No. 129783

IN THE SUPREME COURT OF ILLINOIS

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

Plaintiff-Appellee,

v.

WALGREEN CO.,

Defendant-Appellant.

Appeal from the Illinois Appellate Court, Second Judicial District, No. 2-23-0105.
There Heard on Appeal from the Nineteenth Judicial Circuit Court, Lake County, Illinois, No. 19 CH 675, the Honorable Donna-Jo Vorderstrasse, Judge Presiding

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE ILLINOIS CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT-APPELLANT WALGREEN CO.

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INTEREST OF AMICI CURIAE

Amici the Chamber of Commerce of the United States of America (U.S. Chamber) and the Illinois Chamber of Commerce (Illinois Chamber) are the voice of the business community in Illinois and across the country.

The U.S. Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community. These include briefs regarding the longstanding requirement that a plaintiff must allege an injury in fact to have standing to bring a claim, particularly when seeking to represent a class of individuals who also have not sustained any actual injury from the alleged misconduct.

The Illinois Chamber has more than 1,800 members in virtually every industry. It advocates on behalf of its members to achieve an optimal business environment that enhances job creation and economic growth. It also regularly files *amicus curiae* briefs in cases before this Court that, like this one, raise issues of importance to the State's business community. The Court has acknowledged the value of the Chamber's perspective in explaining

the impact of rulings on the Illinois business community by granting the Chamber leave to file *amicus* briefs in many other cases.

Amici have a strong interest in this case because it speaks to the foundational injury-in-fact requirement for standing to file a claim against a company doing business in this State. Under the lower court's ruling, companies based in Illinois could be haled into the State's courts for high-dollar, high-stakes class actions by plaintiffs around the country, even though those plaintiffs have not sustained—or even articulated—any injury and, for that reason, could not bring their suits in federal court, or the courts of many other states, including their home states. The prospect of creating such specious, national liability in Illinois against Illinois businesses is of great concern to both the Illinois and national business communities.

INTRODUCTION

This case presents the Court with an important opportunity to reaffirm longstanding Illinois law that, regardless of the cause of action, a plaintiff must have a "distinct and palpable" injury in fact to file a lawsuit in the State's courts. *See Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 492-93 (1988). In the past decade, some Illinois courts have strayed from this jurisprudence; they have allowed plaintiffs to maintain lawsuits based solely on alleged violations of statutes, even when the plaintiffs have not sustained injuries from those violations. In doing so, they have misinterpreted this Court's decision in *Rosenbach v. Six Flags Entertainment* Corp., 2019 IL 123186, as eliminating this injury requirement for statutes with private

rights of action. *Rosenbach* did not have such a broad reach. In *Rosenbach*, the Court interpreted specific statutory terms in the state's Biometric Information Privacy Act; it did not reverse—or even discuss—the State's standing jurisprudence. Injury in fact remains a foundational requirement for standing.

Here, an Arizona Plaintiff alleges Walgreens violated the Federal Fair and Accurate Credit Transaction Act (FACTA), which prohibits the printing of more than the last five digits of the credit card number on a receipt. *See* 15 U.S.C. § 1681c(g)(1). Plaintiff alleges Walgreens printed the first six digits of a pre-paid card along with the last four digits on the receipt of a transaction in her home state. Plaintiff does not assert that she suffered any injury from it, including identity or card theft. She alleges solely a technical violation of FACTA. Yet, she is seeking to turn this technical violation into a nationwide class action on behalf of all consumers who received similar receipts, without any evidence that any of them sustained any distinct and palpable injuries from this conduct. These claims could not be brought in federal court or the courts of many states because, as in Illinois, concrete injury is needed for standing. They similarly do not belong in Illinois courts.

