No. 131444

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.

REPLY BRIEF OF DEFENDANT-PETITIONER WALGREEN CO.

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The issue before the Court is not whether Congress created a private right of action for violation of the requirements of FACTA—it did. This case is about whether Fausett and 1.6 million no-injury class members from across the country have standing to assert that cause of action in the Illinois courts.

Fausett argues that Congress has the unfettered power to decide who does and does not have standing to sue in an Illinois court and that, having legislatively determined that no-injury plaintiffs have a private right of action under FACTA, this Court is powerless to deny them standing.

Walgreens argues that this Court, not Congress, decides whether private litigants have standing to sue in Illinois; that Illinois law requires a "concrete injury" for both common law and statutory claims that Fausett cannot demonstrate; and that to rule otherwise would violate the most basic tenets of the constitutional separation of powers.

ARGUMENT

Fausett's Response Brief ("Resp.") is based on a series of false premises. The first is that Walgreens has asked the Court to ignore or change the law of standing in Illinois. Resp. 18-24. Even a cursory review of Walgreens' Opening Brief ("Br.") belies this claim. *See* Br. 11 ("Fausett lacks standing under Illinois law to pursue her FACTA claim, and to represent the class, because *this Court's* repeated decisions—most recently in *Petta v. Christie Bus. Holdings Co., P.C.*, 2025 IL 130337—require a 'concrete' injury-in-fact as an indispensable element of a justiciable claim in Illinois.") (emphasis added). The Court applied the concrete injury-in-fact rule to both common law and statutory causes of action in *Petta*, and Walgreens asks the Court to apply it here.

Fausett's second false premise is that Walgreens has asked the Court to "adopt" federal standing jurisprudence, which she characterizes as "the opposite" of Illinois

standing rules. Resp. 16-17, 30. She is wrong on both counts. Walgreens cites federal authorities for two purposes. First, those cases interpret the legislative intent and scope of FACTA—specifically, whether disclosure of a bank identification number ("BIN") that identifies the card-issuing bank implicates a recognized privacy interest or creates a risk of identity theft. Br. 22. Federal decisions interpreting a federal statute are instructive and entitled to deference. Second, the federal cases cited, including *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), arise under the same federal statute Fausett relies on here and *apply the identical standing requirement of "concrete injury" that this Court has embraced*, so their reasoning is persuasive and should not be disregarded. Br. 21-22, 25.

Fausett's argument that federal standing jurisprudence concerning no-injury plaintiffs is contrary to Illinois law cannot be reconciled with the fact that, in *Petta*, this Court cited *TransUnion* for the same principle Walgreens did in its opening brief: "an allegation of an increased risk of harm is insufficient to confer standing." Br. 19 (citing *Petta*, 2025 IL 130377, ¶ 21 (citing *TransUnion*, 594 U.S. at 436-37, for the proposition that "an unmaterialized risk of future harm, without more, is insufficiently concrete to confer standing to sue for damages in federal court")).

Fausett's third false premise is that Walgreens has asked the Court to "reject" its own holding in *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186. Resp. 23. Again, not so. What Walgreens actually argues is that, at Fausett's urging, the courts below misapplied *Rosenbach* and improperly expanded this Court's construction of BIPA beyond its limited factual and statutory foundation. Br. 16-18, 19-21.

Fausett, like the courts below, simply ignores the crucial distinction made by the Illinois General Assembly when it enacted BIPA, which this Court emphasized in

Rosenbach: the immutable biometric identifiers protected by BIPA are fundamentally different from an individual's financial information—let alone a BIN, which does not reveal any personal information about a cardholder and does not implicate any recognized privacy interest. Br. 17, 19-20. Fausett nowhere explains why this distinction does not control here.

Illinois' "concrete injury" requirement is almost nowhere mentioned in Fausett's Response, and she points to nothing in the record that disputes the trial court's express finding that she is "a no-injury plaintiff" seeking to represent a no-injury class. App. 191, 195. No true third party ever saw her Walgreens receipts, C. 692, at 99:12-100:7, and she admits she "is not presently aware of any harm to her credit or identity," C. 688, at 82:1-83:7. Nor has she taken any remedial measures, because none are required—she simply "took the [Walgreens' receipt] home, placed it in a ziplock bag and put the bag in a filing cabinet folder." C. 702, ¶ 12. Fausett's conduct concedes what her Response does not: that the BIN on her receipts reveals nothing about her personal identifiers and the alleged "risk" of identity theft in this case is illusory.

