No. 20-3202

In the United States Court of Appeals

FOR THE SEVENTH CIRCUIT

LATRINA COTHRON, individually and on behalf of those similarly situated,

Plaintiff-Respondent,

v.

WHITE CASTLE SYSTEM, INC.,

Defendant-Petitioner.

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

AMICUS CURIAE BRIEF OF LEADINGAGE ILLINOIS IN SUPPORT OF WHITE CASTLE SYSTEM, INC., AND REVERSAL

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-3202

Short Caption: Cothron v. White Castle System

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

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Attorney's Signature: s/Debra Bernard Date: 04/01/2021

Attorney's Printed Name: Debra Bernard

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

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n/a

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

LeadingAge Illinois is one of the largest and most respected associations of providers serving older adults in Illinois. LeadingAge Illinois is one of 38 state partners of LeadingAge, which represents more than 5,000 nonprofit aging service providers and other mission-minded organizations. LeadingAge Illinois advocates for quality services, promotes innovative practices, and fosters collaboration to make Illinois a better place to grow old, including for those with disabilities. LeadingAge serves the full spectrum of providers including home and community-based services, senior housing, life plan communities/continuing care retirement communities, assisted living, supportive living, and skilled nursing and/or rehabilitation centers.

LeadingAge has an interest in the outcome of this case because many of its members in Illinois that serve elderly Illinois residents use finger or hand scanning devices to efficiently and accurately pay their employees. If this Court affirms the district court's decision that the

[1] All parties have consented to the filing of this brief. A party's counsel did not author any part of the brief or contribute money that was intended to fund preparing or submitting the brief. Chubb, an insurance company, contributed money that funded preparing and submitting the brief.

Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS 14/1 *et seq.*, imposes over $1,000 of liability for every single scan of an employee's finger, LeadingAge's members will be exposed to viability-threatening liability totaling millions, if not billions, of dollars. Many members will go out of business.

LeadingAge is uniquely positioned to tell this Court about the practical consequences of BIPA. LeadingAge argues that this Court should reverse the district court's interpretation of the statute to avoid (1) a bizarre result not intended by the General Assembly and (2) constitutional problems. In its brief, LeadingAge demonstrates that affirming the district court's interpretation would bankrupt many nursing homes and care facilities across the state, affecting elderly residents and Illinois jobs. A per-scan penalty would create damage awards so disproportionate to the offense as to raise due process concerns. The General Assembly did not intend to bankrupt Illinois' nursing homes just because they used a finger-scan system to pay their employees accurately. Indeed, the risk of injury that the General Assembly intended to protect against with BIPA does not increase meaningfully with each additional scan. LeadingAge argues that it defies logic that a nursing home would have to pay more in

damages for a benign time clocking system than for a wrongful death, racial discrimination, or retaliation for reporting sexual harassment.

INTRODUCTION

The district court is the first Illinois court to hold that BIPA requires an employer to pay thousands of dollars for every time an employee scans his or her finger to clock in and out of work. This per-scan interpretation contradicts the plain language of the statute and would lead to absurd and unconstitutional results.

The district court's per-scan interpretation would bankrupt LeadingAge's members, which are Illinois businesses serving the state's elderly and most vulnerable residents. A company with only 25 employees could be exposed to $1.8 billion in liability for BIPA violations where the employees voluntarily utilized the finger-scan system for years before filing suit. These astronomical damages amounts will push LeadingAge's members out of business or irreparably harm their operations. *See infra* Part I. These damage awards raise due process concerns because they are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, I. M. & S. R. Co. v. Williams*, 251 U.S. 63, 66–67 (1919); *see infra* Part II. Under a per-scan interpretation,

BIPA would put companies out of business even when their employees did not suffer actual damages from the violations. Companies would pay more for using a finger-scan system without BIPA-compliant consent than they would for a wrongful death, for discriminating against an employee based on race, or for firing them for reporting sexual harassment.[2] Even Plaintiff Latrina Cothron disclaims a per-scan recovery and admits that the district court's per-scan interpretation is "absurd" and "bizarre" and would lead to "wildly hyperbolic" damages awards.

This Court must reverse the district court's unsupported interpretation of BIPA.

