accord to determine whether preemption applies. This includes the scope of a management-rights clause. What Plaintiff-Appellant is

arguing is a flaw in the First District's analysis is, in fact, the only permitted analysis at this stage.

As the First District and the Seventh Circuit before it correctly explained, under binding U.S. Supreme Court precedent, what the union agreed to, what the employer said, and the meaning and scope of the terms of a collective bargaining agreement are all questions that *must be saved for the arbitrator*. Put simply, "it is for an arbitrator[ ]to decide whether the employer properly obtained the union's consent." *Id.* Plaintiff-Appellant is free to make his arguments about the scope of the management-rights clause and the terms of the collective bargaining agreement in bringing his Privacy Act claims. He is just making them in the wrong forum. He, like all members of his union, is bound by the agreed-upon terms of the governing collective bargaining agreement and the grievance procedures outlined therein.

With this appeal, Plaintiff-Appellant seeks to dismantle a uniform body of law that currently exists between Illinois state and federal appellate courts concerning the interplay between Privacy Act claims and federal labor law. Instead, he hopes to create a legal landscape in which the forum in which a Privacy Act plaintiff files his claim is outcome determinative. Such an outcome undermines the very purpose of federal labor law, as well as this Court's precedent on how Illinois state courts should approach questions of federal law when there is uniformity in federal courts.

Whether looking to binding U.S. Supreme Court precedent, the First District's well-reasoned opinion, or the "highly persuasive" Seventh Circuit and federal district court cases on which the First District relied, *State Bank of Cherry v. CGB Enters.*, 2013 IL 113836, ¶ 25, the outcome of this appeal is clear. The Court should affirm the First District opinion in *Walton v. Roosevelt University*. Affirming is not only the right legal outcome, but is also essential to ensure the uniform application of federal labor law across Illinois state and federal courts. How federal labor law is applied should not depend on whether a Privacy Act plaintiff elects to file suit in state or federal court. Any result to the contrary would lead to disarray and confusion, as well as undermine the foundation of union-employer relationships. The Court should affirm.

ARGUMENT

I. Federal labor law exists to ensure uniformity in labor-management relations and has a strong preference for arbitration.

In direct response to years of labor-management strife, the LMRA and its predecessor, the National Labor Relations Act ("NLRA"), were enacted with a singular goal in mind: "to promote industrial peace." *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). Collective bargaining agreements are the core product of labor-management negotiations that ensure this peace. But they are only effective when the law governing them is uniform. This is why, as explained below, Congress elected to set forth a clear policy preference for arbitration of labor disputes and to craft a federal labor law scheme that preempts conflicting state law.

A. The collective bargaining agreement and its dispute-resolution procedures are "the keystone" to labor-management relations.

As the U.S. Supreme Court has explained, the collective bargaining agreement is "the keystone of the federal scheme to promote industrial peace." *Lucas Flour*, 395 U.S. at 104. If individual terms of a collective bargaining agreement could be given "different meanings under state and federal law," it would "inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Id.* at 103. Without uniformity and predictability in the law, all labor-management negotiations and the agreements they produce are at risk. If state and federal courts could freely apply different laws to the same agreement, neither labor nor management "could be certain of the rights which it had obtained or conceded" in their agreement. *Id.* The "possibility of conflicting substantive interpretation under competing legal systems," in turn, "would tend to stimulate and prolong disputes as to its interpretation" and run contrary to the policy goals Congress had in mind when it enacted the LMRA. *Id.* at 104.

Similarly, if state courts were unrestricted and could apply the law to collective bargaining agreements differently than federal courts, "the process of negotiating an agreement would be made immeasurably more difficult" because both parties would need to craft terms that "contain the same meaning under two or more systems of law." *Id.* at 103. This possibility of "conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes"

and would also fly in the face of Congress' intent in enacting the LMRA. *Id.* at 104.

Congress also made a clear choice of arbitration as the preferred forum to resolve labor-management disputes. *See id.* at 105 ("[T]he basic policy of national labor legislation [is] to promote the arbitral process as a substitute for economic warfare."); *see also United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960) ("[F]ederal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement."). As the U.S. Supreme Court directly put it in *United Steelworkers*, "arbitration is the substitute for industrial strife." *United Steelworkers*, 363 U.S. at 578. Indeed, "arbitration is part and parcel of the collective bargaining process itself." *Id.* ("Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here.").

