No. 20-3202

In the United States Court of Appeals for the Seventh Circuit

LATRINA COTHRON,

Plaintiff-Appellee,

v.

WHITE CASTLE SYSTEM, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:19-cv-00382.
The Honorable **John J. Tharp Jr.**, Judge Presiding.

BRIEF FOR RETAIL LITIGATION CENTER, INC. and RESTAURANT LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

DEBORAH R. WHITE
KATHLEEN F. MCGUIGAN
RETAIL LITIGATION CENTER, INC.
99 M Street SE, Suite 700
Washington, DC 20003
(202) 869-0200

Counsel for Retail Litigation Center, Inc.

ANGELO I. AMADOR
RESTAURANT LAW CENTER
2055 L Street NW, Suite 700
Washington, DC 20036
(202) 492-5037

Counsel for Restaurant Law Center

MEREDITH C. SLAWE
MICHAEL W. MCTIGUE JR.
STEPHEN A. MILLER
MARIE BUSSEY-GARZA
COZEN O'CONNOR
One Liberty Place
1650 Market Street, Suite 2800
Philadelphia, PA 19103
(215) 665-2000

MICHAEL DE LEEUW
TAMAR S. WISE
COZEN O'CONNOR
175 Greenwich Street, 55th Floor
New York, NY 10007
(212) 509-9400

ANNA WERMUTH
COZEN O'CONNOR
123 North Wacker Drive, Suite 1800
Chicago, IL 60606
(312) 382-3100

Counsel for Amici Curiae

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-03202

Short Caption: Latrina Cothron v. White Castle System, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Retail Litigation Center, Inc.; Restaurant Law Center

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Cozen O'Connor

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Meredith C. Slawe Date: April 5, 2021

Attorney's Printed Name: Meredith C. Slawe

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: One Liberty Place, 1650 Market St., Suite 2800

Philadelphia, PA 19103

Phone Number: (215) 665-2000 Fax Number: (215) 665-2013

E-Mail Address: mslawe@cozen.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-03202

Short Caption: Latrina Cothron v. White Castle System, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Restaurant Law Center

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Cozen O'Connor

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Angelo I. Amador Date: April 5, 2021

Attorney's Printed Name: Angelo I. Amador

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 2055 L Street NW, Suite 700

Washington, DC 20036

Phone Number: (202) 492-5037 Fax Number:

E-Mail Address: aamador@restaurant.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-03202

Short Caption: Latrina Cothron v. White Castle System, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Retail Litigation Center, Inc.; Restaurant Law Center

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Cozen O'Connor

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Anneliese Wermuth Date: April 5, 2021

Attorney's Printed Name: Anneliese Wermuth

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 123 N. Wacker Dr., Suite 1800

Chicago, IL 60606

Phone Number: (312) 382-3100 Fax Number: (312) 382-8910

E-Mail Address: awermuth@cozen.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-03202

Short Caption: Latrina Cothron v. White Castle System, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Retail Litigation Center, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Cozen O'Connor

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Deborah R. White Date: April 5, 2021

Attorney's Printed Name: Deborah R. White

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 99 M Street SE, Suite 700

Washington, DC 20003

Phone Number: (202) 869-0200 Fax Number:

E-Mail Address: Deborah.White@RILA.ORG

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-03202

Short Caption: Latrina Cothron v. White Castle System, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Retail Litigation Center, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Cozen O'Connor

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: Kathleen McGuigan Date: April 5, 2021

Attorney's Printed Name: Kathleen F. McGuigan

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 99 M Street SE, Suite 700

Washington, DC 20003

Phone Number: (202) 869-0200 Fax Number:

E-Mail Address: Kathleen.McGuigan@rila.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-03202

Short Caption: Latrina Cothron v. White Castle System, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Retail Litigation Center, Inc.; Restaurant Law Center

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Cozen O'Connor

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Marie Bussey-Garza Date: April 5, 2021

Attorney's Printed Name: Marie Bussey-Garza

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: One Liberty Place, 1650 Market St., Suite 2800

Philadelphia, PA 19103

Phone Number: (215) 665-2000 Fax Number: (215) 665-2013

E-Mail Address: mbussey-garza@cozen.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-03202

Short Caption: Latrina Cothron v. White Castle System, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Retail Litigation Center, Inc.; Restaurant Law Center

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Cozen O'Connor

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Michael de Leeuw Date: April 5, 2021

Attorney's Printed Name: Michael de Leeuw

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 3WTC, 175 Greenwich Street, 55th Floor

New York, NY 10007

Phone Number: (212) 509-9400 Fax Number: (212) 509-9492

E-Mail Address: MdeLeeuw@cozen.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-03202

Short Caption: Latrina Cothron v. White Castle System, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Retail Litigation Center, Inc.; Restaurant Law Center

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Cozen O'Connor

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Michael W. McTigue Jr. Date: April 5, 2021

Attorney's Printed Name: Michael W. McTigue Jr.

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: One Liberty Place, 1650 Market St., Suite 2800

Philadelphia, PA 19103

Phone Number: (215) 665-2000 Fax Number: (215) 665-2013

E-Mail Address: mmctigue@cozen.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-03202

Short Caption: Latrina Cothron v. White Castle System, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Retail Litigation Center, Inc.; Restaurant Law Center

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Cozen O'Connor

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Tamar S. Wise Date: April 5, 2021

Attorney's Printed Name: Tamar S. Wise

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 3WTC, 175 Greenwich Street, 55th Floor

New York, NY 10007

Phone Number: (212) 509-9400 Fax Number: (212) 509-9492

E-Mail Address: TWise@cozen.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-03202

Short Caption: Latrina Cothron v. White Castle System, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Retail Litigation Center, Inc.; Restaurant Law Center

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Cozen O'Connor

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Stephen A. Miller Date: April 5, 2021

Attorney's Printed Name: Stephen A. Miller

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: One Liberty Place, 1650 Market St., Suite 2800

Philadelphia, PA 19103

Phone Number: (215) 665-2000 Fax Number: (215) 665-2013

E-Mail Address: samiller@cozen.com

TABLE OF CONTENTS

CIRCUIT RULE 26.1 DISCLOSURE STATEMENTS i

TABLE OF AUTHORITIES xii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 7

I. The District Court's Interpretation of BIPA Undermines the Statute's Purpose, Would Lead to "Absurd" Results, and Raises Due Process Concerns 7

A. Courts Should Interpret Statutes Consistent with Their Purpose 7

1. The Intent of BIPA Is to Promote, Not Hinder, the Use of Biometric Technology 7

2. BIPA Should Be Construed to Give Effect to Its Purpose, as Consistent with Sound Public Policy 11

B. BIPA Should Be Interpreted in a Manner That Avoids "Absurd" Results 15

C. BIPA Should Be Interpreted to Avoid Due Process Concerns 17

II. Appellant's Proposed Interpretation of BIPA Reflects the Plain Language and Purpose of the Statute and Avoids Statutory Construction and Other Problems 21

CONCLUSION 24

TABLE OF AUTHORITIES

Beeler v. Saul,
977 F.3d 577 (7th Cir. 2020) 11

Blair v. Nev. Landing P'ship,
859 N.E.2d 1188 (Ill. Ct. App. 2006) 16, 17, 22, 23

Blodgett v. Holden,
275 U.S. 142 (1927) 18

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 19, 21

Bryant v. Compass Grp. USA, Inc.,
958 F.3d 617 (7th Cir. 2020) 19

Burlinski v. Top Golf USA Inc.,
No. 19-6700, 2020 U.S. Dist. LEXIS 161371 (N.D. Ill. Sept. 3, 2020) 12

Citizens Bank of Md. v. Strumpf,
516 U.S. 16 (1995) 11, 15

Clark v. Suarez Martinez,
543 U.S. 371 (2005) 18

Epic Sys. Corp. v. Tata Consultancy Servs. Ltd.,
980 F.3d 1117 (7th Cir. 2020) 18, 20, 21

Feltmeier v. Feltmeier,
207 Ill. 2d 263 (2003) 22

FutureSource LLC v. Reuters Ltd.,
312 F.3d 281 (7th Cir. 2002) 15

Gelbard v. United States,
408 U.S. 41 (1972) 5

Goode v. City of Phila.,
539 F.3d 311 (3d Cir. 2008) 5

Gubala v. Time Warner Cable, Inc.,
846 F.3d 909 (7th Cir. 2017) 5

In re Thorpe,
881 F.3d 536 (7th Cir. 2018) 11

Jones v. United States,
529 U.S. 848 (2000) 18

Kirtsaeng v. John Wiley & Sons, Inc.,
568 U.S. 519 (2013) 1

Lewis v. Governor of Ala.,
944 F.3d 1287 (11th Cir. 2019) 2

Markadonatos v. Vill. of Woodridge,
760 F.3d 545 (7th Cir. 2014) 18

Meegan v. NFI Indus., Inc.,
No. 20-0465, 2020 U.S. Dist. LEXIS 99131 (N.D. Ill. June 4, 2020) 12

Nixon v. Mo. Mun. League,
541 U.S. 125 (2004) 15

Robertson v. Hostmark Hospitality Grp., Inc.,
No. 2018-CH-05194 (Ill. Cir. Ct., Cook Cty. May 29, 2020) 16, 22

Rogers v. CSX Intermodal Terminals, Inc.,
409 F. Supp. 3d 612 (N.D. Ill. 2019) 20

Rosenbach v. Six Flags Ent. Corp.,
129 N.E.3d 1197 (Ill. 2019) ..... *passim*

Saccameno v. U.S. Bank Nat'l Ass'n,
943 F.3d 1071 (7th Cir. 2019) 18

Senne v. Vill. of Palatine, Ill.,
784 F.3d 444 (7th Cir. 2015) 15, 17

Smith v. Top Die Casting Co.,
2019-L-248 (Ill. Cir. Ct., Winnebago Cty. Mar. 12, 2020) 17

South Dakota v. Wayfair, Inc.,
138 S. Ct. 2080 (2018) 1

Spade v. Select Comfort Corp.,
181 A.3d 969 (N.J. 2018) 5

State Farm Mutual Automobile Insurance Company v. Campbell,
538 U.S. 408 (2003) 18-19

Stone v. Instrumentation Lab'y Co.,
591 F.3d 239 (4th Cir. 2009) 15

Treadway v. Gateway Chevrolet Oldsmobile Inc.,
362 F.3d 971 (7th Cir. 2004) 15

United States v. Orona-Ibarra,
831 F.3d 867 (7th Cir. 2016) 18

United States v. Solis-Campozano,
312 F.3d 164 (5th Cir. 2002) 15

Warth v. Seldin,
422 U.S. 490 (1975) 5

Watson v. Legacy Healthcare Fin. Servs., LLC,
No. 2019-CH-03425 (Ill. Cir. Ct., Cook Cty. June 10, 2020) 17, 22

Zbaraz v. Madigan,
572 F.3d 370 (7th Cir. 2009) 11, 15

Statutes, Rules & Other Authority

740 ILCS 14/5(a) 4

740 ILCS 14/5(g) 4

740 ILCS 14/15(b) 6, 7

740 ILCS 14/15(b)(1)–(3) 21

740 ILCS 14/15(d) 6

740 ILCS 14/15(d)(1) 7, 21

740 ILCS 14/20 ..... 4, 12

740 ILCS 14/20(1)–(4) 5

765 ILCS 1075/30 22

Fed. R. App. P. 29(a)(4)(E) 1

Alexander H. Southwell, Ryan T. Bergsieker, Howard S. Hogan, *et al.*, *U.S. Cybersecurity and Data Privacy Outlook and Review – 2021* § II.E, Gibson Dunn (Jan. 28, 2021) 10, 13, 14

Frank Nolan, *Implications of US laws on collection, storage, and use of biometric information*, Eversheds Sutherland (US) LLP (July 2020) 4

Gerald L. Maatman, Jr., Thomas E. Ahlering & Alex W. Karasik, *Biometric Privacy Class Actions By The Numbers: Analyzing Illinois' Hottest Class Action Trend*, Seyfarth Shaw LLP (June 28, 2019) 4, 13

Grace Barbic, *Lawmakers revisit data collection privacy laws*, The Courier (Mar. 10, 2021) 13, 14

Gregory Adams, Justin Kay, & Jane Dall Wilson, *Exam-Proctoring Software Targeted in New Wave of BIPA Class Action Litigation*, Faegre Drinker Biddle & Reath LLP (Mar. 23, 2021) 10, 14

Lauren Capitini, Shelby Dolen, Erik Dullea, *et al.*, *The Year To Come In U.S. Privacy & Cybersecurity Law (2021)*, JDSupra (Jan. 28, 2021) 14

Michael J. Bologna, *Law on Hiring Robots Could Trigger Litigation for Employers*, Bloomberg Law (Oct. 11, 2019) 13

Ryan Blaney, Julia D. Alonzo, & Brook G. Gottlieb, *Litigation Breeding Ground: Illinois' Biometric Information Privacy Act*, National Law Review (Mar. 18, 2021) 10, 14

BRIEF FOR RETAIL LITIGATION CENTER, INC. AND RESTAURANT LAW CENTER AS *AMICI CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

The Retail Litigation Center, Inc. and the Restaurant Law Center respectfully submit this brief as *amici curiae* in support of Appellant.[1]

INTEREST OF *AMICI CURIAE*

The Retail Litigation Center, Inc. ("RLC") is the only trade organization solely dedicated to representing the retail industry in the courts. The RLC's members include many of the country's largest and most innovative retailers. Collectively, they employ millions of workers in Illinois and throughout the U.S., provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases. Since its founding in 2010, the RLC has participated as an *amicus* in more than 150 judicial proceedings of importance to retailers. Its *amicus* briefs have been favorably cited by multiple courts, including the Supreme Court. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013).

The Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the

[1] No counsel for a party authored this brief in whole or in part, and none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

world. This labor-intensive industry is comprised of over one million restaurants and other foodservice outlets employing 15 million people—approximately 10 percent of the U.S. workforce—including nearly 600,000 people in Illinois. Restaurants and other foodservice providers are the largest private-sector employers in Illinois, and the second largest in the United States. Through *amicus* participation, the Restaurant Law Center provides courts with perspectives on legal issues that have the potential to significantly impact its members and their industry. The Restaurant Law Center's *amicus* briefs have been cited favorably by state and federal courts. *See, e.g.*, *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1303 n.15 (11th Cir. 2019) (en banc).

Amici and their members have a significant interest in the outcome of this case. Some of *amici*'s members have used employee biometric timekeeping and security systems to, among other things, maintain complete records, ensure accurate wage payments to employees, prevent time theft and unlawful "buddy punching," monitor remote workers, reduce operating costs, increase productivity, and secure confidential company and employee information. Employees likewise benefit from the increased efficiencies, accurate recordkeeping, improved pay systems, and enhanced security that flow from the use of these systems. But even as employers and employees alike benefit from the use of this highly secure and effective technology, retailers and restaurants are increasingly finding themselves prime targets for abusive lawsuits alleging technical violations of the Illinois Biometric Information Privacy Act ("BIPA").

This case will directly affect the number, scope, and potential consequences of BIPA lawsuits filed against *amici*'s members. BIPA is a remedial statute designed to foster the development and use of innovative biometric technologies while deterring businesses from improperly handling biometric data and ensuring prompt correction when violations do occur. Its liquidated damages and injunctive relief provisions are intended to serve that corrective function. But the district court's holding that each biometric scan constitutes a discrete violation of BIPA, subject to its own liquidated damages award, would push the statute far beyond its purpose of discouraging bad actors and compelling compliance. Indeed, the district court's approach would encourage additional class action lawsuits, often untethered from any actual harm, and lead to devastating penalties for employers.[2] For all these reasons, *amici* and their members have a strong interest in this Court's decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

In enacting BIPA, the Illinois General Assembly recognized the "promise" of biometric technology to, among other things, streamline financial transactions and

[2] The district court "fully acknowledge[d] the large damage awards that may result from this reading of the statute." Mem. Op. & Order at 13, No. 1:19-cv-00382 (Aug. 7, 2020), Dkt. No. 125 ("Op."). The court, nevertheless, seemed to suggest that it was constrained to such a reading based on what was before the court. *Id.* The court acknowledged that its "ruling [was] unlikely to be the last word on this subject," and suggested that Appellant would "have ample opportunity" on appeal "to explain why it is absurd to suppose that the legislature sought to impose harsh sanctions on Illinois businesses." *Id.* at 14. Despite the district court's assertion, Appellant has offered a plain-text reading that a BIPA violation occurs only upon the first finger scan obtained or disclosure made without the required statutory consent. Unlike the statutory interpretation suggested by the court and Appellee, this reading does not lead to absurd results, undermine the statute's purpose, or raise due process concerns and should be adopted.

security screenings. 740 ILCS 14/5(a). Today, businesses, including some restaurants and retailers, are realizing that promise by using these innovative technologies to benefit employees, customers, and businesses alike. Biometric technology used by responsible employers allows for identification of an individual based on unique personal characteristics, such as a fingerprint. The technology is faster, more reliable, and more secure than conventional identification and security measures.[3] Recognizing the numerous benefits of this user-friendly technology, some restaurants and retailers, with full transparency for their employees, have implemented it for purposes such as facilitating operations; protecting employee information, rights, and compensation; and safeguarding data.[4]

The Illinois legislature crafted the provisions of BIPA to support the development of new technology, while building in safeguards for the collection, use, storage, and destruction of sensitive biometric information and identifiers. *See* 740 ILCS 14/5(g). To that end, lawmakers enacted BIPA as a remedial statute with a private right of action designed to encourage responsible use and handling of biometric data. *See* 740 ILCS 14/20; *Rosenbach v. Six Flags Ent. Corp.*, 129 N.E.3d

---

[3] *See* Frank Nolan, *Implications of US laws on collection, storage, and use of biometric information*, Eversheds Sutherland (US) LLP (July 2020), https://www.privacysecurityacademy.com/wp-content/uploads/2020/09/Biometrics-whitepaper.pdf (last visited Apr. 2, 2021).

[4] *See* Gerald L. Maatman, Jr., Thomas E. Ahlering & Alex W. Karasik, *Biometric Privacy Class Actions By The Numbers: Analyzing Illinois' Hottest Class Action Trend*, Seyfarth Shaw LLP (June 28, 2019) https://www.workplaceclassaction.com/2019/06/biometric-privacy-class-actions-by-the-numbers-analyzing-illinois-hottest-class-action-rend/ (last visited Apr. 2, 2021) ("As biometric technology has become more practical and affordable, businesses have gradually begun to utilize these innovative tools for various beneficial purposes, such as implementing biometric time clocks to prevent 'buddy punching,' facilitate consumer transactions, and for restricting access to secure areas.").

1197, 1207 (Ill. 2019) (describing the statute's intent to prevent and deter violations). BIPA's private right of action allows an individual "aggrieved" by a violation of the statute to bring a claim for injunctive relief, the greater of actual damages or liquidated damages of $1,000 for a negligent violation or $5,000 for a reckless or intentional violation, plus attorneys' fees and costs. *See* 740 ILCS 14/20(1)–(4). Notwithstanding the inclusion of the term "aggrieved" in the statute, the Illinois Supreme Court held that a BIPA plaintiff need not prove *any* actual damage to have standing to bring suit under the statute. *See Rosenbach*, 129 N.E.3d at 1207 ("[A]n individual need not allege some actual injury or adverse effect, beyond violation of his or her rights under the Act, in order to qualify as an 'aggrieved' person and be entitled to seek liquidated damages and injunctive relief pursuant to the Act.").[5] When it enabled individuals to assert a claim and seek injunctive relief, even without any harm, the Illinois Supreme Court merely sought to keep the doors of the courts

[5] The Illinois Supreme Court's decision in *Rosenbach* is contrary to rulings from courts across the country—including this Court—that have consistently interpreted the statutory term "aggrieved" to require a showing of concrete harm. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 513 (1975) (holding that a "person aggrieved" under Civil Rights Act must "have been injured by a discriminatory . . . practice"); *Gelbard v. United States*, 408 U.S. 41, 59 n.18 (1972) ("An 'aggrieved person[]' . . . is a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." (internal quotation marks and citation omitted)); *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 910–11 (7th Cir. 2017) (holding plaintiff was not "aggrieved" under the Cable Communications Policy Act because there was no evidence of "financial or other injury"); *Goode v. City of Phila.*, 539 F.3d 311, 321 n.6 (3d Cir. 2008) (explaining that an "aggrieved person" under the state tax code must be "detrimentally harmed" (internal quotation marks and citation omitted)); *Spade v. Select Comfort Corp.*, 181 A.3d 969, 981 (N.J. 2018) ("In the absence of evidence that the consumer suffered adverse consequences as a result of the defendant's regulatory violation, a consumer is not an 'aggrieved consumer' for purposes of the [Truth-in-Consumer Contract, Warranty and Notice Act].").

open to litigation that would ensure compliance—not impede the development of innovative technologies or unfairly target and crush well-intentioned businesses.

The district court's reading, however, goes too far. Tasked with determining when a BIPA claim accrues for purposes of resolving the statute of limitations issue in this case, the district court held that *each* separate finger scan constitutes a separate violation of Section 15(b), and that each attendant disclosure constitutes a violation of Section 15(d). The court adopted this interpretation despite recognizing that it may lead to "absurd" results. Should it stand, the district court's interpretation would penalize employers for each and every finger scan—even when no employee has suffered *any* actual damage. Because employees might scan in and out multiple times per day, the potential penalties that will accrue over a typical workweek are massive and will be an irresistible lure for opportunistic litigants. Faced with litigation risks of this magnitude for purely technical violations of BIPA, legitimate businesses might forgo new and beneficial technology in their Illinois operations. Such actions would deprive employees, customers, and businesses in the state of the enhanced convenience, efficiency, and security these tools offer.

The district court's reading of BIPA is thus untenable—it conflicts with the language and purpose of the statute, defies fundamental canons of statutory interpretation, harms employers and employees alike, leads to extreme and absurd results, and raises significant due process concerns by creating penalties far beyond any identified harm. Respectfully, this Court should reverse the lower court's decision.

ARGUMENT

I. The District Court's Interpretation of BIPA Undermines the Statute's Purpose, Would Lead to "Absurd" Results, and Raises Due Process Concerns.

A. Courts Should Interpret Statutes Consistent with Their Purpose.

BIPA is a remedial statute that balances the need for innovation with the adoption of safeguards. Under BIPA, "[n]o private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first" provides certain disclosures and "receives a written release executed by the subject of the biometric identifier." 740 ILCS 14/15(b). Additionally, "[n]o private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless . . . the subject of the biometric identifier or biometric information . . . consents to the disclosure or redisclosure." 740 ILCS 14/15(d)(1). According to the district court, an employer may be liable for separate violations of these provisions—and separate liquidated damages—for each individual biometric scan and attendant disclosure. Op. at 11–12. The district court's interpretation, however, contradicts the statute's language and purpose.

1. The Intent of BIPA Is to Promote, Not Hinder, the Use of Biometric Technology.

From finger scans to unlock computers and facial scans to access secure buildings, the use of biometric technology is becoming prevalent in everyday life,

including business operations. Consider, for example, the workday of a hypothetical employee named Dorothy, a server at a popular fast-casual restaurant. She begins her shift by scanning her finger to clock in using a secure biometric time clock. As customers begin to arrive, the host seats a young couple in her section. She greets them, takes their drink orders, and then returns to the computer terminal and scans her finger to input the orders. When she delivers their drinks, they are ready to order appetizers. She, again, scans her finger to input that order. Throughout her shift, she repeats this process many times. Each time she puts a drink, appetizer, entrée, or dessert order into the system, Dorothy scans her finger to log in. And, any time she wants to check on an order's status, print a receipt, or close out an order, she scans her finger again.

As a career server, Dorothy has previously worked with passcode and card-swipe enabled systems and greatly prefers the speed and efficiency of using the biometric-based system. In fact, when Dorothy's employer gave her a choice of using a passcode or biometric clock, she elected to use the finger-scan process after reviewing and signing the disclosure forms her employer gave her. Finger scanning enables her to spend less time at the computer terminal and provide better customer service, which she has seen translate into bigger tips. When there is a lull in her day, Dorothy scans her finger again to clock out for a short break and then scans again to clock back in. By the end of her shift, she has scanned her finger a total of 95 times, including one final scan to clock out at the end of the day.

