No. 128004

IN THE SUPREME COURT OF ILLINOIS

LATRINA COTHRON
Plaintiff-Appellee,
v.
WHITE CASTLE SYSTEM, INC.,
Defendants-Appellant.

Question of Law Certified by the United States District Court of Appeals for the Seventh Circuit, Case No. 20-3202

Question of Law ACCEPTED on December 23, 2021 under Supreme Court Rule 20

On appeal from the United States District Court for the Northern District of Illinois under 28 U.S.C. § 1292(b), Case No. 19 CV 00382
The Honorable Judge John J. Tharp, Judge Presiding

BRIEF FOR THE AMERICAN ASSOCIATION FOR JUSTICE AND THE EMPLOYMENT LAW CLINIC OF THE UNIVERSITY OF CHICAGO LAW SCHOOL'S EDWIN F. MANDEL LEGAL AID CLINIC AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE LATRINA COTHRON

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The American Association for Justice ("AAJ") and the Employment Law Clinic of the University of Chicago Law School's Edwin F. Mandel Legal Aid Clinic ("Employment Law Clinic") respectfully submit this brief as *amici curiae* in support of Plaintiff-Appellee Latrina Cothron ("Ms. Cothron").

STATEMENT OF INTEREST OF THE *AMICI CURIAE*

The AAJ is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 75-year history, AAJ has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful injury.

The Employment Law Clinic has represented indigent clients, served as advocates for people typically denied access to justice, and worked to reform the legal system to be more responsive to the interests of the poor for over forty years. In that time, the Employment Law Clinic's dedicated attorneys and law students have represented hundreds of plaintiffs in individual cases and thousands in class action lawsuits.

Amici curiae, AAJ and the Employment Law Clinic, have a special interest in seeing that rights of workers are respected and protected. This case involves an issue of significant importance to the rights of workers to

protect their biometric data from capture and dissemination without their consent. The *amici* have a strong interest in ensuring that workers who are injured by violations of the Illinois Biometric Information Privacy Act (BIPA), 740 ILCS 14/1 *et seq.*, are able to pursue their claims in court.

INTRODUCTION

The Illinois legislature passed BIPA "in 2008 to help regulate 'the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information.'" *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶ 19, 129 N.E.3d 1197, 1203 (quoting 740 ILCS 14/5(g)). BIPA requires that a private entity obtain consent before collecting someone's biometric information. 740 ILCS 14/15(b). White Castle System, Inc. ("White Castle") began to require its employees "to scan their finger-prints to access pay stubs and work computers" shortly after Ms. Cothron started in 2004. *Cothron v. White Castle Sys., Inc.*, 20 F.4th 1156, 1159 (7th Cir. 2021) (*Cothron II*). Despite the passage of BIPA, White Castle did not change its practices or attempt to obtain consent from its employees until a decade later, in 2018. *Ibid.*

Ms. Cothron filed her complaint in the Circuit Court of Cook County against White Castle and Cross Match Technologies, Inc. ("Cross Match"). (R1-1 at 3–26.)[1] Cross Match removed the case to federal court under the

[1] Consistent with White Castle's brief, all "R__" citations refer to documents on the federal district court docket that are not included in White Castle's Appendix.

Class Action Fairness Act (CAFA), 28 U.S.C. §§ 1332(d), 1453. (R1 at ¶¶ 15–17.) To do so, Cross Match needed to satisfy the $5 million amount in controversy requirement. Cross Match admitted, however, that "Plaintiff ha[d] not alleged the amount of damages." (R1 at ¶ 15.) Therefore, Cross Match assumed that Ms. Cothron and the other class members were seeking $5,000 for each separate fingerprint scan. (R1 at ¶ 17.) *See Cothron II*, 20 F.4th at 1159 (noting removal). This is the only way for a class of "hundreds" of employees to reach the required threshold. (R1-1 at 80 n.2.)

White Castle and Cross Match moved for judgment on the pleadings, arguing that the cause of action accrued upon the first unauthorized collection of biometric information after BIPA was passed. (R120 at 7; *see also* R118 at 26.) The District Court for the Northern District of Illinois held that each fingerprint scan was a separate violation. *Cothron v. White Castle Sys., Inc.*, 477 F. Supp. 3d 723, 731 (N.D. Ill. 2020) (*Cothron I*). The Seventh Circuit, on an interlocutory appeal, then certified the question of when a cause of action under BIPA accrues to this Court. *Cothron II*, 20 F.4th at 1166. This Court accepted the certified question. The issue before the Court is whether a violation of BIPA occurs only once when the employer first captures and/or discloses biometric information without consent, or, alternatively, whether a new violation accrues each time the employer captures and/or discloses biometric information without the employee's consent. *Id.* at 1167.

