No. 123186

IN THE SUPREME COURT OF ILLINOIS

STACY ROSENBACH, AS MOTHER AND NEXT FRIEND OF ALEXANDER ROSENBACH, INDIVIDUALLY AND AS THE REPRESENTATIVE OF A CLASS OF SIMILARLY SITUATED PERSONS,
Plaintiff-Appellant,

v.

SIX FLAGS ENTERTAINMENT CORP. AND GREAT AMERICA LLC,
Defendants-Appellees.

On Appeal from the Appellate Court of Illinois, Second District, No. 2-17-317, there heard on Appeal from the Circuit Court of Lake County, Illinois, No. 2016-CH-13, Honorable Luis A. Berrones

BRIEF *AMICUS CURIAE* OF INTERNET ASSOCIATION IN SUPPORT OF THE APPELLEES

Lauren R. Goldman
Michael Rayfield
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500
lrgoldman@mayerbrown.com
mrayfield@mayerbrown.com

Michele Odorizzi
Michael A. Scodro
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600
modorizzi@mayerbrown.com
mscodro@mayerbrown.com

Counsel for Internet Association

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Carolyn Taft Grosboll
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POINTS AND AUTHORITIES

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INTEREST OF *AMICUS CURIAE*

Internet Association represents more than 40 of the world's leading technology companies, from social networking services and search engines to travel sites and online marketplaces.[1] The Association advances policies that protect the freedoms of Internet users, foster innovation, and empower small businesses and the public, while protecting the privacy of consumers.

The Association has a compelling interest in the proper application of the Illinois Biometric Information Privacy Act ("BIPA") and, more broadly, in the proper enforcement of statutory injury requirements like BIPA's "aggrieved" provision. The Association is particularly concerned about the extension of BIPA to services that apply facial recognition technology to online photos. That concern is not theoretical: Two members of the Association—Facebook and Google—are currently the subject of putative class

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[1] The Association's members are: Airbnb; Amazon; Coinbase; Doordash; Dropbox; eBay; Etsy; Eventbrite; Expedia; Facebook; Google; Groupon; Handy; HomeAway; IAC; Intuit; Letgo; LinkedIn; Lyft; Matchgroup; Microsoft; Netflix; Pandora; PayPal; Pinterest; Quicken Loans; Rackspace; Reddit; Salesforce; Snap Inc.; Spotify; Stripe; SurveyMonkey; Thumbtack; TransferWise; Tripadvisor; Turo; Twilio; Twitter; Uber; Upwork; Vividseats; Yelp; Zenefits; and Zillowgroup. *See* https://internetassociation.org/our-members.

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actions under BIPA and have challenged these suits based on (among other things) BIPA's "aggrieved" provision. The imposition of BIPA liability in this context, without any showing of harm, would have a substantial and deleterious impact on technology companies and deter innovation.

The Association is well-situated to respond to the *amicus* briefs filed by the Electronic Privacy Information Center ("EPIC"), and the American Civil Liberties Union ("ACLU"), which this Court accepted for review. Like EPIC and the ACLU, we believe that protecting the privacy of data transmitted over the Internet is exceedingly important. But we do not agree that the Second District's reading of BIPA would undermine Internet privacy. In fact, a contrary reading could have a significant impact on the development of many online technologies that people find useful and enjoyable.

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INTRODUCTION

BIPA was enacted in 2008 to regulate the use of biometric technologies in financial transactions and security screenings. The statute provides a limited private right of action for individuals "aggrieved by a violation of this Act." 740 ILCS 14/20. The plaintiff in this case alleges that the defendants violated BIPA by conducting a finger scan of her son without providing her with adequate notice or obtaining her consent, but she does not claim that she was injured by this alleged violation. The question on appeal is straightforward: whether BIPA's "aggrieved" limitation has meaning. The Second District held that it does—it requires a plaintiff to show an actual injury resulting from the alleged BIPA violation. Plaintiff argues that it does not—that a bare violation of BIPA is sufficient to bring a lawsuit. The Second District was right.

Although this appeal concerns a single unambiguous phrase in a single statute, the case has taken on particular significance because that statute has been applied well outside the context that the General Assembly intended to regulate. In 2015, seven years after BIPA was enacted, the plaintiffs' class action bar began using the statute against technology companies around the country. Most

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prominently, several putative class action lawsuits have been filed alleging that Facebook, Google, and other Internet-based services violated BIPA by using facial-recognition technology to make it easier for people to organize and share photos with family and friends—even though BIPA expressly states that it does not regulate "information derived from" "photographs." 740 ILCS 14/10. The plaintiffs in these cases seek potentially billions of dollars by aggregating BIPA's liquidated damages provisions.

Unless this Court gives meaning to BIPA's aggrieved requirement, the statute will continue to give rise to no-injury class actions calculated to extract massive settlements and chill innovation. Indeed, to improve the chances of class certification, plaintiffs' lawyers have *deliberately* refrained from alleging harm, recognizing that such a showing would be inherently individualized and could overwhelm any common issues among the class. Reversal of the decision below would encourage the proliferation of these strike suits—a result directly contrary to the General Assembly's desire to *facilitate* the "growing" "use of biometrics" in this State because those technologies "promise streamlined financial transactions and security screenings." 740 ILCS 14/5(a).

