No. 131444

In the

Supreme Court of Illinois

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

Plaintiff-Appellee,

v.

WALGREEN CO.,

Defendant-Appellant.

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-APPELLEE

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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

Appellant Walgreen Co. ("Walgreens") violated FACTA's plain terms by disclosing too many digits of Calley Fausett's debt card number. It seeks to avoid liability for that 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 the application of federal law to this case. The Court should ignore these distortions and conclude that the courts of this state remain open forums for injuries designated as such by federal and state legislatures.

First, this Court's opinion in *Rosenbach v. Six Flags Entertainment Corp.* resolves this case. *Rosenbach* firmly established that a violation of statutory rights, alone, confers standing under Illinois law. Walgreens's reading of the case slips reasoning into *Rosenbach*

that is found nowhere in the opinion. 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 consequences that would follow from tightening Illinois standing law. Walgreens, for instance, provides little guidance as to how courts should distinguish violations of statutory rights that are sufficient for standing from those that are not. If its briefing is any indication, Walgreens favors importing the restrictions in Article III of the U.S. Constitution into state law. Because federal courts are courts of limited jurisdiction, Article III imposes a requirement that plaintiffs have suffered a "concrete harm" beyond the violation of one's rights, defined by whether plaintiffs' injuries mirror harms traditionally recognized at common law. That narrow approach to standing, 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. And should this Court narrow Illinois standing law and limit the General Assembly's ability to proactively define new rights and guard against modern risks (as the General Assembly did with BIPA, discussed in *Rosenbach*), it would be usurping the legislature's role and violating the separation of powers enshrined in the Illinois Constitution.

Finally, Walgreens and its 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. In its four-sentence detour on Article II in *TransUnion*, the U.S. Supreme Court reached no Article II holding; 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 does not pose a barrier to concluding Ms. Fausett has standing. Ms. Fausett simply does not exercise the sort of authority that would threaten the federal executive's law-enforcement functions. She instead seeks to enforce *her* rights stemming from Walgreen's unlawful disclosure of too much of *her* debit-card number.

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 rights 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 Entertainment Corp.*, a case involving Illinois's Biometric Information Privacy Act ("BIPA"), this 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] In addition to the court below, Illinois appellate courts have concluded that standing in Illinois does not require more than a violation of statutory rights and have applied that holding to FACTA, the statute at issue here. *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*

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 *Rosenbach*'s holding is limited to the privacy context, Walgreens Br. 16–17, and—relying on federal-court cases interpreting Article III—implies that *Rosenbach* relied on the existence of an underlying common-law privacy right to conclude that the statutory violation there conferred standing to sue, *see id.* 19–20. Not so.

Putting aside that FACTA is also a privacy protection statute, nothing in *Rosenbach* limits its holding to the privacy context. There, this Court recognized that the plaintiff had standing because she alleged that she had suffered an injury under the terms of the statute; "[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," and the plaintiff had alleged that her biometric information had been taken in violation of her rights. *Rosenbach*, 2019 IL 123186, ¶ 34. The statutory violation she alleged was "[t]he precise harm the Illinois legislature sought to prevent." *Id.* (quotations omitted).

Rosenbach therefore stands for the proposition that plaintiffs can establish standing simply by demonstrating that their own rights have been violated under the terms of a statute. Walgreens's reliance on federal cases to support the proposition that a preexisting common-law privacy right is essential to standing reads reasoning into *Rosenbach* that

v. Buth-Na-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.

appears nowhere in the opinion. *See* Walgreens Br. 20. This Court never held that BIPA codified a pre-existing right to privacy in biometric information, nor did it rest its standing holding on the fact that such a right was violated. Indeed, *Rosenbach* does not once mention common-law rights. Instead, this 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. 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—i.e., created 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").

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," *Rosenbach*, 2019 IL 123186, ¶ 33, to imply that the Court must have been referring to an *existing* right to privacy, Walgreens Br. at 20. But legislation can codify both existing rights and new rights. 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 this Court intended to suggest that BIPA codified an existing right, there is nothing in the opinion indicating that the conclusion that a violation of statutory rights is sufficient for standing to sue depends on the existence of a pre-existing common law right to privacy—or on any corresponding privacy injury unique to BIPA.

[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 7.

Indeed, if the *Rosenbach* court had rested its holding on an analogous common-law right to privacy, it would have said so. 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* to support holding that a violation of statutory rights is enough to establish standing under FACTA).

