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 CORPORATION and GREAT AMERICA LLC,

Defendants-Appellees.

On Petition for Leave to Appeal from the
Appellate Court of Illinois, Second District, No. 2-17-0317
There heard on Appeal from the Circuit Court of Lake County, Illinois, No. 2016 CH 13,
The Honorable Luis A. Berrones, Judge Presiding

BRIEF OF *AMICUS CURIAE* ILLINOIS CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANTS-APPELLEES SIX FLAGS ENTERTAINMENT CORPORATION AND GREAT AMERICA LLC

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POINTS AND AUTHORITIES

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INTEREST OF THE *AMICI*

The Illinois Chamber of Commerce (the "Chamber") is an association that zealously advocates on behalf of Illinois businesses to achieve a competitive business environment that will enhance job creation, job retention, and sustained economic growth. The Chamber is often referred to as the unifying voice of the business community in Illinois. The association consists of manufacturers, railroads, insurers, retailer and banks, in addition to a host of other industrial and commercial concerns. Just as the Chamber provides its members with benefits, these businesses, in turn, provide the State of Illinois with jobs, income, profits, and taxes that allow the State of Illinois and its residents to flourish.

The interest of the Chamber in this case is substantial. The answers to the questions raised in this appeal will have a direct and significant impact on the wellbeing of the Chamber's members, some of whom have been the target of approximately 110 recently-filed cookie cutter complaints seeking to impose catastrophic damages on Illinois businesses for alleged technical violations of the Illinois Biometric Information Privacy Act ("BIPA"), 740 ILCS § 14/1, *et seq*. – despite the complete absence of any actual harm to individuals. If the Court accepts Appellant's interpretation of the statute as imposing strict-liability on Illinois businesses for technical violations of BIPA (*i.e*. that any individual is allowed to sue despite a complete lack of harm), the result would be devastating to Illinois businesses – some of whom are small, local businesses, not-for-profit organizations, and hospitals – and most of whom are *not* national Fortune 500 companies.

Specifically, such a holding would mandate the absurd result of providing a windfall to individuals who voluntarily provided their biometric data and did not suffer

any cognizable injury or harm as a result (such an individual's data being misappropriated, misused, or compromised by a data breach or identity theft), while simultaneously driving Illinois businesses either out of Illinois or into bankruptcy.

The limitation imposed by the Appellate Court (*i.e.* that an individual "must allege some actual harm" in order to maintain a cause of action under BIPA) is necessary to ensure an efficient and robust Illinois economy and protect Illinois businesses from exposure to crippling damages. The purpose of BIPA can be fulfilled without imposing such significant economic burden on Illinois businesses nor does the Appellate Court's holding prohibit an individual from maintaining a cause of action when an individual is actually "aggrieved." The Appellate Court's decision strikes the proper balance between fulfilling the purpose of BIPA while simultaneously protecting the Illinois businesses community.

Accordingly, the Chamber respectfully submits this brief so that the Court may better understand the significant impact that a ruling interpreting BIPA as a strict-liability statute would have on the Illinois business community, and why it is important that the Court affirmatively determine that "aggrieved" for purposes of BIPA means something *more* than a violation of BIPA's technical notice and consent requirements.

BACKGROUND

I. BIPA WAS ENACTED TO SAFEGUARD THE IMPROPER DISCLOSURE AND SALE OF CONSUMERS' BIOMETRIC DATA – NOT TO IMPOSE STRICT LIABILITY ON ILLINOIS BUSINESSES

BIPA was enacted in 2008 to address the growing use of biometric data "in the business and security screening sectors [that] appears to promise streamlined financial transactions and security screenings." 740 ILCS 14/5(a). The statute observes that consumers had grown "weary of the use of biometrics when such information is tied to

finances and other personal information," and were thus "deterred from partaking in biometric identifier-facilitated transactions." *Id*. at 14/5(d)-(e). Regardless, BIPA "represents the Illinois legislature's judgment that the collection and storage of biometrics to facilitate financial transactions is not in-of-itself undesirable or impermissible." *Vigil v. Take-Two Interactive Software, Inc.*, 235 F. Supp. 3d 499, 520 (S.D.N.Y. 2017), *vacated in part on other grounds*, 717 F. App'x 12 (2d Cir. 2017). Rather, "the purpose of the BIPA is to ensure that, when an individual engages in a biometric-facilitated transaction, the private entity protects the individual's biometric data, and does not use that data for an improper purpose, especially a purpose not contemplated by the underlying transaction." *Id.* (citing 740 ILCS 14/5(a–g)).

