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No. 128004

IN THE SUPREME COURT OF ILLINOIS

LATRINA COTHRON,

Plaintiff-Appellee,

v.

WHITE CASTLE SYSTEM, INC.,

Defendant-Appellant.

On Certified Question from the
United States Court of Appeals for the Seventh Circuit (No. 20-3202).

There Heard on Appeal from the United States District Court for the
Northern District of Illinois (No. 19-0382),
The Honorable John J. Tharp Jr., Judge Presiding.

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF RETAIL LITIGATION CENTER, INC., RESTAURANT LAW CENTER, AND NATIONAL RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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The Retail Litigation Center, Inc., the Restaurant Law Center, and the National Retail Federation (collectively, "proposed *amici*") respectfully move, pursuant to Illinois Supreme Court Rules 345 and 361, for leave to submit the attached brief of *amici curiae* in support of the position of Defendant-Appellant. Counsel for proposed *amici* has conferred with counsel for the parties, and neither party opposes this motion. In support of this motion, proposed *amici* state the following:

STANDARD FOR GRANTING LEAVE TO FILE *AMICUS* BRIEFS

1. Pursuant to Illinois Supreme Court Rule 345, proposed *amici* state their interest and explain how the proposed brief of proposed *amici* will assist this Court. Ill. Sup. Ct. Rule 345. The brief will provide this Court with "ideas, arguments, or insights helpful to resolution of the case that were not addressed by the litigants themselves." *Kinkel v. Cingular Wireless, L.L.C.*, No. 100925, 2006 WL 8458036, at *1 (Ill. Jan. 11, 2006) (citing *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (chambers opinion by Posner, J.)).

INTEREST OF PROPOSED *AMICI CURIAE*

2. Proposed *amicus* 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 across the United States, 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 well over 150 cases. Its *amicus* briefs have been favorably cited by multiple courts, including the U.S. 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, 542–43 (2013).

3. Proposed *amicus* the Restaurant Law Center ("Law Center") is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. 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 individuals 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 Law Center provides courts—including this Court—with perspectives on legal issues that have the potential to significantly impact its members and their industry. *See, e.g.*, *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶ 16, 129 N.E.3d 1197, 1202 (2019). The 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).

4. Proposed *amicus* the National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. NRF's membership includes retailers of all sizes, formats, and channels of distribution, as well as restaurants and industry partners from the United States and more than forty-five countries abroad. Retail is the nation's largest private-sector employer, contributing $3.9 trillion to annual GDP and supporting one in four U.S. jobs. For over a century, NRF has been a voice for every retailer and every retail job, communicating the impact retail has on local communities and global economies. NRF's *amicus* briefs have been cited favorably by multiple courts. *See, e.g.*, *Constellation Brands, U.S. Operations, Inc. v. NLRB*, 842 F.3d 784, 791 n.20 (2d Cir. 2016).

5. This case is a putative class action brought under the Illinois Biometric Information Privacy Act ("BIPA") against Defendant in connection with the use of a biometric finger-scanner timekeeping system to track its employees' hours of work. On December 20, 2021, the Seventh Circuit certified to this Court the following question:

> Do section 15(b) and 15(d) claims 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 Sys., Inc., 20 F.4th 1156, 1167 (7th Cir. 2021).

6. The proposed *amici* and their members have a significant interest in how this Court determines claims accrue under BIPA. Some of proposed *amici*'s members have used employee biometric timekeeping and security

systems to ensure accurate wage payments to employees, reduce operating costs, increase productivity, prevent time theft and unlawful "buddy punching," and secure confidential company and employee information, among other things. Employees—who knowingly and voluntarily provide their biometric information—also benefit from the increased efficiencies, accurate recordkeeping, improved pay systems, and enhanced security that flow from the use of these systems.

7. But even as employers and employees alike benefit from the use of this highly secure and effective technology, restaurants and retailers are increasingly finding themselves prime targets for abusive lawsuits alleging technical violations of BIPA. This Court's decision will directly affect the number, scope, and potential consequences of BIPA lawsuits filed against proposed *amici*'s members. A decision from this Court that realigns BIPA with the statute's remedial goals is crucial. Such a ruling will ensure BIPA's fidelity to its goals through the continued availability of meaningful penalties while likewise ensuring that businesses operating in Illinois, including proposed *amici's* members, do not collapse under the weight of aggregate damages exposure for inadvertent, technical violations of the statute.

THE BRIEF OF PROPOSED *AMICI* WILL ASSIST THIS COURT

8. The proposed *amici* respectfully submit that their brief will assist this Court by providing the perspective of their respective members. The brief of proposed *amici* encourages this Court to rule—consistent with the statutory

language, common sense, due process, and BIPA's underlying purpose—that claims under Sections 15(b) and 15(d) accrue in their entirety when a biometric data point is first scanned or transmitted. There are no discrete "per scan" injuries that would give rise to or justify cumulative and uncontrolled statutory damages. Nor is there any "continuing violation" that would revive claims that fall squarely outside the applicable statute of limitations. Rather, a BIPA violation is complete upon the initial scan or transmission without the requisite consent. To rule otherwise would dramatically expand BIPA's reach and engender absurd results that raise significant due process concerns. Defendant's approach would maintain BIPA's force and promote the prompt remediation of claims, while also protecting the interests of employees and good-faith businesses alike.

9. In enacting BIPA, the Illinois General Assembly sought to balance the benefits and "promise" of biometric technology with "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." *Rosenbach*, 2019 IL 123186, ¶ 35, 129 N.E.3d at 1206. To this end, BIPA's aim "is to try to head off such problems *before they occur*." *Id.* ¶ 36, 129 N.E.3d at 1206 (emphasis added). A first-scan interpretation of accrual best serves this purpose by encouraging claimants to act quickly to seek redress and enjoin ongoing violations.