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We do not disagree with EPIC's observation that there are risks associated with the collection and use of biometric data (EPIC Br. at 6-12); the General Assembly recognized as much (740 ILCS 14/5(c)). Nor do we disagree with the ACLU that there must be "reasonable limits" on how companies use biometric technologies. ACLU Br. at 3. But that is precisely why the "aggrieved" provision is important: It permits a right of action for people who have suffered real-world harm—like the data breaches identified in EPIC's brief, or serious emotional harm—while barring no-injury claims like those asserted by plaintiff below. EPIC and the ACLU focus on the purported need to *limit* the use of biometric technologies, but they never once acknowledge the policy adopted by the *General Assembly*: to balance the clear benefits of these technologies against their risks by (1) regulating the collection and protection of certain types of biometric data and (2) permitting redress for any injuries caused by a violation of those regulations.

Our brief makes three main points. First, interpreting BIPA's "aggrieved" provision to require an actual injury is critical to ensuring that the statute is applied in the narrow manner contemplated by the General Assembly. Second, the arguments of

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plaintiff and her *amici* are wrong on their merits: They ignore BIPA's text and structure; they misread this Court's decisions; and, if adopted, they would place this Court out of step with many other state high courts that have construed substantively identical statutory provisions. Third, this Court's opinion should make clear that the "aggrieved" requirement applies in the same way to all alleged violations of BIPA, regardless of how the biometric data is collected. The Court should affirm the Second District's decision.

ARGUMENT

I. BIPA'S "AGGRIEVED" PROVISION IS ESSENTIAL TO LIMIT THE STATUTE TO ITS INTENDED PURPOSE.

BIPA was enacted in 2008 to regulate the use of biometric technologies "in the business and security screening sectors" in Illinois. 740 ILCS 14/5(a). The General Assembly found that "[t]he use of biometrics is growing in [these] sectors" and "appears to promise streamlined financial transactions and security screenings." *Id.* "Major national corporations ha[d] selected the City of Chicago and other locations in this State as pilot testing sites for new applications of biometric-facilitated financial transactions, including finger-scan technologies at grocery stores, gas stations, and school cafeterias." *Id.* 14/5(b). But because "many members of the public

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[had been] deterred from partaking in biometric identifier-facilitated transactions," the legislature found that the public would "be served by regulating" this data under certain circumstances. *Id.* 14/5(e), (g).

The General Assembly chose not to regulate *all* uses of biometric technology. BIPA covers only six specified "biometric identifiers"—"a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry"—as well as "biometric information" derived from one of these biometric identifiers and used to identify a person. *Id.* 14/10. A host of items—including both "photographs" and "information derived from" photographs—are expressly exempted from the statute's reach. *Id.* Entities that collect regulated data must provide prior written notice, obtain a written release, and publish a retention policy. *Id.* 14/15.

Most importantly for present purposes, the General Assembly provided a limited private right of action to "[a]ny person *aggrieved by a violation of this Act*." *Id.* 14/20 (emphasis added). A plaintiff may recover "liquidated damages of $1,000 or actual damages, whichever is greater," if he proves that the defendant "negligently" violated BIPA; if the defendant "intentionally or recklessly" violated

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the statute, the plaintiff may recover "liquidated damages of $5,000 or actual damages, whichever is greater." *Id.* 14/20(1)-(2).

The legislative findings and BIPA's carefully cabined provisions cannot be squared with EPIC's assertion that "[s]trict limits on collection of biometric data is the best practice to prevent abuse." EPIC Br. at 2-3. The General Assembly recognized the concern, echoed throughout much of EPIC's brief, that biometric data may be "the target of hackers and identity thieves." *Id.* at 6; *see* 740 ILCS 14/5(c). But the legislature's intent was to *promote* the use of biometric technologies that the public had been deterred from using, by erecting safeguards that would restore and promote public confidence. "The Illinois legislature was concerned that the failure of businesses to implement reasonable safeguards for [biometric] data would deter Illinois citizens from partaking in biometric identifier-facilitated transactions in the first place, and would thus discourage the proliferation of such transactions as a form of engaging in commerce." *Vigil v. Take-Two Interactive Software, Inc.*, 235 F. Supp. 3d 499, 504 (S.D.N.Y. 2017), *aff'd in part, rev'd in part on other grounds*, 717 F. App'x 12 (2d Cir. 2017).

