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

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

Pursuant to Illinois Supreme Court Rule 345(a), the Restaurant Law Center, the Retail Litigation Center, Inc., the National Retail Federation, and the Illinois Restaurant Association respectfully request leave of this Court to file a brief as *Amici Curiae* in the above-captioned matter.

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).

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 200 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).

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).

The Illinois Restaurant Association ("Restaurant Association") is a non-profit trade organization founded over one hundred years ago to promote, educate, and improve the restaurant industry in Illinois. Headquartered in Chicago, the Association has nearly 8,000 members statewide—including restaurant operators, food service professionals, suppliers, and related industry professionals—and represents the Illinois restaurant industry, which includes more than 25,000 owners and operators, and employs hundreds of thousands across the state. The Restaurant Association supports the restaurant industry by promoting local tourism, providing food service education and training programs, providing analysis on topics of the day, providing networking opportunities, hosting culinary events, and advocating for members' interests.

Through regular *amicus* participation, the Law Center, the RLC, the NRF, and the Restaurant Association (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, including this Court's February 17, 2023 decision in this matter, 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.

Proposed *Amici* respectfully submit that the attached brief will be beneficial to assist the Court in understanding the significant implications of the outcome of this case. Indeed,

this Court accepted proposed *Amici*'s brief when it first considered this issue. Proposed *Amici* thus respectfully request leave of this Court to file a brief as *Amici Curiae* in the above-captioned matter.

WHEREFORE, for the reasons stated above, Proposed *Amici* respectfully request that the Court grant leave to file the attached brief. A proposed order is attached to this Motion.

Dated: March 10, 2023

Respectfully submitted,

*/s/ Gretchen M. Wolf*_____

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

Counsel for Restaurant Law Center

Deborah R. White
(deborah.white@rila.org)
RETAIL LITIGATION CENTER, INC.
99 M Street SE, Suite 700
Washington, DC 20003
(202) 869-0200

Counsel for Retail Litigation Center, Inc.

Stephanie A. Martz
(martzs@nrf.com)
NATIONAL RETAIL FEDERATION
1101 New York Avenue NW, Suite 1200
Washington, DC 20005
(202) 783-7971

Counsel for National Retail Federation

Gretchen M. Wolf (ARDC #6278735)
(gretchen.wolf@skadden.com)
Amy Van Gelder (ARDC #6279958)
(amy.vangelder@skadden.com)
William Ridgway (ARDC #6325417)
(william.ridgway@skadden.com)
Gail E. Lee (ARDC #6318334)
(gail.lee@skadden.com)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
155 N. Wacker Drive, Suite 2700
Chicago, IL 60606
(312) 407-0700

Meredith C. Slawe
(meredith.slawe@skadden.com)
Michael W. McTigue Jr.
(michael.mctigue@skadden.com)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
One Manhattan West, 395 9th Ave
New York, NY 10001
(212) 735-3000

Counsel for Amici Curiae

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v.

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The Honorable Judge John J. Tharp, Judge Presiding

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

Angelo I. Amador
RESTAURANT LAW CENTER
2055 L Street NW, Suite 700
Washington, DC 20036

Counsel for Restaurant Law Center

Deborah R. White
RETAIL LITIGATION CENTER, INC.
99 M Street SE, Suite 700
Washington, DC 20003

Counsel for Retail Litigation Center, Inc.

Stephanie A. Martz
NATIONAL RETAIL FEDERATION
1101 New York Avenue NW, Suite 1200
Washington, DC 20005

Counsel for National Retail Federation

Gretchen M. Wolf (ARDC #6278735)
Amy Van Gelder (ARDC #6279958)
William Ridgway (ARDC #6325417)
Gail E. Lee (ARDC #6318334)
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
155 N. Wacker Drive, Suite 2700
Chicago, IL 60606

Meredith C. Slawe
Michael W. McTigue Jr.
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
One Manhattan West, 395 9th Ave
New York, NY 10001

Counsel for Amici Curiae

Dated: March 10, 2023

POINTS AND AUTHORITIES

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

The Restaurant Law Center, the Retail Litigation Center, Inc., the National Retail Federation, and the Illinois Restaurant Association respectfully submit this brief as *amici curiae* in support of Defendant-Appellant's Petition for Rehearing.

