No. 128338

IN THE SUPREME COURT OF ILLINOIS

WILLIAM WALTON,

Plaintiff-Appellant,

v.

ROOSEVELT UNIVERSITY,

Defendant-Appellee.

ON APPEAL FROM THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT, No. 1-21-0011

THERE ON APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT, CHANCERY DIVISION, No. 19 CH 04176

BRIEF OF NELA/ILLINOIS AND RAISE THE FLOOR ALLIANCE AS *AMICI CURAE* IN SUPPORT OF PLAINTIFF-APPELLANT

Catherine Simmons-Gill
Offices of Catherine
Simmons-Gill, LLC
111 West Washington Street
Suite 1110
Chicago, Illinois 60602
(312) 609-6611

Chiquita Hall-Jackson
Hall-Jackson & Associates, P.C.
180 W. Washington St.
Suite 820
Chicago, Illinois 60602
(312) 255-7105

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STATEMENT OF IDENTITY AND INTEREST OF THE AMICI

Amici are non-profit organizations that engage in legal and policy advocacy for low-wage workers. Amici have a strong interest in this case because the Illinois Biometric Information Privacy Act, 740 ILCS 14/1, *et. Seq*. ("BIPA") protects Illinois workers who are particularly vulnerable to having their rights violated.

Amici submit this brief to highlight legal issues and the unintended consequences that would result from reversing the Circuit Court's denial of Defendant's Motion to Dismiss. Neither party's counsel authored this brief, in whole or in part, nor did either party or party's counsel contribute money intended to fund the preparation or submission of the brief. No person, including amici curiae, their members, or their counsel, contributed money intended to fund the preparation or submission of the brief.

NELA/Illinois is the Illinois affiliate of the National Employment Lawyers Association ("NELA"), the largest organization of lawyers who primarily represent employees in labor, employment, and civil-rights disputes in the country. With

approximately 69 state and local affiliates and a membership of over 4,000 attorneys, NELA is the nation's leading advocate for employee rights. Founded in 1986, NELA/Illinois is dedicated to advocating for employee rights and advancing justice in the workplace.

NELA/Illinois has a current membership of approximately 175 individuals – primarily attorneys from Illinois and the surrounding states who solely or primarily represent individuals in employment-related matters. NELA/Illinois provides educational programs, technical support and networking benefits to its members, which also includes mediators and law students. NELA/Illinois also works to help draft and shape legislation and regulatory guidance impacting Illinois workers.

Raise the Floor Alliance (hereafter, "Raise the Floor") originated in 2007 as the "Working Hands Legal Clinic" to provide direct legal assistance and strategic legal advice for low-wage workers in Illinois. Since its founding, it has grown substantially to reach marginalized workers in numerous industries across northern Illinois. As Working Hands Legal Clinic, the organization

provided legal assistance to tens of thousands of low-wage workers throughout Illinois, recovering millions of dollars for workers through litigation and mediation.

The efforts started through Working Hands Legal Clinic have since continued through Raise the Floor, an alliance of community-based non-profit worker advocacy organizations. Raise the Floor works to ensure that low-wage workers have access to quality jobs and are empowered to uphold and improve workplace standards. Raise the Floor continues to litigate on behalf of low-wage workers to expose injustice and enforce workers' legal rights. The organization also actively shapes policy, having drafted or advised the Illinois legislature on amendments to eight different laws to increase and protect the rights of low-wage workers in Illinois, including the Illinois Day and Temporary Labor Services Act and amendments to the Illinois Wage Payment and Collection Act. Raise the Floor has worked for years to ensure that all workers have access to dignified, family-supporting work.

In this case, the Plaintiff worked for Roosevelt University in its Campus Safety department. Plaintiff was, at times, a union member. Like many union workers, Plaintiff was required by his employer to use his biometrics – a hand geometry scan – to clock in and clock out of work.

Amici write not to repeat arguments made by the parties but to describe for the Court the importance of upholding the trial court's decision that the LMRA does not preempt union workers' BIPA claims.

Adopting the standard proposed by Defendant would severely disadvantage union workers, would break with precedent that clearly prohibits using a collective bargaining agreement ("CBA") to break the law, and would actually erode employers' protections afforded by "management rights" provisions in CBAs, thereby contributing to labor unrest in the form of increasing union-employer grievances.