Nevertheless, no-injury lawsuits like this one continue to be filed. In the past decade, the United States Supreme Court has repeatedly held that "concrete and particularized" injury is needed for a plaintiff to have standing to bring a lawsuit in federal court, including when, as here, a federal statute

includes a private right of action. *See, e.g.*, *Spokeo, Inc. v. Robins*, 578 U.S. 330, 343-343 (2016); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204-05 (2021). Pursuant to this jurisprudence, every federal court of appeals to consider this issue has found that a FACTA violation that does not cause an injury in fact does not confer standing. *See, e.g., Thomas v. TOMS King (Ohio), LLC*, 997 F.3d 629, 638-40 (6th Cir. 2021) (finding no injury or increased risk of identity theft from printing the first six and last four digits of a credit card number); *Katz v. Donna Karan Co., L.L.C.*, 872 F.3d 114, 118 (2d Cir. 2017) (noting that the first six digits of a credit card merely identify the financial institution that issued the credit card). Courts in other states have followed these rulings. *See*, *e.g.*, *Saleh v. Miami Gardens Square One, Inc.*, 353 So. 3d 1253, 1254-55 (Fla. Ct. App. 2023); *Budai v. Country Fair, Inc.*, 296 A.3d 20, 26-28 (Pa. Ct. App. 2023).

Against this national legal landscape that clearly would be hostile to Plaintiff's purported class action, she filed her case in Illinois. She is not alone. Several other no-injury class actions have been filed in Illinois courts in recent years. *See, e.g.*, *Barrientos v. Williams-Sonoma, Inc.*, 2023 WL 5720855 (N.D. Ill. Sept. 1, 2023). They disclaimed suffering any concrete injury to avoid removal to federal courts, asserting *Rosenbach* allows them to litigate their no-injury cases in Illinois. Therefore, unless the Court reverses the lower court's ruling, Illinois is poised to become the preferred destination for plaintiffs from other states to file nationwide no-injury class actions

against Illinois companies. Such a result would be an affront to Illinois standing law, waste the State's judicial resources, and unfairly harm Illinois businesses that have not caused anyone injury.

For these reasons, *amici* respectfully request that the Court overturn the ruling below. The injury-in-fact requirement protects the sanctity of the courts and safeguards the rights and interests of plaintiffs and defendants. Illinois courts should not become the nation's forum for no-injury class actions.

ARGUMENT

I. Removing injury in fact as a requirement for standing would be a major departure from established Illinois law.

A. Injury in fact is an important requirement for standing in Illinois law.

This Court has long recognized that the State Constitution limits the power of the Illinois courts to claims brought by plaintiffs who have standing to bring them. *See In re Est. of Burgeson*, 125 Ill. 2d 477, 486 (1988). The state's standing doctrine is not a "procedural technicality"—it is a threshold determination of justiciability. *Rowe v. Raoul*, 2023 IL 129248, ¶¶ 22-23. Standing provides Illinois courts with the ability to "cull their dockets so as to preserve for consideration only those disputes which are truly adversarial and capable of resolution by judicial decision." *Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 488 (1988).

Critical to standing is injury in fact. A plaintiff must have an injury from the alleged misconduct in order to seek vindication in the courts. *See*

Burgeson, 125 Ill. 2d at 486 ("[W]e have defined standing under our State Constitution as the requirement of 'some injury in fact to a legally recognized interest.'") (quoting *Glazewski v. Coronet Ins. Co.*, 108 Ill. 2d 243, 254 (1985)); *State ex rel. Leibowitz v. Fam. Vision Care, LLC*, 2020 IL 124754, ¶ 28 ("This court has held repeatedly that standing requires some injury in fact to a legally recognized interest."). The Court has defined injury in fact as a harm that is "actual or threatened," meaning the harm "'must be (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." *Midwest Com. Funding, LLC v. Kelly*, 2023 IL 128260, ¶ 13 (quoting *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). Thus, plaintiffs are required to have sustained, or be in "immediate danger of sustaining a direct injury," or else they do not have a claim. *Chicago Tchrs. Union, Loc. 1 v. Bd. of Educ. of City of Chicago*, 189 Ill. 2d 200, 206-09 (2000).