BACKGROUND

BIPA requires an Illinois employer to provide certain written information and obtain certain written consent from an employee before collecting his or her biometric information. 740 ILCS 14/15(b) ("Section 15(b)").[3] BIPA also prevents that employer from disclosing an employee's biometric information unless the person consents or other

[2] Indeed, under the district court's interpretation, employers may have obtained what they believed was BIPA-compliant consent but which did not account for the per-scan theory or was otherwise found to be lacking.
[3] This amicus brief focuses on BIPA in the employment context although BIPA also applies to private entities other than employers.

limited circumstances exist. *Id.* 14/15(d) ("Section 15(d)"). A person can recover statutory damages or actual damages, whichever is greater, from an entity that violates the statute. *Id.* 14/20. Statutory damages are $1,000 for a negligent violation and $5,000 for an intentional or reckless violation. *Id.*

Plaintiff Latrina Cothron sued her employer, White Castle System, Inc. ("White Castle"), alleging that White Castle violated BIPA Sections 15(b) and 15(d) by collecting, then "systematically and automatically" disclosing, her biometric information without adhering to BIPA's requirements. (R44, ¶¶ 80–97.)[4] Ms. Cothron alleges she "was required" to scan her finger each time she accessed her work computer and weekly paystubs starting in 2007. (R44, ¶¶ 2, 39–40, 42–44.) Ms. Cothron voluntarily consented to White Castle's finger-scan system, although the complaint alleges that White Castle's notice-and-consent process did not comply with all of BIPA's requirements. (R117 at 2.)

White Castle moved for judgment on the pleadings on the grounds that Ms. Cothron's claims are time barred because they accrued, if ever,

[4] Citations to "R__" refer to the docket entry numbers in the district court. For example, R44 refers to docket entry number 44.

in 2008, with her first scan after BIPA's enactment, and the district court denied White Castle's motion. (R120 at 7; *see also* R118 at 26; R119–R120); A12–15. The court held that an independent, actionable BIPA violation occurred, and thus accrued, each time Ms. Cothron used the finger-scan system without the appropriate notice and consent. Under the district court's "per-scan" interpretation of BIPA, a violation of Section 15(b) occurs "[e]ach time an employee scans [an employee's] fingerprint" and a violation of Section 15(d) occurs each time an employer "discloses" that scan to a third-party. A11, A13.[5] So if a third-party stores the employee's finger-scan, an employer could violate both Section 15(b) *and* Section 15(d) every time the employee scans her finger and the two scans are compared to verify her identity. *Id.*

The district court rejected White Castle's arguments that the plain language of the statute provided damages for only the *first* collection and storage of an employee's finger-scan and that any alternate interpretation would lead to "absurd results." A12–13. The court acknowledged that its per-scan interpretation created "crippling" damage awards but concluded in a single paragraph that two Illinois Supreme Court cases,

[5] By its terms, Section 15(d) does not require *written* consent.

Rosenbach and *Petersen*, bound its hands. A13–14. "In any event," the court said, its ruling would not matter since it "is unlikely to be the last word on this subject." A14. This Court can decide the question and "White Castle will have ample opportunity to explain why" the district court's interpretation leads to absurd results. *Id.*

Amicus LeadingAge joins White Castle to explain why the General Assembly did not intend Illinois businesses to go bankrupt because they had to pay millions or billions of dollars to individuals who did not suffer any actual damages.

ARGUMENT

I. The district court's interpretation of BIPA would bankrupt Illinois nursing homes and elder care facilities.

The district court's holding would bankrupt multiple elder care facilities in Illinois. Many such facilities rely on biometric time clocking systems to pay their employees quickly and accurately. These biometric systems offer advantages over older systems to both employers and employees. For example, with biometric systems, employees do not have to waste time printing and signing by hand documents to access their paystubs and computers. *See* White Castle Br. ("WC Br.") at 4.

The charts below show that, under a per-scan interpretation, a business with 100 employees could be liable for $720 million for negligent violations or $3.6 *billion* for reckless or intentional violations of Section 15(b) alone.[6] *See also* WC Br. at 44 (White Castle could owe $1 billion because the system it used to obtain employees' consent for and register them in the finger-scan system was determined to be not BIPA-compliant). If the business involves a "third-party" when comparing an employee's finger-scan to the finger-scan on file, *see* A11 n.7, and thus violations of Sections 15(b) and (d) are alleged, potential liability grows to $7.2 billion. BIPA liability could exceed a billion dollars for a business with only 25 employees. The charts provide calculations for the longest and shortest options for the BIPA statute of limitations, currently under consideration by Illinois appellate courts. *See Tims v. Black Horse Carriers, Inc.*, No. 1-20-0563 (Ill. App. Ct.).

[6] The charts assume that an employee takes four weeks of vacation a year, works five days a week, and scans his fingerprint six times a day (in and out, lunch, and one break).