Stripped of these false premises, all Fausett offers in her Response is the argument that printing the BIN on her receipts was prohibited by FACTA, so she is entitled to sue in an Illinois court for up to $1,000 in statutory damages because Congress says so. Resp. 15 ("Nothing more is needed."). In essence, she maintains that Congress "empowered" her to enforce the laws of the United States in the Illinois courts, even in the absence of any concrete injury and even though she could not maintain her suit in federal court. Resp. 27. According to Fausett, this Court is powerless to decide for itself whether she satisfies

Illinois's well-established standing requirements and has no role in evaluating the justiciability of her claim.

The flaw in this argument is that Congress does not have the constitutional authority to decide for this Court who does or does not have standing to sue in Illinois. Nor does Congress have the constitutional authority to confer executive branch enforcement power on a no-injury private litigant—particularly where, as here, FACTA expressly confers such enforcement authority on the executive branch. *See* 15 U.S.C. § 1681s.

Allowing nationwide no-injury class actions in Illinois for a technical violation of any federal statute that grants a private right of action—despite the federal courts and other state courts having declared that such a violation implicates no privacy interest at all—would make Illinois a magnet jurisdiction for such claims. Fausett argues that this "quirk" is not only good law, it is good public policy. Resp. 18, 41-42. It is neither. Allowing Fausett to pursue a $1,000 statutory penalty on behalf of each of 1.6 million class members for phantom injuries would make Illinois an outlier jurisdiction and issue an open invitation for similar no-injury claims. *See* Cinemark Amicus Br. 12-16. The Court should protect the integrity of its traditional standing requirement of concrete injury.

I. Illinois Law Requires Concrete Injury For Standing To Sue.

From *Greer* to *Petta*, this Court has not wavered in its insistence that a plaintiff suffer an injury-in-fact to a legally cognizable interest to confer standing. *Greer v. Illinois Hous. Dev. Auth.*, 122 Ill. 2d 462, 492-93 (1988); *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999); *Petta*, 2025 IL 130337, ¶¶ 17-18. That injury "must be *concrete*; a plaintiff alleging only a purely speculative future injury or where there is no immediate danger of sustaining *a direct injury* lacks a sufficient interest to have standing." *Petta*, 2025 IL 130337, ¶ 18 (emphasis added and internal quotation marks omitted).

Fausett argues that *Petta* does not apply to statutory causes of action, Resp. 29, that a mere violation of her statutory rights is enough to give her standing, Resp. 24, 27, 39-40, and that this Court has already held the legislative branch has unfettered power to decide who has judicial standing, Resp. 19-20. None of these things is true.

A. *Petta* Applied The Concrete Injury Requirement To Both Common Law And Statutory Claims.

The plaintiff in *Petta* alleged a broad array of legal theories: common law negligence, negligence *per se* arising out of violations of the Federal Trade Commission Act and the Health Insurance Portability and Accountability Act, and a pure statutory claim under the Illinois Consumer Fraud and Deceptive Business Practices Act for a violation of the Illinois Personal Information Protection Act. *Petta*, 2025 IL 130337, ¶ 10. This Court found that the plaintiff lacked standing under *every one of these theories*, including the pure statutory cause of action.

Nowhere in *Petta* did the Court hold that the "plaintiffs could not seek relief under the Illinois Consumer Fraud Act because it only confers standing to sue for 'actual damage.'" Resp. 29. The Court never even discussed the types of damages available under the various statutory provisions invoked by the plaintiff to support her claim. It simply applied the Illinois requirement that the plaintiff suffer "concrete injury" to have standing to sue, citing *Greer* and its progeny. *Petta*, 2025 IL 130337, ¶¶ 17-18. It recognized no distinction between the common law and the statutory claims.

Nor is it true that the Consumer Fraud Act only permits the award of actual economic damages (from which Fausett infers a distinction from FACTA). Resp. 29-30. Once a plaintiff establishes "actual damage"—which is what this Court requires for standing—the Act empowers the courts to grant "economic damages *or any other relief*"

it deems appropriate. 815 ILCS 505/10a (emphasis added) ("Any person who suffers actual damage as a result of a violation of this Act committed by any other person may bring an action against such person. The court, in its discretion may award actual economic damages or any other relief which the court deems proper…").

Nor can *Petta* be distinguished because the plaintiff and the class members there "faced only an *increased risk* that their private personal data was accessed by an unauthorized third party." *Petta*, 2025 IL 130337, ¶ 21 (emphasis in original); Resp. 28. Fausett has not shown even an "increased risk" of identity theft here.[1] No true third party to the transaction saw her Walgreens receipts and she admits she has experienced no identity theft. Unlike the social security numbers and other personal identifiers at issue in *Petta,* a BIN does not identify Fausett and does *not* enable identity theft.[2] App. 284, ¶ 46.

