No. 131444

IN THE
SUPREME COURT OF ILLINOIS

CALLEY FAUSETT, individually, and on behalf of other similarly situated, *Plaintiff-Appellee,* v. WALGREEN 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.

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POINTS 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 harm 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. 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); *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 prevent identity theft, not remedy identity theft after it occurs.

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

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[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 IL 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 customer's receipt is liable to the customer 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).

FACTA does not require proof of resulting "harm." *Jeffries*, 928 F.3d at 1067, fn. 3 (FACTA "does not make liability contingent on a showing of actual 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").[3]

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[2] Walgreens misstates FACTA was intended to reduce identity theft only by preventing "the printing of entire card numbers and expiration dates on receipts." (br. at 4). The statute bars printing any but the last 5 digits of the card number, not the "entire" card number.

[3] 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 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*

President Bush extolled that the truncation requirement "will help prevent identity theft before it occurs."[4] 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 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.

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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).

[4] 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).

II. Fausett's complaint alleges Walgreens willfully violated her FACTA rights and caused her harm.

Fausett's complaint alleges Walgreens violated FACTA rights belonging to her and the other class members by printing receipts disclosing more of their debit card numbers than the truncation requirement's last-five-digit maximum. (C8) She filed her complaint in Lake County, where Walgreens is headquartered. (C9)

Fausett alleges she used her personal debit card[5] 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 debit 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 two receipts that each displayed the first six and the last four digits of her debit card number. (C14)

In addition to alleging this conduct violated her FACTA rights, Fausett alleges Walgreens' actions caused her to "suffer a heightened risk of identity

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[5] 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.")).

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 testified the cashier saw the receipt. (C692) Finally, she testified identity theft is her biggest fear because it takes so long to repair the damage it can cause. (C688)

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' 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, Walgreens' 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 to automatically print receipts that contain, among other things, the first six and last four digits of the customer's card number. (C391, 446, ¶5 ("Both the receipt and stub receipt include the first six digits … and the last four digits.")). In fact, Walgreens admits its system produced receipts displaying this information when its customers performed fund reload transactions. (Walgreens Br. at 1).

Walgreens also admits the first six digits identify Fausett's card issuer (*id.*), enabling whoever saw the receipt to learn that information about her account. Plus, because the full card number has sixteen digits, disclosing the

first six and last four digits on the receipt gets anyone who sees it two-thirds of the way to learning her full card number. Walgreens admitted its 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 its awareness of FACTA, Walgreens continued to generate debit card reload receipts displaying ten digits of its customers' debit card numbers for 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).[6] (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 that two Illinois appellate courts (at that point) had found a plaintiff has standing to bring a

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[6] Walgreens' 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.

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, ¶¶64-8 and *Duncan v. FedEx Office & Print Services*, 2019 IL App (1st) 180857, ¶23).[7]

Further, Fausett pointed out a reason Illinois standing is broader than federal court standing: 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 unanimous 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

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[7] A third Illinois appellate decision, *Soto*, 2020 IL App (2nd) 180911, would reach this same conclusion a few months later. Finally, the appellate court in this case agreed, making four Illinois appellate court panels that have found standing in FACTA cases, and none that have found otherwise.

> not a restriction that applies to a state court and standing seems to be much more liberally granted in the state court.

(R47)

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, federal court standing jurisprudence had further developed. In *TransUnion v. Ramirez*, 594 U.S. 413 (2021), five of the nine members of the U.S. Supreme Court held that under Article III of the federal 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 "harm" beyond the violation of their rights.

In response, Fausett argued, "[f]ederal 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 this Court's decision in *Rosenbach,* which rejected "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' reliance on *TransUnion* was misplaced because "*TransUnion* only addressed federal standing." (C824) Fausett quoted from Justice Thomas's dissent in *TransUnion*, which was joined by Justices Breyer, Sotomayor, and Kagan. In that dissent, the four 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' standing argument.

After extensive oral argument, 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)[8]

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 opposition to class certification in the trial court. 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.

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[8] Although the trial court stated there appears to be no dispute Fausett is a "no-injury plaintiff", Fausett does dispute she is a no-injury plaintiff because she alleges Walgreens violated her rights under FACTA, and provided allegations and evidence of resulting harms she suffered.

VIII. This Court found leave to appeal was improvidently granted and sent the case to the Second Appellate District for decision.

On May 17, 2024, this Court issued an order finding Walgreens' petition for leave to only appeal the trial court's ruling on standing "was improvidently granted." Specifically:

> the parties are not arguing that the appellate court abused its discretion in denying the petition for leave to appeal, nor are they arguing against any action of the appellate court. Rather, the parties' briefs are focused solely on arguing the merits of the circuit court's judgment. Accordingly, this court's September 27, 2023, order allowing the petition for leave to appeal is vacated. The petition for leave to appeal is denied.
>
> In the exercise of this court's supervisory authority, the Appellate Court, Second District, is directed to vacate its May 18, 2023, order in case No. 2-23-0105, denying the petition for leave to appeal pursuant to Supreme Court Rule 306(a)(8). The appellate court is directed to allow the petition for leave to appeal. The briefs filed in this court shall stand as the parties' briefs in the appellate court.

(May 17, 2024 Order).

IX. The Second Appellate District affirms the trial court's standing decision.

The Second Appellate District agreed with the trial court's determination Fausett has standing, rejecting Walgreens' arguments and affirming the trial court's class certification order. *Fausett v. Walgreen Co.*, 2024 IL App (2d) 230105.

