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, No. 2016 CH 13, the Honorable Luis A. Berrones, Judge.

MOTION OF BIPARTISAN GROUP OF CURRENT AND FORMER MEMBERS OF THE GENERAL ASSEMBLY FOR LEAVE TO FILE *INSTANTER* BRIEF *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE

A group of current and former members of the General Assembly hereby move the Court for leave to file *instanter* the brief *amicus curiae* attached hereto as Exhibit A. In support of their motion, proposed *amici* states as follows:

1. This Court has held that a brief *amicus curiae* will ordinarily be allowed when presented by an individual or group that can provide the Court with "a unique perspective" that will assist the Court beyond the argument the litigants provide. *See* Order Denying Leave to File as *Amicus Curiae*, at 3, *Kinkel v. Cingular Wireless*, No. 100925 (Ill. Jan. 11, 2006).

2. Movants here offer just such a "unique perspective." Proposed *amici* are a bipartisan group of members of the Illinois General Assembly. The decision of the Appellate Court bears directly on the work of the General Assembly. Privacy has long

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been a central concern of Illinoisans and the General Assembly. The General Assembly regularly considers bills meant to ensure the privacy and security of the people of the State of Illinois, many of which are ultimately enacted into law. Our work in this arena involves consideration of competing interests in an effort to strike the right balance between the privacy rights of Illinoisans, fostering technological and commercial development, ensuring that law enforcement can do its job, and any other relevant consideration that is brought to our attention. In this case, the Court will step into this debate for the first time.

3. Thus we respectfully offer our "unique perspective" on these issues to the Court. The Biometric Information Privacy Act strikes a careful balance in an attempt to protect a particular kind of privacy. We believe the Second District's decision upset this balance, and urge the Court to reverse. Further, the Court's decision will be of consequence to the administration of several other statutes, and of relevance to the ongoing conversation about privacy that is occurring in the General Assembly.

4. Movant's brief will assist the Court because it will situate the Biometric Information Privacy Act within the broader debate about privacy in the General Assembly (we considered several privacy-related bills in the last few sessions, and expect to do so again next year), and provide a deeper, first-hand perspective about the General Assembly's understanding of privacy and the ways in which the Biometric Information Privacy Act, and other privacy statutes, operate.

5. Proposed *amici* are the following individual legislators:

- *Senator Daniel Biss*, of Evanston, who represents Illinois' 9th Senate district;

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- *Senator Cristina Castro*, of Elgin, who represents Illinois' 22nd Senate district;

- *Senator Iris Martinez*, of Chicago, who represents Illinois' 20th Senate district. Senator Martinez co-sponsored the Biometric Information Privacy Act during the 95th General Assembly;

- *Senator William Sam McCann*, of Carlinville, who represents Illinois' 50th Senate district;

- *Senator Kwame Raoul*, of Chicago, who represents Illinois' 13th Senate district;

- *Representative Kelly M. Cassidy*, of Chicago, who represents Illinois' 14th House district;

- *Representative Deb Conroy*, of Villa Park, who represents Illinois' 46th House district;

- *Representative Sara Feigenholtz*, of Chicago, who represents Illinois' 12th House district;

- *Representative Laura Fine*, of Glenview, who represents Illinois' 17th House district;

- *Representative Robyn Gabel*, of Evanston, who represents Illinois' 18th House district;

- *Representative Will Guzzardi*, of Chicago, who represents Illinois' 39th House district;

- *Representative Greg Harris*, of Chicago, who represents Illinois' 13th House district;

- *Representative Theresa Mah*, of Chicago, who represents Illinois' 2nd House district;

- *Representative Christian L. Mitchell*, of Chicago, who represents Illinois' 26th House district;

- *Representative Marty Moylan*, of Des Plaines, who represents Illinois' 55th House district;

- *Former Representative Elaine Nekritz*, of Northbrook, who represented Illinois' 57th House district until 2017. Representative Nekritz co-

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sponsored the Biometric Information Privacy Act during the 95th General Assembly;

- *Representative Steven Reick*, of Woodstock, who represents Illinois' 63rd House district;
- *Former Representative Kathleen Ryg*, of Vernon Hills, who represented Illinois' 59th House district until 2009. Representative Ryg sponsored the Biometric Information Privacy Act during the 95th General Assembly;
- *Representative Arthur Turner*, of Chicago, who represents Illinois' 9th House district;
- *Representative Ann Williams*, of Chicago, who represents Illinois' 11th House district; and
- *Representative Sam Yingling*, of Grayslake, who represents Illinois' 62nd House district.