Second, Walgreens and its amici argue that *Rosenbach* interpreted the statutory term "aggrieved" in BIPA and therefore has nothing to say about standing. *See* Walgreens Br. at 17–18; U.S. Chamber Br. at 8. This argument, too, falls short. The certified questions in *Rosenbach* focused 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., specially 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 more than a violation of statutory rights is necessarily a holding that nothing more is required to establish standing under Illinois law. *See Davis v. Yenchko*, 2024 IL 129751, ¶ 23 (citing *Rosenbach* for the proposition that a "violation of the Biometric Information Privacy Act . . . constitutes an invasion of a person's statutory right of privacy in biometric identifiers, *giving that person standing* to recover for violations.") (emphasis added).

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 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 a violation of one's statutory rights alone is sufficient to confer standing under Illinois law.

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 12–14; U.S. Chamber Br. at 6–7. But far from demonstrating the weakness of Ms. Fausett's case, those elements fit comfortably with *Rosenbach* and squarely establish her standing in the courts of this state. Standing "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 own BIN number was printed by Walgreens on a receipt, in violation of her own rights under FACTA. That is a "distinct and palpable" injury, "fairly traceable" to Walgreens, and redressable through the damages provisions in the Act. After all, under *Rosenbach*, a violation of statutory rights constitutes injury-in-fact. *See 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).

Petta v. Christie Business Holdings Company, 2025 IL 130337, doesn't change this. As Walgreens recognizes, the plaintiff there alleged that her "personal identifiers, including her Social Security number, were *potentially* compromised in a data breach," which she argued violated the Federal Trade Commission Act (the "FTC Act"), the Health

Insurance Portability and Accountability Act ("HIPAA"), and the Illinois Consumer Fraud and Deceptive Business Practices Act. Walgreens Br. at 18.[3] But unlike here, the plaintiff in *Petta* did not plead an actionable violation of rights under any of these statutes. Neither the FTC Act nor HIPAA confer a private right of action, *Rosenbach* notes that the Illinois Consumer Fraud Act limits its reach to actions alleging "actual damages,"[4] which the plaintiff in *Petta* did not allege. For this very reason, when the Illinois appellate court found standing in a FACTA case, it distinguished cases that found no standing even though the plaintiff alleged the defendant's actions violated a statute because, unlike FACTA, the statute cited did not confer a right to sue. *See Duncan*, 2019 IL App (1st) 180857, ¶ 27 ("[T]here is no indication that the statutes on which the *Maglio* plaintiffs based their claims expressly grant a private cause of action to a customer for a violation, as does FACTA.") (citation omitted).

The sole injury alleged in *Petta* was that information "*may* have been exposed to a third party," not that it was "*actually acquired*." 2025 IL 130337, ¶ 20. *Petta* therefore fits squarely within this Court's longstanding recognition that justiciable controversies are limited to those "truly adversarial and capable of resolution by judicial decision." *Id.*, ¶ 17 (quoting *Greer*, 122 Ill. 2d at 488). Here, Ms. Fausett hasn't only alleged that her sales receipt *may* have contained information in violation of her FACTA rights; she's alleged

[3] *Petta* doesn't mention the Illinois Consumer Fraud Act. Instead, it mentions the Personal Injury Protection Act, which does not itself provide a right of action to sue.
[4] *Rosenbach*, 2019 IL 123186, ¶ 25 ("To bring a private right of action under [the Illinois Consumer Fraud Act], actual damage to the plaintiff must be alleged.") (brackets added); *see also* Illinois Consumer Fraud Act, 815 ILCS 505/10a(a) ("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.").

that it did. FACTA expressly empowers Ms. Fausett to sue for this conduct and expressly provides relief if she is successful. She therefore has standing.

That federal standing law may be different is irrelevant. Illinois standing is rooted in common law, not Article III of the federal Constitution. *See $1,124,905 U.S. Currency*, 177 Ill. 2d 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. And "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 affirm.

II. TIGHTENING ILLINOIS STANDING LAW WOULD HAVE DEVASTATING CONSEQUENCES FOR ILLINOIS STATUTES.

Walgreens appears to argue that, for some statutes (e.g., BIPA), a statutory violation is enough to confer standing, but other statutes require something more. Walgreens Br. at 19–21. Walgreens does not say how courts should parse which statutory violations are sufficient for standing and which require additional injury, but its briefing suggests that common-law traditions may be relevant. *Id*. at 20 (citing federal authority looking to common-law harms). Such an approach borrows from federal standing law. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (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.") (citation omitted).