Walgreens has cited legal precedents universally supporting this conclusion. Br. 22-23 (collecting cases). Fausett cites none reaching a contrary conclusion.

B. Fausett Suffered No Concrete Injury.

Fausett's claim that she suffered "additional" injury because "her information was actually disclosed to the Walgreens cashier that handled the receipt," Resp. 18, does not

[1] Fausett repeatedly cites generalized statements by President Bush at a 2003 FRCA signing ceremony to support her argument that she was at increased risk of identity theft. Resp. 2-5. None of those statements was directed at BINs, but rather the risk of "dumpster diving" for receipts that at the time included full card numbers and expiration dates. App. 281, ¶¶ 37-38. It is undisputed that the BIN for Fausett's prepaid cash card is not unique to her, reveals nothing about her, and is not linked to any of her credit information. App. 284-87, ¶¶ 46-48, 59-62.

[2] Kenneth R. Jones, a former federal investigator and former regional head of fraud risk management at KPMG with decades of experience in credit, debit, and pre-paid card fraud, App. 272-74, provided an unrebutted expert opinion that the BIN contained on a pre-paid card reveals no personal identifying information about anyone—it only identifies the issuing bank—and therefore cannot possibly cause an increased risk of identity theft. App. 284-87, ¶¶ 46-48, 59-62.

bear scrutiny. To facilitate her cash-reload transaction, Fausett voluntarily disclosed all the information on her prepaid card to the Walgreens cashier. The cashier is not a third party; he or she *is* Walgreens for purposes of the transaction.

Nor did printing the BIN on Fausett's receipts "injure" her in any concrete way. Fausett admits that no one beyond the parties and Fausett's lawyer ever saw the receipts. C. 692, at 99:12-100:7. Even if the receipts had been seen by a third party, the class certification record is undisputed that the BINs "do not represent any 'personal' identifiers relating to the Plaintiff, they do not represent an invasion of Plaintiff's privacy and providing them is in no way a theft of the Plaintiff's identity." App. 284, ¶ 46. Printing the BIN on the receipts "did not enhance any criminals' ability to obtain any information about name, date of birth, social security number or other PII that would help them steal the Plaintiff's identity." App. 277, ¶ 22. This explains why Fausett readily admits she "is not presently aware of any harm to her credit or identity." C. 688, at 82:15-83:7.

Fausett says she was denied the opportunity to rebut this evidence. Resp. 39 n. 13. The record shows otherwise. Walgreens disclosed its experts in advance of class certification briefing and hearing, but Fausett chose not to respond with counterevidence before, during, or after the hearing. *See* C. 634, 706-32, 741-44. Even now, she can point to no contrary opinion anywhere in reported cases or professional literature.

Fausett also offers no evidentiary support whatsoever for her conclusory claim that "she was forced to take action to prevent further disclosure" of the BIN printed on her Walgreens receipt. Resp at 18. As noted above, the record evidence is that she simply took the receipts home and put them in a filing cabinet folder. C. 702, ¶ 12.

All that is left of Fausett's claimed injury is an alleged technical violation of FACTA. There is simply no concrete injury "there" there.

C. This Court Has Never Held That A Plaintiff May Establish "Statutory Standing" Without Concrete Injury.

Fausett next argues that recognizing standing is mandated by this Court's purported confirmation in other cases that "it is not even necessary to satisfy common law standing requirements to enforce statutory rights." Resp. 25. Citing *People v. Johnson*, 2021 IL 125738, and *Rogers v. Schlenker*, 209 Ill. 2d 456 (2004), she asserts that the lack of concrete injury is irrelevant to standing if a plaintiff fulfills "statutory conditions to sue for legislatively created relief." Resp. 25. Neither *Johnson* nor *Rogers* so holds.

In *Johnson*, this Court addressed the circumstances under which an individual may sue for post-conviction relief under the Post-Conviction Hearing Act. 2021 IL 125738. The Act authorizes suit only by a person "imprisoned in the penitentiary" at the time the post-conviction proceedings are instituted. *Id.* ¶ 32. The petitioner in *Johnson* was not imprisoned for the challenged conviction at the time he sought relief, so this Court summarily dismissed his petition. *Id.* ¶¶ 33, 37. The defendant had *not* raised a lack of standing as an affirmative defense. *Id.* ¶¶ 33, 58-59.