In a typical week, Dorothy works five shifts. By the end of the week, she may have scanned her finger nearly 500 times. In a month, she might scan her finger nearly 2,000 times. Under the district court's reading of the statute, that means Dorothy's employer could potentially be liable for $2 million in liquidated damages for a single employee for an alleged BIPA violation over the course of just one month. Such an allegation could arise if, for example, Dorothy claimed that the language in the disclosure she signed did not meet the technical requirements of BIPA, or that additional disclosures and consents were required prior to each scan. Multiply that by the number of employees at the average fast-casual restaurant, and the number of restaurant locations within the state, and the end result is patently inconsistent with the statute's purpose.

Beyond the restaurant industry, other industries use biometric technology and would be similarly adversely impacted by the district court's interpretation of BIPA. For example, many companies, including retailers, hospitals, banks, laboratories, and hazardous material storage facilities, use biometric technology as a key component in their facility security protocols, as well as to protect sensitive health, employee, financial, and business information. Other examples include daycare centers that take finger scans of parents, guardians, or caretakers tasked with picking up children each evening; colleges and universities that use remote proctoring software to ensure secure student testing environments; and businesses that deploy contactless temperature scans during the COVID-19 pandemic that implicate facial recognition

technology.[6] Each of these situations has prompted putative class actions under BIPA.[7]

Acutely aware of the sensitive nature of the biometric information that is the cornerstone of the technologies described above, *amici*'s members dedicate significant time, energy, and resources to compliance and the careful collection, use, storage, and destruction of any biometric information. Despite these best efforts, because of conflicting interpretations of BIPA's requirements or an innocent transgression, a company could be deemed to have committed a technical violation. Companies are immediately at risk of punitive class action litigation and the accompanying aggregate damages exposure. The district court's expansive interpretation of BIPA exacerbates that risk and makes it exponential.

As a result, companies concerned about potential litigation exposure for innocent mistakes could decide not to use these tools, or national and large regional companies like *amici*'s members could choose to carve out their Illinois operations from a technology system roll out. Both scenarios would hurt employees and companies. Employees would be forced to use less efficient or secure technology,

---

[6] *See* Alexander H. Southwell, Ryan T. Bergsieker, Howard S. Hogan, *et al.*, *U.S. Cybersecurity and Data Privacy Outlook and Review – 2021* § II.E, Gibson Dunn (Jan. 28, 2021), https://www.gibsondunn.com/us-cybersecurity-and-data-privacy-outlook-and-review-2021/#_Toc62718910 (last visited Apr. 2, 2021); Ryan Blaney, Julia D. Alonzo, & Brook G. Gottlieb, *Litigation Breeding Ground: Illinois' Biometric Information Privacy Act*, National Law Review (Mar. 18, 2021), https://www.natlawreview.com/article/litigation-breeding-ground-illinois-biometric-information-privacy-act (last visited Apr. 2, 2021); Gregory Adams, Justin Kay, & Jane Dall Wilson, *Exam-Proctoring Software Targeted in New Wave of BIPA Class Action Litigation*, Faegre Drinker Biddle & Reath LLP (Mar. 23, 2021), https://www.jdsupra.com/legalnews/exam-proctoring-software-targeted-in-4630299 (last visited Apr. 2, 2021).

[7] *See id.*

resulting in longer task time and reduced productivity. Employees in the same position or department but located in different states (e.g., Illinois and Indiana) would have to use different systems—one using biometric technology and the other not—creating operational inefficiencies. Additionally, companies would have the additional administrative burdens and costs of two separate systems, two different processes, procedures, training, compliance tracking, and reporting.

The Illinois legislature did not intend for BIPA to obstruct or hinder the development and implementation of new technology for use within the state. Nor was BIPA intended to impose catastrophic damages on companies acting in good faith. *See Rosenbach*, 129 N.E.3d at 1207. If left unremedied, the district court's decision would do just that.

2. BIPA Should Be Construed to Give Effect to Its Purpose, as Consistent with Sound Public Policy.

A statute must be construed in a manner consistent with its purpose. The Supreme Court has cautioned: "It is an elementary rule of [statutory] construction that 'the act cannot be held to destroy itself.'" *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16, 20 (1995) (citation omitted). This Court has consistently heeded that guidance. *See, e.g.*, *In re Thorpe*, 881 F.3d 536, 541 (7th Cir. 2018); *Zbaraz v. Madigan*, 572 F.3d 370, 386 (7th Cir. 2009) ("[T]he district court's interpretation of the statute ignores its purpose."); *Beeler v. Saul*, 977 F.3d 577, 589 (7th Cir. 2020) (textual interpretation of statute should give effect to its purpose).

The Illinois Supreme Court has made clear that the purpose of BIPA is "prevent[ion] and deterren[ce]." *Rosenbach*, 129 N.E.3d at 1207. The Illinois General

Assembly recognized the benefits of biometric technology but sought to balance "the risks posed by the growing use of biometrics by businesses and the difficulty in providing meaningful recourse once a person's biometric identifiers or biometric information has been compromised." *Id.* at 1206. To this end, BIPA's aim "is to try to head off such problems *before they occur*." *Id.* (emphasis added). It is a remedial statute intended to encourage compliance—not a penal statute. *See, e.g.*, *Burlinski v. Top Golf USA Inc.*, No. 19-6700, 2020 U.S. Dist. LEXIS 161371, at *21 (N.D. Ill. Sept. 3, 2020) (discussing BIPA's "remedial scheme" (citing *Meegan v. NFI Indus., Inc.*, No. 20-0465, 2020 U.S. Dist. LEXIS 99131, at *10 (N.D. Ill. June 4, 2020) ("BIPA's provision for actual damages and the regulatory intent of its enactment show that it is a remedial statute."))). Indeed, the plain language of the private cause of action, *including the availability of injunctive relief*, confirms that the statute seeks to prevent and deter, not to punish good faith violations. *See* 740 ILCS 14/20.

The district court's interpretation of BIPA undermines this remedial objective by permitting uncapped cumulative statutory damages (further aggregated in the class action context) that threaten extraordinary, and potentially devastating, penalties on employers operating in good faith in Illinois. This goes far beyond "prevent[ion] and deterren[ce]" and is purely punitive. *See Rosenbach*, 129 N.E.3d at 1207. After all, a company forced to shutter its business cannot remediate its good faith errors, and the employees forced out of work in the process are certainly not served by this outcome. This punitive interpretation of BIPA cannot be squared with the statute's deterrent and remedial goals.

Moreover, the district court's construction of BIPA is contrary to the public interest and will prompt a further explosion of litigation and clogged court dockets. Retailers and restaurants, which provide employment for many workers in Illinois, were threatened with litigation seeking damages for technical violations of BIPA even before the district court's ruling. Illinois state and federal courts were besieged by BIPA actions that only increased after the January 2019 *Rosenbach* decision. Indeed, the plaintiffs' bar filed 173 BIPA class actions in *under five months*—that is 22 more cases than plaintiffs filed in the preceding *ten years*.[8] By October 2019, over 300 BIPA actions were pending in Illinois state court,[9] and as of February 2021, more than 1,000 BIPA actions had been filed in the preceding two years in Illinois alone.[10] The onslaught of opportunistic litigation in this space has continued unabated. Over the past year alone:

- Numerous actions have been filed in connection with critical health screenings, as well as remote work and learning instituted as a result of the COVID-19 pandemic;[11]

---

[8] Maatman, Jr., *supra*, https://www.workplaceclassaction.com/2019/06/biometric-privacy-class-actions-by-the-numbers-analyzing-illinois-hottest-class-action-trend.

[9] Michael J. Bologna, *Law on Hiring Robots Could Trigger Litigation for Employers*, Bloomberg Law (Oct. 11, 2019), https://news.bloomberglaw.com/daily-labor-report/law-on-hiring-robots-could-trigger-litigation-for-employers (last visited Apr. 2, 2021).

[10] Grace Barbic, *Lawmakers revisit data collection privacy laws*, The Courier (Mar. 10, 2021), https://www.lincolncourier.com/story/news/politics/2021/03/10/biometric-information-privacy-act-protect-small-businesses/6944810002/ (last visited Apr. 2, 2021).

[11] Southwell, *supra*, https://www.gibsondunn.com/us-cybersecurity-and-data-privacy-outlook-and-review-2021/#_Toc62718910 ("The COVID-19 pandemic also introduced new types of BIPA litigation associated with health screenings and remote work."); Blaney, *supra*, https://www.natlawreview.com/article/litigation-breeding-ground-illinois-biometric-information-privacy-act ("Due to the COVID-19 pandemic, many employers and schools have turned to remote work and learning, and some use facial recognition or other forms of biometric information as a contactless way to track employees' time or ensure secure access to information or buildings.").

- Employers, including many restaurants, retailers, and small businesses, remained the primary target, most often in connection with their transparent use of biometric-based timekeeping systems;[12]
- Nursing homes, hospitals, the Salvation Army, and universities have also been targeted;[13] and
- "The trend of sizeable settlements . . . has persisted throughout 2020."[14]

Even absent the district court's decision, BIPA's threat of unchecked damages forces many businesses to settle even meritless claims. Settlements are often in the tens of millions of dollars,[15] and Illinois' small businesses are often hit the hardest and forced into extortionate settlements when faced with the prospect of insolvency.[16]

But while *Rosenbach* immediately prompted a wave of BIPA litigation, allowing the district court's decision to stand will lead to a tsunami of lawsuits focused on employees' use of biometric timekeeping systems. The consequences for

---

[12] Indeed, "more than 90% of the BIPA cases on file are brought in the employment context (mostly involving the use of finger- and hand-scanning time clocks)." Lauren Capitini, Shelby Dolen, Erik Dullea, *et al.*, *The Year To Come In U.S. Privacy & Cybersecurity Law (2021)*, JDSupra (Jan. 28, 2021), https://www.jdsupra.com/legalnews/the-year-to-come-in-u-s-privacy-9238400/ (last visited Apr. 2, 2021).

[13] Barbic, *supra*, https://www.lincolncourier.com/story/news/politics/2021/03/10/biometric-information-privacy-act-protect-small-businesses/6944810002/ (identifying BIPA litigation targets); Adams, *supra*, https://www.jdsupra.com/legalnews/exam-proctoring-software-targeted-in-4630299 ("[T]here have been multiple BIPA class action lawsuits brought against universities and other similar entities. These lawsuits have been brought on behalf of students who, while in Illinois, have used online, remote exam-proctoring software that allegedly captures their facial geometry and other data.").

[14] Southwell, *supra*, https://www.gibsondunn.com/us-cybersecurity-and-data-privacy-outlook-and-review-2021/#_Toc62718910.

[15] Blaney, *supra*, https://www.natlawreview.com/article/litigation-breeding-ground-illinois-biometric-information-privacy-act.

[16] Barbic, *supra*, https://www.lincolncourier.com/story/news/politics/2021/03/10/biometric-information-privacy-act-protect-small-businesses/6944810002/ ("Clark Kaericher, Vice President of the Illinois Chamber of Commerce, said despite the fact that most of the headline-making cases are against big companies, it's mostly small companies in the state facing lawsuits. . . . 'It's enough to put any small business into insolvency.'" (quoting Kaericher)).

retailers, restaurants, and other compliance-oriented businesses operating in Illinois will not be remedial; they will be catastrophic.

B. BIPA Should Be Interpreted in a Manner That Avoids "Absurd" Results.

The district court acknowledged that its interpretation might lead to "absurd" results. Op. at 13–14 (explaining that, "absurd or not, . . . where statutory language is clear, it must be given effect"). But in doing so, the district court's order contravenes a fundamental canon of statutory interpretation that statutes should not be construed in a manner that leads to such results. *Nixon v. Mo. Mun. League*, 541 U.S. 125, 138 (2004) ("Court will not construe a statute in a manner that leads to absurd or futile results."); *Senne v. Vill. of Palatine, Ill.*, 784 F.3d 444, 447 (7th Cir. 2015); *Zbaraz*, 572 F.3d at 386 (quoting *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 976 (7th Cir. 2004)); *FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281, 284–85 (7th Cir. 2002); *Stone v. Instrumentation Lab'y Co.*, 591 F.3d 239, 243 (4th Cir. 2009); *United States v. Solis-Campozano*, 312 F.3d 164, 166 (5th Cir. 2002). As this Court has recognized, "[a]n interpretation that flies in the face of a statute's purpose . . . leads to an absurd result." *Zbaraz*, 572 F.3d at 386–87 (citing *Citizens Bank of Md.,* 516 U.S. at 20 ("Just as we will not reach for an unconstitutional interpretation of statutory language, neither will we construe a statute in a way that leads to absurd results.")).