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For its part, the ACLU warns that biometric technologies "now appear[] in a dizzying array of everyday applications," including retail, banking, and school security systems. ACLU Br. at 5-10. But there is no reason to believe that the General Assembly would, like the ACLU, find these developments "frightening" (*id.* at 9); the legislature *wanted* biometric technologies to expand and flourish.[2]

Recent developments threaten to undermine the policy balance set by the General Assembly. Several courts have permitted massive class actions to proceed against companies that apply facial-recognition technology to online photos—despite BIPA's express exclusion of "photographs" and "information derived from" photos. 740 ILCS 14/10. In *In re Facebook Biometric Information Privacy Litigation*, 185 F. Supp. 3d 1155 (N.D. Cal. 2016), for example, the plaintiffs challenge Facebook's "Tag Suggestions" feature, which makes it easier for people to tag Facebook friends in photos. Tag Suggestions is optional, fully disclosed in Facebook's

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[2] The ACLU notes (at 9) that the use of biometric technologies "is all the more" "frightening . . . when law enforcement agencies access [biometric] information." But BIPA does not purport to regulate the use of biometric data by law enforcement agencies; it covers only "private entit[ies]." 740 ILCS 14/15.

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terms, and used solely to improve users' experience on Facebook; the plaintiffs do not allege that Facebook sold or disclosed their data to third parties or that Tag Suggestions harmed them in any way. Nor do they allege that any aspect of Facebook's facial-recognition process takes place in Illinois, as required under this Court's extraterritoriality doctrine. *See Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 184-85, 187 (2005). The plaintiffs nonetheless contend that this useful feature should subject Facebook to billions of dollars in statutory damages under BIPA. Similar lawsuits have been filed against Google and Shutterfly. *Rivera v. Google Inc.*, 238 F. Supp. 3d 1088 (N.D. Ill. 2017); *Monroy v. Shutterfly, Inc.*, 2017 WL 4099846 (N.D. Ill. Sept. 15, 2017).

Given how aggressively litigants have used BIPA to go after emerging technologies, it is critical for the Court to affirm BIPA's basic requirement that plaintiffs must show an injury resulting from the alleged statutory violation. Any contrary interpretation would make it far easier to file gigantic class actions, extract large settlements, and chill innovation in numerous spheres that the General Assembly did not seek to regulate, let alone *eliminate*.

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II. THE SECOND DISTRICT CORRECTLY HELD THAT THE "AGGRIEVED" PROVISION IN BIPA'S PRIVATE RIGHT OF ACTION REQUIRES A SHOWING OF REAL INJURY BEYOND THE STATUTORY VIOLATION.

Plaintiff argues that any violation of a person's "legal rights" conferred by BIPA automatically "causes him to be 'aggrieved.'" OB17. Similarly, EPIC argues that "an 'aggrieved party' is any consumer whose biometric information was collected in violation of [a] statutory requirement." EPIC Br. at 18.[3] These arguments are foreclosed by the plain language of BIPA, the statutory context, and this Court's case law, and they run counter to the views of numerous other state high courts. BIPA's "aggrieved" provision requires a showing of actual injury beyond the alleged statutory violation.

A. BIPA's Text Requires an Actual Injury.

BIPA grants a private right of action to "[a]ny person aggrieved by a violation of this Act." 740 ILCS 14/20. The Second District concluded that this provision requires a plaintiff to prove an "injury or adverse effect" beyond the alleged BIPA violation; a

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[3] The ACLU asserts that the Second District's decision "is inconsistent with the language, purpose, and structure of BIPA" (ACLU Br. at 4), but it does not attempt to provide a definition of "aggrieved"; it focuses solely on the language of BIPA's findings and regulatory provision rather than its private right of action.

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plaintiff's claim fails when "the only injury he or she alleges is a violation of [BIPA] by a private entity that collected his or her biometric identifiers and/or biometric information without providing him or her the disclosures and obtaining the written consent required by [the statute]." *Rosenbach v. Six Flags Entm't Corp.*, 2017 IL App (2d) 170317, ¶¶ 15, 23. This interpretation is correct for at least four main reasons.

First, the word "aggrieved" is synonymous with injury. *See* WEBSTER'S DICTIONARY 11 (2008 ed.) ("aggrieve" means "to inflict injury on"). Neither EPIC nor the ACLU cites any dictionary definition of the term.

Second, the General Assembly itself has defined the term "aggrieved" to require an injury. For example, the Illinois Human Rights Act defines an "aggrieved party" as a person who has been or will be "*injured* by a civil rights violation." 775 ILCS 5/1-103(B) (emphasis added). Under the Soil and Water Conservation District Act, an "aggrieved party" means "any person whose property, resources, interest or responsibility is being *injured or impeded in value or utility*." 70 ILCS 405/3.20 (emphasis added). When the legislature uses the same phrase in different statutes, courts

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normally give that phrase the same meaning. *See Harney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 25. Plaintiff and her *amici* do not acknowledge these statutes.

Third, BIPA's language is even clearer than that of the Human Rights Act and the Soil and Water Conservation District Act, which presumably is why the General Assembly did not see a need to provide an express definition. Instead of saying that a plaintiff has to be "aggrieved" or that an "aggrieved party" may recover, BIPA requires a plaintiff to show that she is a "person aggrieved *by a violation of this Act*." 740 ILCS 14/20 (emphasis added). This provision expressly requires a plaintiff to prove two different things: that there was a violation *and* that she was aggrieved by it. The person's injury must be a *consequence* of the violation—the violation alone does not make someone aggrieved. Thus, EPIC's purported definition of an "aggrieved party" (EPIC Br. at 18) circumvents a critical component of BIPA's language; EPIC's quotation marks notwithstanding, BIPA does not use that phrase.