INTEREST OF *AMICI CURIAE*

This Court accepted the *amicus* brief filed by the Restaurant Law Center, the Retail Litigation Center, Inc., and the National Retail Federation (together with the Illinois Restaurant Association, "*Amici*") when it first considered the question of when claims accrue under Sections 15(b) and 15(d) of the Illinois Biometric Information Privacy Act ("BIPA") 740 ILCS 14/1 *et seq.*, recognizing the significant interests *Amici* have in the outcome of this question and the unique perspective *Amici* could provide the Court. *Amici* respectfully submit that these same interests and perspectives apply in the instant Petition for Rehearing.

PRELIMINARY STATEMENT

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). BIPA was not designed as a mechanism

to impose extraordinary damages on businesses that adopt good faith measures to enhance the security of their employees' information—particularly where no one was harmed. Nor was BIPA designed to be a vehicle for entrepreneurial litigants to leverage the exposure of windfall statutory damages to extract massive settlements.

Yet this Court's holding in *Cothron v. White Castle, Inc.* 2023 IL 128004 (the "Opinion")—that liability under BIPA accrues on a "per scan" basis—turned BIPA into just such a mechanism. The Opinion cemented an erroneous interpretation of the statute that consequently (1) raises significant constitutional due process concerns, (2) threatens the survival of businesses in Illinois, and (3) subverts the intent of the Illinois General Assembly.

Though this Court does not grant petitions for rehearing as a matter of course, it will provide "nonprevailing part[ies] with the opportunity for rehearing in order to apprise the court of points the party believes were overlooked or misapprehended . . . This rule exists so that the court can correct errors into which the court may have inadvertently fallen in deciding the case as originally presented." *Berg v. Allied Sec., Inc.*, 193 Ill. 2d 186, 191, 737 N.E.2d 160, 163 (2000) (J. Freeman, concurring).

Amici respectfully submit that the instant Petition for Rehearing falls squarely within the standard and is furthermore warranted because the implications of the Opinion are so severe. Rehearing is necessary to protect

the due process interests of potential defendants acting in good faith and to ensure that those same entities can continue to operate in Illinois and continue to contribute to the state's economy, without the threat of "annihilative liability" in violation of the intent of the Illinois General Assembly.

ARGUMENT

I. The Incorrect "Per Scan" Interpretation of Liability Under BIPA Renders the Imposition of Unconstitutionally Punitive Damages Inevitable

The Opinion incorrectly interprets BIPA to allow "per scan" liability to accrue, but failed to meaningfully engage with the constitutional implications of a "per scan" theory of liability under BIPA. *See* Opinion at ¶¶ 40, 43 (noting the potential for "harsh, unjust, absurd or unwise" and "excessive damage[s]," but failing to address the corresponding constitutional issues). This alone justifies rehearing. The Opinion makes BIPA a tool to impose disproportionate and business-ending damages, even in the absence of actual injury, contravening the due process protections guaranteed in the United States and Illinois Constitutions.

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) (citation omitted); *see also Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 564,

836 N.E.2d 640, 663 (1st Dist. 2005) (Courts will avoid any construction that would raise doubts as to the statute's constitutionality.).

The Due Process Clause prohibits "grossly excessive" punitive-damages awards because they "further[] no legitimate purpose and constitute[] an arbitrary deprivation of property." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). 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/Gore* guideposts. *See Doe v. Parrillo*, 2021 IL 126577, ¶ 48, 185 N.E.3d. 1248, 1263 (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"). A statute may also violate a defendant's due process rights under the Illinois Constitution when it 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, 403 N.E.2d 1029, 1032 (1980) (internal quotation marks and citation omitted); *see*

also St. Louis, I. M. & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919) (holding a statutory penalty that is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable" will run afoul of due process).

