No. 123626

SUPREME COURT OF ILLINOIS

DESTIN MCINTOSH,
Individually and on Behalf of All Others Similarly Situated,

Plaintiff-Respondent,

v.

WALGREENS BOOTS ALLIANCE, INC.,

Defendant-Petitioner

On Appeal from a Judgment of the Illinois Appellate Court,
First District, First Division, Case No. 1-17-0362
There on appeal from the Circuit Court of Cook County, Chancery Division,
Case No. 16-CH-10738, The Honorable Diane J. Larsen, Judge Presiding

BRIEF OF *AMICI CURIAE* TAXPAYERS' FEDERATION OF ILLINOIS, ILLINOIS RETAIL MERCHANTS ASSOCIATION, AND CHICAGOLAND CHAMBER OF COMMERCE

Robert M. Andalman
Rachael Blackburn
A&G LAW LLC
542 S. Dearborn St.
312 348-7629 (telephone)
randalman@A&Glaw.com
rblackburn@A&Glaw.com

Counsel for Amici Curiae, Taxpayers' Federation of Illinois, Illinois Retail Merchants Association, and Chicagoland Chamber of Commerce

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Carolyn Taft Grosboll
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POINTS AND AUTHORITIES

POINTS AND AUTHORITIES
(continued)

INTEREST OF *AMICI CURIAE*

The Taxpayers' Federation of Illinois ("TFI") is a nonpartisan membership organization comprised of large and small businesses, individuals, and tax professionals who are either based in Illinois or who have a meaningful presence in the State. Its purpose is to advocate and foster sound fiscal policies and efficient and economical operation of government and to represent the interests of Illinois taxpayers in developing a reasonable and responsible system of taxation. TFI seeks to protect the interests of Illinois taxpayers and businesses, and to offer nonpartisan information to lawmakers and the general public. In furthering these goals, TFI studies tax policy, various states' tax laws, and the effects of tax laws on taxpayers and businesses. TFI has in-depth knowledge of tax issues, and believes that retailers have a right to well-established, clear and concise tax rules. TFI also believes retailers should not be subject to crippling liability for good-faith mistakes in applying complex tax laws.

The Illinois Retail Merchants Association ("IRMA") serves as the voice of retailing in Illinois. IRMA represents stores of all sizes and merchandise lines. From the nation's largest retailers to independent businesses in every corner of the State, merchants count on IRMA to promote the best environment to do business in Illinois. IRMA supports policies enabling the free market system to operate efficiently, and recognizes that laws and regulations that increase the price of retail goods work as a tax on those who pay for them—the citizens of Illinois. Therefore, IRMA advocates for broad-based tax laws that apply uniformly in order to keep retailers in Illinois. IRMA also recognizes the importance of Illinois' retail industry, which employs one out of every five people in the State and is a driving force of the State's economy. IRMA works to assist Illinois in stabilizing and strengthening the economic environment to bolster existing employers and attract new ones.

The Chicagoland Chamber of Commerce (the "Chamber") advocates on behalf of Chicagoland businesses to help create and maintain a competitive business environment that enhances sustained economic growth and specifically developing employer-friendly policies for the greater Chicago area to enhance job creation and retention. The Chamber is a unifying voice for businesses across the region, and includes many retailers of all sizes, in addition to other commercial entities. As retailers and other Chamber members receive benefits, Chicagoland itself enjoys increased jobs, wages, profits, and—especially relevant here—taxes and tax collection that allow Chicagoland and its residents to thrive.[1]

[1] Walgreens is a member of and/or supporter of two of the amici. Walgreens has helped amici in preparing the amicus brief, including through the assistance of its counsel in drafting and by partially funding the preparation of the brief.

PRELIMINARY STATEMENT

Taxes assessed by states, counties, and municipalities that are collected by retailers at the point of sale are often complex, confusing, and ambiguous. Attempting to administer such taxes often presents complicated legal, factual, and technical issues. Despite good-faith efforts to apply the web of state and local tax laws, retailers may mistakenly collect a tax on an exempt product like Walgreens did here, or may charge either too high or too low a rate on a given product. So long as the retailer accurately discloses the tax it is charging to the customer at the point of sale and remits that tax to the state, such good faith mistakes are just that—*mistakes* of law. They are not fraud. They are not even deceptive. And they should not subject retailers to class action liability under the Illinois Consumer Fraud and Deceptive Practices Act, 815 ILCS § 505.

