E-FILED
Transaction ID: 1-20-0563
File Date: 9/1/2020 2:15 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

No. 1-20-0563

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

JOROME TIMS, individually and on behalf of others similarly situated,

Plaintiff-Appellee,

v.

BLACK HORSE CARRIERS,

Defendant-Appellant.

On Appeal from the Circuit Court of Cook County, Illinois,
Cook County Circuit, No. 2019-CH-03522
The Honorable David B. Atkins, Judge Presiding

BRIEF OF *AMICUS CURIAE* ILLINOIS CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT-APPELLANT BLACK HORSE CARRIERS

Melissa A. Siebert
ARDC #6210154
Matthew C. Wolfe
ARDC #6307345
SHOOK, HARDY & BACON LLP
111 South Wacker Drive, Suite 4700
Chicago, Illinois 60606
(312) 704-7700
masiebert@shb.com
mwolfe@shb.com

Counsel for Amicus Curiae

POINTS AND AUTHORITIES

INTEREST OF *AMICUS CURIAE*

In recent years, businesses across Illinois have endured a wave of hundreds of lawsuits filed under the Illinois Biometric Privacy Act ("BIPA"). The targets of BIPA lawsuits are Illinois businesses that span multiple industries and vary in size, such as community hospitals, small, family-owned grocery stores, nursing homes and rehabilitation centers, restaurants, food service companies, retailers, hotels and airlines, and other, well-respected Illinois-based businesses – industries that form the backbone of the Illinois economy and provide essential employment and services to Illinois citizens. The vast majority of BIPA lawsuits consist of putative class actions with hundreds, if not thousands, of members alleging technical violations of the statute due to the use of timekeeping systems that purportedly rely on finger, hand, or face scanners. With statutory damages of up to $5,000 per violation, these lawsuits have the potential to impose devastating damages on Illinois businesses across the state.

Amicus Illinois Chamber of Commerce (the "Chamber") is the voice of the business community in Illinois. The Chamber is a statewide organization with more than 1,800 members in virtually every industry, including manufacturing, retail, insurance, construction and finance. The Chamber advocates on behalf of its members to achieve an optimal business environment that enhances job creation and economic growth.

The Chamber's interest in this case is substantial. At least 23 members of the Chamber have been sued in BIPA lawsuits in the last four years. This

BIPA litigation surge continues and shows no signs of slowing down. More than 780 BIPA lawsuits have been filed in state and federal courts since 2016. Since March 2020, no fewer than 140 new BIPA lawsuits have been filed.

The key question before the Court – whether the statute of limitations for BIPA claims is one or five years – has the potential to dramatically expand the onslaught of BIPA class action lawsuits that have, and continue to, demand enormous sums from Illinois businesses. Illinois businesses, especially smaller businesses, will be negatively impacted if the trial court's decision applying the five-year catchall statute of limitations is upheld, which will result in larger alleged class sizes, costlier discovery, and larger amounts sought in damages.

What businesses need now more than ever is certainty. The COVID-19 pandemic has created unprecedented economic challenges, leaving many businesses simply struggling to survive. Allowing five years for plaintiffs to bring BIPA claims, claims which the Illinois Supreme Court has indicated do not require a showing of actual damages, will create an even more uncertain climate for businesses. It will increase exposure to class actions seeking massive, if not catastrophic, damages. Overturning the trial court's decision and applying the one-year statute of limitations for privacy cases to BIPA claims is necessary to promote the legislative objectives of both BIPA and statutes of limitations at large. This brief will assist the Court by addressing the implications of the Circuit Court's decision for the Illinois business community.

INTRODUCTION

This appeal presents an issue of critical importance under BIPA: whether the one-year statute of limitations for privacy claims or the five-year catchall statute of limitations applies to BIPA claims. The scope and viability of hundreds of BIPA class actions turns on the answer to this question.

Statutes of limitations exist to ensure claimants file suit within a reasonable time following an alleged injury. BIPA does not provide for a statute of limitations. But, Illinois does have a one-year statute of limitations that specifically applies to privacy claims. A one-year statute of limitations applies to "[a]ctions for slander, libel, or publication of [a] matter violating the right of privacy." 735 ILCS 5/13-201. Rather than applying the one-year statute of limitations for privacy claims, which governs claims that closely resemble those under BIPA, the Circuit Court held that the absence of any statute of limitations within BIPA makes the catchall five-year statute of limitations automatically the default. This was in error.

Under the Circuit Court's ruling, a BIPA plaintiff who knowingly and voluntarily used a biometric timekeeping system ("timeclock") for years on end and, accordingly, is fully aware of the facts needed to state a claim, can wait five years before filing a lawsuit that notifies the defendant of the alleged violations. Such an interpretation is not only counter to the purpose of limitations periods in general, it undermines the legislative goals of BIPA and stands to dramatically expand the size of BIPA classes, which will inevitably result in costlier settlements.