Justice McLaren filed a dissenting opinion agreeing with the court's resolution of the standing question, but disagreeing with the court's decision to affirm class certification, even though the standing question was the only

issue Walgreens asked this Court to review from the trial court's class certification ruling. *See id.* at ¶49.

X. This Court again allows leave to appeal the standing issue.

Walgreens filed a new petition for leave to appeal to this Court that, once again, only raised the standing argument. This Court allowed leave to appeal as to that issue.

ARGUMENT

For more than one-hundred years, this Court has held a violation of one's rights alone is sufficient to sue in Illinois courts. See *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 the plaintiff must meet that cannot be waived. *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). In Illinois, however, standing is neither jurisdictional nor a requirement the plaintiff must meet; rather it is an affirmative defense that may be forfeited. *State ex rel. Leibowitz v. Family Vision Care, LLC*, 2020 IL 124754 at ¶29.

Fausett has standing under Illinois law because she alleged a violation of her FACTA rights and seeks the statutory damages FACTA provides for that violation. Nothing more is needed.

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 those principles, this Court in *Rosenbach* held violations of the Biometric Information Privacy Act ("BIPA") render a plaintiff "aggrieved," *i.e.*, injured, 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; *see also Cothron v. White Castle Sys., Inc.*, 2023 IL 128004, ¶ 38 ("Rosenbach clearly recognizes the statutory violation itself is the 'injury' …"); and *Davis v. Yenchko*, 2024 IL 129751, ¶ 23 (citing *Rosenbach* for proposition that a "violation of the Biometric Information Privacy Act (740 ILCS 14/1 *et seq.* (West 2016) constitutes an invasion of a person's statutory right … **giving that person standing** to recover for violations.") (Emphasis added).

The appellate court rightly held a plaintiff who alleges a violation of BIPA or FACTA has standing in Illinois because the violation of the plaintiff's rights is, in itself, an injury. *Fausett*, 2024 IL App (2d) 230105. Walgreens, however, asks this Court to adopt *TransUnion's* additional "harm" requirement for injury in federal court to find 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. *Bryant v. Compass Group USA, Inc.*, 958 F.3d 617, 622 (7th Cir. 2020) ("federal courts and Illinois courts define 'injury-in-fact' differently.").

The judicial power of Illinois courts has never been governed by U.S. Supreme Court decisions defining the jurisdictional limitations imposed on

federal courts by Article III of the U.S. Constitution. *ASARCO*, 490 U.S. at 617 ("We have recognized often that the constraints of Article III do not apply to state courts, … 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."). As this Court has repeatedly affirmed, Illinois is not "required to follow the Federal law on issues of justiciability and standing." *Greer v. Illinois Housing Dev. Auth*ority, 122 Ill. 2d 462, 491 (1988). Indeed, this Court "has expressly rejected federal principles of standing." *Lebron*, 237 Ill. 2d at 254, fn. 4.

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 …" See, *Fausett*, 2024 IL App (2d) 230105, ¶ 32. To the contrary, in *TransUnion* the United States Supreme Court fundamentally swept away many decades of *federal* standing law, and suddenly made it impossible to enforce many statutory rights in federal court—despite the fact that FACTA cases had been heard in federal court for years without question.

Rosenbach's holding that a violation of an 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 determinations of the trial court and Second Appellate District that Fausett has standing for the following reasons:

- First, Walgreens cannot meet its burden of proving Fausett lacks standing under Illinois law because Fausett easily satisfies Illinois standing rules;

- Second, this Court should follow *Rosenbach* and hold that a claim for damages for a violation of one's statutory rights does not require additional injury or harm in Illinois, and reject Walgreens' request for this Court to adopt *TransUnion's* federal "harm" requirement;

- Third, the fact that FACTA plaintiffs have standing to bring FACTA claims in Illinois when FACTA plaintiffs in federal court do not have standing is an accepted quirk in the federal system; and

- Fourth, Walgreens' argument on the merits of the class certification order are waived and forfeited, and also lack merit.

I. Fausett satisfies Illinois' standing rules.

Walgreens argues Fausett lacks standing because she has not alleged a harm beyond Walgreens' violation of her statutory rights codified by Congress in FACTA. However, Walgreens does not dispute her information was actually disclosed to the Walgreens cashier that handled the receipt, or that she was forced to take action to prevent further disclosure of the private information displayed on the receipt. (C19, C692). These are recognized harms FACTA exists to prevent. *Deschaaf v. Am. Valet & Limo.*, 234 F. Supp. 3d 964, 970 (D. Az. 2017).

Furthermore, Walgreens' argument is based on federal court interpretation of federal standing requirements. This Court, however, has long held principles of federal standing do not govern standing in the Illinois courts. Indeed, this Court has held that a violation of statutory rights alone creates the injury that provides standing when the statute provides for damages. Thus,

the appellate court was correct to find that the recent change in federal standing law did not affect Illinois' standing law.

In *Rosenbach*, this Court addressed the meaning of the requirement in BIPA that a person be "aggrieved," *i.e.*, injured, by a violation of one's legal rights, 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 ….'" (Emphasis in original; internal citation omitted). *Rosenbach,* 2019 IL 123186, ¶ 30 (quoting *Glos v. People*, 259 Ill. 332, 340 (1913)).

