

No. 18-15982

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re Facebook Biometric Information Privacy Litigation

NIMESH PATEL, Individually and on Behalf of All Others Similarly Situated;
ADAM PEZEN; CARLO LICATA,
Plaintiffs-Appellees,

vs.

FACEBOOK, INC.,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California
No. 3:15-cv-03747-JD
The Honorable James Donato

MOTION TO VACATE ORDER GRANTING INTERLOCUTORY APPEAL
AND DISMISS THE APPEAL

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I. INTRODUCTION

On January 25, 2019, the Illinois Supreme Court issued its opinion in *Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186 (slip opinion attached), confirming that Facebook's proposed interpretation of the Illinois statute at issue in this case—the Biometric Information Privacy Act, 740 ILCS 14/1 *et. seq.* (“BIPA”)—is incorrect. “When interpreting state law, a federal court is bound by the decision of the highest state court.” *In re Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990). Because the Illinois Supreme Court has now resolved the principal Illinois statutory issue Facebook raised in seeking permission to appeal—as well as two other issues to which Facebook pivoted on appeal—the Order granting interlocutory appeal should be vacated and the appeal should be dismissed.¹

This Court previously granted Facebook permission to appeal the district court's grant of class certification, pursuant to Rule 23(f) of the Federal Rules of Civil Procedure. (Ninth Circuit Docket No. 18-80053, 24 (“Order”)) The Order was based on Facebook's assertion that the district court demonstrated manifest error in its determination that common issues predominate over individual ones in this case by rejecting Facebook's arguments about the meaning of BIPA's “aggrieved” provision and the statute's asserted “extraterritorial” impact.

¹ Facebook has indicated that it intends to oppose plaintiffs' Motion.

As demonstrated below, the first issue has been resolved by the Illinois Supreme Court and the remaining issue is “so insubstantial as not to justify further proceedings.” Circuit Rule 3-6. Accordingly, plaintiffs move, pursuant to Federal Rule of Appellate Procedure 27 and Circuit Rule 3-6, that this Court vacate the Order granting permission to appeal and dismiss Facebook’s appeal. *See Nickert v. Puget Sound Tug & Barge Co.*, 480 F.2d 1039, 1041 (9th Cir. 1973) (vacating grant of interlocutory appeal where order was “improvidently entered”); *Colbert v. Dymacol, Inc.*, 344 F.3d 334 (3d Cir. 2003) (dismissing previously granted 23(f) petition where question presented was not accurate).

II. ARGUMENT

Resolving the primary issue for which Facebook sought permission to appeal, the *Rosenbach* opinion confirms that the district court correctly interpreted the word “aggrieved” in the statute, obviating the need for this Court to review any of the myriad issues Facebook raises about the use of that word. Further, *Rosenbach* also resolves additional issues Facebook raised in its Opening Brief (Appellant’s Opening Brief (“AOB”)), by definitively ruling that the Illinois Legislature’s intent in passing the statute was (1) to create a concrete and actionable right and (2) to impose substantial liability on entities that violate the statute, confirming that the district court’s Article III analysis was correct and defeating Facebook’s contention that a class action is not a superior device for resolving this case. Facebook’s final

remaining contention, having to do with purported extraterritorial application of BIPA, is a common issue that cannot support exercise of Rule 23(f) discretion, particularly standing alone. Accordingly, plaintiffs respectfully submit that the Order granting Rule 23(f) permission to appeal should be vacated and the appeal should be dismissed.

A. The Illinois Supreme Court’s decision in *Rosenbach* defeats Facebook’s primary basis for seeking permissive appeal by confirming the meaning of the Illinois statute

In Facebook’s Rule 23(f) Petition, Facebook’s first of two asserted “manifest errors on fundamental questions” requiring interlocutory review—and the primary basis on which Facebook sought permissive appeal—was that “BIPA’s statutory injury requirement defeats predominance.” (Petition at 8) According to Facebook, “BIPA’s ‘aggrieved’ provision requires a showing of actual injury beyond the alleged statutory violation.” (*Id.* at 9)

The Illinois Supreme Court has now fully and decisively rejected that interpretation of BIPA. In *Rosenbach*, the Illinois Supreme Court addressed precisely that issue in connection with BIPA and held that “an individual need not allege some actual injury or adverse effect, beyond violation of his or her rights under the Act, in order to qualify as an ‘aggrieved’ person and be entitled to seek liquidated damages and injunctive relief pursuant to the Act.” 2019 IL 123186, ¶40, slip at 13.

This Court is bound by that ruling in interpreting the Illinois statute. *Kirkland*, 915 F.2d at 1238. Accordingly, the “intervening court decision ... requires” that this Court vacate the permission to appeal and “remand” to the district court. Circuit Rule 3-6(a).