The combination of liquidated damages under BIPA and the ability to aggregate damages on a massive scale through the class action mechanism has made BIPA ripe for litigation abuse. And, the Illinois Supreme Court's recent decision in *Rosenbach* – which holds that no allegations of an actual injury are necessary to state certain BIPA claims, has made bringing BIPA claims even easier. A short statute of limitations is an important restraint on BIPA's potential for abuse.

The primary purpose of BIPA is to protect against the improper disclosure of individuals' private information. BIPA gives private individuals the ability to enforce its provisions through its private right of action. In cases such as this one involving the voluntary use of a timeclock, the purpose of BIPA is best served by requiring individuals to promptly bring BIPA claims. The sooner individuals file suit, the sooner businesses are aware of alleged violations, and the sooner businesses can get compliant with the statute if necessary. The result of an earlier resolution is that fewer individuals' privacy rights are compromised, which is the entire point of BIPA.

In contrast, the Circuit Court's decision creates a countervailing incentive to delay bringing claims to increase class sizes and induce larger settlements, while doing little to further the goals and purpose of BIPA. The Court should reverse the decision below to further the legislative goals of BIPA and to ensure Illinois business are not burdened by the uncertainty and costs associated with a longer limitations period.

ARGUMENT

I. The one-year statute of limitations for privacy claims applies to causes of action under BIPA.

A. The statute of limitations applies to claims involving "publication".

A one-year statute of limitations governs actions "for publication of [a] matter violating the right of privacy." 735 ILCS 5/13-201.

The one-year statute of limitations applies to virtually every privacy common law and statutory claim, such as claims for defamation, false light, public disclosure of private facts, misappropriation of an individual's likeness and violation of the Illinois Right to Publicity Act ("IRPA"). *See Bryson v. News Am. Publications, Inc.*, 174 Ill. 2d 77, 105 (1996) ("[t]he limitations period for invasion of privacy claims and for defamation claims is one year after the cause of action accrues"); *Leopold v. Levin*, 45 Ill. 2d 434, 444 (1970) (the one-year statute of limitations applies to claims for misappropriation of an individual's likeness); *Blair v. Nevada Landing P'ship*, 369 Ill. App. 3d 318, 323 (2006) (the one-year statute of limitations applies to claims under IRPA); *Poulos v. Lutheran Soc. Servs. Of Illinois, Inc.*, 312 Ill. App. 3d 731, 745 (2000) (same as to false light); *Johnson v. Lincoln Christian College*, 150 Ill. App. 3d 733, 745-46 (1986) (same as to public disclosure of private facts); *Founding Church of Scientology of Washington, D. C. v. Am. Med. Ass'n*, 60 Ill. App. 3d 586, 589 (1978) (same as to libel); *Bakalis v. Bd. of Trustees of Cmty. Coll. Dist. No. 504, Cty. of Cook, State of Ill. (Triton Coll.)*, 948 F. Supp. 729, 736 (N.D. Ill. 1996) (same for libel).

What these claims share is they all involve the unlawful publication of personal information, even if it is not a specific element of the claim. *See Kolegas v. Heftel Broad. Corp.*, 154 Ill. 2d 1, 17–18 (1992) (false light claim shows that plaintiff was "placed in a false light before the public"); *Trannel v. Prairie Ridge Media, Inc.*, 2013 IL App (2d) 120725, ¶ 18 (IRPA claims address the "public use" *or* "holding out" of an individual's identity"); *Poulos*, 312 Ill. App. 3d at 745 ("[a]n action for public disclosure of private facts provides a remedy for the dissemination of true, but highly offensive or embarrassing, private facts"); *Ainsworth v. Century Supply Co.*, 295 Ill. App. 3d 644, 648 (1998) (misappropriation of likeness claims are "designed to protect a person from having his name or image used for commercial purposes without consent.")

Very little is required to establish that a claim involves "publication." In fact, publication can occur when private information is disclosed to a single third party. For instance, in *Poulos*, this Court held that the one-year statute of limitations applies to the common-law privacy tort of public disclosure of private facts even though the private facts need not be communicated "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Poulos*, 312 Ill. App. 3d at 740. To that end, courts have held that an action as minor as sending an intra-office communication from one employee to another constitutes publication. *Popko v. Cont'l Cas. Co.*, 355 Ill. App. 3d 257, 265–66 (2005).

B. BIPA claims fall within the plain language of the one-year statute of limitations.

Claims under BIPA are actions that involve the publication of matters violating the right of privacy. This Court has held that BIPA violations necessarily involve publication. In *West Bend Mut. Ins. Co. v. Krisha Schaumburg Tan, Inc.*, 2020 IL App (1st) 191834, this Court analyzed the term "publication" in the BIPA context. Specifically, the Court considered whether an insurance policy's provision for personal injuries arising out of the "publication of material that violates a person's right of privacy" – language virtually identical to that contained in Illinois' one-year statute of limitations – applied to a BIPA claim in which the defendant allegedly disclosed customers' biometrics to a third-party vendor. *Id.* ¶ 27-28. The underlying lawsuit involved a tanning salon that required its customers to enroll in a database in which their fingers were scanned for identity verification purposes. *Id.* ¶ 10. The tanning salon allegedly failed to obtain proper consent and disclosed plaintiff's biometrics to a third-party vendor, in violation of BIPA – the same claim made in hundreds of currently pending BIPA lawsuits. *Id.* ¶ 10-11. This Court held that the common understanding of the term publication includes "a more limited sharing of information with a single third party." *Id.* ¶ 35. As such, publication under BIPA encompasses the act of providing an individual's biometrics to a third party, a core concern of the statute. *Id.* ¶ 38. The insurance policy thus covered this BIPA claim. *Id.*