The Appellate Court's decision—finding Plaintiff stated a Consumer Fraud Act class-action claim even though Walgreens disclosed the tax that it charged and remitted that tax to the City—effectively creates strict liability for all retailers that mistakenly collect a tax. Under the Appellate Court's reasoning, there is nothing retailers can do, short of perfectly applying all tax laws, to avoid consumer fraud liability. Not only does that result completely gut the voluntary payment doctrine's application to retailer tax-collection claims (especially given that the Plaintiff here *voluntarily* paid the water-bottle tax after being informed of that charge), but it expands the definition of fraud and spells potentially disastrous consequences for retailers doing their best to apply Illinois tax law. Some good-faith tax-collection mistakes are inherent in a system with multiple taxing jurisdictions and tax laws that are complex, sometimes ambiguous, and ever-changing. This can be especially challenging for retailers with dozens, hundreds, and even thousands of stores, because they are subjected to different and sometimes inconsistent taxes in each of the many taxing jurisdictions in which they operate. Various taxing jurisdictions are free to set their own rules for how to respond to tax-collection errors. Strict liability for all such mistakes, however, distorts the purpose of the Consumer Fraud Act and the voluntary payment doctrine.

Reversal is necessary to protect retailers that do business in Illinois from crippling liability and to restore the equitable balance, expressed in the voluntary payment doctrine itself, between intentional deception or fraud, on the one hand, and good-faith legal mistakes by both retailers and customers, on the other hand.

ARGUMENT

I. The Appellate Court's Creation of Strict Liability for All Retailers for Over-Collection Misapplies the Consumer Fraud Act and Will Have Devastating Consequences

The Appellate Court held that the mistaken collection of a tax that turns out not to be owed under state or local laws is a violation of the Consumer Fraud Act, and that resulting claims qualify for the fraud exception to the voluntary payment doctrine. Strict liability for all mistaken collection of taxes is not supported by the text or purpose of the Consumer Fraud Act, and it threatens serious harms to Illinois retailers of all types and sizes.

A. Tax regimes are often confounding, ambiguous, and changing

Retailers who sell goods in Illinois are tasked with collecting taxes under federal, state, county, and city laws—which often impose different tax rates, different rules for tax-exempt products, different definitions of product categories, and frequently change all of the above. For example, the Cook County "Sweetened Beverage Tax," which was levied "in addition to any other taxes," produced widespread confusion—so much so that the Cook County Board repealed it just a few months after it took effect. Cook County Code § 74-852(c) (repealed); *see* Walgreens' Petition for Leave to Appeal, at 16 & n.1. The confusion stemmed in part from the definition of "sweetened beverage," which included all beverages with "sweeteners," but exempted beverages with 100% juice, more than 50% milk or milk substitute, beverages to which a customer can add (or request that the retailer add) sweeteners, beverages for medical use or for consumption by infants, and beverages used for "meal replacement" or weight reduction. *See* Cook County Code § 74-851 (repealed).

It fell to retailers to determine, for example, whether a beverage contained 50% milk substitute, or whether a product should be exempt from tax because a customer would use the beverage as a meal replacement or for medical reasons. How would a retailer know that a 25% juice beverage, which is generally not exempt from the tax, was going to be used by a diabetic to increase her blood-sugar, and thus is exempt in that case? The potential for over- or under-collection was common under the law, given its vagaries and difficulties in application.

And the confusion was not only hypothetical—several opportunistic class action lawsuits were filed the same week the sweetened beverage law went into effect. *See, e.g.*, Becky Yerak, *McDonald's, Walgreens, 7-Eleven hit with lawsuits over Cook County soda pop tax*, CHI. TRIB. (Aug. 9, 2017)[2] (referring to *Tarrant v. 7-Eleven, Inc.*, Ill. Cir. Ct., No. 2017 CH 10873 and *Wojtecki v. McDonald's Corp.*, Ill. Cir. Ct., No. 2017 L 008008). One lawsuit involved another confounding aspect of the law—the meaning of the law's provision that the sweetened beverage tax was owed *in addition to* any other taxes on beverages under other state, county, and city laws. The *Wojtecki* lawsuit alleged McDonalds included the sweetened beverage tax in the base price of the product when determining other applicable sales taxes. *See id.* This tax-on-tax issue further complicated that law during its short lifespan.