Johnson stands for the unremarkable proposition that it is within the power of the legislature to "attach [statutory] conditions to the relief it creates"—in that case, a procedural path to post-conviction relief and, ultimately, release from incarceration. *Id.* ¶ 33. The plaintiff failed to meet those conditions for the same reason he would have failed the concrete injury test had the defendant raised the standing issue: there was no ongoing restraint on his liberty, and he therefore suffered no concrete injury under the statute.

Nor does *Rogers* recognize a separate path to standing by fulfilling "statutory conditions." There, the Court considered whether a decedent's daughter (who qualified as an "heir" under the Probate Act if the decedent died intestate) had standing to contest the validity of a will in which she was not named. *Rogers*, 209 Ill. 2d at 462. The Court held that the mere possibility one of four wills executed by the decedent might be valid, which would render the plaintiff's claim void, did not change the fact that the plaintiff had a financial interest in the estate as an heir with the potential to inherit. *Id.* at 465. Nothing in the holding is inconsistent with the concrete injury requirement for standing in Illinois.

This leaves Fausett with just *Rosenbach* to support her claim that a mere statutory violation confers standing on a no-injury plaintiff under FACTA. *Rosenbach*, however, was limited to the context of BIPA, and this Court decided only whether the plaintiff in that case had shown he was "aggrieved" as that term is used in that statute. *Rosenbach* was construing statutory language; it did not, as Fausett claims, alter this Court's standing jurisprudence or its requirement of a concrete injury. It made no reference to either.

Fausett simply ignores a crucial distinction made by the Illinois General Assembly—and cited in *Rosenbach*—between unique, unchangeable biometric identifiers and financial identifiers that are issued by third parties and can be invalidated or altered at any point. *Rosenbach*, 2019 IL 123186, ¶ 35 (financial identifiers are different from immutable biometric characteristics, including because the "identifiers that are used to access finances or other sensitive information…can be changed" if compromised). BIPA defines biometric identifiers as "retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." 740 ILCS 14/10. The Court recognized a privacy interest in these biometric identifiers because, once compromised, that interest "vanishes into thin air" and

the individual "has no recourse." *Rosenbach*, 2019 IL 123186, ¶¶ 34-35; *accord Davis v. Yenchko*, 2024 IL 129751, ¶ 23 (distinguishing standing under FOID Card Act from a "violation of the Biometric Information Privacy Act [which] constitutes an invasion of a person's statutory right of privacy in biometric identifiers"). Fausett offers no argument, let alone legal authority, that this distinction is not dispositive here.

Rosenbach interpreted a unique statute that protects against irreparable biometric identity theft. Fausett seeks to apply its reasoning to a federal statute that has nothing to do with immutable biometric characteristics, in a case involving a plaintiff who admits her personal identifiers have not been disclosed to or misused by anyone. Confining *Rosenbach* to its factual and statutory context is supported by the Court's subsequent application of the concrete injury requirement to common law and statutory claims in *Petta*—without even mentioning *Rosenbach*.[3]

Nor is it "incongru[ous]" that this Court ruled in *Tims v. Black Horse Carriers, Inc*., 2023 IL 127801, that all claims under BIPA are governed by the five-year period set forth in Section 13-205 of the Code of Civil Procedure, rather than Section 13-201 of the Code. Resp. 36-37. In *Tims*, the Court first determined that the lower court erred by applying two different limitations periods to separate violations of BIPA. *Tims*, 2023 IL 127801, ¶ 21. The Court then concluded that "because [BIPA] does not have its own limitations period; because the subsections are causes of action 'not otherwise provided for'; and because we

[3] Despite Fausett's protestations, Resp. 35-36, there is no divergence between federal and state interpretation of BIPA. *Rosenbach* focused on an alleged violation of section 15(b) of BIPA, and the Seventh Circuit has followed this Court's holding that a plaintiff alleging such a violation is "aggrieved" under the statute. *See, e.g., Cothron v. White Castle Systems, Inc*., 20 F.4th 1156, 1164-65 (7th Cir. 2021). Speculation about how this Court would interpret a claim under other subsections of BIPA is improper, and does not bear on the question now before the Court.

must ensure certainty, predictability, and uniformity as to when the limitations period expires in each subsection, the Act is subject to the default five-year limitations period found in section 13-205 of the Code," the five-year "catch-all" limitations period applies. *Id*. ¶ 37. *Tims* never discussed, let alone decided, anything even remotely relevant to the standing analysis presented here.