Section 15(b) only - negligent				
	1 employee	**25 employees**	**100 employees**	**500 employees**
1-Year SOL	$1.44 million	$36 million	$144 million	$720 million
5-Year SOL	$7.2 million	$180 million	$720 million	$3.6 Billion
Sections 15(b) only - intentional or reckless				
	1 employee	**25 employees**	**100 employees**	**500 employees**
1-Year SOL	$7.2 million	$180 million	$720 million	$3.6 Billion
5-Year SOL	$36 million	$900 million	$3.6 Billion	$18 Billion
Sections 15(b) & 15(d) - negligent				
	1 employee	**25 employees**	**100 employees**	**500 employees**
1-Year SOL	$2.88 million	$72 million	$288 million	$1.44 Billion
5-Year SOL	$14.4 million	$360 million	$1.44 Billion	$7.2 Billion
Sections 15(b) & 15(d) - intentional or reckless				
	1 employee	**25 employees**	**100 employees**	**500 employees**
1-Year SOL	$14.4 million	$360 million	$1.44 Billion	$7.2 Billion
5-Year SOL	$72 million	$1.8 Billion	$7.2 Billion	$36 Billion

No LeadingAge Illinois member could survive a loss of hundreds of millions of dollars let alone a loss in the billions. These losses and damages amounts are not hypothetical; they are certain if the per-scan damages interpretation is upheld. And if LeadingAge's members shut down, their employees would lose their jobs and elderly Illinois residents would be left without care.

II. The General Assembly did not intend to bankrupt Illinois businesses for BIPA violations and reversal is necessary to avoid constitutional issues.

Illinois courts consider the consequences of a statute along with the plain language when determining legislative intent. "In determining legislative intent, a court may consider not only the language of the statute but also the . . . problems sought to be remedied, the purpose to be achieved, and the consequences of construing the statute one way or another." *Lakewood Nursing & Rehab. Ctr., LLC v. Dep't of Pub. Health*, 158 N.E.3d 229, 234 (Ill. 2019). Although a court will not contravene the unambiguous plain language of the statute for "hypothetical absurdities," *Petersen v. Wallach*, 764 N.E.2d 19, 24 (Ill. 2002), Illinois courts "must presume that the legislature did not intend to enact a statute that leads to absurdity, inconvenience, or injustice," *Lakewood Nursing*, 158 N.E.3d at 234; *see also Slepicka v. Ill. Dep't of Pub. Health*, 21 N.E.3d 368, 373 (Ill. 2014); *Land v. Bd. of Educ. of Chi.*, 781 N.E.2d 249, 255 (Ill. 2002).

In addition, courts must interpret statutes to avoid constitutional problems. When a serious doubt is raised about the constitutionality of a statute, a court must use an alternate construction if that alternate construction is "fairly possible." *Nielsen v. Preap*, 139 S. Ct. 954, 971 (2019).

The per-scan interpretation of BIPA raises a serious doubt about its constitutionality. The Due Process Clause, which provides that no state shall "deprive any person of . . . property[ ] without due process of law," places outer limits on the size of a civil damages award made pursuant to a statutory scheme. U.S. Const. amend. XIV, § 1; *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989) (citing *Williams*, 251 U.S. at 66–67). Due process is violated by damage awards that are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Williams*, 251 U.S. at 66–67; *United States v. Dish Network L.L.C.*, 954 F.3d 970, 979–80 (7th Cir. 2020) (citing *Williams*), *cert. dismissed*, 141 S. Ct. 729 (2021); *see Capitol Records, Inc. v. Thomas–Rasset*, 692 F.3d 899, 907 (8th Cir. 2012); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007); *Sony BMG Music Ent. v. Tenenbaum*, 719 F.3d 67, 71 (1st Cir. 2013).

As the Second Circuit said, "the potential for a devastatingly large damages award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class, may raise due process issues." *Parker v. Time Warner Ent. Co.*, 331 F.3d 13, 22 (2d Cir. 2003). "It may be that the aggregation in a class action of large numbers of statutory

damages claims potentially distorts the purposes of both statutory damages and class actions," creating "a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements." *Id.* In fact, the most important reason courts choose not to litigate a class's claims in a single forum is because the "potential damages available in a class action are grossly disproportionate to the conduct at issue." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1271 (11th Cir. 2004), *abrogated in part on other grounds by Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639 (2008). In cases where the defendants' potential liability would be "enormous and completely out of proportion to any harm suffered by the plaintiff," a court is likely to find that individual suits are the superior method of adjudication. *Id.* (internal quotation marks and citation omitted).[7]

[7] Indeed, judges have avoided due process problems by refusing to certify classes that seek "potentially annihilating" damages. *Stillmock v. Weis Markets*, 385 F. App'x 267, 279 (4th Cir. 2010) (Wilkinson, J. concurring) (stating that the procedural device "cuts against the grain of practical justice"). For example, in *Ratner v. Chemical Bank New York Trust Co.*, the court rejected class certification in a Truth in Lending Act class action when "the proposed recovery of $100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act." 54 F.R.D. 412, 416 (S.D.N.Y. 1972).