WHEREFORE, Movants respectfully requests that the Court grant them leave to file the attached brief *instanter*.

Dated: July 3, 2018

Respectfully Submitted,

BIPARTISAN GROUP OF CURRENT AND FORMER MEMBERS OF THE GENERAL ASSEMBLY

By: s/ Richard W. Stake, Jr.

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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, No. 2016 CH 13, the Honorable Luis A. Berrones, Judge.

ORDER

The cause having come before the Court on the Motion of a Bipartisan Group of Current and Former Members of the General Assembly for Leave to File *Instanter* Brief *Amicus Curiae* in Support of Plaintiff-Appellant, IT IS HEREBY ORDERED THAT:

The motion is ALLOWED / DENIED

ENTER:

_____
Justice Robert R. Thomas

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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, No. 2016 CH 13, the Honorable Luis A. Berrones, Judge.

NOTICE OF FILING AND CERTIFICATE OF SERVICE

PLEASE TAKE NOTICE that on July 3, 2018, I filed in the above-captioned action the Motion of Bipartisan Group of Current and Former Members of the General Assembly for Leave to File *Instanter* Brief *Amicus Curiae* in Support of Plaintiff-Appellant and the proposed Brief *Amicus Curiae* attached thereto with the Clerk of the Supreme Court of Illinois by electronic means. On that same day, I caused copies of the aforementioned documents to be served via electronic mail, upon the following persons:

Debra R. Bernard
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David M. Oppenheim
david@classlawyers.com

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 notice of filing and certificate of service are true and correct.

s / Richard W. Stake, Jr.

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EXHIBIT A

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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, No. 2016 CH 13, the Honorable Luis A. Berrones, Judge.

BRIEF *AMICUS CURIAE* OF BIPARTISAN GROUP OF CURRENT AND FORMER MEMBERS OF THE ILLINOIS GENERAL ASSEMBLY

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POINTS AND AUTHORITIES

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INTEREST OF *AMICI CURIAE*

Amici are a bipartisan group of current and former members of the Illinois General Assembly. The decision of the Appellate Court bears directly on the work of the General Assembly. Privacy has long been a central concern of Illinoisans and the General Assembly. As explained below, the General Assembly regularly considers bills meant to ensure the privacy and security of the people of the State of Illinois, many of which are ultimately enacted into law. Our work in this arena involves consideration of competing interests in an effort to strike the right balance between the privacy rights of Illinoisans, fostering technological and commercial development, ensuring that law enforcement can do its job, and any other relevant consideration that is brought to our attention. In this case, the Court will step into this debate for the first time.

Thus, through this brief, we respectfully offer our "unique perspective" on these issues to the Court. *See* Order Denying Leave to File a Brief as Amicus Curiae, at 3, *Kinkel v. Cingular Wireless, LLC* (Ill. Jan. 11, 2006) (observing that an *amicus* brief is most helpful when the *amicus* "has a unique perspective, or information, that can assist the court"). The Biometric Information Privacy Act strikes a careful balance in an attempt to protect a particular kind of privacy. As we explain, we believe the Second District's decision upset this balance, and urge the Court to reverse. Further, the Court's decision will be of consequence to the administration of several other statutes, and of relevance to the ongoing conversation about privacy that is occurring in the General Assembly.

This brief is submitted on behalf of the following legislators:
Senator Daniel Biss, of Evanston, who represents Illinois' 9th Senate district;
Senator Cristina Castro, of Elgin, who represents Illinois' 22nd Senate district;
Senator Iris Martinez, of Chicago, who represents Illinois' 20th Senate district. Senator

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Martinez co-sponsored the Biometric Information Privacy Act during the 95th General Assembly;

Senator William Sam McCann, of Carlinville, who represents Illinois' 50th Senate district;

Senator Kwame Raoul, of Chicago, who represents Illinois' 13th Senate District;

Representative Kelly M. Cassidy, of Chicago, who represents Illinois' 14th House district;

Representative Deb Conroy, of Villa Park, who represents Illinois' 46th House district;

Representative Sara Feigenholtz, of Chicago, who represents Illinois' 12th House district;

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Representative Marty Moylan, of Des Plaines, who represents Illinois' 55th House district;

