No. 129783

IN THE
SUPREME COURT OF ILLINOIS

CALLEY FAUSETT, individually, and on behalf of other similarly situated, *Plaintiff-Appellee,* v. WALGREENS CO., *Defendant-Appellant.*	) On Petition for Leave to) Appeal from the Appellate) Court of Illinois,) Second Judicial District,) Appeal No. 2-23-0105,) There Heard On Appeal from) the Nineteenth Judicial) Circuit Court,) Lake County, Illinois,) Case No. 19 CH 675,) Honorable) Donna-Jo Vorderstrasse,) Judge, presiding.

PLAINTIFF-APPELLEE'S BRIEF

Keith J. Keogh
Michael Hilicki
Keogh Law, Ltd.
55 W. Monroe St., Ste. 3390
Chicago, Illinois 60603
Tel: 312-726-1092
keith@keoghlaw.com
mhilicki@keoghlaw.com

Thomas L. Kilbride
Adam R. Vaught
Kilbride & Vaught, LLC
82 S. LaGrange Rd., Suite 208
LaGrange, IL 60525
Tel: 217-720-1961
tkilbride@kilbridevaught.com
avaught@kilbridevaught.com

Bret L. Lusskin
Bret Lusskin, P.A.
668 Golden Beach Drive
Golden Beach, Florida 33160
Tel: 954-454-5841
blusskin@lusskinlaw.com

Scott D. Owens
Scott D. Owens, P.A.
2750 N. 29th Ave., Ste. 209A
Hollywood, Florida 33020
Tel: 954-589-0588
scott@scottdowens.com

Counsel for plaintiff-appellee

ORAL ARGUMENT REQUESTED

E-FILED
3/20/2024 4:39 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF CONTENTS AND AUTHORITIES

ISSUE PRESENTED FOR REVIEW

Whether a person has standing to sue in Illinois when they allege the defendant has violated their rights under a statute that expressly provides a right to sue for statutory damages, even if they do not allege additional injury beyond the violation of their rights?

STATEMENT OF FACTS

Plaintiff-appellee Calley Fausett filed a class action complaint in Lake County on behalf of herself and others similarly situated against defendant-appellant Walgreen Co.'s for alleged violations of the Fair and Accurate Credit Transactions Act of 2003, commonly referred to as "FACTA." (C8) A FACTA claim has three elements: (1) the defendant accepts debit or credit cards, (2) the defendant provided the plaintiff with an electronically printed receipt at the point of the sale or transaction that disclosed more than the last five digits of the plaintiff's debit or credit card number, and (3) the defendant's violation was negligent or willful. See 15 U.S.C. §1681c(g); and *e.g., Lavery v. Radioshack Corp.*, 2014 U.S. Dist. LEXIS 85190, *4-5 (N.D. Ill. June 23, 2014). Fausett alleges Walgreens willfully violated FACTA as to her and other customers by programming its point-of-sale system to provide them with receipts displaying 10 digits (two-thirds) of their debit card numbers.

I. FACTA was passed by Congress to protect against identity theft.

FACTA was passed by Congress in 2003 as an amendment to the Fair Credit Reporting Act, ("FCRA") 15 U.S.C. § 1681 *et seq*. At the signing ceremony in the White House, President George W. Bush praised the bill for

"protecting our citizens by taking the offensive against identity theft."[1] "The crime of identity theft—in which a perpetrator uses the victim's financial or other information in order to obtain products and services or other benefits in the victim's name—ha[d] reached almost epidemic proportions" in the early 2000s. *Jeffries v. Volume Services Am., Inc.*, 928 F.3d 1059, 1062 (D.C. Cir. 2019) (quoting H.R. Rep. No. 108-263, at 25 (2003)). "A hotline established by the Federal Trade Commission to field consumer complaints and questions about identity theft logged over 160,000 calls in 2002 alone." *Id.*

Congress found "electronically printed receipts" contributed to this crisis because they provided criminals with "easy access to" credit and debit card information. *Id*. (quoting, S. Rep. No. 108-166, at 3 (2003)). The FTC likewise found "card numbers on sales receipts are a 'golden ticket' for fraudsters and identity thieves." (C389).

To eliminate the risk of fraud caused by merchants disclosing too much debit and credit card information on customer receipts, FACTA requires that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1). This is known as FACTA's

---

[1] Credit Transactions Act Signing, C-SPAN (Dec. 4, 2003), https://www.c-span.org/video/?179442-1/credit-transactions-act-signing (last visited Mar. 20, 2024).

"truncation requirement." See *Soto v. Great Am. LLC*, 2020 Ill. App. (2nd) 180911 at ¶14.[2]

Further, any person who willfully violates this "truncation requirement" by printing more than the last five digits or the expiration date on a receipt is liable for "any actual damages sustained by the consumer ... or damages of not less than $100 and not more than $1,000," and for "such amount of punitive damages as the court may allow." *Id.* § 1681n(a)(1)(A), (a)(2).

President Bush extolled that the truncation requirement "will help prevent identity theft before it occurs."[3] He said, "[s]lips of paper that most people throw away should not hold the key to their savings and financial secrets." (C9, quoting 39 Weekly Comp. Pres. Doc: 1746, 1757 (Dec. 4, 2003)) President Bush added that the federal government, through FACTA, was "act[ing] to protect individual privacy." *Id.*

By making FACTA part of the FCRA, Congress gave citizens the right to enforce their FACTA rights in state court, providing, "[a]n action to enforce any liability created under this title may be brought in any appropriate United States district court, without regard to the amount in controversy, *or in any*

---

[2] Walgreens misstates FACTA "prevent[s] the printing of entire card numbers and expiration dates on receipts," however, the statute bars printing any by the last 5 digits of the card number, not simply the "entire" card number.

[3] Credit Transactions Act Signing, C-SPAN (Dec. 4, 2003), https://www.c-span.org/video/?179442-1/credit-transactions-act-signing (last visited Mar. 20, 2024).

other court of competent jurisdiction" within two years from the discovery of the violation or within five years of when the violation occurred. (Emphasis added.) 15 U.S.C. 1681p.

II. Fausett's complaint alleges Walgreen's willfully violated FACTA's truncation requirement.

Fausett's complaint alleges Walgreens violated the rights she and the members of the class possess under FACTA by printing receipts with digits exceeding the truncation requirement's five-digit maximum. (C8) She filed her complaint in Lake County, where Walgreens is headquartered. (C9)

Fausett alleges that she used her personal debit card[4] to perform a fund-load transaction at a Walgreens in Phoenix, AZ, near her home. (C14) A fund-load transaction is when the consumer deposits additional funds into their card account by giving the funds to Walgreens to send to the bank holding the account. (C123) Fausett needed the account to receive direct deposits from her employer, DoorDash. (C689) When she performed these reload transactions, Walgreens provided her with a receipt that displayed the first six and the last four digits of her debit card number. (C14)

---

[4] Fausett's debit card is commonly known as a "reloadable" or "prepaid" debit card. According to Walgreens's website, the card is essentially identical to other debit cards. (C132 ("Reloadable prepaid debit cards work like traditional debit cards. Customers can load funds and use to shop, transfer money, pay bills, withdraw cash from an ATM, and receive direct deposits of payroll and government benefits. They can be used anywhere Visa, MasterCard or American Express cards are accepted.")).