For these reasons and as further explained below, amici urge the Court to reverse the District Court's ruling and affirm the trial court's ruling that Plaintiff's BIPA claims are not

preempted by Section 301 of the Labor Management Relations Act or 1947 ("LMRA").

ARGUMENT

I. INTRODUCTION

BIPA's protections provide Illinois citizens, including union workers, a bedrock foundation of protection against unlawful collection of biometric data. As discussed below, in the employment context, BIPA's protections against the unlawful collection or capture of biometric data are essential for Illinois workers.

Union workers are a critical part of the Illinois workforce– consisting of approximately 788,000 Illinois workers, or 15.2% of the workforce. They should not be excluded from BIPA's protections, as advocated by Defendant, merely because they are subject a CBA that does not impact – or even mention – BIPA or biometric privacy.[1] Doing so effectively discriminates against them simply because they are union members.

[1] U.S. Bureau of Labor Statistics, Economic News Release, Table 5. Union affiliation of employed wage and salary workers by state, 2019-2020 annual averages (available at https://www.bls.gov/news.release/union2.t05.htm) (last accessed August 18, 2021).

Defendant argues, incorrectly, that the Plaintiff's claims are preempted by the LMRA. But Defendant's argument fails to consider that the CBA did not contemplate or mention BIPA when ratified. Adopting Defendant's position would create a legal enigma where a defendant wins a legal argument (preemption) simply by raising the issue, because – in Defendant's view – trial courts cannot look at a CBA to decide if state law claims are preempted by the LMRA.

Adopting Defendant's position would have dire consequences for Illinois employers. Currently, management rights clauses protect employers from grievances based on rights reserved to management necessary to run their day-to-day operations, and, as such, issues arising out of management rights are generally not grievable. Here, however, Defendant seeks upend this longstanding status quo and expand the scope of grievable issues to include issues not specifically addressed in CBAs (i.e., previously reserved "management rights").

But absent clear and unequivocal language waiving statutory rights in a CBA, "management rights" ends where statutory rights

begin. Collective bargaining agreements that do not address statutory rights cannot operate to waive them.

Accordingly, adopting Defendant's proffered position would not only be legally incorrect based on current precedent, but would also negatively impact *both* Illinois workers and Illinois employers. Accordingly, this Court must reverse the decision of the District Court and affirm the trial court's decision to deny Defendant's motion to dismiss.

II. UNION MEMBERS' BIPA RIGHTS CANNOT BE WAIVED IN SILENCE

BIPA sets forth a clear requirement that, prior to the collection of biometric information or biometric identifiers, the subject or a legally authorized representative must execute a written release. While this requirement has been seemingly overlooked by the District Court, the text of BIPA is clear – there can be no collection of a person's biometrics without someone executing a written release allowing the collection. 740 ILCS 14/15(b)(3). Stated differently, a union member's statutory rights cannot be waived in silence – for a union to waive its members' privacy rights, BIPA requires the execution of a written release.

Defendant seeks to obliviate this statutory requirement by injecting red-herring arguments related to whether the union may have consented to the use of the BIPA-violating timeclocks on behalf of the Plaintiff. Under Illinois law, those questions are irrelevant because consent to have one's biometrics collected can only be given via a "written release." No written release, no collection of biometrics.

Defendant attempts to put the cart before the horse, arguing about what the union "may" have consented to or how the CBA's Management Rights Clause could impact liability. However, such questions demonstrate an ultimate fact of this matter – the Defendant failed to follow BIPA. Surely if Defendant had a obtained a "written release" from either Plaintiff, or from his union, this fact would have been brought to the attention of the trial court. However, no written release was made a part of the record, nor has Defendant argued that a written release was executed by either Plaintiff or his union.

Here, because there is no written release executed by Plaintiff or his union, no further analysis of any CBA is necessary under

Illinois law because the answer to this question is binary – either there is a written release or there is not a written release.

In addition to common sense regarding the lack of Defendant's receipt of an executed written release, longstanding federal precedent – recently expounded upon by the Seventh Circuit – makes clear that a CBA may only operate to limit the ability to pursue statutory claims when it "explicitly states that an employee must resolve his statutory as well as his contractual rights through the grievance procedure delineated in the collective bargaining agreement." *Vega v. New Forest Home Cemetery, LLC*, 856 F.3d 1130, 1134 (7th Cir. 2017) (citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258-59 (2009)). Holding otherwise would violate the law of Illinois and the fundamental notions of common sense.