This Court concluded a violation of a plaintiff's statutory rights alone was enough 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 alleging a violation of one's statutory rights alone is sufficient to confer standing. *See Davis*, 2024 IL 129751, ¶ 23 (citing *Rosenbach* for the proposition that "violation of the Biometric Information Privacy Act (740 ILCS 14/1 *et seq.* (West 2016) constitutes an invasion of a person's statutory right … **giving that person standing** to recover for violations.") (emphasis added).

The appellate court's determination *Fausett* has standing under *Rosenbach* is consistent with this Court's earlier standing decisions holding, as

Walgreens concedes, that in Illinois a litigant has standing if they suffer "an injury that is "'(1) distinct and palpable; (2) fairly traceable to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief.'" Walgreens Br. at 13 (quoting *Greer*, 122 Ill. 2d. at 493).

Fausett suffered injury because Walgreens violated her FACTA rights, as Illinois has long recognized a violation of statutory rights is an actionable injury. *See Rosenbach*, 2019 IL 123186, ¶ 30 (violation of BIPA rights alone makes one "aggrieved") (citing *Glos v. People*, 259 Ill. 332, 340 (1913)); *Cothron v. White Castle Sys., Inc.*, 2023 IL 128004, ¶ 38 ("Rosenbach clearly recognizes the statutory violation itself is the 'injury' …"); see also *Schroeder v. Winyard*, 375 Ill. App. 3d 358, 366 (2d Dist. 2007) ("'injury' includes 'among other things, the "violation of another's legal right, for which the law provides a remedy.") (citation omitted); *Nordness v. Miltek Corp. Surgical Products*, 286 Ill. App. 3d 761, 764 (1st Dist. 1997) ("Injury is the illegal invasion of a legal right …") (Citation omitted); *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 …").

"Distinct and palpable" simply means the injury must be specific to the named plaintiff and "cannot be characterized as a generalized grievance common to all members of the public." *Id.* (quoting *Ill. Rd. & Transp. Builders Ass'n v. Cnty. of Cook*, 2022 IL 127126 ¶ 17). Fausett easily meets this test because, far from asserting an injury to all members of the public, she alleges

Walgreens' violation of her FACTA rights stems from it printing ten digits of *her* card number on *her receipt*.[9]

Fausett's allegations demonstrate her injury is "fairly traceable" to Walgreens' actions because she alleges it deliberately programmed its system to display ten digits of her and its other customers' debit card numbers on their reload transaction receipts. See *Fausett*, 2024 IL App (2d) 230105, ¶ 22. Finally, her injury is substantially likely to be redressed because she alleges the violation of her rights was willful and FACTA (via the FCRA) provides for statutory damages of $100-$1,000 for any willful violation. *Id.* Thus, Fausett meets the *Greer* standing test.

Walgreens' only response is Fausett allegedly failed to plead sufficient "harm" beyond the violation under *TransUnion*. But Illinois courts do not require additional harm to establish standing. Fausett alleges a willful violation of her statutory rights and seeks the statutory damages Congress expressly provided as a remedy for that violation, without the need to show resulting harm.[10] "No additional consequences need be pleaded or proved."

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[9] This injury is also palpable because it appears on the face of the receipt itself. See *Norris v. National Union Fire Insurance 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").

[10] *Jeffries*, 928 F.3d at 1067, fn. 3 (FACTA "does not make liability contingent on a showing of actual harm."); *Bateman*, 623 F.3d at 718 ("Congress expressly created a statutory damages scheme that intended to compensate individuals for actual or potential damages resulting from FACTA violations, without

Rosenbach, 2019 IL 123186, ¶ 30. Accordingly, under both *Rosenbach* and *Greer*, the appellate court correctly found Fausett has standing to sue.

II. This Court should continue to hold that Illinois standing requirements are not governed by the United States Supreme Court's interpretation of Article III standing requirements.

In *Rosenbach*, this Court was clear one need not allege harm beyond a violation of one's statutory rights to bring a lawsuit in Illinois. 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 *Rosenbach* appellate court holding was the same one the United States Supreme Court reached in *TransUnion*. The *Rosenbach* appellate court erroneously decided the plaintiff must allege and establish "some injury or adverse effect" beyond the violation of their statutory rights. This Court conclusively rejected that notion, however, and held, instead, that the violation of statutory rights itself was sufficient to proceed. The Court stated, "[t]o require individuals to wait until they have sustained some compensable injury beyond violation of their statutory rights before they may seek recourse, as

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requiring individuals to prove actual harm"); *see also Santos v. Healthcare Review Recovery*, 90 F.4th 1144, 1148 (11th Cir. 2024) ("Every circuit to interpret 15 U.S.C. § 1681n(a)(1)(A) agrees that 'the plain language of the provision permits recovery of statutory damages in the absence of actual damages'").

defendants urge, would be completely antithetical to the Act's preventative and deterrent purposes." *Rosenbach*, 2019 IL 123186, ¶ 37.

Walgreens now asks this Court to reject *Rosenbach*'s analysis and follow federal standing law. But, as this Court and federal courts have recognized, "federal courts and Illinois courts define 'injury-in-fact' differently." *Bryant*, 958 F.3d at 622 ("[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*, 177 Ill. 2d 314, 328 (1997).