Of further note, the Cook County sweetened beverage tax law required the incident of the tax to be on the purchaser and specifically stated retailers may list the tax separately on the customer's receipt under City law. *See*

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[2] Available at http://www.chicagotribune.com/business/ct-mcdonalds-walgreens-soda-tax-lawsuits-0809-biz-20170808-story,amp.html.

FREQUENTLY ASKED QUESTIONS, COOK COUNTY GOVERNMENT.[3] Thus, the separate statement of the tax was not intentional deception as stated by the Appellate Court, *see McIntosh v. Walgreens Boots All., Inc.*, 2018 IL App (1st) 170362, ¶ 20, but instead it was required by the taxing statute.

Moreover, complex tax regimes and definitions are often changing. The repeal of the sweetened beverage tax is one example; the Illinois "soft drink" definition is another. Before 2009, Illinois law defined soft drinks as "any complete, finished, ready-to-use, non-alcoholic drink, whether carbonated or not, including but not limited to soda water, cola, fruit juice, vegetable juice, carbonated water, and all other preparations commonly known as soft drinks . . . ; but 'soft drinks' does not include coffee, tea," still water, milk, or drinks with over 50% "natural" fruit or vegetable juice. 35 ILCS § 120/2-10. And if this definition and its exemptions were not confusing enough, after 2009, the law changed to define "soft drinks" as "non-alcoholic beverages that contain natural and artificial sweeteners," and exempted any beverages with milk, milk products, milk substitutes, or more than 50% "vegetable or fruit juice"—though apparently that juice no longer need be "natural." *See id.* Applying these taxes correctly in *every case* to the myriad of different beverages available can be challenging for retailers, to say the least.

And examples of sometimes puzzling tax regimes are not limited to beverage taxes. A complicated tax distinction between Snickers and Twix was

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[3] https://www.cookcountyil.gov/content/frequently-asked-questions-faqs.

recently highlighted in Chief Justice Robert's dissent in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2104 (2018). The two "chocolate-and-caramel confections" are taxed differently—Snickers at the candy rate of 6.25% (plus any local tax), and Twix at the reduced rate for food of 1% (plus any local tax) because Twix contains flour. *Id.*; Ill. Admin. Code tit. 86, § 130.310(a) & Ill. Admin. Code tit. 86, § 130.310(d)(7) (excluding items with flour from "candy" definition). That U.S. Supreme Court opinion also pointed to other tax laws that may trip up good-faith retailers, such as New Jersey's law that taxed yarn used for art projects, but did not tax yarn earmarked to make sweaters. *Wayfair*, 138 S. Ct. at 2103. Ambiguities and non-intuitive exemptions make compliance difficult for retailers—especially in cases like this one, where multiple taxing regimes may impose different tax collection obligations on retailers. Some good-faith mistakes in collection are inevitable and are just that: mistakes, not fraud.

B. Good-faith mistakes in applying complex tax regimes are not fraud

A good-faith, mistaken collection of tax by a retailer is not fraud. This case is a perfect example—and it is just one example among many like it. Walgreens collected Chicago's bottled water tax on sales of certain bottled water products that were exempt under agency guidance because they contained carbonation, flavoring, minerals, or vitamins. Plaintiff has alleged no ill-purpose for this over-collection; rather, Walgreens remitted all collected tax to the City. And Plaintiff has alleged no deception by Walgreens; rather, it is undisputed that Walgreens informed customers it was charging the bottled water tax on every receipt. Plaintiff has only alleged that both *he* and *Walgreens* were unaware that the bottled water tax should not apply to Plaintiff's purchases. This is not fraud—it is a mutual mistake of law.