This injury-in-fact requirement makes sense. As the Court explained in *Greer*, "[t]here is universal agreement that one component of standing—injury in fact—genuinely narrows the class of potential plaintiffs to those whose grievances may be redressed." *Greer*, 122 Ill. 2d at 488. It also ensures "that issues are raised only by those parties with a real interest in the outcome of the controversy." *Carr v. Koch*, 2012 IL 113414, ¶ 28. This requirement helps preserve court resources for those disputes where real, distinct and palpable interests of Illinois parties are at stake.

B. *Rosenbach* did not change the injury-in-fact requirement for standing under Illinois law.

Notwithstanding this clear and repeated precedent, the Circuit Court held that *Rosenbach* eliminated the injury-in-fact requirement for standing. The court stated below that, now, "[i]n Illinois a violation of one's rights in itself is sufficient for standing;" injury is no longer needed. March 1, 2023 Tr. Of Proceeding of Plaintiff's Amended Motion for Class Certification, 171-72, Att. To Walgreen's Pet. For Leave To App. This assertion overstates and mischaracterizes *Rosenbach*. That case did not change Illinois standing law.

Rosenbach centered on the question whether the collection of a person's biometric information without consent caused the plaintiff to be "aggrieved" under Section 15(b) of the Biometric Information Privacy Act (the "Privacy Act"). *See Rosenbach*, 2019 IL 123186 ¶¶ 21-22. The Court engaged in a statutory analysis of the word "aggrieved," concluding the legislature intended "aggrieved" in the Privacy Act to mean "having legal rights that are adversely affected." *Id.* ¶ 32. The Court grounded this explanation in the fact that the General Assembly was codifying "that individuals possess a right to privacy in and control over their biometric identifiers and information." *Id.* ¶ 33. "Accordingly, when a private entity fails to comply" with the Privacy Act, "no additional consequences need be pleaded or proved." *Id.* The Court then emphasized that a violation of the Privacy Act was not merely "technical" in nature; it infringed on the substantive "right to control [one's own] biometric information" and resulted in a "real and significant" injury. *Id.* ¶ 34.

Thus, *Rosenbach* does not stand for the proposition that no injury in fact need be pleaded anytime a plaintiff alleges a violation of a state or federal statute. To the contrary, it held that improper collection of biometric information *does* provide such an injury in fact sufficient to sue. Here, no similar substantive rights are at issue. A FACTA claim over how many credit or debit card numbers appear on a receipt does not involve personal identifiers and does not cause, without more, any "real and significant" injury. In *Rosenbach*, the Court observed that biometric identifiers cannot be changed, making the "procedural protections" in the Privacy Act "particularly crucial in our digital world." *Rosenbach*, 2019 IL 123186, ¶ 34. By contrast, the pre-paid card numbers at issue here have no innate personal significance and can change.

II. Federal courts interpreting these kinds of federal claims have reinforced the need for a concrete injury in order to justify standing, as have other state courts.

Allowing the trial court's decision to stand would make Illinois an outlier in allowing technical statutory claims to survive a motion to dismiss. Other courts that have considered FACTA claims comparable to those here—the printing of certain extra digits of a credit or debit card number—have held that the consumers are not injured and have no standing to bring their claims based on the violation alone. *See Thomas*, 997 F.3d at 636 (observing that the federal circuits "that have weighed in on this issue basically agree that not *every* violation of FACTA's truncation requirement creates a risk of identity theft") (internal quotation omitted) (emphasis original). If the lower

court ruling is allowed to stand, therefore, Illinois will invite countless similar claims to be filed in this State that would not be viable elsewhere.

A. The Court should borrow from the well-reasoned federal law on standing, and require an actual injury beyond a bare statutory violation.