The *Tims* case presents a factual scenario nearly identical to facts at issue in the underlying case in *West Bend*. The plaintiff in *Tims* alleges that his employer violated BIPA by failing to obtain proper consent and by disclosing its employees' biometric data to third parties, related to the employees' use of a timeclock. (SR 168-70). If this Court's understanding of publication includes "a more limited sharing of information with a single third party", the BIPA claims in *Tims* must also involve "publication of material that violates a person's right of privacy" as well. *Id.* ¶ 35.

West Bend is consistent with how the Illinois Supreme Court and other courts have explained BIPA. BIPA sets up a statutory framework designed to prevent individuals' biometric data from falling into the wrong hands. *See Rosenbach v. Six Flags Entm't Corp.*, 2019 IL 123186, ¶ 33 ("[t]hrough [BIPA], our General Assembly has codified that individuals possess a right to privacy in and control over their biometric identifiers and biometric information"). As recognized by the Illinois Supreme Court in *Rosenbach*, and more recently the Seventh Circuit Court of Appeals, the focus of BIPA is on not just on a right to privacy, but also on a right to control the *dissemination* of biometric information. *Id.; Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617, 620 (7th Cir. 2020), *as amended on denial of reh'g and reh'g en banc* (June 30, 2020). Each of BIPA's provisions serve to further that purpose. *Bryant*, 958 F.3d at 620 ("the sensitivity of biometric information and the risk of identity theft or other privacy or economic harm that may result from its dissemination, necessitates

that people be given the opportunity to make informed choices about to whom and for what purpose they will relinquish control of that information.") This conclusion holds true regardless of what provision of the statute is alleged to have been violated. The fundamental purpose of the statute does not change depending on the specific provision at issue, because all the provisions in the statute serve to advance the General Assembly's goal of preventing the wrongful disclosure of biometrics. *Sekura v. Krishna Schaumburg Tan, Inc.*, 2018 IL App (1st) 180175 at ¶ 59 ("[t]he Act's goal is to prevent irretrievable harm from happening and to put in place a process and rules to reassure an otherwise skittish public.")

The Circuit Court's opinion did not evaluate whether BIPA primarily serves to prevent the wrongful disclosure of biometrics. (SR 168-70). But this analysis is crucial to choosing the right statute of limitations. "Where two statutes of limitation arguably apply to the same cause of action, the one which more specifically relates to the action must be applied." *PSI Res. LLC v. MB Fin. Bank, Nat. Ass'n*, 55 N.E. 3d 186, 195 (1st Dist. 2016); *see also Hernon v. E.W. Corrigan Const. Co.*, 595 N.E. 2d 561, 563 (2d Dist. 1992) (collecting cases). Given that this Court has held that BIPA claims alleging disclosure to a third party necessarily involve "publication of material that violates a person's right of privacy", the one-year statute of limitations governing actions involving "publication of [a] matter violating the right to privacy" must apply to claims under BIPA, regardless what section of BIPA is alleged to have been

violated. This conclusion is particularly warranted here, where the plaintiff alleges, like most other BIPA plaintiffs, that the defendant disclosed his biometric information to a third party without his consent. As such, the BIPA claims at issue in *Tims* are time-barred.

C. The BIPA's legislative history and policy objectives further support that the one-year statute of limitations applies to BIPA claims.

The structure of BIPA and its legislative history further support the conclusion that BIPA is a statute designed to redress the wrongful disclosure or publication, of private information, just like the other claims subject to the one-year statute of limitations.

The Illinois General Assembly enacted BIPA to protect against the disclosure and sale of individuals' biometric identifiers and information. *Rosenbach*, 2019 IL 123186 at ¶ 34 (stating that the General Assembly enacted BIPA in light of assessing the "difficulty in providing meaningful recourse once a person's biometric identifiers or biometric information has been *compromised*.") Biometrics present unique risks to individuals' privacy since they are by definition unique and, therefore, unlike a social security number, cannot be changed if taken without an individual's consent. 740 ILCS 14/5. Accordingly, "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."

Vigil v. Take-Two Interactive Software, Inc., 235 F. Supp. 3d 499, 504 (S.D.N.Y. 2017), *vacated in part on other grounds*, 717 F. App'x 12 (2d Cir. 2017).