In addition to alleging Walgreens violated her FACTA rights, Fausett alleges Walgreens's actions caused her to "suffer a heightened risk of identity theft, exposed Plaintiff's private information to others who may have handled the receipt, and forced Plaintiff to take action to prevent further disclosure of the private information displayed on the receipt." (C19) She stated that identify theft is her biggest fear because it takes so long to repair the damage it can cause. (C688) Fausett likewise alleges that as a result of Walgreen's willful violations, she and her fellow class members were "exposed to an elevated risk of identity theft." (C19)

Walgreens admitted it "knows how to comply with FACTA," and knows "that law applies to retailers like Walgreens." (C391) Indeed, just fifteen months before this lawsuit, Walgreens's in-house counsel discussed FACTA with several Walgreens managers, one of whom (correctly) surmised FACTA might apply to a Walgreens "prepaid debit card" program. (C10, 61) Likewise, Walgreen's competitors, such as Wal-Mart, comply with FACTA for their debit card reloads. (C141, ¶7).

Despite this awareness and industry practice, Walgreens deliberately programmed its system automatically to print receipts that contain, among other things, the first six and last four digits of the card number. (C391, 446, ¶5 ("Both the receipt and stub receipt include the first six digits … and the last four digits.")). Walgreens further admitted the decision to include these digits

was deliberate. (See C391, C446, ¶6 ("Walgreens includes the [first six digits on the] receipts because …") (brackets added)).

Finally, despite this awareness, Walgreens continued to generate debit card receipts displaying ten digits of its customers' debit card numbers for an additional eight months after Fausett filed this lawsuit, even though it had the ability to correct its system's programming in days. (C392, 597)

III. Walgreens moved to dismiss the complaint for lack of standing based on federal court decisions.

Walgreens filed a section 2-619.1 motion to dismiss Fausett's complaint that argued Fausett lacked standing as a matter of law (735 ILCS 2-619.1).[5] (C101, 111) Walgreens argued the United States Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016) held that "to satisfy standing requirements *in federal court*, more is required by the Constitution than Congress creating a statutory right to sue." (C113) (emphasis added).

In response, Fausett pointed out this case is not pending in federal court, Illinois standing is broader than federal court standing, and accordingly that two Illinois appellate courts had found a plaintiff has standing to bring a FACTA claim in Illinois courts if they allege a violation of rights under the statute. (C134, citing *Lee v. Buth-Na-Bodhaige, Inc.*, 2019 IL App (5th) 180033,

[5] Walgreen's motion to dismiss (C101) and opposition to class certification (C635) raised numerous issues beyond standing. Before this Court, however, Walgreens only appeals the standing question.

¶¶64-8 and *Duncan v. FedEx Office & Print Servs.*, 2019 IL App (1st) 180857, ¶23).[6]

Further, Fausett pointed out a reason Illinois standing is broader than federal court standing is because Illinois courts are courts of general jurisdiction, whereas federal courts are courts of limited jurisdiction. (C134-35, citing *Belleville Toyota v. Toyota Motor Sales*, 199 Ill.2d 325, 337 (2002).

Finally, in further support of her standing, Fausett cited to this Court's decision in *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, stating the "denial of statutory rights" alone is enough to sue. (C135) (discussing the Illinois Biometric Information Privacy Act).

IV. The trial court rejected Walgreens' standing argument.

After an extensive oral argument, the trial court denied Walgreens' motion to dismiss. The court held as follows.

> With respect to the standing issue, I — you know, the standing issue especially everybody always argues the federal court standing issue with respect to the federal statutes, but I mean I think the state cases are clear that I'm not bound by them and the federal courts are restricted by the Constitution as far as the jurisdiction they can assert in the plaintiff's standing and that's not a restriction that applies to a state court and standing seems to be much more liberally granted in the state court.

(R47)

---

[6] A third Illinois appellate decision, *Soto*, 2020 Ill. App. (2nd) 180911, would reach this same conclusion a few months later.

V. Walgreens reasserted its standing argument at the class certification stage.

Fausett moved for class certification. (C385) In opposition, Walgreens raised its standing argument again. By that point, there had been further development of federal court standing jurisprudence, *TransUnion v. Ramirez*, 594 U.S. 413 (2021), with the U.S. Supreme Court deciding that under Article III of the Constitution, a violation of one's statutory rights alone is not sufficient to sue in federal court, and that instead a plaintiff seeking to sue in federal court must also allege some other "concrete harm" beyond the violation of their rights.

In response, Fausett argued, "[p]laintiff does not need to satisfy the federal Article III 'concrete injury' test to have standing. Federal standing rules do not apply in state court, even in cases based on federal law." (C822, citing *ASARCO Inc. v. Kadish*, 490 U. S. 605, 617 (1989)). "The Illinois Supreme Court 'has expressly rejected federal principles of standing.'" (C822, quoting, *Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 254, fn. 4 (2010)) In support, Fausett cited *Rosenbach,* rejecting "defendants' contention that redress under the Act should be limited to those who can plead and prove that they sustained some actual injury or damage beyond the infringement of the rights afforded them under the law" and holding that "[n]o additional consequences need be pleaded or proved. The violation, in itself, is sufficient ***." (C823)

Fausett also asserted that Walgreens's reliance on *TransUnion* was misplaced because "*TransUnion* only addressed federal standing." (C824) Fausett quoted from Justice Thomas's dissent in *TransUnion*, joined by Justices Breyer, Sotomayor, and Kagan. In that dissent, the Justices explained that "[t]he Court does not prohibit Congress from creating statutory rights for consumers; it simply holds that federal courts lack jurisdiction to hear some of these cases. *** By declaring that federal courts lack jurisdiction, the Court has thus ensured that state courts will exercise exclusive jurisdiction over these sorts of class actions." (C825)

VI. The trial court again rejected Walgreens's standing argument.

After hearing extensive oral arguments, the trial court granted class certification. (C885) In its ruling, the court rejected Walgreens' standing argument.

> "I want to be clear that in Illinois plaintiff does not need to satisfy the federal Article 3 concrete injury test as standing. Judge Berrones found the same thing. Federal standing rules do not apply in state court even in cases based on federal law. The Illinois Supreme Court has expressly rejected federal principles of standing.
>
> In Illinois a violation of one's rights in itself is sufficient for standing. That is how the Court reads *Rosenbach vs. Six Flags*. It rejected defendant's contention that redress under the act should be limited to those who can plead and prove that they sustained some actual injury or damage beyond the infringement of the rights afforded them under the law and held no additional consequences needed be pleaded or proved.

> Now, [*Rosenbach*] wasn't a FATCA case [sic], the Court is aware of that, but the reasoning is persuasive to find that a violation is enough, is sufficient, a violation that is alleged.
>
> We have the *Lee vs. Buth-Na-Bodhaige* case that rejected an objection to standing. This was a FACTA case where the plaintiff pleaded sufficient facts to allege a willful violation of FACTA. It's a Fifth District case, but the Court can look at the reasoning and find it persuasive authority.
>
> Then we get to *TransUnion*. It only addressed federal standing and it is interesting to note that Justice Thomas'[s] dissent recognized that the majority opinion does not limit the ability to sue in state court and will drive litigants to enforce their federal rights in state court and that is where we are."

(R171-73)

VII. This Court allows leave to appeal the standing issue.

Walgreens filed a Rule 306(a)(8) petition for leave to appeal (Ill. S. Ct. R. 306(a)(8) (eff. Oct. 1, 2020)) to the Second Appellate District that presented all the issues it raised in the trial court in opposition to class certification. The Second District denied that petition. Walgreens then filed a petition for leave to appeal to this Court that raised only the standing argument, jettisoning all the other arguments that had been presented to the Second District. This Court allowed leave to appeal.