The Eighth Circuit recently held that a $1.6 billion statutory-damages award under the Telephone Consumer Protection Act violated due process. *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 962 (8th Cir. 2019). To start, the dollar amount was "shockingly large." *Id.* Also, the defendant's conduct was not egregious and the harm to the recipients of the telephone call was "not severe." *Id.* at 963; *cf. Sony BMG*, 719 F.3d at 71–72 (upholding damages award under Copyright Act because it was only $675,000 and defendant's wrongful conduct was "egregious").

Here, billion-dollar damage awards for the use of a finger scanner to timely and accurately pay employees are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *See Williams*, 251 U.S. at 66–67. Under a per-scan interpretation, BIPA would impose a "severe and oppressive" penalty because the law would bankrupt the vast majority of LeadingAge's members in Illinois. *See id.*; *see also Golan*, 930 F.3d at 962 ($1.6 billion award is severe and oppressive). The penalty is also "wholly disproportioned to the offense." *See Golan*, 930 F.3d at 962–63; *see also Sony BMG*, 719 F.3d at 71. The "offense" here is the allegation that White Castle did not comply with BIPA's notice-and-consent process to obtain its employees' biometric information

although the employees voluntarily provided that information over a period of years. Ms. Cothron does not allege that she or any other class members suffered actual damages. Nor does she allege that White Castle acted with intent to harm her or other class members.

A comparison of potential BIPA damages with the damages for other offenses also indicates that a per-scan interpretation of BIPA would make the penalty "wholly disproportioned to the offense and obviously unreasonable." *See Williams*, 251 U.S. at 66–67; *see generally BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996) (comparison between punitive damages and penalties for comparable misconduct is "indicium of excessiveness"). If this Court affirms the holding below, employers would have to pay more money to an individual employee who voluntarily uses a finger-scan device to clock in and out of work ($1.4 million to $14.4 million, as shown in the chart above) than to an employee the employer racially discriminated against or fired in retaliation for whistleblowing. Recent verdicts for racial discrimination and retaliation ranged from $900,000 to $2.5 million. *See Benson v. City of Chicago*, No. 2010L008990, 2016 WL 772400, at *1 (Ill. Cir. Ct. Feb. 10, 2016) ($2.5 million verdict for race/color discrimination); *Davis v. City of Chicago*, Nos. 1-18-2551 & 1-

19-1485, 2020 WL 1090727, at *1 (Ill. App. Ct. Jan. 31, 2020) (reducing $2.8 million verdict for whistleblower retaliation to $900,000), *appeal denied*, 147 N.E.3d 687 (Ill. 2020); *Ohlfs v. Advoc. Health & Hosps. Corp.*, No. 2013L005247, 2016 WL 6916032, at *1 (Ill. Cir. Ct. Oct. 3, 2016) ($1 million for retaliation for reporting sexual harassment).

The per-scan BIPA damages are higher than recent local *wrongful death* verdicts as well. *See, e.g.*, *Estate of Przeslica v. Rodriguez*, No. 2017-L-008646, 2020 WL 3865011 (Ill. Cir. Ct. Mar. 6, 2020) (judge-reduced verdict of $1.82 million for death of a passenger in a vehicle driven by defendant who "drove the vehicle entrusted to his care at 94 mph, lost control of the vehicle and crashed"); *Estate of Flannigan v. Platt*, No. 2018-L-000610, 2018 WL 3876743 (Ill. Cir. Ct. June 1, 2018) ($1.09 million verdict after decedent, "an adult male bar patron, died as a result of an unprovoked attack by defendant"); *Estate of Conklin v. Gilbert*, No. 2016-L-007213, 2018 WL 5778347 (Ill. Cir. Ct. Sept. 4, 2018) (judge-reduced verdict of $1.3 million for decedent doctor who died in a motorcycle accident after defendant failed to yield the right of way); *Estate of Crayton v. Univ. of Chi. Med. Ctr.*, No. 2016-L-004375, 2019 WL 3241929

(Ill. Cir. Ct. May 28, 2019) ($3 million verdict for doctor and hospital malpractice resulting in death).