BIPA regulates the "collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information." 740 ILCS 14/5(g). BIPA defines a "biometric identifier" to include "a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry." 740 ILCS 14/10. Similarly, "[b]iometric information," in turn, is broadly defined to include "any information, regardless of how it is captured, converted, stored, or shared, based on an individual's biometric identifier used to identify an individual," but excludes "information derived from items or procedures excluded under the definition of biometric identifiers." *Id*.

BIPA also creates a limited right of action for "person[s] aggrieved by a violation" of its terms. *Id*. at 14/20. A "person aggrieved" by a negligent violation of BIPA may recover "liquidated damages of $1,000 or actual damages, whichever is greater." *Id*. A "person aggrieved" by an intentional or reckless violation of BIPA may recover "liquidated damages of $5,000 or actual damages, whichever is greater." *Id*.

II. THE APPELLATE COURT CORRECTLY HELD THAT A PLAINTIFF MUST ALLEGE "ACTUAL HARM" TO STATE A CLAIM

On December 21, 2017, the Illinois Appellate Court for the Second District held that a plaintiff "must allege some actual harm" to state a claim under BIPA and for *any* of [BIPA's] remedies to come into play," a plaintiff must allege some "injury or adverse effect." *Rosenbach*, 2017 IL App (2d) 170317, ¶¶1, 28. Eliminating all doubt about the issue, the Appellate Court held that "[i]f a person alleges only a technical violation of the Act without alleging any injury or adverse effect, then he or she is not aggrieved and may not recover under any of the provisions of [BIPA]." *Id*. at ¶23. As detailed below, if the Appellate Court's decision is reversed, the impact on the Chamber's members, as well as all entities doing business in Illinois, will be immense.

ARGUMENT

This brief stresses the real-world consequences of a finding that BIPA does not require any actual injury or harm to render an individual "aggrieved."

I. REVERSAL OF THE APPELLATE COURT'S DECISION WILL OPEN THE FLOODGATES FOR FUTURE LITIGATION AT THE EXPENSE OF ILLINOIS' COMMERCIAL HEALTH

Since 2015, approximately 110 BIPA class actions have been filed against Illinois businesses.[1] These class actions have been filed primarily by the same handful of law firms in pursuit of settlements which would allow them to obtain approximately 33% of the total value of the settlement fund in attorneys' fees.[2] Typically, complaints in BIPA class actions are copied and pasted from previously-filed complaints and include verbatim allegations against a new target. Notably, however, the complaints are also

[1] This figure is based on the Chamber's independent review of court records and filings.
[2] *See* Newberg on Class Actions § 15:73 (5th ed.) (noting that "many courts have stated that. . . . fee awards in class actions average around one-third of the recovery.").

almost entirely void of any allegation of an individual's data has been misappropriated, misused, or compromised by a data breach, identity theft, or any other indicia of actual injury or threat of harm.

The Illinois businesses who have become targets of these lawsuits span multiple industries, and cases have been brought against companies varying in size, such as Illinois-based day care centers (Crème de la Crème), condominium associations (Imperial Tower Condo Association), hospitals (*i.e.* Northwestern Lake Forest Hospital, Saint Anthony Hospital, Silver Cross Hospital and Medical Centers, NorthShore Health System, and Presence Health Network), car dealerships (Mid City Nissan Inc.), liquor stores (Binny's Beverage Depot), grocery stores (Niles Grand, LLC), tanning salons (Schaumburg Tan, Inc.), senior living centers (Sunrise Senior Living Management, Inc.), emergency medical services providers (Superior Air-Ground Ambulance Service, Inc.), janitorial services companies (Millard Group LLC), auto repair companies (ABRA Auto Body & Glass) and restaurant and food service companies (Kronos Foods and Sweetgreen).

Many of the aforementioned smaller Illinois businesses targeted by BIPA class actions find themselves staring down the barrel of expensive, costly, and resource draining class action lawsuits for the first time – the outcome of which has the potential to put them out of business altogether. (*See infra* § II).

The technology at issue in BIPA class actions is often utilized by companies to keep more accurate timekeeping records than traditional time clocks and to prevent "buddy punching" (*i.e.* the process by which an employee will punch in for a coworker before they arrive for work, or alternatively, punch them out after a coworker leaves).