In this regard, a voluntary payment "to another under a mistake of the law, but with knowledge of all the facts, cannot be recovered." *Yates v. Royal Ins. Co.*, 200 Ill. 202, 206 (1902). Plaintiff and Walgreens both made a mistake of law. But Plaintiff plainly had knowledge of the fact that he was being charged a tax. He cannot recover his claim, under the Consumer Fraud Act or otherwise. *See Lusinski v. Dominick's Finer Foods*, 136 Ill. App. 3d 640, 643-45 (1st Dist. 1985) (applying the voluntary payment doctrine to bar a claim where a retailer mistakenly charged a tax, listed the tax on the receipt, and remitted the tax to the proper government entity).

This case is just one example of retailers disclosing and collecting taxes in good-faith efforts to fulfill their obligations under ever-changing and complicated tax regimes. The Appellate Court held, however, that a retailer's listing and charging a tax that is not owed constitutes a sufficient factual pleading to support a claim of intentional deception. *McIntosh*, 2018 IL App (1st) 170362, ¶ 20. But listing the tax is exactly what the voluntary payment doctrine requires (and in some cases, what the tax statute requires)—apprising the customer of all relevant facts. It is then up to the customer to object or decline to pay the tax if he believes that it is unsupported by the law. *See Isberian v. Village of Gurnee*, 116 Ill. App. 3d 146, 151 (1st Dist. 1983).

The Appellate Court did not apply this framework. Instead, it took the act of incorrectly *charging* a tax based on a mistake of law as demonstrating the deceptive intent necessary under the Consumer Fraud Act. *McIntosh*, 2018 IL App (1st) 170362, ¶ 20. The Appellate Court then went further to hold that this satisfaction of the Consumer Fraud Act standard also precluded, as a matter of law, application of the voluntary payment doctrine based on the doctrine's fraud exception. This logic makes the fraud exception as big as the doctrine itself whenever the Consumer Fraud Act is involved. The voluntary payment doctrine only applies when a tax has been somehow *im*properly charged, yet under the Appellate Court's logic, there is no mistaken tax collection to which the doctrine could ever apply since an improper charge is, by the Appellate Court's reckoning, evidence of fraud. *See Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 360 (2009) (observing that the issue of voluntary payment is "of no consequence" when the tax is "properly exacted.").

Even more, labeling the over-collection of a disclosed and remitted tax as fraudulent carries severe consequences in the context of Consumer Fraud Act class actions. Consumer-fraud plaintiffs may obtain damages, attorneys' fees, costs, and "any other relief which the court deems proper," which could include punitive or treble damages. *See* 815 ILCS § 505/10a(a)-(c); Complaint at ¶ 40. If consumer-fraud actions are brought by the government, they may obtain (among other relief) restitution *and* a civil penalty of up to $50,000 per violation of the Act. *See* 815 ILCS § 505/7(a)-(b). These severe penalties are reserved by the Consumer Fraud Act for businesses engaged in unfair or deceptive acts or practices. The purpose of the Act is to root out "deception, fraud, false pretense, false promise, [and] misrepresentation," when businesses intend for others to rely on said deception. *Id.* § 505/2.

The Appellate Court's strict liability for mistakenly collected taxes cannot be justified under the purposes of the Act. A simple mistake, without respect to any element of actual *deception* or *intention* outside the existence of the mistake itself, *McIntosh*, 2018 IL App (1st) 170362, ¶ 20, does not fall in the ambit of the Consumer Fraud Act as written. The severe consequences of Consumer Fraud Act liability should be—and until now have been—limited to actual fraud, where plaintiffs specifically allege facts tending to show retailers intended to deceive and that customers relied on the deception. Mistakes are not enough evidence to prove fraud. Otherwise, plaintiffs will be relieved of any burden to plead any facts supporting a claim of fraud or deception.

Strict liability also relieves plaintiffs of any burden to know the law or to object to a tax at the time of purchase. A customer may simply complete a purchase from a retailer, learn through a news report that the retailer has admitted to mistakenly over-collecting tax on such a purchase, and then bring a class action lawsuit against the retailer under the Appellate Court's logic. Faced with strict liability for all (even innocent) mistakes, retailers will be forced to decide between seeing litigation through, despite a substantial risk of liability (and then facing responsibility for damages, attorneys' fees, and potentially punitive damages), or settling for large sums to avoid a portion of these costs. The Consumer Fraud Act supports, and the voluntary payment doctrine allows, neither result. This Court should reverse the Appellate Court.