10. 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 curative action when issues arise. Its liquidated damages and injunctive relief provisions are intended to serve that corrective function. BIPA was not designed as a mechanism to expose businesses taking good faith measures to enhance the security of their employees' information to extraordinary damages—particularly where no one was harmed. Nor was BIPA designed to be a vehicle for entrepreneurial litigants to leverage windfall statutory damages exposure to extract massive settlements. Adopting Plaintiff's interpretation of the statute would have just such an impact.

11. The adoption of the commonsense approach offered by Defendant, and advocated for by the proposed *amici*, would, consistent with the statute's language and remedial purpose, maintain the force and effect of BIPA, promote the prompt adjudication of claims, and protect the interests of employees and good-faith businesses alike. Accordingly, the attached brief will assist this Court in deciding the question certified by the Seventh Circuit.

12. Counsel for proposed *amici* has conferred with counsel for the parties, and neither party opposes this motion.

CONCLUSION

For the foregoing reasons, the undersigned proposed *amici* have a strong interest in ensuring the proper application of the laws of this State regarding

the accrual of the statute of limitations for BIPA claims, and respectfully request leave to file the attached brief to assist this Court in deciding the certified question before it.

Respectfully submitted,

/s/ Anneliese Wermuth

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BRIEF FOR RETAIL LITIGATION CENTER, INC., RESTAURANT LAW CENTER, AND NATIONAL RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

The Retail Litigation Center, Inc., the Restaurant Law Center, and the National Retail Federation respectfully submit this brief as *amici curiae* in support of Defendant-Appellant.

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 across the United States, 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 well over 150 cases. Its *amicus* briefs have been favorably cited by multiple courts, including the U.S. 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, 542–43 (2013).

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Through regular *amicus* participation, the RLC, Law Center, and NRF (collectively, "*Amici*") provide courts with perspectives on issues that impact their industries and the customers and employees they serve. This is one such case. *Amici* and their members have a significant interest in how this Court determines claims accrue under Sections 15(b) and 15(d) of the Illinois Biometric Information Privacy Act ("BIPA").

Some of *Amici*'s members have used employee biometric timekeeping and security systems to ensure accurate wage payments to employees, reduce operating costs, increase productivity, prevent time theft and unlawful "buddy punching," and secure confidential company and employee information, among other things. Employees—who knowingly and voluntarily provide their biometric information—also 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, restaurants and retailers are increasingly finding themselves prime targets for abusive lawsuits alleging technical violations of BIPA.

This Court's decision 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 curative action when issues arise. Its

liquidated damages and injunctive relief provisions are intended to serve that corrective function. BIPA was not designed as a mechanism to expose businesses taking good faith measures to enhance the security of their employees' information to extraordinary damages—particularly where no one was harmed. Nor was BIPA designed to be a vehicle for entrepreneurial litigants to leverage windfall statutory damages exposure to extract massive settlements.

And yet several court decisions have disregarded the remedial aspects of BIPA's purpose, thereby creating an untenable litigation environment for companies of all sizes and scope. A decision from this Court that realigns BIPA with the statute's remedial goals is crucial. Such a ruling will ensure BIPA's fidelity to its goals through the continued availability of meaningful penalties while likewise ensuring that businesses operating in Illinois do not collapse under the weight of aggregate damages exposure for inadvertent, technical violations of the statute.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Illinois General Assembly long ago understood the "promise" of biometric technology to benefit Illinois residents and businesses by, among other things, "streamlin[ing] financial transactions and security screenings." 740 ILCS 14/5(a). Unique biometric information, such as a fingerprint, enables Illinois businesses to verify an individual's identity quickly and accurately, benefiting both businesses and the consumers and employees that rely on

them. The technology is faster, more reliable, and more secure than conventional identification and security measures.

Many Illinois businesses, including some restaurants and retailers, have recognized the advantages of user-friendly biometric technology and realized its "promise" to the benefit of employees, employers, and customers alike. For example, with full transparency to their employees, some restaurants and retailers have installed biometric timekeeping to protect employee information, manage access to facilities and files, simplify employee time tracking and payroll, and safeguard sensitive data. Among other benefits, biometric recordkeeping of all hours (and minutes) has increased the accuracy of wage payments by ensuring employees are correctly paid for time worked.

The Illinois General Assembly crafted BIPA both to foster the development of new technology and to protect sensitive biometric information and identifiers. *See* 740 ILCS 14/5(g). Toward this latter end, BIPA includes a private right of action designed to promote the responsible use and handling of biometric data and to prompt timely remediation of violations. *See* 740 ILCS 14/20; *Rosenbach*, 2019 IL 123186, ¶ 36, 129 N.E.3d at 1206–07 (describing the statute's intent to prevent and deter violations). BIPA's private right of action allows an individual who has been "aggrieved" by a violation of the statute to bring a claim for injunctive relief, as well as for monetary damages and attorneys' fees and costs. Negligent BIPA violations are subject to the greater of actual damages or liquidated damages of $1,000; reckless or intentional

BIPA violations are subject to liquidated damages of $5,000. *See* 740 ILCS 14/20(1)–(4). BIPA does not provide for criminal penalties. *See id.* Nor does it contemplate that good-faith violators should be forced out of business or otherwise lose the right to operate in Illinois. *See id.*

In light of BIPA's "preventative and deterrent purposes," this Court held in *Rosenbach* that a BIPA plaintiff need not prove *any* actual damage to have standing to bring suit under the statute, thereby ensuring that BIPA would be enforced. *See Rosenbach*, 2019 IL 123186, ¶¶ 37, 40, 129 N.E.3d at 1207.[1] Although this Court surely did not intend to thwart the statute's technology-promotion and remedial purposes, *Rosenbach* has been followed by a surge of threatened and filed class claims alleging no-harm technical violations that has slowed the adoption of beneficial technology and threatened to devastate businesses. Indeed, almost as many actions asserting BIPA claims were filed in the five months immediately following *Rosenbach* than had been filed in the preceding decade combined. And these filings have only increased. More than 900 BIPA cases were filed in the first nine months of 2021.[2] Today, Illinois

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[1] *Amici* respectfully submit that the inclusion of the term "aggrieved" in BIPA should require the demonstration of actual injury consistent with the interpretation of that same term in other statutory frameworks across the country. This Court's decision in *Rosenbach* prompted an unprecedented wave of no-injury putative class action filings in the Illinois state and federal courts. *See infra* Section II.B.