This Court should use the continuing violation concept to determine when the statute of limitations runs for BIPA claims. BIPA claims fit the animating principles of the continuing violation doctrine because BIPA violations are continuing unlawful acts. *See Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 279–80, 798 N.E.2d 75, 89 (2003). Additionally, a continuing violation analysis interprets the language of the statute in a way that avoids unjust results. *See Cunningham v. Huffman*, 154 Ill. 2d 398, 405–06, 609 N.E.2d 321, 325 (1993). White Castle and its *amici* suggest that the Court use a single-publication analysis instead of a continuing violation analysis. Retail Litig. Ctr.'s Br. at 31–33 (citing *Blair v. Nevada Landing Partnership*, 369 Ill. App. 3d 318, 859 N.E.2d 1188 (2d Dist. 2006)). By the plain language of the statute, however, BIPA violations are not publication torts. Additionally, reliance on *Blair*, which interpreted the Illinois Right to Publicity Act (IRPA), 765 ILCS 1075/1 *et seq.*, is misplaced because IRPA is materially different from BIPA: the two acts serve different purposes and protect different kinds of rights.

White Castle's first-scan accrual interpretation would provide employers with no incentive to comply with BIPA. If an employer impermissibly collects biometric information, the employer can simply wait for the statute of limitations to run. The employer is free to continue collecting employees' biometric information with impunity. The employer would have no incentive

to seek permission from its employees. The Illinois legislature could not have intended to create such flimsy protection for such an important interest.

The issue of damages is not part of the certified question and need not be addressed in order to resolve this dispute. Moreover, the potential damages are not as dire as White Castle and its *amici* claim. Ms. Cothron has never sought, and does not currently seek, statutory damages for each scan. This is a figment of White Castle's imagination, invented to stoke fears and create grounds for removal. A continuing violation analysis considers the individual scans to be part of a long-lasting violation resulting in a single award of statutory damages.

This Court need not, and should not, address the constitutional issues allegedly arising from the damages provision. If the Court, however, does reach the constitutional question, it should uphold BIPA's validity. BIPA's statutory damages exceed neither the United States nor the Illinois constitutions. BIPA's liquidated damages are statutory damages, not punitive damages. As statutory damages, the consideration is whether the penalty is unreasonable and disproportionate to the offense. *See St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66–67 (1919). This is a threshold BIPA easily clears, given the irreversible harm caused by the compromise of an individual's biometric information. Given this vital interest, there is no obvious error that warrants deviating from BIPA's plain language.

ARGUMENT

I. BIPA Violations Accrue Upon the Last Unlawful Act.

This Court should use the continuing violation concept to determine when the statute of limitations runs for BIPA claims. Under the continuing violation doctrine, a BIPA violation accrues upon the last unlawful act. The violation begins with the first fingerprint scan without consent and continues until a) the employer stops collecting biometric information or b) the employee gives consent. The statute of limitations starts running when one of these two events occurs.

A. BIPA Violations are Continuing Violations.

A continuing violation occurs when there are "continuing unlawful acts and conduct, not by continual ill effects from an initial violation." *Feltmeier*, 207 Ill. 2d at 278, 798 N.E.2d at 85 (citations omitted); *cf. National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 118 (2002) (holding that "the incidents constituting a hostile work environment are part of one unlawful employment practice"). "A single overt act" fails the test. *Feltmeier*, 207 Ill. 2d at 278, 798 N.E.2d at 85. Rather, the unlawful conduct must be viewed "as a continuous whole." *Id.* at 279, 798 N.E.2d at 86. The statute of limitations begins on "the date of the last injury suffered or when the tortious acts cease." *Id.* at 284, 798 N.E.2d at 89. Significantly, the purpose of statutes of limitations is "not to shield a wrongdoer," which is what alternative interpretations of BIPA would do. *Id.* at 283, 798 N.E.2d at 88 (citing *Tom*

Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc., 61 Ill. 2d 129, 137, 334 N.E.2d 160, 164 (1975)).

It is important to look to the relevant statute for guidance. *Watson v. Legacy Healthcare Fin. Servs., LLC*, 2021 IL App (1st) 210279, ¶ 69 (citing *Feltmeier*, 207 Ill. 2d at 280, 798 N.E.2d at 86); *see Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 347, 770 N.E.2d 177, 191 (2002). BIPA clearly applies "to any information, regardless of how it is captured," 740 ILCS 14/10, meaning that each new capture is an unlawful act. *See Watson*, 2021 IL App (1st) 210279, ¶ 53 ("There is no modifier limiting 'collect' or 'capture'; thus, the requirements apply to each and every collection and capture.'").