The federal definition of injury in fact used to be similar to the Illinois definition, but dramatically changed in recent years due to the United States Supreme Court's decision to add a "harm" requirement to federal standing doctrine. See *Comm. to Elect Forest v. Employees PAC*, 376 N.C. 558, 590 (N.C. 2021) ("For most of the twentieth century, standing existed where there was invasion of a legal right under the common law, a statute, or the Constitution. *** Ultimately the [U.S. Supreme] Court adopted a restrictive interpretation

of injury-in-fact"). This Court, however, has never held a plaintiff asserting a violation of a statutory right must also suffer resulting harm to have standing, much less adopted *TransUnion's* articulation of that requirement for the federal courts.

Accordingly, consistent with its own precedents, this Court should reject Walgreens' bid to replace Illinois standing law with the current federal law on standing, and instead hold, consistent with *Rosenbach*, that Illinois' injury in fact standard is met when a plaintiff alleges a violation of their statutory rights, regardless of additional harm.

a. Illinois does not require "harm" beyond the violation of one's rights for standing, particularly in the context of statutory rights.

Contrary to Walgreens' suggestion, this Court has never interpreted "injury" for standing to require that a violation of a statutory right be paired with a resulting "harm" when the legislature itself did not require it. Indeed, "injury" and "harm" are distinct concepts. See *White*, 163 Ill. App. 3d at 101 ("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*, 286 Ill. App. 3d at 764 ("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 standing requirements of Illinois versus the federal courts arises from the differential development of the law governing standing. 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).

Indeed, in *People v. Johnson*, 2021 IL 125738, ¶ 31, this Court confirmed it is not even necessary to satisfy common law standing requirements 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.*; see also *Fausett*, 2024 IL App (2d) 230105, ¶ 24 ("when a plaintiff alleges a statutory violation, no 'additional

requirements' are needed for standing).") (quoting *Glisson v. City of Marion*, 188 Ill. 2d 211, 222 (1999)).[11]

Thus, like *Rosenbach*, in *Rogers v. Schlenker (In re Estate of Schlenker)*, 209 Ill. 2d 456 (2004), this Court found an heir had standing to challenge the validity of a later will, regardless of whether it would adversely affect her interests, because the legislature gave her the right to assert the challenge without regard to the will's impact:

> Under the plain and unambiguous language of the Probate Act, one's status as an heir is sufficient, in itself, to confer standing to contest a will's validity. If you are an heir, you qualify as a matter of law as an 'interested person' (755 ILCS 5/1-2.11 (West 2002)) entitled to bring a petition under section 8-1 of the Act (755 ILCS 5/8-1 (West 2002)). What you stand to receive under the challenged will or any prior wills is irrelevant. *Id.* at 464-65.

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[11] Walgreens cites *Estate of Burgeson*, 125 Ill. 2d 477 (1988), to argue standing must be "judicially defined," but *Burgeson* did not deal with a statutory rights, and thus nowhere in that case does the Court opine the legislature lacks the power to create causes of action that do not require a showing of resulting harm that nevertheless confer standing to sue in Illinois courts. In any event, the source of Illinois standing doctrine is the common law (*$1,124,905 U.S. Currency*, 177 Ill. 2d at 328), and "common law courts would allow plaintiffs to maintain an action whenever they asserted the violation of their private rights, even when they did not seek or try to prove actual harm or damage." *Wasserman v. Franklin Cnty.*, 320 Ga. 624, 631 (2025); *accord Comm. to Elect Forest*, 376 N.C. at 571 (based on the common law, "we must conclude the use of the term 'judicial power' excluded any requirement that there be 'actual harm' …"). Plus, this Court also holds the legislature has the power to alter the common law standing requirements. See *Lebron*, 237 Ill.2d at 277 ("Our Common Law Act (5 ILCS 50/0.01 *et seq.*) expressly provides '[t]he common law of England ... shall be the rule of decision, and shall be considered as of full force *until repeated by legislative authority*.'") (italics in original).

Accordingly, because Congress empowered Ms. Fausett to enforce her FACTA rights without the need for harm beyond the violation, as the General Assembly did with BIPA (*Rosenbach*) and the Probate Act (*Rogers*), "harm" beyond the violation cannot be necessary for standing here.

Finally, this result also follows from this Court's holding regarding the purpose of Illinois standing doctrine: "to preclude persons having no interest in a controversy from bringing suit, but it … not be an obstacle to the litigation of a valid claim." *$1,124,905 U.S. Currency*, 177 Ill. 2d at 328. Plainly, because the legislature gave Ms. Fausett an express right to sue for statutory damages concerning the disclosure of her debit card information, she has "an interest" in the case. Accordingly, Illinois standing doctrine "should not be an obstacle" to her case. *Id.*

b. This Court has consistently rejected federal standing rules.

While an aggrieved party's ability to enforce statutory rights in the federal courts may be limited by the subject matter jurisdiction constraints of Article III of the U.S. 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. As a result, this Court has "expressly rejected federal principles of standing." *Lebron*, 237 Ill. 2d at 254, fn. 4; see also *Greer*, 122 Ill. 2d at 491 (observing that "to the extent that

the State law of standing varies from Federal law, it tends to vary in the direction of greater liberality[.]").