Here, if the Opinion was correct, the uncapped liquidated damages that would flow would render the otherwise remedial statute unconstitutionally punitive in nature because the resulting penalty to Illinois businesses—including restaurants and retailers—could not pass constitutional scrutiny under *Campbell* and its progeny.

First, a "per scan" interpretation of BIPA allows for the imposition of "crippling" damages in instances where defendants' conduct could hardly be termed "reprehensible" under the *Campbell/Gore* factors. *See e.g. Cothron v. White Castle, Inc.*, 20 F.4th 1156, 1165 (7th Cir. 2021) (noting *Cothron*'s per scan proposal would "yield staggering damages awards" and that violators would "face potentially crippling financial liability"). Indeed, even a *negligent* violation of the statute will expose defendants to $1,000 "for each violation." 740 ILCS 14/20 (1). Under this interpretation, businesses that engage in reasonable, good-faith efforts to comply with BIPA could be subject to enterprise-threatening penalties—an unconstitutional outcome. *See Epic Sys. Corp. v. Tata Consultancy Servs. Ltd.*, 980 F.3d 1117, 1142-44 (7th Cir. 2020) (finding punitive damages unconstitutional when they are disproportionate to compensatory damages, even when a defendant committed intentional,

repeated wrongful conduct for years); *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, the Opinion allows exorbitant penalties to be imposed even without any actual harm. Indeed, no published opinions involving BIPA claims by employees have involved any actual harm since the *Rosenbach v. Six Flags Entertainment Corp.* 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).

Finally, the "per scan" theory of liability is not only logically unsound as the dissent explains, it does not "remedy the evil" the legislature sought to address with BIPA. *Bradley*, 79 Ill. 2d at 418, 403 N.E.2d at 1032; *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). The General Assembly adopted BIPA to protect a "secrecy interest," namely an individual's "right to maintain biometric privacy." Opinion ¶ 53 (Overstreet, J., dissenting) (citing *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, 129 N.E.3d 1197, ¶¶ 33-34 (2019); *McDonald v. Symphony Bronzville Park, LLC*, 2022 IL 126511, 193 N.E.3d 1253, ¶ 24 (2022) , and *West Bend Mutual Life Insurance Co. v.*

Krishna Schaumburg Tan, Inc., 2021 IL 125978, 183 N.E.3d 47, ¶ 46 (2021)). Once that secrecy interest is compromised in violation of BIPA, it cannot be regained. *Id*. No new information is being collected in subsequent scans so there is no new violation to which a penalty could attach. Accruing statutory damages under a "per scan" theory thus disregards the legislature's ultimate concern and instead fosters disproportionate damages that equate to penalties and raise serious due process concerns.

The Opinion is the latest in a series of decisions that have construed BIPA in the broadest and most punitive light. *See Tims v. Black Horse Carriers, Inc.*, 2023 IL 127801, --- N.E.3d --- (2023) (interpreting BIPA to include a five-year statute of limitations period for all claims, rather than a one-year limitations period for certain claims); *McDonald*, 2022 IL 126511 (holding that work-related BIPA claims are not preempted by the Illinois Workers' Compensation Act); *Rosenbach*, 2019 IL 123186 (holding mere technical violations of BIPA sufficient for plaintiffs to bring claims under BIPA; plaintiffs need not allege an actual injury or adverse effect to qualify as an "aggrieved" person under the Act). This progression magnifies the constitutional concerns created by the Opinion. Businesses operating in good faith are now faced with a statutory scheme where an inadvertent mistake on their part, made five years previously with no harm to anyone, could make them liable for enterprise-threatening damages. This flies in the face of the

due process protections guaranteed in the United States and Illinois constitutions.