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

A. REQUIRING COMMON-LAW ANALOGUES WOULD UNDERMINE KEY STATE STATUTORY PROTECTIONS.

Because Illinois law guards against harms that may not have been recognized at common law and allows the legislature to confer actionable rights that serve "preventative and deterrent purposes," (*Rosenbach*, 2019 IL 123186 at ¶ 37), Walgreens's proposal to artificially limit standing to rights involving historical common-law analogs would put key state-law consumer and worker protections at risk.

Privacy harms. Illinois is one 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 rights of action. *See* BIPA, 740 ILCS 14/20 (2008); Right to Privacy in the Workplace Act, 820 ILCS 55/15(c) (2010) (the "Privacy Act"). Both Acts provide damages for statutory violations 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,[5] they protect individuals from harms arguably not recognized at common law. To give one example, as described above, *Rosenbach* recognized that the Illinois General

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

Assembly in BIPA codified a new right to privacy involving one's biometric information, a type of personal information that was not recognized 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(e)–(f). The General Assembly, then, was seeking to *modernize* privacy law, rather than tie new protections to common-law harms. The Privacy Act, too, combats harms that arguably have few common-law analogs. The law prohibits employers from requesting personal online account information, including social media information, from an employee and from requiring employees to invite their employers to online accounts. 820 ILCS 55/10. Again, these novel rights—involving, for example, modern social networking sites—plainly transcend traditional, common-law torts.

A standing inquiry that depends on common-law analogs would 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 and the courts 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, if not doubtful, whether public-disclosure and sunshine laws survive any common-law-based standing inquiry adopted by the federal courts. 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, NYU L. Rev. 269, 271 (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 and Louis J. Manetti, Jr., *Illinois Legislature Introduces Bill to Adopt TILA-Style Commercial Lending Disclosures*, Troutman Pepper Locke (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) (quotations 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 government documents. Indeed, federal courts have already begun narrowing disclosure statutes by concluding that plaintiffs lack standing

where they cannot establish injury beyond 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); *Pub. Int. Legal Found. v. Sec'y Commonwealth of Pennsylvania*, 136 F.4th 456, 462 (3d Cir. 2025); *Pub. Int. Legal Found. v. Benson*, 136 F.4th 613, 629 (6th Cir. 2025). This Court should decline to follow suit.

Consumer protection. Together with federal law, 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 injuries 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 Gilles, *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 conduct 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*, 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).

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 when applying the common-law approach to FACTA, the statute at issue here. *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).

Walgreens and its amici argue that allowing Ms. Fausett's suit to proceed would make Illinois an outlier with respect to standing law. Walgreens Br. at 34; Cinemark Br. at 12. As an initial matter, this Court's "state constitutional jurisprudence cannot be predicated on the actions of [its] sister states." *People v. Fitzpatrick*, 2013 IL 113449, ¶ 23. In any event, Cinemark's state-by-state tables are not persuasive. Taken as true, Table 3 shows that nearly a dozen states expressly allow standing absent injury-in-fact. Cinemark Br. at A-005–006. And Table 2 conflates states that have standing doctrines that occasionally look to federal law with states that have adopted the *TransUnion* approach of looking to common law analogs for statutory injuries. *See* A-0003–004. Indeed, as of early 2025, only about half of state supreme courts have even cited *Spokeo* or *TransUnion*, and "most of those decisions reject or distinguish the U.S. Supreme Court rulings, cite favorably to the dissents in those cases, or cite them for principles other than the requirement of a concrete injury." National Consumer Law Center, *Consumer Class Actions* (10th ed. 2020), Appendix D.3.1, updated at www.nclc.org/library. Absent an affirmance, Illinois risks becoming an outlier in precisely the other direction: The National Consumer Law Center has observed that the only other states where a "majority opinion of the state supreme court" has cited *TransUnion* favorably are Texas and West Virginia. Two justices dissented from the West Virginia ruling, and the following year, the West Virginia Supreme Court concluded that a legislature's grant of standing is sufficient to sue. *See id.*; *see also State ex rel. Dodrill Heating & Cooling, L.L.C. v. Akers*, 874 S.E.2d 265 (W. Va. Apr. 22, 2022).