ARGUMENT

For more than one-hundred years, this Court has held a violation of one's statutory rights alone is sufficient to sue in Illinois state courts. *Rosenbach,* 2019 IL 123186, ¶ 30. Recent changes to federal standing law should not change Illinois law. Federal courts are courts of limited jurisdiction. *Home Depot U. S. A., Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019). Illinois courts are courts of general jurisdiction. *Belleville Toyota*, 199 Ill.2d at 337. In federal court, standing is a jurisdictional requirement that cannot be waived. *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). In Illinois, however, standing is not a part of the courts' subject matter jurisdiction, rather it is an affirmative defense that may be forfeited. *Lebron*, 237 Ill. 2d at 252-253. Fausett meets Illinois standing requirements because she has alleged a violation of her FACTA rights and seeks the statutory damages FACTA provides. And that is all Illinois requires.

This is because "Circuit Courts shall have original jurisdiction of all *justiciable matters*[.]" [Emphasis added]. Ill. Const. (1970), art. VI, § 9. "The legislature may create new *justiciable matters* by enacting legislation that creates rights and duties that have no counterpart at common law or in equity." [Emphasis added]. *People ex rel. Graf v. Village of Lake Bluff*, 206 Ill. 2d 541, 553 (2003). Applying these principles, this Court in *Rosenbach* held that violations of the Biometric Information Privacy Act ("BIPA") cause a plaintiff an injury and "[n]o additional consequences need be pleaded or proved. The

violation, in itself, is sufficient to support the individual's or customer's statutory cause of action." *Rosenbach*, 2019 IL 123186, ¶ 30.

The trial court here correctly held that plaintiff did not need to allege harm beyond the violation of her FACTA rights because "[i]n Illinois a violation of one's rights in itself is sufficient for standing. That's how this Court reads *Rosenbach v. Six Flags*." (R172) A plaintiff who alleges a violation of BIPA or FACTA has standing in Illinois because the violation of the plaintiff's rights is the plaintiff's injury. Nothing more needs to be alleged.

Walgreens, however, asks this Court to adopt *TransUnion's* "concrete harm" requirement for federal courts to find that Fausett lacks standing to bring her FACTA claim in an Illinois court. But "injury in fact" under Illinois law is not synonymous with "injury in fact" under federal law. The judicial power of the Illinois courts has never been governed by the United States Supreme Court's decisions defining the jurisdictional contours of Article III of the federal constitution. *ASARCO*, 490 U.S. at 617. As this Court has affirmed, Illinois is not "required to follow the Federal law on issues of justiciability and standing." *Greer v. Illinois Housing Developmental Auth*ority, 122 Ill. 2d 462, 491 (1988).

Walgreens argues "the only basis for affirmance would be to hold that this Court's decision in *Rosenbach*[], fundamentally swept away many decades of Illinois standing law and set Illinois outside the scope of the widespread agreement among American legal jurisdictions." Walgreens Br. at 10. To the

contrary, it was *TransUnion* that fundamentally swept away many decades of *federal* standing law, now making it impossible to enforce many statutory rights in federal court. *Rosenbach's* finding that a violation of individual's statutory rights alone is sufficient to bring suit in Illinois is the opposite of *TransUnion*, and consistent with *Illinois* standing law over the last 100 years.

In sum, this Court should affirm the trial court's class certification decision for the following reasons:

- First, Walgreens cannot meet its burden of proving Fausett lacks standing under Illinois law because Fausset easily satisfies the Illinois' standing test;
- Second, this Court should follow *Greer* and *Rosenbach*, hold that a claim for damages for a statutory violation does not require an additional injury in Illinois, and reject Walgreens's request for this Court to adopt *TransUnion's* federal "concrete harm" test;
- Third, the fact that FACTA plaintiffs have standing to bring FACTA claims in Illinois when FACTA plaintiffs do not have standing in federal court is an accepted quirk in the federal system; and
- Fourth, Congress intended Illinois to hear FACTA claims regardless of whether they may be brought in federal court.

I. Walgreens cannot meet its burden of proving Fausett lacks standing under Illinois law because Fausset easily satisfies the Illinois' standing test.

From the outset, Walgreens incorrectly assumes Fausett bears the burden of establishing her standing, like she would in federal court. But in Illinois courts standing is a waivable affirmative defense that Walgreens bears the burden of proving. See *State ex rel. Leibowitz v. Family Vision Care, LLC*, 2020 IL 124754 at ¶29 ("A plaintiff need not allege facts establishing standing.

Rather, the defendant bears the burden to plead and prove lack of standing.") (internal citation omitted).

Walgreens cannot meet its burden here. As the trial court here held, "[i]n Illinois a violation of one's rights in itself is sufficient for standing. That's how this Court read *Rosenbach v. Six Flags*." (R172) In *Rosenbach*, this Court addressed the meaning of the requirement in BIPA that a person be "aggrieved" by a violation of law, stating:

> "More than a century ago, our court held that to be aggrieved simply 'means having a substantial grievance; a denial of some personal or property right.' A person who suffers actual damages as the result of the violation of his or her rights would meet this definition of course, but sustaining such damages is not necessary to qualify as 'aggrieved.' Rather, '[a] person is prejudiced or aggrieved, in the legal sense, when a legal right is invaded by the act complained of or his pecuniary interest is directly affected by the decree or judgment.'" (Emphasis in original; internal citation omitted). *Rosenbach,* 2019 IL 123186, ¶ 30 (quoting *Glos v. People*, 259 Ill. 332, 340 (1913)).

This Court concluded that a violation of a plaintiff's statutory rights alone was sufficient for the plaintiff to sue and held "[n]o additional consequences need be pleaded or proved. The violation, in itself, is sufficient to support the individual's or customer's statutory cause of action." *Id.* ¶ 33. *Rosenbach* was thus clear that an allegation of a violation of a statutory right alone is sufficient to confer standing.

Rosenbach is consistent with this Court's earlier standing decisions that held the only injury needed to have standing to sue is one 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. *Greer*, 122 Ill. 2d. at 492-93.

"Distinct and palpable" simply means the injury must be specific to the named plaintiff and not a generalized grievance common to the general public. *Ill. Rd. & Transp. Builders Ass'n v. Cnty. of Cook*, 2022 IL 127126 at ¶17. Walgreens's alleged violation of Fausett's rights easily meets this test. Far from asserting an injury to the general public, she alleges Walgreens violated her FACTA rights by printing ten digits of *her* card number on *her receipt*.[7]

Fausett further alleges her injury is "fairly traceable" to Walgreens's actions because she alleges it deliberately programmed its system to display ten digits of its customers' debit card numbers on their reload transaction receipts. And her injury is substantially likely to be redressed by the grant of the requested relief because she alleges Walgreens's violation was willful and FACTA (via the FCRA) provides for statutory damages of $100-$1,000 for any willful violation.

Fausett's complaint thus meets the *Greer* standing test. Walgreens only argument in response is that she lacks a "concrete harm" under *TransUnion*. But this is not required in Illinois. Fausett alleges a willful violation of her

---

[7] This injury is also palpable because it appears on the face of the receipt itself. See *Norris v. Nat'l Union Fire Ins. Co.*, 368 lll. App. 3d 576, 583 (1st Dist. 2006) ("palpable" means "easily perceptible, plain, obvious, readily visible, [and] noticeable …" (citing Black's Law Dictionary, 6th ed.) (defining "palpable") (brackets added).

statutory rights and she seeks the statutory damages Congress has provided as a remedy. "No additional consequences need be pleaded or proved." *Rosenbach*, 2019 IL 123186, ¶ 30. Accordingly, under both *Rosenbach* and *Greer*, the trial court correctly found Fausett has standing to sue.

II. This Court should follow *Greer* and *Rosenbach*, hold that a claim for damages for a statutory violation does not require an additional injury in Illinois, and reject Walgreens's request for this Court to adopt *TransUnion's* federal "concrete harm" test.