In reaching its conclusion that a violation of the privacy statute, “in itself, is sufficient to support the individual’s or customer’s statutory cause of action” (*Rosenbach*, 2019 IL 123186, ¶33; slip at 11), the Illinois Supreme Court expressly relied on the analysis of the district court in this action. The Illinois Supreme Court expressly rejected the assertion that a violation of the statute was “merely ‘technical’ in nature,” explaining that “[s]uch a characterization ... misapprehends the nature of the harm our legislature is attempting to combat through this legislation.” *Id.*, ¶34; slip at 11. Relying on the district court’s analysis in this case, the Illinois Supreme Court continued: “The Act vests in individuals and customers the right to control their biometric information by requiring notice before collection and giving them the power to say no by withholding consent.” *Id.* And, quoting the district court’s analysis, the Illinois Supreme Court concluded, “[t]hese procedural protections ‘are particularly crucial in our digital world because technology now permits the wholesale collection and storage of an individual’s unique biometric identifiers—identifiers that cannot be changed if compromised or misused.’” *Id.* (quoting *Patel v. Facebook Inc.*, 290 F. Supp. 3d 948, 290 (N.D. Cal. 2018)).

The Illinois Supreme Court put an even finer point on the issue, removing any doubt about its holding as to whether consequential harm beyond the statutory violations is required. “To require individuals to wait until they have sustained some compensable injury beyond violation of their statutory rights before they may seek recourse, as defendants urge, would be completely antithetical to the Act’s preventative and deterrent purposes.” *Id.*, ¶37; slip at 12.

Rosenbach resolves the “aggrieved” issue. The primary ground on which Facebook sought permissive appeal is no longer a necessary, or even permissible, issue for this Court’s consideration. The Order granting permission to appeal should be vacated and Facebook’s appeal should be dismissed.

B. The Illinois Supreme Court’s opinion also demonstrates the baselessness of two other arguments to which Facebook pivoted after this Court granted the Rule 23(f) petition

After permission to appeal was granted, Facebook refocused its appeal on Article III standing and added a superiority assertion based on the potential for significant statutory damages. *Rosenbach* resolves both issues, negating both Facebook’s arguments as well as the need for this Court’s review of the district court’s class certification decision.

1. The Illinois Supreme Court’s opinion confirms the Legislature’s intention to define a concrete injury that establishes Article III standing in this case

Rosenbach confirms that plaintiffs have Article III standing to bring these claims for particular violations of their individual and concrete privacy rights, as the district court correctly held after applying this Court’s guidance in *Robins v. Spokeo, Inc.* (“*Spokeo III*”), 867 F.3d 1108 (9th Cir. 2017) *cert. denied*, ___ U.S. ___, 138 S. Ct. 931 (2018).

After its Petition to appeal was granted, Facebook focused most of its opening brief on the “injury in fact” prong of a standing argument, specifically the question of whether the injury alleged was sufficiently “concrete” to confer standing. (AOB 20-23) When an alleged injury is intangible, such as a privacy violation, the Supreme Court teaches that courts should determine concreteness by considering (1) “whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts” and (2) the judgment of the legislature, which is “well positioned to identify intangible harms that meet minimum Article III requirements.” *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 1549 (2016) (“*Spokeo II*”).

The parties agree that the question of “whether a statute protects a concrete interest ... depends on the meaning of the statute.” (AOB 23 n.9 (emphasis omitted)). Facebook also concedes that privacy violations have long been actionable at common

law (AOB 25), and instead focused its argument solely on *Spokeo II*'s second prong—the judgment of the Illinois Legislature.

Thus, while the question of jurisdiction is a federal matter, in this case it depends on the meaning of a state statute. If the violations alleged here “present the precise harm and infringe the same privacy interests [the Illinois Legislature] sought to protect in enacting [BIPA],” then there is a concrete injury. *See Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017); *see also Diamond v. Charles*, 476 U.S. 54, 65 n.17 (1986) (“The Illinois Legislature, of course, has the power to create new interests, the invasion of which may confer standing.”); *Cantrell v. City of Long Beach*, 241 F.3d 674, 684 (9th Cir. 2001) (holding that state statutes can create interests that support standing in federal court). As articulated by this Court, the question is whether Illinois “conferred the procedural right to protect a plaintiff’s concrete interests” and whether the “procedural violation presents ‘a risk of real harm’ to that concrete interest.” *Spokeo III*, 867 F.3d at 1113.

