**No. 128338**

**IN THE**
**SUPREME COURT OF ILLINOIS**

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| WILLIAM WALTON, individually and on behalf of all others similarly situated,<br><br>*Plaintiffs-Appellant,*<br><br>v.<br><br>ROOSEVELT UNIVERSITY,<br><br>*Defendant-Appellee.* | Appeal from the First District Appellate Court, No. 1-21-0011; There Heard on Appeal from the Circuit Court of Cook County, Illinois, No. 09 CH 04176<br><br>The Honorable Anna H. Demacopoulos, Judge Presiding. |

# BRIEF OF DEFENDANT-APPELLEE ROOSEVELT UNIVERSITY

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## NATURE OF THE CASE

Plaintiff, William Walton ("Walton"), filed this lawsuit against Defendant, Roosevelt University ("Roosevelt"), for alleged violations of the Illinois Biometric Privacy Act (740 ILCS 14/1 *et. seq*) ("Privacy Act"). Roosevelt moved to dismiss, arguing the Federal Labor Management Relations Act (29 U.S.C. § 141) ("LMRA") preempted the claim because Walton, a Roosevelt employee, was a member of the collective bargaining unit in which SEIU Local 1 acted as its sole and exclusive bargaining agent. As a member of the collective bargaining unit, Walton is subject to the Collective Bargaining Agreement ("CBA") agreed to by Roosevelt and SEIU Local 1, and, therefore, LMRA § 301 preempts his claims. Roosevelt argued that federal courts in Illinois have uniformly held Privacy Act claims are preempted by LMRA § 301 and, under Illinois Supreme Court precedent, the circuit court should follow the federal courts' interpretation on whether federal law preempts BIPA.

The circuit court disagreed with the federal courts' analysis and denied Roosevelt's motion to dismiss. However, the court certified a question for the First District Appellate Court under Illinois Supreme Court Rule 308. Ill. S. Ct. R. 308. The circuit court certified the following question:

> Does Section 301 of the Labor Management Relations Act (29 U.S.C. § 185) preempt BIPA claims (740 ILCS 14/1) asserted by bargaining unit employees covered by a collective bargaining agreement?

(SR306.)

The First District Appellate Court allowed the Rule 308 application and answered "the certified question in the affirmative." *Walton v. Roosevelt Univ.*, 2022 IL App (1st) 210011, ¶ 27.

This court subsequently granted Walton's Petition for Leave to Appeal to answer the certified question.

## ISSUE PRESENTED FOR REVIEW

Does Section 301 of the Labor Management Relations Act (29 U.S.C. § 185) preempt BIPA claims (740 ILCS 14/1) asserted by bargaining unit employees covered by a collective bargaining agreement?

## STATUTES INVOLVED

1. The Illinois Biometric Information Privacy Act, 740 ILCS 14/1 *et seq*.;
2. The Labor Management Relations Act, 29 U.S.C. § 151 *et seq*.; and
3. The Railway Labor Act, 45 U.S.C. §§ 151-188.

## STATEMENT OF FACTS

Plaintiff filed a three-count class action complaint alleging violations of the Illinois Biometric Information Privacy Act (740 ILCS 14/1). Walton was an employee of Roosevelt, working in its Campus Safety Department from January 2018 to January 2019. (SR10.) He alleged that as part of his employment, he was required to scan his hand to clock in and out of work. (SR10.) He further alleged that Roosevelt stored his hand geometry data in its employee database. (SR10.) Walton sought to bring claims on behalf of himself and a class of all other similarly-situated individuals. (SR11-12.)

Walton argued that the Privacy Act applies to the time clock at issue. (SR8.) The complaint alleged three counts for allegedly violating the Privacy Act section 15(a), 15(b) and 15(d). (SR15-20.) He sought relief of $5,000 for each reckless violation, $1,000 for each negligent violation, injunctive relief, attorney's fees and costs, and pre and post judgment interest. (SR20.)

**A. Roosevelt moved to dismiss the complaint, arguing federal law preempts the Privacy Act**.

Roosevelt filed a motion to dismiss pursuant to Section 2-619 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619). (SR22.) The motion argued that Walton's Privacy Act claims were preempted by the LMRA. (SR22.)

Roosevelt submitted with the motion an uncontested affidavit from its vice president of human resources. (SR55-56.) The affidavit expressly confirmed that: (a) Walton was a member of SEIU, Local 1 during his employment with Roosevelt (SR56), (b) SEIU, Local 1 and Roosevelt agreed to a Collective Bargaining Agreement ("CBA") that was in effect the entire time Walton worked for Roosevelt (SR56), and (c) a true and correct copy of the CBA at issue was attached. (SR56-58.)

The CBA at issue contains a broad management rights clause that states:

> Subject to the provisions of this Agreement, the Employer shall have the exclusive right to direct the employees covered by this Agreement. Among the exclusive rights of management, but not intended as a wholly inclusive list of them are: the right to plan, direct, and control all operations performed in the building, to direct the working force, to transfer, hire, demote, promote, discipline, suspend or discharge, for proper cause, to subcontract work and to relieve employees from duty because of lack of work

> or for any other legitimate reason. The Union further understands and agrees that the Employer provides an important service to its tenants of a personalized nature to fulfill their security needs, as those needs are perceived by the Employer and the tenants. Accordingly, this Agreement shall be implemented and interpreted by the parties so as to give consideration to the needs and preferences of the tenants.

(SR60.)

The CBA also expressly "recognizes the Union as the sole and exclusive representative of all non-supervisory full and part-time security employees." (SR59.) The CBA also states "the right to bargain on behalf of all such employees is vested solely in the Union." (SR59.)

### B. Roosevelt's motion relied on the Seventh Circuit's decision in *Miller v. Southwest Airlines* to argue the LMRA preempts the Privacy Act.