Illinois businesses also use technology which may be implicated by BIPA for a variety of other purposes unrelated to their bottom lines, including, but not limited to, dispensing of medications, protecting the safety of children at day care centers, and safeguarding radioactive materials.[3]

The revelation amongst the plaintiffs' bar that BIPA provides for uncapped statutory damages and that cases can be easily filed as class actions, with little initial investment, by securing a single individual willing to lend his or her name to a lawsuit (despite not suffering any injury), and copying and pasting a previously-used complaint, has spawned a legal "gold rush" akin to when a critical mass of plaintiffs' attorneys discovered first discovered the Telephone Consumer Protection Act ("TCPA").[4] Unlike the TCPA, however, BIPA requires that a plaintiff be "aggrieved" in order have a cause

[3] Notably, the technology at issue often does not collect, capture, or store biometric identifiers or biometric information at all, much less every time an individual utilizes the timekeeping system. Specifically, the technology at issue typically only collects distinct data points by a scan of an employee's finger, and does not capture a biometric identifier or biometric information as defined in BIPA. Moreover, an individual's fingerprint cannot be recreated from any of the data and therefore, plaintiffs likely could not sustain injury *even in the hypothetical event that the data were disclosed, hacked, etc.* While a court has yet to rule on this issue, at least one BIPA defendant has made such an argument and moved for summary judgment on the same grounds. See Memorandum of Law in Support of Defendants' Motion For Summary Judgment, *Doporcyk v. Roundy's Supermarkets, Inc.*, No. 17-CV-05250 (N.D. Ill.) (ECF No. 42) (following the filing of motion for summary judgment, the parties stipulated to remand the case to the Circuit Court of Cook County).

[4] A recent report by the U.S. Chamber Institute for Legal Reform indicates that lawsuits under the TCPA have become the second-most filed type of federal lawsuit, and details how TCPA lawsuits impact nearly 40 different industries nationwide most of which seek aggregated statutory damages from companies not engaged in the kinds of cold-call telemarketing the TCPA was designed to limit. *See Report: Telephone Consumer Protection Act Lawsuits Up Nearly 50 Percent Following FCC Action*, available at: https://www.instituteforlegalreform.com/resource/report-telephone-consumer-protection-act-lawsuits-up-nearly-50-percent-following-fcc-action

of action under the statute.[5] A ruling to the contrary will undoubtedly result, like the TCPA earlier this decade, in thousands of additional class actions being filed against Illinois businesses.

In other words, absent the requirement contained in the plain language of the statute that an individual must first actually be "aggrieved" in some concrete way to have a cause of action, BIPA (like the TCPA before it) will simply become a vehicle to target Illinois businesses and extract costly settlements. As recently explained by the Seventh Circuit in the context of the TCPA, this cannot have been the intended purpose of BIPA:

> We doubt that Congress intended the TCPA, which it crafted as a consumer-protection law, to become the means of targeting small businesses. *Yet in practice, the TCPA is nailing the little guy*, while plaintiffs' attorneys take a big cut. Plaintiffs' counsel in this case admitted, at oral argument, that they obtained B2B's hard drive and used information on it to find plaintiffs. They currently have about 100 TCPA suits pending.

Bridgeview Health Care Center, Ltd. v. Jerry Clark, 816 F.3d 935, 941 (7th Cir. 2016) (emphasis added).

Fortunately, the Court now has an opportunity in this case to clarify that BIPA was *not* enacted as a means of targeting Illinois businesses. To do so, the Court must simply enforce the plain language of the statute which requires that an individual must be "aggrieved by a violation of [the] Act." 740 ILCS 14/20. While plaintiffs continue to file BIPA actions and subsequently seek to stay them pending the decision of this Court, a decision by this Court removing any and all barriers to the filing of BIPA class actions – essentially rendering BIPA a strict-liability statute akin to the TCPA – will open the

[5] *C.f. Alea London Ltd. v. Am. Home Servs., Inc.*, 638 F.3d 768, 776 (11th Cir. 2011) (noting that "[t]he TCPA is essentially a strict liability statute."); *Bridgeview Health Care Ctr., Ltd. v. Jerryclark*, 2015 WL 4498741, at *2 (N.D. Ill. 2015) ("[T]he TCPA is a strict liability statute that prescribes statutory damages.").

floodgates to potentially thousands of additional class action complaints statewide filed indiscriminately against Illinois businesses, regardless of their size or industry.

II. REVERSAL OF THE APPELLATE COURT'S DECISION WILL IMPOSE A TREMENDOUS ECONOMIC BURDEN ON ILLINOIS BUSINESSES

It is axiomatic that the economic health of any state depends on the commercial success of its businesses. In a direct assault on Illinois businesses, opportunist plaintiffs have threatened this balance by attempting to utilize BIPA's private right of action as a sword to seek devastating damages on behalf of themselves and other individuals – in the absence of any injury.