In fact, Ms. Cothron herself concedes that a per-scan recovery is "obviously unreasonable." *See Williams*, 251 U.S. at 66–67; Plaintiff-Respondent's Answer in Opposition to Defendant-Petitioner's Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) at 22, *White Castle Sys., Inc. v. Cothron*, No. 20-8029 (7th Cir. Oct. 29, 2020), ECF No. 8. She says that she has "never advanced such [a] theory of damages" and that the per-scan interpretation of Sections 15(b) and 15(d) is "baseless," "absurd," and "bizarre." *See* Plaintiff-Respondent's Answer in Opposition to Defendant-Petitioner's Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) at 22, *White Castle Sys., Inc. v. Cothron*, No. 20-8029 (7th Cir. Oct. 29, 2020), ECF No. 8. She states that she should not be able to recover monetary damages for "each instance that White Castle collected, used, stored, and disseminated [her] biometric data in violation of BIPA," and such recovery would be "wildly hyperbolic." *Id.* Other plaintiffs in similar cases agree. *See* Plaintiff's Motion and Memorandum in Support of Remand to State Court at 3–4, *Peatry v. Bimbo Bakeries USA, Inc.*, No. 19-cv-02942 (N.D. Ill. May 13, 2019), ECF No. 14 (calling a per-

scan interpretation "outlandish" and stating that "[p]laintiff 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").

This Court should reverse the district court's interpretation of BIPA to avoid constitutional problems. *See Nielsen*, 139 S. Ct. at 971. As White Castle argues, interpreting BIPA to hold employers liable for each scan of an employee's fingerprint is inconsistent with the plain language of the statute. WC Br. at 19–31. At the very least, an alternate construction of the statue is "fairly possible" and should be adopted. *See Nielsen*, 139 S. Ct. at 971.

The district court relied on *Petersen* and *Rosenbach* to justify its per-scan interpretation, A14, but that reliance is misplaced. *Rosenbach* has nothing to do with a per-scan interpretation; indeed, that plaintiff scanned his finger only once. *Rosenbach v. Six Flags Ent. Corp.*, 129 N.E.3d 1197, 1201 (Ill. 2019). And *Petersen* does not support the district court's decision. 764 N.E.2d 19. The statute at issue in *Petersen* was undisputedly unambiguous and the "absurd result" that defendant put forth was purely hypothetical and not that absurd. The statute provided a six-

year limitations period for attorney malpractice claims unless the alleged injury occurred after the death of the client. *Id.* at 24. If the alleged injury occurred after the death of the client, the claim had to be brought within two years after the client's death. *Id.* at 23. The defendant "conjecture[d]" that the exception for injuries occurring after the client's death could give a hypothetical claimant less time to file suit than the original six-year statute of limitations. *Id.* at 23–24. He did not point to a single concrete example, argue that the statute was ambiguous, or make any sort of constitutional claim. The court refused to contravene the plain language of the statute for "hypothetical absurdities." *Id.* at 24.

Here, the absurd result is far from hypothetical and would occur in virtually every BIPA case even in contexts other than employment. Further, there are due process concerns and the plain language of the statute supports White Castle's interpretation. Three Illinois courts interpreted the plain language of Section 15(b) to conclude that a claim accrues *once*, "on the date an entity first denies individuals the power to control their biometric information by failing to obtain consent prior to the first collection." WC Br. at 22–23 (citing A24 (Order at 3, *Watson v. Legacy Healthcare Fin. Servs., LLC*, No. 2019-CH-03425 (Ill. Cir. Ct. June 10,

2020) ("[A]ll [of the employee's] damages flowed from that *initial act* of collecting and storing Plaintiff's handprint . . . *without first complying* with the statute." (emphasis added))); A32 (Memorandum and Order at 4, *Robertson v. Hostmark Hospitality Group, Inc.*, No. 2018-CH-05194 (Ill. Cir. Ct. May 29, 2020) (explaining a defendant's "alleged failure to first obtain" a person's "written consent *before* collecting his biometric data . . . is the essence of and gave rise to the cause of action" (emphasis added)); and A19 (Memorandum of Decision and Order at 2, *Smith v. Top Die Casting Co.*, No. 2019-L-248 (Ill. Cir. Ct. Mar. 12, 2020) ("The offense, and thus the cause of action for the offense, occurs *the first time* the biometric information is collected . . . ." (emphasis added))).