Construing BIPA to impose liquidated damages absent injury on a per-scan basis would have significant adverse consequences for the retail and foodservice industries. Given the ever-changing and ever-improving technology and the evolving

legal landscape, compliance with BIPA's requirements is not always known or obvious, and despite an employer's good-faith best efforts, technical violations might still occur.

The flaws in the district court's interpretation are compounded by the fact that a BIPA plaintiff need not demonstrate any actual damages. As the Illinois Supreme Court held, a BIPA plaintiff has standing to sue even for a minor technical violation of the statute without having ever been harmed. *See Rosenbach*, 129 N.E.3d at 1207. Taken to its logical conclusion, the district court's interpretation could enable a single BIPA plaintiff, who has suffered no actual injury, to singlehandedly put an employer out of business (and all of its employees out of jobs). Indeed, a plaintiff, having recognized its employer's technical violation, would have a perverse incentive to delay bringing suit and instead—with each new scan resetting the statute of limitations and constituting a new offense—allow the violations to accumulate to the plaintiff's financial gain and the employer's detriment. That would truly be absurd, at odds with the statutory purpose, and contrary to the "orderly administration of justice." *See Blair v. Nev. Landing P'ship*, 859 N.E.2d 1188, 1193 (Ill. Ct. App. 2006) (explaining that "predictability and finality" of statutes of limitations "are desirable, indeed indispensable, elements of the orderly administration of justice").

Numerous courts in Illinois have agreed with Appellant's position that a BIPA violation occurs only upon the initial breach of the statute's requirements. *See, e.g.*, *Robertson v. Hostmark Hospitality Grp., Inc.*, No. 2018-CH-05194, slip op. at 5 (Ill. Cir. Ct., Cook Cty. May 29, 2020) (A-5) (holding that arguments that BIPA is violated

on a per-scan basis are "contrary to the unambiguous language of the statute" and would "lead to an absurd result" and affirming that a violation occurs only on the first time that biometric data is collected without consent); *Watson v. Legacy Healthcare Fin. Servs., LLC*, No. 2019-CH-03425, slip op. at 3 (Ill. Cir. Ct., Cook Cty. June 10, 2020) (A-13) (holding that the BIPA claims accrued only upon the first collection of the biometric information); *Smith v. Top Die Casting Co.*, 2019-L-248, slip op. at 3 (Ill. Cir. Ct., Winnebago Cty. Mar. 12, 2020) (A-20) (holding that a BIPA claim accrues only on the initial collection of biometric information and finding that violations accruing on a per-scan basis, "would likely force out of business—in droves—violators who without any nefarious intent installed new technology"). These decisions follow the longstanding rule that "a plaintiff's cause of action . . . accrues at the time his or her interest is invaded." *See Blair*, 859 N.E.2d at 1193.

This Court should reject the district court's holding and adopt Appellant's interpretation, which is consistent with the statutory text and continues to provide for meaningful remedial relief. Doing so will avoid the perverse incentive for delayed claims and the absurd outcome of crushing penalties that have no connection to any actual harm. *See Senne*, 784 F.3d at 447.

C. BIPA Should Be Interpreted to Avoid Due Process Concerns.

By permitting excessive liquidated damages unrelated to any actual harm, the district court's interpretation of BIPA also ignores another canon of statutory construction: that statutes should be construed to avoid due process concerns. "In the words of Justice Holmes, 'the rule is settled that as between two possible

interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. *Even to avoid a serious doubt the rule is the same*.'" *Markadonatos v. Vill. of Woodridge*, 760 F.3d 545, 548 (7th Cir. 2014) (Posner, J., concurring) (emphasis in original) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (concurring opinion)).[17] Particularly in the context of constitutionally suspect damages awards, "[a] federal court . . . can (and should) reduce a punitive damages award sometime before it reaches the outermost limits of due process." *Epic Sys. Corp. v. Tata Consultancy Servs. Ltd.*, 980 F.3d 1117, 1142 (7th Cir. 2020) (quoting *Saccameno v. U.S. Bank Nat'l Ass'n*, 943 F.3d 1071, 1086 (7th Cir. 2019)).

The district court's endorsement of an interpretation that would result in staggeringly high liquidated damages exposure for a BIPA defendant, when a BIPA plaintiff is not required to demonstrate actual injury, raises due process concerns. The Supreme Court's guidance is clear that purely punitive damages may not be unlimited, nor may they grossly exceed the actual damages suffered by the plaintiff. In *State Farm Mutual Automobile Insurance Company v. Campbell*, the Supreme Court held:

> [I]t is well established that there are procedural and substantive constitutional limitations on these awards. . . . The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly

[17] *See also Clark v. Suarez Martinez*, 543 U.S. 371, 380–81 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail."); *United States v. Orona-Ibarra*, 831 F.3d 867, 876 (7th Cir. 2016) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (quoting *Jones v. United States*, 529 U.S. 848, 857 (2000))).

> excessive or arbitrary punishments on a tortfeasor. . . . The reason is that elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.

538 U.S. 408, 416–17 (2003) (internal quotation marks and citations omitted). The Supreme Court also reaffirmed its instructions to "courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418 (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

Applying these principles to the potential liquidated damages that could flow from the district court's interpretation of BIPA demonstrates that it cannot withstand scrutiny, even under the test for punitive damages, which BIPA never intended to impose. First, even a business that engaged in reasonable, good-faith efforts to comply with BIPA could be subject to enterprise-threatening penalties under the district court's reading of the statute.

Second, exorbitant penalties could be awarded even without any actual damages. Indeed, the near-certainty of such an outcome is clear, given that *no published opinions involving BIPA claims by employees have involved any actual harm since the Rosenbach opinion was issued*. *See, e.g.*, *Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617, 620 (7th Cir. 2020) (while plaintiff "voluntarily created a user

account for the Smart Market vending machines and regularly made use of the fingerprint scanner to purchase items from the machines," she still asserted a BIPA claim for failure to comply with the technical requirements of the statute); *Rogers v. CSX Intermodal Terminals, Inc.*, 409 F. Supp. 3d 612, 615, 617 (N.D. Ill. 2019) (although the plaintiff "voluntarily provided his fingerprints," he still "qualifie[d] as an aggrieved person under BIPA because" of an alleged violation of the statute's requirements).

Third, this Court's recent decision in *Epic Systems* also highlights the meaningful concerns with the excessive penalties that would result from the district court's interpretation of BIPA. In *Epic Systems*, a jury held that the defendant engaged in *intentional*, repeated wrongful conduct spanning years that caused financial harm to the plaintiff. *Epic Sys. Corp.*, 980 F.3d at 1142. Even on these facts, this Court found the punitive damages award—double the compensatory damages amount—exceeded the outermost limits of the due process guarantee. *See id.* at 1144. Considering the Supreme Court's *BMW* guidelines, this Court held that, although the defendant's "conduct consisted of a repeated course of wrongful actions spanning multiple years" and "was also intentional and deceitful," it "was not reprehensible 'to an extreme degree'" because the defendant "caused no physical harm to [the plaintiff]" and "did not recklessly disregard the safety of others." *Id.* at 1142 (citation omitted). The Court further explained that a constitutionally acceptable punitive damages award is one that mirrors the actual harm suffered by the plaintiff. *See id.* at 1145.

In light of *Epic Systems* and the Supreme Court's guidance, the potential for unlimited, purely punitive liquidated damages in a BIPA action under the district court's interpretation of the statute raises significant due process concerns. If left to stand, the district court's interpretation of BIPA could impose astronomical liquidated damages, even where an employer operated in good faith and a plaintiff suffered *no* actual harm. This vast disconnect between a plaintiff's actual loss and the potential penalty imposed on the defendant threatens to exceed the boundaries of due process delineated by the Supreme Court in *State Farm* and *BMW* and by this Court in *Epic Systems*. This Court should reject this reading of the statute.

II. Appellant's Proposed Interpretation of BIPA Reflects the Plain Language and Purpose of the Statute and Avoids Statutory Construction and Other Problems.

The interpretation of BIPA that Appellant advocated before the district court, and advocates here, is supported by the plain text of the statute and Illinois case law. The statute expressly provides that no entity may capture an individual's biometric information or identifier unless it provides the required disclosures and obtains the required release. *See* 740 ILCS 14/15(b)(1)–(3) (emphasis added); *see also Rosenbach*, 129 N.E.3d at 1206. Likewise, no entity may disclose an individual's biometric information or identifier unless there is consent. *See* 740 ILCS 14/15(d)(1). Thus, as Appellant correctly reasoned, a BIPA cause of action accrues upon the *first* scan or disclosure without the statutorily required disclosures or consent: "where there is a single overt act from which subsequent damages may flow, the statute [of limitations] begins to run on the date the defendant invaded the plaintiff's interest and inflicted

injury, *and this is so despite the continuing nature of the injury*." Def.'s Mem. in Supp. of Def.'s Mot. for J. on the Pleadings at 5, No. 1:19-cv-00382 (June 30, 2020), Dkt. No. 120 (emphasis added in Def.'s Mem.) (citing *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278 (2003)).

A BIPA claim accrues at the first failure to obtain statutorily mandated consent—"not the[] continuing failure to do so." *Id.* at 6 (citing *Robertson*, slip op. at 4). As soon as the first collection without such consent was complete, so too was the infringement of the interest protected by the statute. *See Feltmeier*, 207 Ill. 2d at 278; *Blair*, 859 N.E.2d at 1192; *Robertson*, slip op. 4 (A-4) (holding the protected interest was violated by "Defendants' alleged failure to first obtain [plaintiff's] written consent before collecting his biometric data"); *Watson*, slip op. at 3 (A-13) ("While the Complaint alleges that Plaintiff had to scan his hand every day he worked, all his damages flowed from that initial act of collecting and storing Plaintiff's handprint in Defendants' computer system without first complying with the statute.").

Blair is instructive. There, the plaintiff sought to recover under the Illinois Right of Publicity Act for the alleged wrongful use of his picture in promotional materials. 859 N.E.2d at 1192. Just as BIPA requires an entity to obtain consent before collecting or disclosing biometric information, the Illinois Right of Publicity Act prohibits "us[ing] an individual's identity for commercial purposes during the individual's lifetime without having obtained previous written consent from the appropriate person." *Id.* (quoting 765 ILCS 1075/30). In *Blair*, the plaintiff's

photograph was used in various media to promote the defendant's business from 1995 through 2004. *See id.* at 1193. The plaintiff argued that his cause of action accrued on January 14, 2004, the last date his photograph was used. *See id.* at 1191. The Illinois Appellate Court rejected that position and concluded that the claim accrued on the date the photograph was first published in 1995. According to the court, "the plaintiff allege[d] one overt act"—the use of his likeness in violation of the statute—"with continual effects." *Id.* at 1193 ("The fact that a single photo of the plaintiff appeared via several mediums between 1995 and 2004 evidences a continual effect."). The same conclusion is warranted here because the plaintiff has alleged one overt act—collection and disclosure of a finger scan without the requisite consent. Like the subsequent publications of the plaintiff's photograph in *Blair*, any subsequent finger scans or attendant disclosures here were not separate statutory violations; they were continual effects of the initial overt act.

Appellant's plausible, plain-text interpretation of BIPA avoids the pitfalls of the district court's position: it encourages employers to ensure compliance with BIPA without imposing prohibitive penalties, does not cause absurd results in the event of an inadvertent technical violation, and does not impose grossly excessive, entirely penal damages that would implicate due process concerns. For these reasons, this Court should adopt Appellant's reading of BIPA and hold that a claim under the Act accrues only on the initial scan or disclosure.

CONCLUSION

For these reasons and those set forth in the Appellant's brief, the district court's holding should be reversed.