For years, Illinois courts have aligned this Court's injury-in-fact prerequisite for standing with the federal "injury in fact" requirement—and rightly so. *See, e.g.*, *Maglio v. Advoc. Health & Hosps. Corp.*, 2015 IL App (2d) 140782, ¶¶ 25-26 ("Federal standing principles are similar to those of Illinois, and the case law is instructive"). Shortly after this Court's ruling in *Greer*, the U.S. Supreme Court echoed this Court's sentiments when holding that injury in fact is essential for standing under Article III of the U.S. Constitution. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The U.S. Supreme Court established a similar three-part test as in *Greer* for determining whether a plaintiff has standing, requiring the plaintiff to show (1) an injury in fact, (2) fairly traceable to the defendant's alleged conduct, and (3) that can be redressed by the courts. *Id.* at 560-61.[1] Indeed, the *Lujan* Court relied on much of the same authority as this Court did in *Greer*.

Over the past decade, the U.S. Supreme Court has reinforced this jurisprudence, affirming in several cases that plaintiffs must show that they

[1] By comparison, this Court held in *Greer* that standing in Illinois requires that the claimed injury be "(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." *Greer*, 122 Ill. 2d at 492-93 (quoting and citing United States Supreme Court cases).

"suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo,* 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560). The Court explained that when Congress enacts a statute such as FCRA or FACTA, it is "identifying and elevating" certain potential harms that should be protected. *Id*. at 340-41. But, that "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id*. at 341. Rather, the alleged injury "must actually exist." *Id*. at 340. As here, if there is a "bare procedural violation" of a statute, without more, there is no injury in fact and the statute does not confer standing for the plaintiff to bring a claim. *Id*. at 341-342.

Spokeo is particularly instructive here because it involved the Fair Credit Reporting Act, of which FACTA is a part. The U.S. Supreme Court observed that Congress adopted this legislation to provide procedures to help decrease the risk that false information about a consumer would be disseminated to others, though fully recognizing that not every tidbit of incorrect information results in an injury. *Id.* at 341-342. For example, the Court stated that it is "difficult to imagine how the dissemination of an incorrect zip code" associated to a consumer, "without more, could work any concrete harm." *Id*. at 342.

The U.S. Supreme Court then revisited the injury-in-fact requirement for standing in *TransUnion*, 141 S. Ct. at 2214. The lower courts, as with the Circuit Court here, allowed claims to proceed despite the fact that many plaintiffs never sustained any harm. The Court again "rejected the proposition that 'a plaintiff automatically satisfies the injury in fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'" *TransUnion*, 141 S. Ct. at 2205 (quoting *Spokeo*, 578 U.S. at 341). Rather, the potentially damaging information about the individual in that case had to have been exposed to a third party to have created a potential tangible harm akin to defamation. *Id.* at 2209. This injury requirement "ensures that federal courts decide only 'the right of individuals.'" *Id.* at 2203 (quoting *Marbury v. Madison*, 5 U.S. 137, 170 (1803)).[2]

B. Federal case law interpreting claims like the one here demonstrates that there is no standing.

It is not surprising, then, that federal courts have uniformly held that a FACTA violation, in itself, does not confer standing. A real or palpable injury caused by the violation is required in order to file a lawsuit.

[2] Similarly, a critical goal of standing in Illinois is to "preserve for consideration only those disputes which are truly adversarial and capable of resolution by judicial decision." *Greer*, 122 Ill. 2d at 488; *see also Maglio*, 2015 IL App (2d) 140782, ¶ 24 (affirming dismissal of identity-theft claims as unduly "speculative" and not "distinct and palpable").