[2] Megan L. Brown et al., *A Bad Match: Illinois and the Biometric Information Privacy Act*, Institute for Legal Reform (Oct. 2021) at 5, https://instituteforlegalreform.com/wp-content/uploads/2021/10/ILR-BIPA-Briefly-FINAL.pdf.

state and federal courts are inundated with these no-harm actions—most of which target small Illinois companies.[3]

In this case, the Northern District of Illinois had to determine when a BIPA claim accrues so that it could identify the applicable statute of limitations period. The district court held that *each* separate finger scan constitutes a separate violation of Section 15(b), and that each attendant transmission constitutes a separate violation of Section 15(d). *Cothron v. White Castle Sys., Inc.* (*Cothron I*), 477 F. Supp. 3d 723, 733–34 (N.D. Ill. 2020). In so doing, the district court transformed BIPA into a tool for private plaintiffs' attorneys to profit at the expense of Illinois businesses, employees, and customers. The district court adopted this interpretation despite the court's acknowledgement that it could lead to "absurd" results. *Id.* at 733.

On appeal, the Seventh Circuit recognized that, if affirmed, the district court's order would result in "staggering damages awards" against businesses that have implemented biometric timekeeping in good faith. *Cothron v. White Castle Sys., Inc.* (*Cothron II*), 20 F.4th 1156, 1165 (7th Cir. 2021). The Seventh Circuit further recognized that, while the issue of damages was not expressly before it, the statute inextricably intertwines damages and claim accrual, and that an affirmance could expose businesses to "crippling financial liability." *Id.*

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[3] *See* 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-smallbusinesses/6944810002/.

Faced with these important and novel issues of state law, the Seventh Circuit certified the following question to this Court:

> Do section 15(b) and 15(d) claims 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?

Id. at 1167.

Amici respectfully encourage this Court to rule—consistent with the statutory language, common sense, due process, and BIPA's underlying purpose—that claims under Sections 15(b) and 15(d) accrue in their entirety when a biometric data point is first scanned or transmitted. There are no discrete "per scan" injuries that would give rise to or justify cumulative and uncontrolled statutory damages. Nor is there any "continuing violation" that would revive claims that fall outside the applicable statute of limitations. Rather, a BIPA violation is complete upon the initial scan or transmission without the requisite consent. To rule otherwise would dramatically expand BIPA's reach and engender results that raise significant due process concerns. In contrast and yet consistent with the statute's language and purpose, Defendant's approach would maintain BIPA's force and promote the prompt remediation of claims, while also protecting the interests of employees and good-faith businesses alike.

ARGUMENT

I. A BIPA Claim Is Complete Upon the First Scan or Transmission, as Mandated by BIPA's Plain Language and the Purpose Behind Its Enactment.

This Court has repeatedly observed that, "[w]hen interpreting a statute, this court's primary objective is to ascertain and give effect to the intent of the legislature." *City of Chicago v. City of Kankakee*, 2019 IL 122878, ¶ 28, 131 N.E.3d 112, 119 (2019) (quoting *J & J Ventures Gaming, LLC v. Wild, Inc.*, 2016 IL 119870, ¶ 25, 67 N.E.3d 243, 251 (2016)). "[T]he court may consider the reason for the law, the problems sought to be remedied, the purposes to be achieved, and the consequences of construing the statute in one way or another." *Id.*

As evidenced by BIPA's plain language, an injury under the statute accrues when biometric information *is first* scanned or transmitted without adequate consent or disclosures. As this Court recently summarized, "[BIPA] mandates that, *before obtaining an individual's fingerprint*, a private entity must" provide certain disclosures. *McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511, ¶ 21, --- N.E. 2nd --- (2022) (emphasis added). "The entity must also obtain a signed 'written release' from an individual *before collecting* her biometric identifier or biometric information." *Id.* (emphasis added); *see also* 740 ILCS 14/15(b) ("No private entity may collect . . . biometric information, *unless it first*" provides requisite disclosures and "receives a written release." (emphasis added)). "BIPA also requires a private entity to obtain consent *before* disclosing or disseminating an individual's biometric

identifier to a third party." *Symphony Bronzeville*, 2022 IL 126511, ¶ 22 (emphasis added); *see also* 740 ILCS 14/15(d)(1). Once a person's unique identifier is scanned or transmitted without the requisite consent, the violation is complete. As the Seventh Circuit recognized, this language is "consistent with White Castle's proposed first-time-only accrual rule." *Cothron II*, 20 F.4th at 1163; *see also id.* at 1165 (finding Defendant's theory had a "plausible hook in the statutory text").

This interpretation makes sense. As this Court explained in *Rosenbach*, BIPA protects the "right to privacy in and control over" one's biometric data. 2019 IL 123186, ¶ 33, 129 N.E.3d at 1206. Hence, *Rosenbach* held that a mere technical violation of one of BIPA's requirements is itself sufficient to support a cause of action for statutory damages even if no actual injury resulted from the alleged violation. *Id.* Using this logic, the right to privacy and control is fully invaded and the individual can bring suit in the instant the biometric data is scanned or transmitted without proper consent. *Id.*; *see also Symphony Bronzeville*, 2022 IL 126511, ¶ 43 ("McDonald's claim seeks redress for the lost opportunity 'to say no by withholding consent.'" (quoting *Rosenbach*, 2019 IL 123186, ¶ 34, 129 N.E.3d at 1206)).

