

**IN THE
ILLINOIS SUPREME COURT**

STACY ROSENBACH, as Mother and Next Friend of Alexander Rosenbach, individually and as the representative of a class of similarly situated persons, Petitioner/Plaintiff, v. SIX FLAGS ENTERTAINMENT CORP. and GREAT AMERICA LLC, Respondents/Defendants.) On Appeal from the) Appellate Court of Illinois,) Second Judicial District,) No. 2-17-317)) There on Appeal from the) Circuit Court of Lake) County, Illinois No. 2016-) CH-13)) The Hon. Luis A.) Berrones, Judge Presiding)))
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**Motion for Leave to File Brief *Amicus Curiae* by Electronic Privacy
Information Center (EPIC) in Support of Petitioner/Plaintiff
Urging Reversal**

Marc Rotenberg Alan Butler Natasha Babazadeh ELECTRONIC PRIVACY INFORMATION CENTER 1718 Connecticut Ave. NW Suite 200 Washington, D.C. 20009 (202) 483-1140	Adam J. Levitt Amy E. Keller DICELLO LEVITT & CASEY LLC Ten North Dearborn Street Eleventh Floor Chicago, Illinois 60602 (312) 214-7900
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Counsel for Amicus Curiae

July 5, 2018

Pursuant to Illinois Supreme Court Rules 345 and 361, the Electronic Privacy Information Center (“EPIC”) respectfully moves for leave to submit an *amicus* brief in support of Petitioner-Plaintiff, Stacy Rosenbach, and urges reversal of the Illinois Appellate Court, 2017 Ill. App (2d) 170317 (Ill. App. Ct. Dec. 21, 2017). A copy of EPIC’s *amicus* brief and a proposed order are attached.

In evaluating a motion for leave to submit an *amicus* brief, the Court will “consider whether the brief will provide it with ideas, arguments, or insights helpful to resolution of the case that were not addressed by the litigants themselves.” Order, *Kinkel v. Cingular Wireless, L.L.C.*, 223 Ill.2d 1 (Jan. 11, 2006) (No. 100925) (citing *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (chambers opinion by Posner, J.)). This Court has traditionally followed the guidance of the Seventh Circuit in evaluating whether a proposed *amicus* brief will be helpful to the resolution of a case, and found that a brief should be accepted “(1) when a party is not competently represented or not represented at all, or (2) when the would-be *amicus* has a direct interest in another case, and the case in which he seeks permission to file an *amicus curiae* brief may, by operation of *stare decisis* or *res judicata*, materially affect that interest; or (3) when the *amicus* has a unique perspective, or information, that can assist the court beyond the help that the lawyers for parties are able to provide.” *Id.* (citing *National Organization for Women v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000)).

The Court should grant EPIC’s motion for leave and accept the proposed brief, under the third reason listed above, because of EPIC’s unique expertise on privacy law, and consumer protection of biometrics and personal data collected by theme parks specifically. EPIC supports its motion as follows:

1. EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values. EPIC maintains one of the most popular web sites in the world concerning privacy—epic.org—and is recognized as a preeminent expert on consumer privacy issues.
2. EPIC has played a unique role in advocating for consumer protections for biometric data, and for protecting youth data collected by theme parks specifically.
3. EPIC first identified, in 2005, the risks posed by the collection biometric identifiers by theme parks. *See EPIC, Theme Parks and Your Privacy* (2018).¹ EPIC noted that the collection of biometric identifiers by theme parks was disproportionate and unnecessary theme parks to collect biometric identifiers from attendees. At the very least, EPIC explained “Theme park visitors should have knowledge of the practice of collecting fingerprint

¹ Available at <https://epic.org/privacy/themepark/>.

information so they may act to protect their and their children’s privacy.”

EPIC further stated, “Knowing as much as possible whenever personally identifiable information is being collected from you or your family is your best defense. It is not in your privacy interest to fail to ask questions or challenge requests for personally identifiable information. It is important to ask questions and assert your right to protect you and your children’s privacy.” *Id.*

4. The State of Illinois subsequently enacted the Illinois Biometric Information Privacy Act to establish safeguards for the collection of biometric data, including specific requirements for the collection of this information. Now before this Court is a person whose child’s biometric data was unlawfully obtained in violation of the Act.
5. EPIC has previously submitted many amicus briefs in federal and state courts concerning emerging privacy issues, including four briefs for the U.S. Supreme Court during the past term, and a brief in the D.C. Circuit about the massive OPM data breach, that included the compromise of 5.1 million fingerprints, precisely the same digital data gathered by Six Flags. *See* Br. of *Amici Curiae* EPIC et al., *Carpenter v. United States*, No. 16-402 (June 22, 2018); Br. of *Amici Curiae* EPIC et al., *Byrd v. United States*, 138 S. Ct. 1318 (2018) (No. 16-1371); Br. of EPIC, *Dahda v. United States*, 138 S. Ct.