Shortly after the Supreme Court's ruling in *Spokeo*, the U.S. Court of Appeals for the Seventh Circuit heard a case where the plaintiffs alleged the defendant violated FACTA by printing the credit card's expiration date on the receipt and sought damages. *See Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 727 (7th Cir. 2016). The Court explained that under *Spokeo*, the fact that Congress passed a statute with a private right of action "is a good indicator that whatever harm might flow from a violation of that statute would be particular to the plaintiff. Yet the plaintiff still must allege a concrete injury that resulted from the violation in his case." *Id.* at 727. "Congress' judgment that there should be a legal remedy for the violation of a statute does not mean each statutory violation" confers standing. *Id.*

The Seventh Circuit then looked at the legislative history of the Credit and Debit Card Receipt Clarification Act, which Congress enacted in response to cases brought based on the mere printing of certain credit card information on receipts without any resulting harm to a consumer. *Id.* at 728. The court observed that Congress was "quite concerned with the abuse of FACTA lawsuits, finding that 'the continued appealing and filing of these lawsuits represents a significant burden on the hundreds of companies that have been sued and could well raise prices to consumers without corresponding consumer protection benefit.'" *Id.* at 728 (quoting Clarification Act, Pub. L. 110–241, § 2(a)(7)). "That is why Congress sought to limit FACTA lawsuits to consumers 'suffering from any actual harm.'" *Id.* (quoting § 2(b)). The

Seventh Circuit then noted that this ruling "is in accord with those of our sister circuits in similar statutory-injury cases." *Id.* at 728-29.

Federal district courts throughout the Seventh Circuit, including those sitting in Illinois, have followed this jurisprudence, holding that plaintiffs alleging technical violations of FACTA without injury do not have standing. *See, e.g., Donahue v. Everi Payments, Inc.*, 2019 WL 13253793 at *2 (N.D. Ill. Aug. 19, 2019) (stating, typically, the plaintiff would have to identify "a third party that improperly received private information" in order to be injured by a FACTA violation); *Blanco v. Bath & Body Works, LLC*, 2022 WL 1908980 at *2-4 (N.D. Ill. June 3, 2022) (Because there was "no allegation that anyone acted on the information contained in the receipt or that an identity thief even saw the receipt," the allegations amounted to "nothing more than the theoretical risk of a future harm that is too speculative to amount to an injury in fact").[3] In *Barrientos v. Williams-Sonoma, Inc.*, 2023 WL 5720855 (N.D. Ill. Sept. 1, 2023), the court noted the "strange turn of events," which was common to all three of these cases: the *plaintiffs* were the ones arguing they were not injured by the FACTA violations. *Id*. at *3. They wanted to

[3] The one federal court of appeals to find that a mere violation of FACTA conferred standing did so based upon a "nightmare scenario" where the *entire* sixteen-digit credit card number was printed, along with the expiration date. *Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059, 1065-67 (D.C. Cir. 2019). Even the *Jeffries* court, however, recognized that "not every FACTA violation creates a concrete injury in fact." *Id.* at 1066.

avoid removal and have their claims remanded to Illinois courts, where, post-*Rosenbach*, they hoped no-injury claims would suddenly be viable.

As the Seventh Circuit noted, the other federal circuits that addressed the specific issue presented here—printing "the first six and last four digits of the consumer's credit card"—have similarly concluded that this FACTA violation does not constitute an injury in fact and, therefore, does not give rise to a cause of action or convey standing. *Thomas*, 997 F.3d at 363; *see also Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 934 (11th Cir. 2020) (noting the Second, Third and Ninth Circuit have considered FACTA violations involving partially truncated credit-card numbers and "concluded that the violation created neither a harm nor a material risk of harm").[4] The courts explained that a violation of FACTA "does not automatically create a concrete injury" and that cases like the one at bar "do not establish an increased risk of identity theft either because they do not show how, even if Plaintiff's receipt fell into the wrong hands, criminals would have a gateway to consumers' personal and financial data." *Thomas*, 997 F.3d at 640. The information reveals nothing about the plaintiff, solely the bank that issued the card. *See id.* at 636. And, the mere printing of the information on a receipt is not the same as if personal information was "lost, stolen, or seen by a third set of eyes." *Id.* "[N]o one's identity is stolen at the moment a receipt

[4] *See also Kamal v. J. Crew Grp., Inc.,* 918 F.3d 102, 116-117 (2019) (printing of extra digits did not lead to material risk of identity theft); *Katz*, 872 F.3d at 116 (same).

is printed with too many digits." *Muransky*, 979 F.3d at 930. There is no "intrinsic worth in a compliant receipt. . . . So it makes little sense to suggest that receipt of a noncompliant receipt itself is a concrete injury." *Id*. at 929.