Finally, as the Second District explained, "if the Illinois legislature intended" to permit recovery without "any injury or adverse effect," "it could have omitted the [aggrieved requirement]

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and stated that every violation was actionable." *Rosenbach*, 2017 IL App (2d) 170317, ¶ 23. In other words, adopting plaintiff's definition of the term "would render the [provision] superfluous," *id.*, contrary to this Court's direction that statutes be construed so that each clause has meaning. *Brucker v. Mercola*, 227 Ill. 2d 502, 514 (2007).

Plaintiff responds that "'aggrieved' is not superfluous" because it "limits the private cause of action . . . to the individual whose legal rights . . . were deprived by the defendant's violation"; "[w]ithout 'aggrieved,' the provision would allow 'any person' to enforce a violation of the Act." OB31-32. That is wrong. To bring *any* suit in this State, a plaintiff must establish standing, which "requires some injury-in-fact to a legally cognizable interest." *Maglio v. Advocate Health & Hosps. Corp.*, 2015 IL App (2d) 140782, ¶ 22; *see also Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999) ("The doctrine of standing is designed to preclude persons who have no interest in the controversy from bringing suit."); *cf. Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation."). The legislature drafted BIPA against this backdrop, requiring an injury *beyond* what is required for standing. Notably, other State statutes do not have

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this requirement; the Cable and Video Customer Protection Law, for example, provides that "[a]ny customer, the Attorney General, or a local unit of government may pursue alleged violations of this Act." 220 ILCS 5/22-501(r)(4). BIPA requires more.

B. Plaintiff's Structural Arguments Are Unavailing.

Plaintiff and her *amici* offer a handful of structural arguments to avoid the plain text of BIPA's "aggrieved" provision. Each fails.

Attorney General enforcement. The ACLU places great emphasis on the idea that BIPA does not permit the Illinois Attorney General ("AG") to bring an action, arguing that "[t]he American legal system relies upon ex post private enforcement as an important complement to ex ante public regulation." ACLU Br. at 18-21. *See also* OB14-15 (arguing that BIPA "leaves enforcement exclusively to private lawsuits"). Plaintiff asserts that "[i]f a private person must wait to sue until he suffers harm beyond the violation of his rights under BIPA, the BIPA becomes purely remedial and loses any regulatory or prophylactic effect": "No one could enforce the Act to require any entity to create guidelines, make them public, provide written notice, or obtain informed written consent before collecting Biometrics." OB16.

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These are pure policy arguments with no foundation in the statutory text, findings, or intent. The logical conclusion to be drawn from the absence of a governmental right of action is that the General Assembly wanted to *limit* BIPA suits—as its findings indicate. *See* Part I. This is not unusual: Some Illinois statutes—including a statute protecting "student biometric information" that plaintiff refers to as the "legislative precursor" of BIPA (OB11)—do not have *any* right of action. *See* 105 ILCS 5/10-20.40. As EPIC observes, certain statutory and common law causes of action (like trespass to land) do not require any harm beyond what is necessary for standing. EPIC Br. at 14-17. But many causes of action—including many privacy-based actions—require a showing of harm even when they can be enforced only by private parties. *See, e.g.*, *Dwyer v. Am. Express Co.*, 273 Ill. App. 3d 742, 749 (1995) (common law claim for misappropriation of someone's likeness requires deprivation of the value of the plaintiff's identity); RESTATEMENT (SECOND) OF TORTS §§ 652D & cmt. a, 652E & cmt. a (unreasonable publicity and false light claims require disclosure of information to the public). The legislature evidently concluded—with good reason—

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that the availability of a *private* action for *injured* parties would sufficiently deter companies from violating BIPA's provisions.

EPIC takes the deterrence argument a step further, contending hyperbolically that "[t]he deterrence effect of a law like BIPA would be *miniscule* if private entities knew that they could only be held liable in the rare case where a victim can prove downstream harm." EPIC Br. at 14 (emphasis added). EPIC does not elaborate on this assertion, and it is flatly inconsistent with the first 12 pages of EPIC's brief, which argue that "the risks of [a biometric data] breach" have "increased," and that "the consequences of a breach are severe." *Id.* at 11; *see also id.* at 6-12 (providing examples). EPIC cannot have it both ways: contend that the use of biometric data has widespread, "severe" consequences, while simultaneously arguing that "downstream harm" will be "rare."

Liquidated damages. Plaintiff argues (at 25) that BIPA's "liquidated damages provision would seem unnecessary and inappropriate if the General Assembly intended to bar actions that alleged no adverse effect other than the violation of" BIPA. The ACLU similarly contends (at 18) that the "liquidated damages provisions are evidence of the Illinois legislature's intent to allow a

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private cause of action where there is no injury beyond loss of the statutory rights to notice and informed consent." This argument ignores the purposes of BIPA's liquidated-damages provisions.