1491 (2018) (No. 17-43); Br. of *Amici Curiae* EPIC et al., *Microsoft v. United States*, 138 S. Ct. 1186 (2018) (No. 17-2); Br. of *Amici Curiae* EPIC et al., *In re OPM Data Security Breach Litigation*, 266 F. Supp. 3d 1 (D.D.C. 2017), *appeal docketed*, No. 17-5217 (D.C. Cir. Sept. 27, 2017).

6. EPIC has long advocated for strict limits on the collection, use, and retention of biometric data. Biometric data is personally identifiable information that cannot be changed, even if compromised. So, improper collection, storage, and use of this information can contribute to identity theft, inaccurate identifications, and infringement on constitutional rights. *See* EPIC, *Biometric Identifiers* (2018);² Comments of EPIC, *In re: FACT Act Biometric Study*, Treas. No. R411005 (Apr. 1, 2004).³
7. EPIC has also focused, in particular, on the problem of combatting identity theft after a breach of biometric and other sensitive personal data, which underscores the need to enforce strict limits on collection at the front end. *See, e.g.*, Br. of *Amici Curiae* EPIC et al., *In re OPM, supra* (arguing that the court should make clear that the constitutional right to informational privacy safeguards the personal data held by federal agencies, including the fingerprint records held by OPM that were breached); Br. of *Amicus Curiae*

² Available at <https://epic.org/privacy/biometrics/>.

³ Available at <https://epic.org/privacy/biometrics/factabiometrics.html>.

EPIC, *Attias v. Carefirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017) (No. 16-7108) (arguing that courts should not limit consumers' ability to seek redress when their social security numbers have been breached); Br. of *Amicus Curiae* EPIC, *Storm v. Paytime, Inc.*, 90 F. Supp. 3d 359 (M.D. Penn. 2015), *appeal docketed*, No. 15-3690 (3d Cir. Nov. 6, 2015) (arguing that breaches of SSNs and other identifiers create a serious risk of fraud and identity theft).

8. EPIC also has unique expertise on the ability of consumers to seek redress in privacy cases. *See, e.g.*, Br. of *Amici Curiae* EPIC et al., *Spokeo v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339) (arguing that the violation of a consumer's privacy rights under federal law constitutes an injury-in-fact sufficient to confer Article III standing); Letter from Amicus EPIC, *Eichenberger v. ESPN, Inc.*, 876 F.3d 979 (9th Cir. 2017) (No. 15-35449) (arguing that a violation of the VPPA disclosure rule is an injury-in-fact sufficient to confer Article III standing); *Alleruzzo v. Supervalu, Inc.*, 870 F.3d 763 (8th. Cir. 2017) (Nos. 16-2378, 16-2528) (arguing that violations of statutory and common law rights give rise to Article III standing in federal court).
9. EPIC's unique expertise on privacy law and the risks associated with the collection of biometric information can provide important context for the Court.

For the foregoing reasons, the undersigned proposed *amicus* respectfully requests leave to file the attached amicus brief.

July 5, 2018

Respectfully submitted,

/s/ Adam J. Levitt
Adam J. Levitt
Amy E. Keller
DiCELLO LEVITT & CASEY LLC
Ten North Dearborn Street
Eleventh Floor
Chicago, Illinois 60602
(312) 214-7900
alevitt@dlcfirm.com
akeller@dlcfirm.com

/s/ Alan Butler
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

RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Supreme Court Rules 345(b) and 341(a) and (b). The length of this motion is 6 pages.

Dated: July 5, 2018

/s/ Adam J. Levitt
Adam J. Levitt

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 5, 2018, I electronically filed the foregoing motion with the Clerk of the Illinois Supreme by using the electronic filing system.

Dated: July 5, 2018

/s/ Adam J. Levitt

Adam J. Levitt