1. White Castle's Conduct Was Continually Unlawful.

Each new fingerprint scan is necessarily a new collection—even if only one original copy is stored in the system—because BIPA distinguishes between "collection" and "storage." Every fingerprint scan is an "active step" taken by the employer to "collect or otherwise obtain biometric data." *Heard v. Becton, Dickinson & Co.*, 524 F. Supp. 3d 831, 841 (N.D. Ill. 2021). The scans are part of the employer's ongoing failure to perform its duties under BIPA, causing a recurring injury. *See Roark v. Macoupin Creek Drainage Dist.*, 316 Ill. App. 3d 835, 847, 738 N.E.2d 574, 585 (4th Dist. 2000) ("the ongoing failure to keep the drain system functional was an ongoing violation"); *see also Gredell v. Wyeth Lab'ys, Inc.*, 346 Ill. App. 3d 51, 59, 803 N.E.2d 541, 547 (1st Dist.

2004) (noting the continuous nature of fraudulent misrepresentations and that the violation ended when the product was taken off the market).

White Castle's *amici* incorrectly suggest that any effects of an alleged BIPA violation accrue immediately upon the initial scan or transmission. Retail Litig. Ctr.'s Br. at 31. The *amici* argue that BIPA violations encompass "continual effect[s] from an initial violation" rather than "continuing unlawful acts and conducts," such that "the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury." *Feltmeier*, 207 Ill. 2d at 279–80, 798 N.E.2d at 85. This interpretation is misguided.

2. A Continuing Violation Analysis Avoids Unjust Results.

In interpreting the statute, the Court should avoid "unjust results." *Cunningham*, 154 Ill. 2d at 405, 609 N.E.2d at 325. The purpose behind having a statute of limitations is "to prevent stale claims, not to preclude claims before they are ripe for adjudication . . . and certainly not to shield a wrongdoer." *Feltmeier*, 207 Ill. 2d at 283, 798 N.E.2d at 88.

If White Castle's first-scan accrual analysis applies, then defendants—once the statute of limitation passes—are free to continue collecting employees' biometric information (for instance, fingerprint scanning) in perpetuity without employees' consent, because all suits would be time-barred. White Castle's proposed interpretation allows employers to escape all liability under BIPA simply by waiting out the statute of limitations, after which they can do anything with employees' biometric information,

regardless of whether they receive consent. Allowing such a result clearly produces an unjust result that directly contradicts BIPA's expressed regard for the importance of biometric information and its unique risks.

B. White Castle Misconstrues the Nature of BIPA Violations.

1. The Single-Publication Analysis Does Not Apply to BIPA.

White Castle's *amici* rely on *Blair v. Nevada Landing Partnership*, 369 Ill. App. 3d 318, 859 N.E.2d 1188 (2d Dist. 2006), as support for not adopting a continuing violation analysis. Retail Litig. Ctr.'s Br. at 31–33. In *Blair*, the court used a single publication analysis to hold that the claim accrued on the first publication date: later publications of the plaintiff's photograph were "continual effects" of the initial overt act. 369 Ill. App. 3d at 324, 859 N.E.2d at 1193. The analysis in *Blair*, which dealt with a claim under IRPA, cannot apply in this case. BIPA and IRPA are fundamentally different statutes. Moreover, because BIPA claims—unlike the violation in *Blair*—are not limited to publication, a single-publication analysis is inappropriate.

There is no blanket rule for when a continuing violation analysis should apply to a tort case, so the result should be "based on interpretation of the language contained in the" relevant statute. *Belleville Toyota*, 199 Ill.2d at 347, 770 N.E.2d at 191. Therefore, the Court's analysis of whether the continuing violation doctrine applies to BIPA should be limited to the language of BIPA. Comparisons to other statutes, such as IRPA, have no

bearing on whether the continuing violation doctrine applies to BIPA violations.

First, BIPA and IRPA serve different purposes and protect different kinds of rights. Unlike IRPA, which concerns "property rights that are freely transferable," 765 ILCS 1075/15, BIPA protects biometric rights that "are inherently not transferable." *Watson*, 2021 IL App (1st) 210279, ¶ 70. IRPA recognizes an individual's right to privacy as the "right to control and to choose . . . how to use an individual's identity for *commercial purposes*." 765 ILCS 1075/10 (emphasis added). By contrast, as the legislature noted in the BIPA text, "[b]iometrics are unlike other unique identifiers . . . 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). Section 15(c) of BIPA is the only provision that discusses the commercial sale of biometric information. 740 ILCS 14/15(c). The existence of other non-commercial provisions regulating retention, collection, disclosure, and destruction of biometric information reinforces the idea that BIPA, compared to IRPA, is a much broader and fundamentally different statute.