These policy goals are not just mere aspirations; they are rooted in lived experience. Stability and predictability matter in labor law, arguably more so than many areas of law. The United States and Illinois have a long history of labor disputes, and a governing body of federal labor law allows both businesses and labor organizers to effectively negotiate. Unions are the exclusive bargaining agent in labor-management relations, and employers

must be able to rely on that fact to effectively negotiate with them. Likewise, unions' ability to serve as the exclusive representative of their members should be respected—state laws cannot undermine "the union's choices on behalf of the workers." *Miller*, 926 F.3d at 904. The proper role of collective bargaining must continue to be respected in *all* courts, not just federal ones.

When federal labor law is properly enforced, just as the First District recognized here, unions and businesses alike know what to expect, in what forum (*i.e.*, arbitration) disputes will be resolved, and how questions of preempted state law will be handled. Unlike typical contract negotiations where the parties are merely determining whether to enter a relationship, the choice involved in a collective bargaining agreement "is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces." *United Steelworkers*, 363 U.S. at 580. Once that choice has been made through labor-management negotiations, it is the clear directive from Congress and the U.S. Supreme Court that it must be respected and enforced.

B. To promote "industrial peace," the preemptive effect of the LMRA is well established.

Section 301 of the LMRA grants federal courts jurisdiction over disputes concerning collective bargaining agreements. *See* 29 U.S.C. § 185(a). Specifically, § 301 provides: "Suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought

in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." *Id.* A robust body of case law has developed interpreting the scope of § 301 and its preemptive effect.

The U.S. Supreme Court first analyzed the preemptive effect of § 301 in *Teamsters v. Lucas Flour Co.* In *Lucas Flour*, the Court explained that the "dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute," and "issues raised in suits of a kind covered by § 301 [are] to be decided according to the precepts of federal labor policy." *Lucas Flour*, 369 U.S. at 103. The Court thus concluded that through § 301, "Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Id.* at 104. The Court also emphasized the importance of determining terms of collective bargaining agreements by federal law, explaining that "the subject matter of [section] 301(a) 'is peculiarly one that calls for uniform law.'" *Id.* at 103 (quoting *Pa. R. Co. v. Pub. Serv. Comm.*, 250 U.S. 566, 569 (1919)).

Lucas Flour involved a state court improperly applying state law to an alleged violation of a collective bargaining agreement. But its import and application do not end there. As the U.S. Supreme Court explained twenty years later, to give "the policies that animate § 301 . . . their proper range, . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219 (1985). The

LMRA "require[s] that the relationships created by a collective-bargaining agreement be defined by the application of an evolving federal common law grounded in national labor policy." *Id.* at 211 (citations, brackets, and internal quotation marks omitted).

Thus, in the interest of "uniformity and predictability," *Lueck* held that any "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, *must* be resolved by reference to uniform federal law." *Id.* (emphasis added). The U.S. Supreme Court emphasized that uniform federal labor law applies regardless of "whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort." *Id.* To hold otherwise, *Lueck* continued, "would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law." *Id.* (quoting *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962)). In short, "principles of federal labor law must be paramount in the area covered by [the LMRA]." *Lingle v. Norgle Div. of Magic Chef, Inc.*, 486 U.S. 399, 404 (1988).

Indeed, in recognizing that state courts could retain jurisdiction to address cases subject to the LMRA despite the language of § 301, the U.S. Supreme Court "proceeded upon the hypothesis that the state courts would apply federal law in exercising jurisdiction over litigation within the purview of § 301(a)." *Lucas Flour*, 369 U.S. at 102 (discussing premise upon which the

Court reached its holding in *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), that § 301 of the LMRA did not deprive state courts of jurisdiction). Put simply, where there are inconsistencies between state and federal law, "incompatible doctrines of local law must give way to principles of federal labor law." *Id.*

To determine whether the substance of a state-law claim is preempted under § 301, the U.S. Supreme Court has set forth the following test: "when resolution of a state-law claim is substantially dependent upon analysis of the terms of the agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, or dismissed as pre-empted by federal labor-contract law." *Lueck*, 471 U.S. at 220 (citation omitted). Time and again, the U.S. Supreme Court has applied this same test. *See, e.g.*, *Lingle*, 486 U.S. at 413 (A state-law claim is preempted if it "requires the interpretation of a collective-bargaining agreement."); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987) (Preemption applies to "claims substantially dependent on analysis of a collective-bargaining agreement.").