These rulings make sense, and the Court should continue its policy of looking to federal decisions to guide its treatment of claims under federal statutes. *See Melena v. Anheuser-Busch, Inc.*, 219 Ill. 2d 135, 141-42 (2006); *State Bank of Cherry v. CGB Enterprises, Inc.*, 2013 IL 113836, ¶ 33 (same). As this Court has fully appreciated, it is important to preserve unity with federal courts when interpreting federal statutes. *See State Bank of Cherry*, 2013 IL 113836, ¶ 35. Here, Congress and the federal courts are aligned: being handed a receipt containing one's own credit card information may be a technical violation of FACTA, but presents *less* risk than carrying around the credit card itself, and does not constitute an injury for which a claim can be brought. The Court should hold the same under its jurisprudence that a palpable injury is required for standing in state courts.

C. Other state courts requiring injury in fact for standing have similarly rejected these no-injury FACTA claims.

Maintaining the injury-in-fact requirement for standing and reversing the ruling below also will keep Illinois within mainstream jurisprudence among the states. Most states require a "palpable" or "concrete" injury in order for a person to have standing to bring a claim, including when the claim is based on a statutory violation. When presented with a bare violation of

FACTA, courts in these other states have followed the federal circuits and have dismissed the cases.

For example, in *Saleh v. Miami Gardens Square One, Inc.*, 353 So. 3d 1253 (Fla. Ct. App. 2023), the Florida Court of Appeals held that the printing of additional credit card numbers, in itself, did not, demonstrate a "concrete, distinct and palpable, and actual or imminent" injury. *Id.* at 1255-56. As here, there were no allegations in that case that anyone else saw the receipts or caused the plaintiff actual harm. *See id.* at 1255. The court found it persuasive that Congress enacted the Clarification Act, demonstrating its intent that technical FACTA claims without actual injury ought not be viable, and that the Eleventh Circuit rejected these claims. *See id.* It stated there was no basis to expand FACTA standing beyond federal limits "where Florida law also imports an injury in fact requirement under our standing framework." *Id.*; *see also Southam v. Red Wing Shoe Co., Inc.,* 343 So. 3d 106, 112-13 (Fla. Dist. Ct. App. 2022), *review denied,* 2022 WL 16848677 (Fla. Nov. 10, 2022) (also finding plaintiff's FACTA claim did not demonstrate a "concrete," "distinct and palpable" or "actual or imminent" injury).

Similarly, the Pennsylvania Superior Court held in two cases that plaintiffs lacked standing to bring bare FACTA claims because the defendants' "conduct has not adversely affected them." *Budai v. Country Fair, Inc.*, 296 A.3d 20, 26-28 (Pa. Ct. App. 2023), *appeal denied*, 2023 WL 7517160 (Pa. Nov. 14, 2023); *Gennock v. Kirkland's Inc.*, 299 A.3d 900, 900-901 (Pa.

Super. Ct. 2023) (unpublished), *appeal denied*, 2023 WL 7545980 (Pa. Nov. 14, 2023) (finding no standing for FACTA claim when plaintiff did not allege any injury from the alleged violation). The Pennsylvania court explained that because the plaintiffs did not allege third-party access to the credit card numbers or that the numbers printed were sufficient to enable identity theft, they did not suffer any injury in fact. *See Budai*, 296 A.3d at 26.