II. The Appellate Court's Decision Severely Expands Retailer Liability for Any Good-Faith Mistake in Collecting Taxes

A. Retailers are caught in a Catch-22

As noted above, the Appellate Court's decision effectively creates strict liability under the Consumer Fraud Act for retailers who collect a tax when it is not owed. So retailers that collect taxes under ambiguous laws or when the tax's applicability to a particular product is in some doubt now will be at risk of class actions and strict liability under the Consumer Fraud Act—along with its attendant damages, fees, and costs. *See* 815 ILCS § 505/10a(a), (c). This strict liability regime may encourage retailers to fail to collect taxes under ambiguous laws when the tax may not be owed. This would both undermine the efficient collection of taxes in Illinois, as well as open retailers up to potentially crippling liability by *qui tam* lawsuit for *under*-collection of taxes.

If retailers fail to collect a tax under an unclear law, and the tax turns out to apply to the given product, they open themselves up to an audit by the taxing authority and, as recent cases show, they may subject themselves to *qui tam* actions under that Illinois False Claims Act. *See, e.g.*, *People ex rel. Beeler, Schad & Diamond, P.C. v. Relax the Back Corp.*, 2016 IL App (1st) 151580, ¶¶ 14, 30 (reversing circuit court opinion in favor of relator against retailer for failing to collect sufficient taxes); *People ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow, Inc.*, 2017 IL App (1st) 152668, ¶ 158 (affirming circuit court opinion against retailer for failing to collect and remit all required use taxes). In these actions, a customer who thinks he or she should have been charged a tax that he or she was not charged can sue the retailer on behalf of the government to collect those taxes. The *qui tam* relator then may keep up to 30% of the proceeds of any action or settlement obtained from the retailer. 740 ILCS § 175/4(d)(2). And retailers' liability in such *qui tam* actions is potentially massive. If found liable for recklessly failing to collect a tax under the Illinois False Claims Act, *id.* § 175/3(b), retailers may be liable for treble damages, *id.* § 175/3(a), the *qui tam* relator's expenses, attorneys' fees, and costs, *id.* § 175/4(d)(2), and an additional "civil penalty of not less than $5,500 and not more than $11,000" for *each* allegedly false act by the retailer, *id.* § 175/3(a).

This potentially expansive liability for minor failures to collect all taxes owed pressures many retailers to settle false-claims actions. *See* Glenn

G. Lammi, *Will State AG's Action Put An End To Unabashed Abuse of State's False Claims Law?*, FORBES (July 27, 2016)[4] ("The pressure on businesses, especially smaller ones, to settle [False Claims Act under-collection] claims is overwhelming."). The failure to collect (and failure to remit) a five-cent tax that *was* owed in 100 cases, for example, could lead to treble damages (*i.e.*, $15), *plus* the minimum of $5,500 *per violation* (potentially $550,000), and attorneys' fees and costs. It is no wonder that many companies feel pressured to settle these actions. *See, e.g.*, *id.* (describing a small patio furniture company targeted under such a *qui tam* action spending around $30,000 "to settle a lawsuit even after a state tax audit cleared his company of any wrongdoing" in an alleged failure to collect taxes); Andrew Maloney, *False Claims Act Lawsuits May Change*, CHI. DAILY L. BULL. (Sept. 14, 2015)[5] (describing a small wrestling gear company settling a *qui tam* action for under-collection of taxes for over $25,000, a massive hit to such a small company).

One consequence of the Appellate Court's decision to create strict consumer-fraud liability for every mistaken collection of a tax, then, will be to subject retailers to crippling liability if they are not 100% correct in every tax interpretation and application. Retailers will be subject to consumer-fraud

[4] Available at https://www.forbes.com/sites/wlf/2016/07/27/will-illinois-state-ags-action-put-an-end-to-unabashed-abuse-of-states-false-claims-law.
[5] Available at https://www.chicagolawbulletin.com/archives/2015/09/14/whistleblower-suits-9-14-15.aspx.

class actions anytime they mistakenly charge a tax that was not owed (even when simply attempting to apply complex or unclear laws); and they may be subject to *qui tam* actions anytime they mistakenly fail to charge a tax that was owed. And that is not to mention the taxing authority audits that may proceed in lieu of, or in addition to, false-claim actions for under-collection of sales taxes. The repercussions of such a strict-liability regime for all tax collection mistakes will be severe for Illinois retailers. This result is intolerable given that retailers collect taxes solely in their capacity as agents of the state; they act as tax collectors only because they are required to.