The legislative history of BIPA further demonstrates that the statute was intended to redress wrongful disclosure, and, accordingly, publication of private information. The statute was enacted in the wake of the Pay by Touch bankruptcy, in which a court approved the sale of a defunct company's database of biometric data. *See Sekura*, 2018 IL App (1st) 180175 at ¶¶ 63, 115. Lawmakers' chief concern was that individuals' biometric data would be sold or otherwise disclosed to third parties. The legislature made this concern explicit in the preamble to the statute. 740 ILCS 14/5(c) ("Biometrics, however, are biologically unique… therefore, once *compromised*, the individual has no recourse") (emphasis added).

BIPA accomplishes its objective of protecting against the wrongful disclosure of private information in two ways. First, it prohibits the precise conduct it sets out to deter: dissemination of biometrics without individuals' consent. 740 ILCS 14/15 (c), (d), and (e). Second, it institutes procedural protections for companies to take when collecting biometric data, such as providing adequate notice and establishing retention policies. 740 ILCS 14/15(a) and (b). Due to a person's inability to readily change his or her biometrics, when a private entity fails to comply with *any* provision of the statute, "the right of the individual to maintain [his or her] biometric privacy vanishes into thin air" and the "precise harm the Illinois legislature sought to

prevent is then realized". *Rosenbach*, 2019 IL 123186 at ¶¶ 33-34 ("when a private entity fails to comply with one of section 15's requirements, that violation constitutes an invasion, impairment, or denial of the statutory rights of any person or customer whose biometric identifier or biometric information is subject to the breach").

Indeed, as explained above, courts have consistently recognized that the statute's provisions serve to further BIPA's primary objective of preventing wrongful disclosure of sensitive data. *See Rosenbach*, 2019 IL 123186 at ¶ 36 (BIPA's notice and consent provisions serve to ensure individuals' privacy rights are honored to begin with). *See also Figueroa v. Kronos Inc.*, 2020 WL 1848206, *3 (N.D. Ill. Apr. 13, 2020) *(*the denial of plaintiffs' *"*opportunity to withhold their consent to the collection or dissemination of their data" was "no mere technicality, for without being informed that Kronos or outside data hosts would obtain their data, Plaintiffs were denied entirely an opportunity to object, in any fashion, to the way their data was handled"); *Howe v. Speedway LLC*, 2018 WL 2445541, at *5 (N.D. Ill. May 31, 2018) ("BIPA's notice and consent provisions do not create a separate interest in the right-to-information, but instead operate in support of the data protection goal of the statute.")

When determining what statute of limitations applies, the Illinois Supreme Court has a "singular concern" and that is "to ascertain and give effect to the legislature's intent." *Uldrych v. VHS of Ill., Inc.*, 239 Ill. 2d 532, 540 (2011) (*citing Moore v. Green*, 219 Ill. 2d 470, 488 (2006)). "When the spirit

and intent of the legislature are clearly expressed and the objects and purposes of a statute are clearly set forth, courts are not bound by the literal language of a particular clause of the statute that might defeat such clearly expressed legislative intent." *Id.* (citing *In re Application of the Cty. Treasurer*, 214 Ill. 2d 253, 259 (2005)). A court "must presume that *several statutes relating to the same subject . . . are governed by one spirit and a single policy*, and that the legislature intended the several statutes to be consistent and harmonious." *Id.* (emphasis added).

As is the case here, BIPA's several subsections "are governed by one spirit and a single policy." *See id.* And, as the case law, legislative intent, and structure of the statute demonstrate, BIPA was enacted for a singular purpose, which was to prevent "*publication* of matter violating the right of privacy." *See* 735 ILCS 5/13-201 (emphasis added). The overarching purpose of the statute does not change depending on the specific provision allegedly violated. As recognized in *Rosenbach* and *Bryant*, each of BIPA's provisions share the same purpose, and that is to prevent the wrongful publication of private information. And, that purpose determines the proper limitations period. Accordingly, the one-year statute of limitations applies to BIPA claims regardless of the particular provision alleged to have been violated.

D. The one-year statute of limitations applies to claims that closely resemble BIPA.

BIPA's similarities to other statutes where the one-year statute of limitations applies also supports the application of the one-year statute of

limitations in this case. For instance, IRPA is a statute that closely tracks BIPA and falls within the purview of the one-year statute of limitations. *Blair*, 369 Ill. App. 3d at 323. Like BIPA, IRPA codifies rights to privacy. "IRPA grants to each individual the 'right to control and to choose whether and how to use [his or her] identity for commercial purposes,' and prohibits use of 'an individual's identity for commercial purposes during the individual's lifetime without having obtained previous written consent.'" *Troya Int'l, Ltd. v. Bird-X, Inc.*, No. 15 C 9785, 2017 6059804, at *13 (N.D. Ill. Dec. 7, 2017) (citing 765 ILCS 1075/10, 1075/30). Under BIPA, "individuals possess a right to privacy in and control over their biometric identifiers and biometric information," which BIPA regulates by "requiring notice before collection and giving them the power to say no by withholding consent." *Rosenbach*, 2019 IL 123186, ¶ 34.