Walgreens suggests adopting a federal "harm" requirement for all cases is consistent with *Petta v. Christie Business Holdings Co., P.C.*, 2025 IL 130337 (Walgreens Br. at 18-19), but that is incorrect. In *Petta*, the plaintiff filed a class action complaint after receiving a letter from the defendant informing her that her private personal data might have been exposed to a third-party. *Id.* ¶ 20. The plaintiff's complaint alleged (1) common-law negligence, (2) common-law negligence per se based on violation of the Federal Trade Commission Act ("FTC Act"), (3) common-law negligence per se based on violation of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), and (4) violation of the Personal Information Protection Act. *Id.* ¶ 10. The Court found the plaintiff lacked standing because, "[v]iewing the letter in the light most favorable to Petta, the primary factual allegation of the complaint is that Petta and the other members of the putative class faced only an increased risk that their private personal data was accessed by an unauthorized third party. In a complaint seeking monetary damages, such an allegation of an increased risk of harm is insufficient to confer standing." *Id.* ¶ 21.

This is consistent with *Rosenbach* and the other precedents discussed above because, unlike BIPA (and FACTA), none of the statutes cited in *Petta* conferred a right to sue. The FTC Act and HIPAA provide no right of action, and the plaintiffs only cited them to establish a duty for their negligence

claims. The Personal Injury Protection Act also provides no right of action, and instead just states a violation of its terms constitutes an unlawful practice under the Illinois Consumer Fraud & Deceptive Business Practices Act. 815 ILCS 330/20. The plaintiffs could not seek relief under the Illinois Consumer Fraud Act because it only confers standing to sue for "actual damage." *Rosenbach*, 2019 IL 123186, ¶ 25 ("To bring a private right of action under that law, actual damage to the plaintiff must be alleged."). The *Petta* plaintiffs did not allege actual damage, and as such lacked standing to sue under the statute.

Thus, unlike *Rosenbach*, *Petta* did not decide standing in the context of a statute that legislatively conferred a right and made the right enforceable without regard to additional injury or harm. Accordingly, *Petta* cannot be read to require "harm" beyond a violation of statutory rights for standing when, as here, the statute itself does not require it.

Indeed, to the contrary, in *Rosenbach* this Court found allowing an aggrieved party to bring a claim under BIPA *before* any harm occurred aligned with the preventative and deterrent purposes of the Act. *Id*. ¶ 37 ("To require individuals to wait until they have sustained some compensable injury beyond violation of their statutory rights before they may seek recourse, as defendants urge, would be completely antithetical to the Act's preventative and deterrent purposes.")

The same is true here. FACTA, like BIPA, was passed to prevent identify theft and deter conduct that can cause it, not to provide damages after a

person's identity is stolen. See *Fausett*, 2024 IL App (2d) 230105, ¶ 37 (noting "FACTA's preventative and deterrent purposes"); see also *Jeffries*, 928 F.3d at 1067, fn. 3 (FACTA "does not make liability contingent on a showing of actual harm."); and *Bateman*, , 623 F.3d at 718 (noting "[FACTA]'s deterrent purpose" and Congress's determination that "[a]llowing consumers to recover statutory damages furthers this purpose by deterring businesses from willfully making consumer financial data available, even where no actual harm results.").

In short, consistent with *Rosenbach* and this Court's other precedents finding standing to enforce statutory rights without regard to resulting harm, the Court should continue to reject federal standing limitations.

c. The federal test for standing is inapposite because *Spokeo* and *TransUnion* changed it to require a "harm" in addition to a violation of rights.

Walgreens wants this Court to adopt the *Spokeo* and *TransUnion* "harm" requirement for injury in fact without acknowledging how those decisions radically, and only recently, changed federal law. Illinois has never adopted that additional requirement, and to do so now would require this Court to significantly limit access to the courthouse 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, to demonstrate injury in fact in federal court, a plaintiff must now show harm 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 United States Supreme Court only incorporated the federal injury in fact requirement into its constitutional standing analysis later. 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")).[12]

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[12] Consistent with *Warth*, when FACTA was enacted in 2003, there was no question 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.).

In *Spokeo*, however, the Supreme Court dramatically changed the meaning of injury in fact in federal court. The Ninth Circuit had found an injury in fact when the plaintiff alleged that his statutory rights had been violated. *Id.* at 340. Rejecting that conclusion, the Supreme Court declared that the violation of an individual's statutory rights, by itself, is insufficient to demonstrate concrete harm under Article III, and that instead it was now necessary to plead concrete harm beyond the violation:

> 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 injury 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 contained erroneous information had been given to a third party and those whose credit reports contained 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 groups 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*:

> "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).

Walgreens does not mention how radical a departure *TransUnion* was from traditional federal standing principles. Regardless, the United States Supreme Court's recent changes to the standing requirements of Article III did not alter Illinois' standing requirements.

d. Federal standing decisions on BIPA undermine Walgreens' argument BIPA and FACTA should be viewed differently.

Walgreens suggests *Rosenbach* should be limited to cases involving "the unique characteristics of immutable biometric identifiers" under BIPA. Walgreens Br. at 17-18. But nothing in *Rosenbach* justifies that conclusion. Instead, *Rosenbach* held that because BIPA provides a right to sue by anyone "aggrieved" (injured) by a violation of the rights the statute confers, and because a violation of those rights makes one aggrieved regardless of

"additional consequences," the violation "in itself, is sufficient." *Rosenbach*, 2019 IL 123186 at ¶30. As the court below observed:

> Although Rosenbach and this case involve different statutes, the rationale for the supreme court's holding in that case is equally applicable here. That is because both statutes provide for a right of action based on a violation of an individual's statutory rights, even in the absence of any actual harm or adverse effect. *Fausett*, 2024 IL App (2d) 230105, ¶ 36.