And those consequences will be made even more severe if other courts follow the Appellate Court's lead and decide the proper interpretation of complex tax laws in the context of consumer class action or *qui tam* actions. This may lead to courts interpreting laws one way and the relevant executive agencies, including the Department of Revenue, interpreting tax laws a different way—as in the case of the small patio furniture company whose *qui tam* action went on even after an audit cleared the company of wrongdoing. *See*, *supra*, Lammi. But retailers need certainty with respect to the proper interpretation of tax laws, as they attempt to faithfully apply those laws as agents of the state. Strict liability for violation of a law that will potentially be interpreted differently by different authorities is the worst-case scenario for retailers.

Small and medium-sized sellers are likely to make occasional errors in the calculation of taxes due, in large part, to the complexity of the tax-collection process. Even large and sophisticated retailers will sometimes be tripped up by this complexity or may interpret truly vague or ambiguous laws differently than a court may interpret that law. Due to the complexity and ambiguity of many laws, retailers may be accused of making tax-collection errors when they have not or when the meaning of a law is not settled, and the mere accusations may have very expensive and significant legal consequences under this new strict liability regime. *See* Debra Cassens Weiss, *Chicago Lawyer Has Filed More Than 900 Qui Tam Actions Against Internet Retailers*, ABA JOURNAL (Oct. 21, 2016).[6]

B. The repercussions of the Appellate Court's decision will be widespread.

The negative consequences of the Appellate Court's decision will only increase as more retailers are swept into more taxing regimes. In particular, the risks, both of over-collection and under-collection of taxes, have recently been heightened by the United States Supreme Court decision in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). That Court lowered the constitutional bar for state governments to require out-of-state retailers to collect sales tax for states all over the nation—wherever a retailer sells even

[6] Available at http://www.abajournal.com/news/article/chicago_lawyer_has_filed_more_than_900_qui_tam_actions_against_internet_ret.

relatively small amounts of goods even if not physically present. *Id.* at 2099. By force of this decision, more and potentially less sophisticated retailers are now swept into complex and ever-changing state and local tax regimes. *See id.* at 2103 (Roberts, C.J., dissenting) ("Correctly calculating and remitting sales taxes" after *Wayfair* "will likely prove baffling for many retailers," given more than "10,000 jurisdictions levy sales taxes" with different rules, rates, and definitions). After *Wayfair*, even small Illinois retailers may not merely be subject to all the taxing jurisdictions and rules in Illinois, but may be subject to state tax laws around the nation. That burden is undeniably great, and is even greater for small businesses. *See id.* at 2104 ("The burden will fall disproportionately on small businesses.").

If this Court affirms the Appellate Court decision, and other states follow in those footsteps to establish strict consumer-fraud liability for tax over-collection, then the burden on retailers of expanded tax collection obligations under *Wayfair* could present crippling risks. Illinois retailers will not only face strict liability for trying to comply with all tax laws in Illinois, but they may face the same liability for any mistake in applying a foreign state law where they do some business. That result is untenable. The "daunting complexity" of nationwide sales tax collection and its attendant "legitimate concerns"—*e.g.*, that "State taxes differ, not only in the rate imposed but also in the categories of goods that are taxed," *Wayfair*, 138 S.

Ct. at 2098 (majority)—may lead to strict liability for Illinois retailers under theories of "fraud" for *any* over-collection in *any* jurisdiction.

Important to the Supreme Court's reasoning that retailers could be required to collect tax even without a physical presence was that South Dakota implemented several features in its tax system to offer reasonable protections for small retailers. *See Wayfair*, 138 S. Ct. at 2098-99. It remains very much the role of states and state courts to protect retailers from the most crippling burdens of a nationwide tax collection system. The Illinois legislature took a step in this direction by adopting language identical to South Dakota's law: limiting its sales tax as applied to out-of-state retailers to retailers with "cumulative gross receipts from sales of tangible personal property to purchasers in Illinois [at] $100,000 or more," or retailers that sell "200 or more" tangible things to Illinois purchasers. 35 ILCS § 105/2(9)(A)-(B). This Court can best balance the interests of all parties and offer reasonable protections to retailers by reaffirming that the voluntary payment doctrine applies—and thus retailers are not *per se* liable for consumer fraud—when retailers mistakenly over-collect a sales tax after disclosing the tax. If this Court were to hold otherwise, then other state courts may reciprocate by imposing similar strict liability in a manner that could affect Illinois retailers under *Wayfair*.