In Ohio, the Court of Appeals held that Ohio state courts should reject the concept that standing may "exist on the basis of a federal statute despite the absence of an alleged injury in fact." *Smith v. Ohio State Univ.*, 2017-Ohio-8836, 2017 WL 6016627 (Ohio Ct. App 2017) (unpublished) (affirming dismissal of FCRA background-check-disclosure claims). The court echoed the sentiments from the other states that in order for a statute to confer standing absent an injury, the statute must clearly abrogate the common law standing doctrine. *See id.* at ¶ 13. Further, where the statute at issue is a Federal statute, the court noted that any attempt by Congress "to supplant the traditional requirements of stating in Ohio state court" would create a "separation of powers" problem, given the standing limitations in federal courts. *Id.* at ¶ 14.

III. Relaxing traditional standing requirements facilitates forum shopping, inappropriately burdens local courts and juries, and leads to abusive in terrorem settlements—not justice.

If the Court shifts course from its jurisprudence and opens its doors to suits based on bare FACTA violations, it would turn Illinois into a

clearinghouse for statutory violations of federal law that could not be brought elsewhere. Illinois would be the destination of choice for such no-injury class litigation, regardless of any meaningful connection to this State. As discussed above, it is already happening. Several federal statutory class actions exactly like the one here were remanded to Illinois courts because the lack of injury in fact has made their claims unfit for the federal judiciary. *See e.g.*, *Donahue*, 2019 WL 13253793 at *2; *Barrientos*, 2023 WL 5720855 at *3-7; *Blanco*, 2022 WL 1908980 at *2-4. In a paradigm shift, *plaintiffs* are arguing they have no injury in order to remain in Illinois courts and take advantage of rulings like the one below that would allow them to get money without experiencing any harm. Such a result would unduly burden judicial resources across Illinois and unfairly harm companies doing business in the State by inflicting on them litigation burdens not imposed on employers in other states.

A. Judicial resources should be preserved for cases connected to the community.

Illinois should not have to spend its limited judicial resources on cases where the State's communities, judges and juries have little to no interest. As this Court expressed in the *forum non conveniens* context, the public interest supports rejecting cases like these that have minimal connection to Illinois given "the administrative difficulties caused when litigation is handled in congested venues instead of being handled at its origin; the unfairness of imposing jury duty upon residents of a community with no connection to the

litigation; and the interest in having local controversies decided locally." *Fennell v. Illinois Cent. R. Co.*, 2012 IL 113812, ¶16 (2012). Illinois courts should focus on real matters that are connected to their communities, not abstract no-injury federal class actions for people in other states.

Already, in Illinois, like many states, judicial resources are stretched thin, with many local courts seeing an increase in claims and a reduction in resources. Such budget cuts can threaten the basic mission of state courts, which is to serve their local communities, and undermine the purpose of jury service. *See* C.J. Thomas L. Kilbride, *The High Price of Low Funding*, 100 Ill. B.J. 587 (Nov. 2012);[5] *accord* Richard Y. Schauffler & Matthew Kleiman, *State Courts and Budget Crisis: Re-thinking Court Services*, THE BOOK OF THE STATES 2010, 290 (expressing concern that citizens will have difficulty accessing their courts to have local contract, tort, and other claims heard).

Illinois judicial resources should be preserved for disputes over cognizable injuries with a connection to the State.

B. Allowing no-injury class actions to proceed past the pleading stage often leads to abusive in terrorem settlements.

Finally, courts and scholars across the country have long expressed concern that no-injury class actions can lead to prolonged, expensive litigation, and abusive*, in terrorem* settlements driven by risk aversion, not justice. As the U.S. Supreme Court explained fifty years ago, litigating a

[5] https://www.isba.org/ibj/2012/11/thehighpriceoflowfunding

putative class action, regardless of the merits, "may so increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). The liability threat has only worsened with the recent verdict trends.

