No. 128004

IN THE SUPREME COURT OF ILLINOIS

LATRINA COTHRON, ***Plaintiff-Appellee,***

v.

WHITE CASTLE SYSTEM, INC., ***Defendant-Appellant.***

Question of Law Certified by the United States District Court of Appeals for the Seventh Circuit, Case No. 20-3202

Question of Law ACCEPTED on December 23, 2021 under Supreme Court Rule 20

On appeal from the United States District Court for the Northern District of Illinois under 28 U.S.C. § 1292(b), Case No. 19 CV 00382
The Honorable Judge John J. Tharp, Judge Presiding

BRIEF OF *AMICUS CURIAE* ILLINOIS MANUFACTURERS' ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, ILLINOIS HEALTH AND HOSPITAL ASSOCIATION, ILLINOIS RETAIL MERCHANTS ASSOCIATION, CHEMICAL INDUSTRY COUNCIL OF ILLINOIS, ILLINOIS TRUCKNG ASSOCIATION, MID-WEST TRUCKERS ASSOCIATION AND CHICAGOLAND CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT-APPELLANT WHITE CASTLE SYSTEMS, INC.

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POINTS AND AUTHORITIES

I. IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Illinois Manufacturers' Association ("IMA"), the National Association of Manufacturers ("NAM"), the Illinois Health and Hospital Association ("IHA"), the Illinois Retail Merchants Association ("IRMA"), the Chemical Industry Council of Illinois ("CICI"), the Illinois Trucking Association ("ITA"), Mid-West Truckers' Association ("MTA"), and the Chicagoland Chamber of Commerce (collectively the "Associations"), trade associations which represent the interests of thousands of Illinois businesses, join together as *amicus curiae* to submit this brief in support of Appellant-Defendant White Castle Systems, Inc. The Associations' members include thousands of Illinois employers providing employment for more than 2.9 million employees. *See* Motion for Leave to File a Brief of *Amicus Curiae* in Support of Defendant-Appellant. These Illinois businesses are justifiably concerned about the prospect that this Court will interpret the Illinois Biometric Information Privacy Act, 740 ILCS 14 *et seq.* ("BIPA"), in such a way that would expose them to liability totaling millions -- if not billions -- of dollars and threaten their very existence.

This is not hyperbole. The United States District Court for the Northern District of Illinois (the "District Court") acknowledged that an interpretation of BIPA to allow for a "per-scan" theory of accrual and recovery of statutory

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[1] All parties have consented to the filing of this brief. No party's counsel authored any part of the brief or contributed money that was intended to fund the preparation or submission of this brief.

liquidated damages on a "per scan" basis could lead to "crippling" damages awards. *See Cothron v. White Castle System, Inc.*, 477 F. Supp. 3d 723, 733 (N.D. Ill. Aug. 7, 2020). Particularly when considered against the backdrop of the unprecedented challenges presented by COVID-19, these types of catastrophic damages would prove to be the death knell for countless Illinois businesses, many of which are already struggling with staffing shortages and financial insecurity caused by the pandemic. In turn, this would have a devastating impact on Illinois employees who could find themselves out of work. This cannot be the result the legislature intended.

The question presented in this matter regarding when claims under Sections 15(b) and 15(d) of BIPA accrue is inextricably linked to BIPA's damages provisions in Section 20 of the Act, which provides that "[a] prevailing party *may recover for each violation*" of BIPA: (1) liquidated damages of $1,000 or actual damages for a negligent violation of the Act, (2) liquidated damages of $5,000 or actual damages for an intentional or reckless violation of the Act, (3) reasonable attorneys' fees and cost, and (4) injunctive relief. 735 ILCS 14/20 (emphasis added). However, the statutory interpretation of BIPA advocated by plaintiff-appellee Latrina Cothron would lead to the possibility of ruinous liability for Illinois businesses as a result of alleged violations of the statute even where there has been absolutely no assertion by Cothron – or by any other plaintiff in the more than 1,450 BIPA class action lawsuits which have been filed since 2017 -- that her biometric information has been hacked, breached, or compromised, or that she has

suffered any tangible harm. The Associations therefore urge this Court to reject an interpretation of BIPA that would lead to an "absurd" result that was clearly not intended by the Illinois General Assembly.