In its brief, Facebook argued that plaintiffs have not alleged a concrete injury because the Illinois Legislature did not intend to create a “general right to privacy in biometrics.” (AOB 23 (alterations omitted))² Rather, Facebook contends, the Legislature intended BIPA *solely* “to ensure that the private entity protects the

² Citations and internal quotation marks omitted throughout unless otherwise noted.

individual's biometric data, and does not use that data for an improper purpose.” (*Id.* (alterations omitted)) Under Facebook's reasoning, the Legislature wanted to allow people to sue if their biometrics were unlawfully sold or disclosed in violation of 740 ILCS 14/15(c-e), but not if their biometrics were unlawfully collected in violation of 740 ILCS 14/15(b). (AOB 24)

That interpretation is no longer tenable. The Illinois Supreme Court confirmed that the Illinois Legislature “codified that individuals possess a right to privacy in and control over their biometric identifiers and biometric information.” *Rosenbach*, 2019 IL 123186, ¶33; slip at 10. That right applies to “collection, retention, disclosure, and destruction of” biometric data. *Id.* “When a private entity fails to adhere to the statutory procedures ... ‘the right of the individual to maintain [his or] her biometric privacy vanishes into thin air. The precise harm the Illinois Legislature sought to prevent is then realized.’” *Id.*, ¶34; slip at 11 (quoting *Patel*, 290 F. Supp. 3d at 954). “This is no mere ‘technicality.’” The injury is real and significant.” *Id.*

The standing question here depends on the meaning of the state statute, and that meaning has now been authoritatively determined. By enacting BIPA, Illinois “conferred the procedural right to protect a plaintiff's concrete interests” to maintain her biometric privacy. *See Spokeo III*, 867 F.3d at 1113. Collecting biometric information without consent is “no mere ‘technicality,’” but a “real and significant” injury that the Illinois Legislature intended to redress when it passed BIPA.

Rosenbach, 2019 IL 123186, ¶34; slip at 11. That is sufficient to resolve the question of jurisdiction and this Court’s interlocutory of review of standing is unnecessary. *Kirkland*, 915 F.2d at 1238.

2. The Illinois Supreme Court also holds that “substantial potential liability” was part of the Illinois Legislature’s intent, defeating Facebook’s “superiority” argument

Rosenbach confirms, contrary to Facebook’s assertion, that “the legislature intended for [BIPA] to have substantial force,” including “substantial potential liability” for violators. 2019 IL 123186, ¶¶36-37; slip at 12. Accordingly, Facebook’s argument regarding the superiority prong of Federal Rule of Civil Procedure 23(b)(3) (not included in the Petition, but added on appeal), based on its assertion that the statutory damages alleged were “inconsistent with legislative intent” (AOB 54), has also been rejected.

The Illinois Supreme Court explained that the “strategy adopted by the General Assembly through enactment of [BIPA]” includes “subjecting private entities who fail to follow the statute’s requirements to substantial potential liability, including liquidated damages, injunctions, attorney fees, and litigation expenses ‘for each violation’ of the law whether or not actual damages, beyond violation of the law’s provisions, can be shown.” *Rosenbach*, 2019 IL 123186, ¶36; slip at 12. Indeed, the Illinois Supreme Court held that the liability aspect of the law “is as integral to

implementation of the legislature’s objectives as” the part of the statute that “impos[es] safeguards.” *Id.*, ¶¶36-37; slip at 12.

In light of *Rosenbach*’s holding regarding the meaning of the Illinois statute, Facebook’s assertion to the contrary fails. Superiority is also no ground for this Court’s interlocutory review.

**C. The only remaining Rule 23(f) assertion by Facebook—
“extraterritoriality—is without merit and is no basis to
challenge class certification**

The only aspect of Facebook’s appeal not addressed by *Rosenbach* is its extraterritoriality assertion. This common issue was never a proper basis for challenging class certification here. And now, standing alone, that issue is far too “insubstantial” to justify this Court’s intervention, given that “petitions for Rule 23(f) review should be granted sparingly.” *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005); Circuit Rule 3-6(b). This Court should dismiss the appeal in its entirety.

As fully briefed (Appellees’ Answering Brief 37-44), the district court was well within its broad discretion in concluding that Facebook’s “extraterritoriality” assertion “pose[s] no certification bar.” (ER12) In reaching its decision, the district court faithfully applied Illinois Supreme Court law that the critical question is “whether the circumstances relating to [the] disputed transactions ... occurred primarily and substantially in Illinois.” *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 187

(2005). Following that guidance, the district court concluded “[t]he named plaintiffs are located in Illinois along with all of the proposed class members, and the claims are based on the application of Illinois law to use of Facebook mainly in Illinois.” (ER12)

Facebook’s claim to the contrary—both in the district court and on appeal—is entirely suppositional. As the district court held, “Facebook has not tendered any evidence to indicate that the circumstances relating to the challenged conduct did not occur ‘primarily and substantially within’ Illinois.” (ER13)

Thus, the only remaining aspect of Facebook’s appeal is a request to review the district court’s discretionary conclusion about predominance of common issues, based on application of the Illinois law that all parties agree applies (ER12), and challenged only by Facebook’s speculation. That limited issue alone does not “justify further proceedings” in this Court. Circuit Rule 3-6(b).