As the injury is complete upon the first violative scan or transmission, a "one-and-done theory [of accrual] makes sense." *Cothron II*, 20 F.4th at 1165. And as this Court has held, a cause of action for an alleged statutory privacy violation (like an alleged BIPA violation) accrues when a plaintiff's privacy

interest is first invaded. *Blair v. Nev. Landing P'ship*, 369 Ill. App. 3d 318, 323, 859 N.E.2d 1188, 1192 (2006). An "aggrieved" person is not entitled to "wait for someone to draw him or her a road map. At that time he or she must investigate whether a legal cause of action exists." *Nelson v. Jain*, 526 F. Supp. 1154, 1157 (N.D. Ill. 1981). "[W]here 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." *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 279, 798 N.E.2d 75, 85 (2003).

A first-scan interpretation of BIPA is also consistent with the statute's purpose—namely, "prevent[ion] and deterren[ce]." *Rosenbach*, 2019 IL 123186, ¶ 37, 129 N.E.3d at 1207. In enacting BIPA, the Illinois General Assembly sought to balance the benefits and "promise" of biometric technology with "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.* ¶ 35, 129 N.E.3d at 1206. To this end, BIPA's aim "is to try to head off such problems *before they occur*." *Id.* ¶ 36, 129 N.E.3d at 1206 (emphasis added). A first-scan theory of accrual best serves this purpose by encouraging claimants to act quickly to seek redress and enjoin ongoing violations. Illinois residents are best served by claimants surfacing issues immediately, rather than delaying to allow statutory damages and attorneys' fees to accrue.

Plaintiff argued before the Seventh Circuit that Defendant's first-scan interpretation should be rejected because, "[o]nce a private entity has violated the Act, it would have little incentive to course correct and comply if subsequent violations carry no legal consequence." *Cothron II*, 20 F.4th at 1165. But Plaintiff ignores the fact that she can seek and obtain statutory relief without establishing any actual injury. The risk of aggregate statutory damages that businesses face in no-injury putative class actions under BIPA (either $1,000 or $5,000 per class member) presents meaningful incentives to encourage already compliance-oriented businesses like *Amici*'s members to comply with the statute.[4] In addition, as Justice Burke recently noted, "any risk of future injury is alleviated by the availability of permanent injunctive relief in the underlying action." *Symphony Bronzeville*, 2022 IL 126511, ¶ 57 (Burke, J., concurring). A plaintiff can enjoin future violations of BIPA by bringing suit promptly. *See* 740 ILCS 14/20.

In this case, Plaintiff alleges that Defendant violated BIPA when it scanned her fingerprint using a biometric time clock without first obtaining

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[4] The aggregate exposure businesses face in such no-injury class actions, along with the accompanying threat of litigation costs and windfall attorneys' fees, have destroyed businesses. Some companies, including restaurants and retailers, choose to enter into extortionate settlements rather than face the risk of cumulative statutory damages, regardless of the merits. This "*in terrorem*" character of no-injury, statutory class actions is well recognized. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."); *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1276 (11th Cir. 2019).

her requisite consent. The alleged BIPA violation occurred and was complete at the time of that first scan. This interpretation will accomplish BIPA's prevention and deterrence goals by encouraging parties to bring claims promptly to businesses' attention so that any violations may be timely remediated. Respectfully, this Court should affirm the decisions of numerous courts in this state that have held that BIPA claims accrue when defendants fail to "first obtain [plaintiff's] written consent before collecting his biometric data." *Robertson v. Hostmark Hosp. Grp., Inc.*, No. 2018-CH-05194, slip op. at 4 (Ill. Cir. Ct. Cook Cnty. May 29, 2020) (A-4) (adopting first-scan interpretation of BIPA); *see also, e.g.*, *Smith v. Top Die Casting Co.*, 2019-L-248, slip op. at 3 (Ill. Cir. Ct. Winnebago Cnty. Mar. 12, 2020) (A-13) (same).

II. The "Per Scan" Theory of Liability Is Inconsistent with BIPA's Purpose and Basic Canons of Statutory Interpretation, and Would Cause Constitutional Problems.

A. The Intent Behind BIPA Is to Promote, Not Hinder, the Proper Use of Biometric Technology.

From finger scans to unlock computers and eye scans to access airport security, the use of biometric technology is becoming more prevalent in everyday life, including business operations. Consider the workday of a hypothetical employee named Allie, 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 happy young couple in her section. Allie 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. Allie, again, scans her finger to input that order. Throughout her shift, Allie repeats this process multiple times. Each time she enters a drink, appetizer, entrée, or dessert order into the system, Allie 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, Allie scans her finger again.

As a career server, Allie 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 Allie's employer gave her a choice of using a passcode or biometric time clock, she elected to use the finger-scan process after reviewing and signing the disclosure forms her employer gave her. Finger scanning—which merely compares Allie's fingerprint to a record collected on her first day—enables her to spend less time at the computer terminal and provide better customer service, which she has seen translate into greater tips. When there is a lull in her day, Allie 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 95 times, including one final scan to clock out at the end of the day.

In a typical week, Allie 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. If a "per scan" theory of liability under BIPA were adopted, in just one month, Allie's employer could potentially be liable to

Allie alone for $2 million in liquidated damages for a negligent violation.[5] Allie could attempt to assert a claim if, for example, she alleged that the language in the disclosure she signed did not meet the technical requirements of BIPA, or that additional disclosures and consents were somehow required before 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 results are staggering. If the average restaurant chain has 70 employees at each location, and a particular restaurant chain has 600 locations in Illinois, the potential damages would be approximately *$84 billion* in a single month for an alleged negligent violation.[6] Such a result is patently absurd and inconsistent with the statute's purpose.