This case presents important and recurring questions regarding when claims accrue under BIPA, as well as the potential damages that may flow from such accrual. All of the Associations have members that have been and continue to be sued for alleged violations of BIPA even where, like White Castle, they have taken steps to fully comply with the statute. Many of these lawsuits are ongoing, giving the Associations and their members a significant interest in a sensible interpretation of the statute that avoids absurd and unjust results. The Associations are uniquely positioned to inform this Court about how the answer to the questions presented for review will impact Illinois businesses, as well as the potentially devastating consequences of a "per scan" theory of accrual and statutory liquidated damages.

II. BACKGROUND

The Associations and their more than 30,000 members, which employ more than 2.9 million individuals in Illinois (approximately half of all workers in the State),[2] have a clear interest in the Court's decision in this matter. Like White Castle, many of the Associations' members use timekeeping systems and other forms of biometric technology that require employees to scan their fingers, hands,

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[2] *See* https://www.bls.gov/oes/2020/may/oes_il.htm#31-0000 (last visited Mar. 2, 2022).

or faces to record their hours worked, gain physical access to restricted spaces (including, for example, accessing controlled substances in healthcare settings), and to access computer or point-of-sale systems.[3] The use of biometric technology provides numerous benefits to both employers and employees. Systems that include biometric functions are more accurate, easier to use, and save users from having to manage and update complicated passwords. Further, biometric technology can prevent "buddy punching" in the workplace, ensure that employees are correctly paid for all hours worked, safeguard confidential personal and health information, protect sensitive business and financial data, reduce retail theft, and prevent unauthorized access to controlled substances in the workplace.

BIPA has created business costs and attendant risks that are disproportionate to the privacy protections it endeavors to provide. For example, in the context of the healthcare industry, represented here by the Illinois Health and Hospital Association, BIPA creates an administrative barrier to tracking, controlling, and overseeing controlled substance utilization through locked medicine cabinets. This not only prevents hospitals from easily deploying state-of-the-art technology and best practices to prevent drug diversion, it also poses risks

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[3] It is important to note that while a majority of BIPA lawsuits have been filed by employees against their current or former employers, primarily with respect to the use of alleged biometric time clocks, within the text of BIPA itself, "employment" is referenced only once. *See* 740 ILCS 14/10 (defining "written release" as "informed written consent or, in the context of employment, a release executed by an employee as a condition of employment").

to patients, *e.g.*, not being able to provide treatments in a timely manner because the provider cannot access the medication cabinet where they have not provided a biometric consent. These concerns have been exacerbated by the COVID-19 pandemic, both for employers in the healthcare industry and businesses in other sectors. For instance, it has been difficult for Illinois hospitals to quickly onboard staff (including large numbers of temporary employees) and enable them to access medicine cabinets quickly due to BIPA compliance concerns.[4] The Associations have found that, by and large, when their members have become aware of the BIPA's statutory requirements, they have taken prompt, reasonable steps to ensure compliance and safeguard biometric data by either obtaining knowing and voluntary employee consent to the collection of their alleged biometric information, using time clocks that require consent to be given on the device itself, or discontinuing use of biometric technology altogether, thereby achieving the "preventative and deterrent purposes" of the BIPA. *See Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶ 37. However, like White Castle, even when employers

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[4] The recent decision of the Illinois Appellate Court for the First Judicial District in *Mosby v. Ingalls Mem. Hosp., et al.*, 2022 IL App (1st) 200822, in which the Appellate Court held that a hospital's use of finger-scanning technology to secure medication lockers does not fall within BIPA's healthcare exclusion for "information collected, used, or stored for healthcare treatment, payment, or operations under the federal Health Insurance Portability and Accountability Act of 1996," will only make it more difficult for healthcare providers to provide high-quality patient care and prevent improper access to or diversion of controlled substances.

have taken such reasonable steps to ensure such compliance, they are still being forced to defend against hundreds of BIPA class action lawsuits.