First, the provisions are intended to deter *particularly culpable* BIPA violations. An aggrieved person may seek "an injunction," "reasonable attorneys' fees and costs," and "other [appropriate] relief" *without* proving that the defendant acted with any particular state of mind. 740 ILCS 14/20(3)-(4). But liquidated damages are available only "against a private entity that negligently violates a provision of this Act" ($1,000) or does so "intentionally or recklessly" ($5,000). *Id.* 14/20(1)-(2). These provisions are intended to impose monetary liability for negligent, reckless, or intentional violations, but "[i]n order for *any* of the remedies to come into play, the plaintiff must be . . . 'aggrieved.'" *Rosenbach*, 2017 IL App (2d) 170317, ¶ 28.

Second, the availability of statutory damages does not serve as proof of *injury*; it simply relieves plaintiffs of the problem of *quantifying the damages* flowing from that injury. *See M.I.G. Invs., Inc. v. Marsala*, 92 Ill. App. 3d 400, 405 (1981); *Doe v. Chao*, 540 U.S. 614, 625 (2004). Only injured parties may sue under BIPA, but if they can prove the state of mind necessary to seek monetary relief,

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BIPA allows them to obtain liquidated damages that reasonably estimate their actual harm. BIPA's liquidated-damages provisions have no impact on the bare minimum of actual harm required for a private right of action.

Improper use and disclosure provisions. Finally, plaintiff argues that the Second District's reading would make BIPA's notice-and-consent provisions "unenforceable nullities," because the "injury or adverse effect contemplated by the Appellate Court only arises from situations concerning improper use or disclosure of Biometrics," and "BIPA contains separate, subsequent provisions regarding improper use and disclosure." OB23 (citing 14/15/(c)-(e)).[4]

That is incorrect. The fact that a plaintiff cannot prove a use or disclosure violation does not mean she cannot show harm from a notice-and-consent violation. For example, a plaintiff may be able to recover for such a violation if she suffered serious emotional harm due to the collection of her biometric data, or if she is at real risk of

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[4] Plaintiff's use of the phrase "separate, subsequent provisions" is misleading. The use-and-disclosure provisions (740 ILCS 14/15(c)-(e)) are "subsequent" in the sense that they appear below the subsections on notice and consent (*id.* 14/15(a)-(b)) in the same provision. But *all* of these subsections come before the "aggrieved" provision (*id.* 14/20); that element applies across the board.

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identity theft. The precise forms of harm that would suffice are not before the Court in this case, but plaintiff has no reasonable basis to assert that a requirement of actual harm would somehow render BIPA's notice-and-consent provisions ineffectual or superfluous.

C. This Court's Precedents Support the Second District's Reading of BIPA.

Plaintiff cites two decisions of this Court, long-predating BIPA, for the proposition "that a person is 'aggrieved' when his legal right is invaded or denied," and "nothing more is required." OB17-18, 36-37 (citing *Glos v. People*, 259 Ill. 332, 340 (1913), and *Am. Surety Co. v. Jones*, 384 Ill. 222, 229-30 (1943)). These cases involve entirely different factual and legal contexts. And to the extent they are relevant, they support the defendants' position here.

The issue in both cases was whether the plaintiffs could challenge proceedings to which they were *not parties*. Although this Court held that it was *necessary* for such plaintiffs to show that "a legal right is invaded by the act complained of" (*Glos*, 259 Ill. at 340; *Jones*, 384 Ill. at 229-230)—and that therefore the plaintiffs could not challenge the prior proceeding—the Court did not hold that this is *sufficient* to make someone "aggrieved." To the contrary, this

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Court has consistently held that to be aggrieved, a plaintiff must show *both* a violation of his rights *and* a resulting injury.

In *Glos*, the plaintiff filed a "bill of review" challenging a foreclosure proceeding to which she was not a party. 259 Ill. at 334, 338. She claimed that "she was directly and affirmatively affected by the proceedings" because they operated "in such a way as to place a cloud upon her title to the real estate in question." *Id.* at 338, 341. This Court explained that under the common law, a non-party to a foreclosure proceeding may file a bill of review only if she is "aggrieved by the decree." *Id.* at 339. This requirement is strict: "[E]ven persons having an interest in the cause, if not aggrieved by the particular assigned errors in the decree, cannot maintain a bill of review, *however injuriously* the decree may affect the[ir] rights." *Id.* (emphasis added). "'Aggrieved' means having a substantial grievance; a denial of some personal or property right." *Id.* at 340. The Court concluded that the plaintiff was not "*prejudiced in any way*" because the foreclosure proceedings were "invalid on their face in so far as they attempt to affect the rights of [the plaintiff]"; "the decree in question [was] no cloud on her title." *Id.* at 340, 344 (emphasis added). Accordingly, she was not "aggrieved." *Id.*

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In *Jones*, foreign insurance companies challenged the Illinois Director of Insurance's decision—again, in a separate proceeding—to allow a domestic insurance company to operate in Illinois. The companies invoked a statute that specified the venue in which a company that "is aggrieved" could contest such a decision. 384 Ill. at 224, 227-28. Following *Glos*, this Court held that the plaintiffs were not "aggrieved" because they were not parties to the administrative order. *Id.* at 230. They were arguably "prejudice[d]"—*i.e.*, harmed—because a contrary decision would have left them free "from the competition of [the domestic] company." *Id.* But that harm was insufficient because, unlike an insurance company deprived of its legal right to operate, the plaintiffs did not have "a *direct, immediate and substantial*" legal interest that was violated by the Director's decision. *Id.* at 229-30 (emphasis added).