Former Representative Elaine Nekritz, of Northbrook, who represented Illinois' 57th House district until 2017. Representative Nekritz co-sponsored the Biometric Information Privacy Act during the 95th General Assembly;

Representative Steven Reick, of Woodstock, who represents Illinois' 63rd House district;

Former Representative Kathleen Ryg, of Vernon Hills, who represented Illinois' 59th House district until 2009. Representative Ryg sponsored the Biometric Information Privacy Act during the 95th General Assembly;

Representative Arthur Turner, of Chicago, who represents Illinois' 9th House district;

Representative Ann Williams, of Chicago, who represents Illinois' 11th House district; and

Representative Sam Yingling, of Grayslake, who represents Illinois' 62nd House district.

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ARGUMENT

Amici urge this Court to reverse the decision below. The Second District's decision fails to respect the types of choices the legislature must make in passing statutes like the Biometric Information Privacy Act. As a result, the decision leaves a vital privacy interest unprotected despite the efforts of the General Assembly, and disincentivizes compliance with Illinois law. The decision cannot stand.

I. Illinois has a long history of protecting privacy rights.

Illinois has long been a leader in protecting personal and informational privacy. Reported decisions of the Appellate Court recognized a right to privacy as early as 1952, which was held to be actionable without proof of special damages. *See Eick v. Perk Dog Food*, 347 Ill. App. 293, 299-306 (1st Dist. 1952). And this Court concluded in 1970 that "privacy is one of the sensitive and necessary human values and undeniably there are circumstances under which it should enjoy the protection of the law." *Leopold v. Levin*, 45 Ill. 2d 434, 440-41 (1970). As is appropriate, however, courts proceeded cautiously when defining the contours of privacy rights. *Id.* at 440 ("The dimensions of the right in Illinois have thus far been conservatively interpreted under the appellate courts' decisions."). As such, the people and their representatives stepped in when necessary.

In 1970 the people of the State of Illinois enacted one of the first modern constitutions to recognize a substantive right to privacy. *See* Ill. Const., art. I, § 6; *see also* Note, Mark Silverstein, *Privacy Rights in State Constitutions: Models for Illinois?*, 1989 U. Ill. L. Rev. 215, 215-16. This Court has recognized that this newly enacted constitutional provision "goes beyond federal constitutional guarantees by expressly recognizing a zone of personal privacy, and that the protection of that privacy is stated

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broadly and without restrictions." *Kunkel v. Walton*, 179 Ill. 2d 519, 537 (1997). Indeed, the records of the constitutional debates show clearly that the delegates to the convention clearly meant to protect a zone of informational privacy. Silverstein, *supra*, at 278-79.

The General Assembly ensures that this recognized right to privacy has day-to-day meaning. Over the past two decades, the General Assembly has enacted a robust array of privacy protections addressing a variety of situations of concern to Illinoisans. The following list provides just a flavor of this work:

- Right of Publicity Act, 765 ILCS 1075
- AIDS Confidentiality Act, 410 ILCS 305
- Genetic Information Privacy Act, 410 ILCS 513
- Personal Information Protection Act, 815 ILCS 530
- Right to Privacy in the Workplace Act, 820 ILCS 55
- Telephone Solicitations Act, 815 ILCS 413
- Restricted Call Registry Act, 815 ILCS 402
- Automatic Telephone Dialers Act, 815 ILCS 305

As the recent debate over proposed amendments to the Personal Information Protection Act ("PIPA") shows, the General Assembly has remained vigilant to ensure that "law [] keep[s] pace with a changing world where there's more and more new types of complex data out there." 99th Ill. Gen. Assem., Senate Proceedings, April 22, 2015, at 37 (Statement of Sen. Biss); *see* 95th Ill. Gen. Assem., House Proceedings, May 30, 2008, at 33 (Statement of Rep. Ryg) (noting that in 1998 the General Assembly "pass[ed] legislation in Illinois that made us a leader in terms of protections for genetic privacy"). Absent legislative action "as technology evolves, we lose more and more privacy." 99th Ill. Gen. Assem., Senate Proceedings, April 22, 2015, at 42 (Statement of Sen. Hastings). Laws such as those listed above ensure that Illinoisans enjoy robust privacy protections in the face of changing technology.

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II. The BIPA provides needed privacy protections.