II. A "Per Scan" Interpretation of Liability Under BIPA Will Harm Illinois Companies and Employees

This Court has been willing to reconsider its earlier decisions in circumstances where the result of the prior decision would amount to "legalized extortion and a crippling of . . . commerce as we know it." *AT&T v. Vill. Of Arlington Heights*, 156 Ill. 2d 399, 409, 620 N.E.2d 1040, 1044 (1993). If left unchanged, the Opinion here would engender just such a result. *See* Opinion ¶ 61 (Overstreet, J., dissenting) ("the majority's construction of the Act could easily lead to annihilative liability for businesses").

The Illinois General Assembly 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). 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, and simplify employee time tracking and payroll. 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.

Acutely aware of the sensitive nature of the biometric information used for these purposes, *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 of the statute 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. To be clear, it is not just Illinois restaurants and retailers that might 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.[1] Adoption by this Court of a "per scan" theory of liability exponentially exacerbates these risks.

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[1] *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),

(cont'd)

Indeed, the risks BIPA poses of unchecked aggregate damages has forced many businesses to settle even meritless claims, often for tens of millions of dollars – and these cases were settled *before* this Court's Opinion.[2] Illinois's small businesses, often the hardest hit, have been coerced into extraordinarily large settlements when faced with the prospect of insolvency

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, *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.

[2] 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; Tiffany Cheung et al., *Privacy Litigation 2021 Year in Review: Biometric Information Privacy Act (BIPA),* Morrison & Foerster (Jan. 11, 2022), https://www.mofo.com/resources/insights/220107-biometric-information-privacy-act; 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.

absent settlement.[3] This trend of sizeable settlements "persisted throughout 2020"[4] and "saw an uptick in 2021."[5]

The aggregate exposure businesses face in such no-injury class actions, along with the accompanying threat of litigation costs and windfall attorneys' fees, will inevitably have a chilling effect on innovation and economic growth in Illinois. Companies concerned about potential litigation exposure for innocent mistakes may decide not to use available technology, or national and large regional companies like *Amici*'s members may choose to carve out their Illinois operations when rolling out important new technology systems, or more concerningly, choose to do business elsewhere.[6] Either scenario hurts both employees and business. If companies are compelled to use different, less effective technologies in their operations, employees would be forced to

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

[4] 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/.

[5] Cheung; *see also* Schaller.

[6] *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.

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. If companies are forced to abandon their Illinois operations in favor of other locations where they do not face bankruptcy for inadvertent mistakes, there will be fewer jobs in Illinois, negatively affecting the entire state economy. This cannot be the result the General Assembly envisioned when it enacted BIPA in 2008.

III. A "Per Scan" Interpretation of Liability Under BIPA Cannot be Squared with Legislative Intent

When called to interpret a statute, it is this Court's role to "[avoid] the construction of a statute that leads to an absurd result." Opinion ¶ 59 (Overstreet, J., dissenting). *See also 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." (citation omitted)).

The Opinion does precisely what *Wade* and its progeny proscribe: it embraces an illogical interpretation of the words in Sections 15(b) and 15(d)

without regard to common sense, creating absurd results and subverting the intent of the Illinois General Assembly. First, per scan liability would incentivize purported plaintiffs to delay bringing their claims as long as possible to maximize their potential recovery. Opinion ¶ 60 (Overstreet, J., dissenting). This perverse incentive contravenes the legislature's intent to create a remedial statute aimed at protecting biometric data and deterring violations. Second, and as discussed in more detail above, per scan liability would lead to "annihilative liability for businesses." *Id* at ¶ 61. This punitive approach is the antithesis to BIPA's goals of "prevent[ion] and deterren[ce]." *Rosenbach*, 2019 IL 123186, ¶ 37, 129 N.E.3d at 1207. 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. Third, per scan liability could result in an entity that commits a single *intentional* violation of the Act paying a mere $5,000 in damages, whereas an entity that commits multiple unintentional violations, with no identified harm, would be liable for far greater damages. Opinion. at ¶ 63.

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. This Court should not create those consequences here.

CONCLUSION

Amici respectfully encourage this Court to grant Defendant-Appellant's Petition for Rehearing and to rule—consistent with due process, common sense, 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 is no subsequent discrete "per scan" injury that would give rise to or justify cumulative and uncontrolled statutory damages. Rather, a BIPA violation is complete upon the initial scan or transmission without the requisite consent.