Rosenbach was clear that a plaintiff is not required to allege harms beyond a statutory violation to bring a lawsuit in Illinois. This holding is fatal to Walgreens appeal. Walgreens thus argues *Rosenbach* did not mean what it said. Walgreens argues that this Court in *Rosenbach* "carefully avoided" addressing standing, (Walgreens Br. at 20), but *Rosenbach* expressed no such intention. The *Rosenbach* Court reversed the appellate court's holding that "a plaintiff who alleges only a technical violation of the statute without alleging some injury or adverse effect is not an aggrieved person within the meaning of the law." *Id.* ¶ 1.

The appellate court's holding in *Rosenbach* was the same holding the United State Supreme Court arrived at in *TransUnion*. The appellate court erroneously decided the plaintiff must allege and establish "some injury or adverse effect" beyond a statutory violation. *Rosenbach* conclusively rejected that requirement, however, and held, instead, that the violation of their statutory rights itself was sufficient to proceed.

Yet Walgreens treats Illinois standing law as though it follows federal law. But as federal and state courts have recognized, "federal courts and Illinois courts define 'injury-in-fact' differently." *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617, 622 (7th Cir. 2020) ("[T]he fact that both Illinois courts and federal courts impose an injury-in-fact standing requirement on litigants does not necessarily mean that both forums define that requirement in the same way"); *Soto v. Great America LLC*, 17-CV-6902, 2018 WL 2364916, at *5 (N.D. Ill. May 24, 2018) (Dow, J.); see also *Lee*, 2019 IL App (5th) 180033, ¶¶ 66-67 (comparing state and federal standing law). "In Illinois, standing is part of the common law. However, federal principles of standing are grounded largely on the jurisdictional case and controversy requirements imposed by article III of the United States Constitution." *People v. $1,124,905 U.S. Currency & One 1988 Chevrolet Astro Van*, 177 Ill. 2d 314, 328 (1997).

Moreover, the federal definition of "injury in fact" has dramatically changed in the past decade due to the Supreme Court's recent incorporation of a "concrete harm" requirement into federal standing doctrine. This Court, however, has never adopted the federal "concrete harm" requirement, much less *TransUnion's* articulation of it. Consistent with its own precedents, this Court should reject Walgreens's bid to change Illinois standing law into current federal standing law and hold that Illinois' injury in fact standard is met when a plaintiff alleges a violation of their statutory rights, regardless of any additional harm.

a. The federal "injury in fact" test was changed in *Spokeo* and *TransUnion* to require a "concrete harm" in addition to a violation of statutory rights.

Walgreens wants this Court to adopt the *Spokeo* and *TransUnion* "concrete harm" test without acknowledging how those decisions radically, and recently, changed federal law. But Illinois has never adopted that test, and to do so now would require this Court to change Illinois law radically at a time when Illinois standing law has never been further apart from federal law.

Under federal law, the "'irreducible constitutional minimum' of standing contains three elements." *Spokeo*, 578 U.S. at 338. Relevant here, a plaintiff must show an "injury in fact" that he or she suffered "'an invasion of a legally protected interest' that is 'concrete and particularized'[.]" *Id.* at 339.

The "injury in fact" requirement "emerged in the 1970s and 1980s amidst a fast-growing administrative state and questions about the extent to which citizens could challenge agency action as representatives of the public." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 973 (11th Cir. 2020) (Jordan, J., dissenting). "And the concept then was not even about constitutional standing; it concerned a statutory cause of action under the Administrative Procedure Act." *TransUnion*, 594 U.S. at 451 (Thomas, J., dissenting) (citing *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970)).

The federal injury in fact requirement was later incorporated into the Supreme Court's constitutional standing analysis. See *e.g., Warth v. Seldin*,

422 U.S. 490 (1975). But even in *Warth*, the Supreme Court was clear that, "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing[.]'" *Id.* at 500 (citing *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, nt. 3 (1973) (stating, "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute")).

In *Spokeo*, 578 U.S. 330 (2016), however, the Supreme Court dramatically changed the meaning of "injury in fact" in federal court. The Court held, "[a]n injury in fact must also be 'concrete.'" *Id.* at 339. The Ninth Circuit had found an injury in fact when the plaintiff alleged that his statutory rights had been violated and that his interest in those rights was individualized rather than collective. *Id.* at 340. Rejecting that finding, the Supreme Court stated that, "[b]oth of these observations concern particularization, not concreteness." *Id.*

The Court then declared that the violation of an individual's statutory rights, by itself, is insufficient to demonstrate concrete harm under Article III:

> Congress' role in identifying and elevating intangible harms 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. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, [plaintiff] could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III. *Id.* at 341.

A few years later, the Court reaffirmed that analysis in *TransUnion*, holding that a plaintiff whose only alleged "concrete harm" is a violation of their statutory rights lacks Article III standing. In that case, a putative class of nearly eight-thousand people sued TransUnion for allegedly failing to use reasonable procedures to prevent inaccurate information from being placed in their credit files in violation of the FCRA. Specifically, they had been falsely labeled as potential terrorists simply because their first and last name matched that of a person on a Treasury Department list of persons who pose a security threat. *TransUnion*, 594 U.S. at 420. In finding a "potential match," the only information TransUnion considered was the individual's first and last names; it did not compare birthdays, middle names, or other identifying information. *Id.* Thus, as an example, if actor Michael B. Jordan were placed on the Treasury Department's list, retired Chicago Bulls star Michael J. Jordan would have a potential match placed on his credit report.

The claimants in *TransUnion* consisted of two groups: those whose credit reports containing erroneous information had been given to a third party and those whose credit reports containing erroneous information had *not* been given to a third party. *Id.* at 434. The Court found that even though the FCRA provided both groups a cause of action, the plaintiffs whose credit files were given to third parties with the erroneous information suffered a concrete harm, but those whose credit files were not disclosed to a third party did not suffer a

concrete harm, even though both were exposed to the very risk of harm Congress found to merit protection. *Id.* at 437.

In his dissent, Justice Thomas noted, "[n]ever before has this Court declared that legal injury is inherently insufficient to support standing. And never before has this Court declared that legislatures are constitutionally precluded from creating legal rights enforceable in federal court if those rights deviate too far from their common-law roots." *Id.* at 453-54 (Thomas, J., dissenting). In her dissent, Justice Kagan made a similar point, stating, "[t]he Court here transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement. It holds, for the first time, that a specific class of plaintiffs whom Congress allowed to bring a lawsuit cannot do so under Article III." *Id.* at 462 (Kagan, J., dissenting).

In his critique, Justice Thomas summed up the majority's holding in *TransUnion* as follows:

> "Ultimately, the majority seems to pose to the reader a single rhetorical question: Who could possibly think that a person is harmed when he requests and is sent an incomplete credit report, or is sent a suspicious notice informing him that he may be a designated drug trafficker or terrorist, or is not sent anything informing him of how to remove this inaccurate red flag? The answer is, of course, legion: Congress, the President, the jury, the District Court, the Ninth Circuit, and four Members of this Court." *Id.* at 460 (Thomas, J., dissenting).

b. Illinois's requirements for "injury in fact" do not require a "concrete harm."

Contrary to Walgreens's suggestions, this Court has never interpreted "injury in fact" in Illinois to include a requirement that a violation of one's statutory rights be paired with a "concrete harm." Indeed, "injury" and resulting "harm" are distinct concepts. See *White v. Touche Ross & Co.*, 163 Ill. App. 3d 94, 101 (1st Dist. 1987) ("An injury has been defined as an invasion of a person's interest, even if there is no immediate harm or that harm is speculative."); *Nordness v. Miltek Corp. Surgical Products*, 286 Ill. App. 3d 761, 764 (1st Dist. 1997) ("Injury is the illegal invasion of a legal right [while] damage is the loss, hurt, or harm which results from the injury.") (citation omitted).