Second, a single-publication analysis cannot apply to BIPA claims because BIPA claims are not purely publication torts. The *Blair* court concluded that because *Blair* concerned a publication tort, "defamation and privacy actions are 'complete at the time of the first publication, and any

subsequent [ ] distributions of copies of the original publication are of no consequence to the creation [ ] of a cause of action." *Blair*, 369 Ill. App. 3d at 324–25, 859 N.E.2d at 1193 (citation omitted) (emphasis deleted). The continuing violation doctrine did not apply under a single-publication analysis because the first publication of plaintiff's image was one overt act. Subsequent publications were merely continual effects of that first publication. *Blair*'s denial of the continuing violation claim—based on a single-publication analysis—has no relevance here, however, because BIPA claims cover much more than publication.

Courts have consistently held that a violation of BIPA does not necessarily constitute a publication. The Circuit Court in *Robertson v. Hostmark Hospitality Group, Inc.* held that publication is not a "necessary element for a person to be aggrieved by a violation of the BIPA statute." No. 18-CH-5194, 2019 WL 8640568, at *3 (Cir. Ct. Cook Cty. Jul. 31, 2019). A claim alleging a BIPA statutory violation is distinct from an action alleging publication of matter that violates the right to privacy. *Id.* at *3 ("[W]e are dealing with an action for a violation of the BIPA statute and not an action for slander, libel, or for the publication of matter violating the right to privacy."). In *Stauffer v. Innovative Heights Fairview Heights, LLC*, the court reiterated *Robertson*'s reasoning: it rejected the defendant's argument that BIPA violations were essentially invasion of privacy claims related to the

publication of matter violating the right of privacy. 480 F. Supp. 3d 888, 904 (S.D. Ill. 2020).

Reading a publication requirement into BIPA claims, in order to apply a single-publication analysis, would misconstrue the plain language of the statute. BIPA regulates "the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(g). Although use of biometric information—such as disclosure of information—could encompass "publication," there is no publication element to storing, retaining, or destroying biometric information. Using a single-publication analysis, based on a finding that BIPA violations are publication torts, would wrongly collapse BIPA's enumerated purposes into a single purpose of regulating "usage." To avoid wrongly conflating BIPA violations with torts dealing purely with publication, the Court should not use a single-publication accrual analysis.

2. White Castle's Interpretation Is Inconsistent with the Plain Language of BIPA.

The plain language of the statute prevents reading BIPA claims as accruing on an entity's "first" capture or collection. Most recently, the First District Appellate Court in *Watson* interpreted BIPA to mean that "an entity may not collect or capture without 'first' informing a subject and receiving a release." *Watson*, 2021 IL App (1st) 210279, ¶ 53. The court rejected defendants' attempt to "rewrite the statute so that it reads 'before an entity first collects or captures.'" *Ibid*. Because the word "first" in Section 15

"modifies the words 'informs' and 'receives,'" "[i]t modifies the entity's obligations, not the triggering actions." *Ibid.*

White Castle's attempt to limit BIPA injuries to the employer's initial unlawful act misconstrues the meaning and purpose of the statute. White Castle cites *West Bend Mutual Insurance Company v. Krishna Schaumburg Tan, Inc.* as holding that BIPA "protects a secrecy interest." Def.-Appellant's Br. at 16 (citing *West Bend Mut. Ins. Co. v. Krishna Schaumburg Tan, Inc.*, 2021 IL 125978, ¶ 46). Therefore, White Castle concludes that "[a] BIPA injury is, quite simply, the loss of control over and secrecy in one's biometrics without knowing consent." *Id.* at 16. Based on this definition, White Castle argues that a "single overt act" happens upon the initial loss of control over one's biometrics, and once that control is lost, the injury is complete. *Id.* at 17–18.

West Bend, however, dealt with a claim that the entity violated BIPA by disclosing biometric information to a third party. *West Bend*, 2021 IL 125978, ¶ 46. The *West Bend* Court found that BIPA "protects *a* secrecy interest" in relation to the claim at issue. *Ibid.* (emphasis added). White Castle wrongly generalizes *West Bend*'s analysis on Section 15(d) disclosure claims when it concludes that "[a] person cannot keep information secret from another person who already has it," and therefore once a party collects or discloses biometrics without complying with BIPA, the invasion of the plaintiff's interest and the plaintiff's injury "are one and the same." Def.-

Appellant's Br. at 18. The *West Bend* analysis should instead be limited to the facts at issue there because the *West Bend* Court addressed only one kind of BIPA violation—disclosure.