The statutes also operate in very similar ways. Plaintiffs suing under IRPA can recover the greater of "(1) actual damages, profits derived from the unauthorized use, or both; or (2) $1,000." 765 ILCS 1075/40(a). Punitive damages are available against a person who willfully violates IRPA. *Id.* at 1075/40(b). Similarly, BIPA entitles prevailing plaintiffs to the greater of actual damages or liquidated damages of $1,000 for negligent violations and $5,000 for intentional or reckless violations. 740 ILCS 14/20. Both statutes codify rights to privacy. Both provide for statutory damages according to differing levels of culpability. Both are concerned with preventing the disclosure or publication of a person's data.

Like BIPA, IRPA does not have a statute of limitations within it. *Blair*, 369 Ill. App. 3d at 322. Nonetheless, the one-year privacy statute of limitations applies to IRPA claims because they involve the disclosure of private facts. *Id*.

The application of the one-year statute of limitations to IRPA is particularly notable because it establishes that publication does not need to be a specific element of a claim in order to come within the purview of the one-year statute of limitations. Claims under IRPA simply require "[1] an appropriation of one's name or likeness, [2] without one's consent, [3] for another's commercial benefit." *Blair*, 369 Ill. App. 3d at 322 (recognizing that to state a claim under IRPA, a plaintiff must essentially meet the same three elements as its common-law antecedent). Publication is not an express element of IRPA claims, but the one-year statute of limitations applies. Likewise, although it is possible to plead a BIPA claim without alleging publication, publication is central to BIPA's overall purpose and the nature of BIPA liability.

The Illinois Supreme Court has emphasized that the nature of liability – not the particular relief sought – is determinative in assessing whether the one-year statute of limitations applies. *Travelers Cas. & Sur. Co. v. Bowman*, 229 Ill. 2d 461, 469 (2008). Here, all of the claims falling within the one-year statute of limitations share a common purpose: to protect the right to control information about oneself. *CBS, Inc. v. Partee*, 198 Ill. App. 3d 936, 945, (1990) (privacy is "the individual's right to control dissemination of information about

himself") And, liability occurs when a third party interferes with that control, whether by disclosing private facts to a third-party, the basis of public disclosure of private facts claims, or profiting off a person's image without their consent, such as with misappropriation of likeness claims. *See, e.g., Poulos*, 312 Ill. App. 3d at 745 ("[a]n action for public disclosure of private facts provides a remedy for the dissemination of true, but highly offensive or embarrassing, private facts"); *Ainsworth*, 295 Ill. App. 3d at 648 (misappropriation of likeness claims are "designed to protect a person from having his name or image used for commercial purposes without consent.")

In sum, a one-year statute of limitations governs privacy actions that protect against the disclosure of private information. The framework of BIPA as well as its legislative history and objectives demonstrate that BIPA claims are precisely that type of action. This conclusion particularly warranted when a plaintiff, as is the case here, contends a defendant violated BIPA through its disclosure of biometric information. Plaintiff, and all other BIPA claimants, cannot escape the legislature's intent to create a statutory cause of action that closely resembles other claims that fall within the purview of the one-year statute of limitations. The one-year statute of limitations, therefore, applies to BIPA claims.

II. A One-Year Statute of Limitations is Essential to Limit BIPA to Its Intended Purpose.

A short statute of limitations is consistent with BIPA's policy prerogatives. Lawmakers designed the statute to incentivize compliance and

"to try to head off [] problems before they occur." *Rosenbach*, 2019 IL 123186 at ¶ 36. This legislative intent is evident in the duties imposed by BIPA, which focus primarily on safeguards companies must put in place before receiving any biometrics. It is also evident in the enforcement mechanism of the statute. *Id*.

The private action enforcement aspect of the statute plays a particularly critical role in incentivizing companies to comply with the statute, as recognized in *Rosenbach*. *Id*. at ¶ 37. "When private entities face liability for failure to comply with the law's requirements without requiring affected individuals or customers to show some injury beyond violation of their statutory rights, those entities have the strongest possible incentive to conform to the law and prevent problems before they occur and cannot be undone." *Id*.

Because BIPA is enforced solely through private actions, a company may not discover the existence of alleged violations until it is served with a lawsuit, at which point measures may be taken to get compliant. 740 ILCS 14/20. Allowing plaintiffs five years to bring BIPA claims will effectively delay compliance with the statute and risk compromising *more* individuals' privacy rights. In contrast, a one-year statute advances BIPA's principal objective: claims will be brought sooner, companies will become compliant sooner, and fewer individuals' privacy rights will potentially be compromised.[1]

[1] Other privacy statutes have statutes of limitations of similar duration. For instance, the Fair Credit Reporting Act of 1970 has a two-year statute of limitations and a five-year statute of repose. 15 U.S.C. § 1681. The Privacy Act of 1974 also has a two-year statute of limitations. 5 U.S.C. § 552a(g)(5). Additionally, actions under the Illinois