II. Federal Authorities Interpreting FACTA Are Relevant And Entitled To Deference.

The interpretation of a federal statute by federal courts has obvious value and is entitled to deference. Br. 20-21 (citing *State Bank of Cherry v. CGB Enters., Inc.*, 2013 IL 113836, ¶ 35). Federal courts have uniformly ruled that FACTA recognizes no "privacy interest" in the BIN on a credit or debit card.[4] Br. 20 (citing *Noble v. Nev. Checker Cab Corp.*, 726 F. App'x 582, 583-84 (9th Cir. 2018); *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 780-81 (9th Cir. 2018); *Kamal v. J. Crew Grp., Inc.*, 2017 WL 2587617, at *3 (D.N.J. June 14, 2017), *aff'd in part*, *vacated in part*, 918 F.3d 102 (3d Cir. 2019)).

[4] A reloadable prepaid card is not a conventional credit or debit card. App. 262-63, ¶¶ 2-8. As the unrebutted testimony of Walgreens' expert confirmed, "[u]nlike credit cards which are affixed to a set limit that is then paid over time, or a debit card that is linked to a person's bank account, prepaid cards do not have any value until the funds are loaded onto the card. Pre-paid cards are generally not linked to a consumer's bank checking account or to a consumer's credit union shared draft account like debit cards. Rather, the value associated with the card is maintained in a pooled account ***owned by the issuer***." App. 280, ¶ 30.

Fausett's argument that pre-paid cards function like debit cards when they are used to make *purchases*, Resp. 6 n.5, likewise has no application here. Walgreens printed FACTA-compliant receipts when it accepted pre-paid cards as tender for a purchase, but *not* during a cash-load transaction. As Walgreens' expert payment industry expert Phil Philliou explained, in a cash reload, "[c]ash, not the GPR card, was being accepted by Walgreens to be added to the cardholder's GPR card account balance." C. 744. "'Accepted' in this context is understood in the payments industry to mean tendered for the payment of goods or services." *Id.*

Federal courts have also expressly found that a BIN is not a personal identifier, and its disclosure creates no risk of identity theft. Br. 22 (citing *Thomas v. TOMS King (Ohio), LLC*, 997 F.3d 629, 636 (6th Cir. 2021) (disclosure of BIN "does not inevitably lead to identity theft or increase the risk of it."); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 934–35 (11th Cir. 2020) (en banc) (disclosure of BIN does not create "either a harm or a material risk of harm stemming"); *Kamal v. J. Crew Grp., Inc.,* 918 F.3d 102, 116 (3d Cir. 2019) (disclosure of BIN does not "present[] a material risk of concrete, particularized harm"); *Katz v. Donna Karan Co.*, 872 F.3d 114, 120 (2d Cir. 2017) (no injury because "the first six digits …constitute the IIN (or BIN) for the card's issuer, digits which can be easily obtained for any given user")). Other than quoting from the dissent in *Muransky* about the historical emergence of the injury-in-fact requirement, Fausett does not even acknowledge these federal cases interpreting a federal statute, let alone explain why this Court should disregard them.

The United States Supreme Court put the exclamation point on these holdings through its analysis of 15 U.S.C. § 1681n(a), upon which Fausett relies for her private right of action. *TransUnion*, 594 U.S. at 426, 414 ("reject[ing] the proposition that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right" because "[a]n injury in law is not an injury in fact.") (citation and internal quotation marks omitted).

While the constitutional origins of standing differ in the Federal and Illinois courts, the courts are indisputably aligned in requiring "concrete injury." *Compare TransUnion*, 594 U.S. at 417 ("To have Article III standing to sue in federal court, plaintiffs must demonstrate, among other things, that they suffered a concrete harm. No concrete harm, no

standing.") *with Petta*, 2025 IL 130337, ¶ 18 ("The injury alleged by the plaintiff must be concrete…."). *TransUnion* is therefore relevant to this case and, given the interest in uniform application of federal statutes, worthy of deference. That its holding does not advance Fausett's interests, or that she prefers the dissenting view, does not mean that the majority decision of the United States Supreme Court can or should be ignored.[5]

Fausett also makes much of the use of the word "harm" in *TransUnion*, claiming that it signals a different standard than "injury." Resp. 21-22, 30-34. In fact, *TransUnion* uses the term "injury" interchangeably with "harm," never suggesting that the Court draws any distinction between the two. *See, e.g., TransUnion*, 594 U.S. at 438 ("If those plaintiffs prevailed in this case, many of them would first learn that they were 'injured' when they received a check compensating them for their supposed 'injury.' It is difficult to see how a risk of future harm could supply the basis for a plaintiff 's standing when the plaintiff did not even know that there was a risk of future harm.").