At issue before this Court is whether claims under Section 15(b) and 15(d) of BIPA "accrue each time a private entity scans a person's biometric identifier and each time a private entity transmits such a scan to a third party, respectively, or only upon the first scan and first transmission." *Cothron v. White Castle System*, 20 F.4th 1156, 1165 (7th Cir. 2021). The ramifications of this Court's decision reverberate well beyond the narrow interests of the individual parties in this case. Currently, Illinois businesses are facing a deluge of BIPA litigation. In fact, more than 1,450 putative class action lawsuits alleging violations of BIPA have been filed in state and federal courts since 2017, with approximately 700 of those cases currently pending. Many of those lawsuits have been filed by former employees whose alleged biometric data was permanently deleted and destroyed when their employment ended, thereby eliminating the possibility that such data could be the subject of a data breach or misuse by a bad actor. Moreover, upon information and belief, in the 14 years since the BIPA was enacted, there has not been a single case in which the plaintiff has alleged that biometric data was compromised or misused, or that a plaintiff was the subject of identity theft as a result of a security breach involving his or her biometric identifiers or biometric information. Thus,

the purpose of BIPA, to encourage the responsible use and handling of biometric data to prevent identity theft, has largely been accomplished.[5]

Despite the fact that not a single plaintiff has alleged any actual harm as a result of misuse, theft or misappropriation of his or her data, BIPA settlements to date have been eye-popping due to the sheer number of individuals involved and plaintiffs' attorneys' fees and costs. In fact, as we have seen, the primary beneficiaries of these settlements are plaintiffs' counsel, who routinely seek between 30 and 40 percent of the total settlement amount as attorneys' fees. In fact, based upon publicly available data, the Associations believe that the attorneys' fees awarded to plaintiffs' attorneys as a result of BIPA settlements to date exceed $191 million. By comparison, the average payment to individual class members has been $877. Even the named plaintiffs in those settlements have only received average incentive award payments of just over $7,300. Such a wide gulf between individual relief and shocking fee awards demonstrates that BIPA litigation is no more than a windfall for the plaintiffs' bar, who file copycat complaints and then reap significant financial gains even where there has been no tangible harm alleged and, instead only a purported violation based upon a

[5] In the event that an individual's biometric data is ever actually compromised or misused, there are mechanisms in BIPA to redress any attendant harm. First, an individual can bring a claim under Section 15(e) of BIPA, which requires entities in possession of biometric identifiers or biometric information to reasonably safeguard such data. 735 ILCS 14/15(e). Second, an individual can seek actual damages under Section 20 of BIPA.

hypothetical future risk to an individual's privacy rights, which has never come to fruition.

III. ARGUMENT

A. BIPA IS A REMEDIAL STATUTE.

Illinois enacted BIPA in 2008 to address emerging biometric technology. At the time BIPA was enacted, the General Assembly acknowledged that "[t]he full ramifications of biometric technology are not fully known," and sought to regulate the "collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and biometric information." 735 ILCS 14/5(f), (g). BIPA does not seek to bar or discourage companies from using biometric technology. Rather, as this Court noted, the General Assembly tried "to head off…problems *before* they occur" by "imposing safeguards to ensure that individuals' and customers' privacy rights in their biometric identifiers and biometric information and properly honored and protected *to begin with, before they are or can be compromised.*" *Rosenbach,* 2019 IL 123186, at ¶ 36 (emphasis added); *see also Bryant v. Compass Grp. USA, Inc.,* 958 F.3d 617, 626 (7th Cir. 2020) ("The text of the statute demonstrates that its purpose is to ensure that consumers understand, *before* providing their biometric data, how that information will be used, who will have access to it, and for how long it will be retained") (emphasis added). Thus, the operative period of time is "before." In fact, the word "before" appears in this Court's decision in *Rosenbach* six times. This is because "[w]hen a private entity fails to adhere to the statutory procedures [in BIPA]….the right of the individual to maintain [his or]

her biometric privacy vanishes into thin air" and "[t]he precise harm the Illinois legislature sought to prevent is then realized." *Rosenbach,* 2019 IL 123186, at ¶ 34. At that time, this Court has held that an individual is "aggrieved" under BIPA and can maintain a private right of action under Section 20 of the Act. *Id.*