Furthermore, *Rosenbach* demonstrates that BIPA presents a statutory scheme in which violations are causes of action that plaintiffs should bring as soon as possible. When assessing the impact of potential delays associated with requiring plaintiffs to allege an actual injury in addition to a violation of the statute, the court found: "[t]o require individuals to wait until they have sustained some compensable injury beyond violation of their statutory rights before they may seek recourse…would be completely antithetical to the Act's preventative and deterrent purposes." *Rosenbach*, 2019 IL 123186 at ¶ 37. A five-year statute of limitations would be equally antithetical to the purpose the statute.[2]

Without an effective time bar, plaintiffs will have significant incentive to delay bringing their claims: the potential for larger damages and penalties and thus larger financial rewards for the plaintiffs. Given the turnover in workforces today, sophisticated plaintiffs and their lawyers would capitalize on these incentives to delay filing suit, to the detriment of BIPA's goal of preventing of violations at the outset. A one-year statute of limitations,

---

Personal Information Protection Act and Illinois Consumer Fraud and Deceptive Business Practices Act have three-year statutes of repose. 815 ILCS 530/20 (violations of the Illinois Personal Information Protection Act are violations of the Illinois Consumer Fraud and Deceptive Business Practices Act); 815 ILCS 505/10a(e)(any claim under the Illinois Consumer Fraud and Deceptive Business Practices Act "shall be forever barred unless commenced within 3 years after the cause of action accrued").

[2] Notably, BIPA provides a remedy for failing to destroy individuals' biometrics within three years from the individual's last interaction with a private entity. 740 ILCS 14/15(a). As such, applying a one-year statute of limitations will not deprive individuals whose biometrics are disclosed after the requisite three-year period from a remedy.

instead, complements and promotes BIPA's objectives by encouraging diligent notice of purported violations of the statute.

III. A One-Year State of Limitations Promotes the Legislative Policy Goals Underpinning Statutes of Limitations.

Statutes of limitation provide vital "security and stability to human affairs." *Gabelli v. SEC*, 568 U.S. 442, 448-49 (2013). Courts throughout the country have consistently recognized the importance of statutes of limitations "to allow more certainty and reliability" in civil litigation; policy goals which "are a necessity in a marketplace where stability and reliance are essential components of valuation and expectation for financial actors." *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2055 (2017).

The Illinois Supreme Court has similarly recognized and respected the General Assembly's prerogative to adopt a statute of limitations, which "represent society's recognition that predictability and finality are desirable, indeed indispensable, elements of the orderly administration of justice". *Sundance Homes, Inc. v. Cty. of DuPage*, 195 Ill. 2d 257, 265–66 (2001). Statutes of limitations exist to "discourage the presentation of stale claims and to encourage diligence in the bringing of actions". *Id*.

In the context of BIPA claims, a one-year privacy statute of limitations promotes the policy goals behind statute of limitations in several ways. *First*, BIPA claims are precisely the type of claim that can and should be brought at an early stage. As is the case in *Tims*, the vast majority of BIPA plaintiffs are employees who knowingly and voluntarily scan their fingers, hands, or faces

for timekeeping and pay purposes. Courts have noted the obvious – individuals who scan their fingers are aware that their information is being collected and stored. *See*, *e.g.*, *Bryant*, 958 F.3d at 620 (plaintiff "voluntarily created a user account for the Smart Market vending machines and regularly made use of the fingerprint scanner to purchase items from the machines"); *Santana v. Take-Two Interactive Software, Inc.*, 717 F. App'x 12 (2d Cir. 2017) (explaining that "[n]o reasonable person, however, would believe that the MyPlayer feature was conducting anything other than [] a [facial] scan"); *McGinnis v. United States Cold Storage, Inc.*, 382 F. Supp. 3d 813, 819 (N.D. Ill. 2019) (plaintiff "knew his fingerprints were being collected because he scanned them in every time he clocked in or out of work, and he knew they were being stored because the time-clock-scanned prints were obviously being compared to a stored set of prints"); *Howe v. Speedway LLC*, 2018 WL 2445541, at *6 (N.D. Ill. May 31, 2018) (employee's "fingerprints were collected in circumstances under which any reasonable person should have known that his biometric data was being collected"); *Goings v. UGN, Inc.*, 2018 WL 2966970, at *4 (N.D. Ill. June 13, 2018) (noting that the plaintiff-employee "was aware that he was providing his biometric data to defendants" for timekeeping purposes); *McCollough v. Smarte Carte, Inc.*, 2016 WL 4077108 at *1 n.1 (N.D. Ill. Aug. 1, 2016) ("This Court assumes that a customer would understand that Smarte Carte collects and retains their fingerprint data for at least the duration of the rental. The system would not work otherwise.") In other words, the facts giving rise to

many BIPA violations, including the one at issue in *Tims*, are apparent at the first scan.[3]