Finally, Fausett argues that, because FACTA claims can be brought in state or federal courts, Congress had the power to direct state courts to grant standing to no-injury plaintiffs even though state law precludes it. Resp. 43. Although Fausett incorrectly characterizes the legislative history of FACTA and statements by the executive branch as

[5] Fausett's characterization that "many states" have rejected the federal test for standing is misleading. Resp. 40-42. The six states Fausett cites—North Carolina, Georgia, Michigan, West Virginia, South Carolina, and Iowa—all made standing decisions based on legal history, statutory context, or constitutional language unique to those states. *Id.* (collecting cases). None involved a federal statute or considered the specific question presented here: whether Congress has or can unilaterally confer standing in state court on a no-injury plaintiff. Only *Kenn v. Eascare, LLC*, 103 Mass. App. Ct. 643 (2024), addressed a similar question, Resp. 41, and it had to break with other Massachusetts cases requiring a concrete injury akin to the federal standard to do so. *Kenn* was a marked departure from Massachusetts jurisprudence and is not a benchmark for this Court.

"determinations" of fact, Resp. 38-39, she points to nothing in the text of FACTA or its legislative history that supports her claim that Congress "expressly intended" to abrogate state law standing requirements. Resp. 43.

III. Congress Does Not Have The Constitutional Authority To Usurp Judicial Standing Requirements Or To Grant No-Injury Plaintiffs Executive Enforcement Power.

A. Congress Cannot Usurp Judicial Authority to Determine Standing.

Fausett argues that, whenever Congress creates a private right of action for statutory damages, the judiciary has no power to decide for itself whether a plaintiff asserting that right has standing to sue. The "Illinois standing doctrine 'should not be an obstacle' to her case" because, she maintains, Congress "gave [her] an express right to sue for statutory damages concerning the disclosure of her debit card information." Resp. 27.

Fausett cites *Graf v. Village of Lake Bluff*, 206 Ill. 2d 541 (2003), as support for this remarkable proposition. Resp. 44. *Graf* does not so hold. The language Fausett cites—that the "legislature may create new justiciable matters by enacting legislation that creates rights and duties that have no counterpart at common law or in equity"—concerned jurisdiction, not standing, and the Court's holding merely reaffirmed that the General Assembly cannot impose non-waivable conditions precedent to the exercise of jurisdiction over a statutory cause of action. Resp. 44; *Graf*, 206 Ill. 2d at 553 ("the jurisdiction of the circuit court is conferred by the constitution, not the legislature") (quoting *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 335-36 (2002))

Graf did address standing in a separate section of the decision but, consistent with Walgreens' position here, held that the plaintiff had standing to challenge the annexation of his property only because he suffered a concrete injury: "the increased financial burdens to [the plaintiff] resulting from the assessment of Village property taxes and the

requirement that he purchase vehicle stickers from the Village are substantial." *Id*. at 548. That holding does not even purport to change bedrock Illinois law that the judicial branch decides whether, when, and how to exercise judicial power. *In re Est. of Burgeson*, 125 Ill. 2d 477, 485 (1988) ("Standing, as a component of justiciability, must likewise be judicially defined."); *accord Ferguson v. Patton*, 2013 IL 112488, ¶¶ 22-23 (it is for the courts to define the justiciability of a claim); *Agran v. Checker Taxi Co*., 412 Ill. 145, 149 (1952) ("If the power is judicial in its nature, it necessarily follows that the legislature is expressly prohibited from exercising it").

Walgreens' argument that the effect of the rulings below is to usurp the exclusive authority of the judiciary to determine standing is not raised here "for the first time." Resp. 44. Walgreens raised its constitutional concerns in its opposition to class certification, C. 641-43, in its petition for leave to appeal to the appellate court, and in its initial briefing to this Court, which the appellate court considered. *See* Ill. App. Ct. Case No. 2-23-0105, Pet. for Leave to Appeal, at 10, 15-18, 20; Ill. Sup. Ct. Case No. 129783, Appellant's Opening Br., at 28. The appellate court specifically acknowledged Walgreens' argument that the United States Constitution "does not empower Congress to 'elevate' statutory violations into injuries that trigger the judicial power to resolve controversies." *Fausett v. Walgreen Co.*, 2024 IL App (2d) 230105, ¶ 47.