The Biometric Information Privacy Act ("BIPA"), 740 ILCS 14, is a direct descendent of this tradition. The General Assembly recognized that the expanding use of biometric technology poses a potentially significant privacy threat because of the nature of biometric data. *Id.* § 5(c). As the legislature found, if an individual's biometric data were compromised that individual would have little recourse. *Id.* And because of the expanding use of biometrics in different facets of life, including ordinary consumer transactions, the General Assembly determined that strong protections were necessary. *Id.* § 5(a), (b), (g). The General Assembly specifically noted that emerging uses of technology could not be foreseen or technology's effects predicted, and that measures were necessary to ensure consumer privacy as technology changed. *Id.* § 5(f). To that end, the BIPA codifies a series of measures aimed at ensuring that an individual can make informed choices about how and when they use their biometric data. *Id.* § 15.

The past decade has made clear that the General Assembly's concerns were prescient. Biometrics have become an even more pervasive part of everyday life. This case involves the use of biometrics in connection with a transaction. (C0009.) More and more companies are making use of biometrics to identify purchasers. Banks and employers are also using biometric data to authenticate employees or bank account holders. *See* 99th Ill. Gen Assem., Senate Proceedings, May 31, 2015, at 201 (Sen. Hastings describing how his bank uses fingerprint data to authenticate customers and that his account was breached). In all of these situations, biometric data is connected to financial information, social security numbers, or other information traditionally considered "personally identifying information." The New York Times recently reported

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that officials at Madison Square Garden have used facial-recognition technology to identify who is in the arena, ostensibly to improve security. Kevin Draper, "Madison Square Garden Has Used Face-Scanning Technology on Customers," N.Y. Times, https://nyti.ms/2tNRj4c (Mar. 13, 2018). Researchers have also shown that facial-recognition technology may be used to predict sexual orientation. *See* Derek Hawkins, "Researchers use facial recognition tools to predict sexual orientation. LGBT groups aren't happy," Washington Post, https://wapo.st/2JFDE2s (Sept. 12, 2017).

The ever-expanding use of biometric technology demonstrates the need to ensure that Illinoisans have strong privacy protections. *See* 99th Ill. Gen. Assem., Senate Proceedings, May 31, 2015, at 199 (Statement of Sen. Biss) (observing that "biometric data" is "very, very, very sensitive data"). That is why the General Assembly has repeatedly rejected attempts to weaken the BIPA. Companies, in particular out-of-state tech companies, have made no secret of their desire to gut the BIPA. *See, e.g.*, Sun-Times Editorial Board, "In the brave new world of biometrics, Illinois should be looking out for you," Chicago Sun-Times, https://goo.gl/iXCgS6 (Apr. 12, 2016, 6:40 p.m.). As the Sun-Times editorial board aptly described it, the protections provided by the BIPA "stick[] in the craw of companies that want to monetize all that information no matter what the cost to privacy. Lobbyists took aim at the law in past years, and they're pushing harder than ever this year." *Id.*; *see* Amendment 2 to Senate Bill 3053, 100th Ill. Gen. Assem, introduced Feb. 14, 2018; Senate Amendment 1 to House Bill 6074, 99th Ill. Gen. Assem., introduced May 26, 2016 (each containing new exemptions to the BIPA). But the General Assembly has always rejected these proposals. *See, e.g.*, Megan Geuss,

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"Illinois senator's plan to weaken biometric privacy law put on hold," ArsTechnica, https://goo.gl/33Akz5 (May 27, 2016, 11:31 a.m.).

Similar concerns were cited by legislators in debate over a proposed bill that would have allowed police to use drones to conduct aerial surveillance of "large-scale events" in Illinois. Several lawmakers expressed unease with the possibility that drones might be equipped with facial-recognition technology. *See* Greg Bishop, Illinois News Network, "Bipartisan opposition nearly kills bill to allow police drone surveillance in Illinois," https://bit.ly/2s9mh3n (Mar. 25, 2018) ("Lawmakers also raised concerns that the bill would allow for facial recognition technology that could scan crowds and catalog the identity of participants."). Legislators, including Representatives Williams, Reick, and Butler, voiced opposition to the bill due to the ways in which permitting law enforcement to use drones equipped specifically with facial-recognition technology might enable unwanted surveillance. (A recording of the House of Representatives' floor debate about the bill on March 25, 2018, is available from the House of Representatives' Transcription Office.) These concerns led the bill's sponsor to file an amendment, subsequently adopted and passed by the House, providing that "a law enforcement agency that uses a drone under the [law] shall not equip the drone with facial recognition or biometric technology." *See* House Floor Amendment No. 1 to Senate Bill 2562, 100th Ill. Gen. Assem., adopted May 30, 2018. The General Assembly understands the importance of the BIPA, and biometric privacy more generally, and keeps a vigilant watch over the use of biometric technologies in Illinois.