Nor are BIPA claims difficult to file, as evidenced by the hundreds of BIPA lawsuits across Illinois. Most BIPA complaints are copied and pasted from previously filed complaints that simply substitute the parties. *See*, *e.g.*, *Colon v. Dynacast, LLC*, 2019 WL 5536834, at *4 (N.D. Ill. Oct. 17, 2019) (noting that the case was "virtually identical" to several other BIPA cases); *see also* Anna L. Metzger, *The Litigation Rollercoaster of BIPA: A Comment on the Protection of Individuals from Violations of Biometric Information Privacy*, 50 Loy. U. Chi. L. J. 1051, 1055 (2019) (observing that "in 2017, the number of lawsuits filed under BIPA exploded as employees began suing their employer"). Little, if any, investigation into the facts of each case is done before getting the case on file. Moreover, under *Rosenbach*, plaintiffs "need not allege some actual injury or adverse effect, beyond violation of his or her rights under the Act . . . to seek liquidated damages and injunctive relief." *Rosenbach*, 2019 IL 123186, ¶ 40.

Given the low barriers to filing suit, courts should apply "relatively short time limits for types of claims that are readily recognizable early in their existence and that would be expected to bring about litigation soon after their arising." David Crump, *Statutes of Limitations: The Underlying Policies*, 54 U.

[3] Where it is not obvious that biometrics are potentially being collected, discovery and tolling doctrines could help mitigate any concern about a plaintiff not realizing she has a claim until it is too late.

Louisville L. Rev. 437, 443 (2016) (pointing to the one-year statute of limitations for defamation claims as an example).

Second, allowing a longer limitations period is unfair to BIPA defendants. Courts have emphasized that statutes of limitations "embody a policy of repose, designed to protect defendants by eliminating stale claims." *Lozano v. Montoya Alvarez,* 572 U.S. 1, 14, (2014) (internal quotations omitted). Businesses using biometric technology, whether for timekeeping purposes to ensure their employees are paid properly or to make consumer transactions more secure, are entitled to the "security and stability to human affairs" that are "vital to the welfare of society" and should not be "surprise[d] through the revival of claims that have been allowed to slumber." *Gabelli v. SEC*, 568 U.S. 442, 448, 449 (2013). The Circuit Court's decision undercuts that fairness by forcing BIPA defendants to litigate claims over alleged violations that occurred long ago.

Extending the statute of limitations comes with real costs. BIPA lawsuits are time-consuming and expensive to litigate. BIPA lawsuits have touched on nearly every major sector of the Illinois economy, including healthcare, technology, manufacturing and retail. Class action lawsuits, in particular, inherently carry heavy discovery costs. And, the threat of the financial burden that comes with discovery, alone, can be enough to force a BIPA defendant to settle, regardless of the merits of the case. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("faced with even a small chance

of a devastating loss, defendants will be pressured into settling questionable claims"); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007) ("the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment]"). That threat becomes much more intense when facing larger classes resulting from a longer statute of limitations.

Uncertainty surrounding basic features of the statute also contributes to the burden that comes with BIPA cases and the pressure to settle meritless cases. For instance, some plaintiffs have taken the position that every scan constitutes a new violation of the statute, thereby resetting the limitations clock with every scan. The effect of such an interpretation would significantly prolong the time plaintiffs have to bring claims and increase damages to astronomical levels. A one-year statute of limitations will bring some repose and finality to BIPA liability, which will enable Illinois businesses to focus on hiring employees, keeping stores and warehouses open, and staying in business, as opposed to litigating expensive class actions.

IV. BIPA's restraints on commercial free speech further support applying the one-year statute of limitations.

One of the primary justifications for a shorter limitations period for claims such as defamation, libel and slander is that those claims implicate First Amendment concerns. *See*, *e.g.*, *Firth v. State*, 98 N.Y.2d 365, 370 (2002) (refusing to find that every publication re-starts the statute of limitations a defamation claim because such a rule would "implicate an even greater

potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants" and "[i[nevitably, there would be a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet.") The Utah Court of Appeals described the reasoning behind shorter limitations periods for claims like defamation as follows:

> [The] short limitations period is explained by the fact that defamation claims regularly collide with free speech interests and "always reside in the shadow of the First Amendment." The shorter time period in which "those making statements are exposed to legal challenges reduces the chilling effect on speech that may accompany the prospect of defending statements well beyond their shelf lives.

Bates v. Utah Ass'n of Realtors, 2013 UT App 34, ¶ 3 (2013), *quoting Jensen v. Sawyers*, 2005 UT 81, ¶¶ 50, 55. *See also* Patricia Avidan, *Protecting the Media's First Amendment Rights in Florida: Making False Light Plaintiffs Play by Defamation Rules*, 35 Stetson L. Rev. 227, 250 (2005) (the shorter statute of limitations period for defamation claims should be applied to false light claims "to protect media defendants' First Amendment rights").

That rationale applies with equal force to claims arising under BIPA, which also implicate First Amendment concerns. "[T]he creation and dissemination of information are speech for First Amendment purposes." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 568 (2011). "An individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated." *Id. See also Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("[I]f

the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct").