B. Congress Cannot Constitutionally Delegate The Power To Enforce FACTA To No-Injury Private Plaintiffs.

FACTA is a federal statute that explicitly charges certain executive agencies with enforcing its provisions, including the Federal Trade Commission. *See* 15 U.S.C. § 1681s. While a private plaintiff who suffers concrete injury from a statutory violation has standing to sue, in the absence of such injury, it falls to those agencies to enforce the statutory

mandates. Congress has no constitutional authority to delegate that executive power to Fausett because she has suffered no concrete injury. *TransUnion*, 594 U.S. at 429.

Fausett again argues that Walgreens is making this argument "for the first time." Resp. 45. Here, too, Walgreens argued this point in its opposition to class certification, C. 641-43, in its petition for leave to appeal to the appellate court, and in its initial briefing to this Court. *See* Ill. App. Ct. Case No. 2-23-0105, Pet. for Leave to Appeal, at 10, 15-17; Ill. Sup. Ct. Case No. 129783, Appellant's Opening Br., at 32. The appellate court considered the issue, embracing Fausett's argument that this aspect of *TransUnion* was not a part of the Supreme Court's holding. *Fausett*, 2024 IL App (2d) 230105, ¶ 47. In any event, the issue is inextricably intertwined with the standing concerns presented in Walgreens' petition for leave to appeal. *In re Rolandis G.*, 232 Ill. 2d 13, 37 (2008) ("review of an issue not specifically mentioned in a petition for leave to appeal is appropriate when that issue is 'inextricably intertwined' with other matters properly before the court"); *accord People v. Guy*, 2025 IL 129967, ¶ 59.

Fausett describes as mere "dicta" the Supreme Court's holding in *TransUnion* that allowing a no-injury plaintiff to sue under FACTA would violate of Article II of the Constitution. Resp. 45. Her claim cannot be squared with the language of the Court's decision: "A regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law *not only* would violate Article III *but also* would infringe on the Executive Branch's Article II authority." *TransUnion*, 594 U.S. at 429 (emphasis added). The Court plainly articulated a *second* ground for its finding that the Constitution precludes Congressional overreach through FACTA. *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

Even if the Supreme Court's holding concerning the Article II separation of powers issue were *dicta*, however, it would be judicial, not *obiter*, *dicta* that is "entitled to much weight, and should be followed unless found to be erroneous." *Cates v. Cates*, 156 Ill. 2d 76, 80 (1993).

Fausett's only argument that *TransUnion's* holding concerning Article II was erroneous is based on her claim that she suffered "additional injuries" beyond a mere statutory violation. Resp. 45. The undisputed class action record in this case shows that claim is false. *See* Section I.B. *supra.*

IV. Sound Public Policy Supports Reversal.

Affirming certification of nationwide classes of no-injury plaintiffs in Illinois would drain already scarce judicial resources and create enormous hydraulic pressure on defendants to settle statutory claims regardless of their merit. Br. 32-33. Fausett argues that this constitutes sound public policy because, when lower Illinois courts have done so (and after this Court decided to review those decisions), the cases have settled. Resp. 46. The scope of the class certified here demonstrates why. It includes approximately 1.6 million no-injury plaintiffs, each of whom claims up to $1,000 in statutory damages. This potential litigation exposure to Walgreens bears no rational relationship to the phantom "injury" supposedly suffered. *Blair v. Equifax Check Servs, Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) ("[A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight…. [A] grant of class status can propel the stakes of a case into the stratosphere.").

Illinois's well-established standing requirements should not be abrogated to enable class representatives who have suffered no concrete injury, under any legal or commonsense definition of that term, to wage billion-dollar fights in the Illinois courts.

V. Fausett Does Not Have A Valid FACTA Claim, Which Is A Prerequisite For Class Certification.

Fausett claims Walgreens waived the argument that she lacks a valid claim under FACTA and therefore cannot serve as a class representative under Illinois law. Resp. 47. In fact, Walgreens made this argument from the pleading stages through the class certification hearing. C. 106-09 (motion to dismiss); C. 640-41, 647 (opposition to class certification). The trial court ruled on the issue, App. 189-90, 196-97, and Walgreens raised it explicitly in its first petition for leave to appeal to the appellate court and its opening brief to this Court—both of which the appellate court considered. *See* Ill. App. Ct. Case No. 2-23-0105, Pet. for Leave to Appeal, at 14, 25-30; Ill. Sup. Ct. Case No. 129783, Appellant's Opening Br., at 9.