In this regard, the court noted BIPA and FACTA share the same basic purpose: to prevent harm *before* it occurs given "the cost of complying with the statute versus the harm that can result in the absences of compliance." *Fausett*, 2024 IL App (2d) 230105, ¶ 37 ("Echoing the words of the supreme court in *Rosenbach*, to require individuals to wait until they have sustained some compensable injury beyond violation of their statutory rights before they may seek recourse, as defendant urges, would be completely antithetical to FACTA's preventative and deterrent purposes").

Although Walgreens tries to differentiate BIPA from FACTA, suggesting that violations of BIPA rights constitute an injury in fact whereas violations of FACTA rights do not, the Seventh Circuit Court of Appeals 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.

Specifically, the Seventh Circuit has held that violations of BIPA sections 15(a) and 15(c) do not involve a concrete harm and, therefore, do not establish Article III standing, while violations of sections 15(b) and 15(d) do involve 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' argument and change Illinois standing law to require "harm" to accompany a violation of one's statutory rights to gain access to the courthouse, it would also be compelled to find – as did the Seventh Circuit – 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, although *Rosenbach* only addressed 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 under BIPA that could never be brought in either state or federal court. Notably, Walgreens does not address that incongruity, likely because it severely undercuts its argument that violations of BIPA rights should be treated differently than violations of FACTA rights for standing purposes in Illinois were this Court to adopt the federal "harm" requirement for standing.

e. This Court also should reject the federal "harm" requirement for standing because it leads to confusion between standing and the merits of the suit, and requires improper evaluation of the wisdom of legislation.

In *Greer*, this Court rejected the federal "zone of interests" 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* "harm" requirement for standing has received similar criticism for causing confusion. 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).

Plus, Walgreens' proposed adoption of *TransUnion*'s "harm" requirement for standing in statutory rights cases would undermine the separation of powers because it requires this Court to second-guess the wisdom of legislative enactments, and to deny enforcement of those enactments the court thinks insufficient to merit judicial attention. See, 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).

But a statute's wisdom is not the concern of the courts. *Rowe v. Raoul*, 2023 IL 129248, ¶ 19. Indeed, this Court recently declared "[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." *Id.*

Congress determined conduct violating FACTA subjects consumers to an increased risk of identity theft that merits enforcement by the consumer

whose information is disclosed. So, it enacted FACTA and included a private right of action to prevent consumers from being subjected to this risk. *See Jeffries*, 928 F.3d at 1065 ("FACTA punishes conduct that *increases the risk* of third-party disclosure, not the actual disclosure itself.") (Emphasis in original). Years later Congress reiterated "[e]xperts in the field agree proper truncation of the card number" is what protects consumers from identity theft. Pub. L. No. 110-241, § 2(a)(6), 122 Stat. 1565, 1565 (2008). Yet Walgreens asks this Court to reject Congress's determinations because it presented its own "expert" to dispute Fausett's claim that Walgreens' FACTA violations subjected her to this risk. Walgreens Br. at 7.[13]

Walgreens may think the heightened risk of losing a few hundred dollars is too petty to be worthy of a court's time and resources. But for people like Fausett, the loss of a few hundred dollars is the difference between survival and catastrophe. Congress and the President recognized that risk and deemed it important enough to protect against with FACTA.

The Court should, therefore, decline Walgreens' invitation to undermine FACTA's legislative intent by erecting barriers to suit that Congress did not impose. Instead, this Court should continue to follow its recent holding that

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[13] Walgreens cites its putative expert opinions as "fact," but Congress determined otherwise, and FACTA itself does not invite litigants to question its determination. Even if this were an issue, however, Fausett has not had the opportunity to present a rebuttal expert as discovery has not been completed in the trial court.

"[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 but not in federal court is an accepted quirk in the federal system and consistent with congressional intent.

Walgreens claims that "eliminating the injury-in-fact requirement" would make Illinois an "outlier jurisdiction" (Walgreens Br. at 34), but Fausett, does not propose to change the law. It is Walgreens that asks this Court to change Illinois standing law by adopting the federal "harm" requirement created by *Spokeo* and *TransUnion*. By affirming the trial court, this Court will simply be reaffirming Illinois is not governed by federal standing requirements. The long-standing rule in Illinois is that a violation of one's rights alone is an injury in fact sufficient to confer standing to sue. *Rosenbach*, 2019 IL 123186 at ¶ 30; *see also Yenchko*, 2024 IL 129751, ¶ 23 (citing *Rosenbach* for the proposition that a "violation of the Biometric Information Privacy Act (740 ILCS 14/1 *et seq*. ***[g]iv[es] that person standing to recover for violations."). And the legislature alone determines who has standing to enforce rights created by statute. *See Johnson*, 2021 IL 125738 at ¶31 ("The legislature, having conferred a right of action may determine who shall sue, and the conditions under which the suit may be brought.").

The appellate court correctly rejected Walgreens' argument that declining to adopt the current federal standing test makes Illinois an "outlier."