The difference in the requirements imposed by the courts of this state and the federal courts arises from the differential development of the law governing standing in Illinois. In Illinois, the courts' jurisdiction is defined in article VI, section 9 of the Illinois constitution: "Circuit Courts shall have original jurisdiction of all justiciable matters[.]" Ill. Const. (1970), art. VI, § 9. Although the constitution does not define "justiciable matters," this Court has explained that "a 'justiciable matter' is a controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests." *Belleville Toyota*, 199 Ill. 2d at 335.

"The legislature may create new justiciable matters by enacting legislation that creates rights and duties that have no counterpart at common law or in equity." *Graf*, 206 Ill. 2d at 553. As this Court has stated:

> "Where the legislature enacts a comprehensive statutory scheme, creating rights and duties which have no counterpart in common law or equity, the legislature has created a 'justiciable matter.' Once the right is created, it is by reason of our constitution that our circuit courts acquire power to adjudge concerning that right. However, it is by reason of the statute that the justiciable matter exists." *In re M.M.*, 156 Ill. 2d 53, 65 (1993).

In *People v. Johnson*, 2021 IL 125738, ¶ 31, this Court recently confirmed that a showing of an injury in fact was not even needed to enforce statutory rights. The Court distinguished between "common-law standing, which requires an injury in fact to a legally recognized interest, and *** statutory standing, which requires the fulfillment of statutory conditions to sue for legislatively created relief." *Id.*

While standing in federal courts implicates their limited subject matter jurisdiction under Article III of the United States Constitution (*Spokeo*, 578 U.S. at 338), this Court has explained that "issues of standing and ripeness do not implicate this court's subject matter jurisdiction." *Lebron*, 237 Ill. 2d at 253. Instead, "[u]nder Illinois law, lack of standing is an affirmative defense, which is the defendant's burden to plead and prove." *Id.* at 252. "While a lack of subject matter jurisdiction cannot be forfeited, a lack of standing will be forfeited if not raised in a timely manner in the trial court." *Id.* at 252-53.

As a result, this Court has rejected rote application of federal standing principles in Illinois. This Court is "not, of course, required to follow the Federal law on issues of justiciability and standing. Moreover, to the extent that the State law of standing varies from Federal law, it tends to vary in the direction of greater liberality[.]" *Greer*, 122 Ill. 2d at 491.

In *Greer*, this Court rejected the "zone of interests" test adopted by the Supreme Court in its standing analysis in *Data Processing*, the same case it first introduced the "injury in fact" requirement for federal courts. *Id*. at 489-91. The *Greer* court reasoned that if "we were convinced that the zone-of-interests test served some useful purpose we would not hesitate to adopt it. But the criticisms generally leveled against it persuade us that it is not a useful addition to the doctrine of standing." *Id*. at 491. Instead, the Court found the zone of interest test "tends to lead to confusion between standing and the merits of the suit." *Id*. at 492.

After rejecting the federal zone of interest test, this Court held:

> "We thus adhere to the principle that standing in Illinois requires only some injury in fact to a legally cognizable interest. More precisely, the claimed injury, whether 'actual or threatened' 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." *Id*. at 492-93.

The *Greer* test remains the law of this state. This Court has never adopted the U.S. Supreme Court's recent, additional federal standing requirement that the plaintiff also suffer a concrete harm beyond the violation

of their rights. Indeed, in *Midwest Commercial Funding, LLC v. Kelly*, 2023 IL 128260, ¶ 13, this Court reiterated "[s]tanding requires some injury in fact to a legally cognizable interest."

More specifically, Illinois has not adopted the "concrete harm" requirement for "injury in fact" recently created by *Spokeo* and *TransUnion* for cases involving violations of statutory rights brought in federal court. Again, "federal courts and Illinois courts define 'injury-in-fact' differently" *Bryant*, 958 F.3d at 622.

c. Three appellate decisions have found Illinois' definition of "injury in fact" to find FACTA plaintiffs have standing.

Confirming a violation of one's FACTA rights alone is sufficient to sue in Illinois, the First, Second, and Fifth Districts of the Illinois Appellate Court have all concluded that FACTA plaintiffs possess standing, relying on Illinois standing principles. The First District was the first to address the issue in *Duncan*, 2019 IL App (1st) 180857. The Fifth District was next with its decision in *Lee*, 2019 IL App (5th) 180033. And the Second District issued the third ruling in *Soto*, 2020 IL App (2d) 180911. Although *Duncan* and *Soto* have since been vacated by agreement of the parties to those cases pursuant to settlement, this Court did not review the merits of those decisions. In addition, decisions of the appellate court are not binding on this Court, so a technical lack of precedential value fails to undermine the persuasive value of the reasoning in those decisions.

In *Duncan*, the First District reversed dismissal of the complaint for lack of standing. *Duncan*, 2019 IL App (1st) 180857, ¶ 8. The trial court had premised its dismissal order on the reasoning in *Spokeo* and the post-*Spokeo* federal FACTA decisions finding that FACTA plaintiffs lacked standing. *Id.* ¶ 18. The appellate court disagreed, distinguishing the federal law on standing by noting that "Illinois courts generally are not as restrictive as federal courts in recognizing the standing of a plaintiff to bring a claim. Although federal law and Illinois law both require an 'injury in fact' to find standing, it does not necessarily mean that both forums define that requirement in the same way." *Id.* ¶ 21.

As the court found, "[a] distinct and palpable injury refers to an injury that cannot be characterized as a generalized grievance common to all members of the public." *Id.* "[U]nder Illinois law, when a plaintiff alleges a statutory violation, no 'additional requirements' are needed for standing." *Id.* ¶ 23, quoting *Glisson v. City of Marion*, 188 Ill. 2d 211, 222 (1999). Applying that reasoning, the court found that under Illinois law plaintiff's allegation of a FACTA violation was sufficient to create an injury in fact to a legally cognizable interest for purposes of standing. *Id.* ¶¶ 24-25.

In *Lee*, the court addressed a class member's objection to a class settlement. The objector raised plaintiff's standing. As in *Duncan*, *Lee* analyzed *Spokeo* and compared its holding to law stated in *Greer*. *Id.* ¶¶ 66-67. The court reasoned that, "[s]o long as a case presents a justiciable matter, the

circuit court has jurisdiction" and "[u]nder Illinois law, standing is not jurisdictional." *Id.* ¶ 67. Applying that reasoning, the court found the plaintiff had "pleaded sufficient facts to allege a willful violation of FACTA and prayed for statutory damages. Therefore, [the plaintiff] pleaded a justiciable claim over which the circuit court had jurisdiction." *Id.* ¶ 68.

Similarly, the court in *Soto* also found that plaintiffs have standing to bring FACTA claims in Illinois. As the court noted, "[s]tanding in federal and Illinois courts *** is controlled by the forums' distinct constitutional provisions." *Id.* ¶ 20. "Standing in Illinois is not jurisdictional; it is an affirmative defense that the defendant must plead and prove." *Id.* "Although designed to preclude persons having no interest in a controversy from bringing suit, standing in Illinois should not be an obstacle to the litigation of a valid claim." *Id.* "Guided by the above principles and FACTA's plain language," the court held that the "plaintiffs had standing to pursue their statutory claims without pleading an actual injury beyond the violation of their statutory rights." *Id.* ¶ 21.

Because *Duncan*, *Lee*, and *Soto* relied on this Court's precedents in finding that the FACTA plaintiffs possessed standing, this Court should apply their reasoning to uphold the trial court's order in this case. The applicable rule is simple: Congress dictated that no company may print a receipt that contains more than last five digits of a consumer's credit or debit card. Here, Walgreens printed ten digits of Fausett's debit card on her receipt and she has

alleged this was a willful violation her statutory rights. Her complaint satisfied the Illinois requirements for stating an injury in fact to a legally cognizable interest and needs no allegation of any additional harm.

d. The federal courts' standing decisions on BIPA undermine Walgreens' argument that BIPA and FACTA should be viewed differently.