Respectfully submitted,

April 5, 2021

/s/ Meredith C. Slawe

Meredith C. Slawe
Michael W. McTigue Jr.
Stephen A. Miller
Marie Bussey-Garza
COZEN O'CONNOR
One Liberty Place
1650 Market Street, Suite 2800
Philadelphia, PA 19103
(215) 665-2000

Michael de Leeuw
Tamar S. Wise
COZEN O'CONNOR
175 Greenwich Street, 55th Floor
New York, NY 10007
(212) 509-9400

Anna Wermuth
COZEN O'CONNOR
123 N. Wacker Dr., Suite 1800
Chicago, IL 60606
(312) 382-3100

Counsel for Amici Curiae

Deborah R. White
Kathleen F. McGuigan
RETAIL LITIGATION CENTER, INC.
99 M Street SE, Suite 700
Washington, DC 20003
(202) 869-0200

Counsel for Retail Litigation Center, Inc.

Angelo I. Amador
RESTAURANT LAW CENTER
2055 L Street NW, Suite 700
Washington, DC 20036
(202) 492-5037

Counsel for Restaurant Law Center

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief of Retail Litigation Center, Inc. and Restaurant Law Center as *Amici Curiae* in Support of Appellant and Reversal complies with Fed. R. App. P. 29(c) and the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,476 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2016 in 12-point Century Schoolbook font.

Dated: April 5, 2021

/s/ Meredith C. Slawe
Meredith C. Slawe
One of the Attorneys for *Amici Curiae*
Retail Litigation Center, Inc. and Restaurant Law Center

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2021, the *Amici Curiae* Brief was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Meredith C. Slawe
Meredith C. Slawe

APPENDIX

TABLE OF CONTENTS TO APPENDIX

Memorandum and Order on *Thomas Robertson v. Hostmark Hospitality Group, Inc.,* Case No. 18 CH 5194, entered on May 29, 2020 ..... A-1

Order on *Brandon Watson v. Legacy Healthcare Financial Services, LLC, etc., et al.* Case No. 19 CH 3425, entered on June 10, 2020 ..... A-11

Memorandum of Decision and Order on *Marcia Smith v. Top Die Casting Co.,* Case No. 2019 L 247, entered on March 12, 2020 ..... A-18

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

THOMAS ROBERTSON, individually, and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	**Case No. 18-CH-5194**
HOSTMARK HOSPITALITY GROUP, INC., et al,	)	
Defendants,	)	

MEMORANDUM AND ORDER

Plaintiff Thomas Robertson has filed a motion to reconsider this court's January 27, 2020 Memorandum and Order pursuant to 735 ILCS 5/2-1203(a).

I. Background

On April 20, 2018, Plaintiff Thomas Robertson ("Robertson") filed his original complaint alleging Defendants Hostmark Hospitality Group, Inc. ("Hostmark") and Raintree Enterprises Mart Plaza, Inc. ("Raintree") (collectively "Defendants") violated the Biometric Information Privacy Act ("BIPA").

On April 1, 2019, this court granted Robertson's motion for leave to file an amended class action complaint (the "Amended Complaint"). The Amended Complaint now alleges three counts, each alleging a violation of a different subsection of section 15 of BIPA. 740 ILCS 14/15.

Count I alleges a violation of subsection 15(a) based upon Defendants failure to institute, maintain, and adhere to a publicly available retention and deletion schedule for biometric data. 740 ILCS 14/15(a). Count II alleges a violation of subsection 15(b) based upon Defendants failure to obtain written consent prior to collecting and releasing biometric data. 740 ILCS 14/15(b). Count III alleges a violation of subsection 15(d) based upon Defendants failure to obtain consent before disclosing biometric data. 740 ILCS 14/15(d).

On July 31, 2019, this court issued its Memorandum and Order denying Defendants' motion to dismiss Robertson's Amended Complaint. In summary, this court held that: (1) Robertson's claim was not preempted by the Illinois Worker's Compensation Act; (2) the applicable statute of limitations was five years, as provided for in 735 ILCS 5/13-205; and (3) Robertson had adequately pled his claim.

As part of the court's July 31, 2019 ruling, this court addressed the parties' arguments regarding the date Defendants stopped collecting Robertson's biometric information but did not address their arguments regarding when Robertson's claims accrued.

On August 30, 2019, Defendants filed their motion to reconsider and certify questions to the appellate court. In their motion to reconsider, Defendants argued, *inter alia*, that this court erred in applying a five-year statute of limitations to Robertson's claim. On September 4, 2019, this court denied Defendants' motion, in part, but allowed further briefing on the issue of the application of the five-year statute of limitation.

On January 27, 2020, this court issued its Memorandum and Order granting in part and denying in part Defendants' motion to reconsider. The court held that Robertson's claims relating to Defendants' alleged violations of section 15(b) and 15(d) accrued in 2010. The court found that the continuing violation rule did not apply to Robertson's claims because the violations of sections 15(b) and 15(d) represented a single discrete act from which any damages flowed. Thus, it was held that Counts II and III were barred by the five statute of limitations.

Regarding Count I, the court viewed section 15(a) as imposing two distinct requirements: (1) requiring private entities to develop a publicly available retention schedule and deletion guidelines; and (2) requiring the permanent deletion of an individual's biometric data, either in accordance with the deletion guidelines or within 3 years of the individual's last interaction with the private entity, whichever is earlier.

The court held that since it was Defendants' stated position that they ceased collection of biometric data in 2013, the math dictated by section 15(a) results in the conclusion that Robertson's claim could not have started to accrue until, at the earliest, 2016. Accordingly, Robertson's claim was not barred by the five-year statute of limitations.

II. Motion to Reconsider

A. *Application of the Continuing Violation Rule*

"The intended purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence, changes in the law, or errors in the court's previous application of existing law." Chelkova v. Southland Corp., 331 Ill. App. 3d 716, 729-30 (1st Dist. 2002). A party may not raise a new legal or factual argument in a motion to reconsider. North River Ins. Co. v. Grinnell Mut. Reinsurance Co., 369 Ill. App. 3d 563, 572 (1st Dist. 2006).

Robertson's current Motion to Reconsider of this court's January 27, 2020 Memorandum and Order reiterates his previously stated position that his claim is well within the statute of limitations because he was a victim of a continuing violation of his rights under BIPA. Alternatively, he seeks to certify the question to the First District pursuant to Illinois Supreme Court Rule 304(a). [1]

[1] Not surprisingly, Defendants argue this court properly applied the law surrounding continuing violations to Robertson's BIPA claims. Alternatively, Defendants suggest that if the question is to be certified it should be pursuant to Illinois Supreme Court Rule 308.

Robertson's most recent request suggests that the proper application of the continuing violation rule is illustrated by Cunningham v. Huffman, 154 Ill. 2d 398, 406 (1993).

Cunningham involved a matter of first impression, namely, "whether the Illinois four-year statute of repose is tolled until the date of last treatment when there is an ongoing patient/physician relationship." Cunningham v. Huffman, 154 Ill. 2d 398, 400 (1993). The trial court found that the plaintiff's claims were time-barred and the continuous course of treatment doctrine was not the law in Illinois. Id. at 401. The Appellate Court affirmed the dismissal stating that "in medical malpractice actions, the statute of repose is triggered only on the last day of treatment, and if the treatment is for the same condition, there is no requirement that the negligence be continuous throughout the treatment. Id. at 403.

The Illinois Supreme Court declined to adopt the continuous course of treatment doctrine. Id. at 403-04. Nonetheless, the court held that statutory scheme did not necessarily preclude the cause of action asserted by the plaintiff. Id. at 404. Specifically, the court held that the medical treatment statue of repose would not bar the plaintiff's action if he could demonstrate: (1) that there was a continuous and unbroken course of *negligent* treatment, and (2) that the treatment was so related as to constitute one continuing wrong." Id. at 406 (emphasis in original). The Illinois Supreme Court emphasized "that there must be a continuous course of *negligent* treatment as opposed to a mere continuous course of treatment." Id. at 407 (emphasis in original).

Robertson's assertion is that Cunningham stands for the proposition that "the continuing violation doctrine applies where a plaintiff demonstrates a continuous and unbroken course of conduct, so related as to constitute one continuous wrong." (Motion at 5).

But the Illinois Supreme Court has explicitly rejected Robertson's argument, stating **"[t]he Cunningham opinion did not adopt a continuing violation rule of general applicability in all tort cases or, as here, cases involving a statutory cause of action.** Rather, the result in Cunningham was based on interpretation of the language contained in the medical malpractice statute of repose." Belleville Toyota v. Toyota Motor Sales, U.S.A., 199 Ill. 2d 325, 347 (2002)(Fitzgerald, J)(emphasis ours).

Robertson ignores Belleville and replies that "[t]here is no binding authority to which the Court may turn for guidance on the exact issue regarding whether the continuing violation doctrine applies." (Reply at 4).

While Justice Fitzgerald's written opinion in Belleville is pretty solid authority to the contrary, as this court previously pointed out, the First District has considered "[w]hether a series of conversions of negotiable instruments over time can constitute a continuing violation under Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc., 199 Ill. 2d 325 (2002), for the purpose of determining when the statute of limitations runs." Kidney Cancer Assoc. V. North Shore Com. Bank, 373 Ill.App.3d 396, 397-98 (1st Dist. 2007). The court reasoned that where a complaint alleges a serial conversion of negotiable instruments by a defendant, it cannot be denied that a single unauthorized deposit of a check in an account opened by the defendant gives the plaintiff a right to file a conversion action. Id. at 405. The court rejected the plaintiff's claim

that the defendant's repeated deposits (identical conversions) following the initial deposit served to toll the statute of limitations under the continuing violation rule. Id. Instead, according to the court, each discrete act (deposit) provided a basis for a cause of action and the court need not look to the defendant's conduct as a continuous whole for prescriptive purposes. Id.

In Rosenbach v. Six Flags Entertainment Corp., 2019 IL 123186, ¶ 33, the Illinois Supreme Court held when a private entity fails to comply with one of section 15's requirements, that violation is itself sufficient to support the individual's or customer's **statutory cause of action**. Id. (emphasis ours).

Robertson's Amended Complaint alleges that his statutory rights were invaded in 2010, when Defendants allegedly first collected and disseminated his biometric data without complying with section 15's requirements. (Amended Complaint at ¶42).

In our January 27, 2020 Memorandum and Order, this court explained that under the general rule a cause of action for a statutory violation accrues at the time a plaintiff's interest is invaded. Blair v. Nevada Landing Partnership, 369 Ill. App. 3d 318, 323 (2nd Dist. 2006) (citing Feltmeier v. Feltmeier, 207 Ill. 2d 263, 278-279 (2003)("where there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury." Id, 207 Ill. 2d at 279); see also, Limestone Development Corp. v. Village of Lemont, 520 F.3d 797, 801 (7th Cir. 2008) ("The office of the misnamed doctrine is to allow suit to be delayed until a series of wrongful acts blossoms into an injury on which suit can be brought. [citations]. It is thus a doctrine not about a continuing, but about a cumulative, violation.").

Here, this court respectfully disagrees with Robertson concerning the application of continuing violation rule. It was Defendants' alleged failure to first obtain Robertson's written consent before collecting his biometric data which is the essence of and gave rise to the cause of action, not their continuing failure to do so. Robertson's statutory rights were violated in 2010 when Defendants allegedly first collected and disseminated his biometric data without complying with section 15's requirements.

Per Feltmeier, "where there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury." Id., 207 Ill. 2d at 279. That Defendants lacked the written release to collect and consent to disseminate Robertson's biometric data from 2010 until they ceased collection, does not change the fact Robertson's statutory rights were violated in 2010 nor does it serve to delay or toll the statute of limitations. Id; see also, Bank of Ravenswood v. City of Chicago, 307 Ill. App. 3d 161, 168 (1st Dist. 1999) (holding that the action for trespass began accruing when the defendant invaded plaintiff's interest and the fact that subway was present below the ground was a continual ill effect from the initial violation but not a continual violation.).

The court did not err in holding that the continuing violation rule did not apply to Robertson's claims.

B. *Single vs. Multiple Violations*

Robertson argues that this court erred in holding that his claims for violation of sections 15 (b) and (d) amount to single violations which occurred in 2010. Instead, according to Robertson, each time Defendants collected or disseminated his biometric data without a written release constitutes a single actionable violation.