This Court has consistently instructed that a statute should be read as a whole and not in isolation. *Lakewood Nursing & Rehab. Ctr., LLC v. Department of Public Health*, 2019 IL 124019, at ¶ 17 ("Because the statute is viewed as a whole, words and phrases must be construed in light of other relevant statutory provisions and not in isolation."). It therefore stands to reason that just like there is only one period of time "before" an individual is aggrieved by an alleged violation of BIPA, there can only be one "after." This is true because once an individual loses the right to maintain control of his or her privacy interest, it can never be regained. *See Fox v. Dakkota Integrated Sys., LLC,* 980 F.3d 1146, 1155 (7th Cir. 2020) (noting that "once compromised," biometric information is "compromised forever"). For this reason, claims under BIPA can only accrue once, upon either the first use of biometric technology or the first transmission of biometric data.

The General Assembly did not intend for BIPA to be punitive. Rather, BIPA is remedial in nature, intended to provide incentives for entities "to conform to the law and prevent problems before they occur and cannot be undone." *Rosenbach,* 2019 IL 123186, at ¶ 37; *see also Burlinski v. Top Golf USA Inc.,* 2020 U.S. Dist. LEXIS 161371, at *21 (N.D. Ill. Sept. 3, 2020) (noting that BIPA is remedial in nature and

the goal of the statute "is to set up a regulatory framework to protect biometric privacy"), *citing Meegan v. NFI Indus., Inc.,* 2020 U.S. Dist. LEXIS 99131, at *4 (N.D. Ill. June 4, 2020) (describing BIPA as "a remedial statute"). The District Court's decision in this case -- in which it speculated that the legislature may have "sought to impose harsh sanctions on Illinois businesses" and held that it was not "the role of a court – particularly a federal court" to "avoid a construction [of the statute] that may penalize violations severely" -- is contrary to the purpose of the statute articulated by this Court in *Rosenbach,* namely, to encourage compliance and prevent the "compromise[] or misuse[]" of biometric data.

B. THE REMEDIAL PURPOSE OF BIPA IS REALIZED BY ALLOWING A PRIVATE RIGHT OF ACTION AND AVAILABILITY OF INJUNCTIVE RELIEF.

The private right of action under BIPA sets it apart from any other biometric privacy statute in the country. If the goal of the statute is prevention and deterrence, that goal is achieved by allowing individuals to bring claims seeking injunctive relief, as well as attorneys' fees and costs incurred in obtaining such relief. This would have the effect of preventing the very harm BIPA was intended to prevent from being realized and is consistent with this Court's ruling in *Rosenbach.* 2019 IL 123186, at ¶ 37 ("To require individuals to wait until they have sustained some compensable injury beyond violation of their statutory rights before they may seek recourse . . .would be completely antithetical to the Act's preventative and deterrent purposes."). Indeed, the threat of litigation alone has proven effective in incentivizing Illinois businesses to comply with the statute.

As discussed above, BIPA was enacted not to bar use of biometrics, but to ensure that individuals are provided notice and the opportunity to provide informed consent before their biometric data is collected. *See Bryant,* 958 F.3d at 626 (noting that "the informed-consent regime laid out in section 15(b) is the heart of BIPA"). The legislature recognized that biometrics provide the promise of "streamlined financial transactions and security screenings." 740 ILCS 14/5. In the context of time clocks, a typical employee could use the clock four times a day or more if scanning in and out at the beginning and end of the day, and for meals and other breaks. If biometric technology is used for computer access or access to a secured location on a jobsite, the number of scans a day could be significantly higher. In light of this reality, the legislature could not have intended each scan to be a separate violation of the statute. The only reasonable interpretation of a law focused on ensuring notice and consent is that a violation occurs when biometric identifiers or biometric information is first collected or obtained. "In determining legislative intent, a court may consider not only the language of the statute but also the reason and necessity for the law, the problems sought to be remedied, the purpose to be achieved, and the consequences of construing the statute one way or another." *Lakewood Nursing & Rehab. Ctr., LLC*, 2019 IL 124019, at ¶ 17.