BIPA's section entitled "Right of action" provides:

> [a]ny person aggrieved by a violation of this Act shall have a right of action in a State circuit court or as a supplemental claim in federal district court against an offending party. A prevailing party may recover for *each* violation: (1) against a private entity that negligently violates a provision of this Act, liquidated damages of $1,000 or actual damages, whichever is greater; (2) against a private entity that intentionally or recklessly violates a provision of this Act, liquidated damages of $5,000 or actual damages, whichever is greater; (3) reasonable attorneys' fees and costs, including expert witness fees and other litigation expenses; and (4) other relief, including an injunction, as the State or federal court may deem appropriate."

740 ILCS 14/20 (emphasis added).

To date, there are no reported cases interpreting either what constitutes a separate violation of BIPA or what an appropriate amount of statutory damages would be for each violation of the Act. Accordingly, there is still uncertainty surrounding whether a breach of all of the requirements of the BIPA constitute a separate "violation" of BIPA for purposes of assessing statutory damages.[6] Moreover, and unsurprisingly, plaintiffs in

[6] The boilerplate complaints in BIPA class actions typically allege (in near or identical language) that defendants violated BIPA in a variety of ways including failing to: (i) obtain the release required by 740 ILCS 14/15(b)(3); (ii) inform plaintiff and the class in

BIPA class actions also have taken the position that each individual "scan" of biometric information (e.g., facial recognition, fingerprints, etc.) constitutes a separate violation entitling consumers and employees to statutory damages. Notably, for Illinois businesses that utilize timekeeping technology that involves a finger scan, employees often "scan" in and out multiple times each day upon arrival and departure for the day, for lunch, and during breaks. Finally, while BIPA does not contain its own statute of limitations, plaintiffs in BIPA class actions have taken the position that the statute of limitations in BIPA cases is five years, pursuant to Illinois' catch-all statute of limitations period, 735 ILCS 5/13-205, and accordingly seek damages for a five-year time period.

The combination of these aforementioned factors advanced by plaintiffs would result in astronomical potential damages to Illinois businesses. A simple example demonstrates the ruinous absurdity of the potential damages Illinois businesses may incur in the event that this Court reverses the Appellate Court's ruling. For purposes of the below illustration, we have assumed that: (1) the defendant is an Illinois business which utilizes biometric timekeeping technology; (2) a "violation" means only a single violation of one of the requirements of BIPA identified *supra* n. 5; (3) each scan constitutes a separate, negligent violation entitling an individual to $1,000 in statutory damages under

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writing that their biometric identifiers or biometric information were being collected and stored as required by 740 ILCS 14/15(b)(1); (iii) inform plaintiff and the class in writing of the specific purpose for which their biometric information or biometric identifiers was being collected, stored and used, as required by 740 ILCS 14/15(b)(2); (iv) inform plaintiff and the class in writing of the specific length of term their biometric information or biometric identifiers were being stored and used, as required by 740 ILCS 14/15(b)(2); and (v) provide a publicly available retention scheduled detailing the length of time biometric information is stored or guidelines for permanently destroying the biometric information it stores, as required by 740 ILCS 14/15(a).

BIPA;[7] (4) each class member worked five days a week, 50 weeks per year, for a five-year period; and (5) each individual utilized the technology to scan in and out for timekeeping purposes four times a day (upon arrival and departure for work and for lunch):

Number of Employees	1	20	500	1,000
Amount Per Violation	$1,000	$1,000	$1,000	$1,000
Scans Per Day	4	4	4	4
Days Worked Per Week	5	5	5	5
Weeks Worked Per Year	50	50	50	50
Years Worked	5	5	5	5
Total Damages Per Employer[8]	*$5 Million*	*$100 Million*	*$2.5 Billion*	*$5 Billion*

As indicated above, an Illinois business utilizing biometric technology for timekeeping purposes with 20 employees could be exposed to $100 million in damages, while an Illinois business with approximately 1,000 employees could be facing $5 billion in damages (excluding attorneys' fees) – absent any actual injury to the plaintiff.