So too has the Seventh Circuit. *See, e.g.*, *Miller*, 926 F.3d at 904 ("[I]f a dispute necessarily entails the interpretation or administration of a collective bargaining agreement . . . state law is preempted to the extent that a state has tried to overrule the union's choices on behalf of the workers."); *Healy v. Metro. Pier & Exposition Authority*, 804 F.3d 836, 842 (7th Cir. 2015) (Where a state-law claim "requires interpretation of the collective bargaining agreement,

§ 301 preempts the claim and converts it into a § 301 claim."); *Crosby v. Cooper B-Line, Inc.*, 725 F.3d 795, 797 (7th Cir. 2013) (§ 301 preemption "covers not only obvious disputes over labor contracts, but also any claim masquerading as a state-law claim that nevertheless is deemed really to be a claim under a labor contract.").

Illinois courts also routinely have applied this test, as well as the reasoning of the U.S. Supreme Court, when adjudicating disputes that are subject to the LMRA. *See, e.g.*, *Gelb v. Air Con Refrigeration & Heating, Inc.*, 356 Ill. App. 3d 686, 692 (2005) ("In general, where a collective bargaining agreement exists between employers and employees who are parties to litigation, their disputes fall within the exclusive purview of federal labor laws, not state laws, in order to ensure uniform interpretation of collective bargaining agreements." (citations omitted)).

As the First District correctly held in *Walton*, "[f]or preemption to apply, the employer need only advance a nonfrivolous argument that the complained-of conduct was authorized by the collective bargaining agreement, like in a management-rights clause." *Walton*, 2022 IL App (1st) 210011, ¶ 17 (citing *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1179 (7th Cir. 1993)); *see also Fernandez*, 14 F.4th at 646 ("In *Miller* the employers plausibly contended that the unions had consented. We held that this is enough to prevent suits by individual workers."). If the employer can satisfy this very low standard, the claim cannot be resolved without interpretation of the agreement

and is preempted—the plaintiff must then follow the grievance procedures forth in the collective bargaining agreement. *See Brotherhood of Locomotive Eng'rs & Trainmen v. Union Pac. R.R. Co.*, 879 F.3d 754, 758 (7th Cir. 2017) ("If the [employer] can articulate an argument that is 'neither obviously insubstantial or frivolous, nor made in bad faith,' the court lacks jurisdiction to do anything but dismiss the case and allow arbitration to go forward.").

With this consistency, Congress's intent to foster uniformity in labor law has remained central: "§ 301 mandated resort to federal rules of law in order to ensure uniform interpretation of collective-bargaining agreements" because uniformity "promote[s] the peaceable, consistent resolution of labor-management disputes." *Lingle*, 486 U.S. at 403–04 (discussing holding of *Lucas Flour*); *see also Walton*, 2022 IL App (1st) 210011, ¶ 16 ("[W]here a collective bargaining agreement exists between employers and employees who are parties to litigation, their disputes fall within the exclusive purview of federal labor laws, not state laws, in order *to ensure uniform interpretation of collective bargaining agreements*." (citing *Gelb*, 356 Ill. App. 3d at 692) (emphasis added)).

Likewise reinforced by these uniform federal and state decisions is Congress's strong preference for arbitration of labor disputes: "[t]he need to preserve the effectiveness of arbitration was one of the central reasons that underlay the Court's holding [regarding preemption] in *Lucas Flour*." *Lueck*, 471 U.S. at 219. If it were otherwise, "[a] rule that permitted an individual to

sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, as well as eviscerate a central tenet of federal labor contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract *in the first instance*." *Id.* at 220 (citation omitted and emphasis added). This, the U.S. Supreme Court noted, is "[p]erhaps the *most harmful* aspect" of a state court decision that "would allow essentially the same suit to be brought directly in state court without first exhausting the grievance procedures established in the bargaining agreement." *Id.* at 219 (emphasis added).