Robertson's argument is contrary to the unambiguous language of the statute and taken to its logical conclusion would inexorably lead to an absurd result.

* * *

Section 10 of BIPA defines "written release" as: "[. . .] informed written consent or, *in the context of employment, a release executed by an employee as a condition of employment*." 740 ILCS 14/10 (emphasis added).

And, Section 15 (b)(3) of BIPA provides:

> (b) No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first: *** (3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative.

740 ILCS 14/15 (b)(3).

Reading section 10 and 15 of BIPA together makes clear that the "written release" contemplated by section 15 (b)(3) in the context of employment is to be executed as a condition of employment. 740 ILCS 14/10 and 15(b)(3).

As explained by the court in its January 27, 2020 Memorandum and Order, "[t]he most reasonable and practical reading of section 15 (b) requires an employer to obtain a single written release as a condition of employment from an employee or his or her legally authorized representative to allow the collection of his or her biometric data for timekeeping purposes for the duration of his or her employment. Such a release need not be executed before every instance an employee clocks-in and out, rather a single release should suffice to allow the collection of an employee's biometric data." January 27, 2020 Memorandum and Order at 4.

Robertson admits that this is a reasonable reading, (Motion at 7), but argues that Defendants, having failed to obtain a written release or his consent, had to obtain his written release before collecting his biometric data. Since Defendants failed to do, Robertson argues, each time Defendants' collected Robertson's biometric is independently actionable.

But, taken to its logical conclusion Robertson's construction would lead employers to potentially face ruinous liability.

Section 20 of BIPA provides any individual aggrieved by a violation of BIPA with a right of action and further provides that said individual may recover liquidated statutory damages for

each violation in the amount of either $1,000 for negligent violations or $5,000 for intentional or reckless violations. 740 ILCS 14/20.

Robertson alleges that he was required to scan his fingerprints each time he clocked in and out. (Amended Complaint at ¶44). Therefore, at minimum, there exists at least two potentially recoverable violations for *each day* Robertson worked. Extending this to its logical conclusion, a plaintiff like Robertson could potentially seek a total of $500,000 for negligent violations or $2,500,000 for intentional or reckless violations *for each year*[2] Defendants allegedly violated BIPA.

It is a well-settled legal principle that statutes should not be construed to reach absurd or impracticable results, Nowak v. City of Country Club Hills, 2011 IL 111838, ¶ 21, which is where Robertson's argument would take us. This court finds nothing in the statute as it is written or as it was enacted to indicate it was the considered intent of legislature in passing BIPA to impose fines so extreme as to threaten the existence of any business, regardless of its size.

C. *Section 15 (d)(1) – Consent for Dissemination*

Section 15 (d)(1) of BIPA provides:

> (d) No private entity in possession of a biometric identifier or biometric information may disclose, redisclose, or otherwise disseminate a person's or a customer's biometric identifier or biometric information unless:
>
> (1) the subject of the biometric identifier or biometric information or the subject's legally authorized representative consents to the disclosure or redisclosure;
>
> * * * * *

740 ILCS 14/15 (d)(1).

Robertson's main contention here is that: (1) he never alleged when Defendants actually disseminated his biometric data; and (2) a defendant can potentially violate section 15(d) multiple times by disseminating an individual's biometric to additional third-parties.

But this court did not rule that section 15(d)(1) can only be violated a single time by a defendant. Rather, it ruled that based on the allegations as pled, Robertson's claim accrued in 2010.

The court recognizes that "a plaintiff is not required to plead facts with precision when the information needed to plead those facts is within the knowledge and control of defendant rather than plaintiff." Lozman v. Putnam, 328 Ill. App. 3d 761, 769-70 (1st Dist. 2002). However, even under this standard a plaintiff may not simply plead the elements of a claim, Holton v. Resurrection Hospital, 88 Ill. App. 3d 655, 658 (1st Dist. 1980), nor does this rule excuse a plaintiff from alleging sufficient facts. Holton, 88 Ill. App. 3d at 658-59.

[2] Two violations a day multiplied five days multiplied fifty weeks a year multiplied either 1,000 or 5,000.

If Robertson was actually trying to allege that Defendants violated section 15(d)(1) multiple times by disseminating his biometric data to multiple third parties on many occasions between 2010 and whenever Defendants ceased collection, this allegation is not well-pled and Robertson has not stated a claim for this factual scenario. To be sure, Robertson's Amended Complaint plainly alleges that any dissemination occurred systematically and automatically, but Robertson does not allege any underlying facts which support this assertion.

Robertson also argues that it is possible for a private entity to violate section 15(d) multiple times and that therefore the court erred in holding that Defendants violated Robertson's section 15(d)(1) statutory rights only in 2010. ("Defendants, at any point in time, could have disseminated [his] biometric data to any number of other entities, any number of times, over any period of time," (Motion at 13)).

Robertson alleges Defendants "disclose or disclosed [his] fingerprint data to at least one out-of-state third-party vendor, and likely others," (Id. at ¶33), but the allegation relating to "likely others" is not well pled. The Amended Complaint contains no allegations alleging Defendants disseminated Robertson's biometric data to additional third parties at some undetermined point between 2010 and the date Defendants ceased collection.

The Amended Complaint plainly alleges that any disseminations were, on information and belief, done "systematically or automatically." (Id. at ¶¶ 33, 97). "[A]an allegation made on information and belief is not equivalent to an allegation of relevant fact [citation]." Golly v. Eastman (In re Estate of DiMatteo), 2013 IL App (1st) 122948, ¶ 83 (citation omitted).

Without alleging the supporting underlying facts which lead Robertson to believe that his biometric data was being systemically and automatically disseminated, his allegation regarding additional dissemination to additional third parties remains an unsupported conclusion. The same is true for the allegations Robertson pleads on information and belief. Defendants are not required to admit unsupported conclusions on a motion dismiss.

The court did not err.

III. Motions to Certify Questions and/or Motions Leave to Appeal

Robertson seeks leave to immediately appeal this court's orders pursuant to Illinois Supreme Court Rule 304(a). Defendants assert that Illinois Supreme Court Rule 308 is the better procedural vehicle and seeks certification of three questions:

1. Whether exclusivity provisions of the Illinois Worker's Compensation Act bar BIPA claims?

2. Whether BIPA claims are subject to the one-year statute of limitations pursuant to 735 ILCS 5/13-201 or the two-year statute of limitations pursuant to 735 ILCS 5/13-202?

3. Whether a claim for a violation of section 15(a) accrues when a private entity first comes into possession of biometric data?

The questions Defendants seek to certify have been either directly addressed or are closely related to questions other judges have certified.

Judge Raymond W. Mittchell in McDonald v. Symphony Bronzeville Park, LLC, Case No. 17 CH 11311 has already certified a similar question to Defendants' first question in an appeal is pending under Marquita McDonald v. Symphony Bronzeville Park, LLC, No. 1-19-2398.

Similarly, in Juan Cortez v. Headly Manufacturing Co., Case No. 19 CH 4935, Judge Anna H. Demacopoulos has certified the second question concerning of what statute of limitations appropriately applies BIPA claims. This court is informed that the First District has accepted the matter and it is currently being briefed.

The third proposed question – as to whether a violation of section 15(a) begins accruing when a private entity first comes into possession of biometric data – is not yet pending on appeal.

A. Rule 308?

Rule 308(a) provides as follows:

> When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved.

ILL. SUP. CT., R. 308(a).

Rule 308(a) "should be strictly construed and sparingly exercised." Kincaid v. Smith, 252 Ill. App. 3d 618, 622 (1st Dist. 1993). "Appeals under this rule should be available only in the exceptional case where there are compelling reasons for rendering an early determination of a critical question of law and where a determination of the issue would materially advance the litigation." Id.

Because Rule 308 should be strictly construed and sparingly exercised, the court will not certify a question already accepted by the Appellate Court. Accordingly, in the interests of efficiency and of not burdening the First District with issue in cases which echo one another, the court declines to certify questions regarding the applicability of the Illinois Worker's Compensation Act, or questions concerning the appropriate statute of limitations under BIPA. Answers to those questions should be forthcoming through the certifications by Judges Mitchell and Demacopoulos.

Regarding the third question concerning the accrual of section 15(a) claims, the court is willing to certify a question regarding section 15(a) but is not willing to certify the question as currently phrased by Defendants.

As explained by the court in its January 27, 2020 Memorandum and Order, section 15(a) contains two distinct requirements: (1) private entities in possession of biometric data must develop a publicly available retention schedule and deletion guidelines; and (2) those guidelines

must provide for the permanent destruction of biometric data when the initial purpose for collecting the biometric data has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first.

Contrary to Defendants' phrasing of their question regarding section 15(a), the court did not rule that a section 15(a) violation could only accrue once. Rather the court interpreted section 15(a) as imposing two distinct requirements on private entities each with separate accrual dates. The pure legal question is not simply when does the action for a violation of section 15(a) accrue but rather whether the court's interpretation of the statutory language of section 15(a) is correct.

Defendants motion is therefore denied, as written. If they wish, Defendants may resubmit the request to reflect this court's ruling and it will be reconsidered.

B. Rule 304(a)?

Rule 304(a) provides as follows:

> If multiple parties or multiple claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all of the parties or claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both.

ILL. SUP. CT., R. 304(a).

Rule 304(a) creates "an exception to [the] general rule of appellate procedural law by permitting appeals from trial court orders that only dispose of a portion of the controversy between parties." Mostardi-Platt Associates, Inc. v. American Toxic Disposal, Inc., 182 Ill. App. 3d 17, 19 (1st Dist. 1989). Rule 304(a)'s exception "arises when a trial judge [. . .] makes an express finding that there is no just reason to delay the enforcement or appeal of the otherwise nonfinal order." Id.

Here, the court did issue a final judgment as to fewer than all of the claims on January 27, 2020 when it granted Defendants' motion to reconsider and dismissed Counts II and III of Robertson's Amended Complaint with prejudice because they were barred by the applicable statute of limitations.

However, as explained many issues Robertson would seek review of under Rule 304(a) will be disposed of by the Appellate Court's answers to Judge Demacopoulos' certified question. Therefore, the court declines to make the necessary finding to allow Robertson to appeal pursuant to Rule 304(a).

III. Conclusion

Robertson's motion for reconsideration is DENIED.

Robertson's request for a Rule 304(a) finding is DENIED.

Defendants' request for to certify questions pursuant to Rule 308(a) is GRANTED IN PART and DENIED IN PART. The court denies Defendants' questions relating to the application of the Illinois Worker's Compensation Act and the two-year statute of limitations.

The court grants Defendants' request in so far as it seeks to certify a question relating to section 15(a) but denies Defendants' question as currently written.

The court orders the parties to confer and to attempt to reach an agreement regarding the phrasing of a question relating to the section 15(a).

The court set the next status date for this matter as June 16, 2020 at 9:30 a.m.

Entered: 5-29-20

Judge Neil H. Cohen

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION
GENERAL CHANCERY SECTION

BRANDON WATSON, individually and on behalf of all others similarly situated, Plaintiff, v. LEGACY HEALTHCARE FINANCIAL SERVICES, LLC d/b/a Legacy Healthcare; LINCOLN PARK SKILLED NURSING FACILITY, LLC d/b/a Warren Barr Lincoln Park a/k/a The Grove at Lincoln Park; and SOUTH LOOP SKILLED NURSING FACILITY, LLC d/b/a Warren Barr South Loop, Defendants.	CASE NO. 19 CH 3425 CALENDAR 11

ORDER

This matter came before the Court on Defendants' 2-619 motion to dismiss the putative Class Action Complaint of Plaintiff Brandon Watson. For the reasons explained below, the motion is granted.

BACKGROUND

Plaintiff was required to scan his hand to clock in and out of work at Defendants' nursing home facilities in Chicago.[1] Plaintiff worked as a Certified Nursing Assistant for Defendant Legacy Healthcare Financial Services, LLC ("Legacy"), which controls 26 nursing home facilities in Illinois. He worked at Defendant Lincoln Park Skilled Nursing Facility, LLC from December of 2012 through February of 2019, and at Defendant South Loop Skilled Nursing Facility, LLC from May through November of 2017.