The legal validity of Fausett's alleged claim was addressed by both the majority and the dissent in the appellate court. *Fausett*, 2024 IL App (2d) 230105, ¶¶ 17, 19, 50, 56-60. The majority did not find that the issue had been waived; it acknowledged the legal validity of Fausett's claim was a prerequisite to class certification. It was the majority's failure to decide this potentially dispositive issue concerning class certification that led to Justice McLaren's dissent. *Fausett*, 2024 IL App (2d) 230105, ¶ 60.

In any event, the legal validity of Fausett's claim is "'inextricably intertwined' with other matters properly before the court." *Rolandis*, 232 Ill. 2d at 37; *Guy*, 2025 IL 129967, ¶ 59. The validity of Fausett's cause of action is determinative of the propriety of the class certification order on appeal. Br. 9-10, 35-37; *DeBouse v. Bayer*, 235 Ill. 2d 544, 560 (2009); *see also Griffith v. Wilmette Harbor Ass'n*, 378 Ill. App. 3d 173, 184 (2007).

Fausett's argument that FACTA applies to the cash transaction here turns standard statutory construction on its head. The statute on its face applies to receipts "provided to

the cardholder at the point of the sale or transaction," but only when the vendor "accepts credit cards or debit cards." 15 U.S.C. § 1681c(g)(1). No court outside the trial court in this case has interpreted that language to apply to a cash transaction.

Fausett's argument that this plain statutory language should be ignored because cash transactions were not explicitly *excluded*, Resp. 48 n.17, violates the principle that all statutory language must be given meaning. *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill. 2d 141, 151-52 (1997) ("Where a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions. This rule of statutory construction, *expressio unius est exclusio alterius*, is based on logic and common sense. It expresses the learning of common experience that *when people say one thing they do not mean something else*.") (citations omitted and emphasis added).

FACTA nowhere says that it applies to a transaction where a vendor accepts cash, rather than a credit or debit card. *See, e.g., Shlahtichman v. 1-800 Contacts, Inc.*, No. 09 CV 4032, 2009 WL 4506535, at *5 (N.D. Ill. Dec. 2, 2009) ("[I]f Congress intended for FACTA to apply to internet transactions, it would have made a reference to e-mail order confirmations or internet commerce."), *aff'd*, 615 F.3d 794 (7th Cir. 2010).

Fausett's failure to cite *any* authority in support of her strained statutory interpretation, despite the vast body of case law interpreting FACTA, is telling. Resp. 47-48. It also highlights the failure of her claim to meet the willfulness standard embodied in a statutory claim under FACTA. *See Safeco Ins. Co. v. Burr*, 551 U.S. 47, 69-70 (2007) (defendant did not act willfully where the conduct had a foundation in the statutory text and no court decision or regulatory guidance "warned it away from the view it took").

Deciding the legal validity of Fausett's claim now would serve the interests of judicial economy. Given that the trial court has already rejected Walgreens' position that Fausett does not allege a valid claim under FACTA, and the appellate court acknowledged, but refused to decide, the issue, remand would waste time and resources.

CONCLUSION

Walgreens respectfully requests that the Court reverse the class certification decision of the appellate court, hold that Illinois' traditional standing requirement of concrete injury has not been met on the facts of this case, direct the circuit court to dismiss the case for lack of standing, and grant such other relief this Court deems just and proper.

Dated: August 6, 2025

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 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 twenty (20) pages.

/s/ Robert H. Riley
Robert H. Riley

No. 131444

IN THE SUPREME COURT OF ILLINOIS

CALLEY FAUSETT, individually and on behalf of others similarly situated,	)	On Petition for Leave to Appeal from the Illinois Appellate Court, Second Judicial District,
Plaintiff-Respondent,	)	No. 2-23-0105
v.	)	On Appeal from the Nineteenth Judicial Circuit Court,
WALGREEN CO.,	)	Lake County, Illinois
Defendant-Petitioner.	)	Case No. 19 CH 675
	)	Hon. Donna-Jo Vorderstrasse, Judge Presiding

NOTICE OF FILING AND PROOF OF SERVICE

I, Mary A. Laird, an attorney, hereby certify that on August 6, 2025, I caused the foregoing Reply Brief of Defendant-Petitioner Walgreen Co. to be electronically filed and served upon the Clerk of the Supreme Court of Illinois through the Illinois e-filing system. I further certify that on August 6, 2025, I caused a true and correct copy of the foregoing to be served via e-mail upon the counsel of record listed below.

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Within five days of acceptance, the undersigned states that 13 paper copies of the Reply Brief of Defendant-Petitioner bearing the Court's file-stamp will be sent to the Court.

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

/s/ Mary A. Laird
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