Illinois and federal law on LMRA preemption is clear. Uniformity is a foundational tenet of federal labor law, and neither state nor federal courts may supplant the arbitration process created for and negotiated by the unions.

II. The First District correctly deferred to the uniform body of federal law holding Privacy Act claims brought by unionized plaintiffs are preempted by federal labor law.

In holding that Plaintiff-Appellant's Privacy Act claims were preempted, the First District recognized that an extensive, uniform body of federal case law directly on point already existed. The court thus properly relied heavily on the Seventh Circuit decisions in *Miller* and *Fernandez* that preceded it, as well as the "more than a dozen" federal district court decisions that have addressed the issue. *Walton*, 2022 IL App (1st) 210011, ¶ 24. The court correctly found "the reasoning expressed by the federal courts to be sound, and [it] decline[d] to find that all of the federal decisions are wrongly decided and without reason or logic." *Id.*

This Court has repeatedly recognized that Illinois courts should defer to federal courts on interpretation of federal statutes, particularly on settled issues of federal preemption. Not only are Illinois courts to give deference to federal decisions, but this Court has held that opinions from the U.S. Supreme Court on questions of federal law, which include settled questions of federal labor law and the scope of § 301 preemption, are binding on all Illinois courts. *E.g.*, *Bowman v. Am. River Transp. Co.*, 217 Ill. 2d 75, 91 (2005). As this Court has stated, "it is well settled that uniformity of decision is an important consideration when state courts interpret federal statutes, [and the Court] will give 'considerable weight' to the decisions of federal courts that have addressed preemption." *Carter v. SSC Odin Operating Co.*, 237 Ill. 2d 30, 40 (2010) (quoting *Sprietsma v. Mercury Marine*, 197 Ill. 2d 112, 120 (2001), *reversed on other grounds by* 537 U.S. 51 (2002)).

This makes sense. Particularly where uniformity is a goal of a federal statute, there should be uniformity in state courts applying federal law. As this Court explained in *State Bank of Cherry*, "uniformity of the law continues to be an important factor in deciding how much deference to afford federal court interpretations of federal law." *State Bank of Cherry*, 2013 IL 113836, ¶ 35. To hold otherwise would only encourage forum shopping and create uncertainty for litigants facing an otherwise uniform body of law. Put simply, whether a plaintiff files in state or federal court should not dictate how federal law is applied. Thus, "[b]ecause [this Court] find[s] the goal of developing a uniform

body of law to be important, [Illinois courts] must accord more deference to federal court interpretations when those interpretations are unanimous." *Id.* ¶ 54.

The deference Illinois state courts have given to federal courts in the interpretation of federal law has remained steadfast. This Court "has *consistently* recognized the importance of maintaining a uniform body of law in interpreting federal statutes if the federal courts are not split on an issue." *State Bank of Cherry*, 2013 IL 113836, ¶ 34 (emphasis added). The Court has thus deferred to the holdings of federal courts when it comes to interpreting a variety of federal statutes involving both criminal and civil law. *See, e.g.*, *id.* (federal Food Security Act of 1985); *Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 21 (2011) (Federal Arbitration Act); *People v. Williams*, 235 Ill. 2d 178, 187 (2009) (federal Copyright Act of 1976); *City of Chicago v. Comcast Cable Holdings, L.L.C.*, 231 Ill. 2d 399, 414 (2008) (federal Cable Communications Policy Act of 1984); *U.S. Bank Nat'l Ass'n v. Clark*, 216 Ill. 2d 334, 352 (2005) (federal Depository Institutions Deregulation and Monetary Control Act of 1980); *Sprietsma*, 197 Ill. 2d at 120 (Federal Boat Safety Act of 1971).

In each of these cases, the driving force was ensuring consistent application of the law—state courts defer to federal courts on questions of federal law because it is "in the interest of a *uniform body of precedent*." *Williams*, 235 Ill. 2d at 187 (emphasis added).