Fausett, 2024 IL App (2d) 230105, ¶ 43. As the court observed, "[m]any states reject the federal test for standing." *Id.* (collecting cases); see also *Lebron*, 237 Ill. 2d at 254, fn. 4 (this Court "has expressly rejected federal principles of standing."); *Kenn v. Eascare*, LLC, 103 Mass. App. Ct. 643, 652 (MA App. Ct. 2024) ("[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"); *Comm. to Elect Forest*, 376 N.C. at 590 (rejecting current federal standing test, noting it "has been increasingly used to constrain access to federal courts even where a statute creates a right to sue."); *Wasserman v. Franklin Cnty.*, 320 Ga. 624, 631 (Ga. 2025) ("what has been deemed essential to invoking the judicial power of Georgia courts is not the nature or extent of a plaintiff's damages, but the violation of a right, as adjudicating these rights is what holds a defendant accountable.") (citation omitted); *Lansing School Education. Association v. Lansing Board of* Education, 792 N.W.2d 686, 693 (Mich. 2010) ("[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) (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) ("[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) (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.").[14] Viewed in proper context, Illinois' view on standing is not some outlier.

Walgreens also argues failing to change Illinois standing law by adopting the federal "harm" requirement puts this state at odds with federal court decisions on standing in FACTA cases. But, the fact Illinois courts may hear some federal statutory claims federal courts may not is "a notable quirk of the United States federalist system." *Soto*, 17-CV-6902, 2018 WL 2364916, at *5, see also, *ASARCO*, 490 U.S. at 617 ("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). And this Court should not entertain Walgreens' 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.

[14] The decisions Walgreens cites from other states apply their own state-specific standing rules which, needless to say, do not apply here.

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.").[15]

Indeed, Congress expressly intended FACTA would be enforced in state court. It 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). 15 U.S.C. 1681p. The plain and unambiguous language used by Congress clearly permits courts in Illinois (and all other states and territories with competent jurisdiction) to decide FACTA cases, regardless of whether federal courts may hear them.

Finally, Walgreens argues allowing "no injury plaintiffs" to bring putative class actions seeking statutory damages raises a due process concern. Walgreens Br. at 30, fn. 8. The appellate court correctly rejected that argument, noting it "incorrectly presupposes" a violation of FACTA rights alone is not an injury even though, as established above, "it does under Illinois

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[15] In a similar vein, Walgreens argues federal standing decisions involving FACTA should be given deference, but that is incorrect because the federal standing decisions it cites do not "interpret FACTA" itself, but rather just follow inapplicable federal standing law. Indeed, there is nothing in FACTA to "interpret" as it relates to standing because Congress did not incorporate federal standing limitations into FACTA. See 15 U.S.C. 1681p.

law." *Fausett*, 2024 IL App (2d) 230105, ¶ 48. Additionally, the court correctly noted the argument "is premature, as this appeal only comes before this court only after the trial court granted the motion to certify the class. Significantly, to date, no trial has occurred, and no damages have been awarded." *Id.*

IV. Walgreens' remaining arguments are waived and lack merit.

Walgreens makes multiple arguments it did not raise in either of its petitions for leave to appeal to this Court or in the briefing considered by the Second Appellate District. Walgreens limited its petition for leave to appeal and briefing to the issue of standing. Indeed, Walgreens did not even raise some of the issues in the trial court. Thus, they are waived here. *Illinois Dept. of Healthcare & Family Services v. Warner*, 227 Ill. 2d 223, 233 (2008). Moreover, they lack merit for several reasons.

Initially, Walgreens argues for the first time that the trial and appellate court decisions here "improperly delegate to the legislative branch the authority to determine justiciability of a claim." Walgreens Br. at 28. But there is no improper delegation because "[t]he 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 (Emphasis added). Congress's decision to create a justiciable right of action in FACTA barring the disclosure of more than the last five digits of Ms. Fausett's debit card number on Walgreens' receipts is an entirely proper legislative action.

Second, Walgreens argues for the first time "[t]he lower courts usurped the authority of the executive branch to enforce federal statutes in the absence of an actual injury." Walgreens Br. at 29. Putting aside Fausett suffered additional injuries as well as that Walgreens' violation of her rights itself is an injury, Walgreens cites *TransUnion dicta* suggesting a "regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law would … infringe on the Executive Branch's Article II authority." But *TransUnion* did not decide the question of whether FACTA violates Article II. It only decided if the parties before the Court satisfied Article III's standing requirements. *TransUnion*, 141 S. Ct. at 2200.

Third, Walgreens questions for the first time whether Illinois standing rules should apply to class members from other states. Walgreens Br. at 26, fn. 7. At no time in this case prior to filing its brief here has Walgreens made that argument. Any such argument should have been made to the trial court and cannot be raised for the first time on appeal, let alone after complete briefing before this Court, oral argument in the Second District, and after limiting its petition to this Court to the issue of standing. In any event, the question is a non-issue because standing is only determined as to the party plaintiff, not as to absent class members. *See I.C.S. Ill., Inc. v. Waste Mgmt. of Ill., Inc.*, 403 Ill. App. 3d 211, 221 (1st Dist. 2010) ("To determine standing in a class action, our focus must be on the named plaintiffs themselves and not on the general class they purport to represent."). Furthermore, there is no cause to consider other

courts' standing rules because this case is only pending in Illinois, and Illinois courts apply their own rules of justiciability. *PennEast Pipeline Co., LLC v. New Jersey*, 141 S.Ct. 2244, 2264 n.1 (2021) (a state has "'sole control' of 'its own courts.' A State is free to develop its own justiciability rules governing state tribunals.").