Even under Defendant's first-scan interpretation, businesses using biometric technology would still be subject to substantial aggregate damages. Assuming the same restaurant chain were accused of a BIPA violation, under a first-scan interpretation of the statute the company would still face $42

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[5] For an alleged intentional violation, Allie's employer could potentially be liable to Allie alone for $10 million in liquidated damages in just one month (2,000 scans per month x $5,000 per intentional violation = $10,000,000).

[6] 2,000 scans per month x 70 employees x 600 restaurants x $1,000 per negligent violation = $84,000,000,000. And if this restaurant chain were accused of *intentionally* violating the statute, the potential damages would be approximately *$420 billion* in a single month (2,000 scans per month x 70 employees x 600 restaurants x $5,000 per intentional violation = $420,000,000,000).

million in potential liability for an *unintentional* violation of BIPA[7] and up to $210 million in potential liability for an *intentional* violation of BIPA[8]—the definition of which is yet unsettled. Attorneys' fees and potential injunctive relief would also be available.

And it's not just Illinois restaurants that use biometric technology and are thus at grave risk from a "per scan" theory of liability. Daycare centers use finger scans of parents, guardians, and caretakers who pick up children. Schools use biometric tools to aid in remote learning. Transportation companies use biometrics to monitor driver wakefulness and keep roads safe. Retailers, hospitals, banks, laboratories, and hazardous material storage sites use biometric technology to secure their facilities and to protect sensitive health, employee, and financial information. Each of these situations and many more have generated putative class actions under BIPA.[9]

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[7] 70 employees x 600 restaurants x $1,000 per negligent violation = $42,000,000.

[8] 70 employees x 600 restaurants x $5,000 per intentional violation = $210,000,000.

[9] *See, e.g.*, Alexander H. Southwell 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/; Ryan Blaney et al., *Litigation Breeding Ground: Illinois' Biometric Information Privacy Act*, Nat'l L. Rev. (Mar. 18, 2021), https://www.natlawreview.com/article/litigation-breeding-ground-illinois-biometric-information-privacy-act; Gregory Abrams et al., *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; Hannah Schaller et al., *BIPA Litigation in 2021: Where We've Been & Where We're Headed*, ZwillGenBlog (Aug. 18, 2021), https://www.zwillgen.com/litigation/bipa-litigation-2021/; Jason C. Gavejian,

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 to the careful collection, use, storage, and destruction of biometric data. Despite their best efforts, and sometimes because of conflicting interpretations of BIPA, even responsible businesses operating in good faith can commit technical violations that subject them to substantial aggregate damages. These risks are not hypothetical but reflect the actual experiences of companies based in and doing business in Illinois. Respectfully, adoption by this Court of a "per scan" theory of liability would exponentially exacerbate these risks.

A series of BIPA decisions has created a minefield of litigation perils in Illinois and has made this state an outlier in terms of risk for national businesses. 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 when rolling out important new technology systems.[10] Both

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COVID-19 Screening Program Can Lead to Litigation Concerning Biometric Information, BIPA, Nat. L. Rev. (Oct. 15, 2020), https://www.natlawreview.com/article/covid-19-screening-program-can-lead-to-litigation-concerning-biometric-information; Erica Gunderson, *The Implications of Six Flags Biometrics Ruling on Silicon Valley*, WTTW (Jan. 29, 2019), https://news.wttw.com/2019/01/29/implications-six-flags-biometrics-ruling-silicon-valley.

[10] *See* Jake Holland, *As Biometric Lawsuits Pile Up, Companies Eye Adoption With Care*, Bloomberg Law (Feb. 9, 2022), https://www.bloomberglaw.com/bloomberglawnews/privacy-and-data-security/BNA%200000017ed4e8de63a7fffde92af10000.

scenarios would hurt employees and companies. Employees would be forced to use less efficient or less secure technology, 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. Companies would also face the additional administrative burdens and costs of two separate systems, processes, procedures, training, compliance tracking, and reporting.

As discussed above, the Illinois General Assembly 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. To the contrary, BIPA is a remedial statute intended to encourage compliance. *See, e.g.*, *Quarles v. Pret A Manger (USA) Ltd.*, No. 20-7179, 2021 U.S. Dist. LEXIS 79053, at *12 n.8 (N.D. Ill. Apr. 26, 2021) (predicting this Court "would hold that BIPA is a remedial statute"); *Burlinski v. Top Golf USA, Inc.*, No. 19-6700, 2020 U.S. Dist. LEXIS 161371, at *21–22 (N.D. Ill. Sept. 3, 2020) (discussing BIPA's "remedial scheme" (quoting *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."))). 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. But, if adopted by this Court, a "per scan" theory of liability would do just that.

B. A "Per Scan" Theory of Liability Would Promote Protracted Litigation Instead of Prompt Remedial Action.

Not only would a "per scan" theory of liability hinder innovation, it would promote delayed (and often meritless) litigation by permitting uncapped cumulative statutory damages (further aggregated in the class action context) that threaten extraordinary penalties on employers operating in good faith in Illinois. This punitive approach would be the antithesis to BIPA's goals of "prevent[ion] and deterren[ce]." *Rosenbach*, 2019 IL 123186, ¶ 37, 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.

Such a construction of BIPA would also prompt a further expansion of opportunistic class action litigation. The increase in class action filings in Illinois federal and state courts following this Court's January 2019 *Rosenbach* decision is instructive. In the ten *years* before the decision, the plaintiffs' bar filed 173 BIPA cases; in just five *months* after the *Rosenbach* decision, 151 BIPA class actions were filed.[11] By October 2019, over 300 BIPA actions were

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[11] Gerald L. Maatman, Jr. et al., *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-trend.

pending in Illinois state courts.[12] These BIPA filings have continued unabated, with an average of more than 100 BIPA cases filed *per month* between January and September 2021.[13] And the increased demand on judicial resources has begun to manifest: in 2021 at least 89 state and federal court rulings referenced BIPA—a four-fold increase from 2019.[14]

Litigation in this space is expected to grow given the increased use of contactless and remote technology during the pandemic. Over the past two years:

- 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;[15]

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[12] 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.