In this matter, the First District recognized this Court's precedent regarding the weight to be given to a uniform body of federal law in *State Bank of Cherry* and its well-reasoned basis:

> When an Illinois court interprets a federal statute like the Labor Management Relations Act (29 U.S.C. § 141 *et seq.*), we give "considerable weight" to the decisions of federal courts that have addressed the issue. (Emphasis omitted.) *State Bank of Cherry,* 2013 IL 113836, ¶¶ 33, 35. Our supreme court has consistently recognized the importance of maintaining a uniform interpretation of federal statutes and has instructed that when, federal decisions interpreting federal statutes are uniform, we should usually follow course. *Id.* ¶ 34. When an issue of interpreting a federal statute has been uniformly decided in federal court and the identical factual and legal issue is raised in this court, we will follow the federal courts' decisions unless we find them to be "wrongly decided." (Internal quotation marks omitted.) *Id.* ¶ 47.

Walton, 2022 IL App (1st) 210011, ¶ 23.

In sum, where "the lower federal courts are uniform on their interpretation of a federal statute, [Illinois courts], in the interest of preserving unity, will give *considerable weight* to those courts' interpretations of federal law and find them to be *highly persuasive*." *State Bank of Cherry*, 2013 IL 113836, ¶ 35 (second emphasis added) (citing *Carter*, 237 Ill. 2d at 40). Moreover, this Court has directed Illinois courts that they "may afford a Seventh Circuit decision more persuasive value than [they] would the decisions of other federal courts." *Id.* ¶ 53. As the First District recognized, this case has both—a uniform body of federal law from federal district courts and multiple Seventh Circuit decisions directly on point.

III. Federal and Illinois appellate law on LMRA preemption of Privacy Act claims is well settled and completely uniform.

Applying binding U.S. Supreme Court precedent on federal labor law preemption, the First District, the Seventh Circuit, and federal district courts have uniformly held that federal labor law preempts Privacy Act claims brought by unionized plaintiffs. *Walton*, 2022 IL App (1st) 210011, ¶ 27; *Fernandez*, 14 F.4th at 646–47; *Miller*, 926 F.3d at 903–04. As outlined below and correctly set forth by the First District, the test for preemption in the Privacy Act context is simple. Where the union is the authorized representative of the Privacy Act plaintiff (*i.e.*, the plaintiff is part of a union), and where timekeeping is a topic of negotiation that requires the interpretation or administration of a collective bargaining agreement, resolution of the Privacy Act claim requires interpretation of the collective bargaining agreement.

Because both questions are answered in the affirmative here, the First District correctly concluded that Plaintiff-Appellant was bound by the grievance procedures set forth in the operative collective-bargaining agreement and his Privacy Act claims were preempted. Plaintiff-Appellant's arguments to the contrary would usurp the role of unions, destabilize collective bargaining, and upend settled law.

A. A union is the legally authorized representative of a unionized Privacy Act plaintiff.

First, the threshold question is whether the Privacy Act plaintiff is unionized, which is to say whether the union is the plaintiff's legally authorized representative under the Privacy Act. *E.g.*, *Walton*, 2022 IL App (1st) 210011,

¶ 20; *Fernandez*, 14 F.4th at 646; *Miller*, 926 F.3d at 903. There is normally no question on this point, and there should be no question here, given that it is undisputed that Plaintiff-Appellant was in fact a union member. Despite this, Plaintiff-Appellant argues the union was *not* his authorized representative for purposes of the Privacy Act. This position is outlandish, and was rejected by the Seventh Circuit in *Fernandez* and *Miller*. The Court therefore should follow that uniform federal law. *State Bank of Cherry*, 2013 IL 113836, ¶ 34.

Furthermore, such an argument is contradicted by uniform federal law, by the text of the LMRA and the Privacy Act itself. The LMRA provides that union representatives "shall be the *exclusive representatives* of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." 29 U.S.C. § 159(a) (emphasis added). Indeed, as the First District noted, the collective-bargaining agreement at issue in this appeal "makes the union the sole and exclusive bargaining agent for the employees in the union," and Plaintiff-Appellant "and any other similarly situated employees agreed to their employment being covered by the subject collective bargaining agreement." *Walton*, 2022 IL App (1st) 210011, ¶ 21.