III. CONCLUSION

For the reasons set forth above, this Court should vacate the Order granting permission to appeal, dismiss the appeal, and allow this well-developed case to proceed to trial.

DATED: January 31, 2019

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STATEMENT OF RELATED CASES
(Circuit Rule 28-2.6)

Appellants' counsel is not aware of any related cases pending before this Court.

Susan K. Alexander

SUSAN K. ALEXANDER

2019 IL 123186

**IN THE
SUPREME COURT
OF
THE STATE OF ILLINOIS**

(Docket No. 123186)

STACY ROSENBACH, as Mother and Next Friend of Alexander Rosenbach, Appellant, v.
SIX FLAGS ENTERTAINMENT CORPORATION *et al.*, Appellees.

Opinion filed January 25, 2019.

CHIEF JUSTICE KARMEIER delivered the judgment of the court, with opinion.

Justices Thomas, Kilbride, Garman, Burke, Theis, and Neville concurred in the judgment and opinion.

OPINION

¶ 1 The Biometric Information Privacy Act (Act) (740 ILCS 14/1 *et seq.* (West 2016)) imposes numerous restrictions on how private entities collect, retain, disclose and destroy biometric identifiers, including retina or iris scans, fingerprints, voiceprints, scans of hand or face geometry, or biometric information. Under the Act, any person “aggrieved” by a violation of its provisions “shall have a

right of action *** against an offending party” and “may recover for each violation” the greater of liquidated damages or actual damages, reasonable attorney fees and costs, and any other relief, including an injunction, that the court deems appropriate. *Id.* § 20. The central issue in this case, which reached the appellate court by means of a permissive interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. Jan. 1, 2016), is whether one qualifies as an “aggrieved” person and may seek liquidated damages and injunctive relief pursuant to the Act if he or she has not alleged some actual injury or adverse effect, beyond violation of his or her rights under the statute. The appellate court answered this question in the negative. In its view, “a plaintiff who alleges only a technical violation of the statute without alleging *some* injury or adverse effect is not an aggrieved person” within the meaning of the law. (Emphasis in original.) 2017 IL App (2d) 170317, ¶ 23. We granted leave to appeal (Ill. S. Ct. R. 315(a) (eff. Nov. 1, 2017)) and now reverse and remand to the circuit court for further proceedings.

¶ 2

BACKGROUND

¶ 3

The question the appellate court was asked to consider in this case arose in the context of a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2016)). We therefore take the following well-pleaded facts from the complaint and accept them as true for purposes of our review. *Cochran v. Securitas Security Services USA, Inc.*, 2017 IL 121200, ¶ 11.

¶ 4

Six Flags Entertainment Corporation and its subsidiary Great America LLC own and operate the Six Flags Great America amusement park in Gurnee, Illinois. Defendants sell repeat-entry passes to the park. Since at least 2014, defendants have used a fingerprinting process when issuing those passes. As alleged by the complaint, their system “scans pass holders’ fingerprints; collects, records and stores ‘biometric’ identifiers and information gleaned from the fingerprints; and then stores that data in order to quickly verify customer identities upon subsequent visits by having customers scan their fingerprints to enter the theme park.” According to the complaint, “[t]his makes entry into the park faster and more seamless, maximizes the time pass holders are in the park spending money, and eliminates lost revenue due to fraud or park entry with someone else’s pass.”

¶ 5 In May or June 2014, while the fingerprinting system was in operation, Stacy Rosenbach's 14-year-old son, Alexander, visited defendants' amusement park on a school field trip. In anticipation of that visit, Rosenbach had purchased a season pass for him online. Rosenbach paid for the pass and provided personal information about Alexander, but he had to complete the sign-up process in person once he arrived at the amusement park.

¶ 6 The process involved two steps. First, Alexander went to a security checkpoint, where he was asked to scan his thumb into defendants' biometric data capture system. After that, he was directed to a nearby administrative building, where he obtained a season pass card. The card and his thumbprint, when used together, enabled him to gain access as a season pass holder.

¶ 7 Upon returning home from defendants' amusement park, Alexander was asked by Rosenbach for the booklet or paperwork he had been given in connection with his new season pass. In response, Alexander advised her that defendants did "it all by fingerprint now" and that no paperwork had been provided.

¶ 8 The complaint alleges that this was the first time Rosenbach learned that Alexander's fingerprints were used as part of defendants' season pass system. Neither Alexander, who was a minor, nor Rosenbach, his mother, were informed in writing or in any other way of the specific purpose and length of term for which his fingerprint had been collected. Neither of them signed any written release regarding taking of the fingerprint, and neither of them consented in writing "to the collection, storage, use sale, lease, dissemination, disclosure, redisclosure, or trade of, or for [defendants] to otherwise profit from, Alexander's thumbprint or associated biometric identifiers or information."