Holding that the injury is complete upon the first unlawful collection because secrecy is lost forever would make Section 15(b)(2)—which requires informing the person of the length of term for which the biometric information is stored, 740 ILCS 14/15(b)(2)—toothless. Consider an example where an entity informs a plaintiff that they are collecting fingerprint scans and storing them for one year, but actually stores them for ten years. Because the plaintiff believes that their biometrics have been destroyed after the first year, they fail to realize the company has violated Section 15(b)(2) until after the statute of limitations passes. White Castle's interpretation, where all secrecy has been lost and thus only the first collection accrues the claim, would bar any plaintiffs from recovering when companies violate their obligation to accurately inform people of how long their biometrics are stored for. This result directly contradicts BIPA's purpose in serving "public welfare, security, and safety." 740 ILCS 14/5(g).

Thus, because White Castle and its *amici* misconstrue the nature of BIPA violations and the purpose of the statute, the Court should use a continuing violation analysis instead of a single-publication or first-scan accrual analysis.

II. The Determination of Damages Is Not Before the Court.

White Castle and its *amici*'s argument rests, in part, on policy concerns about the potential for large damages awards. Def.-Appellant's Br. at 39–49; Retail Litig. Ctr.'s Br. at 22–30; Ill. Chamber of Com.'s Br. at 8–12, 14–26; Ill. Mfr.'s Ass'n's Br. at 10–19. The proper calculation of damages, however, is not before the Court. The certified question depends on the interpretation of BIPA's claim-accrual provisions, 740 ILCS 14/15(b), (d), not its separate damages provisions, 740 ILCS 14/20. As the Seventh Circuit recognized, "the calculation of damages is separate from the question of claim accrual." *Cothron II*, 20 F.4th at 1165; *accord Watson*, 2021 IL App (1st) 210279, ¶ 66 (acknowledging that, when determining claim accrual, "[q]uestions relating to damages are not before us"). The Court should decide no more than is necessary.

Furthermore, a ruling for Ms. Cothron need not precipitate the parade of horribles that White Castle and its *amici* predict. Ms. Cothron has never sought, and does not seek, "catastrophic damages." Ill. Mfr.'s Ass'n's Br. at 2. Nor has any plaintiff in any BIPA action sought such dramatic relief. Rather, it was White Castle and its co-Defendant that alleged large potential damages as part of their strategy to remove the case to federal court under CAFA. (R1 at ¶¶ 15–17.) White Castle raised the specter of punishing damages to obtain a federal forum and distract from the instant legal question of claim accrual. White Castle is purporting to solve a problem of its

own making. The Court should not let White Castle's legal strategy warp its interpretation of BIPA's plain language.

If the Court were to hold that collection and disclosure of the same fingerprints is a continuing violation, damages would not necessarily reach the stratosphere. If the repeated collection and disclosure of the same biometric information were a single, continuing violation, as discussed above, BIPA would only permit a single award of statutory damages.

III. BIPA's Damages Provisions Do Not Raise Constitutional Concerns.

A. Constitutional Questions Are Not Properly Before the Court.

White Castle and its *amici* ask the Court to interpret BIPA narrowly to avoid constitutional issues allegedly arising from its damages provisions. Def.-Appellant's Br. at 42–46; Retail Litig. Ctr.'s Br. at 26–30; Ill. Chamber of Com.'s Br. at 17–18. The issue of BIPA's constitutionality, however, is a discrete question of law that is not before the Court.

The certified question is narrow. Of course, the Court may determine the question's scope or "reformulate" it. *Cothron II,* 20 F.4th at 1167. Here, however, the accrual question can be resolved without reaching the issue of BIPA's constitutionality. To be sure, "an interpretation under which the statute would be considered constitutional is preferable to one that would leave its constitutionality in doubt." *Braun v. Ret. Bd. of Firemen's Annuity & Ben. Fund of Chicago*, 108 Ill. 2d 119, 127, 483 N.E.2d 8, 12 (1985). Courts, however, may not inject constitutional concerns into routine matters of

statutory construction. This Court has "repeatedly stated that cases should be decided on nonconstitutional grounds whenever possible, reaching constitutional issues only as a last resort." *In re E.H.*, 224 Ill. 2d 172, 178, 863 N.E.2d 231, 234 (2006) (collecting cases); *see People v. Barker*, 2021 IL App (1st) 192588, ¶ 55, *appeal denied*, No. 127459, 2021 WL 6500597 (Ill. Nov. 24, 2021) ("[C]ourts should not anticipate a question of constitutional law before the necessity of deciding it.").