Further, even if plaintiffs' "per scan" damages theory is rejected, Illinois businesses could still be facing significant and disproportional damages. For example, an Illinois business with 1,000 employees could be facing $1 million in damages for negligent violations and $5 million in damages for willful violations (excluding attorneys' fees) – absent any actual injury to their employees. Meanwhile, a smaller Illinois business with only 200 employees could be facing $200,000 in damages for

[7] To be clear, the Chamber and Illinois businesses highly dispute that plaintiffs' "per scan" damages theory is correct or that a five-year statute of limitations period applies to BIPA, but only accepts these propositions as true for purposes of demonstrating the worst-case damages scenarios for Illinois businesses based on representations made by plaintiffs in current BIPA litigation.

[8] Damages would be five times higher if a court were to find that the violations of BIPA were willful.

negligent violations and $1 million in damages for willful violations (excluding attorneys' fees) – significant sums which could mean the difference between continued commercial viability and bankruptcy for smaller businesses.

Accordingly, the resulting damages and exposure for Illinois businesses (regardless of size) are extremely significant and business threatening (at best) and completely annihilating (at worst). These potential damages are staggering for Fortune 500 companies, much less day care centers, condominium associations, hospitals, car dealerships, liquor stores, grocery stores, tanning salons, senior living centers, emergency medical services providers, janitorial services companies, and auto repair companies – which will almost certainly go out of business in the event of such a judgment.

In sum, reversal of the Appellate Court's decision will almost certainly result in a flood of additional class action litigation, clog the Illinois judicial system with thousands of BIPA class action lawsuits, and expose Illinois businesses to devastating monetary damages at the risk of the health of Illinois commerce. Faced with the threat of devastating monetary damages and expensive class action litigation and discovery, many Illinois businesses may be forced to settle for significant amounts despite any actual injury to plaintiff or the class. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (noting that the threat of discovery expenses in class action litigation "will push cost-conscious defendants to settle even anemic cases").

The resulting impact on Illinois businesses is obvious: such massive exposure will force businesses to go bankrupt, and increased litigation costs will make employing people more difficult and expensive, translating to fewer growth opportunities, increased layoffs, and out-of-state relocations. Further, new businesses will be discouraged from

opening or moving to Illinois when they can avoid potential strict-liability "no-injury" class action lawsuits, like those currently being pursued under BIPA – to the ultimate detriment of all Illinois residents.

CONCLUSION

The Court's decision in this case has real-life consequences for Illinois businesses who have been targeted in BIPA class actions, most of whom cannot withstand a multi-million dollar judgment. The Chamber submits that the Appellate Court's holding respects the purposes of BIPA while protecting Illinois businesses from the devastating monetary exposure which would result from allowing any individual to sue for a mere technical violation of the statute absent actual harm. The purpose of BIPA can be fulfilled without imposing significant economic burden on Illinois businesses. Accordingly, for all the reasons stated above, the Illinois Chamber of Commerce respectfully submits that this Court should affirm the judgment of the Appellate Court in this matter.

Dated: September 10, 2018

Respectfully submitted,

Illinois Chamber of Commerce

By: /s/ Thomas E. Ahlering

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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 containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 3,574 words.

/s/ Thomas E. Ahlering

CERTIFICATE OF SERVICE

The foregoing Brief of *Amicus Curiae* the Illinois Chamber of Commerce was filed electronically on September 10, 2018 with the Supreme Court of Illinois using the Court's electronic filing system and that the same was emailed to the following counsel of record.

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Within five days of acceptance by the Court, the undersigned also states that he will cause thirteen copies of the Brief to be mailed with postage prepaid addressed to:

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

/s/ Thomas E. Ahlering

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 CORPORATION 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, No. 16-CH-13 Hon. Luis A. Berrones, Judge Presiding

NOTICE OF FILING

TO: (SEE ATTACHED SERVICE LIST)

PLEASE TAKE NOTICE that on September 10, 2018 we electronically filed with the Clerk of the Supreme Court of Illinois the **Brief of *Amicus Curiae* Illinois Chamber of Commerce in Support of Defendants-Appellees Six Flags Entertainment Corporation and Great America LLC** in this matter in accordance with Illinois Supreme Court Rules, a copy of which has been served upon you via the Court's electronic filing system and by email.

DATED: September 10, 2018

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Thomas E. Ahlering, an attorney, do hereby certify that I have caused a true and correct copy of the foregoing **NOTICE OF FILING AND BRIEF OF *AMICUS CURIAE* ILLINOIS CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANTS-APPELLEES SIX FLAGS ENTERTAINMENT CORPORATION AND GREAT AMERICA LLC** to be served upon the following counsel of record, via the Supreme Court of Illinois' electronic filing system and via email, on this 10th day of September, 2018:

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

/s/ Thomas E. Ahlering
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