¶ 9 The school field trip was Alexander's last visit to the amusement park. Although he has not returned there since, defendants have retained his biometric identifiers and information. They have not publicly disclosed what was done with the information or how long it will be kept, nor do they have any "written policy made available to the public that discloses [defendants'] retention schedule or guidelines for retaining and then permanently destroying biometric identifiers and biometric information."

¶ 10 In response to the foregoing events, Rosenbach, acting in her capacity as mother and next friend of Alexander (see 755 ILCS 5/11-13(d) (West 2016)), brought this action on his behalf in the circuit court of Lake County.¹ The action seeks redress for Alexander, individually and on behalf of all other similarly situated persons, under the Act (740 ILCS 14/1 *et seq.* (West 2016)), which, as noted at the outset of this opinion, provides that any person “aggrieved” by a violation of the Act’s provisions “shall have a right of action *** against an offending party” and “may recover for each violation” the greater of liquidated damages or actual damages, reasonable attorney fees and costs, and any other relief, including an injunction, that the court deems appropriate (*id.* § 20).

¶ 11 The complaint, as amended, is in three counts. Count I seeks damages on the grounds that defendants violated section 15(b) of the Act (*id.* § 15(b)) by (1) collecting, capturing, storing, or obtaining biometric identifiers and biometric information from Alexander and other members of the proposed class without informing them or their legally authorized representatives in writing that the information was being collected or stored; (2) not informing them in writing of the specific purposes for which defendants were collecting the information or for how long they would keep and use it; and (3) not obtaining a written release executed by Alexander, his mother, or members of the class before collecting the information. Count II requests injunctive relief under the Act to compel defendants to make disclosures pursuant to the Act’s requirements and to prohibit them from violating the Act going forward. Count III asserts a common-law action for unjust enrichment.

¶ 12 Defendants sought dismissal of Rosenbach’s action under both sections 2-615 and 2-619 of the Code (735 ILCS 5/2-615, 2-619 (West 2016)) in a combined motion filed pursuant to section 2-619.1 (*id.* § 2-619.1). As grounds for their motion, defendants asserted that one of the named defendants had no relation to the facts alleged, that plaintiff had suffered no actual or threatened injury and therefore

¹Although Stacy Rosenbach has been referred to as the plaintiff in these proceedings, that is not technically accurate. Alexander is the plaintiff. Rosenbach is his next friend. A next friend of a minor is not a party to the litigation but simply represents the real party, who, as a minor, lacks capacity to sue in his or her own name. See *Blue v. People*, 223 Ill. App. 3d 594, 596 (1992). During oral argument, counsel for Rosenbach confirmed that she appears here solely on behalf of her son and asserts no claim for herself.

lacked standing to sue, and that plaintiff's complaint failed to state a cause of action for violation of the Act or for unjust enrichment.

¶ 13 Following a hearing, and proceeding only under section 2-615 of the Code, the circuit court denied the motion as to counts I and II, which sought damages and injunctive relief under the Act, but granted the motion as to count III, the unjust enrichment claim, and dismissed that claim with prejudice.

¶ 14 Defendants sought interlocutory review of the circuit court's ruling under Illinois Supreme Court Rule 308 (eff. Jan. 1, 2016) on the grounds that it involved a question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal might materially advance the ultimate termination of the litigation. The following two questions of law were identified by the circuit court:

(1) “[w]hether an individual is an aggrieved person under §20 of the Illinois Biometric Information Privacy Act, 740 ILCS 14/20, and may seek statutory liquidated damages authorized under §20(l) of the Act when the only injury he alleges is a violation of §15(b) of the Act by a private entity who collected his biometric identifiers and/or biometric information without providing him the required disclosures and obtaining his written consent as required by §15(b) of the Act,” and

(2) “[w]hether an individual is an aggrieved person under §20 of the Illinois Biometric Information Privacy Act, 740 ILCS 14/20, and may seek injunctive relief authorized under §20(4) of the Act, when the only injury he alleges is a violation of §15(b) of the Act by a private entity who collected his biometric identifiers and/or biometric information without providing him the required disclosures and obtaining his written consent as required by §15(b) of the Act.”

¶ 15 The appellate court granted review of the circuit court's order and answered both certified questions in the negative. In its view, a plaintiff is not “aggrieved” within the meaning of the Act and may not pursue either damages or injunctive relief under the Act based solely on a defendant's violation of the statute. Additional injury or adverse effect must be alleged. The injury or adverse effect need not be pecuniary, the appellate court held, but it must be more than a “technical violation of the Act.” 2017 IL App (2d) 170317, ¶ 28.

¶ 16 Rosenbach petitioned this court for leave to appeal. Ill. S. Ct. R. 315 (eff. Nov. 1, 2017). We allowed her petition and subsequently permitted friend of the court briefs to be filed in support of her position by the Electronic Privacy Information Center and by a consortium of groups including the American Civil Liberties Union, the Center for Democracy and Technology, and the Electronic Frontier Foundation. See Ill. S. Ct. R. 345 (eff. Sept. 20, 2010). The court also permitted the Restaurant Law Center and Illinois Restaurant Association, the Internet Association, and the Illinois Chamber of Commerce to file friend of the court briefs in support of defendants.