[13] Brown, *supra* note 2.

[14] Kristin L. Bryan et al., *2021 Year in Review: Biometric and AI Litigation*, 12 Nat'l L. Rev. 45 (Jan. 5, 2022), https://www.natlawreview.com/article/2021-year-review-biometric-and-ai-litigation; *see also* Tiffany Cheung et al., *Privacy Litigation 2021 Year in Review: Biometric Information Privacy Act (BIPA)*, Morrison & Foerster (Jan. 11, 2022) (finding more BIPA decisions were published in 2021 than 2020, and expecting even more will be published in 2022), https://www.mofo.com/resources/insights/220107-biometric-information-privacy-act.html.

[15] Southwell, *supra* note 9 ("The COVID-19 pandemic also introduced new types of BIPA litigation associated with health screenings and remote work."); Blaney, *supra* note 9 ("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;[16] and
- Nursing homes, hospitals, the Salvation Army, and universities have also been targeted.[17]

BIPA's threat of unchecked aggregate damages has forced many businesses to settle even meritless claims, often for tens of millions of dollars.[18] Illinois's small businesses, often the hardest hit, have been coerced into extraordinarily large settlements when faced with the prospect of insolvency absent settlement.[19] This trend of sizeable settlements "persisted throughout 2020"[20] and "saw an uptick in 2021."[21]

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16 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 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/.

17 Barbic, *supra* note 3 (identifying BIPA litigation targets); Abrams, *supra* note 9 ("[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.").

18 Bryan, *supra* note 14; Cheung, *supra* note 14; Blaney, *supra* note 9.

19 Barbic, *supra* note 3 ("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)).

20 Southwell, *supra* note 9.

21 Cheung, *supra* note 14; *see also* Schaller, *supra* note 9.

Plaintiff's interpretation of the statute will only drive up settlement demands and create windfalls for plaintiffs' attorneys. This Court need look no further than the terms of a recent $50,000,000 settlement involving McDonald's. In that case, class members will receive either $375 or $190, but class counsel may seek up to $18,500,000 in attorneys' fees. Pls.' Unopposed Mot. Prelim. Approval at 12, 14, 17, *Lark v. McDonald's USA, LLC*, Nos. 17-L-559, 20-L-0891 (Ill. Cir. Ct. St. Clair. Cnty. Nov. 16, 2021) (A-26, A-28, A-31).

In holding that a BIPA plaintiff need not prove actual damage to have standing to bring suit, this Court ensured the statute would be enforced. *See Rosenbach*, 2019 IL 123186, ¶ 40, 129 N.E.3d at 1207. Unfortunately, the plaintiffs' bar has abused that standard to target well-intentioned businesses in an effort to extort *in terrorem* settlements. The increase in BIPA litigation since *Rosenbach* will seem small in comparison to the number of lawsuits that will be filed if this Court adopts a "per scan" theory of liability. *Amici* do not believe that the Illinois General Assembly sought to punish businesses acting in good faith, overburden the courts, or impede the development of innovative technologies when it enacted BIPA. Nor do *Amici* believe that this Court intended such consequences through its ruling in *Rosenbach*. This Court certainly should not create those consequences here.

C. A "Per Scan" Interpretation of BIPA Would Lead to Absurd Results and Should Be Rejected.

Illinois law disfavors statutory interpretations that lead to "absurd, inconvenient, or unjust" results. *People v. Raymer*, 2015 IL App (5th) 130255,

¶ 9, 28 N.E.3d 907, 911 (2015) ("In construing a statute, a court presumes that the legislature did not intend to create an absurd, inconvenient, or unjust result."); *Wade v. City of N. Chi. Police Pension Bd.*, 226 Ill. 2d 485, 510, 877 N.E.2d 1101, 1116 (2007) ("When a literal interpretation of a statutory term would lead to consequences that the legislature could not have contemplated and surely did not intend, this court will give the statutory language a reasonable interpretation." (citing *In re Marriage of Eltrevoog*, 92 Ill. 2d 66, 70–71, 440 N.E.2d 840, 842 (1982))); *Harshman v. DePhillips*, 218 Ill. 2d 482, 501, 844 N.E.2d 941, 953 (2006) ("However, when interpreting a statute, we must presume the legislature did not intend to produce an absurd or unjust result." (citing *Andrews v. Kowa Printing Corp.*, 217 Ill. 2d 101, 107–08, 838 N.E.2d 894, 899 (2005))).

Construing BIPA to impose liquidated damages absent injury on a "per scan" basis would lead to absurd results that are contrary to the statute's legislative intent. For example, the theory will discourage the adoption of biometric technology and innovation because of a fear that a technical statutory violation could subject a business to devastating liability. Given the ever-changing and ever-improving technology and the evolving legal landscape, compliance with BIPA's requirements has become a moving target. And despite an employer's good-faith efforts, technical violations might still occur. Many Illinois employers—including restaurants and retailers—are beginning to forego the use of biometric technology, to the detriment of both

employer and employee, simply to avoid the *possibility* that a former employee may, after knowingly scanning her finger daily and for years, bring a meritless BIPA claim.[22] The Illinois General Assembly surely did not intend to inhibit advances in or the beneficial use of this technology.