And the BIPA promises to stay relevant in the coming years as potential applications of biometric technology expand rapidly. For instance, one company,

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BioCatch, is focused on what it calls "behavioral biometrics," which identifies you based on your behavior, such the way you scroll through a webpage, toggle between fields, hold a mouse, or the force you use to type on the keyboard. *See* BioCatch, www.biocatch.com. Facebook has filed for patents that would allow its facial-recognition technology to be used to "analyze in-store activity of a user." USPTO Application #20170337602, *available at* https://goo.gl/UFQbP5. The patent's abstract describes potential uses of the technology such as to "identif[y] a user profile associated with a customer shopping at a merchant location, determine[] a trust level for the customer based on user profile information, and based on the trust level, cause[] a secured product display to provide a customer access to a secured product." Yet another company promises that its facial-recognition software can "profil[e] people and reveal[] their personality based only on their facial image." *See* Faception, "Our Technology," www.faception.com/our-technology.

The Biometric Information Privacy Act gives these technologies space to develop while also ensuring that Illinoisans are given the tools they need to maintain control over their information. *See* Sun-Times Editorial Board, *supra* ("The [BIPA] wasn't written by Luddites, as its opponents imply. It doesn't bar the use of biometrics. It simply establishes a handful of commonsense rules to put your privacy ahead of someone else's profits. … The Illinois law allows companies to use biometrics as long as that privacy is respected."). Indeed, the BIPA principally ensures that the use of these technologies is transparent. "The success of large-scale or public biometric systems is dependent on gaining broad public acceptance of their validity. To achieve this goal, the risks and benefits of using such a system must be clearly presented." National Academy of

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Sciences, *Biometric Recognition: Challenges and Opportunities (Report in Brief)*, 7 (2010). A company that employs these technologies without making the required disclosures or obtaining the required consent upsets the balance struck by the BIPA. *See* 95th Ill. Gen. Assem., House Proceedings, May 30, 2008, at 249 (Statement of Rep. Ryg) (discussing bankruptcy and impending sale of Pay By Touch, and urging that the sale "leaves thousands of customers from Albertson's, Cub Foods, Farm Fresh, Jewel Osco, Shell, and Sunflower Market wondering what will become of their biometric and financial data"). And those actions alone trigger private enforcement.

III. The Second District's decision undermines the necessary protections codified in the BIPA.

To enforce the BIPA's requirements, the General Assembly provided for a scheme of private enforcement. 740 ILCS 14/20. In implementing this private right of action, the General Assembly was aware that privacy harms are notoriously difficult to measure. *See, e.g.*, *Best v. Taylor Machine Works*, 179 Ill. 2d 367, 476 (1997) (Miller, J., concurring in part and dissenting in part) (noting that "noneconomic losses" are "difficult to quantify"). But the General Assembly also recognized that an invasion of these rights should be a compensable harm. *See Leopold*, 45 Ill. 2d at 440-41 (noting that there are "undeniably … circumstances under which [privacy] should enjoy the protection of the law"). Thus, the statute provides for "liquidated damages" that may be pursued upon infringement of the privacy rights set forth in the statute itself. *See City of Elmhurst v. Kegerreis*, 392 Ill. 195, 205 (1945) ("A cause of action consists of the right belonging to the plaintiff for some wrongful act or omission done by the defendant by which that right has been violated … that is, the act or wrong of the defendant against the plaintiff which caused a grievance for which the law gives a remedy."). The purposeful inclusion of a

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liquidated damages provision in the statute underscores the General Assembly's judgment about how sensitive a person's biometric data is, and the importance of biometric privacy. And these liquidated damages not only free a plaintiff from the burden of quantifying harm from a privacy violation, but also incentivize private enforcement of the critical privacy protections provided by the BIPA. *See Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 32 (reasoning that "the $500 liquidated damages available under" a federal privacy statute are "at least in part, an incentive for private parties to enforce the statute"); *Eads v. Heritage Enterprises, Inc.*, 204 Ill. 2d 92, 103 (2003) ("The Nursing Home Care Act sought to achieve its purposes … by encouraging nursing home residents to press their claims as private attorneys general."); *Scott v. Ass'n for Childbirth at Home, International*, 88 Ill. 2d 279, 288 (1981) (noting that a statutory damages provisions was "but one part of the regulatory scheme, intended as a supplemental aid to enforcement").