BIPA is a statute that does exactly that: it imposes restraints on the way private entities can use or disseminate factual information. The statute expressly prohibits, among other things, the dissemination and sale of biometric information. 740 ILCS 14/15(c) and (d). Any restrictions on private entities' access to information, such as customer data or identifying information, necessarily implicates the First Amendment with respect to commercial free speech. *Sorrell*, 564 U.S. at 576 (statute that restricted the sale and dissemination of prescriber-identifying information violated the First Amendment); *see also U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999) (invalidating law that restricted use of customer information for marketing purposes).

BIPA also imposes restrictions with respect to how businesses communicate with their employees and consumers. BIPA dictates the form and format of certain public communications through its disclosure requirements. For instance, BIPA requires businesses to inform individuals "in *writing* of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used." 740 ILCS 14/15(b)(2). A business could easily make this disclosure verbally, but BIPA does not allow that and, accordingly, curtails free speech.

Indeed, BIPA's requirements are far "more extensive than necessary to serve that interest" of preventing identity theft. As the Sixth Circuit noted in *Daniel v. Cantrell*:

> Just because Congress' goal was to prevent the disclosure of private information, does not mean that Congress intended the implementation of every conceivable method of preventing disclosures. Printing all personal information in hieroglyphics instead of English would also help prevent the disclosure of such information.

375 F.3d 377, 383-384 (6th Cir. 2004). Converting the information to "hieroglyphics" would also protect it, but would be more extensive than necessary. *Id.* at 384. Prohibiting employers from collecting and using factual identifying information without making certain disclosures and obtaining written consent is even more extensive, because it restricts employers from engaging in wholly permissible activities. *See id.*; *see also, e.g., State v. Madrigal*, 241 Ill. 2d 463, 473 (2011) ("what is wrongful is not the gathering of such information by using a person's name or address, but rather gathering or using such information for the purpose of committing identity theft.").

The inherent tension between the restrictions imposed under BIPA and the rights afforded under the First Amendment weighs in favor of applying a shorter statute of limitations. A one-year limitations period better preserves the right to free speech, a right that all businesses hold. Not only does a shorter limitations period reduce the potential exposure to legal liability for constitutionally protected commercial speech, but it also lessens any chilling effect on speech that may result from the prospect of litigating stale claims.

The right to commercial speech is well-recognized in Illinois. *See, e.g., Vill. of Schaumburg v. Jeep Eagle Sales Corp.*, 285 Ill. App. 3d 481, 486 (1996). Any claim that threatens to undercut that right must be brought diligently. A one-year statute of limitations incentivizes litigants to bring these types of claims in a timely manner, which avoids undermining constitutionally vested rights.

CONCLUSION

The Court should reverse the decision below and, instead, apply the statute of limitations set forth in Section 13-201 to claims under BIPA.

Dated: August 27, 2020

Respectfully submitted,

ILLINOIS CHAMBER OF COMMERCE

By: */s/ Matthew C. Wolfe*

Melissa A. Siebert
ARDC #6210154
Matthew C. Wolfe
ARDC #6307345
SHOOK, HARDY & BACON L.L.P.
111 South Wacker Drive, Suite 4700
Chicago, Illinois 60606
(312) 704-7700
masiebert@shb.com
mwolfe@shb.com

Counsel for Amicus Curiae
Illinois Chamber of Commerce

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) 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 27 pages or 6,747 words.

Dated: August 27, 2020 */s/ Matthew C. Wolfe*

NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, Matthew C. Wolfe, an attorney, hereby certify that on **August 27, 2020**, I caused a true and complete copy of the foregoing **BRIEF OF *AMICUS CURIAE* ILLINOIS CHAMBER OF COMMERCE IN SUPPORT OF DEFENDANT-APPELLANT BLACK HORSE CARRIERS** the Illinois Chamber of Commerce to be filed electronically with the Clerk's Office of the Illinois Appellate Court, First Judicial District, using e-filing provider **Odyssey eFileIL**, which sends notification and a copy of this filing by electronic mail to all counsel of record. I further certify I caused an additional courtesy copy of this filing to be served by electronic mail upon the following:

Ryan F. Stephan (rstephan@stephanzouras.com)
James B. Zouras (jzouras@stephanzouras.com)
Catherine T. Mitchell (cmitchell@stephanzouras.com)
STEPHAN ZOURAS, LLP
100 North Riverside Plaza, Suite 2150
Chicago, IL 60606
Attorneys for Appellee Jorome Tims

David M. Schultz (dschultz@hinshawlaw.com)
John P. Ryan (jryan@hinshawlaw.com)
Adam R. Vaught (avaught@hinshawlaw.com)
Louis J. Manetti, Jr. (lmanetti@hinshawlaw.com)
HINSHAW & CULBERTSON LLP
151 North Franklin Street, Suite 2500
Chicago, Illinois 60606
Attorneys for Appellant Black Horse Carriers, Inc.

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.

/s/ Matthew C. Wolfe