Fourth, Walgreens argues this Court "should interpret FACTA to avoid constitutional questions," because "[n]othing in the text of FACTA purports to set aside the law of standing of any state." Walgreens Br. at 30-31. But Fausett is not suggesting FACTA changes anything about Illinois standing law. As stated above, Fausett has standing under long held principles of Illinois law. It is Walgreens that is attempting to use *TransUnion* to change the law of standing in Illinois.

Fifth, Walgreens argues it is "bad public policy" to continue to recognize a violation of one's rights alone is sufficient grounds to sue, despite that being the rule of this State for over a century. Walgreens claims this will cause Illinois to be "overrun" with statutory rights cases. Walgreens Br. at 33. However, in the six years since the appellate court in *Duncan* ruled FACTA plaintiffs have standing to enforce their rights, our courts have not been "overrun." In support, Walgreens cites only three other Illinois FACTA cases. One of those was settled (*Richardson*), and the other two are non-FACTA cases that were also terminated before the issue was decided.

Finally, going well beyond standing, which is the only issue raised in its petition to appeal, Walgreens now argues the Court should reverse the class certification order because Fausett allegedly has not "stated a valid FACTA claim." Walgreens Br. at 35-37. For the reasons previously stated, this argument is forfeited. Walgreens' initial petition for leave to appeal to the Second District following class certification expressly included this argument. After the Second District denied leave to appeal, however, Walgreens filed a petition for leave to appeal in this Court that raised only the standing issue. When this Court remanded the case to the Second District after it determined leave to appeal was improvidently granted, it directed the appellate court to use the briefs that had been filed in this Court. Thus, Walgreens' arguments on the merits of the class certification order are forfeited by its failure to raise them in its petition for leave to appeal to this Court. *Lazenby v. Mark's Const., Inc.*, 236 Ill. 2d 83, 92 (2010).

Forfeiture aside, Walgreens' argument still fails on its merits. Walgreens asserts FACTA does not apply to the fund-load transactions at issue because it did not accept Ms. Fausett's debit card as payment, however FACTA does not limit its reach to receipts where the card is accepted "as payment."[16] To the contrary, FACTA's plain text covers "*any* receipt provided to the

[16] FACTA only uses the term "accept" to identify *who* it covers, *i.e.*, any "person that accepts credit cards or debit cards for the transaction of business," not to describe *when* it applies. 15 U.S.C. §1681c(g)(1).

cardholder." (Emphasis added.) 15 U.S.C. §1681c(g)(1). That should end the matter, as Walgreens may not read unwritten "exceptions, limitations, or conditions the legislature did not express, nor may [it] add provisions not found in the law." *Rosenbach*, 2019 IL 123186, ¶ 24 (brackets added).[17]

[17] FACTA also cannot be read to limit its reach to payment/sales transactions because it covers all receipts provided "at the point of the sale or transaction." 15 U.S.C. §1681c(g)(1). By including "or transaction" after "sale," FACTA necessarily reaches transactions involving no sale, *e.g.*, returns and reloads. To read it otherwise renders "or transaction" meaningless, violating the rule a statute must be read to "give effect to each word …" *Vaught v. Industrial Com.*, 52 Ill. 2d 158, 165 (1972). That FACTA goes beyond payment/sales transactions is also consistent with FACTA's prohibition against disclosing more than the last five digits of card numbers on any receipt, as it makes no sense to suggest that information loses its sensitive character when the receipt is generated for a return or fund reload instead of a for a payment/sale. Finally, FACTA expressly lists what it excludes. *See* 15 U.S.C. §1681c(g)(2) ("shall not apply"), and "cash" or "non-sale" transactions are not listed, further confirming Congress did not intend to exclude them. See *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 151-152 (1997) (when a statute lists what it covers, "there is an inference that omissions should be understood as exclusions.").

CONCLUSION

Under longstanding Illinois law, the violation of Fausett's FACTA rights alone confers standing because it is an injury in fact to a legally cognizable interest, plus it confers standing because it is the legislature that determines who has the right to sue. This Court has consistently recognized that Illinois standing law is more liberal than its federal counterpart (*Greer*, 122 Ill.2d at 491), and that states "have great latitude to establish the structure and jurisdiction of their own courts." *Howlett v. Rose*, 496 U.S. 356, 372 (1990). Nonetheless, Walgreens has asked this Court to radically change the entirety of Illinois standing law by eliminating the ability to enforce statutory rights in Illinois despite the national legislature's determination that consumers are entitled to do so because, to Walgreens, such cases are unworthy of judicial resources. As to FACTA however, Congress and the President disagree, and Illinois is bound to enforce the law as it is written.

If Walgreens believes FACTA is unworthy of expending judicial resources, the appropriate remedy is to lobby Congress to repeal the Act. Or, alternatively, Walgreens could simply refrain from violating clear existing law. But because Walgreens did not choose either option and instead is alleged to have willfully violated Ms. Fausett's rights, this Court should hold she has standing to seek to prove her claim and vindicate those rights in the courts of Illinois, as Congress intended.

For these reasons, plaintiff-appellee Calley Fausett respectfully requests that this Court affirm the appellate court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of 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 13,481 words.

/s/ *Adam R. Vaught*

STATE OF ILLINOIS)
)
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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 23rd day of July 2025 and serve it to opposing counsel through the Court's electronic filing manager to counsel below.

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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*