And this is not to mention the out-of-state retailers who sell to Illinois customers. In attempting to comply with Illinois tax collection after *Wayfair*, these retailers may err on the side of under-collection of Illinois taxes to avoid consumer class actions under the Consumer Fraud Act. Surely, this result would go against Illinois's interest in out-of-state retailers collecting and remitting Illinois sales and use taxes. Alternatively, out-of-state retailers may choose to stop doing business with Illinois customers rather than opening themselves up to strict consumer-fraud liability or *qui tam* actions in Illinois courts for every tax-collection mistake. The deleterious effects of this Court affirming the Appellate Court would be widespread—affecting Illinois retailers who must collect taxes under multiple levels of statewide (and nationwide) taxing regimes, and affecting retailers all over the United States which collect Illinois tax.

The challenge that Illinois retailers face is growing as the number and complexity of taxing jurisdictions and rules continue to expand. Adoption of the Appellate Court's logic would expand retailer liability in a manner that conflicts both with the text and purpose of the Consumer Fraud Act and with the State's longstanding public policy as expressed in the voluntary payment doctrine. Reversal is necessary to restore the proper balance of encouraging Illinois tax collection without crippling retailers by setting them up for immense liability anytime they make a good-faith mistake in applying often complex and ever-changing taxing regimes.

III. Conclusion

For these reasons, *Amici* respectfully request that this Court reverse the Appellate Court thereby requiring dismissal of McIntosh's claim.

Dated: November 6, 2018

Respectfully,

/s/ Robert M. Andalman

Robert M. Andalman
Rachael Blackburn
A&G Law LLC
542 S. Dearborn Street
10th Floor
Chicago, IL 60605
Tel: (312) 348-7629
randalman@AandGlaw.com
rblackburn@AandGlaw.com

Counsel for Amici Curiae,
Taxpayer Federation of Illinois,
Illinois Retail Merchants Association, and
Chicagoland Chamber of Commerce

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) 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 20 pages.

By: /s/ Robert M. Andalman

Counsel for Amici Curiae,
Taxpayer Federation of Illinois,
Illinois Retail Merchants Association,
and
Chicagoland Chamber of Commerce

Dated: November 6, 2018

NOTICE OF FILING AND CERTIFICATE OF SERVICE

On November 6, 2018, I, Robert M. Andalman, an attorney hereby certify that I caused a copy of the foregoing Brief of Amici Curiae Taxpayer Federation of Illinois, Illinois Retail Merchants Association, and Chicagoland Chamber of Commerce, to be filed with the Clerk of the Illinois Supreme Court using the Illinois Odyssey electronic filing system, and caused a copy to be served via e-mail on the following:

Joseph J. Siprut
Todd L. McLawhorn
Richard S. Wilson
SIPRUT PC
17 North State Street, Suite 1600
Chicago, Illinois 60602
312.236.0000 (telephone)
312.878.1342 (facsimile)
jsiprut@siprut.com
tmclawhorn@siprut.com
rwilson@siprut.com

Attorneys for Plaintiff Destin McIntosh

Kenneth M. Kliebard
Gregory T. Fouts
Kristal M. Petrovich
MORGAN, LEWIS & BOCKIUS LLP
77 West Wacker Drive
Chicago, Illinois 60201
312.324.1000 (telephone)
312.324.1001 (facsimile)
kenneth.kliebard@morganlewis.com
gregory.fouts@morganlewis.com
kristal.petrovich@morganlewis.com

Attorneys for Defendant Walgreens Boots Alliance, Inc.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

By: /s/ Robert M. Andalman

Robert M. Andalman

Counsel for Amici Curiae,
Taxpayer Federation of Illinois,
Illinois Retail Merchants Association,
and
Chicagoland Chamber of Commerce

Dated: November 6, 2018