Just before Roosevelt filed its motion, the Seventh Circuit ruled in *Miller v. Southwest Airlines Co.*, 926 F.3d 898, 904 (7th Cir. 2019), that Privacy Act claims are preempted by Railroad Labor Act ("RLA"). (SR25.) Roosevelt's motion to dismiss argued *Miller* was directly on point. In that case, three employees filed a class-action lawsuit against their employer, Southwest Airlines, alleging it violated the Privacy Act by collecting biometric data as part of its time keeping system. (SR25.) The case had been removed from state court to federal court, and Southwest Airlines moved to dismiss the claim, arguing the RLA preempted the Privacy Act. *Miller*, 926 F.3d at 904. The Seventh Circuit agreed.

As Roosevelt's motion argued, the Seventh Circuit found there could "be no doubt" that how workers clock in and out is the proper subject of

negotiations between employers and the unions that act as the exclusive bargaining agent of all those in the bargaining unit. (SR25.) The motion quoted the central holding in *Miller*, which held as follows:

> A state cannot remove a topic from the union's purview and require direct bargaining between individual workers and management. And Illinois did not try. Its statute [the Privacy Act] provides that a worker or an authorized agent may receive necessary notices and consent to the collection of biometric information. 740 ILCS 14/15(b). We reject plaintiffs' contention that a union is not a "legally authorized representative" for this purpose. Neither the statutory text nor any decision by a state court suggests that Illinois wants to exclude a collective-bargaining representative from the category of authorized agents.

(SR25.)

On this basis, Roosevelt argued the LMRA § 301 preempted the Privacy Act because Walton's employment was covered by the CBA, and the union was the sole and exclusive bargaining agent for biometric data issues related to clocking in and out of work. (SR29.) Because Walton had not exhausted his remedies provided in the CBA, federal law preempted his lawsuit. (SR29-30.)

In response, Walton first argued preemption did not apply because, under the CBA, he was not a union member for the first thirty-one days of employment. (SR95.) Walton next argued preemption did not apply because the CBA never addressed Privacy Act or privacy claims. (SR98.) And his final argument was that his statutory rights cannot be waived through a CBA. (SR99.)

In reply, Roosevelt cited several decisions from the Northern District of Illinois applying *Miller* that had been issued since the motion was filed.

(SR117-55.) While *Miller* held the RLA preempted the Privacy Act, the subsequent federal decisions applying *Miller* found that Privacy Act claims are also preempted by the LMRA. (SR117-55.) These courts relied on United States Supreme Court precedent stating the preemption analysis under the RLA and LMRA are "virtually identical". (SR120-33; 136-45; 148-55.)

Roosevelt also cited an order from Judge Dorothy French Mallen in the Illinois Eighteenth Judicial Circuit that followed *Miller* and the federal district court's decisions to likewise hold the LMRA preempts Privacy Act claims. (SR178, 294-95.) Judge Mallen dismissed the Privacy Act complaint without prejudice to bring the claims in a proper forum. (SR178.)

Additionally, Roosevelt argued Walton's argument that he was not a union member for the first thirty-one days of his employment was irrelevant. (SR112.) Regardless of whether Walton was a union member during the first thirty-one days, he was still a member of the collective bargaining unit and therefore subject to the collective bargaining agreement. (SR112.) Under federal law, this was sufficient for preemption to apply. (SR112-14.) Additionally, Roosevelt argued that the decisions from the federal courts dismissing Privacy Act claims based on the LMRA must be followed because the federal court decisions rested on uniform interpretations of federal labor law. (SR 299.)

### C. The circuit court denied the motion to dismiss, finding the LMRA does not preempt Walton's BIPA claims.

The circuit court below denied the motion to dismiss. (SR148.) It found *Miller* was distinguishable from this case. (SR151.) It held the fact *Miller* arose out of airline employment was important to the analysis, stating "preemptive intent tends to be more readily inferred in aviation because it is an 'area of the law where the federal interest is dominant.'" (SR151.) The circuit court therefore found that the analysis for RLA preemption differed from the preemption analysis under the LMRA. (SR151.)

Additionally, the court relied on an order from Judge Neil H. Cohen of the Circuit Court of Cook County that denied a motion to compel arbitration. (SR151.) The court below stated it agreed with Judge Cohen's analysis of *Miller*, holding that *Miller's* "statement as to biometric information being indistinguishable from many subjects of collective bargaining, like drug testing, to be mere dicta and unnecessary to its disposition." (SR151.)

The court then stated that the LMRA did not preempt the Privacy Act because "[a]n entity's duties under BIPA are not limited to interactions with employees, but extend to any individual with whom that entity collects biometric data." (SR153.) The court said "[i]t is thus unquestionable that an entity's obligations and a person's rights under BIPA exist independently of both employment and any given CBA." (SR153.) It thus concluded the LMRA "cannot be read broadly to preempt non-negotiable rights conferred on individual employees as a matter of state law, it is the legal character of a

claim, as 'independent' of rights under the CBA that decides whether a state cause of action may go forward." (SR153.) The court therefore held LMRA preemption did not apply to Walton's BIPA claims. (SR155.)

### D. Roosevelt University filed a motion to reconsider or in the alternative to certify a Rule 308 question; the circuit court certified the question.

Roosevelt filed a motion to reconsider or in the alternative to certify a Rule 308 question. (SR156.) It argued the court below erred in its analysis and should have deferred to the uniform federal court decisions on federal preemption. (SR157-65.) The motion argued the court should reconsider its decision because it conflicted with federal authority that had found the discussion in *Miller* was not mere *dicta* and that *Miller* applied with equal force to claims involving the LMRA as compared to the RLA. (SR158.) The motion cited several federal district-level opinions in support. (SR160-65.) The motion argued the trial court should follow the federal courts on the issue of whether federal preemption applies. (SR162.)

In the alternative, the motion asked the court to certify a question under Supreme Court Rule 308. (SR166.) The motion argued the question before the court met Rule 308's requirements that (1) the order involved questions of law as to which there are substantial grounds for differences of opinion, and (2) an immediate appeal may advance the ultimate determination. (SR166.)