Under federal law, the answer is equally clear because the CBA is silent on the topics of biometric privacy rights, timekeeping methodology generally, and – of course – statutory rights under BIPA.

Without evidence of a written release or the mention of BIPA or biometrics in the CBA, there should be no further question

regarding whether or not there was "consent" to the use of the biometric timeclock by either Plaintiff or his union. Without evidence of an executed written release, any argument regarding management rights or implied consent must be found subordinate to the fact that Defendant likely violated the law. Because deciding whether or not BIPA was violated does not turn on any potential implied consent, Plaintiff's claims do not arise under or implicate the CBA. Accordingly, the District Court should be reversed and the trial court should be affirmed as the LMRA does not preempt Plaintiff's BIPA claims.

III. TRIAL COURTS MUST HAVE THE AUTHORITY TO DECIDE IF A LEGAL CLAIM IMPLICATES A COLLECTIVE BARGAINING AGREEMENT

Even looking past the fact that Defendant has no evidence of a BIPA-compliant written release here, Defendant's arguments still fail. Plaintiff's BIPA claims are not subject to the CBA's grievance procedure or LMRA preemption because the CBA does not specifically include BIPA – a statutory right – as a claim to be subject to the grievance procedure.

Bedrock Supreme Court precedent makes clear that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law." *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 211 (1985). Preemption will not occur if a dispute simply references or requires consultation of a CBA. *Livadas v. Bradshaw,* 512 U.S. 107, 124 (1994).

Expanding on *Lueck*, in *Livadas* the Supreme Court set forth:

> we were clear that when the meaning of contract terms is not the subject of dispute, the bare fact that a collective-bargaining agreement will be consulted in the course of state-law litigation plainly does not require the claim to be extinguished…

512 U.S. at 124, (citing *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 at 413, n. 12 ("A collective-bargaining agreement may, of course, contain information such as rate of pay . . . that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled.").

This approach makes sense; otherwise a trial court would not have the power to reject even the most baseless and spurious arguments defendants could make about preemption. Such a result

is untenable because it would, in essence, create a legal defense that neither a plaintiff nor a court could oppose.

Defendant's contention that only an arbitrator can decide whether an issue should be subject to the grievance procedure would lead to absurd results, Illinois courts have relied on Supreme Court precedent in rejecting the Defendant's "Do Not Read" approach to LMRA preemption of state law claims.

Recently in *Byrne v. Hayes Beer Distrib. Co.*, this Court followed the clear "two-step framework" for deciding whether or not a state law claim is preempted by the LMRA. 2018 IL App (1st) 172612, ¶ 24. In *Byrne*, the union entered into a CBA covering delivery drivers *Id*. ¶ 5. "Article 12 of the CBA describes the drivers' commission pay structure. [Defendant] compensates drivers for each case delivered to stops on a driver's route and provides for deductions from commission payments for a driver accepting a bad check or counterfeit currency or a cash shortage." *Id*. Additionally (and importantly), "[a]rticle 13 of the CBA states that a driver's duties include '[c]hecking all code dates and rotating all stock to insure product freshness.'" *Id*. ¶ 6 (internal quotations to CBA).

The defendant deducted money from drivers pay if they failed to remove stale beer even though "[n]othing in the CBA directly addresses adjustments for stale beer, and nothing in the record shows that [plaintiff] or other drivers consented to [defendant] deducting money from their pay for the cost of the stale beer." *Id.* ¶ 7.

The defendant argued for arbitration on the basis that litigating the claims at issue under the Illinois Wage Payment and Collection Act required interpreting the CBA "because the wage deductions are used to enforce drivers' duties to timely rotate products, as spelled out in article 13 of the CBA." *Id.* ¶ 29.