The Privacy Act did not seek to undermine this relationship. Rather, it expressly provides that an individual's "legally authorized representative" may receive notice and give consent to the collection, use, and storage of an individual's biometric data. 740 ILCS 14/15(b). Taken together, the First

District correctly recognized that "[u]nder the Privacy Act, it is clearly within the union's purview to negotiate with the employer about its members' biometric information." *Walton*, 2022 IL App (1st) 210011, ¶ 20. The Seventh Circuit and federal district courts are in accord.

In holding federal labor law preempts Privacy Act claims, the Seventh Circuit expressly "reject[ed] plaintiffs' contention that a union is not a 'legally authorized representative' for [Privacy Act purposes]." *Miller*, 926 F.3d at 903; *see also Fernandez*, 14 F.4th at 646 ("If labor and management want to bargain collectively about particular working conditions, they are free to do so. Workers cannot insist that management bypass the union and deal with them directly about these subjects. After all, the [LMRA] says that a certified union is each worker's *exclusive* representative on collective issues." (citing 29 U.S.C. § 159(a)) (emphasis in original)). Thus, "instead of *excluding* a union from acting on its members' behalf with respect to their privacy rights under [the Privacy Act], [the Act] *explicitly allows* 'an authorized agent' to receive notices and consent to the collection of biometric information." *Peatry v. Bimbo Bakeries USA, Inc.*, No. 19 C 2942, 2020 WL 919202, at *4 (N.D. Ill. Feb. 26, 2020) (emphasis added); *see also Gray v. Univ. of Chi. Med. Ctr., Inc.*, No. 19-cv-04229, 2020 WL 1445608, at *4 (N.D. Ill. Mar. 26, 2020) ("The [u]nion had a collective bargaining agreement with [the employer], and the union was the 'legally authorized representative' of Plaintiff for [Privacy Act] purposes.").

Common sense, plain meaning, and established agency and labor law strongly suggest that a union can be a person's legally authorized representative for Privacy Act purposes. What Plaintiff-Appellant is arguing regarding the scope of the union's authorization as his representative makes no sense. The Privacy Act contemplates a legally authorized representative for notice and consent purposes, and the LMRA contemplates that representative is *exclusively* the union for unionized employees. Plaintiff-Appellant's argument undermines the role of the union and should be rejected outright.

B. Timekeeping is a topic of labor-management negotiations.

Second, the First District properly asked whether timekeeping is a topic of negotiation that requires the interpretation or administration of a collective bargaining agreement. *Walton*, 2022 IL App (1st) 210011, ¶ 21. Like the Seventh Circuit before it, the First District was unmistakably clear and correct in answering this question in the affirmative: "The timekeeping procedures for workers are a topic for negotiation that is clearly covered by the collective bargaining agreement and requires the interpretation or administration of the agreement." *Id.*; *accord*, *e.g.*, *Miller*, 926 F.3d at 903 ("[T]here can be no doubt that how workers clock in and out is a proper subject of negotiation between unions and employers.").

Plaintiff-Appellant suggests both the First District and Seventh Circuit missed the mark in their analysis because a Section 15(b) claim is not about timekeeping per se, but the employer's purported failure to obtain an employee's consent. This argument was directly addressed and rejected by the

First District, as well as the Seventh Circuit before it. As the First District explained in rejecting Plaintiff-Appellant's proposition, "[i]t is impossible to consider whether [Plaintiff-Appellant] and his similarly situated fellow employees have a claim under the Privacy Act without first determining whether their union consented on their behalf, which the Act permits the union to do and which the members arguably empower the union to do on their behalf." *Walton*, 2022 IL App (1st) 210011, ¶ 21; *accord Miller*, 926 F.3d at 903 (The union "may receive necessary notices and consent to the collection of [its members'] biometric information" as governed by Section 15(b).).

Moreover, as the First District concluded, the scope of preemption does not end with Section 15(b). Questions of "retention and destruction schedules" governed by Section 15(a) and questions of "third parties implementing timekeeping and identification systems" under Section 15(d) are also "topics for bargaining between unions and management." *Miller*, 926 F.3d at 903; *see also* 740 ILCS 14/15(a); *id.* § 15(d).