B. In Any Event, BIPA's Damages Are Not Constitutionally Suspect.

If the Court reaches the constitutional question, it should uphold BIPA's validity. BIPA does not impose punitive damages. Moreover, under any claim-accrual analysis proposed in this litigation, BIPA's statutory damages do not violate the United States or Illinois constitutions.

1. BIPA Imposes Statutory, Not Punitive, Damages.

The United States Constitution's Due Process Clause, U.S. Const. amend. XIV, § 1, places limits on both punitive and statutory damages. BIPA's "liquidated damages," 740 ILCS 14/20(1), (2), are statutory damages, not punitive damages.

"Punitive damages are . . . awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1979). By contrast, compensatory damages remedy the harm the defendant caused. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

Statutory damages enable a plaintiff to recover when "it might otherwise be difficult or impossible to prove the existence or amount of plaintiff's actual damages." Sande Buhai, *Statutory Damages: Drafting and Interpreting*, 66 U. Kan. L. Rev. 523, 543 (2018). "Privacy, information disclosure, and civil rights cases often present [ ] forbidding difficulty-of-proof problems. . . . Statutory damage awards that reasonably approximate" plaintiffs' harms resolve these problems. *Id.* at 545. Because statutory damages typically attempt to estimate, and thereby redress, a plaintiff's loss, "courts have recognized that standardized statutory damages can serve a compensatory purpose." *Giannopoulos v. Iberia Lineas Aereas de Espana, S.A.*, No. 11 C 775, 2012 WL 5383271, at *5 (N.D. Ill. Nov. 1, 2012) (collecting cases).[2]

BIPA protects the precise type of privacy or information-disclosure harm that statutory damages remedy. *See West Bend*, 2021 IL 125978, ¶ 51 ("[BIPA] codifies persons' right to privacy in their biometric identifiers and information."). To do so, it awards either actual damages or "liquidated damages," but not both. 740 ILCS 14/20(1), (2). BIPA gives plaintiffs the option of statutorily prescribed damages when actual damages are difficult or

[2] Statutory damages can constitute punitive damages when they are awarded in addition to actual damages. *See In re Trans Union Corp. Priv. Litig.*, 211 F.R.D. 328, 341 (N.D. Ill. 2002). This caveat is not relevant here. BIPA's statutory damages are awarded in lieu of actual damages in situations where actual damages cannot be determined. Accordingly, BIPA statutory damages serve a compensatory purpose.

impossible to quantify. Therefore, BIPA's liquidated damages provisions constitute statutory damages, not punitive damages.[3]

2. BIPA's Statutory Damages Do Not Exceed Federal Due Process Limits.

The United States Constitution's limits on punitive damages do not apply to statutory damages, despite White Castle and its *amici*'s suggestions to the contrary. The federal Constitution instead enforces a less restrictive limit. Under the proper test, BIPA's liquidated damages provisions survive under any claim-accrual analysis considered in this litigation.

a. *St. Louis, I.M. & S. Ry. Co. v. Williams* Is the Correct Test.

White Castle and its *amici* cite *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), to suggest that its restrictions apply to BIPA's liquidated damages provisions. Def.-Appellant's Br. at 43–45; Retail Litig. Ctr.'s Br. at 26–28; Ill. Chamber of Com.'s Br. at 17. The United States Supreme Court held that the Due Process Clause places limits on punitive damages. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996); *State Farm*, 538 U.S. at 416. This limit derives from the

[3] The Court has stated that BIPA has "preventative and deterrent purposes." *Rosenbach*, 2019 IL 123186, ¶ 37, 129 N.E.3d at 1207. Logically, however, any award of damages will have some deterrent effect. This is not dispositive when determining whether damages are punitive: For example, courts have held that the Copyright Act's statutory damages are not punitive damages even though they serve as a "deterrent." *Capitol Recs., Inc. v. Thomas-Rasset*, 692 F.3d 899, 907–08 (8th Cir. 2012).

principle of fair notice. *Id.* at 417. The Court established three "guideposts" for courts to analyze punitive damages awards:

> (1) [T]he degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Id. at 418. The Court concluded that even "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Id.* at 429.

Every federal court of appeals to have considered the issue, however, concluded that the limits established in *Gore* and *State Farm* do not apply to non-punitive statutory damages. *See Zomba Enters., Inc. v. Panorama Recs., Inc.*, 491 F.3d 574, 587 (6th Cir. 2007); *Thomas-Rasset*, 692 F.3d at 907; *Sony BMG Music Ent. v. Tenenbaum*, 719 F.3d 67, 71 (1st Cir. 2013). The United States Supreme Court's "concern about fair notice does not apply to statutory damages, because those damages are identified and constrained by the authorizing statute." *Thomas-Rasset*, 692 F.3d at 907.