On October 28, 2020, the court heard argument on the motion to reconsider. (SR307-13.) The court denied the motion to reconsider (SR311), but

permitted the parties to submit an agreed proposed certified question for the court's consideration. (SR312-13.)

On December 2, 2020, the parties submitted a proposed question. (SR303.) The proposed question stated, "Does Section 301 of the Labor Management Relations Act preempt BIPA claims asserted by bargaining unit employees covered by a collective bargaining agreement?" (SR303.) On December 9, 2020, the circuit court certified the proposed question, only modifying it to include citations to the LMRA and the Privacy Act. (SR306.)

### E. The First District Appellate Court accepted the Rule 308 application and answered the certified question in the affirmative.

On February 1, 2021, the First District Appellate Court accepted Roosevelt's Rule 308 application. *Walton v. Roosevelt Univ.*, 2022 IL App (1st) 210011, ¶ 11. Roosevelt subsequently filed its opening brief. Roosevelt argued that the Appellate Court should answer the certified question in the affirmative because the federal courts in Illinois have uniformly determined the LMRA preempts Privacy Act claims when a Privacy Act claim relating to use of a timeclock is asserted by an employee covered by a collective bargaining agreement with a broad management rights clause. (Def. Br. at 14-15.) It argued that this Court has made clear that when federal courts have made a uniform interpretation of federal law, Illinois courts should follow that interpretation. Moreover, the federal courts were legally correct. (Def. Br. at 15-22.)

In response, Walton made two general arguments. First, Walton argued preemption does not apply here because there is no need for the Court to interpret the CBA in order to adjudicate his Privacy Act claims. (Pl. Br. at 8-19.) Second, Walton argued that the court was not required to follow federal decisions because: (a) the 7th Circuit in *Miller* applied the RLA instead of the LMRA, (b) inferior federal district court rulings are owed little deference, and (c) the federal district decisions contravene United States Supreme Court precedent on LMRA preemption. (Pl. Br. at 20-29.)

Roosevelt filed a reply, arguing that the Seventh Circuit issued an opinion after Roosevelt filed its opening brief which agreed with Roosevelt's arguments and rejected the idea that *Miller* was limited to claims involving the RLA. (Def. Reply Br. at 2-6.) In *Fernandez v. Kerry, Inc.*, 14 F.4th 644 (7th Cir. 2021), the Seventh Circuit affirmed a district court order applying its previous decision in *Miller* to hold that LMRA § 301 preempts Privacy Act claims for use of a timeclock. (Def. Reply Br. at 3-6.) Roosevelt argued that the Appellate Court should follow *Fernandez* because: "Illinois courts may choose not to follow the Seventh Circuit or uniform lower federal courts if the court finds the decision to be 'wrongly decided.'" (Def. Reply Br. at 2 (*citing State Bank of Cherry v. CGB Enterprises*, 2013 IL 113836, ¶ 54).) *State Bank of Cherry* held "[w]hat is meant by 'wrongly decided' in this circumstance is not merely that this court would rule a different way. Rather, in giving deference to unanimous federal court opinion, *we will find the federal court decisions to*

*be 'wrongly decided' only if the federal decision is outside 'logic' and 'reason.'"* *Id*. (emphasis added).

Walton conceded that "the factual and legal issues of this case are indistinguishable from *Fernandez*". *Walton*, 2022 IL App (1st) 210011 ¶ 18. The appellate court also acknowledged the numerous federal district court decisions that held LMRA preempts claims under the Privacy Act for use of a timeclock where "similar" CBA's contained a broad management rights clause. *Walton*, 2022 IL App (1st) 210011 ¶ 22.

The appellate court rejected Walton's argument that the federal courts, including *Fernandez,* "were wrong." *Walton*, 2022 IL App (1st) 210011 ¶ 22-24 The appellate court refused to hold that the uniform decisions from the federal court were "without logic and reason," so it could find they were wrongly decided pursuant to *State Bank of Cherry*. *Walton*, 2022 IL App (1st) 210011 ¶ 23-24. In fact, the appellate court found "the reasoning of the federal courts to be sound". *Walton*, 2022 IL App (1st) 210011 ¶ 24. The appellate court recognized the broad management rights clause at issue and found "[c]ertainly Roosevelt has met the low bar of advancing a nonfrivolous argument that bargained-for rights are at issue in this dispute . . ." *Walton*, 2022 IL App (1st) 210011 ¶ 25. Thereafter, the Appellate Court held:

> Walton and his fellow unionized employees are not prohibited from pursuing redress for a violation of their right to biometric privacy—they are simply required to pursue those rights through the grievance procedures in their collective bargaining agreement rather than in state court in the first instance. Walton cannot bypass his union, his sole and exclusive bargaining agent, to

> demand that Roosevelt deal with him directly on this issue. Walton comes to the court attempting to represent a class of similarly situated employees over a workplace grievance, but that is a place for his union, not Walton himself. Federal law prevents state courts from stepping in and usurping the bargained-for dispute resolution framework where the parties have elected to establish a working relationship that comes within the purview of the Labor Management Relations Act. Accordingly, we answer the certified question in the affirmative and find that Privacy Act claims asserted by bargaining unit employees covered by a collective bargaining agreement are preempted under federal law.

*Id.* ¶ 27.

## STANDARD OF REVIEW

A certified question brought pursuant to Illinois Supreme Court Rule 308 presents a question of law subject to *de novo* review. *Eighner v. Tiernan*, 2021 IL 126101, ¶ 18; *Rozavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 21. *De novo* review is also proper where an appeal concerns a question of law that requires statutory interpretation, and arising in the context of an order denying a § 2-619 motion to dismiss. *O'Connell v. Cnty. of Cook*, 2022 IL 127527, ¶ 19.

## ARGUMENT

Two different panels of the Seventh Circuit, an appellate court panel from the First District, and over a dozen district courts have unanimously agreed that federal labor law preempts claims under the Privacy Act for use of a timeclock where the collective bargaining agreement at issue contains a broad management rights clause and the union acts as the exclusive bargaining agent for the bargaining unit. Walton asks this Court to find the

unanimous legal reasoning from all these various justices and judges is "outside logic and reason." He is wrong.

## I. It was not outside logic and reason for the Seventh Circuit and over a dozen federal district courts to conclude that the LMRA preempts Privacy Act claims.

### A. The LMRA preempts state law claims when the defendant raises a non-frivolous argument that the claim requires interpretation or implementation of a collective bargaining agreement.

LMRA § 301 provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

LMRA § 301 preempts a state law claim if resolution of the claim "requires the interpretation of a collective-bargaining agreement." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988). This preemption encompasses "claims founded directly on rights created by collective-bargaining agreements, and also claims substantially dependent on analysis of a collective-bargaining agreement." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 394 (1987). LMRA § 301 grants federal jurisdiction over controversies arising out of collective bargaining agreements and authorizes federal courts to forge a body of federal law for the enforcement of collective bargaining agreements. *Loewen Group Int'l, Inc. v. Haberichter*, 65 F.3d 1417, 1421 (7th

Cir. 1995). If resolution of the state law claim depends on interpretation or implementation of a collective bargaining agreement, the claim is preempted. *Gelb v. Air Con Refrigeration & Heating, Inc.,* 356 Ill. App. 3d 686, 693 (1st Dist. 2005). Defenses and claims must be considered in determining whether resolution of a state-law claim requires construing the relevant collective bargaining agreement. *Id.* at 693.

LMRA § 301 preemption applies when a "nonfrivolous" argument is raised that the claim at issue cannot be resolved without interpreting or implementing the collective bargaining agreement. *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1179 (7th Cir. 1993) (holding that LMRA § 301 applied to a privacy claim because defendant raised "a nonfrivolous argument that . . . the plaintiffs' claim that the surveillance invaded their privacy cannot be resolved without an interpretation of the agreement").

A preempted state law claim "must either be treated as a [Section] 301 claim, or dismissed as pre-empted by federal labor-contract law." *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 220 (1985). With some exceptions not present here, employees must exhaust collective bargaining grievance procedures before bringing suit in federal court. *McLeod v. Arrow Marine Transp., Inc.,* 258 F.3d 608, 616 (7th Cir. 2001).

A claim that an employer violated the Privacy Act with respect to its employees requires a court to interpret and administer the CBA. The Privacy Act was enacted in 2008 to regulate "the collection, use, safeguarding,

handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(g). The Act defines "biometric identifier" to mean "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." *Id.* § 10. "Biometric information" means "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual." *Id.*

In this case, Walton alleged Roosevelt violated the Privacy Act through its use of a hand scan timeclock. Section 15 of the Privacy Act imposes obligations on private entities regarding the collection, retention, disclosure, and destruction of biometric identifiers and information. *Id.* § 15. Private entities need to obtain consent from or provide disclosures to the subject or the subject's "legally authorized representative." *Id.* In the context of federal labor law preemption, this has been interpreted as including a union representative. *See Fernandez v. Kerry, Inc.*, 14 F.4th 644, 645 (7th Cir. 2021); *Miller v. Sw. Airlines Co.*, 926 F.3d 898, 903 (7th Cir. 2019) (rejecting the argument that a union is not a "legally authorized representative" for purposes of the Privacy Act).

### B. The appellate court properly followed the uniform federal court decisions to hold that Walton's claims under the Privacy Act for use of a timeclock are preempted by LMRA § 301.

The appellate court properly gave considerable weight to the federal court decisions when it held that those decisions were not beyond logic and reason and that federal labor law preempts a claim for use of a timeclock where

the collective bargaining agreement contains a broad management rights clause. Two separate and unanimous panels of the Seventh Circuit Court of Appeals, as well as fourteen federal district courts, have decided this issue in Roosevelt's favor. Walton readily admits there is no legal or factual way to distinguish the Seventh Circuit Court's most recent decision that addressed the exact issue, but still asks this Court to reach a contrary conclusion.

**1. Illinois Courts give considerable weight to lower federal courts' uniform interpretation of federal law in the interest of unity.**

When interpreting federal statutes, including whether a claim is preempted by federal law, this Court has consistently looked to the decisions of the United States Supreme Court, the federal circuits, and the federal district courts. *State Bank of Cherry v. CGB Enters.*, 2013 IL 113836, ¶ 33. In the absence of a United States Supreme Court decision, the weight that this Court "gives to federal circuit and district court interpretations of federal law depends on factors such as uniformity of law and the soundness of the decisions." *Id.*; *see also Carter v. SSC Odin Operating Co.*, 237 Ill. 2d 30, 40 (2010) (holding that "uniformity of decision is an important consideration when state courts interpret federal statutes, and we will give 'considerable weight' to the decisions of federal courts that have addressed preemption under" a federal statute).

This Court has "consistently recognized the importance of maintaining a uniform body of law in interpreting federal statutes if the federal courts are not split on an issue." *State Bank of Cherry*, 2013 IL 113836 ¶ 34. Thus, "if the

lower federal courts are uniform in their interpretation of a federal statute, this court, in the interest in preserving unity, will give *considerable weight* to those courts' interpretations of federal law and find them to be highly persuasive." *Id.* ¶ 35 (emphasis in original). Only where there is a split in the federal courts will this Court elect to follow the decisions it believes to be better reasoned. *Id.* Where otherwise uniform, this Court will defer to the uniform interpretation of the federal courts. *Id.*

This Court has also "repeatedly recognized, uniformity of decision is an important consideration when state courts interpret federal statutes." *Id*. And has stated, "[w]hile we are *bound* only by the United States Supreme Court, if the lower federal courts are uniform on their interpretation of a federal statute, this court, in the interest of preserving unity, will give *considerable weight* to those courts' interpretations of federal law and find them to be highly persuasive." *Id*. ¶ 35 (emphasis in original).

Furthermore, this Court has held that Illinois courts may choose not to follow the Seventh Circuit or uniform lower federal courts if the court finds the decision to be "wrongly decided"—in a narrow sense. *Id.* ¶ 54. "What is meant by 'wrongly decided' in this circumstance is not merely that this court would rule a different way. Rather, in giving deference to unanimous federal court opinion, *we will find the federal court decisions to be 'wrongly decided' only if the federal decision is outside 'logic' and 'reason.'*" *Id*. (emphasis added). "To hold otherwise and not follow unanimous federal precedent simply because we

would 'rule the other way' would nullify the uniformity portion of our analysis." *Id*.

This deference is highlighted here because Congress intended § 301 of the LMRA to be interpreted and administered uniformly. *See Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962) ("[t]he dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute."). The LMRA "require[s] that the relationships created by a collective-bargaining agreement be defined by the application of an evolving federal common law grounded in national labor policy." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985). Any "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, *must* be resolved by reference to uniform federal law." *Id.* (emphasis added).

**2. The Seventh Circuit and the Illinois federal district courts have uniformly determined that Walton's Privacy Act claims are preempted by LMRA § 301.**

Two separate panels of the Seventh Circuit in unanimous decisions held that Privacy Act claims for use of a timeclock are preempted by federal labor law.

With its decision in *Fernandez v. Kerry, Inc.*, the Seventh Circuit resolved any potential ambiguity as to whether the LMRA preempts Privacy Act claims for use of a timeclock when the collective bargaining agreement at issue contains a broad management rights clause. In that case, five employees filed a claim against their employer for alleged violations of the Privacy Act.

*Fernandez v. Kerry, Inc.*, 14 F.4th 644, 645 (7th Cir. 2021). They alleged that the employer required workers to use fingerprints to clock in and out, and that the employer did not get their consent before doing so. *Id.* at 645. The employees were members of a bargaining unit and were represented by a union that had a collective bargaining agreement with the employer. *Id*. The defendant argued that the complaint should be dismissed because plaintiffs' claims for violations of the Privacy Act for use of a timeclock were preempted by LMRA § 301. *Id.* The collective bargaining agreement contained a management rights clause. *Id*. at 645-46. The district court dismissed the complaint, finding that its prior opinion in *Miller* was controlling even though this case involved preemption under the LMRA and not the RLA. *Id*. at 646.

On appeal, the Seventh Circuit affirmed the district court's decision. *Id*. at 647. It held:

> Here, as in *Miller*, the employer invokes a management rights clause. We remarked in *Miller*: "Whether [the] unions *did* consent to the collection and use of biometric data, or perhaps grant authority through a management-rights clause is a question for [decision under the agreement]. Similarly, the retention and destruction schedules for biometric data, and whether [employers] may use third parties to implement timekeeping and identification systems, are topics for bargaining between unions and management. States cannot bypass mechanisms of [federal law] and authorize direct negotiation or litigation between workers and management." 926 F.3d at 903 (emphasis in original).

*Id*. at 647.

Walton admitted—as he must—that the factual and legal circumstances at issue here are indistinguishable from *Fernandez*. *Walton v.*

*Roosevelt Univ.*, 2022 IL App (1st) 210011, ¶ 18. The appellate court in this case therefore held:

> While this appeal was pending, the United States Court of Appeals for the Seventh Circuit directly addressed the question brought to bear in this appeal. In *Fernandez v. Kerry, Inc.*, 14 F.4th 644, 646-47 (7th Cir. 2021), the court of appeals found that unionized employees' claims that their employer violated the Privacy Act were preempted by the [LMRA]. *As Walton conceded at oral argument*, the relevant factual and legal circumstances of this case are indistinguishable from *Fernandez*, so our real objective in this appeal becomes to determine whether the court of appeals' ruling on a matter of federal law is wrongly decided in such a way that we deem it to be without logic and reason.

*Id.* (emphasis added).

Contrary to the circuit court's decision, *Fernandez* expressly held the Seventh Circuit's comprehensive preemption analysis under the RLA in *Miller* applied with equal force to the LMRA. In *Miller*, the Seventh Circuit held that the Railway Labor Act ("RLA") preempted the Privacy Act. 926 F.3d at 898.[1] *Miller* was a consolidated appeal involving Privacy Act claims brought by employees of Southwest Airlines and United Airlines.[2] *Id.* at 901. The court framed the issue before it as "whether persons who contend that air carriers have violated state law by using biometric identification in the workplace must present these contentions to an adjustment board" under the RLA. *Id.* at 900.

The airlines argued the plaintiffs' unions had consented, either expressly or through the collective bargaining agreements' management rights

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[1] The preemption analysis under the RLA and the LMRA is "virtually identical." *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 260 (1994).
[2] *Miller* also involved questions of federal procedure not relevant to this case.

clauses. *Id*. The airlines argued "to the extent these matters are disputed, an adjustment board rather than a judge must resolve the difference—and that if state law gives workers rights beyond those provided by federal law and collective bargaining agreements, it is preempted by the Railway Labor Act." *Id*.

*Miller* rejected the plaintiffs' arguments and agreed with the defendants' position. Specific to Southwest Airlines,[3] the court found there was no doubt Southwest had a collective bargaining agreement that covered the Southwest plaintiffs. *Id.* at 903. The court said "Southwest asserts that the union assented to the use of fingerprints, either expressly on being notified before the practice was instituted or through a management-rights clause. And there can be no doubt that how workers clock in and out is a proper subject of negotiation between unions and employers—is, indeed, a mandatory subject of bargaining." *Id*.

In finding the RLA preempted the Privacy Act, the court stated Illinois "cannot remove a topic from the union's purview and require direct bargaining between individual workers and management. And Illinois did not try. Its statute provides that a worker or an authorized agent may receive necessary notices and consent to the collection of biometric information." *Id*. at 903 (citing

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[3] Based on the procedural posture of the consolidated cases, the court analyzed the case against Southwest separately from United Airlines, but the preemption analysis was the same.

740 ILCS 14/15(b)). The court rejected plaintiffs' argument that the unions were not a "legally authorized representative" for Privacy Act purposes, finding "[n]either the statutory text nor any decision by a state court suggests that Illinois wants to exclude a collective-bargaining representative from the category of authorized agents." *Id*.

*Miller* further explained that when a subject independent of the collective agreement arises and concerns different treatment of different workers, then litigation may proceed outside the scope of the RLA. *Id.* at 904. Claims such as retaliatory discharge fall under this category because "[s]uch a claim can be resolved without interpreting a collective bargaining agreement; it is person-specific and does not concern the terms and conditions of employment." *Id*. *Miller* held that unlike person-specific claims (such as a claim for retaliatory discharge), claims for alleged violations of the Privacy Act for use of a timeclock are not person specific but rather assert a right in common with all other union members. *Id. Miller* therefore held:

> [O]ur plaintiffs assert a right in common with all other employees, dealing with a mandatory subject of collective bargaining. It is not possible *even in principle* to litigate a dispute about how an air carrier acquires and uses fingerprint information for its whole workforce without asking whether the union has consented on the employees' collective behalf. That's why this dispute must go to an adjustment board. *Lingle*,[4] *Hawaiian Airlines*,[5] and *Hughes*[6] all recognize that, if a dispute necessarily entails the interpretation or administration of a collective bargaining

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[4] *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399, 401 (1988)
[5] *Hawaiian Airlines v. Norris*, 512 U.S. 246, 252 (1994)
[6] *Hughes v. United Air Lines, Inc.*, 634 F.3d 391, 392 (7th Cir. 2011)

> agreement, there's no room for individual employees to sue under state law—in other words, *state law is preempted to the extent that a state has tried to overrule the union's choices on behalf of the workers*.

*Id*. (emphasis added).

As a result, *Miller* held the lawsuits were preempted by federal law, and the disputes were referred to an adjustment board. *Id.* at 905-06; *see also Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1179 (7th Cir. 1993) (holding that LMRA § 301 applied to a privacy claim because "the company has a nonfrivolous argument that the surveillance of which the plaintiffs complain is authorized, albeit implicitly, by the management-rights clause of the agreement, so that the plaintiffs' claim that the surveillance invaded their privacy cannot be resolved without an interpretation of the agreement").

Additionally, fourteen separate federal district courts throughout Illinois have uniformly held that Privacy Act claims for use of a timeclock are preempted by federal labor law.[7] The federal courts have all unquestionably

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[7] The district-level cases are:

- *Williams v. Ecolab, Inc.*, No. 21 C 695, 2021 U.S. Dist. LEXIS 156864, at *10-11 (N.D. Ill. Aug. 19, 2021)
- *Singleton v. B.L. Downey Co., LLC*, No. 21 C 236, 2021 U.S. Dist. LEXIS 133855, at *6 (N.D. Ill. July 19, 2021)
- *Carmean v. Bozzuto Mgmt. Co.*, No. 20 C 5294, 2021 U.S. Dist. LEXIS 111842, at *10-11 (N.D. Ill. June 15, 2021)
- *Hicks v. Evergreen Living & Rehab Ctr.*, No. 20 cv 4032, 2021 U.S. Dist. LEXIS 198716, at *13 (N.D. Ill. Mar. 8, 2021)
- *Barton v. Swan Surfaces, LLC*, 20 cv 499, 2021 U.S. Dist. LEXIS 384464, at *19-20 (S.D. Ill. Mar. 2, 2021)

addressed the issue before this Court in a uniform manner. They uniformly have held LMRA § 301 preempts Privacy Act claims involving use of a timeclock when the CBA at issue contains a broad management rights clause.

The appellate court could have stopped its analysis by simply deciding (correctly) that *Fernandez* (and the other federal court decisions) were not "without logic or reason." However, the appellate court took its analysis a step further and held that "it is the proper interpretation of the Privacy Act when viewed through the prism of Labor Management Relations Act's preemptive effect." *Walton*, 2022 IL App (1st) 210011 ¶ 20. The court correctly acknowledged that the "collective bargaining agreement at issue" contains a broad management rights clause and it makes the union the sole and exclusive bargaining agent for the bargaining unit. *Id.* ¶ 21. It then correctly held:

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- *Fernandez v. Kerry, Inc.*, 17 cv 8971, 2020 U.S. Dist. LEXIS 223075, at *15-16 (N.D. Ill. Nov. 30, 2020)
- *Gil v. True World Foods Chi., LLC*, No. 20 C 2362, 2020 U.S. Dist. LEXIS 223092, at *8 (N.D. Ill. Nov. 30, 2020)
- *Roberson v. Maestro Consulting Servs. LLC*, 507 F. Supp. 3d 998, 1016 (S.D. Ill. 2020)
- *Crooms v. Sw. Airlines Co.*, 459 F. Supp. 3d 1041, 1050-51 (N.D. Ill. 2020)
- *Williams v. Jackson Park SLF, LLC*, No. 19 cv 8198, 2020 U.S. Dist. LEXIS 175625, at *10-11 (N.D. Ill. Sept. 24, 2020)
- *Frisby v. Sky Chefs Inc.*, 19 C 7989, 2020 U.S. Dist. LEXIS 136989, at *10-11 (N.D. Ill. Aug. 3, 2020)
- *Fox v. Dakkota Integrated Sys., LLC*, No, 19 C 2872, 2020 U.S. Dist. LEXIS 251577, at *10-11 (N.D. Ill. May 26, 2020)
- *Peatry v. Bimbo Bakeries USA, Inc.*, No. 19 C 2942, 2020 U.S. Dist. LEXIS 32577, at *12 (N.D. Ill. Feb. 26, 2020)
- *Gray v. Univ. of Chi. Med. Ctr., Inc.*, No, 19 cv 4229, 2019 U.S. Dist. LEXIS 229536, at *14-15 (N.D. Ill. Mar. 26, 2019)

> The issue here is not unique to Walton, it concerns every member of his union in the same manner. It is impossible to consider whether Walton and his similarly situated fellow employees have a claim under the Privacy Act without first determining whether their union consented on their behalf, which the Act permits the union to do and which the members arguably empower the union to do on their behalf. Whether the management rights clause at issue in Walton's collective bargaining agreement covers biometric information is a question that itself results in preemption.

*Id*. ¶ 21.

Walton wrongly criticizes the appellate court for failing to analyze the language of the collective bargaining agreement at issue. (Pl. Br. at 20-29.) The plain language of the opinion establishes the court in fact analyzed "the collective bargaining agreement at issue" including the broad management rights clause contained within it. *Walton*, 2022 IL App (1st) 210011 ¶ 21. Aside from being wrong, Walton's argument that the appellate court failed to analyze the CBA's management rights clause is disingenuous. Roosevelt argued without any rebuttal that the management rights clause at issue here is broader than the language used in the collective bargaining agreements in *Miller* or *Fernandez*. (SR59.) Walton admitted in his response at oral argument the relevant factual and legal circumstances of this case are indistinguishable from *Fernandez*. *Walton*, 2022 IL App (1st) 210011 ¶ 18. Walton's argument that the appellate court failed to expressly recite the broad management rights clause at issue is therefore disingenuous because he readily admitted that there was no way to distinguish it from *Fernandez*.

Walton's admission that *Fernandez* is not factually or legally distinguishable presents a larger obstacle under *State Bank of Cherry*. Pursuant to *State Bank of Cherry*, Walton must establish that the uniform decisions from five different justices[8] on the Seventh Circuit Court of Appeals and more than a dozen federal district court judges are "outside logic and reason." These decisions are not "outside logic and reason" and therefore they must be followed as the appellate court properly held.

## II. Walton's lawsuit improperly tries to circumvent the union when the CBA identifies the union as the sole and exclusive bargaining agent and contains a broad management rights clause.

Walton's lawsuit improperly attempts to usurp the role of the union as the sole and exclusive bargaining agent of the bargaining unit. The CBA expressly "recognizes the Union as the sole and exclusive representative of all non-supervisory full and part-time security employees." (SR59.) Further, "right to bargain on behalf of all such employees" is vested solely in the Union. (SR59.) Walton and his counsel attempt to usurp the role of the Union by asking this Court to hold that Roosevelt must bargain with them instead.

A state cannot remove a topic from the Union's purview and require direct bargaining between individual workers and management. *Miller v. Southwest Airlines Co.*, 926 F.3d 898, 903 (7th Cir. 2019). The Illinois legislature acknowledged this basic premise because the Privacy Act declares

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[8] Judge Easterbrook was on the panel in both *Miller* and *Fernandez*.

that "a worker or *an authorized agent* may receive necessary notices and consent to the collection of biometric information." *Id.* (emphasis added). Contrary to federal labor law analysis and the expressed words of the Privacy Act, Walton insists that Roosevelt individually negotiate with each person in the bargaining unit. What happens when one union member signs a release, but another union member requests more hourly pay and yet a third asks for more vacation time? The entire collective bargaining process would collapse; this is why federal labor law prohibits direct bargaining between individual workers and management.

Notably, the CBA in this case contains a broad management rights clause—just like in *Miller* and *Fernandez*. *See id.* (noting that whether the defendants' "unions did consent to the collection and use of biometric data, or perhaps grant authority through a management-rights clause, is a question for an adjustment board."). The broad management rights clause in the CBA here states:

> Subject to the provisions of this Agreement, the Employer shall have the exclusive right to direct the employees covered by this Agreement. Among the exclusive rights of management, but not intended as a wholly inclusive list of them are: the right to plan, direct, and *control all operations performed in the building, to direct the working force*, to transfer, hire, demote, promote, discipline, suspend or discharge, for proper cause, to subcontract work and to relieve employees from duty because of lack of work or for any other legitimate reason. The Union further understands and agrees that the Employer provides an important service to its tenants of a personalized nature to fulfill their security needs, as those needs are perceived by the Employer and the tenants. Accordingly, this Agreement shall be implemented

> and interpreted by the parties so as to give consideration to the needs and preferences of the tenants.

(SR60) (emphasis added). This mirrors the management rights clause in *Fernandez* that the employer had the right to "determine the extent to which the business shall be operated" and the right to manage "the direction of the working forces". *Fernandez v. Kerry, Inc.*, No. 17 cv 8971, Dkt. No. 85-1 at 7 (N.D. Ill. Jan. 31, 2020).[9]

In its motion to dismiss, Roosevelt not only attached the CBA as an exhibit, but an affiant laid foundation for the document and swore that it was a "true and correct copy" of the CBA that was effective when Walton worked for Roosevelt. (SR56.) Walton did not and could not dispute the CBA's validity. (SR90-103.)

The CBA provides Roosevelt the broad right to manage the operation of its business and to direct its workforce. *Miller v. Sw. Airlines, Inc.*, No. 2018 C 86, No. 18 C 86, 2018 U.S. Dist. LEXIS 143369, at *15-18 (N.D. Ill. Aug. 23, 2018) (plaintiff's Privacy Act claim was preempted because it requires interpretation of the CBA, which includes defendant's right to "manage and direct the work force"). Determining whether the broad right to manage business operations includes how employees clock in and out shows that Walton's claim is preempted: the agreement must be interpreted and applied

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[9] This Court can take judicial notice of the CBA from *Fernandez* because "no sound reason exists to deny judicial notice of public documents which are included in the records of other courts and administrative tribunals." *May Dep't Stores Co. v. Teamsters Union*, 64 Ill. 2d 153, 159 (1976).

to answer that question. *See Miller v. Sw. Airlines, Inc.*, No. 18 C 86, 2018 U.S. Dist. LEXIS 180531, *7 (N.D. Ill. Oct. 22, 2018) (stating that the defendant met its low burden of articulating an argument that is "neither obviously insubstantial or frivolous, nor made in bad faith" by showing that resolution of plaintiffs' Privacy Act claim required the interpretation of the CBA including the broad management rights clause).

It is therefore "not possible even in principle" for Walton to litigate his dispute without interpreting or administering the CBA. *See Miller*, 926 F.3d at 904.

Thus, what Roosevelt told the Union, whether Roosevelt furnished that information to the Union in writing, when these events happened, and what the Union said or did in response are all matters that are subject to the grievance procedure under the CBA. *Id*. (what Southwest told the union, whether Southwest furnished that information in writing, when these things happened, and what the union said or did in response "are topics for resolution by an adjustment board rather than a judge."). In other words, the dispute necessarily entails the interpretation and administration of the CBA, so "there's no room for individual employees to sue under state law". *Id*.

Two further points demonstrate that the LMRA fully preempts Walton's Privacy Act claims. First, the CBA does not need to explicitly refer to biometric information for the LMRA to preempt Privacy Act lawsuits. *See Miller*, 926 F.3d at 903 (noting that "there can be no doubt that how workers clock in and

out is a proper subject of negotiation between unions and employers"); *see also* *Fernandez*, 14 F.4th at 646 (holding that whether the means of clocking in and out under the LMRA is a mandatory or permissive subject is irrelevant because it is enough to recognize that "the union is the workers' agent. If labor and management want to bargain collectively about particular working conditions, they are free to do so. Workers cannot insist that management bypass the union and deal with them directly about these subjects.").

Second, federal courts have consistently rejected the argument that federal labor law does not preempt a Privacy Act claim because such a claim is grounded upon rights that stem from a source other than the CBA. *Miller*, 926 F.3d at 904 (explaining that state law claims that fall outside the scope of federal labor law preemption are person-specific claims which do not concern the terms and conditions of employment, and that Privacy Act claims concern rights common to all of defendants employees and involve clocking in-out which concerns terms and conditions of employment); *Peatry*, 2020 U.S. Dist. LEXIS 32577 at *10 (holding that the plaintiff's Privacy Act "claims require interpretation of the CBA, meaning that §301 preempts her BIPA claim regardless of whether the Court treats her rights under BIPA as negotiable"); *Frisby*, 2020 U.S. Dist. LEXIS 136989 at *10-11 (same); *Crooms*, 2020 U.S. Dist. LEXIS 84360 at *11-12.

At bottom, the LMRA § 301 preempts the Privacy Act claims at issue, and the appellate court correctly answered the certified question.

## III. Walton's remaining arguments are raised for the first time on appeal and are thus forfeited; they also are meritless.

Walton's other arguments are meritless and are improperly being brought in the first instance before this Court. Issues raised for the first time on appeal are generally considered forfeited. *Board of Education v. Kusper*, 92 Ill. 2d 333, 343 (1982).

Not only did he fail to raise the following arguments before the circuit court, but Walton also failed to make these arguments before the appellate court.

Walton argues that unions cannot bargain away privacy rights under section 15(a). He argues that even if Roosevelt advanced a nonfrivolous argument regarding the management rights clause of the CBA, Roosevelt cannot bargain away section 15(a) rights because section 15(a) creates a duty owed to the public. (Pl. Br. at 43). This argument, besides being untimely made, defies all logic.

Section 15(a) states in relevant part:

> (a) A private entity in possession of biometric identifiers or biometric information must develop a written policy, *made available to the public*, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first.

740 ILCS 14/15 (emphasis added).

Being "made available to the public" does not, in any away, create a duty to the public. Instead, in this context, to be "made available" to the public means accessible to the relevant or otherwise affected audience. Here, this can only mean to the employees who used the timekeeping device. *See* 740 ILCS 14/15(a).

Walton also belatedly argues that the Privacy Act sets a baseline for biometric privacy rights, and a CBA cannot go below this floor. (Pl. Br. at 39.) Even if not forfeited, this argument is fundamentally flawed. Walton cites to this court's decision in *Krasinski v. United Parcel Service*, 124 Ill. 2d 483 (1988) for support. (Pl. Br. at 40.) But he overlooks that *Krasinksi* denied LMRA preemption in the context of defamation—not timekeeping. *Krasinski,* 124 Ill. 2d at 483. Defamation is easily distinguishable from timekeeping procedures. Defamation is person-specific and concerns an interest over a person's individual reputation. *See generally Bryson v. News Am. Publs*., 174 Ill. 2d 77, 87 (1996); *Chapski v. Copley Press*, 92 Ill. 2d 344 (1982); *Colson v. Stieg*, 89 Ill. 2d 205 (1982).

The Seventh Circuit in *Miller* expressly rejected the argument that violations of the Privacy Act for use of a timeclock was somehow akin to person-specific claims. *Miller*, 926 F.3d at 904. In no way can timekeeping be considered similar to a claim defamation in this context because the claims at issue here apply to the entire bargaining unit as a whole.

## CONCLUSION

For all of the foregoing reasons, Defendant-Appellee, Roosevelt University, respectfully requests this court affirm the judgment of the appellate court reversing the circuit court, and answer the certified question in the affirmative.

Respectfully submitted,

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## CERTIFICATION 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) table of contents with points and authorities, this Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 8,341 words.

*/s/ John P. Ryan*

## CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he electronically filed via Odyssey eFileIL defendant-appellee's Brief with the Clerk of the Supreme Court of Illinois, on the 16th day of November, 2022.

The undersigned further certifies that on the 16th day of November, 2022, an electronic copy of the foregoing Brief is being served via Odyssey eFile IL.

In addition, the undersigned certifies that the foregoing Brief was served via email on the 16th day of November, 2022, before 5:00 p.m., to counsel of record listed on the attached Service List.

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/John P. Ryan*

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