Plaintiff filed his one-count Class Action Complaint on March 15, 2019, alleging that Defendants failed to properly disclose and obtain releases related to the collection, storage, and use of his biometric information, in violation of the Illinois Biometric Information Privacy Act ("BIPA"). He asks for statutory damages and an injunction under BIPA, individually and on behalf of a class of similarly-situated employees.

[1] The facts recited here are based upon the allegations of Plaintiff's Complaint, which are taken as true for purposes of this motion.

Defendants move to dismiss the Complaint under Section 2-619 of the Illinois Code of Civil Procedure, arguing that (1) Plaintiff's claims are time-barred; (2) Plaintiff's claims are preempted by the Illinois Workers Compensation Act; and (3) Plaintiff's claims are preempted by Section 301 of the Labor Management Relations Act.

APPLICABLE LAW

The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation. *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359, 367 (2003). Section 2-619(a)(5) provides for dismissal of a claim that "was not commenced within the time limited by law." Dismissal of a complaint pursuant to section 2-619(a)(9) is permitted where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." *Id.* The affirmative matter must negate the cause of action completely. *Id.* The trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party, and grant the motion only if the plaintiff can prove no set of facts that would support a cause of action. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997).

ANALYSIS

(1) Statute of Limitations

Defendants argue that Plaintiff's claim is barred by the statute of limitations. BIPA does not contain its own statute of limitations, so Defendants contend that the claim should be governed by the one-year statute applicable to what it calls the "most analogous common law claim"—invasion-of-privacy claims. That statute provides:

> Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued.

735 ILCS 5/13-201.

This is not the applicable statute of limitations. BIPA's Section 15(d) could be construed to address "publication of matter violating the right of privacy" in prohibiting private entities from "disclos[ing], redisclos[ing], or otherwise disseminat[ing] a person's or a customer's biometric identifier or biometric information . . . ." 740 ILCS 14/15(d). However, in this case Plaintiff did not include a claim under Section 15(d). Rather, he claimed violations only of Sections 15(a) and (b), which require private entities to publicly provide retention schedules and guidelines for permanently destroying biometric information, and to make disclosures and obtain releases before collecting, storing, and using that information. Sections (a) and (b) are violated even if there is no publication. Therefore, the one-year statute does not apply.

Nor does the two-year statute of limitations for a "statutory penalty" (735 ILCS 5/13-202) apply to this case. BIPA's liquidated damages provision is remedial, not penal. In *Rosenbach v. Six Flags Entertainment Corp.*, the Illinois Supreme Court explained that the General Assembly enacted BIPA "to try to head off such problems before they occur," by enacting safeguards and "by subjecting private entities who fail to follow the statute's

requirements to substantial potential liability, including liquidated damages . . . ." 2019 IL 123186, ¶ 36. Like the Telephone Consumer Protection Act at issue in *Standard Mutual Ins. Co. v. Lay*, BIPA was "designed to grant remedies for the protection of rights, introduce regulation conducive to the public good, or cure public evils." 2013 IL 114617, ¶ 31.

The applicable statute of limitations is the five-year "catch-all" provision of 735 ILCS 5/13-205. It begins to run on the date the cause of action accrued. Defendants argue that, even if the five-year statute applies, Plaintiff's claim is time-barred because his cause of action accrued when Defendant scanned Plaintiff's hand on his *first* day of work—December 27, 2012. This suit was filed on March 15, 2019, more than six years later.

Plaintiff argues that each daily scan of his hand violated BIPA, so his *last* day of work—February 21, 2019—is the key date for limitations purposes. He argues that all scans in the five years before he filed the Complaint are actionable.

Generally, a cause of action accrues "when facts exist that authorize one party to maintain an action against another." *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 278 (2003). Plaintiff argues that his claims are most analogous to wage claims, where each inadequate paycheck gives rise to a separate cause of action. The same cannot be said for each of Plaintiff's hand scans. As the Court in *Feltmeier* stated:

> [W]here there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury.

Id. at 79. (emphasis added).

In wage claims, damages flow from each inadequate paycheck. Additional damages accrue every time a paycheck is short. By contrast, Plaintiff's damages flow from the "single overt act" of the initial collection and storage of his biometric data. According to the Complaint, "From the start of Plaintiff's employment with Defendants in 2012," Defendants required him to have his "fingerprint and/or handprint collected and/or captured so that Defendants could store it and use it moving forward as an authentication method." (Cplt ¶18). The Complaint alleges that, *before* collecting Plaintiff's biometric information, Defendants did not provide Plaintiff with the required written notices and did not get his required consent. (Cplt ¶¶ 22, 23). While the Complaint alleges that Plaintiff had to scan his hand every day he worked, all his damages flowed from that initial act of collecting and storing Plaintiff's handprint in Defendants' computer system without first complying with the statute. Plaintiff's handprint was scanned and stored in Defendants' system on Day 1, allowing for authentication every time he signed in.

Plaintiff's cause of action accrued when his handprint allegedly was collected in violation of BIPA on his first day of work on December 27, 2012. Therefore, because Plaintiff filed his case on March 15, 2019, Plaintiff's claim is time-barred under the five-year statute of limitations.

This holding disposes of the case, but the Court will address Defendants' other arguments for the record.

(2) Preemption by Workers Compensation Act

Defendant argues that Plaintiff's claims are preempted by the exclusive remedy provisions of the Illinois Workers Compensation Act (the "Act"), 820 ILCS 305/5(a) and 11.

The Act "generally provides the exclusive means by which an employee can recover against an employer for a work related injury." *Folta v. Ferro Eng'g*, 2015 IL 118070, ¶ 14. However, the employee can escape the Act's exclusivity provisions by establishing that the injury "(1) was not accidental; (2) did not arise from his [or her] employment; (3) was not received during the course of employment; or (4) was not compensable under the Act." *Id.*

Defendant argues that none of these exceptions apply in this case. In response, Plaintiff argues that exceptions (1) and (4) both apply—that the BIPA violations were not accidental and were not compensable under the Act.

To show that an injury was not accidental, "the employee must establish that his employer or co-employee acted deliberately and with specific intent to injure the employee." *Garland v. Morgan Stanley & Co.*, 2013 IL App (1st) 112121, ¶ 29. Plaintiff has made no such allegation in his Complaint, so he has not established that the injury was not accidental. To put it another way, the Complaint leaves open the possibility that the injury *was* accidental. Plaintiff implicitly acknowledges this when he alleges that he and the members of the class are entitled to recover "anywhere from $1,000 to $5,000 in statutory damages." (Cplt ¶ 57). Statutory damages of $1,000 may be recovered for *negligent* violations of BIPA (740 ILCS 14/20(1)), and caselaw has equated "negligent" with "accidental" under the Act. *See Senesac v. Employer's Vocational Res.*, 324 Ill. App. 3d 380, 392 (1st Dist. 2001).

Plaintiff also argues that exception (4) applies—the injury was not compensable under the Act. In *Folta,* the Illinois Supreme Court addressed how courts should analyze this exception.[2] Rejecting the argument that the plaintiff's mesothelioma was not compensable under the Act because recovery in his situation was barred by a statute of repose, the court focused on the *type of injury* alleged and whether the legislature intended such injuries to be within the scope of the Act. The court stated, "[W]hether an injury is compensable is related to whether the type of injury categorically fits within the purview of the Act." *Id.* at ¶ 23. Because the Act specifically addressed diseases caused by asbestos exposure (such as mesothelioma), the court found that the legislature contemplated that this type of disease would be within the scope of the Act, and it was therefore compensable under the Act. *Id.* at ¶¶ 25, 36.

The same cannot be said for injuries sustained from violations of BIPA. As the court stated in *Liu v. Four Seasons Hotel, Ltd.*, 2019 IL App (1st) 182645, ¶ 30, BIPA "is a privacy rights law that applies inside and outside the workplace." By including in BIPA a provision for a private right of action in state or federal court (740 ILCS 14/20), the legislature showed it did not contemplate that BIPA claims would categorically fit within the purview of the Workers Compensation Act. Moreover, BIPA's definition of "written release" refers specifically to

[2] *Folta* was decided under both the Workers Compensation Act and the Workers' Occupational Diseases Act, 820 ILCS 310/5(a) and 11, which contain analogous exclusivity provisions.

releases executed by an employee as a condition of employment, further evidence that the legislature did not intend the Workers Compensation Act to preempt BIPA actions in the employment context. 740 ILCS 14/10.

The court holds that BIPA claims are not compensable under the Act. Therefore, BIPA claims fall within the fourth exception to the Act's exclusivity provisions. Plaintiff's BIPA claims are not preempted by the Act.

(3) Preemption by § 301 of Labor Management Relations Act

Finally, Defendant argues that this case should be dismissed because Section 301 of the Labor Management Relations Act (29 U.S.C. §185(a)) preempts Plaintiff's BIPA claim. That section provides:

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

In analyzing this provision, the U.S. Supreme Court stated:

> [I]f the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles—necessarily uniform throughout the Nation—must be employed to resolve the dispute.

Lingle v. Norge Div. of Magic Chef, 486 U.S. 399, 405-06 (1988).

In Illinois, the First District Appellate Court explained the analysis as follows:

> Where a matter is purely a question of state law and is entirely independent of any understanding of the terms of a collective bargaining agreement, it may proceed as a state-law claim. By contrast, where the resolution of a state-law claim depends on an interpretation of the collective bargaining agreement, the claim will be preempted. Where claims are predicated on rights addressed by a collective bargaining agreement, and depend on the meaning of, or require interpretation of its terms, an action brought pursuant to state law will be preempted by federal labor laws. Defenses, as well as claims, must be considered in determining whether resolution of a state-law claim requires construing of the relevant collective bargaining agreement.

Gelb v. Air Con Refrigeration & Heating, Inc., 356 Ill. App. 3d 686, 692-93 (1st Dist. 2005) (internal citations omitted).

With their motion, Defendants submitted sworn declarations attaching copies of the collective bargaining agreements ("CBAs") in effect at the Lincoln Park and South Loop nursing facilities where Plaintiff worked. The Lincoln Park CBA with SEIU provided, in relevant part:[3]

> Management of the Home, the control of the premises and the direction of the working force are vested exclusively in the Employer subject to the provisions of this Agreement. The right to manage includes . . . to determine and change starting times, quitting times and shifts, and the number of hours to be worked . . . to determine or change the methods and means by which its operations ought to be carried on; to set reasonable work standards . . . .

(Dfts' Mot., Choi Dec., Exh. A, p. 7).

The South Loop CBA with Local 743 in effect when Plaintiff worked at the South Loop facility in 2017 provided, in relevant part:

> [South Loop] has, retains, and shall continue to possess and exercise all management rights, functions, powers, privileges and authority inherent in the right to manage includ[ing] . . . the right to determine and change schedules, starting times, quitting times, and shifts, and the number of hours to be worked . . . to determine, modify, and enforce reasonable work standards, rules of conduct and regulation (including reasonable rules regarding . . . attendance, and employee honesty and integrity) . . . .

(Dfts' Mot., James Dec., Exh. A, p. 5).

Under *Lingle* and *Gelb*, the question is whether resolution of the BIPA claim in this case depends on an interpretation of the CBAs quoted above. Defendants argue that Plaintiff's claim "cannot possibly be resolved" without interpreting the governing CBAs. The Court disagrees. Resolution of this case is purely a question of state law—whether or not Defendants complied with BIPA by making the required written disclosures and getting the required written release before collecting, storing, and using Plaintiff's biometric information. Even if the CBAs allowed Defendants to set a rule requiring Plaintiff to clock in with his handprint—as part of "determining reasonable work standards"—the Court does not need to interpret the CBAs to decide if Defendants complied with BIPA's requirements. This is so even though the unions may be Plaintiff's "legally authorized representatives" under Section 15(b)(3) for purposes of signing the required release. The Court does not need to interpret the CBA to determine if the release was signed or not.

The CBAs are only tangentially related to this dispute, if at all. As the U.S. Supreme Court stated in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985), "[N]ot every dispute

[3] Defendants attached the CBA in effect between May 1, 2017 and April 30, 2020. The relevant CBA would be the one in effect when Plaintiff began work at Lincoln Park on December 27, 2012. Even if Defendants had attached the correct CBA, though, Defendants' preemption argument fails for the other reasons described herein.

concerning employment, or *tangentially involving* a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law." (emphasis added). Preemption promotes uniformity of federal labor law, but preemption is required only if resolution of the dispute is "substantially dependent" on analysis of the terms of the CBA. *Id.* at 220.