The BIPA is also written to permit private enforcement *before* anything bad happens to an individual. The statute's language requires that individuals be provided full and complete information *before* they decide to surrender their biometric information. 740 ILCS 14/15(a), (b). The statute also limits what companies can do with biometric data once they have it, and that uses of the data not within the scope of the individual's consent are forbidden. *Id.* § 15(c), (d), (e). In other words, the BIPA allows Illinois consumers to control how and when they surrender their biometric data, and how and when that data is used.

The Appellate Court nevertheless concluded that a private entity that disregards the BIPA's protections cannot be held to account unless some consequential harm befalls

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the victim of the entity's lawlessness. *See Rosenbach v. Six Flags Entertainment Corp.*, 2017 IL App (2d) 170317, ¶ 20. That is not what the statute provides. The point of attaching a liquidated damages provision to the BIPA or any other privacy statute is to free plaintiffs from the obligation to prove specific harms beyond invasion of their statutory rights. And the entire structure of the BIPA encourages enforcement *before* anything bad happens. The Second District's decision turns this scheme upside down.

In fact, the General Assembly recently amended the Personal Information Protection Act to establish protections for biometric data after the point of collection. *See* Pub. Act 99-503. The PIPA requires companies that suffer data breaches take certain steps to notify individuals. *See* 815 ILCS 530/10, 12. As recently amended, the PIPA also requires companies in possession of information about Illinoisans to take "reasonable security measures" to protect that information and prevent data breaches. *Id.* § 45. Before 2016 the PIPA did not protect biometric data, but that changed with Pub. Act 99-503. As we had in 2008, the General Assembly recognized that biometric data is incredibly sensitive, and so companies need to be transparent about how they are handling such data. *See* 99th Ill. Gen Assem., Senate Proceedings, April 22, 2015, at 43 (Statement of Sen. Biss) ("This bill is about disclosure and transparency so we can know when data that is sensitive and private and is held by third parties is lost in a way that would imperil us."). Even so, a violation of the PIPA is enforceable only in an action under the Consumer Fraud Act. *See* 815 ILCS 530/20. And the Consumer Fraud Act permits recovery only of actual damages. 815 ILCS 505/10a(a).

Though there is some overlap between the BIPA and the PIPA, *compare* 815 ILCS 530/45 *with* 740 ILCS 14/15(e) (each requiring entities to take measures to protect

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stored biometric data), the two laws serve different purposes. The BIPA addresses the circumstances surrounding collection of biometric data, ensuring that entities obtain informed consent before collecting biometric data, 740 ILCS 14/15(a), (b), that the use of such data is limited to the scope of that consent, *id.*, and that further consent is obtained for any new uses of that data, *id.* § 15(c), (d). The law provides a means for consumers to maintain control over their information and prevent future harm. Thus, the law may be enforced by private parties without adverse consequences. The PIPA, by contrast, recognizes that bad things do happen, and enacts procedures for what to do in those circumstances. 815 ILCS 530/10, 12. That *ex post* protection backstops the important up-front protections provided by the BIPA. But the Second District's decision doesn't allow these up-front protections to be meaningfully enforced, undoing the General Assembly's handiwork.

The Second District concluded that the word "aggrieved" cabined the private-enforcement scheme in the BIPA. *See Rosenbach*, 2017 IL App (2d) 170317, ¶¶ 22-23. With respect, we do not believe that the word "aggrieved" can bear that kind of weight. The General Assembly has used nearly identical language to create private rights of action in three different privacy statutes: the BIPA, the AIDS Confidentiality Act, and the Genetic Information Privacy Act, all of which were considered during the 95th General Assembly. *See* Pub. Act 95-7 (amending the AIDS Confidentiality Act); Pub. Act 95-927 (amending the Genetic Information Privacy Act); Pub. Act 95-994 (enacting the BIPA). All three laws permit suit by "aggrieved" individuals, and each provide for tiered recovery depending on the severity of the defendant's statutory violation. And we have always understood liability under these laws to be triggered by an unlawful act *by the*