Furthermore, *State Farm*'s latter two guideposts are inapplicable to statutory damages. The second guidepost is inapposite because '[i]t makes no sense to consider the disparity between 'actual harm' and an award of statutory damages when statutory damages are designed precisely for instances where actual harm is difficult or impossible to calculate." *Id.* at 907–08. An award of statutory damages is the civil penalty; therefore, the

third "guidepost would require a court to compare the award to itself, a nonsensical result." *Sony BMG*, 719 F.3d at 71.

The First, Sixth, and Eighth Circuits instead applied the Due Process Clause's test for statutory damages announced in *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63 (1919). In *Williams*, the United States Supreme Court held that statutory damages are excessive "only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Id.* at 66–67. This Court has held that *Williams* is the test for the validity of statutory damages under the United States Constitution. *In re Marriage of Miller*, 227 Ill. 2d 185, 198–99, 879 N.E.2d 292, 301 (2007). The Illinois Appellate Court expressly declined to apply *Gore* and *State Farm* in a case that "involves a statutory penalty rather than an award of punitive damages." *In re Marriage of Chen & Ulner*, 354 Ill. App. 3d 1004, 1022, 820 N.E.2d 1136, 1152 (2d Dist. 2004). This Court should again apply *Williams*, and not *Gore* or *State Farm*.

b. BIPA Satisfies *Williams* and the Constitution.

Applying *Williams*, statutory damages here are not "wholly disproportioned to the offense." Though actual damages likely cannot be calculated, the harm of a loss of privacy "is real and significant." *Rosenbach*, 2019 IL 123186, ¶ 34, 129 N.E.3d at 1206. Loss of privacy causes injury on at least two dimensions.

First, the loss of privacy is often connected to economic harm. As the Illinois General Assembly understood, once an individual's biometric information is compromised, she "is at heightened risk for identity theft, and is likely to withdraw from biometric-facilitated transactions," 740 ILCS 14/5(c). These effects hamper her ability to participate in economic life. Bearing out the General Assembly's predictions, surveys have found that many Americans "expressed a willingness to give up a benefit in exchange for avoiding a program that used biometrics." Matthew B. Kugler, *From Identification to Identity Theft: Public Perceptions of Biometric Privacy Harms*, 10 U.C. Irvine L. Rev. 107, 130 (2019).

Second, the loss of privacy is a dignitary harm. Biometric identifiers convey intensely personal information about an individual's own body. Consequently, many Americans "say that biometric data collection and sharing feels invasive." *Id.* at 142; *see also id.* at 134 ("A person's face is part of them in a way that their social security number or identity card is not."). The law has long recognized that dignitary torts, such as invasion of privacy, constitute real injuries that can justify compensatory damages. *See* Restatement (Second) of Torts § 901 cmt. c (1979).

The constitutional test for statutory damages is highly deferential. *Williams* itself permitted a 113-to-1 ratio between statutory and actual damages. *See Zomba Enters.*, 491 F.3d at 588. This ratio is far higher than the four-to-one ratio discussed in *State Farm*. *Williams*, then, leaves states

with "a wide latitude of discretion" to compensate their injured citizens. 251 U.S. at 66. Whatever the precise harm here, it is significant. Thus, it is very unlikely that, under any proposed claim-accrual analysis, statutory damages would exceed *Williams*' 113-to-1 ratio.

This Court has previously acknowledged "the substantial and irreversible harm that could result if biometric identifiers and information are not properly safeguarded." *Rosenbach*, 2019 IL 123186, ¶ 37, 129 N.E.3d at 1207. It should not now conclude that this harm is so *de minimis* that the statutory damages that redress it are "obviously unreasonable." It should hold that BIPA's damages comply with the United States Constitution.

3. BIPA's Statutory Damages Do Not Exceed Illinois Due Process Limits.

White Castle and one of its *amici* also suggest that BIPA's statutory damages implicate the Illinois Constitution. Def.-Appellant's Br. at 43–46 & n.10; Retail Litig. Ctr.'s Br. at 28–30. They are mistaken.

The Illinois Constitution prohibits "depriv[ations] of life, liberty or property without due process of law." Ill. Const. art. I, § 2. When reviewing statutory damages, Illinois courts have "discern[ed] no reason to construe [the state's] due process clause differently than the federal due process clause," *Miller*, 227 Ill. 2d at 196, 879 N.E.2d at 299, and have applied the *Williams* test.