In these cases, defendants are in an untenable position. Defense costs can run into tens of millions of dollars. *See* Adeola Adele, *Dukes v. Wal-Mart: Implications for Employment Practices Liability Insurance* (July 2011) (noting defense costs of up to $100 million). These actions can drag on for years, even before a court takes up class certification. *See* U.S. Chamber Inst. for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, at 1 (Dec. 2013) ("Approximately 14 percent of all class actions remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis."). When the costs of litigating far exceed the settlement demand, taking the case to trial is generally not a viable option.

Thus, merely allowing a putative class action to survive a motion to dismiss can enable plaintiffs to leverage the inefficiencies of the judicial system "to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 149 (2008); *accord AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting the "risk of 'in terrorem' settlements that class actions entail"). This risk of this

injustice is heightened, as the late Justice Ruth Bader Ginsburg observed, when "a class action poses the risk of massive liability unmoored to actual injury." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting).

Experience has also shown that it is difficult to value a class action for settlement purposes where the class members have not suffered a palpable, measurable injury. *See generally* Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 L. & CONTEMPORARY PROBLEMS 97 (1997); Jason Scott Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions Under Federal Consumer Protection Statutes*, 2017 COLUM. BUS. L. REV. 1 (2017). As a result, even when parties try to settle no-injury claims, few, if any, benefits end up going to the class. Often, there is little interest among absent class members to claim an award. They do not feel aggrieved and view returning the claim form not worth it. *See* Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399, 419 (2014) (finding "very small percentages of class members actually file and receive compensation from settlement funds"). In 2019, the Federal Trade Commission found a weighted mean claims rate of just 4%—meaning that 96% of class members in consumer class settlements recovered nothing. *See* Fed. Trade Comm'n, *Consumers and Class Actions: A Retrospective and*

Analysis of Settlement Campaigns, at 11 (Sept. 2019). The claims rate is lowest in cases where the class has not sustained any concrete harms.

Also, uninjured class members have little incentive to monitor the litigation and hold their counsel accountable; they "have individually too little at stake to spend time monitoring the lawyer—and their only coordination is through" such counsel. *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Tr. Co. of Chi.*, 834 F.2d 677, 681 (7th Cir. 1987). The result is that "class counsel effectively appoint themselves as agents for the class, wielding a power to transact in class members' rights." Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 150-51 (2003). It is not surprising, then, that the bulk of the money in these actions ends up going to class counsel. The truth is that consumers rarely see value in no-injury class actions.

Worse, this type of litigation ends up costing consumers money, reduces the amount of resources businesses can spend on research and development, and hurts employees. To this end, "litigation expenses, attorney's fees, and settlement costs" are often passed "to consumers through increased prices, fewer innovations, and lower product quality." Joanna Shepherd, *An Empirical Study of No-Injury Class Actions* 23 EMORY UNIV. SCH. OF LAW, LEGAL STUDIES RESEARCH PAPER SERIES No. 16–402 (2016).

All of these concerns are exemplified here. FACTA class actions where nobody has suffered injury are expensive to litigate, provide no benefits to the

public, and largely result in money for lawyers. *See generally*, Johnston, *High Cost, Little Compensation,* 2017 COLUM. BUS. L. REV. 1 (analyzing the costs, inefficiencies, and lack of benefit provided to plaintiffs in no-injury class actions, including FACTA, in the United States District Court for the Northern District of Illinois). The Court should make it clear that violations of federal statutes, even those that include a private right of action, must cause some injury in fact in order to meet the State's standing requirements. The burden of no-injury class actions on the courts and defendants is great, the need to compensate plaintiffs is nonexistent, and the benefits to consumers are negligible at best.

CONCLUSION

For the foregoing reasons, the Court should reverse the trial court below and hold that the case should be dismissed for lack of standing.

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Respectfully submitted,

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA and THE ILLINOIS CHAMBER OF COMMERCE

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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 5,957 words.

Dated: December 6, 2023 */s/ Matthew C. Wolfe*