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defendant, rather than the suffering of consequential harm by the plaintiff. *See* 95th Ill. Gen. Assem., House Proceedings, May 17, 2007, at 22 (statement of Rep. Ford) (noting that amendment to AIDS Confidentiality Act would "increase penalt[ies] for any misconduct by doctors"); 95th Ill. Gen. Assem., House Proceedings, May 30, 2008 (Statement of Rep. Ryg) (stating that amendments to the Genetic Information Privacy Act would give Illinois residents an "even stronger" claim "for the mishandling of information and the intentional mishandling"). So far as we can tell, until the decision below so had the courts. *See Doe v. Chand*, 335 Ill. App. 3d 809, 822 (5th Dist. 2002) (noting that the "liquidated damages" provided for in the AIDS Confidentiality Act "can be recovered without proof of damages"); *Sekura v. Krishna Schaumberg Tan, Inc.*, 2016 CH 4945, 2017 WL 1181420, at *3 (Cir. Ct. Cook Cty. Feb. 9, 2017) (C 0577) ("In general, the term 'aggrieved' has been used consistently in numerous statutes to provide claims for the infringement of granted legal rights without the need to plead specific or actual damages. Absent the addition of language explicitly requiring such pleading, the natural inference is that anyone like the plaintiff here whose personal information has allegedly been mishandled in violation of BIPA may bring a claim."). That is consistent with the tiered remedial scheme we enacted, which focuses on the defendant's culpability. *See* 740 ILCS 14/20(1), (2) (providing for damages if the defendant "negligently violations a provision of this Act" and enhancing those damages if the defendant "intentionally or recklessly violates a provision of this Act").

The Second District thought that its holding was necessary to avoid rendering the phrase "aggrieved by a violation of this Act" superfluous. *See Rosenbach*, 2017 IL App (2d) 170317, ¶ 23. We disagree. Without that phrase "any person" could sue for

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violations of the BIPA, regardless whether they had been asked to surrender their biometric information. The challenged phrase makes clear that only individuals who need the protections of the BIPA can enforce them. The right of action is out of reach until an individual is faced with a choice about whether to surrender their biometric data to a company. That is all the phrase "aggrieved by a violation of this Act" is intended to do.

IV. The Second District's decision disincentivizes companies to comply with Illinois law.

Perversely, the Second District's decision appears to *discourage* companies from complying with the BIPA. As we have said, the purpose of the BIPA is to promote transparency in the collection and use of biometric data, by mandating certain disclosures and requiring companies to collect informed consent. *See* 740 ILCS 14/15. But if liability is linked with "actual harm," as the Second District held, companies have every incentive *not* to be transparent. If a consumer lacks access to basic information about how her biometric data is being used or disclosed, she may never realize that any harm she has suffered is traceable to the unlawful collection or use of her biometric data. The Second District's decision thus risks undermining the balance struck by the BIPA.

The Second District's decision also significantly hampers the ability of Illinois citizens to enforce the privacy protections in the BIPA, either individually or by banding together when a defendant has harmed hundreds of individuals. *See Smyth v. Kaspar American State Bank*, 9 Ill. 2d 27, 44 (1956) (recognizing that to allow defendants an opportunity "to contest liability with each [plaintiff] … would, in many cases[,] give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants"). Violations of the BIPA are unlikely to be one-off occurrences; companies collecting, disclosing, or selling biometric data are likely to collect, disclose,

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or sell the data of all of their customers. Indeed, that appears to be what happened here. (C0005-C0006.) The BIPA is especially important in these types of situations. The General Assembly recognized as much, and provided for liquidated damages "as a supplemental aid to enforcement." *Scott*, 88 Ill. 2d at 288; *see Abbasi ex rel. Abbasi v. Paraskevoulakos*, 187 Ill. 2d 386, 395 (1999) ("The threat of liability is an efficient method of enforcing a statute."). By requiring an antecedent showing of some unspecified "actual" harm, the decision below significantly weakens the ability of private parties to enforce the terms of the statute.

CONCLUSION

Amici respectfully urge the Court to reverse the judgment of the Appellate Court.

July 3, 2018

Respectfully Submitted,

s/ Richard W. Stake, Jr.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a), 315(f), and 345(b). The length of this brief, excluding the pages or words contained in the Rule 341(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 15 pages.

Dated: July 3, 2018 s/ Richard W. Stake, Jr.

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