In light of the remedial purposes of BIPA, any damages resulting from alleged violations of the statute should encourage compliance, but not be punitive in nature. *See Rosenbach,* 2019 IL 123186, at ¶ 37 (noting that the damages scheme under BIPA was intended to incentivize entities "to conform to the law and

prevent problems before they occur and cannot be undone"). Courts have expressed concern about the consequence of easily multiplied statutory damages in the absence of any showing of actual harm. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1271 (11th Cir. 2004) ("here defendants are being sued for statutory damages for unintentional acts under a strict liability standard, however, courts take a harder look at whether a defendant deserves to be subject to potentially immense liability"); *Azoiani v. Love's Travel Stops & Country Stores, Inc.*, No. EDCV 07-90 ODW (OPx), 2007 U.S. Dist. LEXIS 96159, at *13 (C.D. Cal. Dec. 18, 2007) (refusing to certify proposed class where "Plaintiff 'does not seek to quantify or recover actual damages in this case'" and "the statutory recovery of $ 100 to $ 1000 per violation would result in a class recovery between $ 423 million and $ 4 billion"); *Najarian v. Avis Rent a Car System*, No. CV 07-588-RGK (Ex), 2007 U.S. Dist. LEXIS 59932, at *14 (C.D. Cal. June 11, 2007) ("potential statutory damages would be particularly excessive here, since Plaintiff alleges no actual injury on behalf of himself or any Class Member, admits he has suffered no actual damages, and expert analysis shows that it is impossible for there to be any injury"); *Legge v. Nextel Communs., Inc.*, No. CV 02-8676 DSF (VBKx), 2004 U.S. Dist. LEXIS 30333, at *54 (C.D. Cal. June 25, 2004) ("Financial impact on a defendant, while not grounds to deny a motion [for class certification], is certainly a consideration 'when based on a disproportionality of a damage award that has little relation to the harm actually suffered by the class, and on the due process concerns attended upon such an impact'"); *In re Trans Union Corp. Privacy Litigation*, 211 F.R.D. 328, 351 (N.D. Ill.

2002) ("consideration of the financial impact is proper when based on the disproportionality of a damage award that has little relation to the harm actually suffered by the class, and on the due process concerns attended upon such an impact"); *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y. 1972) ("the proposed recovery of $100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act").

C. INTERPRETING BIPA TO ALLOW A "PER-SCAN" THEORY OF ACCRUAL OR LIABILITY WOULD RESULT IN EXPONENTIALLY LARGE DAMAGES AWARDS AND CREATE ABSURD AND UNJUST RESULTS.

An interpretation of BIPA which allows for a "per-scan" theory of accrual or liability would lead to absurd and unjust results that could bankrupt Illinois businesses and cause thousands of Illinois employees to be unemployed. It would also be antithetical to the purpose of the statute, which is to promote the adoption of commonsense data privacy practices, which in turn will minimize the risk that biometric information could be improperly accessed or used. In fact, a "per-scan" interpretation of accrual and recovery would incentivize employees to *avoid* taking any actions which would encourage compliance, instead continuing to repeatedly use biometric technology with the goal of maximizing a potential award of statutory liquidated damages.

Under a "per-scan" interpretation of BIPA, even small businesses could face ruinous, multi-million-dollar liability. Because the longest potential statute of limitations for claims under BIPA is five years, employers with high rates of employee turnover face the prospect of devastating damages awards. Turnover tends to be particularly high among hourly workers, who are most likely to use a biometric time clock. In fact, employers in the retail industry in Illinois (which accounts for approximately twenty percent of the State's workforce), had average annual turnover rates of 58 percent pre-pandemic. In 2020, that number jumped to 68 percent. If BIPA is interpreted to mean that a new claim accrues with each scan of a finger (or hand, face, retina, etc.) and that each scan is a separate "violation" of the Act for which statutory liquidated damages may be awarded, the damages imposed on Illinois businesses would unquestionably be absurd and unjust. This could not have been what the legislature intended. *See Lakewood Nursing & Rehab. Ctr., LLC*, 2019 IL 124019, at ¶ 17 ("we must presume that the legislature did not intend to enact a statute that leads to absurdity, inconvenience, or injustice.").