As the court in *Gelb* directed, this Court has considered the defenses as well as the claims in this case. The Court notes that Defendants have raised no defenses that require an interpretation of the CBAs. Defendants do not assert that the unions received the required BIPA disclosures or signed BIPA releases on behalf of employees. Instead, they only point out that the broad management rights provisions of the CBAs allow them to set work standards. Deciding this case does not require the Court to interpret the CBAs.

In making our holding, the Court respectfully declines to follow the nonbinding Seventh Circuit case of *Miller v. Southwest Airlines*, 926 F. 3d 898 (7th Cir. 2019) and the Northern District of Illinois cases that followed it, *Gray v. Univ. of Chi. Med. Ctr., Inc.*, No. 19-cv-04229, 2019 U.S. Dist. LEXIS 229536 (N.D. Ill. Mar. 26, 2019) and *Peatry v. Bimbo Bakeries USA, Inc.*, No. 19 C 2942, 2020 U.S. Dist. LEXIS 32577 (N.D. Ill. Feb. 26, 2020). Our case involves a motion to dismiss under Section 2-619 of the Illinois Rules of Civil Procedure, which should be granted "only if the plaintiff can prove no set of facts that would support a cause of action." *In re Chicago Flood Litigation,* 176 Ill. 2d 179, 189 (1997). Here, Plaintiff *could* prove a set of facts under which his claim was not preempted. Defendants did not meet their burden of proof on their 2-619 motion to dismiss argument based on Section 301 preemption.

CONCLUSION

Defendants' Motion to Dismiss is granted under 2-619(a)(5) and Plaintiff's Complaint is dismissed with prejudice for failure to bring suit within five years after the cause of action accrued. This is a final order disposing of all matters.

ENTERED:

Judge Pamela McLean Meyerson

Judge Pamela McLean Meyerson

JUN 10 2020

Circuit Court – 2097

STATE OF ILLINOIS
CIRCUIT COURT
SEVENTEENTH JUDICIAL CIRCUIT

DONNA R. HONZEL
Associate Judge

Winnebago County Courthouse
400 West State Street
Rockford, Illinois 61101
PHONE (815) 319-4804* FAX (815) 319-4809

March 12, 2020

David Fish
The Fish Law Firm, P.C.
200 East Fifth Ave., Ste.123
Naperville, IL 60563

Jeffrey R. Hoskins
Hinshaw & Culbertson LLP
151 North Franklin Street, Ste. 2500
Chicago, IL 60606

Marcia Smith vs. Top Die Casting Co.
2019-L-248

MEMORANDUM OF DECISION AND ORDER

Plaintiff has filed suit alleging defendant violated sections 15 (a) and (b) of the Biometric Information Privacy Act (BIPA), 740 ILCS 14/1 *et seq.* Defendant has filed a 2-619 Motion to Dismiss the complaint on the basis that defendant believes suit has been brought outside the statute of limitations. The matter has been fully briefed and argued. The court finds and orders as follows:

I. Violation of section 15(a)

740 ILCS 14/15 deals with "Retention; collection; disclosure; destruction" Section (a) states,

"A private entity in possession of biometric identifiers or biometric information must develop a written policy, made available to the public, establishing *a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied* **or within 3 years of the** individual's **last interaction with the private entity**, **whichever occurs first**. Absent a valid warrant or subpoena issued by a court of competent jurisdiction, a private entity in possession of biometric identifiers or biometric information must comply with its established retention schedule and destruction guidelines." (Emphasis added.)

The parties agree that the plaintiff began working for the defendant in August of 2017. It also appears without dispute that the plaintiff's last day on the job was February 28, 2019. Her assignment "officially" ended March 5, 2019. It also appears uncontroverted that when the

plaintiff began working for the defendant and defendant acquired her biometric information, there was no written policy in place for the retention and destruction of that data. Under the wording of the statute, and the use of the "or" connector, either there are written guidelines for permanently destroying the biometric information once the purpose for having it/using it have been satisfied or in the absence of written guidelines, destruction must take place within 3 years of the individual's last interaction with the entity. The latter applies here.

The United States Supreme Court has said, "a cause of action does not become 'complete and present' until the plaintiff can file suit and obtain relief." *Bay Area Laundry and Dry Cleaning Pension Trust Fund v Febar Corp. of California, Inc.*, 522 U.S. 192 at 193. In *Blair v Nevada Landing Partnership*, 369 Ill.App.3d 318, 323 our Second District Appellate Court stated, "Generally, in tort, a cause of action accrues and the limitations period begins to run when facts exist that authorize one party to maintain an action against another [citing *Feltmeier*, infra." At this point, only approximately 1 year after the plaintiff's last interaction with the defendant, the plaintiff's claim has not ripened as there is still a considerable time (at minimum until February 28, 2022), for the defendant to comply with the statute, regardless of what the statute of limitations is.

Defendant's motion to dismiss is granted as it pertains to paragraph 47 as well as any other paragraphs alleging a violation of section 15(a).

II. Violation of section 15(b)

740 ILCS 14/15(b) states, "No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, **unless it first**:

(1) informs the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;

(2) informs the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and

(3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative."

The plain language of the statute indicates when a claim accrues for violating this section. The offense, and thus the cause of action for the offense, occurs the first time the biometric information is collected without meeting the requirements of paragraphs (1) – (3).

The Illinois Supreme Court has said, "At this juncture, we believe it important to note what does *not* constitute a continuing tort. A continuing violation or tort is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation. See *Pavlik*, 326 Ill.App.3d at 745, 260 Ill.Dec. 331, 761 N.E.2d 175; *Bank of Ravenswood*, 307 Ill.App.3d at 167, 240 Ill.Dec. 385, 717 N.E.2d 478; *279 *Hyon*, 214 Ill.App.3d at 763, 158 Ill.Dec. 335, 574 N.E.2d 129. Thus, where there is a single overt act from which subsequent damages may flow, the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury. See *Bank of Ravenswood*, 307 Ill.App.3d at 167–68, 240 Ill.Dec. 385, 717 N.E.2d 478; *Hyon*, 214 Ill.App.3d at 763, 158

Ill.Dec. 335, 574 N.E.2d 129; *Austin v. House of Vision, Inc.*, 101 Ill.App.2d 251, 255, 243 N.E.2d 297 (1968). For example, in *Bank of Ravenswood,* the appellate court rejected the plaintiffs' contention that the defendant city's construction of a subway tunnel under the plaintiff's property constituted a continuing trespass violation. The plaintiffs' cause of action arose at the time its interest was invaded, *i.e.*, during the period of the subway's construction, and the fact that the subway was present below ground would be a continual effect from the initial violation, but not a continual violation. *Feltmeier v Feltmeier*, 207 Ill.2d 263 at 278-279." (Emphasis in original) See also *Blair,* supra at 324 -325.

In this matter, it is undisputed that the plaintiff first began using the timeclock in question in August of 2017. Plaintiff's argument that each time the plaintiff clocked in constituted an independent and separate violation is not well taken. The biometric information is collected the one time, at the beginning of the plaintiff's employment, and thereafter the original print, or coordinates from the print, are used to verify the identity of the individual clocking in. Thus, the offending act is the initial collection of the print and at that time the cause of action accrues. To hold otherwise is contrary to the plain wording of the statute and common sense as to the manner the initially collected biometric information is utilized. Additionally, as a matter of public policy, the interpretation plaintiff desires would likely force out of business – in droves - violators who without any nefarious intent installed new technology and began using it without complying with section (b) and had its employees clocking in at the start of the shift, out for lunch, in for the afternoon and out for the end of the shift. Over a period of 50 weeks (assuming a two week vacation) at $1000 for each violation it adds up to $1,000,000 *per employee* in a year's time. This would appear to be contrary to 14/5 (b) and (g) – Legislative findings; intent. It also appears to be contrary to how these time clocks purportedly work.

Given the violation occurs at the first instance of collection of biometric data that does not conform to the requirements set forth, the question becomes what the statute of limitations is given the Act's silence. Defendant argues that because BIPA clearly concerns matters of privacy as well as concerns itself with the dissemination of uniquely personal information and preventing that from occurring, the one year statute of limitations set forth in 13-201 applies, supporting its motion to dismiss.

The parties agree that the Illinois Supreme Court (in *Rosenbach v Six Flags Entm't Corp.* 2019 IL 123186) as well as other cases addressing BIPA have made it clear that BIPA involves an invasion of privacy but they disagree as to what that means. BIPA's structure is designed to prevent compromise of an individual's biometric data. Indeed, the common law right to privacy as it relates to modern technology is at the core of BIPA. The United States Supreme Court has noted that "both the common law and the literal understanding of privacy encompass the individual's control of information concerning his or her person." *U.S. Dep't of Justice v Reporters Comm.for Freedom of the Press*, 489 U.S. 749, 763. Defendant relies heavily on *Blair* and its application of 13-201's one year limitation period and the fact the Right of Publicity Act (765 ILCS 1075) involved in *Blair*, like BIPA, sets forth no statute of limitations period.

However, the Court noted in *Blair* that at common law there was a tort of appropriation of likeness, for which a plaintiff needed to set forth elements of appropriation of a person's name or likeness, without consent, done for another's commercial benefit. The statute of limitations for doing so was the one year statute set forth in 13-201. The Right to Publicity Act went into effect January 1, 1999 and completely replaced the common law tort. The legislature specifically

said it was meant to supplant the common-law. As such, the *Blair* court held the one year statute of limitations would remain applicable for the Act. BIPA is not an act which completely supplants a specific common law cause of action, so is distinguishable from the Right to Publicity Act in this regard. Additionally, *Blair* clearly involved publication as an essential element. That further distinguishes it from BIPA to the extent that publication is not a necessary element of every BIPA claim. Notably, the case at hand contains no allegation of publication.

The Second District's decision and language in *Benitez v KFC Nat. Management Co.*, 305 Ill.App.3d 1027 is informative. There, while the matter involved intrusion upon seclusion and the voyeuristic nature of the affront to privacy which is not present here, the court stated, at page 1034, "The fact that publication is not an element of intrusion upon seclusion is crucial, since the plain language of section 13-201 indicates that the one-year statute of limitations governs only libel, slander and privacy torts involving publication. (see 735 ILCS 5/13-201 (West 1994); *McDonald's Corp. v. Levine*, 108 Ill.App.3d, 737, 64 Ill.Dec. 224, 439 N.E.2d 475(1982) (even if eavesdropping claim was actually a claim for intrusion upon seclusion, the one-year statute of limitations of what is now section 13-201 would not apply…)). Accordingly, since the statute does not refer to a cause of action for intrusion upon seclusion, we decline to read the statute as such." The court went on to note two cases which disagreed with its decision and held that 13-201 applied to intrusion upon seclusion and sexual harassment cases. The court commented, at pages 1007-8, "Nonetheless, we are not persuaded by those cases, since neither case provides any explanation whatsoever of why section 13-201 applies to a cause of action for intrusion upon seclusion. Instead, we find the plain language of the statute controlling."

It is also noteworthy that inclusion upon seclusion is a relatively new, statutorily created violation of the right to privacy and it is an extension of the common law's four distinct types of privacy breaches. While BIPA claims are not claims which can be characterized as intrusion upon seclusion cases, BIPA also is a statutorily created violation of the right to privacy which extends common law privacy protections, as opposed to supplanting a common law right. For those reasons also, as well as the Second District's logic and analysis of 13-201 in *Benitez* (which this court must follow) 13-201 does not apply.

Therefore, for all the foregoing reasons, the court finds that section 5/13-205's Five year limitations period applies to BIPA violations. Given the lack of an express limitations period in the Act, and the finding 13-201 does not apply, BIPA falls into the category of "civil actions not otherwise provided for" and plaintiff has clearly brought her claim prior to August, 2022.

The defendant's motion to dismiss section (b) allegations of BIPA violations is denied.

So ordered:

Date: 3/12/2020 Enter: _____
Hon. Judge Donna Honzel