In a rather brief analysis, Plaintiff-Appellant suggests Privacy Act claims brought under Section 15(a) are not preempted because data retention and destruction policies implicate a duty owed to the public generally. This argument has been repeatedly rejected. As the Seventh Circuit recognized in *Miller*, "the retention and destruction schedules for biometric data . . . are topics for bargaining between unions and management." *Miller*, 926 F.3d at 903. Federal district courts are in accord. *See, e.g.*, *Hicks v. Evergreen Living*

& Rehab Ctr., LLC, No. 20-CV-04032, 2021 WL 4440315, at *4 (N.D. Ill. Mar. 8, 2021) ("Of course, [the Privacy Act plaintiff's] claim regarding retention and destruction schedules concerns a term of her employment."), *reconsideration denied,* No. 20-CV-04032, 2021 WL 4440316 (N.D. Ill. Aug. 16, 2021). Plaintiff-Appellant cites no federal authority for his position to the contrary, because none exists. Put simply, as the First District, Seventh Circuit, and federal district courts have repeatedly and uniformly explained, because the whole of the Privacy Act implicates privacy interests and rights that are common to all employees, "[i]t is not possible *even in principle* to litigate a dispute about how an [employer] acquires and uses fingerprint information for its whole workforce without asking whether the union has consented on the employees' collective behalf." *Fernandez*, 14 F.4th at 646 (quoting *Miller*, 925 F.3d at 904) (emphasis added).

In sum, the *only* meaningful issues when it comes to assessing preemption of Privacy Act claims are (1) whether the union is the plaintiff's authorized representative (which requires only that the plaintiff hold a unionized position) and (2) whether the dispute concerns a topic of negotiation that requires the interpretation or administration of a collective bargaining agreement. Both questions have been—and should continue to be—uniformly answered in the affirmative by Illinois appellate and federal courts.

C. The employer need only offer a nonfrivolous argument that preemption applies.

As the First District correctly held, the employer need offer only a nonfrivolous argument that the union is the plaintiff's authorized representative and that the agreement covers timekeeping and related privacy concerns. *Walton*, 2022 IL App (1st) 210011, ¶¶ 17, 25; *see also Brazinski*, 6 F.3d at 1179; *Union Pac.*, 879 F.3d at 758. This bar is "quite low," *Union Pac.*, 879 F.3d at 758, and reference to a broad management-rights clause alone uniformly has been held sufficient by both the First District, Seventh Circuit, and federal district courts. *See Walton*, 2022 IL App (1st) 210011, ¶ 21; *Fernandez*, 14 F.4th at 646–47; *Miller*, 926 F.3d at 903–04.

On appeal, just as he did before the First District, Plaintiff-Appellant argues specific reference to biometrics and a deeper analysis of the collective bargaining agreement is required for a "nonfrivolous" argument for preemption to exist. He is advocating for the exact mistake some Illinois circuit courts have made and the First District rejected. *Walton*, 2022 IL App (1st) 210011, ¶¶ 21–22. For example, the circuit court in this case scoured the *entire* collective bargaining agreement "to see" if a "clear and unmistakable" provision exists that the union explicitly waived its members' rights under the Privacy Act. *Walton v. Roosevelt Univ.*, No. 19 CH 04176 (Cir. Ct. Cook Cty. May 5, 2020) (SR148), at 7.

However, as the First District correctly explained, "[c]ollective bargaining agreements may include express and implied terms, and it is up to

an arbitrator, not a state court, to define the scope of the parties' agreement." *Walton*, 2022 IL App (1st) 210011, ¶ 22 (citing *Fernandez*, 14 F.4th 646–47; *In re Amoco Petro. Additives Co.*, 964 F.2d 706, 710 (7th Cir. 1992)). Simply put, "[w]hether it is ultimately true that [Plaintiff-Appellant's] union, in fact, consented to the procedures at issue here either expressly or implicitly is not for us to determine at this stage"—rather, it "is reserved for arbitration or other bargained-for grievance procedures under the [LMRA]." *Id.* ¶ 25 (citing *Fernandez*, 14 F.4th at 646); *see also Miller*, 926 F.3d at 904 (explaining that evidence of what an employer told the union and what the union agreed to is "*properly* not in [a trial court or appellate] record," and should not be considered by any court as part of the preemption analysis).