¶ 17 ANALYSIS

¶ 18 Because this appeal concerns questions of law certified by the circuit court pursuant to Illinois Supreme Court Rule 308 (eff. Jan. 1, 2016), our review is *de novo*. *Rozsavolgyi v. City of Aurora*, 2017 IL 121048, ¶ 21. *De novo* review is also appropriate because the appeal arose in the context of an order denying a section 2-615 motion to dismiss (*Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 429 (2006)) and its resolution turns on a question of statutory interpretation (*Eads v. Heritage Enterprises, Inc.*, 204 Ill. 2d 92, 96 (2003)).

¶ 19 The Biometric Privacy Information Act (740 ILCS 14/1 *et seq.* (West 2016)), on which counts I and II of Rosenbach’s complaint are founded, was enacted in 2008 to help regulate “the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information.” *Id.* § 5(g). The Act defines “biometric identifier” to mean “a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry.” *Id.* § 10. “Biometric information” means “any information, regardless of how it is captured, converted, stored, or shared, based on an individual’s biometric identifier used to identify an individual.” *Id.* It is undisputed that the thumbprint collected by defendants from Rosenbach’s son, Alexander, when they processed his season pass constituted a biometric identifier subject to the Act’s provisions and that the electronically stored version of his thumbprint constituted biometric information within the meaning of the law.

¶ 20 Section 15 of the Act (*id.* § 15) imposes on private entities such as defendants various obligations regarding the collection, retention, disclosure, and destruction of biometric identifiers and biometric information. Among these is the following:

“(b) No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person’s or a customer’s biometric identifier or biometric information, unless it first:

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

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

(3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject’s legally authorized representative.” *Id.* § 15(b).

¶ 21 These provisions are enforceable through private rights of action. Specifically, section 20 of the Act provides that “[a]ny person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party.” *Id.* § 20. Section 20 further provides that

“[a] prevailing party may recover for each violation:

(1) against a private entity that negligently violates a provision of this Act, liquidated damages of \$1,000 or actual damages, whichever is greater;

(2) against a private entity that intentionally or recklessly violates a provision of this Act, liquidated damages of \$5,000 or actual damages, whichever is greater;

(3) reasonable attorneys’ fees and costs, including expert witness fees and other litigation expenses; and

(4) other relief, including an injunction, as the State or federal court may deem appropriate.” *Id.*

¶ 22 As noted earlier in this opinion, Rosenbach’s complaint alleges that defendants violated the provisions of section 15 of the Act when it collected her son’s

thumbprint without first following the statutorily prescribed protocol. For the purposes of this appeal, the existence of those violations is not contested. The basis for defendants' current challenge is that no other type of injury or damage to Rosenbach's son has been alleged. Rosenbach seeks redress on her son's behalf and on behalf of a class of similarly situated individuals based solely on defendants' failure to comply with the statute's requirements. In defendants' view, that is not sufficient. They contend that an individual must have sustained some actual injury or harm, apart from the statutory violation itself, in order to sue under the Act. According to defendants, violation of the statute, without more, is not actionable.

¶ 23 While the appellate court in this case found defendants' argument persuasive, a different district of the appellate court subsequently rejected the identical argument in *Sekura v. Krishna Schaumburg Tan, Inc.*, 2018 IL App (1st) 180175. We reject it as well, as a recent federal district court decision correctly reasoned we might do. *In re Facebook Biometric Information Privacy Litigation*, 326 F.R.D. 535, 545-47 (N.D. Cal. 2018).

¶ 24 We begin our analysis with basic principles of statutory construction. When construing a statute, our primary objective is to ascertain and give effect to the legislature's intent. That intent is best determined from the plain and ordinary meaning of the language used in the statute. When the statutory language is plain and unambiguous, we may not depart from the law's terms by reading into it exceptions, limitations, or conditions the legislature did not express, nor may we add provisions not found in the law. *Acme Markets, Inc. v. Callanan*, 236 Ill. 2d 29, 37-38 (2009).

¶ 25 Defendants read the Act as evincing an intention by the legislature to limit a plaintiff's right to bring a cause of action to circumstances where he or she has sustained some actual damage, beyond violation of the rights conferred by the statute, as the result of the defendant's conduct. This construction is untenable. When the General Assembly has wanted to impose such a requirement in other situations, it has made that intention clear. Section 10a(a) of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/10a(a) (West 2016)) is an example. To bring a private right of action under that law, actual damage to the plaintiff must be alleged. *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 149 (2002); *Haywood v. Massage Envy Franchising, LLC*, 887 F.3d 329, 333 (7th Cir. 2018).