Nor is a "per scan" interpretation consistent with BIPA's consent scheme. BIPA was designed to protect people from having their information scanned or transmitted without their consent. Hence, as discussed above, "[BIPA] mandates that, *before obtaining an individual's fingerprint*, a private entity must" provide certain disclosures and "obtain a signed 'written release.'" *Symphony Bronzeville*, 2022 IL 126511, ¶ 21 (emphasis added). Once the business has scanned a fingerprint without the requisite consent, the right to privacy is fully invaded and the violation is complete. *See id.* ¶ 43; *Rosenbach*, 2019 IL 123186, ¶ 33, 129 N.E.3d at 1206. Additional scans of the same biometric information do not compound this statutory injury. If that were the case, businesses would be required to obtain new consent with every scan or transmission. Such a requirement would not only be "absurd," it would run counter to the statute's text and purpose.

The flaws in a "per scan" interpretation of the statute are compounded by the fact that a BIPA plaintiff need not prove any actual damages. In *Rosenbach*, this Court held that plaintiffs need not have been harmed to sue for a technical violation of the statute. *See Rosenbach*, 2019 IL 123186, ¶ 40,

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[22] *See* Holland, *supra* note 10.

129 N.E.3d at 1207. Under this framework, a "per scan" theory of liability could enable a lone 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. As plaintiffs—including Plaintiff in this action—have been forced to concede elsewhere, that would be absurd, at odds with the statutory purpose, and contrary to the "orderly administration of justice." *See Blair*, 369 Ill. App. 3d at 324, 859 N.E.2d at 1193 (explaining that "predictability and finality" of statutes of limitations "are desirable, indeed indispensable, elements of the orderly administration of justice"); *see also* Pl.-Resp't's Answer in Opp'n to Def.-Pet'r's Pet. for Permission to Appeal at 22, *White Castle Sys., Inc. v. Cothron*, No. 20-8029 (7th Cir. Oct. 29, 2020), Dkt. No. 8 (disclaiming "per scan" theory of damages as "baseless and absurd" and any claim to such recovery "wildly hyperbolic"); Pl.'s Mot. & Mem. Supp. Remand to State Ct. at 3–4, *Peatry v. Bimbo Bakeries USA, Inc.*, No. 19-2942 (N.D. Ill. May 13, 2019), Dkt. No. 14 ("Plaintiff does not and could not allege that she is entitled to statutory damages for every instance that she and others similarly-situated scan a fingerprint to clock in to or out of work," which would be "outlandish" and "defy [] reality").

While the question certified to this Court concerns the *accrual* of BIPA claims, not damages under the statute, the issues are necessarily intertwined. As the Seventh Circuit recognized:

> Cothron responds that the calculation of damages is separate from the question of claim accrual. True, but she does not explain how alternative theories of calculating damages might be reconciled with the text of section 20 [if a "per scan" interpretation were adopted].

Cothron II, 20 F.4th 1165. Because the "per scan" theory of accrual would result in "baseless and absurd" liability—even for businesses deploying biometric technology securely, openly, and in good faith—this Court, respectfully, should instead adopt the reasonable first-scan interpretation proposed by Defendant.

D. A "Per Scan" Interpretation of BIPA Would Yield Unconstitutional Outcomes.

Statutes should be construed to avoid due process violations. Indeed, "an interpretation under which the statute would be considered constitutional is preferable to one that would leave its constitutionality in doubt." *Oswald v. Hamer*, 2018 IL 122203, ¶ 38, 115 N.E.3d 181, 193 (2018) (quoting *Braun v. Ret. Bd. of Firemen's Annuity & Benefit Fund*, 108 Ill. 2d 119, 127, 483 N.E.2d 8, 12 (1985)) (collecting cases); *see also Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 564, 836 N.E.2d 640, 663 (2005) (Courts will avoid any construction which would raise doubts as to the statute's constitutionality.).

Interpreting BIPA to engender staggeringly high and uncapped liquidated damages exposure for a BIPA defendant, even absent harm, would

not only raise due process concerns, it would be unconstitutional. The U.S. Supreme Court's direction is clear—purely punitive damages may not be unlimited, nor may they grossly exceed the actual damages suffered by the plaintiff:

> [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 excessive or arbitrary punishments on a tortfeasor. . . . The reason is that [e]lementary 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.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416–17 (2003) (internal quotation marks and citations omitted). The U.S. Supreme Court instructed "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, 574–75 (1996)).

This Court has adopted the *Campbell* guideposts. *See Doe v. Parrillo*, 2021 IL 126577, ¶ 48, --- N.E.3d. --- (2021); *Int'l Union of Operating Eng'rs, Loc. 150 v. Lowe Excavating Co.*, 225 Ill. 2d 456, 490, 870 N.E.2d 303, 324 (2006) (applying *Campbell*, holding a punitive damages award more than eleven times the plaintiff's compensatory damages improper where defendant's

conduct was intentional but "minimally reprehensible"). This Court has also explained that a statute violates a defendant's due process rights under the Illinois Constitution when the statute is not "reasonably designed to remedy the evils which the legislature has determined to be a threat to the public health, safety and general welfare." *People v. Bradley*, 79 Ill. 2d 410, 417 (1980) (internal quotation marks and citation omitted); *see also St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919) (holding a statutory penalty which is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable" will run afoul of due process).

As discussed above, a "per scan" interpretation of BIPA, and the uncapped liquidated damages that would flow from this Court adopting such a theory, would render the remedial statute punitive in nature. The resulting penalty to Illinois businesses—including restaurants and retailers—cannot pass constitutional scrutiny.

First, even a business that engaged in reasonable, good-faith efforts to comply with BIPA could be subject to enterprise-threatening penalties under a "per scan" interpretation of the statute. A *negligent* violation of the statute will expose defendants to $1,000 "for each violation." 740 ILCS 14/20(1). As the Seventh Circuit observed:

> Because White Castle's employees scan their fingerprints frequently, perhaps even multiple times per shift, Cothron's [per scan] interpretation could yield staggering damages awards in this case and others like it. If a new claim accrues with each scan, as Cothron argues, violators face potentially crippling financial liability.