Plaintiff-Appellant's attempt to analyze those issues before this Court as a threshold question as to whether the union was his authorized representative and whether preemption applies in the first instance is wholly inappropriate and contrary to federal labor law. Any adoption of Plaintiff-Appellant's argument would undermine the U.S. Supreme Court's binding holding that "interpretation of collective-bargaining agreements remains firmly in the arbitral realm." *Lingle*, 468 U.S. at 411; *see also Lueck*, 471 U.S. at 219–20 (Courts must strive to "preserve the effectiveness of arbitration" when it comes assessing questions of LMRA preemption to avoid an outcome that could "eviscerate a central tenet of federal labor contract law.").

Notably, this analysis is not unique to Privacy Act claims. For instance, in *Matter of Amoco Petroleum Additives Co.,* 964 F.2d 706, 709–10 (7th Cir. 1992), union-represented employees alleged that their employer invaded their privacy by installing a video camera on the hallway ceiling outside the women's locker room. The camera enabled the employer to record who entered and exited the locker room, but not anything happening inside. *Id.* at 707. The Seventh Circuit found that the state law privacy claims were preempted by the LMRA. This was true regardless of whether the collective bargaining agreement at issue expressly mentioned video cameras. Because "privacy in the workplace" is an "ordinary subject of bargaining" and "[t]he extent of privacy is a 'condition' of employment," the Seventh Circuit held that a "court could not award damages without first construing the collective bargaining agreement and rejecting [the employer's] interpretation of the management-rights clause." *Id.* at 710. Thus, the claims were preempted and subject to mandatory arbitration. *Id.*

Privacy Act cases involving unionized employees, such as this one, are like *Amoco* for at least two reasons. First, Privacy Act claims complain about a condition of employment, *i.e.*, the manner in which an employee records his or her work time, a core subject of collective bargaining. *See Miller*, 962 F.3d at 903. Second, the claims also focus on the extent of privacy in the workplace, another ordinary condition of employment. *See Amoco,* 964 F.2d at 709.

Plaintiff-Appellant attempts to distinguish *Amoco* by suggesting his case is not about the use of timekeeping but the employer's purported failure to obtain consent. He repeatedly emphasizes that he is not contesting the employer's ability to install timekeeping but raising a factual question as to whether it obtained informed consent to do so.

Plaintiff-Appellant is missing the point. Where, as here, unions and employers "have agreed that a neutral arbitrator will be responsible, in the first instance, for interpreting the meaning of their contract," that choice must be respected. *Lueck*, 471 U.S. at 219. If it were not so, "their federal right to decide who is to resolve contract disputes will be lost." *Id.*; *see also, e.g.*, *Union Pac.*, 879 F.3d at 759 ("Wading through the competing declarations to determine the actual authority the [employer] had to modify the disciplinary policies, based on past practices, is a job for the arbitrator.")

Accordingly, as the First District recognized, the question of whether Roosevelt University obtained consent is *exactly* what needs to be sent to the arbitrator to resolve. *See Walton*, 2022 IL App (1st) 210011, ¶ 25; *Fernandez*, 14 F.4th at 645–46; *Miller*, 926 F.3d at 903. Plaintiff-Appellant has the right to make his arguments about the purported lack of consent—but he is doing so in the incorrect forum. He must go through the agreed-upon grievance process in the collective bargaining agreement.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below and maintain uniformity in the application of federal labor law to Privacy Act claims brought by unionized plaintiffs. To hold otherwise would undermine the uniform application of federal labor law and the very character of a union. Indeed, reversal would lead to the exact circumstance the U.S. Supreme Court highlighted in *Lucas Flour*—the law would be unpredictable; neither unions nor employers would know how to engage properly in negotiations concerning timekeeping procedures and privacy in the workplace; and the role of the union as the employee's legally authorized representative would be undermined. Whether a unionized Privacy Act plaintiff files suit in state or federal court should not dictate whether his claims are preempted under federal labor law. As the First District, the Seventh Circuit, and federal district courts have uniformly held, Privacy Act claims brought by unionized plaintiffs are preempted, and unionized plaintiffs must follow the agreed upon grievance process to adjudicate their claims.

Dated: November 16, 2022

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 pages or 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 33 pages.

Dated: November 16, 2022 */s/ Matthew C. Wolfe*