¶ 26 In contrast is the AIDS Confidentiality Act (410 ILCS 305/1 *et seq.* (West 2016)). There, the legislature authorized private rights of action for monetary relief, attorney fees, and such other relief as the court may deem appropriate, including an injunction, by any person “aggrieved” by a violation of the statute or a regulation promulgated under the statute. *Id.* § 13. Proof of actual damages is not required in order to recover. *Doe v. Chand*, 335 Ill. App. 3d 809, 822 (2002).

¶ 27 Section 20 of the Act (740 ILCS 14/20 (West 2016)), the provision that creates the private right of action on which Rosenbach’s cause of action is premised, clearly follows the latter model. In terms that parallel the AIDS Confidentiality Act, it provides simply that “[a]ny person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party.” *Id.*

¶ 28 Admittedly, this parallel, while instructive (*Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 25), is not dispositive. Separate acts with separate purposes need not, after all, define similar terms in the same way. Rather, “ ‘the same word may mean one thing in one statute and something different in another, dependent upon the connection in which the word is used, the object or purpose of the statute, and the consequences which probably will result from the proposed construction. [Citations.]’ ” *People v. Ligon*, 2016 IL 118023, ¶ 26 (quoting *Mack v. Seaman*, 113 Ill. App. 3d 151, 154 (1983)). Accepted principles of statutory construction, however, compel the conclusion that a person need not have sustained actual damage beyond violation of his or her rights under the Act in order to bring an action under it.

¶ 29 As with the AIDS Confidentiality Act, the Act does not contain its own definition of what it means to be “aggrieved” by a violation of the law. Where, as here, a statutory term is not defined, we assume the legislature intended for it to have its popularly understood meaning. Likewise, if a term has a settled legal meaning, the courts will normally infer that the legislature intended to incorporate that established meaning into the law. *People v. Johnson*, 2013 IL 114639, ¶ 9. Applying these canons of construction, it is clear that defendants’ challenge to Rosenbach’s right to bring suit on behalf of her son is meritless.

¶ 30 More than a century ago, our court held that to be aggrieved simply “means having a substantial grievance; a denial of some personal or property right.” *Glos v.*

People, 259 Ill. 332, 340 (1913). A person who suffers actual damages as the result of the violation of his or her rights would meet this definition of course, but sustaining such damages is not necessary to qualify as “aggrieved.” Rather, “[a] person is prejudiced or aggrieved, in the legal sense, when a legal right is invaded by the act complained of *or* his pecuniary interest is directly affected by the decree or judgment.” (Emphasis added.) *Id.*

¶ 31 This understanding of the term has been repeated frequently by Illinois courts and was embedded in our jurisprudence when the Act was adopted. See *American Surety Co. v. Jones*, 384 Ill. 222, 229-30 (1943); *In re Estate of Hinshaw*, 19 Ill. App. 2d 239, 255 (1958); *In re Estate of Harmston*, 10 Ill. App. 3d 882, 885 (1973); *Greeling v. Abendroth*, 351 Ill. App. 3d 658, 662 (2004). We must presume that the legislature was aware of that precedent and acted accordingly. See *People v. Cole*, 2017 IL 120997, ¶ 30.

¶ 32 The foregoing understanding of the term is also consistent with standard definitions of “aggrieved” found in dictionaries, which we may consult when attempting to ascertain the plain and ordinary meaning of a statutory term where, as here, the term has not been specifically defined by the legislature. *In re M.I.*, 2016 IL 120232, ¶ 26. Merriam-Webster’s Collegiate Dictionary, for example, defines aggrieved as “suffering from an infringement or denial of legal rights.” Merriam-Webster’s Collegiate Dictionary 25 (11th ed. 2006). Similarly, the leading definition given in Black’s Law Dictionary is “having legal rights that are adversely affected.” Black’s Law Dictionary 77 (9th ed. 2009). This is therefore the meaning we believe the legislature intended here.

¶ 33 Based upon this construction, the appellate court’s response to the certified questions was incorrect. Through the Act, our General Assembly has codified that individuals possess a right to privacy in and control over their biometric identifiers and biometric information. See *Patel v. Facebook Inc.*, 290 F. Supp. 3d 948, 953 (N.D. Cal. 2018). The duties imposed on private entities by section 15 of the Act (740 ILCS 14/15 (West 2016)) regarding the collection, retention, disclosure, and destruction of a person’s or customer’s biometric identifiers or biometric information define the contours of that statutory right. Accordingly, when a private entity fails to comply with one of section 15’s requirements, that violation constitutes an invasion, impairment, or denial of the statutory rights of any person

or customer whose biometric identifier or biometric information is subject to the breach. Consistent with the authority cited above, such a person or customer would clearly be “aggrieved” within the meaning of section 20 of the Act (*id.* § 20) and entitled to seek recovery under that provision. No additional consequences need be pleaded or proved. The violation, in itself, is sufficient to support the individual’s or customer’s statutory cause of action.