Although Walgreens tries to differentiate BIPA from FACTA, suggesting that violations of BIPA rights provide an injury in fact whereas violations of FACTA rights do not, the Seventh Circuit Court of Appeals has reached the opposite conclusion. The Seventh Circuit has held that the violations of certain BIPA provisions do not provide the "concrete harm" necessary for Article III standing, undermining Walgreens attempt to distinguish BIPA from FACTA.

Sections 15(a)-(e) of BIPA (740 ILCS 14/15(a)-(e)), "regulate the collection, retention, disclosure, and destruction of biometric identifiers and biometric information." *Tims v. Black Horse Carriers, Inc.*, 2023 IL 127801, ¶ 29. Section 15(a) regulates the establishment, maintenance, and adherence to a retention schedule and guidelines for destroying collected biometric information; section 15(b) regulates and requires entities to provide notice and obtain written consent before collecting or storing biometric information; section 15(c) regulates and prohibits the selling or otherwise profiting from collected biometric information; section 15(d) regulates the disclosure or

dissemination of biometric information without consent; and section 15(e) regulates the proper storage and protection of collected biometric information.

The Seventh Circuit has held that violations of sections 15(a) and 15(c) lack a concrete harm and therefore do not establish Article III standing, while violations of sections 15(b) and 15(d) do provide a concrete harm. See, *Bryant*, 958 F.3d at 622 (stating that "[w]e conclude that Bryant did not suffer a concrete and particularized injury as a result of Compass's violation of section 15(a). She therefore lacks standing under Article III to pursue that claim in federal court"); *Thornley v. Clearview AI, Inc*., 984 F.3d 1241, 1248–49 (7th Cir. 2021) (finding a lack of standing for section 15(c)); *Cothron v. White Castle Systems, Inc.*, 20 F.4th 1156, 1161 (7th Cir. 2021) (finding sections 15(b) and 15(d) do provide standing though sections 15(a) and 15(c) do not).

Were this Court to accept Walgreens's argument and change Illinois standing law to require "concrete harm" to accompany a violation of one's statutory rights to gain access to the courthouse, it would be compelled to find that violations of several sections of BIPA are not actionable in Illinois. But this Court's decision in *Rosenbach* cannot be read to allow standing to enforce some sections of BIPA, and not others. For example, even though *Rosenbach* addressed only a section 15(b) claim the Court did not limit its holding to that subsection alone. See, *Rosenbach*, 2019 IL 123186, ¶10. Likewise, in *Tims*, this Court addressed the statute of limitations that applied to claims brought under

sections 15(a)-(e) even though the claims in that case had been brought only under section 15(a), (b), and (d). *Tims*, 2023 IL 127801, ¶¶ 7, 37.

Tims was decided after the courts in *Bryant*, *Thornley*, and *Cothron* had already held that violations of section 15(a) and 15(c) do not confer standing to sue in federal court. It would be odd indeed for this Court to go through the effort of establishing in *Tims* the statute of limitations for claims that could never be brought in either state or federal court. Notably, Walgreens does not address that potential oddity, likely because it severely undercuts its argument that violations of rights under BIPA should be treated differently than violations of rights under FACTA for standing purposes in Illinois were this Court to adopt the "concrete harm" requirement.

e. This Court should reject the concrete harm test because it leads to confusion between standing and the merits of the suit and it requires improper evaluation of the wisdom of legislation.

In *Greer*, this Court rejected the federal "zone of interest" test for standing, finding "the criticisms generally leveled against it persuade us that it is not a useful addition to the doctrine of standing." *Greer*, 122 Ill. 2d at 491. The Court observed that test "tends to lead to confusion between standing and the merits of the suit. In the case before us, for example, application of the zone-of-interests principle would entail an examination of the goals, purposes, and objectives of the IHDA Act so as to determine whether the plaintiffs were among its intended beneficiaries. *Id*. at 492.

The *TransUnion* concrete harm test is even more rigid and narrow then the zone of interest test already rejected by this Court and it also causes confusion between standing and the merits of the suit.[8] Though previously discussed, Justice Thomas's dissent exposes the problem with the concrete harm test. As he noted, the test posed a rhetorical question: "Who could possibly think that a person is harmed when he requests and is sent an incomplete credit report, or is sent a suspicious notice informing him that he may be a designated drug trafficker or terrorist, or is not sent anything informing him of how to remove this inaccurate red flag?" *TransUnion* at 594 U.S. at 460 (Thomas, J., dissenting). To Justices Thomas, Breyer, Sotomayor, and Kagan, "[t]he answer is, of course, legion: Congress, the President, the jury, the District Court, the Ninth Circuit, and four Members of this Court." *Id*.

Further, Walgreens's argument on why Fausett lacks "injury in fact" reads more like a criticism of FACTA than an analysis on whether she was injured. Walgreens Br. at 23-26. Walgreens concedes it printed receipts with

---

[8] See generally Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349 (criticizing as "lawless" the Court's transformation of the injury-in-fact test from an effort to expand the category of those entitled to bring suit into an effort to achieve the opposite effect); Jacob Phillips, *TransUnion, Article III, and Expanding the Judicial Role*, 23 FEDERALIST SOC'Y REV. 186 (2022) (arguing that *TransUnion* undermines Congress's authority to legislate and does not protect the executive as it claims to, thus frustrating the separation of powers).

ten digits in violation of her rights but argues that the "question is whether the disclosure of the first six digits caused Fausett to suffer an injury in fact to a legally cognizable interest." Under Illinois law, that answer is simple: yes. Congress prohibited Walgreens from displaying ten digits of a consumer's card number on their receipt, where an identity thief can find it. If Walgreens did so, that "violation, in itself, is sufficient" to sue. *Rosenbach*, 2019 IL 123186 ¶ 33

But Walgreens tells this Court that adjudication of that violation is "unworthy of judicial resources." Walgreens Br. at 30. It asks this Court to sit in judgment, not of whether Fausett was injured, but whether Congress's policy decisions to give her a right designed to reduce her exposure to identity theft and provide relief when it is willfully violated are wise. This approach undermines the separation of powers because it second guesses the wisdom of legislative enactments. The presumption is that a "challenged statute is valid. Its wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained[.]" *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983). This Court recently declared that "[o]ur role is not to judge the wisdom of legislation but only to determine when it offends the constitution. *** [W]e do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Rowe v. Raoul*, 2023 IL 129248, ¶ 19.

In *Greer* this Court declined to adopt the "zone of interest" test because it "tends to lead to confusion between standing and the merits of the suit." *Greer*, 122 Ill. 2d at 491. The concrete harm test does the same. As Justice Kagan stated, "[t]he Court here transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement." *TransUnion*. at 462 (Kagan, J., dissenting).

Walgreens downplays the harm to Fausett, arguing "[t]he bald and ultimately baseless allegation of an alleged 'increased risk' of harm cannot, as a matter of law, suffice." Walgreens Br. at 26. But "FACTA punishes conduct that *increases the risk* of third-party disclosure, not the actual disclosure itself." (Emphasis in original). *Jeffries*, 928 F.3d at 1065. Fausett testified identity theft is "my biggest fear. It takes years, a lifetime, to repair identity theft." (C688) Walgreens may think the mere heightened risk of losing a few hundred dollars is a concern unworthy of this Court's resources. But for people like Fausett, the loss of a few hundred dollars is the difference between surviving and catastrophe. Congress and the President deemed that risk important enough to protect against with FACTA.[9]

---

[9] Walgreens suggests its FACTA violations cause no risk of identity theft, citing its putative expert opinions as "fact," but Congress determined otherwise, and FACTA itself does not invite litigants to question its determination. Even if this was an issue, however, Fausett has not had the opportunity present a rebuttal expert as discovery has not been completed in the trial court.