Illinois' Due Process Clause also proscribes statutory penalties that are not "reasonably designed to remedy the evils which the legislature has

determined to be a threat to the public health, safety and general welfare." *People v. Bradley*, 79 Ill. 2d 410, 417, 403 N.E.2d 1029, 1032 (1980) (quoting *Heimgaertner v. Benjamin Elec. Mfg. Co.*, 6 Ill. 2d 152, 159, 128 N.E.2d 691, 695 (1955)). This test "focuses on the purposes and objectives of the enactment in question." *Ibid.* Illinois courts decline to enforce statutory penalties that stand "in contravention of the express intent of the legislature." *Id.* at 418, 403 N.E.2d at 1032. In other words, due process permits a court to avoid the consequences of an "obvious mistake of the legislature." *Id.* at 420, 403 N.E.2d at 1033 (Ryan, J., concurring in part and dissenting in part). Barring such mistake, "legislation challenged on due process grounds will be upheld if it is rationally related to a legitimate goal." *People v. Kimbrough*, 163 Ill. 2d 231, 242, 644 N.E.2d 1137, 1143–44 (1994).

BIPA's statutory damages clear this low bar. The Court has explained that the General Assembly legitimately chose to grant individuals the ability to control the collection and use of their biometric information. *See Rosenbach*, 2019 IL 123186, ¶¶ 34–35, 129 N.E.3d at 1206. At the core of the "strategy adopted by the General Assembly" are provisions "subjecting private entities who fail to follow the statute's requirements to substantial potential liability." *Id.* at ¶ 36, 129 N.E.3d at 1206–07. BIPA's statutory damages are not merely rationally related to the General Assembly's goals, but are actually "integral" to accomplishing those goals. *Id.* at ¶ 37, 129 N.E.3d at 1207. The General Assembly made no mistake. Rather, it acted

rationally and reasonably. BIPA's damages thereby comply with the Illinois Constitution.

CONCLUSION

For the reasons set forth above, *amici curiae* American Association for Justice and the Employment Law Clinic of the University of Chicago Law School's Edwin F. Mandel Legal Aid Clinic respectfully urge this Court to apply a continuing violation analysis to decide the question of when a cause of action under BIPA accrues. Based on that analysis, this Court should hold that claims under Section 15(b) and 15(d) of BIPA continue to accrue each time a private entity scans a person's biometric identifier and each time a private entity transmits such a scan to a third party, until the entity obtains the person's consent or stops collecting and/or transmitting the biometric information.

Respectfully Submitted,

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April 7, 2022

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 25 pages.

Respectfully submitted,

/s/ Randall D. Schmidt
Counsel for *Amicus Curiae* the Employment Law Clinic

Dated: April 7, 2022

No. 128004

IN THE SUPREME COURT OF ILLINOIS

LATRINA COTHRON, *Plaintiff-Appellee,* v. WHITE CASTLE SYSTEM, INC., *Defendant-Appellant.*	Question of Law Certified by the United States District Court of Appeals for the Seventh Circuit, Case No. 20-3202 Question of Law ACCEPTED on December 23, 2021 under Supreme Court Rule 20 On appeal from the United States District Court for the Northern District of Illinois under 28 U.S.C. § 1292(b), Case No. 19 CV 00382 The Honorable Judge John J. Tharp, Judge Presiding

[PROPOSED] ORDER

This matter coming to be heard on the Motion of the American Association for Justice and the Employment Law Clinic of the University of Chicago Law School's Edwin F. Mandel Legal Aid Clinic for Leave to File a Brief of *Amici Curiae* in Support of Plaintiff-Appellee, due notice having been given and the Court being fully advised in the premises, **IT IS HEREBY ORDERED** that the Motion of the American Association for Justice and the Employment Law Clinic is granted / denied.

Entered**:**

Justice

Prepared by:
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NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, Randall D. Schmidt, an attorney, hereby certify that on April 7, 2022, I caused true and complete copies of the foregoing;

A. Motion, including exhibits and draft Order, of the American Association for Justice and the Employment Law Clinic of the University of Chicago Law School's Edwin F. Mandel Legal Aid Clinic for Leave to File a Brief of *Amici Curiae* in Support of Plaintiff-Appellee, and

B. Brief of the American Association for Justice and the Employment Law Clinic of the University of Chicago Law School's Edwin F. Mandel Legal Aid Clinic as *Amici Curiae* in Support of Plaintiff-Appellee Latrina Cothron

to be filed electronically with the Clerk's Office of the Illinois Supreme Court, using e-filing provider Odyssey eFileIL, which sends notification and a copy of this filing by electronic mail to the following counsel of record:

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Under penalties by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certified that the statements set forth in this notice of filing and certificate of service are true and correct.

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