Just three years after *Jones*, a plaintiff sued a tavern under the Dram Shop Act and won damages. *Gibbons v. Cannaven*, 393 Ill. 376, 377-78 (1946). She then brought a separate suit against the owners of the building in which the tavern was operating, seeking payment of the judgment against the tavern. *Id.* at 378. The owners filed a petition to appeal the judgment in the *first* case. *Id.* Citing

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Jones, this Court explained that a non-party may appeal a judgment only if he was "aggrieved by the judgment sought to be reviewed." *Id.* at 380. "It is essential," the Court explained, for the owners to show that "they were *injured* by the judgment, or will be directly benefited by its reversal." *Id.* at 381 (emphasis added). The Court held that the building owners would not be injured by any inability to appeal the first judgment, because they would be able to litigate the same issues in the action against them. *Id.* at 394.

In sum, the term "aggrieved" requires *both* a showing of injury (as *Glos* and *Gibbons* held) *and* a "direct, immediate and substantial" legal interest that has been violated (as *Jones* held).

D. Other State High Courts Have Interpreted "Aggrieved" to Require an Actual Injury.

Plaintiffs' position, if adopted, would place this Court out of step with ten state high-court decisions that have interpreted the term "aggrieved" in the context of a private action.

One recent case is particularly instructive, because the court's analysis is strikingly similar to the Second District's ruling below. In *Spade v. Select Comfort Corp.*, 232 N.J. 504 (2018), the New Jersey Supreme Court addressed a question certified by the Third

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Circuit about the meaning of New Jersey's Truth in Consumer Contract, Warranty and Notice Act ("TCCWNA"). This statute prohibits businesses from offering contracts with provisions that "violate[] any clearly established legal right of a consumer" (N.J.S.A. 56:12-15), and it provides that "[a]ny person who violates the provisions of this act shall be liable to the *aggrieved consumer* for a civil penalty" (N.J.S.A. 56:12-17 (emphasis added)). Like BIPA, TCCWNA does not permit the New Jersey Attorney General to bring a suit under the statute. The plaintiffs alleged that their contracts with several furniture companies did not inform them of their right to a refund for untimely deliveries, as required by "clearly established" New Jersey regulations, but they did not allege that they suffered any harm from these violations. 232 N.J. at 510-13.

The court held that "a consumer who receives a contract that includes language prohibited by [law], but who suffers no monetary or other harm as a result of that noncompliance, is not an 'aggrieved consumer' entitled to a remedy under the TCCWNA." *Id.* at 509. By adding the modifier "aggrieved" to the term "consumer" in TCCWNA's cause of action, the New Jersey Legislature meant to "distinguish[] consumers who have suffered harm because of a

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violation of [TCCWNA] from those who have merely been exposed to unlawful language in a contract or writing." *Id.* at 522. Any other interpretation, the court explained, would make "the term 'aggrieved' . . . superfluous." *Id.* The court provided a variety of illustrations of how someone might suffer real-world harm from a violation of the furniture regulations: For example, "[i]f an untimely delivery and misleading . . . language leaves a consumer without furniture needed for a family gathering, [he] may be an 'aggrieved consumer.'" *Id.* at 523-24. Because the plaintiffs had not alleged any such harm, their claims had to be dismissed. *See id.*

This holding is in accord with decisions of the highest courts of Wisconsin, Maine, Wyoming, Virginia, Pennsylvania, Indiana, Massachusetts, Oklahoma, and Oregon.[5] In fact, we have found no

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[5] *See Leibovich v. Minm. Ins. Co.*, 310 Wis. 2d 751, 775 (2008) (describing the "nearly synonymous relationship of the terms 'aggrieved' and 'injured'"); *Nergaard v. Town of Wesport Island*, 973 A.2d 735, 740 (Me. 2009) (to be an "aggrieved party," a plaintiff must "demonstrate not only that he or she had party status at the administrative proceedings, but *in addition*, that he or she has suffered a particularized injury or harm"); *Sinclair Oil Corp. v. Wyo. Public Serv. Comm'n*, 63 P.3d 887, 894 (Wy. 2003) (statute allowing challenges to agency action only for persons "aggrieved" required an allegation of "injury or potential injury" that is "perceptible, rather than [ ] speculative"); *Friends of the Rappahannock v. Caroline Cty. Bd. of Sup'rs*, 286 Va. 38, 48-49 (2013) ("aggrieved person" in context

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state high court decision that has *rejected* the proposition that the term "aggrieved" requires an actual injury.[6] This Court should join the overwhelming weight of authority on this question.