This Court should not adopt the "concrete harm" to second guess that wisdom. Instead, "[t]he legislature, having conferred a right of action may determine who shall sue, and the conditions under which the suit may be brought." *Johnson*, 2021 IL 125738 at ¶31.

III. The fact that FACTA plaintiffs have standing to bring FACTA claims in Illinois when FACTA plaintiffs do not have standing in federal court is an accepted quirk in the federal system.

Walgreens claims that "eliminating the injury-in-fact requirement would remove Illinois from the overwhelming majority view of courts that have adhered to an injury-in-fact requirement for standing." Walgreens Br. at 27. Fausett, however, does not propose to change this requirement. It is Walgreens that asks this Court to change it by adopting the federal "concrete harm" requirement. By affirming the trial court, this Court will simply be reiterating that Illinois is not governed by federal standing requirements and that standing in Illinois requires only a violation of one's rights is itself an injury in fact.

Contrary to Walgreens' argument that this will make Illinois an outlier, many states reject the federal test for standing. See *Lebron*, 237 Ill. 2d at 254, fn. 4 (this Court "has expressly rejected federal principles of standing.") and, *e.g., Committee to Elect Forest v. Employees PAC*, 853 S.E.2d 698, 721-22. 729 (N.C. 2021) (rejecting the current federal standing test, noting that it "has been increasingly used to constrain access to federal courts even where a statute creates a right to sue."); *Lansing School Education. Association v. Lansing*

Board of Education, 792 N.W.2d 686, 693 (Mich. 2010) (stating "[t]here is no support in either the text of the Michigan Constitution or in Michigan jurisprudence, however, for … adopting the federal standing doctrine."); *State ex rel. Dodrill Heating & Cooling, LLC v. Akers*, 246 W.Va. 463, 471 (W. Va. 2022) (finding a violation of statutory rights is sufficient to show injury for standing "because the Legislature has made it so."); *Freemantle v. Preston*, 398 S.C. 186, 194-95 (S.C. 2012) (stating that "[t]he traditional concepts of constitutional standing are inapplicable when standing is conferred by statute."); *Kline v. SouthGate Property. Management, LLC*, 895 N.W.2d 429, 437 (Iowa 2017) (noting that the focus for standing is the "scope of the cause of action as enacted by the legislature …"); see also *Protect Our Parks, Inc. v. Chicago Park Dist.*, 971 F.3d 722, 731 (7th Cir. 2020) ("[T]he states can empower their courts to hear cases that federal courts cannot—and many states have done just that."). Viewed in proper context, Illinois's view on standing is not some outlier.

In fact, the Massachusetts Appeals Court recently rejected adoption of *TransUnion's* "concrete harm" requirement for standing in Massachusetts courts. In *Kenn v. Eascare*, LLC, 103 Mass. App. Ct. 643, 649 (MA App. Ct. 2024), the court reversed the trial court dismissal of a FCRA lawsuit for lack of standing that followed *TransUnion's* reasoning. The court stated, "[t]he plaintiff's lack of standing in Federal court is not dispositive of the question of her standing in State court." *Id.* "Under general principles of standing in the

courts of the Commonwealth, an allegation of injury is required." *Id.* at 650. The court reasoned that "[t]he plaintiff alleged the violation of her legal rights under FCRA, which, if proved, entitles her to damages under FCRA. Although her injury may not be 'concrete' as that term is understood in art. III jurisprudence, it is not 'speculative, remote, and indirect' as a matter of State law." *Id.* at 652. The court concluded that under Massachusetts law, "the plaintiff is not required to allege that the violation of her legal rights under FCRA caused her 'some kind of separate, identifiable harm arising from the violation itself.'" *Id.* at 653.

Likewise, in *Rosenbach*, this Court held a violation of one's BIPA rights, without more, is sufficient to sue. *Rosenbach*, 2019 IL 123186, ¶ 30 ("[n]o additional consequences need be pleaded or proved. The violation, in itself, is sufficient to support the individual's or customer's statutory cause of action.").

Walgreens also suggests that declining to change Illinois standing law and adopt a federal "concrete harm" test would make Illinois an outlier because federal courts have uniformly rejected the proposition that a violation of an individuals' FACTA right 's confers standing without regard to some injury in fact." But, as noted above, the federal courts' interpretation is premised on an Article III analysis from *Spokeo* and *TransUnion* that is not biding on Illinois courts. The fact that Illinois courts may hear federal statutory claims and that federal courts cannot has been accurately described "as a notable quirk of the

United States federalist system." *Soto*, 17-CV-6902, 2018 WL 2364916, at *5. It is not a new quirk, either.

To the contrary, in *ASARCO*, 490 U.S. at 623–24, the Supreme Court held it could hear an appeal of a judgment entered in state court on a claim the plaintiffs would have lacked standing to bring in federal court. In so holding, the Court expressly noted "state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, *a federal statute*." [Emphasis added]. *ASARCO*, 490 U.S. at 617 (emphasis added).

Furthermore, this Court should not entertain Walgreens's suggestion that Illinois courts ought to reject FACTA claims simply because federal courts can no longer hear them. Pursuant to the supremacy clause (U.S. Const. art. VI., cl. 2), Illinois courts must hear federal claims if they have jurisdiction. *Italia Foods, Inc. v. Sun Tours, Inc.,* 2011 IL 110350, ¶ 22, (stating that "[t]he obligation on State courts to hear Federal causes of action is not self-imposed by enabling legislation, but arises under the supremacy clause.")

Indeed, "[f]ederal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum—although both might well be true—but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature." *Howlett By &*

Through Howlett v. Rose, 496 U.S. 356, 367 (1990). "The Supremacy Clause makes those laws 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure." *Id.* "A state court may not deny a federal right, when the parties and controversy are properly before it *** The existence of the jurisdiction creates an implication of duty to exercise it." *Id.* at 369-70. "When Congress, in the exertion of the power confided to it by the Constitution, adopted that act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of [the State] as if the act had emanated from its own legislature, and should be respected accordingly in the courts of the State." *Id.* at 371.

Because Illinois law does not require an individual to allege additional harm beyond the violation of the individual's statutory rights to create standing, plaintiffs do not have the jurisdictional barrier to bringing FACTA claims in Illinois that they now face in federal court. Under the supremacy clause, Illinois courts are therefore mandated by the Constitution to hear FACTA claims.

IV. Congress intended Illinois to hear FACTA claims regardless of whether they may be brought in federal court.

Finally, Walgreens argues that this Court should, "conclude that Congress has not authorized Fausett to bring her suit in Illinois any more than it has authorized her to bring her suit in federal court. There is certainly no

clear statement in the statute that Congress intended to allow uninjured plaintiffs to sue in state courts open to such suits, but not in any federal court." Walgreens Br. at 33. That argument has no basis in either law or policy.

In FACTA, Congress provided, "[a]n action to enforce any liability created under this title may be brought in any appropriate United States district court, without regard to the amount in controversy, *or in any other court of competent jurisdiction*[.]" (Emphasis added). § 618. The plain and unambiguous language used in that statement clearly permits courts in Illinois (and all other states and territories with competent jurisdiction) to decide FACTA cases.