This Court rejected the defendant's arguments and reversed the trial court:

> [Plaintiff]'s claim that the Wage Act prevents [defendant] from deducting money for stale beer without consent does not require reference to or an interpretation of the CBA. His claims derive solely out of section 9 of the Wage Act (820 ILCS 115/9 (West 2016)), which mandates that employees agree to any wage deductions in writing at the time the deduction is made. Further, although the CBA requires drivers to rotate stock to ensure product freshness, the CBA could have but does not address how that provision is to be enforced or, assuming that money can be deducted from the drivers' commission, the manner in which those

> deductions are to be made. Those questions fall squarely under section 9 of the Wage Act, and they exist independently of and do not require interpretation of any provision of the CBA.

Id. ¶ 32.

In reaching that conclusion, this Court found *Daniels v. Board of Education of the City of Chicago*, 277 Ill. App. 3d 968, (1996) instructive on what types of claims do not require interpretation of a CBA. The First District analogized the claim for payment for accrued vacation days where the "CBA was silent on compensation for accrued vacation days on separation from employment" – the situation in *Daniels* – to the drivers' duties. *Id.* ¶¶ 33-36. The *Daniels* court reasoned:

> Similarly, the CBA describes the drivers' duties to rotate product to maintain freshness but does not describe how that provision will be enforced and whether [defendant] can deduct from drivers' compensation for stale beer. In short, because [plaintiff]'s claim arises under section 9 of the Wage Act and nothing in the CBA addresses the consequences of failing to rotate the beer, there is nothing requiring interpretation of the CBA.

Id. ¶ 35.

Importantly, the Court also rejected the employer's contention that the question of arbitration should be decided by an

arbitrator. Because "this dispute did not arise under the CBA" – step one of the two-step framework – there was no issue for the arbitrator to decide. *Id.* ¶ 36. As such, "it would be 'fruitless' to require a plaintiff to file a grievance and exhaust contractual remedies." *Id.* (quoting *Daniels*, 277 Ill. App. 3d at 974).

Proceeding to "step two" of the analysis, both *Byrne* and *Daniels* support the reversal of the District Court and holding that Plaintiff's BIPA claims (on which the CBA is silent) do not require interpreting the CBA. While Defendant has repeatedly (and incorrectly) argued that resolving Plaintiff's claims will require interpreting the "managements rights clause," that is simply untrue.

The question is not "[w]hether the broad right to manage business operations includes how employees clock in and out" *but instead* "whether the broad right to manage business operations relieves Defendant of complying with BIPA's statutory framework." As explained in Section IV, *infra*, an employer cannot use a management rights provision to break the law.

Plaintiff's BIPA claims do not arise under the CBA; nor do they require interpreting the CBA. As such, the claims at issue are not preempted by the §310 of the LMRA. The District Court should be reversed and the Circuit Course should be affirmed.

IV. NO MANAGEMENT RIGHTS CLAUSE CAN IMMUNIZE ILLEGAL CONDUCT

Defendant's "interpretation of management rights" argument fails because it necessarily relies on the flawed premise that a management rights provision can immunize otherwise illegal conduct.

Parties to a labor agreement cannot contract for what is illegal under state law. The Supreme Court of Illinois explained in *Gonzalez*, "Clearly, § 301 does not grant the parties to a CBA, the ability to contract for what is illegal under state law." *Gonzalez v. Prestress Engineering Corp.*, 115 Ill. 2d 1, 10 (1986) (quoting *Allis-Chalmers*, 471 U.S. at 212). Similarly, the U.S. Supreme Court held, "clearly, [section] 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 212.

A CBA does not and should not give the union or the employer the ability to contract around the requirements of state law. In *Snyder v. Dietz & Watson, Inc.*, 837 F. Supp. 2d 428 (D.N.J. 2011), the defendant-employer argued that the plaintiff-employee's claims were preempted by § 301. However, the court disagreed, and ruled that there is no precedent that allows an employer to claim a § 301 preemption by contracting for what is illegal. *Id*. at 445, 448 ("The right to be paid the wages earned, without deductions for unauthorized purposes, exists independently of the CBA and cannot be eviscerated by a collective bargaining agreement.") (emphasis added).

The same reasoning applies here. BIPA's protections exist independently of the CBA, have easy-to-follow requirements, and cannot be sidestepped by claiming "'management rights to break the law." This Court should make clear that "management rights" end where employees' statutory rights begin.