These courts specifically rejected the district court's per-scan interpretation. The "argument that each time the plaintiff clocked in constituted an independent and separate violation is not well taken." A20 (Memorandum of Decision and Order at 3, *Smith*, No. 2019-L-248); *see also* A24 (Order at 3, *Watson*, No. 2019-CH-03425); A33–34 (Memorandum and Order at 5–6, *Robertson*, No. 2018-CH-05194). "The biometric information is collected the one time, at the beginning of the plaintiff's employment, and thereafter the original print, or coordinates from the

print, are used to verify the identity of the individual clocking in." A20 (Memorandum of Decision and Order at 3, *Smith*, No. 2019-L-248). "Thus, the offending act is the initial collection of the print," and "[t]o hold otherwise is contrary to the plain wording of the statute." *Id.* And, "as a matter of public policy," the per-scan interpretation would "force out of business—in droves—violators who without any nefarious intent" started using finger-scans to clock employees in and out without complying with Section 15(b). *Id.*

At the very least, the statute is ambiguous and the canon of constitutional avoidance cuts against the district court's interpretation. *See Nielsen*, 139 S. Ct. at 971.[8]

[8] Interestingly, recent settlements for BIPA cases amount to approximately ~$1,000 per class member. *See, e.g.*, Memorandum in Support of Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement at 1, *Martinez v. Nando's Restaurant Group, Inc.*, No. 1:19-cv-07012 (N.D. Ill. Oct. 26, 2020), ECF No. 60 ("gross settlement sum of $1,000 per class member which amounts to $1,787,000 for the entire Class"); *see also* Final Approval Order, Final Judgment and Order of Dismissal with Prejudice, *Martinez*, No. 1:19-cv-07012 (N.D. Ill. Oct. 27, 2020), ECF No. 63; Preliminary Approval Order, *Johnson v. Rest Haven Illiana Christian Convalescent Home*, No. 2019 CH 1813 (Ill. Cir. Ct. Oct. 18, 2019) (preliminarily approving $3,000,000 settlement for a class of 3,352), https://providencebipasettlement.com/important-case-documents/.

Properly interpreted, BIPA would still protect Illinois residents from the misuse of their biometric information and deter Illinois employers from obtaining and disclosing that information without proper consent. BIPA exists to protect individuals' right to privacy in and control over their biometric information. As this Court said, the "concrete injury BIPA intended to protect against" is "a consumer's loss of the power and ability to make informed decisions about the collection, storage, and use of her biometric information." *Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617, 627 (7th Cir. 2020), *as amended on denial of reh'g and reh'g en banc* (June 30, 2020); *see Rosenbach*, 129 N.E.3d at 1206–07. An employee's "loss of the power and ability to make informed decisions about the collection" and use of his or her biometric information occurs during only the initial collection and storage of an employee's finger-scan. The repeated scans used to verify the employee's identity do not cause any incremental loss or injury. A nursing home that collected and stored 200 employees' fingerprints without BIPA-compliant consent would still have

to pay $200,000 or $1 million (depending on state of mind)—a meaningful amount that would act as a deterrent.[9]

Moreover, individuals can recover their "actual damages" under BIPA, so employers would have to make whole Ms. Cothron or any other Illinois employee injured by their employer's misuse of their biometric information. 740 ILCS 14/20. These costs would serve BIPA's "preventative and deterrent purposes." *Rosenbach*, 129 N.E.3d at 1207; *see generally Arianas v. LVNV Funding LLC*, 54 F. Supp. 3d 1308, 1310–11 (M.D. Fla. 2014) (holding that the maximum damages available under Florida's Consumer Collection Practices Act are $1,000 per action, not per violation). As a result, a per-scan interpretation is not necessary to vindicate the privacy right created by the Illinois General Assembly and would only serve to destroy or cripple Illinois businesses, including those serving some of Illinois' most vulnerable residents.

[9] There are several proposed legislative amendments that would change various aspects of the statute and the damages regime. *See, e.g.*, H.B. 559, 560, 602, 1764 & 3112, 102nd Gen. Assemb. (Ill. 2021); S.B. 300, 1067 & 2039, 102nd Gen. Assemb. (Ill. 2021).

CONCLUSION

This Court should reverse the district court's opinion.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following: This brief complies with the type-volume limitation of Circuit Rule 29 because this brief contains 4,569 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2016 version of Microsoft Word in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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