For these reasons and those set forth in the Defendant-Appellant's brief, *Amici* respectfully encourage this Court to grant Appellant's Petition for Rehearing and rule that Section 15(b) and 15(d) claims under BIPA accrue only upon the first scan or first transmission.

Dated: March 10, 2023

Respectfully submitted,

/s/ Gretchen M. Wolf

Gretchen M. Wolf (ARDC #6278735)
(gretchen.wolf@skadden.com)
Amy Van Gelder (ARDC #6279958)
(amy.vangelder@skadden.com)
William Ridgway (ARDC #6325417)
(william.ridgway@skadden.com)
Gail E. Lee (ARDC #6318334)
(gail.lee@skadden.com)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
155 N. Wacker Drive, Suite 2700
Chicago, IL 60606
(312) 407-0700

Meredith C. Slawe
(meredith.slawe@skadden.com)
Michael W. McTigue Jr.
(michael.mctigue@skadden.com)
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
One Manhattan West, 395 9th Ave
New York, NY 10001
(215) 735-3000

Counsel for Amici Curiae

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

Counsel for Restaurant Law Center

Deborah R. White
(deborah.white@rila.org)
RETAIL LITIGATION CENTER,
INC.
99 M Street SE, Suite 700
Washington, DC 20003
(202) 869-0200

Counsel for Retail Litigation Center, Inc.

Stephanie A. Martz
(martzs@nrf.com)
NATIONAL RETAIL FEDERATION
1101 New York Avenue NW, Suite
1200
Washington, DC 20005
(202) 783-7971

Counsel for National Retail Federation

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 14 pages and 3,109 words.

/s/ Gretchen M. Wolf

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

ORDER

Upon motion of counsel for Proposed *Amici* the Restaurant Law Center, the Retail Litigation Center, Inc., the National Retail Federation, and the Illinois Restaurant Association, and the Court being fully advised in the premises:

IT IS HEREBY ORDERED that Proposed *Amici's* motion for Leave to File a brief as *Amici Curiae* in support of Defendant-Appellant is GRANTED/DENIED.

Dated:_____

_____

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

NOTICE OF FILING AND CERTIFICATE OF SERVICE

The undersigned, an attorney, notifies counsel of record and certifies that on March 10, 2023, she caused the foregoing Motion for Leave to File Brief as *Amici Curiae*, accompanying Brief, and Proposed Order to be filed with the Supreme Court of Illinois electronically through Odyssey eFile IL, and that on that same day she caused a pdf of same to be e-mailed to the following counsel of record:

Ryan F. Stephan
James B. Zouras
Andrew C. Ficzko
Teresa M. Becvar
STEPHAN ZOURAS, LLP
100 North Riverside Plaza, Suite 2150
Chicago, Illinois 60606
312-233-1550
rstephan@stephanzouras.com
jzouras@stephanzouras.com
aficzko@stephanzouras.com
tbecvar@stephanzouras.com

Counsel for Plaintiff-Appellee

Melissa A. Siebert
Erin Bolan Hines
COZEN O'CONNOR
123 N. Wacker Dr., 18th Floor
Chicago, IL 60606
(312) 382-3100
msiebert@cozen.com
ebolanhines@cozen.com

Counsel for Defendant-Appellant

Within five days of acceptance by the Court, the undersigned also states that she will cause thirteen copies of the Brief to be mailed with postage prepaid addressed to:

Clerk's Office – Springfield
Supreme Court Building
200 E. Capitol Ave.
Springfield, IL 62701

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument, the motion for leave, and the brief are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

/s/ Gretchen M. Wolf
Gretchen M. Wolf (ARDC #6278735)
155 N. Wacker Drive, Suite 2700
Chicago, Illinois 60606
(312) 407-0700
gretchen.wolf@skadden.com

Counsel for Amici Curiae