In short, a defendant-employer cannot use a provision in the CBA to circumvent Illinois state law. Otherwise, union workers would be at risk of having more than just BIPA rights violated by

their employers. The Defendant-employer in this case did not include a provision within the CBA regarding the handling of their employee's biometric data. This Court should not provide the Defendant with a back-door way to strip union members' rights merely because Defendant's CBA has management rights clause.

V. THE *MILLER* AND *FERNANDEZ* DECISIONS REAL-WORLD IMPLICATIONS DEMONSTRATE WHY THOSE HOLDINGS ARE UNTENABLE

The Seventh Circuit's decisions in *Miller v. Sw. Airlines Co.*, 926 F.3d 898 (7th Cir. 2019) and *Fernandez v. Kerry*, Inc., 14 F.4th 644 (7th Cir. 2021) leave unions' and their members' in an untenable position: file a grievance challenging management rights (which is antithetical to all traditional notions of labor law) or effectively be written out of BIPA protections. This result alone shows that these federal decisions were "wrongly decided," as it reverses the meaning of management rights (rights which are reserved to management and therefore not "grievable") and discriminates against union members.

Additionally, while the Defendant argues that this matter must be submitted to arbitration, this argument – and *Miller* and

Fernandez – overlooks that most grievance procedures require notice within *days* for statutory violations that have routinely been found to have a *five-year* statute of limitations. Applied here, this means that Mr. Walton would have his statute of limitations period reduced from five years to a mere 10 days. *Compare*, *Tims v. Black Horse Carriers, Inc.*, 2021 IL App (1st) 200563, ¶ 33, appeal allowed, 184 N.E.3d 1029 (Ill. 2022) (finding five-year statute of limitations for § 15(a), (b), and (e) claims), *with* S.R. 75-76 (CBA mandating that grievances shall be presented within ten calendar days of occurrence).

Surely, neither the Seventh Circuit nor the First District would seek to create a procedural black hole that effectively strips union members of their privacy rights.

VI. DEFENDANT'S POSITION WILL HURT ILLINOIS EMPLOYERS IN THE LONG RUN

Finally, in addition to harming employee rights, Defendant's assertion that the grievance procedure should have been used to seek a remedy under BIPA is contrary to the law and ultimately exposes Illinois employers to grievances solely challenging management's decisions about non-contractual issues.

The "Grievance Procedure" in the relevant agreement here provides a "procedure for handling a grievance pertaining to any difference or dispute which may arise under this Agreement. . . ." (S.R. 75-16). However, here, as explained above, there is no basis for filing a grievance because the CBA is silent on BIPA and biometrics, therefore, there is no dispute "arising under the Agreement." See, §II, *supra* (explaining that there is no mention of BIPA or biometrics in the CBA).

Thus, Defendant's position harms employers as well. Should this Court find that an employee or union must initiate grievance proceedings challenging a management rights provision irrespective of an underlying violation of the CBA, Illinois employers will be exposed to countless grievances unrelated to the CBA. This would ultimately render management rights provisions useless. Allowing employees and unions to file grievances for non-contractual issues sets a terrible precedent for future labor-management relations and endorsing this position would harm Illinois employees and employers by fostering labor unrest, contrary to the LMRA's underlying purpose.

CONCLUSION

BIPA protects Illinois citizens from the unlawful collection of their biometrics. Ruling that LMRA § 301 preempts BIPA claims overlooks the fact that there is no mention of BIPA, biometrics, or timekeeping procedures in the CBA. Defendant's position seeks to circumvent significant precedent holding that a management rights provision may not be used to violate the law, and harms both unionized employees and Illinois employers by allowing grievances on issues outside the CBA. Accordingly, the *amici* ask the Court to affirm the trial court's ruling denying the motion to dismiss.

Dated: August 3, 2022

/s/ Catherine Simmons-Gill
Catherine Simmons-Gill
OFFICES OF CATHERINE SIMMONS-GILL, LLC
111 West Washington Street
Suite 1110
Chicago, Illinois 60602
(312) 609-6611
simmonsgill@gmail.com

Chiquita Hall-Jackson, Esq.
HALL-JACKSON & ASSOCIATES P.C.
180 W. Washington St., Suite 820
Chicago, IL 60602
(312) 255-7105

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 21 pages.

Dated: August 3, 2022 */s/ Catherine Simmons-Gill*