III. BIPA'S INJURY REQUIREMENT APPLIES THE SAME WAY TO ALL ALLEGED STATUTORY VIOLATIONS.

The ACLU argues (at 8) that BIPA's "aggrieved" provision should not be given effect because of "the rapidly improving capability" of technologies to "enable[] surreptitious collection" of biometric data. This analysis is unsound. BIPA's "aggrieved"

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of a declaratory judgment must "allege facts demonstrating a particularized harm"); *Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 204 (2005) (holding that, "[w]ith respect to th[e] requirement of being aggrieved," "[t]he keystone . . . is that the person must be negatively impacted in some real and direct fashion."); *Huffman v. Office of Envtl. Adjudication*, 811 N.E.2d 806, 812 (Ind. 2004) (statute requiring a plaintiff to be "aggrieved or adversely affected . . . contemplates some sort of personalized harm"); *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 121-22 (2011) ("Aggrievement requires a showing of more than minimal or slightly appreciable harm"); *Walls v. Am. Tobacco Co.*, 11 P.3d 626, 629 (Okla. 2000) ("[T]he term 'aggrieved consumer' implies that the consumer must have suffered some detriment . . . to pursue a private right of action."); *Comm. of One Thousand to Re-Elect State Senator Walt Brown v. Eivers*, 296 Or. 195, 200 (1983) (plaintiff was "aggrieved" where false statement "cause[d]" it "injury").

[6] Two federal courts have dismissed BIPA claims based in part on the aggrieved provision. *Vigil*, 235 F. Supp. 3d at 519-21; *McCollough v. Smarte Carte, Inc.*, 2016 WL 4077108, at *4 (N.D. Ill. Aug. 1, 2016).

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provision is a necessary element of the statute's private right of action, and therefore applies the same way to *all* alleged violations of the statute. The Court should recognize that satisfying BIPA's aggrieved limitation is a precondition to bringing any kind of lawsuit under the statute—regardless of the facts or technology involved.

As discussed above, BIPA regulates six "biometric identifiers"—"a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry"—and "biometric information" derived from this data. 740 ILCS 14/10. And it imposes liability in five situations—failure to give prior notice, failure to obtain a written release, sale of biometric data, disclosure of such data, and inadequate protection of such data. *Id.* 14/15. BIPA's "aggrieved" provision does not draw any distinction between the forms of data covered by BIPA or the type of violation alleged. The ability to bring a private action depends on whether a particular "*person*" is "aggrieved" by *any* alleged "violation." *Id.* 14/20 (emphasis added).

Nevertheless, in the *Facebook Biometric* action, the court suggested that the "aggrieved" requirement does not apply to certain alleged violations of the statute. The plaintiffs in that case assert that Facebook violated BIPA by applying facial-recognition software

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to photos uploaded to the service without complying with BIPA's notice-and-consent provisions. They conceded that they suffered no "downstream" or "consequential harm" as a result of Facebook's conduct; but they argued that a violation of the statute, without more, was sufficient to satisfy the "aggrieved" requirement.

In granting the plaintiffs' motion for class certification, the court declined to follow the Second District's decision in this case, holding that it was merely a "non-binding data point for ascertaining Illinois law." *In re Facebook Biometric Info. Privacy Litig.*, 2018 WL 1794295, at *6 (N.D. Cal. Apr. 16, 2018). But the court also found in the alternative that this case is distinguishable from the facts before it: It held that even if a plaintiff alleging "an express request for a fingerprint scan" must show actual harm, a plaintiff whose photo is subjected to facial recognition does not—*if* he alleges that he was not "on notice that [the defendant] was collecting [his] data." *Id.* at *8.

Simply put, BIPA does not say that the applicability of the "aggrieved" requirement turns on whether a plaintiff was aware that his data was collected, or on the *type* of data that was collected; the provision applies to *all* alleged BIPA violations. To be sure, people who are "on notice" of the data collection may be *less likely* to be

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aggrieved. But there is no reason to assume that this will always be determinative: Someone who is unaware that his data is being collected might not care in the slightest when he finds out. Others may be unhappy about it, but will not be able to show a compensable *injury*—either a significant emotional or reputational harm, monetary loss, reduced security of their data, or something comparable. And someone who *is* "on notice" that her data is being collected may nonetheless suffer an injury—for example, if there is a data breach and her identity is stolen. Whether the statute has been violated is a wholly separate issue from whether the plaintiff is "aggrieved by a violation of this Act"—as the Second District held.

Put differently, a plaintiff's awareness of the data collection may in some cases be *relevant* to whether she is aggrieved. But it does not determine whether the aggrieved requirement *applies*. The General Assembly did not make the private right of action dependent on whether the collection of data was "surreptitious" (ACLU Br. at 8) or overt; all plaintiffs must show an *injury* from the alleged violation.