Even if, as the District Court posited, the threat of "substantial potential liability" is "one of the principal means the Illinois legislature adopted to achieve BIPA's objectives of protecting biometric information," a threat of potential damages in the amount of $1,000 per person, plus attorneys' fees and costs, is

substantial and more than sufficient[6] to ensure compliance with the statute.[7] If an employee scans his or her finger (or hand, face, retina, etc.) on a time clock four times per day -- once at the beginning and end of each day, and again to "clock-in" and "clock-out" for one break -- over the course of a year, a single employee would have scanned 1,000 times.[8] If a new claim accrues each time the employee scans his or her finger (or hand, face, retina, etc.) on the system, and the employee can recover a separate award of statutory liquidated damages for each scan, the potential damages for a single employee over the course of a year would total $1 million, which is more than 17 times the average annual earnings for Illinois employees.[9] *See Smith v. Top Die Casting Co.,* No. 2019-L-248, slip op. at 3 (Cir. Ct. Winnebago Cty. March 12, 2020) (noting that a potential award of $1,000,000 per employee in a year's time "would appear to be contrary to 14/5 (b) and (g) – Legislative findings; intent [of BIPA]" and "contrary to how these time clocks

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[6] Even an award of $1,000 per person has the potential to financially cripple businesses, particularly those with high turnover rates and/or a large number of employees.

[7] The Associations do not concede that each individual who proves a violation of BIPA is automatically entitled to damages of $1,000. As the Illinois Appellate Court for the First Judicial District recently noted in *Watson v. Legacy Healthcare Fin. Servs.,* 2021 IL App (1st) 210279, at fn. 4, "[BIPA] introduces a list of possible damages with the statement that this list constitutes what a 'prevailing party *may* recover.'" (Emphasis in original.) Such damages are discretionary and not guaranteed even if a violation is established.

[8] This assumes 5 days of work per week and 50 weeks of work per year.

[9] *See* U.S. Bureau of Labor Statistics, May 2020 State Occupational Employment and Wage Estimates for Illinois, at https://www.bls.gov/oes/2020/may/oes_il.htm#31-0000 (last visited March 2, 2022).

purportedly work"). Under a possible five-year statute of limitations, the damages for that same employee would total $5 million. Under such a "per-scan" interpretation, a small business of 50 employees which has a turnover rate of 30 percent annually would employ a total of 110 people over a five year period.[10] If each of the company's current and former employees were to recover $1,000 in statutory liquidated damages, that would lead to a potential award of statutory liquidated damages in the amount of $110,000, plus attorneys' fees and costs, a substantial sum for a small business. However, if this Court were to adopt a "per-scan" theory of accrual and damages, that same small business would be facing statutory liquidated damages of $110 million.[11] Such a result would be absurd, unjust, and punitive, and would have the practical effect of driving Illinois companies out of business and leading to rampant unemployment across the State.

Under a "per-scan" theory of recovery, the potential damages for employers of various sizes under various potential statutes of limitations would be as follows:

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[10] The Associations do not concede that a five-year statute of limitations applies to claims under BIPA. This Court is separately considering the issue of whether a one-year or five-year statute of limitations applies to claims under BIPA in *Tims v. Black Horse Carriers,* Inc., Case No. 127801. However, it is undisputed that the longest potentially relevant statute of limitations is five years.

[11] Assuming that each of its employees "clock-in" and "clock-out" four times per day, five days a week, 50 weeks per year.