In short, rejection of the *TransUnion* approach to standing would not put Illinois outside of the mainstream. By preserving Illinois's broader approach to standing and

rejecting the "common-law" analysis sanctioned by *TransUnion*, this Court avoids arbitrarily rendering existing statutes unenforceable and permits the Illinois General Assembly to continue to fulfill its role of enacting enforceable legislation protecting against harms and potential harms, regardless whether they are also 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 in Illinois courts 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 not only prevent enforcement of federal statutes like the one here, but also improperly impede the General Assembly's constitutional authority to freely legislate, thus undermining the separation of powers enshrined in the Illinois Constitution. Ill. Const. 1970, art. II, § 1 ("The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."). 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) (quotations and citations omitted).

The Illinois Constitution envisions the legislature and judiciary serving 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 explained, it is the "province of the legislature to enact laws, and it is the province of the courts to construe them." *People v. Mayfield*, 2023 IL 128092, ¶ 27, *reh'g denied* (May 22, 2023). Courts lack "legislative powers and may not enact or amend statutes," nor can they "restrict or enlarge the meaning of an unambiguous statute"; the "responsibility" for the

"justice or wisdom of legislation rests upon the legislature." *Id.*; *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.") (quotations 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).

Any standing rules that allow 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 erode the boundaries promised by separation-of-powers principles.[6] Instead of allowing the General Assembly to make use of its "superior position in determining public policy," *id.* at 64, 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").

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 protect against harms that may seem uncertain, under the justification that the risk of those

[6] It would also violate this Court's admonition that courts may not construe statutes to contain "exceptions, limitations, or conditions the legislature did not express, nor may [they] add provisions not found in the law." *Rosenbach*, 2019 IL 123186, ¶ 24 (brackets added).

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; *see also* Elizabeth Earle Beske, *Charting a Course Past* Spokeo *and* TransUnion, 29 Geo. Mason L. Rev. 729, 773 (2022) (discussing FACTA, and observing that "[s]ometimes, a harm has such dire consequences that a legislature might opt to ensure it never happens"). 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 (quotations and citations omitted).

BIPA and prophylactic laws like it will be imperiled if this Court accepts Walgreens's invitation to narrow Illinois's standing doctrine. Rather than preserving the General Assembly's broad discretion to "determine public policy, to prescribe solutions to problems, and to alter the common law," the Court would be 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.

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.

Contrary to Walgreens's and its amici's argument, Article II of the U.S. Constitution is irrelevant to this case. 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 "alternative holding," Walgreens Br. at 29–30, 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*. The Court explained, 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, amici Retail Litigation Center argues 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 14. 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 (emphasis in original).

Walgreens and the Retail Litigation Center misread *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 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." (quotations 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 brief reference to 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* Walgreens Br. at 29; Retail Litigation Center Br. at 7. 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 case at its word. *See Brown v. Davenport*, 596 U.S. 118, 141 (2022).

In other words, *TransUnion*'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 the Court stated it had "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 requires 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*, 29 F.4th at 1283–97 (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'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 (Newsom, J., concurring). Moreover, any Article II theory would have to wrestle with the fact that private plaintiffs—through *qui tam* actions, "suits brought by individuals standing in the government's shoes"—have often assumed the mantle of public enforcement. *Id.* at 1124–25 (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, Boston 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 drastic change in standing doctrine. That it did not in *TransUnion* is 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 language spoke to the separation of powers between the federal executive and the *federal* judiciary, so it has 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 11–12. But that approach supports a finding of standing in this case.

In *Sierra v. City of Hallandale Beach, Fla.*, 996 F.3d 1110 (11th Cir. 2021)—a precursor to *Laufer*, 29 F.4th 1268—Judge Newsom explained in a concurring opinion 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. Under his view, 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:

"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 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 visit the hotel and "expressly disclaimed any interest in benefiting from the provision that she seeks to enforce." *Id.* at 1290 (Newsom, J., concurring). 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—as a self-professed "advocate of the rights" of others—had filed hundreds of ADA lawsuits against hotels, "presumably to aid others who might actually want to visit them." *Id.* at 1290, 1297.

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; *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 12 (2023) (Thomas, J., concurring in the judgment) (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 14, Ms. Fausett alleges Walgreens subjected *her* to a congressionally determined risk of harm by disclosing *her* card information on its receipts in violation of *her* rights. FACTA allows Ms. Fausett to bring a lawsuit only against businesses where she conducted a card transaction and was provided a receipt that fails to comply with statutory requirements. 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." *Laufer*, 29 F.4th at 1296.

The U.S. 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 here.

CONCLUSION

For the foregoing reasons, amicus curiae Public Justice again 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 345 and 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, and the certificate of service, is 7,822 words.

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