CONCLUSION

The Court should affirm the Second District's decision.

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Respectfully submitted,

/s/ Michele Odorizzi
Michele Odorizzi
Michael A. Scodro
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600
modorizzi@mayerbrown.com
mscodro@mayerbrown.com

Lauren R. Goldman
Michael Rayfield
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500
lrgoldman@mayerbrown.com
mrayfield@mayerbrown.com

Counsel for Internet Association

Dated: September 10, 2018

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I, Michele Odorizzi, certify that this brief conforms to the requirements of Supreme Court Rules 341(a) and (b). The length of this brief, excluding pages or words contained in the Rule 3413(d) cover, the Rule 341(h)(1) 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 5,920 words.

/s Michele Odorizzi
Michele Odorizzi

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No. 123186

IN THE SUPREME COURT OF ILLINOIS

STACY ROSENBACH, AS MOTHER AND NEXT FRIEND OF ALEXANDER ROSENBACH, INDIVIDUALLY AND AS THE REPRESENTATIVE OF A CLASS OF SIMILARLY SITUATED PERSONS,
Plaintiff-Appellant,

v.

SIX FLAGS ENTERTAINMENT CORP. AND GREAT AMERICA LLC,
Defendants-Appellees.

On Appeal from the Appellate Court of Illinois, Second District, No. 2-17-317, there on Appeal from the Circuit Court of Lake County, Illinois, No. 2016-CH-13, Honorable Luis A. Berrones

NOTICE OF FILING

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that on September 10, 2018, we electronically filed the foregoing BRIEF *AMICUS CURIAE* OF INTERNET ASSOCIATION IN SUPPORT OF THE APPELLEES with the Clerk of the Illinois Supreme Court, copies of which are hereby served upon you.

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/s/ Michele Odorizzi
Michele Odorizzi
Michael A. Scodro
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600
modorizzi@mayerbrown.com
mscodro@mayerbrown.com

Lauren R. Goldman
Michael Rayfield
MAYER BROWN LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 506-2500
lrgoldman@mayerbrown.com
mrayfield@mayerbrown.com

Counsel for Internet Association

Dated: September 10, 2018

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CERTIFICATE OF SERVICE

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 are true and correct.

The undersigned hereby certifies that she is one of the attorneys for Amicus Internet Association and that she served the foregoing BRIEF *AMICUS CURIAE* OF INTERNET ASSOCIATION IN SUPPORT OF THE APPELLEES on all counsel of record by causing a copy thereof to be sent via email on September 10, 2018 to counsel of record at the email addresses listed below.

/s Michele Odorizzi
Michele Odorizzi

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Carolyn Taft Grosboll
SUPREME COURT CLERK

Service List

Phillip A. Bock
David M. Oppenheim
Bock, Hatch, Lewis & Oppenheim, LLC
134 N. La Salle Street, Suite 1000
Chicago, Illinois 60602-1086
(312) 658-5500
david@classlawyers.com

Ilan Chorowsky
Mark Bulgarelli
Progressive Law Group, LLC
1570 Oak Avenue, Suite 103
Evanston, Illinois 60201
(312) 787-2717

Counsel for Plaintiff-Appellant

Adam J. Levitt
Amy E. Keller
DiCello Levitt & Casey LLC
Ten North Dearborn Street
Eleventh Floor
Chicago, Illinois 606062
(312) 214-7900
alevitt@dlcfirm.com
akeller@dlcfirm.com

Marc Rotenberg
Alan Butler
Natasha Babazadeh
Electronic Privacy Information Center
1718 Connecticut Ave. NW
Suite 200
Washington, DC 20009
(202) 483-1140
rotenberg@epic.org
butler@epic.org
babazadeh@epic.org

Counsel for Amicus Curiae *Electronic Privacy Information Center (EPIC)*

Debra Bernard
Perkins Coie LLP
131 S. Dearborn St., Suite 1700
Chicago, IL 60603
dbernard@perkinscoie.com

Counsel for Defendant-Appellee

Rebecca K. Glenberg
Roger Baldwin Foundation of ACLU, Inc.
150 North Michigan Ave., Suite 600
Chicago, IL 60601
(312) 201-9740
rglenberg@aclu-il.org

Nathan Freed Wessler
American Civil Liberties Union Foundation
125 Broad St., 18th Fl.
New York, NY 10004
(212) 549-2500
nwessler@aclu.org

Joseph Jerome
Center for Democracy & Technology
1401 K St. NW, Suite 200
Washington, DC 2005
(202) 407-8812
jjerome@cdt.org

Adam Schwartz
Electronic Frontier Foundation
815 Eddy Street
San Francisco, CA 94109
(415) 436-9333
adam@eff.org

Michael C. Landis
Illinois PIRG Education Fund, Inc.
328 S. Jefferson St., Ste. 620
Chicago, IL 60661
(312) 544-4433
mlandis@pirg.org

Counsel for Amici Curiae *American Civil Liberties Union* et al.

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