Number of Employees	**One-Year Statute of Limitations**	**Two Year Statute of Limitations**	**Five Year Statute of Limitations**
50 employees	$50 million	$100 million	$250 million
100 employees	$100 million	$200 million	$500 million
500 employees	$500 million	$1 billion	$2.5 billion
1,000 employees	$1 billion	$2 billion	$5 billion
2,500 employees	$2.5 billion	$5 billion	$12.5 billion

Such an outcome cannot possibly be the legislature's intent, and this Court should not interpret the statute in a way causes illogical or unjust results. *See Nelson v. Artley*, 2015 IL 118058, ¶ 27 ("In construing a statute, we presume that the legislature did not intend absurd, inconvenient, or unjust results, and we will not, absent the clearest reasons, interpret a law in a way that would yield such results.") As the Circuit Court of Winnebago County held in *Smith*:

> [A]s a matter of public policy, the interpretation plaintiff desires [that each time he clocked in constituted an independent and separation violation of BIPA] 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 the afternoon and out for the end of the shift.

No. 2019-L-248, slip op. at 3; *see also Robertson v. Hostmark Hospitality Group, Inc.*, No. 18-CH-5194, slip op. at 5 (Cir. Ct. Cook Cty. May 29, 2020) (rejecting plaintiff's claim that each collection or dissemination of his biometric information constitutes a separate violation of BIPA, finding that such argument "is contrary to the

unambiguous language of the statute and taken to its logical conclusion would inexorably lead to an absurd result").

A "per-scan" theory of liability would be wildly disproportionate to any alleged harm (if any at all) and would create business costs that bear no relation to the protections the statute was intended to provide. In *Rosenbach,* this Court noted that "whatever expenses a business might incur to meet the law's requirements are likely to be *insignificant* compared to the substantial and irreversible harm that could result of biometric identifiers and information are not properly safeguarded." ¶ 37 (emphasis added). However, damages akin to those described above under a "per-scan" theory of liability, are hardly insignificant. Rather, they are crippling. The Associations urge this Court to reject such an interpretation of the statute, which would cause crippling potential liability for Illinois employers.

IV. CONCLUSION

The U.S. Chamber Institute for Legal Reform has described BIPA as "a prime example of a misdirected law that has led to more litigation abuse than consumer protection."[12] BIPA lawsuits themselves have "provided little benefit to consumers [or employees] and failed to remedy concrete harms, while the law has punished businesses operating in good faith and inevitably deterred them from adopting biometric based technology that will benefit businesses and consumers alike." *Id*. BIPA, through its private right of action, allows for

[12]*See* https://instituteforlegalreform.com/wp-content/uploads/2021/10/ILR-BIPA-Briefly-FINAL.pdf (last visited March 2, 2022).

potentially uncapped awards of statutory liquidated damages and unlimited attorneys' fees. Even if it is determined that claims accrue only once, upon the first scan and first transmission of biometric data, and that individuals may recover $1,000 in statutory liquidated damages, such an interpretation still poses the threat of substantial potential liability. In fact, BIPA already has had and continues to have a devastating financial impact on Illinois businesses. The potential exposure under a "per-scan" interpretation of accrual and liquidated damages awards available under BIPA, even in light of the majority of businesses which have taken steps to comply with the statute, is even more astronomical, with attorneys being awarded disproportionately huge sums relative to the nominal amounts recovered by individuals. Such an interpretation of the damages scheme would be punitive in nature and is unnecessary to achieve the remedial purpose of BIPA.

The Associations maintain that, in light of the lack of procedures in place to protect Illinois businesses which have attempted in good faith to comply with BIPA, the only commonsense interpretation of the statute is to hold that claims accrue only once, upon the first scan and first transmission. Failure to so hold would create an unjust and unintended interpretation of BIPA and thwart its designated purpose of encouraging companies to comply with the statute and take reasonable steps to safeguard biometric data before it can be improperly accessed or misused. In addition, a contrary holding would likely bankrupt an immeasurable number of employers and put thousands of employees out of work at a time Illinoisians continue to struggle with the effects of a global pandemic.

For all of these reasons, this Court should answer the certified question by holding that claims under Sections 15(b) and 15(d) of BIPA accrue only once, upon the first scan and first transmission of biometric data.

Dated:March 3, 2022

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 341

The undersigned hereby certifies that this Brief complies with the form and length requirements of Supreme Court Rules 341 (a) and (b). The length of this brief, excluding the pages or words contained in Rule 341(d) cover, the Rule 341 (h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service and the appendix, is 20 pages.

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