Furthermore, Fausett was injured (her rights were violated), but regardless, Congress squarely intended consumers be able to sue without the need to show resulting "harm." *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 718 (9th Cir. 2010) ("Congress expressly created a statutory damages scheme that intended to compensate individuals for actual or potential damages resulting from FACTA violations, without requiring individuals to prove actual harm"); *Jeffries*, 928 F.3d at 1067, fn.3 (FACTA "does not make liability contingent on a showing of actual harm.").[10]

---

[10] The U.S. and Illinois Chambers of Commerce contend Congress demonstrated a contrary intent in the "Clarification Act of 2007" but that is incorrect. The Clarification Act only addressed lawsuits involving disclosure of expiration dates, not too much of the card number, and then only to provide retroactive amnesty for violations up to 2008. *See Muransky v. Godiva*

It should also be noted when FACTA was enacted in 2003, there was no question that FACTA claims could be brought in federal court. And they were, for years, without any standing issue. See *Hammer v. Sam's East, Inc.*, 754 F.3d 492, 498 (8th Cir. 2014) (holding FACTA violation, without more, satisfies the injury in fact test because "the actual-injury requirement may be satisfied *solely* by the invasion of a legal right that Congress *created*. This is not a novel principle within the law of standing.") (emphasis in original), and *e.g.*, *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014); *Van Straaten v. Shell Oil Products Co. LLC*, 678 F.3d 486, 489 (7th Cir. 2012).

It was only because the Supreme Court decided to change federal standing law in *Spokeo* and *TransUnion* that lower federal courts were forced to rule FACTA plaintiffs lacked standing because of their inability to allege "concrete harm" in addition to the violation of their rights. But Congress has not amended FACTA in response. As a result, this Court may just as easily conclude Congress intended for states to take over exclusive jurisdiction of FACTA claims by not amending FACTA following *Spokeo* and *TransUnion*.

Chocolatier, Inc., 905 F.3d 1200, 1210 (11th Cir. 2018), *rev'd on other grounds*, 979 F.3d 917 (11th Cir. 2020) (*en banc*). It did not otherwise change FACTA and the reference to "actual harm" in the Clarification Act's findings only refers to the Clarification Act itself, not FACTA. In re *Toys 'R' Us – Delaware, Inc. – Fair and Accurate Credit Transactions Act (FACTA) Litig.,* 300 F.R.D. 347, 364, fn. 39 (C.D. Cal. 2013) ("the 'Purpose' subsection of the Clarification Act … states: 'The purpose of this [Clarification] Act . . . is to ensure that consumers suffering from any actual harm to their credit or identity are protected …" (brackets in original).

Walgreens makes two additional arguments in passing. First, it implies (at 32-33) that this Court should find that FACTA violates Article II, citing *TransUnion*. In *TransUnion* the Court stated, "[a] regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority." *TransUnion*, 594 U.S. at 429. The Court did not go on to conclude, however, that FACTA was such a scheme, or make an Article II violation a part of its holding. Instead, as the trial court found here (R172), *TransUnion* only decided the test for standing to sue in federal court, holding "[n]o concrete harm, no standing." *Id*. at 442. That roots its holding clearly in Article III and not Article II. *See also id*. at 417 ("To have Article III standing to sue in federal court …").

Second, Walgreens raises a due process argument asserting that "allowing uninjured plaintiffs to bring putative class actions seeking statutory damages raises serious due process concerns that Congress would not have intended." Walgreens Br. at 33. That argument presupposes that a violation of FACTA alone does not constitute an injury, but as established above, it does under Illinois law. Additionally, the argument is premature as this appeal only comes before the Court after the trial court granted the motion to certify the class. To date, no trial has occurred, and no damages have been awarded.

Further, even large damage awards do not in and of themselves create due process violations. *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301

1312 (11th Cir. 2009) (discussing the FCRA and holding "[t]he statute gives potential defendants notice that if they violate FACTA, they will be subject to penalties of $ 100 to $ 1,000 per violation. We therefore conclude that the statute satisfies due process by giving sufficient notice to potential violators.") Fausett will have to prove Walgreens "willfully" violated the Act to recover statutory damages. If that happens it will be Walgreens' conduct and Congress' damages authorization that will determine the damages. *Murray v. GMAC Mort. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006) ("The reason that damages can be substantial, however, does not lie in an 'abuse' of Rule 23; it lies in the legislative decision to authorize awards as high as $1,000 per person, 15 U.S.C. §1681n(a)(1)(A), combined with [defendant's numerous violations].") (brackets added)." Finally, Walgreens has forfeited any due process argument by failing to raise it during the briefing on the certification in the trial court. *Illinois Dept. of Healthcare & Family Services v. Warner*, 227 Ill. 2d 223, 233 (2008).

CONCLUSION

Under longstanding Illinois law, a violation of an individual's statutory rights providing is an injury in fact to a legally cognizable interest and confers standing to sue. While Illinois standing law may be more liberal than its federal counterpart (*Greer*, 122 Ill.2d at 491), states "have great latitude to establish the structure and jurisdiction of their own courts." *Howlett*, 496 U.S. at 372. Nonetheless, Walgreens asks this Court (at 30) to change Illinois standing law radically because, to Walgreens, FACTA cases "are unworthy of

judicial resources." The United States Congress and the President, however, disagree. If Walgreens believes FACTA is unworthy, the appropriate remedy is to lobby Congress to repeal the Act. Or, alternatively, Walgreens could simply not violate the existing law to avoid further lawsuits. But until Congress decides to repeal FACTA, this Court should hold that those who violate it may be held liable in the courts of Illinois for their willful violations of federal law.

For these reasons, plaintiff-appellee Calley Fausett respectfully requests that this Court affirm the trial court's ruling she has standing to sue Walgreens in Illinois court.

Respectfully submitted,

/s/ *Thomas L. Kilbride*

Keith J. Keogh
Michael Hilicki
Keogh Law, Ltd.
55 W. Monroe St., Ste. 3390
Chicago, Illinois 60603
Tel: 312-726-1092
keith@keoghlaw.com
mhilicki@keoghlaw.com

Thomas L. Kilbride
Adam R. Vaught
Kilbride & Vaught, LLC
82 S. LaGrange Rd., Suite 208
LaGrange, IL 60525
217-720-1961
tkilbride@kilbridevaught.com
avaught@kilbridevaught.com

Bret L. Lusskin
BRET LUSSKIN, P.A.
668 Golden Beach Drive
Golden Beach, Florida 33160
Tel: 954-454-5841
blusskin@lusskinlaw.com

Scott D. Owens
Scott D. Owens, P.A.
2750 N. 29th Ave., Ste. 209A
Hollywood, Florida 33020
Tel: 954-589-0588
scott@scottdowens.com

Counsel for plaintiff-appellee

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) 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 11,305 words.

/s/ *Adam R. Vaught*

STATE OF ILLINOIS)
)
COUNTY OF COOK)

PROOF OF SERVICE

I, Adam R. Vaught, attorney for plaintiff-appellee, certify that I electronically filed via Odyssey EFile IL the foregoing plaintiff-appellee's appellee's brief with the Clerk of the Supreme Court on the 20th day of March 2024.

The undersigned further certifies that on the 20th day of March 2024, an electronic copy of the foregoing plaintiff-appellee's appellee's brief is being served through the Court's electronic filing manager to counsel below.

Robert M. Andalman
Rachael Blackburn
Diana Guler
A&G LAW, LLC
542 South Dearborn Street,
10th Floor
Chicago, IL 60605
randalman@aandglaw.com
rblackburn@aandglaw.com
dguler@aandglaw.com

Robert N. Hochman
Neil H. Conrad
Emma Kurs
SIDLEY AUSTIN LLP
1 South Dearborn Street
Chicago, IL 60603
rhochman@sidley.com
nconrad@sidley.com
ekurs@sidley.com

Under penalties as provided by law pursuant to § 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109), the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Adam R. Vaught

E-FILED
3/20/2024 4:39 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK