No. 129783

In the
Supreme Court of Illinois

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

Plaintiff-Respondent,

v.

WALGREEN CO.,

Defendant-Petitioner.

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,
the Hon. Donna-Jo Vorderstrasse, Judge Presiding.

BRIEF OF *AMICUS CURIAE* PUBLIC JUSTICE IN SUPPORT OF PLAINTIFF-RESPONDENT

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POINTS AND AUTHORITIES

INTERESTS OF AMICUS CURIAE

Public Justice is a legal advocacy organization that specializes in socially significant civil litigation, with a focus on fighting corporate and governmental misconduct. The organization maintains an Access to Justice Project that pursues litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of workers, consumers, and people whose civil rights have been violated to seek redress in the civil court system. This case is of interest to Public Justice because it raises questions regarding state standing law, which affects the ability of injured consumers to seek remedies through the civil justice system. Public Justice has litigated dozens of cases in federal and state courts fighting for proper interpretations of federal Article III and state-court standing rules.

SUMMARY OF THE ARGUMENT

Petitioner Walgreen Co. ("Walgreens") violated FACTA's plain terms by disclosing too many digits of Calley Fausett's debit card number. Now it seeks to avoid liability for that clear violation by asking this Court to hold that consumers injured by a statutory violation can't sue. To support that position, Walgreens and its amici rely on crabbed readings of this Court's precedents, ignore the consequences of abandoning Illinois's existing standing doctrine, and misconstrue how federal law applies to this case. The Court should see through these distortions.

First, this Court's opinion in *Rosenbach v. Six Flags Entertainment* resolves this case. *Rosenbach* firmly established that a statutory violation, alone, confers standing under Illinois law. Walgreens's alternative interpretation, on the other hand, slips reasoning into

Rosenbach that is nowhere to be found in that opinion's text. Moreover, contrary to Walgreens's argument, *Rosenbach*'s departure from federal standing law is of no moment. Illinois has long preserved standing principles broader than federal law, and *Rosenbach* fits squarely within that tradition.

Second, Walgreens and its amici cast aside the grave consequences that would follow from tightening Illinois standing law. Walgreens, for instance, provides little guidance as to how courts are to distinguish statutory violations that are sufficient for standing from those that are not. If its briefing is any indication, Walgreens favors the federal standing approach, which requires that plaintiffs' injuries mirror harms traditionally recognized at common law. That approach, however, would import unnecessary confusion into Illinois law and imperil countless state statutes that protect consumers and workers. Many of those statutes respond to modern challenges—in privacy, consumer rights, civil rights, and more—that may have few historical common-law analogs. What is more, should this Court step in and limit the General Assembly's power to proactively define new harms and guard against modern risks, it would be usurping the legislature's role and therefore violating the separation of powers enshrined in the Illinois Constitution.

Finally, Walgreens's amici argue that Article II of the Federal Constitution bars plaintiff's case. But if this Court were to rest its standing holding on Article II, it would be the first court, state or federal, to ever do so. There is no need to cross that Rubicon. In its four-sentence detour on Article II in *TransUnion*, the U.S. Supreme Court reached no Article II "holding." The Court does not hide revolutionary holdings in the corners of its opinions, and its musings on Article II are nothing more than dicta. Furthermore, even if

Article II did apply to this case—and it does not—it would pose no barrier. As Walgreens's amici's own authorities demonstrate, plaintiff here simply does not exercise the sort of authority that would threaten the Federal Executive's law-enforcement functions.

This Court should affirm the judgment under review.

ARGUMENT

I. Plaintiff Has Standing under Illinois Law

Walgreens and its amici argue that Illinois law closes the courthouse doors unless a plaintiff can prove harm beyond the injury of a statutory violation itself. But this Court has already held that a violation of statutory rights alone is enough to confer standing.

In *Rosenbach v. Six Flags*, a case involving Illinois's Biometric Information Privacy Act (BIPA), the Court concluded that "a person need not have sustained actual damage beyond violation of his or her rights under [BIPA] in order to bring an action under it." 2019 IL 123186, ¶ 28. In other words, "[t]he [statutory] violation, in itself, is sufficient to support the individual's or customer's statutory cause of action." *Id.* ¶ 33; *see also McDonald v. Symphony Bronzeville Park*, LLC, 2022 IL 126511, ¶ 48 (explaining that BIPA "subject[s] private entities who fail to follow the statute's requirements to substantial potential liability [] whether or not actual damages, beyond violation of the law's provisions, can be shown").[1]

[1] Illinois appellate courts have similarly concluded that standing in Illinois does not require more than a violation of statutory rights and have applied that holding to the statute at issue here—FACTA. *See Soto v. Great America, LLC*, 2020 IL App (2d) 180911, ¶¶ 17, 25–26 (relying in part on *Rosenbach* to hold that "plaintiffs are not required under Illinois law to plead an injury other than a willful violation of their statutory rights to pursue their claims of statutory damages under FACTA"); *Duncan v. FedEx Off. & Print Servs., Inc.*, 2019 IL App (1st) 180857, ¶ 23 ("[U]nder Illinois law, when a plaintiff alleges a statutory violation, no 'additional requirements' are needed for standing."); *Lee v. Buth-Na-*

Rosenbach, then, stands for the proposition that a violation of one's statutory rights alone is sufficient for standing under Illinois law. Walgreens and its amici resist that conclusion, but their objections fall short.

First, Walgreens argues that BIPA "codified a preexisting cognizable legal interest in the privacy in one's unique biometric information." Walgreens Br. at 20. According to Walgreens, a "personal interest in one's biometric data [] exists independent of the statute . . . Because BIPA 'codifies' a substantive privacy interest that was invaded . . . the question of standing was not at issue." Walgreens Br. at 21.

That interpretation, however, reads reasoning into *Rosenbach* that appears nowhere in the opinion. This Court never held that BIPA codified a pre-existing common-law right to privacy in biometric information, nor did it rest its standing holding on the fact that such a right was violated. Indeed, *Rosenbach* did not mention the common law even once. Instead, the Court recognized that "[t]he Act *vests* in individuals and customers the right to control their biometric information by requiring notice before collection and giving them the power to say no by withholding consent." *Rosenbach*, 2019 IL 123186, ¶ 34 (emphasis added). In other words, the right to control was a *new* right that individuals did not have under Illinois law until BIPA "vest[ed]" them with it and imposed new "duties" on private entities. *Id.* ¶¶ 33–34; *see also McDonald,* 2022 IL 126511, ¶ 48 (explaining that the General Assembly, through BIPA, "impos[ed]" new "safeguards").

Bodhaige, Inc., 2019 IL App (5th) 180033, ¶¶ 64, 68 ("FACTA provides a private cause of action for statutory damages and does not require a person to suffer actual damages in order to seek recourse for a willful violation of the statute . . . This is consistent with the preventative and deterrent purposes of FACTA."). *Duncan* and *Soto* have been vacated pursuant to settlements, but they remain persuasive for this Court.

Walgreens relies on *Rosenbach*'s statement that "the General Assembly has codified that individuals possess a right to privacy in and control over their . . . biometric information" to argue that it must have been referring to an *existing* right to privacy. *Rosenbach*, 2019 IL 123186, ¶ 33. But codify can refer to both existing rights and new rights. If *Rosenbach* had said that the General Assembly codified a right to free chocolate cake, without any mention of a corresponding common law right, would Walgreens really read that to mean there was a *pre-existing* right to free chocolate cake? Of course not. The Court, then, should be taken at its word: BIPA "vest[ed]" individuals with a new right.[2] *Rosenbach*, 2019 IL 123186, ¶ 34.

In any event, even if the Court had meant to say BIPA codified an existing right instead of creating a new right, there is nothing in the opinion to suggest that its holding that a violation of statutory rights is enough to bring suit turned on the existence of a pre-existing common law right to privacy or on any corresponding privacy injury unique to BIPA. Indeed, if the *Rosenbach* Court had rested its holding on an analogous common-law right to privacy, one might have expected it to have mentioned the common law at least once. In short, as Illinois courts have already held, *Rosenbach*'s holding that a violation of one's statutory rights is a sufficient injury to bring suit applies broadly across statutes, including the one at issue here. *See Soto*, 2020 IL App (2d) 180911, ¶¶ 17, 26 (citing *Rosenbach*, which addressed BIPA, to support a holding that a violation of statutory rights is enough to establish standing under FACTA).

[2] Indeed, some of Walgreens's own amici agree that BIPA created a new right. Cinemark, for instance, recognizes that a "unique substantive right to privacy [was] conferred by the Illinois Legislature in BIPA." Cinemark Br. at 6.

Second, Walgreens and its amici argue that *Rosenbach* was focused on interpreting the statutory term "aggrieved" in BIPA and therefore has nothing to say about standing. *See* Walgreens Br. at 10; U.S. Chamber Br. at 7. This argument, too, falls flat. It is true that the certified questions in *Rosenbach* centered on the meaning of the term "aggrieved" under Section 20 of BIPA. *Rosenbach*, 2019 IL 123186, ¶ 1. But certifying a question "does not negate the doctrines of mootness, ripeness, standing, or procedural default." *In re Marriage of O'Brien,* 2011 IL 109039, ¶ 58 (Garman, J., concurring); *see also Kronenmeyer v. U.S. Bank Nat'l Ass'n,* 368 Ill. App. 3d 224, 227 (5th Dist. 2006) (ruling that "[b]ecause the plaintiffs lack standing, there is no reason to determine" the answer to a certified question). The Court's holding that an "aggrieved" person need not show anything more than a violation of statutory rights was *necessarily* a holding that nothing more was required establish standing under Illinois law.

Walgreens's alternative interpretation strains credulity. Under its logic, the Court in *Rosenbach* spilled pages of ink explaining that a violation of statutory rights alone is sufficient to render a plaintiff "aggrieved" and thus sue, only to leave its entire opinion vulnerable to the objection that the plaintiff lacked standing. It would be especially odd for the Court to have ignored standing when it was expressly raised by the defendant in the trial court, and was discussed at length in briefs filed by amici, including by one of the organizations that now supports Walgreens as amicus here.

Back then, Walgreens's amicus Illinois Retail Merchants Association (IRMA) argued that *Rosenbach did* present "constitutional standing" questions because "the question of standing [] is interwoven with the first certified question of whether an

allegedly harmless statutory violation renders a plaintiff 'aggrieved' under BIPA . . . Were BIPA's 'aggrieved person' requirement interpreted to allow a plaintiff who had not suffered injury to bring a claim, it would run afoul of the constitutional standing requirement." Brief for Illinois Retail Merchants Association et al. as Amici Curiae Supporting Defendants-Appellees, *Rosenbach v. Six Flags Ent.*, 2019 IL 123186, 2018 WL 5777924, at *16 (Sept. 18, 2018). Because "[n]o statute can create standing that exceeds the limits of the Illinois Constitution," IRMA argued, "BIPA's private right of action should be interpreted consistent with those limits." *Id.*; *see also* Brief for Internet Association as Amici Curiae Supporting Appellees, *Rosenbach v. Six Flags Ent.*, 2019 IL 123186, 2018 WL 5777925, at *14 (Sept. 18, 2018) (urging Court to interpret BIPA in light of standing principles.). The *Rosenbach* court ultimately did just that—and, as described above, implicitly concluded that standing under Illinois law did not preclude suits based solely on a violation of one's statutory rights.

Finally, Walgreens and its amici repeatedly cite black-letter standing elements from this Court's opinions as *ipso facto* proof that Ms. Fausett lacks standing. *See* Walgreens Br. at 14–15; U.S. Chamber Br. at 5–6. But far from demonstrating the weakness of Ms. Fausett's case, those elements fit comfortably with *Rosenbach* and squarely establish her standing.

Standing doctrine "is one of the devices by which courts attempt to cull their dockets so as to preserve for consideration only those disputes which are truly adversarial and capable of resolution by judicial decision." *Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 488 (1988). To access Illinois courts, "the claimed injury, whether 'actual or

threatened' must be: (1) 'distinct and palpable'; (2) 'fairly traceable' to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief." *Id.* at 492–93 (citations omitted).

The dispute in this case is plainly "adversarial and capable of resolution by judicial decision." *See id.* at 488. Ms. Fausett's—*not* anyone else's—debit card number was printed by Walgreens on a receipt, in violation of her rights under FACTA. That is a "distinct and palpable" injury "fairly traceable" to Walgreens that is redressable through damages. After all, under *Rosenbach*, a violation of statutory rights constitutes injury-in-fact. *Rosenbach*, 2019 IL 123186, ¶ 33. And the "doctrine of standing . . . should not be an obstacle to litigation of a valid claim." *People v. $1,124,905 U.S. Currency & One 1988 Chevrolet Astro Van*, 177 Ill. 2d 314, 330 (1997).

Moreover, that federal standing law may be different is of no moment. Illinois standing is rooted in the Illinois Constitution, Article VI, § 9, and common law, not Article III of the Federal Constitution. *Id.* at 328. Illinois courts "are not, of course, required to follow the Federal law on issues of justiciability and standing." *Greer*, 122 Ill. 2d at 491. Indeed, "to the extent that the State law of standing varies from Federal law, it tends to vary in the direction of greater liberality." *Id.* To give one example, while the U.S. Supreme Court has adopted the "zone-of-interests test" as part of its standing inquiry, this Court has explicitly rejected it because "the zone-of-interests test would unnecessarily confuse and complicate the law." *Id.*

In sum, *Rosenbach* controls this case, it confirms Ms. Fausett's standing to sue, and the Court should not indulge Walgreens' efforts to read it out of this Court's precedents.

II. Tightening Illinois Standing Law Would Have Devastating Consequences for Illinois Statutes

Walgreens argues that, for some statutes (*e.g.*, BIPA), a statutory violation is enough to confer standing, but other statutes require something more. Walgreens Br. at 20–21. Walgreens does not say how courts are supposed to parse which statutory violations are sufficient for standing and which require additional injury, but its briefing suggests that common-law traditions may be relevant. Walgreens Br. at 21–22 (citing federal authorities that look to common-law harms). Such an approach would seem to borrow from federal standing law. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021) ("[C]ourts should assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts. That inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury.") (citations omitted).

This Court should reject Walgreens' position, which would jeopardize key *state* protections and undermine the separation of powers under the Illinois Constitution.

A. Requiring Common-Law Analogs Would Undermine Key State Statutory Protections

Because Illinois law guards against countless harms that may not have been recognized at common law, adopting an approach that relies on historical common-law analogs would likely put key state-law consumer and worker protections at risk.

Privacy harms. Illinois is part of a handful of states that "have taken the lead on privacy enforcement." Danielle Keats Citron, *The Privacy Policymaking of State Attorneys General*, 92 Notre Dame L. Rev. 747, 755 (2016). Several Illinois privacy statutes, such as

BIPA and the Right to Privacy in the Workplace Act, contain private causes of action. *See* BIPA, 740 ILCS 14/20 (2008); Right to Privacy in the Workplace Act, 820 ILCS 55/15(c) (2010). Both Acts provide damages for a statutory violation and do not require any showing of actual damages. 740 ILCS 14/20; 820 ILCS 55/15(c). Moreover, because both statutes respond to recent developments in modern technology and social media,[3] they protect individuals from harms that arguably were not recognized at common law. To give one example, as described above, *Rosenbach* recognized that the Illinois General Assembly in BIPA codified a new right to privacy involving one's biometric information, a type of personal information that simply did not exist when the common-law right to privacy was developed. *Rosenbach*, 2019 IL 123186, ¶ 33.

Under BIPA, private entities must acquire consent before collecting and retaining biometric identifiers, including fingerprints and face scans, and inform individuals of the purpose for which any identifiers will be used. 740 ILCS 14/20. The General Assembly, in enacting BIPA, expressly recognized the novelty of biometric protections, noting that there is "limited State law regulating" biometrics and that the "full ramifications of biometric technology are not fully known." 740 ILCS 14/5. The General Assembly, then, was seeking to *modernize* privacy statutes, rather than tie new protections to common-law harms. The Privacy Act, too, combats harms that arguably have few common-law analogs, including prohibiting employers from requesting personal online account information, including

[3] BIPA was enacted in 2008, and the Privacy Act has undergone several amendments to keep pace with technological developments. *See* Stacey L. Smiricky, *Illinois Updates Privacy Law to Address Social Media*, SHRM (November 15, 2016), available at bit.ly/3UuCrCw.

social media information, from an employee and from requiring employees to invite their employers to online accounts. 820 ILCS 55/10. Again, these novel harms—involving, for example, modern social networking sites—may have been outside the scope of traditional, common-law torts.

A standing inquiry that depends on common-law analogs could jeopardize privacy statutes like BIPA and the Privacy Act. That's because "the [traditional] privacy torts have little application to contemporary privacy issues," such as the "collection, use, and disclosure of personal data." Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 Boston L. Rev. 793, 810 (2022). Indeed, modern privacy statutes have emerged precisely because traditional privacy torts often cannot fully accommodate modern privacy interests. Rather than leave litigants to "hammer[] square causes of action into round torts," state legislatures have stepped in to head off novel data protection threats. *Muransky v. Godiva Chocolatier, Inc.,* 979 F.3d 917, 931 (11th Cir. 2020) (en banc). The Court should be wary of leaving litigants with such a tortured task, and instead preserve the state legislature's ability to proactively legislate enforceable rights in response to modern privacy needs.

Denial of information. It is also unclear whether public-disclosure and sunshine laws would survive any common-law-based standing inquiry adopted by this Court. As one commentator observed, "there was neither a common-law right to access documents nor a tradition of such a right before [the federal Freedom of Information Act]." Erwin Chemerinsky, *What's Standing After* Transunion v. Ramirez, 96 NYU L. Rev. 269, 271 (October 2021). Illinois has its own Freedom of Information Act. *See* 5 ILCS 140/1.

Moreover, the General Assembly routinely considers legislation that would strengthen disclosures in key areas, such as small business lending. *See, e.g.*, P. Russell Perdew, *Illinois Legislature Introduces Bill to Adopt TILA-Style Commercial Lending Disclosures*, Locke Lord (February 28, 2023).

The "purpose of [Illinois] FOIA is to open governmental records to the light of public scrutiny." *Stern v. Wheaton-Warrenville Cmty. Unit Sch. Dist. 200*, 233 Ill. 2d 396, 405 (2009) (quotation marks and citation omitted); *see also* 5 ILCS 140/1 ("[I]t is declared to be public policy of the State of Illinois . . . that all persons are entitled to full and complete information regarding the affairs of government[.]"). That foundational principle of open government would be undermined by cabining access to the courts based on common-law traditions that may not recognize a right to access the government documents at issue. Indeed, federal courts have already begun narrowing disclosure statutes by concluding that some plaintiffs do not suffer injury from a lack of disclosure. *See, e.g., Campaign Legal Ctr. v. Scott*, 49 F.4th 931, 933 (5th Cir. 2022) (concluding that plaintiffs alleging violation of National Voter Registration Act's public-disclosure provision lacked standing). This Court should not follow suit.

Consumer protection. Together with federal protections, Illinois law curbs predatory and abusive practices that target consumers. For example, the Illinois Collection Agency Act bars debt collectors from harassing consumers and their families and requires debt collectors to disclose accurate information to consumers. 205 ILCS 740/9.

These harms do not always mirror common-law traditions. Indeed, federal courts consulting the common law in the consumer protection space have come to "unsurprisingly

chaotic" conclusions. Myriam E. Giles, *The Private Attorney General in a Time of Hyper-Polarized Politics*, 65 Ariz. L. Rev 337, 378 (2023). While "some courts have held that harms alleged under contemporary consumer protection statutes are incomparable to traditional torts, [] others have had little difficulty finding that violations of consumer protection statutes have close analogues to common law tort actions." *Id.* These unpredictable conclusions would both complicate judicial decision-making and make it harder for Illinois consumers to vindicate their rights. *See, e.g., Ward v. Nat'l Patient Acct. Servs. Sols., Inc.*, 9 F.4th 357, 362 (6th Cir. 2021) (concluding that alleged debt collector harassment and deceptive practices in violation of the federal FDCPA was not comparable to the common law "tort of intrusion upon one's right to seclusion").

Civil rights. The Illinois Human Rights Act prohibits discrimination, harassment, and retaliation across a swath of areas, including employment, public accommodations, and education. *See* Illinois Human Rights Act, 775 ILCS 5/1. But certain discriminatory harms may not have deep roots in the common law. For example, some have suggested that there was no common-law tradition against discrimination that does not cause tangible economic harm. Chemerinsky, *What's Standing*, 96 NYU. L. Rev. at 283–84. As a result, requiring a common-law analog might render some Illinois anti-discrimination statutes toothless. *See Laufer v. Arpan LLC*, 29 F.4th 1268, 1286–87 (11th Cir. 2022) (Newsom, J., concurring), *vacated on other grounds*, 77 F.4th 1366 (11th Cir. 2023) (expressing uncertainty as to whether *Transunion* leaves only "discrimination in violation of the Constitution," rather than "discrimination [that] rise[s] to the level of a statutory violation," as sufficient for standing).

In sum, the defects of a standing doctrine rooted in common law are legion. And the above examples of effects on Illinois law are just the tip of the iceberg. Countless other broad-based defects plague any common-law approach. *See id.* at 1288 ("Just how old must a common-law tort be in order to qualify as having been 'traditionally . . . regarded as providing a basis for a lawsuit in English or American courts?'"). As a result, courts have already come to conflicting conclusions applying the common-law approach to the statute at issue here, FACTA. *Compare Jeffries v. Volume Servs. Am., Inc.,* 928 F.3d 1059, 1064 (D.C. Cir. 2019) (concluding that the harms protected by FACTA have sufficient common-law analogs), *with Muransky*, 979 F.3d at 931–32 (concluding that a FACTA violation is not analogous to the common-law breach of confidence tort).

Amici for Walgreens argue that allowing Ms. Fausett's suit to proceed would make Illinois an outlier with respect to standing law. Cinemark Br. at 10. As an initial matter, this Court's "state constitutional jurisprudence cannot be predicated on the actions of our sister states." *People v. Fitzpatrick*, 2013 IL 113449, ¶ 23. In any event, Cinemark's state-by-state tables are not persuasive. For starters, one table shows that nearly a dozen states expressly allow standing absent injury-in-fact. Cinemark Br. at A-5. Other tables demonstrate only that other states have standing doctrine that loosely mirrors federal law—not that other states have expressly adopted the *TransUnion* approach of looking to common law analogs for statutory injuries. Indeed, as of mid-2023, the highest courts in only eighteen states and the District of Columbia had even cited the U.S. Supreme Court's *Spokeo* or *TransUnion* rulings, and most of the decisions that did cite them rejected or distinguished them, cited favorably to the dissents in those cases, or cited them for

principles other than the requirement of a concrete injury. National Consumer Law Center, *Consumer Class Actions* (10th ed. 2020), Appendix G.3.1, updated at www.nclc.org/library.

In short, there is little evidence that Illinois's rejection of the *TransUnion* approach to standing would be outside of the mainstream. By preserving Illinois' broader approach to standing and not using the common law analysis provided by *TransUnion*, this Court can leave existing statutes intact and permit the Illinois General Assembly to continue to effectively legislate against harms that may not have been cognizable at common law.

B. Requiring any Injury Beyond a Violation of Statutory Rights Poses Separation-Of-Powers Concerns under the Illinois Constitution

Denying standing to plaintiffs who do not allege harm beyond the violation of their rights, even when the legislature decides there is no need to allege such additional harm, would improperly trample on the legislature's constitutional authority to freely legislate and thus undermine the separation of powers enshrined in the Illinois Constitution, which provides: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill. Const. 1970, art. II, § 1. In "both theory and practice, the purpose of the [separation of powers] provision is to ensure that the whole power of two or more branches of government shall not reside in the same hands." *In re D.S.*, 198 Ill. 2d 309, 321 (2001) (quotation marks and citations omitted).

As such, under the Illinois Constitution, the legislature and judiciary serve different roles. While Illinois courts are tasked with construing statutes, "[t]he legislative power is vested in a General Assembly." Ill. Const. 1970, art. IV, § 1. As this Court recently summarized,

> Ordinarily, it is the province of the legislature to enact laws, and it is the province of the courts to construe them. Courts have no legislative powers and may not enact or amend statutes. A court may not restrict or enlarge the meaning of an unambiguous statute. The responsibility for the justice or wisdom of legislation rests upon the legislature.

People v. Mayfield, 2023 IL 128092, ¶ 27, reh'g denied (May 22, 2023); *see also People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 297 (2003) ("Under the doctrine of the separation of powers, courts may not legislate, rewrite or extend legislation.") (quotation marks and citations omitted). "In relation to the judicial branch, the General Assembly, which speaks through the passage of legislation, occupies a 'superior position' in determining public policy." *Phoenix Ins. Co. v. Rosen*, 242 Ill. 2d 48, 55–56 (2011) (citation omitted).

But any standing doctrine that allows the judiciary to "amend" legislatively created causes of action to require proof of harm the statute does not require, or to deny enforcement absent such proof, would flip that separation-of-powers logic on its head. Instead of allowing the General Assembly to make use of its "superior position in determining public policy," *id.*, the Court would be impermissibly "rewrit[ing] statutes to make them consistent with the court's idea of orderliness and public policy." *Henrich v. Libertyville High Sch.*, 186 Ill. 2d 381, 395 (1998), as modified on denial of reh'g (June 1, 1999). By stripping the General Assembly of its constitutional authority to make policy judgments, that upside-down arrangement would violate the Illinois Constitution's separation of powers. *See People v. Ruth*, 2022 IL App (1st) 192023, ¶ 20, appeal denied (Ill. 2022) (separation of powers violation can occur where "one branch of government [exercises powers] which properly should be exercised by another branch").

Indeed, this Court has repeatedly recognized the General Assembly's wide latitude to legislate in defense of workers and consumers. That includes the legislature's ability to legislate against harms that may seem uncertain—because just the risk of those harms is not, as a policy matter, worth tolerating. In *Rosenbach*, for example, the Court gave due deference to the General Assembly's judgment in BIPA that "once [biometric information is] compromised, the individual has no recourse [and] is at *heightened risk* for identity theft . . . ." *Rosenbach*, 2019 IL 123186, ¶ 35 (quoting 740 ILCS 14/5(c)) (emphasis added). BIPA was designed to "head off [] problems before they occur" by imposing safeguards against the disclosure of biometric information. *Id.* ¶ 36. As this Court explained,

> [W]hatever expenses a business might incur to meet the law's requirements are likely to be insignificant compared to the substantial and irreversible harm that could result if biometric identifiers and information are not properly safeguarded . . . 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.

Id. ¶ 37. "Sometimes, a harm has such dire consequences that a legislature might opt to ensure it never happens." Elizabeth Earle Beske, *Charting a Course Past* Spokeo *and* TransUnion, 29 Geo. Mason L. Rev. 729, 773 (2022) (discussing FACTA). If Walgreens disagrees with the harms the legislature has chosen to prevent, its "appeal must be to the [legislature], and not to the court." *People ex rel. Sherman*, 203 Ill. 2d at 297 (quotation marks and citations omitted).

BIPA and other prophylactic laws would therefore be in peril should this Court decide to narrow its standing doctrine. Rather than preserving the General Assembly's wide berth to "determine public policy, to prescribe solutions to problems, and to alter the

common law," the Court would imposing its own notions of "orderliness and public policy" and therefore overstep its constitutional role. *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 473 (1997) (Miller, J., concurring in part and dissenting in part); *Henrich*, 186 Ill. 2d at 395.

Accordingly, this Court should reaffirm the legislature's authority to proactively legislate and hold that Ms. Fausett has standing to bring her suit.

III. This Case Does Not Present Article II Issues

Article II of the U.S. Constitution has no relevance to this case, which concerns the requirements of standing under Illinois law, not the federal Constitution. Moreover, even if federal Article II were relevant in state court—which it is not—it would not apply in a case like this, where the plaintiff has suffered *personal* harm and cannot plausibly be said to be enforcing the public's interest in general compliance with the law.

Walgreens and its amici place great weight on *TransUnion*'s supposed Article II "holding," which occupies just four sentences in an opinion that spans more than twenty pages. *TransUnion*, 594 U.S. at 429. In particular, the Court stated—in decidedly hypothetical language—that a "regime where Congress could freely authorize unharmed plaintiffs to sue defendants not only would violate Article III but also *would* infringe on the Executive Branch's Article II authority." *Id.* (emphasis added). The Court explained that, in the absence of a case or controversy under Article III, "the choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch." *Id.* In other words, "[p]rivate plaintiffs . . . are not charged with pursuing the public interest in enforcing a defendant's

general compliance with regulatory law." *Id.* Seizing on that language, the Retail Litigation Center argues in this case that "Walgreens [] hurt no one . . . [and] committed, at most, a violation of federal law that injured the sovereign rather than any specific person." Retail Litigation Center Br. at 13. From that, the Retail Litigation Center concludes that allowing Ms. Fausett to sue would supposedly violate the U.S. Constitution because, under Article II, only the "President gets to decide when . . . to enforce a law to ensure general regulatory compliance." Retail Litigation Br. at 8.

The Retail Litigation Center misreads *TransUnion*. That opinion's fleeting observations about Article II wrought no drive-by revolution in federal law, and they certainly do not bar Ms. Fausett's action. That is true for at least two reasons.

First, *TransUnion*'s holding was expressly limited to Article III. The *Transunion* Court, time and again, emphasized that the case before it was about Article III standing, not Article II. *See TransUnion,* 594 U.S. at 417 (introducing case with discussion of Article III); *id.* at 422 ("The question in this case is whether the [] class members have Article III standing[.]"); *id.* ("The law *of Art. III standing* is built upon . . . [the] idea of separation of powers.") (emphasis added) (quotation marks and citation omitted); *id.* at 424 ("The question in this case focuses on the Article III requirement that the plaintiff's injury in fact be 'concrete'"). Even in its short discussion of Article II, the Court made clear any Article II concerns would arise only if it first held that there were no "case or controversy" under Article III. *Id.* at 429 ("We accept the 'displacement of the democratically elected branches when necessary to decide an actual case.'") (citation omitted). Indeed, in *TransUnion*'s

final paragraph, the Court itself described its holding as a "conclusion about Article III standing." *Id.* at 442.

It is difficult to square that plain language with any suggestion that *TransUnion* had an "alternative" or "independent" Article II holding. *See* Retail Litigation Cener Br. at 6–7; Illinois Defense Counsel Br. at 5–6. That is particularly so when the Supreme Court has previously explained that "standing jurisprudence . . . derives from Article III and not Article II." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 n.4 (1998). Rather than "comb" *TransUnion* "for stray comments and stretch them beyond their context," we should take the Supreme Court at its word. *See Brown v. Davenport*, 596 U.S. 118, 141 (2022).

In other words, the *TransUnion* Court's statements about Article II were textbook dicta. The Court—in its brief, four-sentence digression—provided only generalized observations about Article II, without applying those observations to the case before it. *See Cent. Virginia Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated."). Indeed, in the opinion's next section, in which the Court "appl[lied] [] fundamental standing principles *to this lawsuit,*" *TransUnion*, 594 U.S. at 430 (emphasis added), it never again made mention of Article II. *See id.* at 430–42. Dicta, of course, "settles nothing." *Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 352 n. 12 (2005); *see also Exelon Corp. v. Dep't of Revenue*, 234 Ill. 2d 266, 277 (2009) ("*Obiter dictum* refers to a remark or expression of opinion that a court uttered as an aside, and is generally not binding authority or precedent within the *stare decisis* rule.").

That the Court's remarks were dicta makes sense. Transforming standing jurisprudence would require more than four sentences. Judge Newsom, who has supplied perhaps the most thorough application of Article II to standing, has explained in two lengthy concurrences that any standing doctrine that rests on Article II would present its own thorny questions. *Sierra v. City of Hallandale Beach, Fla.*, 996 F.3d 1110, 1139 (11th Cir. 2021) (Newsom, J., concurring) ("I readily confess that re-conceptualizing 'standing' in Article II terms is not a panacea, and it raises its own set of hard questions."); *see also Laufer v. Arpan LLC*, 29 F.4th 1268, 1283–97 (11th Cir. 2022) (Newsom, J., concurring), *vacated*, 77 F.4th 1366 (11th Cir. 2023).

To take a few examples, Walgreens and its amici make much of the federal "Executive Branch's exclusive law enforcement authority," Retail Litigation Center Br. at 8, but it's hardly "self-evident where proper individual enforcement leaves off and the 'executive Power' begins." *Sierra*, 996 F.3d at 1139. Moreover, any Article II theory would have to wrestle with the fact that private plaintiffs—through *qui tam* actions, "suits by individuals standing in the government's shoes"—have often assumed the mantle of public enforcement. *Id.* at 1125 (describing "Supreme Court decisions involving *qui tam* actions [that] . . . accepted that plaintiffs could sue in the absence of any personal harm."). And, critically, public enforcement is routinely complemented by private enforcement without posing any Article II concerns. "Using a private right of action is an important enforcement mechanism for laws. Nearly all regulatory agencies are significantly understaffed and under-resourced, and they cannot enforce in every case . . . A private right of action works to deputize 'private attorneys general' to help enforce the law." Daniel J. Solove & Danielle

Keats Citron, *Standing and Privacy Harms: A Critique of* Transunion v. Ramirez, 101 B.U. L. Rev. Online 62, 70 (2021).

Finally, some scholars have expressed doubt that lawsuits involving two private plaintiffs implicate Article II at all. *See, e.g.*, Cass Sunstein, *Injury In Fact, Transformed*, 2021 Sup. Ct. Rev. 349, 367 n. 99 (2021) ("In *TransUnion* itself, Article II could not possibly be relevant. The case involved a suit between private parties! . . . [I]t would require an adventurous understanding of Article II to think that the authority of the executive is at stake or in danger.").

The Supreme Court would presumably address these questions—and many more—before implementing a sea-change in standing doctrine. That it did not in *TransUnion* is yet more evidence that its four-sentence diversion was mere dictum.

Second, even if *TransUnion* contained an alternative Article II holding—and it does not—that holding would not apply in this case. As an initial matter, the Court's Article II musings related to the separation of powers between the federal executive and the *federal* judiciary, so they have no relevance to the separate question of the federal executive's role vis-à-vis *this Court*. *See TransUnion*, 594 U.S. at 429.

And, as described above, *TransUnion* did not even apply any Article II analysis to the FCRA provision before it, so it is hard to know when private enforcement of a specific federal statutory provision would impermissibly encroach on the executive's authority to enforce the laws. To fill in the gaps, the Retail Litigation Center relies heavily on Judge Newsom's Article II approach to standing. Retail Litigation Center Br. at 10–12. But that approach supports a finding of standing in this case.

In *Sierra*, Judge Newsom explained that, in his view, "an Article III 'Case' exists if, and whenever, the plaintiff has a cause of action—including under any statutory provision authorizing suit in federal court to vindicate violation of a legal right." 996 F.3d at 1139. By Judge Newsom's lights, violation of a statutory right is enough for Article III standing—no separate "factual injury" need be shown. *Id.* at 1123.

And though Judge Newsom expressed that Article II may limit certain causes of action, he perceived no Article II issue with respect to FACTA violations. As he explained his view: "Congress can create causes of action, for instance, authorizing a private plaintiff to vindicate his personal rights against the publication of his credit-card numbers." *Id.* at 1136 (citing *Muransky*, 979 F.3d at 929–31). Judge Newsom expressly disagreed with the outcome in *Muransky*, where the Eleventh Circuit concluded that the named plaintiff lacked standing when he received a receipt that revealed the first six and last four digits of his card, just like Ms. Fausett. *See Muransky*, 979 F.3d at 922.

If that weren't enough, that the FACTA violation here meets even any hypothetical Article II requirements is all the more clear in light of the circumstances in which Judge Newsom *has* concluded there was an Article II issue. In *Laufer*, the Eleventh Circuit considered the standing of a "tester" plaintiff who alleged that a hotel operator violated the ADA by not providing accessibility information about its guest rooms on its website. 29 F.4th at 1289–90. The plaintiff had no plan to ever visit the hotel and "expressly disclaimed any interest in benefiting from the provision that she seeks to enforce." *Id.* at 1290. Further, the plaintiff regularly "view[ed] hundreds of websites for hotels that she readily admits she has no plans to patronize in order to [determine] whether they comply with the ADA." *Id.*

To that end, the plaintiff had filed hundreds of ADA lawsuits against hotels, "presumably to aid others who might actually want to visit them" and as a self-professed "advocate of the rights of . . . disabled persons." *Id.*

Judge Newsom concluded that greenlighting a suit in that situation would likely present Article II concerns. *Id.* at 1297. "A tester like Laufer exercises executive-style enforcement discretion by freely choosing how vigorously the law should be enforced—she can bring one lawsuit, or a dozen, or hundreds." *Id.* at 1295. Moreover, "a tester like Laufer investigates her targets first and then selects from among them which to pursue." *Id.*; *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 12 (2023) (Thomas, J., concurring) (in a similar case involving plaintiff Laufer, expressing Article II concerns because "[a]s a public official would do, Laufer even monitors [] hotel websites she has found lacking. She uses 'a system' to track each of the hundreds of hotels she has sued.").

That is a far cry from the situation in this case. Ms. Fausett does not purport to represent the interests of others (except insofar as she represents a class of persons whose personal rights, like hers, were violated). And contrary to the Retail Litigation Center's claim that "Walgreens [] hurt no one," Retail Litigation Center Br. at 13, Ms. Fausett experienced *personal* harm when Walgreens printed a receipt with *her own* card digits in violation of FACTA. Nor does Ms. Fausett rove around stores, proactively "investigat[ing] her targets" and "select[ing]" potential defendants. *Laufer*, 29 F.4th at 1295. Indeed, unlike the plaintiff in *Laufer*, who never intended to visit or transact business with the hotels she sued, FACTA allows Ms. Fausett to bring a lawsuit only against businesses where she conducted a card transaction and was provided an illegal receipt. She simply does not

exercise or attempt to exercise any sort of "broad-ranging enforcement discretion that the Constitution vests exclusively in Executive Branch officials." *See id.* at 1296.

In sum, Walgreens and its amici cannot succeed in making a mountain out of a molehill. The Supreme Court, like Congress, does not "hide elephants in mouseholes." *See Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). And here, it did not revolutionize standing law in a mere four sentences. Article II has no application to this case.

CONCLUSION

For the foregoing reasons, amicus curiae Public Justice urges this Court to affirm the judgment under review.

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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 this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 25 pages.

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