Cothron II, 20 F.4th 1165. Such a "staggering" and "crippling" penalty cannot be sustained by mere negligence. *See Lowe Excavating*, 225 Ill. 2d at 481–83, 870 N.E.2d at 319–20 (finding punitive damages award unconstitutionally disproportionate even though defendant acted with "intentional malice").

Second, exorbitant penalties could be awarded even without actual harm. 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.*, *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). As the Eleventh Circuit and others have observed, "[g]iven the '*in terrorem* character of a class action,' [] a class defined so as to improperly include uninjured class members increases the potential liability for the defendant and induces more pressure to settle the case, regardless of the merits." *Cordoba*, 942 F.3d at 1276 (quoting *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677–78 (7th Cir. 2009)).

Third, adopting an interpretation of BIPA that would create massive liability exposure for Illinois employers without the presence of actual harm would not reasonably advance BIPA's goals of encouraging the responsible use of biometric technology. Nor would it reduce the risk of biometric data being collected without the employee's knowledge, as employees in time-clock cases

acknowledge they knew that they were providing their finger or hand scans to their employers. Because a "per scan" theory of liability could impose devastating liability on employers with no countervailing benefit to employees—who already knowingly consent to providing their biometric information—adoption of that position would violate employers' due process rights. *See Bradley*, 79 Ill. 2d at 418, 403 N.E.2d at 1032 (holding statute violated due process where penalty was "not reasonably designed to remedy the evil[]" the legislature identified); *People v. Morris*, 136 Ill. 2d 157, 162, 554 N.E.2d 235, 236–37 (1990) (holding statutory penalty unconstitutional where it did not advance legislature's stated purpose in enacting statute).

Fourth, the Seventh Circuit's recent decision in *Epic Systems Corp. v. Tata Consultancy Services Ltd.* underscores the constitutional challenges attendant to the excessive penalties that a "per scan" theory of liability would generate. 980 F.3d 1117 (7th Cir. 2020), *petition for cert. filed*, No. 20-1426 (U.S. Apr. 6, 2021). In *Epic Systems*, a jury held that the defendant engaged in *intentional*, repeated wrongful conduct spanning years that caused financial harm to the plaintiff. *See id.* at 1142. Even on these facts, the Seventh Circuit found the punitive damages award—double the compensatory damages amount—exceeded the outermost limits of the due process guarantee. *See id.* at 1144. Respectfully, this Court should similarly avoid the excessive, purely punitive liquidated damages that flow from a "per scan" interpretation of BIPA, and instead adopt Defendant's first-scan interpretation.

III. The Continuing Violation Doctrine Does Not Apply to BIPA Claims.

In an effort to find middle ground, some courts have applied the "continuing violation" doctrine to toll the limitations period in BIPA actions until the plaintiff's last scan. *See McGinnis v. U.S. Cold Storage, Inc.*, No. 19-L-9, slip. op. at 4 (Ill. Cir. Ct. Will Cnty. Nov. 4, 2020), *appeal docketed*, No. 3-21-0190 (Ill. App. Ct.). As the district court recognized in this action, however, "BIPA claims do not fall within the limited purview of this exception." *Cothron I*, 477 F. Supp. 3d at 730. That is because the doctrine applies only where "[a] continuing violation or tort is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation." *Feltmeier*, 207 Ill. 2d at 278, 798 N.E.2d at 85. Any effects of an alleged BIPA violation accrue immediately upon the initial scan or transmission.

Adopting the continuing violation doctrine ignores this reality and would unjustly encourage claimants to delay asserting their BIPA claims. *See Cunningham v. Huffman*, 154 Ill. 2d 398, 405, 609 N.E.2d 321, 325 (1993) (applying doctrine in medical malpractice action where "cumulative results of continued negligence [are] the cause of the injury," such that strict application of the statute of limitations would yield "unjust results"); *Feltmeier*, 207 Ill. 2d at 282, 798 N.E.2d at 86–87 (extending doctrine to intentional infliction of emotional distress claim, as the "pattern, course and accumulation of acts" together constituted the tortious behavior (citation omitted)).

The Appellate Court's decision in *Blair* is instructive. There, the plaintiff sought to recover under the Illinois Right of Publicity Act for the alleged wrongful use of his photograph in promotional materials. 369 Ill. App. 3d at 320–21, 859 N.E.2d at 1190. Just as BIPA requires an entity to obtain consent before scanning or transmitting biometric data, 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.* at 323, 859 N.E.2d at 1192 (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 324, 859 N.E.2d at 1193. The plaintiff argued that his cause of action accrued in 2004 when his photograph was last used. *Id.* at 321, 859 N.E.2d at 1191. The 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 324, 859 N.E.2d 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. Plaintiff has alleged one overt act—fingerprint scanning or transmission of a fingerprint scan without *first* obtaining the requisite consent. Like the later publications of the plaintiff's photograph in *Blair*, any later scans or

attendant transmissions here were not separate statutory violations or an ongoing act; they were continual effects of the initial overt act.

Rather than preventing "unjust results," application of the continuing violation doctrine would permit BIPA claimants to "sit back and wait" to file their claims. *Cunningham*, 154 Ill. 2d at 405, 609 N.E.2d at 325. Such delay undercuts BIPA's objectives of "prevent[ion] and deterren[ce]." *Rosenbach*, 2019 IL 123186, ¶ 37, 129 N.E.3d at 1207. Instead, BIPA claimants should be encouraged to promptly seek redress to serve the statute's remedial purpose. Respectfully, this Court should therefore decline to apply the continuing violation doctrine to BIPA claims.

CONCLUSION

For these reasons and those set forth in the Defendant's brief, *Amici* respectfully encourage this Court to answer the Certified Question by ruling that Section 15(b) and 15(d) claims under BIPA accrue only upon the first scan or first transmission.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 34 pages and 9,203 words.

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