¶ 34 In reaching a contrary conclusion, the appellate court characterized violations of the law, standing alone, as merely “technical” in nature. 2017 IL App (2d) 170317, ¶ 23. Such a characterization, however, misapprehends the nature of the harm our legislature is attempting to combat through this legislation. The Act vests in individuals and customers the right to control their biometric information by requiring notice before collection and giving them the power to say no by withholding consent. *Patel*, 290 F. Supp. 3d at 953. These procedural protections “are particularly crucial in our digital world because technology now permits the wholesale collection and storage of an individual’s unique biometric identifiers—identifiers that cannot be changed if compromised or misused.” *Id.* at 954. When a private entity fails to adhere to the statutory procedures, as defendants are alleged to have done here, “the right of the individual to maintain [his or] her biometric privacy vanishes into thin air. The precise harm the Illinois legislature sought to prevent is then realized.” *Id.* This is no mere “technicality.” The injury is real and significant.

¶ 35 This construction of the law is supported by the General Assembly’s stated assessment of 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. In enacting the law, the General Assembly expressly noted that

“[b]iometrics are unlike other unique identifiers that are used to access finances or other sensitive information. For example, social security numbers, when compromised, can be changed. Biometrics, however, are biologically unique to the individual; therefore, once compromised, the individual has no recourse, is at heightened risk for identity theft, and is likely to withdraw from biometric-facilitated transactions.” 740 ILCS 14/5(c) (West 2016).

The situation is particularly concerning, in the legislature's judgment, because "[t]he full ramifications of biometric technology are not fully known." *Id.* § 5(f).

¶ 36 The strategy adopted by the General Assembly through enactment of the Act is to try to head off such problems before they occur. It does this in two ways. The first is by imposing safeguards to insure that individuals' and customers' privacy rights in their biometric identifiers and biometric information are properly honored and protected to begin with, before they are or can be compromised. The second is by subjecting private entities who fail to follow the statute's requirements to substantial potential liability, including liquidated damages, injunctions, attorney fees, and litigation expenses "for each violation" of the law (*id.* § 20) whether or not actual damages, beyond violation of the law's provisions, can be shown.

¶ 37 The second of these two aspects of the law is as integral to implementation of the legislature's objectives as the first. Other than the private right of action authorized in section 20 of the Act, no other enforcement mechanism is available. It is clear that the legislature intended for this provision to have substantial force. When private entities face liability for failure to comply with the law's requirements without requiring affected individuals or customers to show some injury beyond violation of their statutory rights, those entities have the strongest possible incentive to conform to the law and prevent problems before they occur and cannot be undone. Compliance should not be difficult; whatever expenses a business might incur to meet the law's requirements are likely to be insignificant compared to the substantial and irreversible harm that could result if biometric identifiers and information are not properly safeguarded; and the public welfare, security, and safety will be advanced. That is the point of the law. To require individuals to wait until they have sustained some compensable injury beyond violation of their statutory rights before they may seek recourse, as defendants urge, would be completely antithetical to the Act's preventative and deterrent purposes.

¶ 38 In sum, defendants' contention that redress under the Act should be limited to those who can plead and prove that they sustained some actual injury or damage beyond infringement of the rights afforded them under the law would require that we disregard the commonly understood and accepted meaning of the term "aggrieved," depart from the plain and, we believe, unambiguous language of the

law, read into the statute conditions or limitations the legislature did not express, and interpret the law in a way that is inconsistent with the objectives and purposes the legislature sought to achieve. That, of course, is something we may not and will not do. *Solich v. George & Anna Portes Cancer Prevention Center of Chicago, Inc.*, 158 Ill. 2d 76, 83 (1994); *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 275 (2009).

¶ 39

CONCLUSION

¶ 40

For the foregoing reasons, we hold that the questions of law certified by the circuit court must be answered in the affirmative. Contrary to the appellate court's view, an individual need not allege some actual injury or adverse effect, beyond violation of his or her rights under the Act, in order to qualify as an "aggrieved" person and be entitled to seek liquidated damages and injunctive relief pursuant to the Act. The judgment of the appellate court is therefore reversed, and the cause is remanded to the circuit court for further proceedings.

¶ 41

Certified questions answered.

¶ 42

Appellate court judgment reversed.

¶ 43

Cause remanded.

DECLARATION OF SERVICE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is Post Montgomery Center, One Montgomery Street, Suite 1800, San Francisco, California 94104.

2. I hereby certify that on January 31, 2019, I electronically filed the foregoing document: **MOTION TO VACATE ORDER GRANTING INTERLOCUTORY APPEAL AND DISMISS THE APPEAL** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

3. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on January 31, 2019, at San Francisco, California.

Tamara J. Love

TAMARA J. LOVE